



**THE INDO-PAKISTAN
WESTERN BOUNDARY CASE TRIBUNAL**

(Constituted pursuant to the Agreement of 30 June, 1965)

AWARD

19 FEBRUARY 1968

(INTRODUCTION, CONCLUSIONS, & THREE MAPS)

THE INDO-PAKISTAN WESTERN BOUNDARY CASE TRIBUNAL

(Constituted pursuant to the Agreement of 30 June, 1965)

AWARD

In the case concerning the Gujarat (India)–West Pakistan boundary
between

the Republic of India,
represented by

Mr. B. N. Lokur, Special Secretary to the Government of India in the
Ministry of Law, and Member of the Law Commission of India,
as Agent,

and by

Dr. K. Krishna Rao, Joint Secretary and Legal Adviser, Ministry of
External Affairs, Government of India,

as Deputy Agent,

assisted by

Mr. C. K. Daphtary, Attorney-General of India,

as Leading Counsel,

and by

Mr. N. C. Chatterjee, Member of Parliament, and Senior Advocate,
Supreme Court of India,

Mr. J. M. Thakore, Advocate General of Gujarat, and

Mr. N. A. Palkhivala, Senior Advocate, Supreme Court of India,

as Counsel,

and by

Colonel S. K. S. Mudaliar, Retired Director, Survey of India,

Mr. R. N. Duggal, Deputy Director, Historical Division, Ministry of
External Affairs, Government of India,

Colonel P. Rout, Director, Survey of India,

Mr. P. K. Kartha, Assistant Legal Adviser, Legal and Treaties Division,
Ministry of External Affairs, Government of India,

Mr. K. V. Bhatt, Deputy Secretary, Government of Gujarat,

Mr. K. H. Patel, Senior Research Officer, Historical Division, Ministry
of External Affairs, Government of India, and

(ii)

Lieut.-Col. T. S. Bedi, Superintendent of Surveys, Survey of India
as Experts,

and by

Mr. A. Sankararaman, Private Secretary to Special Secretary to the
Government of India in the Ministry of Law, and Member of the Law
Commission of India, and

Mr. B. M. Wanchoo, Personal Assistant to Special Secretary to the
Government of India in the Ministry of Law, and Member of the Law
Commission of India,

as Aides,

and

the Islamic Republic of Pakistan,

represented by

Mr. I. U. Khan, Chairman, West Pakistan Public Service Commission,
as Agent,

and by

Mr. Shahid M. Amin, Director, Ministry of Foreign Affairs,
as Deputy Agent,

assisted by

Mr. Manzur Qadir, Senior Advocate, Supreme Court of Pakistan,
as Leading Counsel

and by

Mr. Asrarul Hossain, Advocate General of East Pakistan, Senior
Advocate, Supreme Court of Pakistan,

Mr. Saeed Akhtar, Advocate, Supreme Court of Pakistan,

Mr. Aziz A. Munshi, Advocate, Supreme Court of Pakistan, and

Mr. Farooq A. Hassan, Advocate, High Court of Judicature, West
Pakistan,

as Counsel,

and by

Mr. Enver Adil, Commissioner, Family Planning Council, Government
of Pakistan,

(iii)

Mr. A. Ahad, Officer on Special Duty, Ministry of Law and Parliamentary Affairs, former Surveyor General of Pakistan,

Mr. A. M. Y. Channah, Officer on Special Duty, Ministry of Foreign Affairs, formerly in the Provincial Civil Service of Sind, and

Mr. M. Rafique, Deputy Director, Geodesy, Survey of Pakistan,

as Experts,

and by

Mr. Faiz Muhammad, Special Assistant to the Agent of Pakistan, and

Mr. Bashir Ahmad, Boundary Tahsildar, Board of Revenue,

as Aides.

THE TRIBUNAL, composed of

Gunnar Lagergren, Chairman,

Nasrollah Entezam, Member,

Ales Bebler, Member,

delivers the following Award :

CHAPTER I

INTRODUCTION

The Indian Independence Act of 18 July 1947, enacted by the British Parliament, set up, with effect from 15 August 1947, two independent Dominions, known as India and Pakistan. The suzerainty of the British Crown over the Indian or Native States (or Estates) of Kutch, Santalpur, Tharad, Suigam, Wav, and Jodhpur lapsed and they eventually acceded to and merged with India.

The territory allotted to Pakistan included the Province of Sind. It had formed part of British India which was under the sovereignty of the British Government.

In the course of time, the two Dominions became the Republic of India and the Islamic Republic of Pakistan.

The mainlands of Sind and of the above-mentioned Indian States all about upon the Great Rann of Kutch; Sind in the north and west and the States to the south and east.

From July 1948 and onwards, Diplomatic Notes were exchanged between the Governments of India and Pakistan concerning the boundary between the two countries in the Gujarat—West Pakistan region. The dispute led in early 1965 to a tension which ultimately resulted in the outbreak of hostilities in April 1965.

1. Constitution of the Tribunal. Proceedings.

On 30 June, 1965, the Government of India and the Government of Pakistan concluded an Agreement, reading as follows :

WHEREAS both the Governments of India and Pakistan have agreed to a cease-fire and to restoration of the status quo as at 1 January 1965, in the area of the Gujarat-West Pakistan border, in the confidence that this will also contribute to a reduction of the present tension along the entire Indo-Pakistan border;

WHEREAS it is necessary that after the status quo has been established in the aforesaid Gujarat—West Pakistan border area, arrangements should be made for determination and demarcation of the border in that area;

NOW, THEREFORE, the two Governments agree that the following action shall be taken in regard to the said area :

Article 1 :

There shall be an immediate cease-fire with effect from 0030 hours GMT, on 1 July 1965.

Article 2 :

On the cease-fire :

- (i) All troops on both sides will immediately begin to withdraw;
- (ii) This process will be completed within seven days;
- (iii) Indian police may then reoccupy the post at Chhad Bet in strength no greater than that employed at the post on 31 December 1964;
- (iv) Indian and Pakistan police may patrol on the tracks on which they were patrolling prior to 1 January 1965, provided that their patrolling will not exceed in intensity that which they were doing prior to 1 January 1965 and during the monsoon period will not exceed in intensity that done during the monsoon period of 1964;
- (v) If patrols of Indian and Pakistan police should come into contact they will not interfere with each other, and in particular will act in accordance with West Pakistan-India border ground-rules agreed to in January 1960;
- (vi) Officials of the two Governments will meet immediately after the cease-fire and from time to time thereafter as may prove desirable in order to consider whether any problems arise in the implementation of the provisions of paragraphs (iii) to (v) above and to agree on the settlement of any such problems.

Article 3 :

- (i) In view of the fact that :
 - (a) India claims that there is no territorial dispute as there is a well-established boundary running roughly along the northern edge of the Rann of Kutch as shown in the pre-partition maps, which needs to be demarcated on the ground.
 - (b) Pakistan claims that the border between India and Pakistan in the Rann of Kutch runs roughly along the 24th parallel as is clear from several pre-partition and post-partition documents and therefore the dispute involves some 3,500 square miles of territory.
 - (c) At discussions in January 1960, it was agreed by Ministers of the two Governments that they would each collect further data regarding the Kutch-Sind boundary and that further discussions would be held later with a view to arriving at a settlement of this dispute; as soon as officials have finished the task referred to in article 2. (vi), which in any case will not be later than one month after the cease-fire, Ministers of the two Governments will meet in order to agree on the determination of the border in the light of their respective claims, and the arrangements for its demarcation. At this meeting and at any proceedings before the Tribunal referred to in article 3 (ii) and (iv) below, each Government will be free to present and develop their case in full.

- (ii) In the event of no agreement between the Ministers of the two Governments on the determination of the border being reached within two months of the cease-fire, the two Governments shall, as contemplated in the Joint Communiqué of 24 October 1959, have recourse to the Tribunal referred to in (iii) below for determination of the border in the light of their respective claims and evidence produced before it and the decision of the Tribunal shall be final and binding on both the parties.
- (iii) For this purpose there shall be constituted, within four months of the cease-fire, a Tribunal consisting of three persons, none of whom would be a national of either India or Pakistan. One member shall be nominated by each Government and the third member, who will be the Chairman, shall be jointly selected by the two Governments. In the event of the two Governments failing to agree on the selection of the Chairman within three months of the cease-fire, they shall request the Secretary-General of the United Nations to nominate the Chairman.
- (iv) The decision of the Tribunal referred to in (iii) above shall be binding on both Governments, and shall not be questioned on any ground whatsoever. Both Governments undertake to implement the findings of the Tribunal in full as quickly as possible and shall refer to the Tribunal for decision any difficulties which may arise between them in the implementation of these findings. For that purpose the Tribunal shall remain in being until its findings have been implemented in full.

The cease-fire came into effect as provided in Article 1 of the Agreement.

The Ministerial Conference provided for in sub-paragraph (i) of Article 3 of the Agreement did not take place. The High Contracting Parties decided to have recourse to the Tribunal referred to in sub-paragraph (iii) of that Article.

The Government of India nominated as Member of the Tribunal Ambassador Ales Bebler, Judge of the Constitutional Court of Yugoslavia, and the Government of Pakistan Ambassador Nasrollah Entezam, Iran, former President of the General Assembly of the United Nations. As the two Governments failed to agree on the selection of the Chairman of the Tribunal they did, pursuant to sub-paragraph (iii) of Article 3 of the Agreement, request the Secretary-General of the United Nations to nominate him. On 15 December 1965 the Secretary-General of the United Nations nominated as Chairman Judge Gunnar Lagergren, now President of the Court of Appeal for Western Sweden.

Dr. J. Gillis Wetter was appointed as Secretary-General and Treasurer of the Tribunal, and Mr. Jan De Geer as Deputy Secretary-General.

The First Meeting of the Tribunal was held on 15 February 1966 in the Alabama Hall in the Hôtel de Ville at Geneva.

In the course of the subsequent four Meetings of the Tribunal held in February 1966 at the Palais des Nations, Geneva, it was decided that the name of the Tribunal should be "The Indo-Pakistan Western Boundary Case Tribunal (Constituted pursuant to the Agreement of 30 June, 1965)", and procedural rules were adopted, including the following :

Quorum : The number of Members constituting a quorum for the conduct of the proceedings shall be three.

Vacancies : Should a vacancy occur among the Members of the Tribunal, it shall be filled by the method laid down for the original appointment.

The language of the proceedings will be English.

Minutes of the proceedings of the Tribunal shall be prepared by the Secretary-General and shall be signed by the Chairman and the Secretary-General.

Evidence : The Tribunal will be the judge of the relevance and the weight of the evidence presented to it.—If the Tribunal, whether on the request of a Party or otherwise, considers it necessary to inspect the original of any document, which is in the possession or under the control of a Government other than the Parties, or of any person other than a citizen of India or Pakistan residing in India or Pakistan, respectively, the Tribunal may request such Government or person to make the same available to the Tribunal. The Tribunal will direct how and by whom the costs in this connection are to be borne.

Cross-examination of Deponent of Affidavit :

If a Party submits an affidavit to the Tribunal in support of its case, the other Party shall, on request, be given an opportunity to cross-examine the deponent.

Discovery and Inspection : A Party may, by notice in writing, call upon the other Party to make available to it for inspection any document which is or is likely to be in the possession or under the control of such other Party; and thereupon such other Party shall, if the document is in its possession or under its control, provide adequate and expeditious facilities to the Party to take inspection and copies of the document and, on request of such Party and at its cost shall furnish to it such number of photostat copies as it required and also produce the document before the Tribunal. If the document is not in the possession or under the control of the other Party, an affidavit shall be filed to that effect before the Tribunal.

Supplementary Rules of Procedure : The Tribunal may lay down supplementary rules of procedure after consultation with the Parties.

Costs : Each Party will pay its own costs. The remuneration and expenses of the Members and of the Secretary-General of the Tribunal, and the costs of the Tribunal, will be shared equally between the Parties.

Written Proceedings : The presentation of Memorials will be simultaneous (it being understood that in this case neither of the Parties is to be considered as either claimant or defendant). Each Party will file a Memorial and a Counter-Memorial, and may also submit a Final Memorial. All Memorials will be printed.—The Memorials shall be submitted on 1 June 1966, the Counter-Memorials on 1 August 1966, and the Final Memorials (if any) on 1 September 1966. No extension of these time-limits will be granted.—The Memorials should be comprehensive and must be accompanied by all documents relied on.—All documentary evidence shall be submitted in the form of photostat copies. However, it will be sufficient for the Parties to submit accurate copies of maps (which need not, therefore, necessarily be photostats), and photostat copies will not be needed of any printed and published books.

Oral Hearings : The oral hearings will take place at Geneva, reserving the right for the Tribunal to meet in London or at any other place, should this be deemed necessary in order to inspect the original of any document which could not conveniently be made available in Geneva. If the Tribunal should decide to meet at a place in either India or Pakistan, it will at each such time for reasons of policy and courtesy visit both Nations.—The oral hearings will begin in the Palais des Nations on 15 September 1966. The hearings will take place five days a week. The hearings will consist of an opening statement, an answer, a reply and a rejoinder. (It was decided by the drawing of lots that India would make the opening statement. The Parties would thereafter address the Tribunal alternately.)—The Meetings will be held in private.—If a Member of the Tribunal should put questions to Agents and Counsel or ask for explanations, Agents and Counsel will always be informed that immediate answers are not required.

Award : The Award shall be signed by all three Members of the Tribunal and will be rendered at a Session which both Parties will be invited to attend.

Memorials, Counter-Memorials and Final Memorials were submitted on the stipulated dates.

In the course of June and July 1966, a delegation from Pakistan visited New Delhi for the purpose of inspecting and obtaining copies of maps and documents in Government archives, and a delegation from India visited Islamabad for the same purpose. Thereafter, during the preparation of the Counter-Memorials and Final Memorials, and throughout the proceedings before the Tribunal, both Parties through direct communications continuously requested the production of maps and other documentary evidence from each other and assisted one another in searching for and producing such evidence.

The oral hearings began on 15 September 1966. They continued with a few interruptions until 14 July 1967. The oral hearings were held at the Palais des Nations in Geneva. In the course thereof, documents, maps and photographs not exhibited with the Memorials were submitted to the Tribunal.

At the Meeting held on 19 October 1966, the Tribunal and the Delegations of the Parties attended the showing of a film of some portions of the Rann of Kutch area produced by Pakistan.

On 13 July 1967 the Parties reached an Agreement on the procedure for the demarcation of the boundary to be determined by the Tribunal. This Agreement is attached as Annex I to this Award.

The Minutes of the Proceedings of the Tribunal, containing, i.a., decisions of the Tribunal on procedural matters, and important statements and submissions of the Parties, were all shown to the Parties for comments, before being signed. In addition to these Minutes, Verbatim Records of the proceedings were made. They cover over 10,000 pages. The number of maps exhibited in the case is about 350.

The Tribunal wishes to pay tribute to the spirit of co-operation and courtesy prevailing between the Parties. They have, in unique measure, assisted the Tribunal and one another in the production and search for the unusually rich and complex documentary evidence.

2. The Question of *ex aequo et bono*.

During the Meetings of the Tribunal in February 1966, the question arose whether the Tribunal was invested with power to adjudicate *ex aequo et bono*. On this issue, after hearing the Parties, the Tribunal, on 23 February 1966, rendered the following decision :

The question submitted to the Tribunal is whether or not the Agreement of 30 June 1965 confers upon it the power to decide the case *ex aequo et bono*.

India moves that this Agreement does not authorise the Tribunal to decide the present case *ex aequo et bono*, while Pakistan submits that the said Agreement gives the Tribunal such power.

India requests the Tribunal to decide this issue during the present Session. Pakistan moves that the issue should not be decided until after the closure of the written proceedings.

Having regard to the circumstances of the case, the Tribunal deems it appropriate to resolve the issue at this stage of the proceedings.

As both Parties have pointed out, equity forms part of International Law; therefore, the Parties are free to present and develop their cases with reliance on principles of equity.

An international Tribunal will have the wider power to adjudicate a case *ex aequo et bono*, and thus to go outside the bounds of law, only if such power has been conferred on it by mutual agreement between the Parties.

The Tribunal cannot find that the Agreement of 30 June 1965 does authorise it clearly and beyond doubt to adjudicate *ex aequo et bono*.

Therefore, and as the Parties have not by any subsequent agreement consented to confer the power upon the Tribunal to adjudicate *ex aequo et bono*, the Tribunal resolves that it has no such power.

3. Submissions.

The following submissions are made by the Parties.

On behalf of the Government of India :

That the Tribunal determine the alignment of the entire boundary between West Pakistan and Gujarat—from the point at which the blue dotted line meets the purple line in Indian Map B-44 in the west to the North-Eastern Trijunction in the east—as it appears in the Indian Maps B-44, B-37, B-19 and B-20 where the correct alignment is shown by appropriate boundary symbols.

On behalf of the Government of Pakistan :

That the Tribunal determine that the border between India and Pakistan is that which is marked with a green-yellow, thick broken line in the Pakistan Claim Map.

The annexed Map A is a mosaic of the Indian Maps B-44, B-37, B-19 and B-20, and the Pakistan Claim Map is annexed as Map B. In Map A, one of the component maps does not have a colour riband to show the boundary, while another has only a purple riband and the remaining two have a purple riband and a yellow riband therein. The alignment of the boundary claimed by India, however, is represented by the symbol —.—.—. in all the component maps.

It is common ground that the Gujarat-West Pakistan boundary stretches from the mouth of the Sir Creek in the west to a point on the Jodhpur boundary in the east. The Parties agree that the Western Terminus of the boundary to be determined by the Tribunal is the point at which the blue dotted line meets the purple line as depicted in Indian Map B-44 and the Pakistan Resolution Map, and that the Eastern Terminus of the same boundary is a point situated 825.8 metres below pillar 920 on the Jodhpur boundary as depicted in Pakistan Map-137.

This agreement leaves out of the matters submitted to the Tribunal the portion of the boundary along the blue dotted line, as depicted in Indian Map B-44 and the Pakistan Resolution Map, as well as the boundary in the Sir Creek. The blue dotted line is agreed by both Parties to form the boundary between India and Pakistan. In view of the aforesaid agreement, the question concerning the Sir Creek part of the boundary is left out of consideration.

From the Western Terminus, the boundary claimed by India takes off to the north and that claimed by Pakistan to the south; and from the Eastern Terminus, the boundary claimed by India takes off to the south-west while the boundary claimed by Pakistan turns south-east.

Both Parties agree that before Independence the boundaries between the Province of Sind, on the one hand, and one or more of the Indian States which lay on the opposite side of the Great Rann, on the other hand, were conterminous. Therefore, in the disputed region, apart from India and Pakistan, there is no other State that does or could have sovereignty. There is between India and Pakistan

a conterminous boundary today, whether or not there was at all times a conterminous boundary between Sind and the Indian States.

Pakistan contends that, should the Tribunal find that the Province of Sind and the Indian States were not fully conterminous, then the area between Sind and these States would be an "undefined area", falling outside the scope of the Indian Independence Act, 1947. In such an event, the conterminous boundary between India and Pakistan would have to be determined by the Tribunal on the basis of rules and principles applicable in such circumstances.

Pakistan adds that the evidence produced by it in this case is in support of its principal submission, although some of it could also be used in support of its alternative submission.

Both Parties agree that the Rann was not a "tribal area" as defined in Section 311 of the Government of India Act, 1935.

Each Party states that the boundary claimed by it is the traditional, well-established and well-recognised boundary.

For the purposes of this case, India states that the Rann means the Rann lying to the east of the vertical line and to the south of the horizontal line as depicted in Map A. Pakistan has another concept of the topographical extent of the Rann. Pakistan maintains that the Rann lay to the east of what was once the Khori River and considers that the area in dark pink to the west of that river and to the east of the vertical line in Map B was not part of the Rann, but was part of the land area of Sind; this area is referred to by Pakistan as "the delta lands in dispute". Similarly, according to Pakistan, the area in light pink in Map B lying below the boundary claimed by India, and including Dhara Banni, Chhad Bet, Pirol Valo Kun, Kanjarkot, Vighokot and Sarfbela, is not the Rann but part of the land area of Sind; this area is referred to by Pakistan as "the upper lands in dispute", the north-western part of which is sometimes referred to as the "jutting triangle." Pakistan contends that the Khori River, which has disappeared, once separated the upper lands in dispute from the delta lands in dispute and the latter lands from the Sayra lands which once lay along the eastern bank of that river.

On the basis that the delta lands in dispute and the upper lands in dispute once formed and partly now form the land area of Sind, Pakistan claims this area as a part of Sind and hence of Pakistan.

Accordingly, Pakistan contends that for the purpose of these proceedings, the Rann should be regarded as the area shown in blue in Map B.

Pakistan contends that the boundary runs roughly along the 24th parallel, north latitude, as shown in Map B. This line passes through certain fixed points that have traditionally been regarded as marking the boundary; otherwise it is a smooth line as nearly as possible in the middle of the Great Rann. Apart from these fixed points, the exact alignment of the boundary has never been settled.

Pakistan produced two tracings prepared for this case, Pakistan Maps 126 and 127, for the purpose of showing the median line, the former on the assumption

that Bela, Pachham, Dhara Banni, Sarfbela and Bawarka Bet are part of the mainland, and the latter on the assumption that they are islands. According to the submission of Pakistan, the former is the correct assumption.

Pakistan submits :

(a) that during and also before the British period, Sind extended to the south into the Great Rann up to its middle and at all relevant times exercised effective and exclusive control over the northern half of the Great Rann;

(b) that the Rann is a "marine feature" (used for want of a standard term to cover the different aspects of the Rann). It is a separating entity lying between the States abutting upon it. It is governed by the principles of the median line and of equitable distribution, the bets in the Rann being governed by the principle of the "nearness of shores";

(c) that the whole width of the Rann (without being a condominium) formed a broad belt of boundary between territories on opposite sides; that the question of reducing this wide boundary to a widthless line, though raised, has never been decided; that such widthless line would run through the middle of the Rann and that the Tribunal should determine the said line.

Pakistan adds : Map B represents the situation immediately after the earthquake of 16 June 1819. Before that date there existed an extension of the Kutch mainland to the north, along the eastern bank of the Khori River. This extension is referred to as the district of Sayra. If the Tribunal were to accept the vertical line to the north of the Western Terminus as the boundary between India and Pakistan, this would imply a notional extension along that line of the former Sayra lands. The boundary would then continue to the south from the top of the said vertical line till it reached the 24th degree of north latitude, and from there roughly along the said latitude to the east, leaving a small strip to India, however narrow, along the vertical line.

India contends that the boundary runs roughly along the northern edge of the Rann as shown in the pre-partition maps. This is the traditional, well-established and well-recognised boundary between Sind, on the one hand, and Kutch and the Indian States of Jodhpur, Wav and Suigam, on the other hand, which, in the course of time, became crystallised and consolidated. This boundary was acknowledged, recognised, admitted and acquiesced in by the Paramount Power. The Paramount Power explicitly settled a part of the Sind-Kutch boundary by a Resolution of the Government of Bombay in 1914. The same Resolution implicitly confirmed the rest of the boundary. The Index Map (Ind. Map B-45) used by the Government of India, the Government of Bombay and the Sind authorities for the preparation of the definition of the boundaries of Sind, and the definition of the boundaries of Sind as proposed by the Government of India and slightly modified by the Government of Bombay in consultation with the Sind authorities, have the force of an official description of the territory of Sind and are binding on Pakistan; they show that at the time of the creation of Sind as a Governor's Province, the Rann was not included in the territory of Sind and the southern boundary of Sind lay along the northern edge of the Rann as conceived

by India. The alignment of this boundary is shown in Map A, which is composed of the most accurate of available pre-partition maps.

Both Parties agree that, should the Tribunal find that the evidence establishes that the disputed boundary between India and Pakistan lies along a line different from the claim lines of either Party, the Tribunal is free to declare such a line to be the boundary.

Pakistan further states that the intention of the Parties is to end this dispute finally, and it was for that purpose that the Agreement of 30 June, 1965 was entered into.

The Joint Communiqué of 24 October 1959, referred to in sub-paragraph (ii) of Article 3 of the Agreement of 30 June, 1965 stipulates :

“It was agreed that all outstanding boundary disputes. . . should be referred to an impartial tribunal. . . for settlement and implementation of that settlement by demarcation on the ground and by exchange of territorial jurisdiction, if any.”

Pakistan comments that the emphasis on finality and settlement forms the keynote of the Communiqué and the Agreement and, therefore, the Tribunal is under an obligation to find a boundary. Frustration of the reference is not contemplated.

4. Pillars on the Claimed Boundary Lines.

The Tribunal is informed that a boundary pillar exists at the Western Terminus, but that no such pillar has as yet been erected at the Eastern Terminus.

Along the accepted horizontal line to the west of the Western Terminus, and along the vertical line as claimed by India to the north thereof, 134 pillars were erected in 1924. Pillars also seem once to have been fixed eastwards from the top of the vertical line along the two loops in Badin Taluka.

As to the boundary claimed by Pakistan, Pakistan takes up the position that in 1924 seven pillars were erected on the vertical boundary south of the Western Terminus. India denies that such pillars were ever erected, and Pakistan has accepted the Indian statement that the seven pillars do not in fact now exist. Pakistan further maintains that to the south-east of the Eastern Terminus, two or more pillars were erected in 1850 on the claimed boundary, the southernmost of them near the edge of the Rann being referred to as Becher's pillar. India, on the other hand, maintains that if there are such pillars along the boundary of Jodhpur they do not necessarily represent the Sind boundary.

5. The Main Arguments and Evidence of the Parties.

India argues that the possessions of the Rao of Kutch in the first half of the 18th century extended to the territories beyond the Great Rann and that this necessarily implies that the Great Rann was within his territory. Even though he lost these possessions beyond the Rann, he did not lose his sovereignty over

the Rann. India quotes a Diplomatic Note of Pakistan of 1960 in which it is stated that before 1762 the whole of the Rann of Kutch up to its northern extremity and even beyond fell within the jurisdiction of the Kutch State. The crossings of the Rann or invasions of Kutch by the Sind Rulers are no evidence of their control over the Rann as they were by way of military forays without the intention or the result of establishing sovereignty over the Rann. India contends that there is no evidence to establish that at any time after 1762 the Rao of Kutch was deprived of his sovereignty over the Rann of Kutch; on the other hand, there is a body of evidence showing that the Rao of Kutch continued to enjoy sovereignty over the Rann and such sovereignty was recognised by the British Government. India says that the various acts of display of State authority cited by it confirm that the sovereignty of Kutch extended over the whole Rann.

India says that Kutch asserted in Annual Administration Reports for over 75 years that the entire Rann belonged to Kutch and these assertions were acquiesced in by the Government of Bombay, the Government of India and the Secretary of State who did not contradict the assertions. India further points out that the British Government positively recognised, through Statistical Abstracts relating to British India, Bombay Administration Reports, Gazetteers, Memoranda on Indian States, Notes prepared on important occasions and a number of other official publications and correspondence spread over a like period, that the entire Rann belonged to Kutch. India also points out that ever since 1871 maps based on scientific surveys carried out by the Survey Department of the Government of India have consistently shown the northern edge of the Rann as the conterminous Sind-Kutch boundary; although these maps were distributed to officials from the Secretary of State down to the Collectors of districts and to other persons, no one objected to this depiction of the boundary; in fact, the Secretary of State and the Government of India scrutinised some of these maps and expressly approved them.

The cartographic evidence of India consists of a large number of maps prepared and published by the Survey of India. The "basic maps" comprise maps published on the basis of ground survey by Macdonald (1855—1870), by Pullan (1879—1886), by Erskine (1904—1905) and by Osmaston (1937—1939). The "compiled maps" were prepared on the basis of basic maps, supplemented by extra-departmental information, and comprise the atlas sheets, the degree sheets, the 32-mile maps of India, and some other maps on different scales made for special purposes. India has also exhibited maps of the talukas of Sind prepared and published by the Sind Survey authorities.

India further attaches great importance to the Resolution of the Government of Bombay passed on 24 February 1914 with the approval of the Government of India rectifying the Kutch-Sind boundary, and the subsequent erection of boundary pillars in 1924 along the vertical line, northwards from what is now referred to as the Western Terminus. India submits that the 1914 Resolution presupposed and was based on the existence of an established boundary running roughly along the northern edge of the Rann. India also places special reliance upon the officially proposed definitions (Ind. Docs. A-35 and A-36) and depiction (Ind. Map B-45) of the boundary of Sind at the

time of its creation as a Governor's Province in 1935. India contends that they all confirm the boundary as claimed by it.

Pakistan argues that from about the sixth century onwards a "current of history" had consisted of invasions by the Rulers of Sind of the Kutch mainland. Sind had established a garrison of 5,000 men at Lakhpat (1765 until about 1775). Pakistan also relies on an account given in 1827 to the effect that Sind had actually taken possession of Khadir and levied contributions on Wagur, which were admittedly parts of Kutch until the advance of the British army in 1816 stopped these actions. Pakistan argues that the Rulers of Sind had manifested effective control and dominion over the Rann by their ability to cross it. The fortifications built by Kutch inside the Sind mainland were maintained only during a temporary interlude of 10 or 20 years.

Pakistan argues further that under the political system of the British in India, Kutch "froze" in 1819, when it entered into treaty relationship with the British, and could not have increased since that time, short of an express act by the King-in-Parliament, or at least the King-in-Council. Therefore the basic issue before this Tribunal is the extent of the sovereignty of Kutch in 1819.

Pakistan refers to statements of officials in the Sind Administration and others to the effect either that the Rann itself is the boundary, or that the boundary lies in the middle of the Rann. Statements of the Rao of Kutch in 1854 and 1866 are also relied upon by Pakistan as containing admissions by him to the same effect. Two maps (Pak. Maps 1 of 1814 and 4 of 1826) have been produced to show that the boundary between Sind and Kutch was situated in the middle of the Rann, and a number of other "pre-survey" maps are said to indicate that the Rann as a "marine feature" is either a "dividing entity" or itself a "belt of boundary", in which the surrounding States at most had established themselves as sovereigns over some bays.

Pakistan cites a Report of Investigation and two Decisions, from which it deduces that the sovereign rights of the coastal States over the bays in the Rann were divided along a line that ran equidistant from the shores on either side of the Rann (the Report of Major Miles in 1823, the Resolution of the Government of Bombay, dated 6 March 1860, relative to Keswala Bay, and the Resolution of the Government of Bombay of 30 April 1867, agreed to by the Secretary of State for India, relative to Poong Bay). The approach was similar, says Pakistan, in the Resolution of 20 December 1897 of the Government of Bombay, disposing of proprietary rights in the Nara and Parpatana Bays. This series of instances was followed by the Report of R. M. Kennedy in 1898 concerning certain disputes between Kutch and Morvi, where he applied as a general rule for the division of the Rann (or more particularly the Little Rann): "half and half across". Upon this Report, the Secretary of State acted in his Despatch of 8 February 1900.

These instances are relied upon by Pakistan both as illustrating the principles applied during British Paramountcy, thus constituting precedents, and as demonstrating a division in fact which is not consonant with India's position that the whole Rann belonged to Kutch or other Indian States.

Pakistan maintains that the question of the boundary between Sind and the Indian States was never solved. The Commissioner in Sind raised the matter of the accurate boundary between Thar Parkar (District in Sind) and Kutch in 1875, but it was postponed on account of the death of the Rao of Kutch. The matter of the boundary in the Great Rann became an issue for the Paramount Power which through the Bombay Government in 1885 and 1905 preferred to leave this question alone, and in 1938, through the Crown Representatives to the Western India States, declared that it was "in dispute" (see also the Western India States Agency file of 1934, Pak. Doc. B.325).

Pakistan has introduced much evidence to show that Sind (or British) jurisdiction extended over the disputed territory. Pakistan then also relies upon acts of private individuals, like cultivation, fishing and grazing. Special importance is attached to grazing in Chhad Bet, Dhara Banni and Pirol Valo Kun. It is submitted that this grazing was protected and supported by British authorities and that it is of vital interest for the inhabitants of the Sind coast.

Pakistan contends that in relation to the northern half of the Rann what is conclusively established is the total absence of Kutch before 1926. The question of exercise of jurisdiction by Kutch in that half did not arise before that date, when attempts for the first time were made and proved abortive. As regards the assertions made by Kutch in the Annual Administration Reports, Pakistan argues that the British Government had no obligation to contradict them. Furthermore, with a view to creating confidence in the Indian States, the British policy was not to discuss statistical statements.

In order to meet the Indian reliance on maps, Pakistan submits that many maps relied upon by India were, as far as the relevant political boundary is concerned, incorrect as being based upon misunderstanding or confusion, and that they were never invoked on the several occasions when the boundary between Sind and the Indian States on the opposite side of the Rann was discussed.

India answers that it was not the policy of the British Government either to say something which was not true or to refrain from correcting a wrong assertion.

India also says that Kennedy misinterpreted some earlier decisions in considering that there was a general rule for dividing the Rann into two equal halves. The series of instances relied upon by Pakistan in this respect are not based on any principle of equidistance but were entirely passed on facts or as a matter of convenience.

Finally, India argues that a large number of instances relied upon by Pakistan did not amount to acts of exercise of jurisdiction or did not relate to the area in dispute. According to India, in any event, there is no continuous and effective display of authority by Sind over the disputed area and whatever acts were committed by the subordinate officials of Sind, contrary to the attitude of the Government of India and the Government of Bombay, would have no effect. India denies that the grazing was protected and supported by the State authorities; India points out that Sind cattle have not been grazing in Dhara Banni and Chhad Bet

since 1956 and argues that grazing in these bets is not of vital interest for the inhabitants of Sind.

The Parties agree that the Tribunal is not bound to appraise the evidence presented to it in accordance with the submissions or propositions made by them concerning its purport and effect.

With regard to evidence referred to as "instances of exercise of jurisdiction", which in this case includes acts performed by private individuals, Pakistan states that all the instances relied upon by Pakistan which relate to the period before Independence are evidence of territorial rights as they existed in 1819. The instances of exercise of jurisdiction related to the period after Independence are, on the other hand, primarily to be regarded as an independent source of title; they represent at the same time a prolongation of the situation existing during the time of the Amirs (the Rulers of Sind before the British conquest in 1843) and the British era.

While maintaining that the Rann of Kutch does not constitute a "no man's land", Pakistan adds that, if the Tribunal nevertheless were to come to the conclusion that it was an "undefined area" or a "no man's land", then all "instances of exercise of jurisdiction" ought to be treated as independent sources of title.

India submits that little value can be attributed to the instances of exercise of jurisdiction after Independence which are relied upon by either Party since the present dispute was already latent.

It may be noted here that the latest instance of exercise of jurisdiction referred to by Pakistan relates to 1956, and by India, to 1964.

It was agreed in respect to all the evidence produced in the case that during the British occupation of Sind (1843—1947) no intention ever existed to acquire territories for Sind to the detriment of the neighbouring Indian States.

6. Relevant Dates.

Both Parties state that the boundary of Kutch (being the boundary which for the whole or the main portion of the distance between the two Termini was conterminous with that of Sind) has remained unchanged since the time when Kutch became a vassal State under the British by virtue of the Treaty of 13 October 1819 between the Rulers of Kutch and the East India Company.

India adds that the events subsequent to 1819 relied upon by India evidence the boundary existing in or before 1819, or a later consolidation of this boundary. No precise moment can, however, be indicated when the boundary was so consolidated. The boundary claimed by India has been recognised by all parties concerned on several occasions after 1819. Pakistan argues that sovereign rights may have evolved in the course of time, especially in relation to the small bets in the Rann.

Both Parties agree that a relevant date for ascertaining the boundary of Sind would be 18 July 1947, the date of the passing of the Indian Independence Act.

As to the boundaries of the former Indian States, both Parties emphasise the date of their accession to India. Pakistan adds that in case the accession is defective, the date of merger would be decisive.

Pakistan, however, also relies upon the accrual of additional sources of title after Independence; viz. first, nine years (1947—1956) of continuous and peaceful display of State functions, and second, a binding admission made by India to Pakistan in a communication of 1955 that the border between the two countries was near Karim Shahi.

7. Applicable Law. Equity.

As has been mentioned above, the State of Kutch became a vassal State under British Paramountcy in 1819, and the same status was imposed upon the other States in the Great Rann of Kutch area, all of which after Independence acceded to and merged with India. In 1843, the British conquered Sind and established themselves as sovereign thereof.

The Parties have agreed that for the appraisal of events which occurred after 15 August 1947 (the date of Independence), International Law has to be applied in this case. Similarly, International Law was evidently applicable to the relationship between Kutch and the neighbouring Indian States, on the one side, and Sind, on the other side, up to the conquest of Sind in 1843. But there is controversy about the applicability of International Law to the relations between the Paramount Power and its vassals, such as Kutch. This question has particular importance for the period after the British conquest of Sind because from this event on Britain was, as the sovereign of Sind, the neighbour of its own vassals, Kutch and the other Indian States under its suzerainty.

According to Pakistan, the "relations between the Paramount Power and the Native States are in no way governed by International Law, and... any application of it by that Power to those States must proceed from the Paramount Power itself as a matter of grace and concession" (Tupper, *Indian Political Practice*, Vol. I, 1895, p. 15). Pakistan develops this theory by pointing out that as between the Paramount Power and the vassal State, there could be no question of acquiescence, nor of any omission to object or contradict, at any rate on the side of the Suzerain Power. The rights of the Paramount Power could not lapse in favour of an Indian State by any supposed neglect, acquiescence or acknowledgement by its officials. Even when an express admission had been made, it did not bind the Paramount Power vis-a-vis the vassal State, except when contained in a Treaty. Even Treaty engagements were actually unilateral. It was for the British to respect them. They did.

India answers: Even if the application of International Law might have been at the option of the Paramount Power, the proposition that it could at any time go back on its word imputes very serious dishonesty to Great Britain.

Pakistan has not, in any event, inherited the powers of Paramountcy and cannot therefore now object to a situation which emerged in due course during the British period. Furthermore, acquiescence and recognition are not matters of International Law exclusively; they are, in the circumstances of the case, matters of evidence.

Pakistan says that decisions of the Paramount Power, with respect to boundaries, competently made in conformity with the law prevailing at the time, are binding on the Parties to this dispute.

India maintains that decisions of the Paramount Power, functioning through the Secretary of State, the Government of India or the Government of the Province concerned, with respect to boundaries were final and valid and are binding upon the Parties to this dispute. Such decisions were made in the exercise of Paramountcy; there was no custom, nor was there any legislative provision regulating such decisions, nor was there any uniformity in the mode of expression of such decisions.

As regards the authority to settle boundary disputes during the British period, Pakistan submits that the Paramount Power alone was competent to do so.

India considers that, in addition to formal decisions, there are other bases for determining boundaries, as, for example, by way of acquiescence, recognition, acknowledgement or admission on the part of the Paramount Power. Pakistan relies in this respect mainly on local conceptions and acknowledgements.

India comes close to the notion of "uti possidetis" when stating:

"On principle the proper thing is to say that the frontier was that which at that time (15 August 1947) the father country or the mother country acknowledged to be the frontier and it is right that that frontier should continue, unless there was something very striking at the time of partition or subsequent thereto which requires positively that it should be treated otherwise." (Verbatim Records, p. 12843).

On the other hand, Pakistan also argues that the rights of the inhabitants of the northern coast of the Rann are rights of the people of the Muslim unit that was taken over by the British as a unit from its Muslim Rulers and later returned to the Muslim State of Pakistan. Those rights are inseparably attached to the coast of that unit.

It may be added that with respect to the relations between the Paramount Power and the subordinate States of India, neither of the Parties made any distinction between the British supremacy exercised by the East India Company (until 2 September 1858) and the British Crown.

As to equity, the position of India may be summarised as follows: The Tribunal has to ascertain where the boundary has been and is and not to ascertain where a boundary ought to be. This is a question of fact and not a question of law, the hardship of which has to be mitigated by equity. If the Tribunal finds that a particular line is the boundary, then there is no question of any

equity being applied in order to vary it from where, as a matter of fact, it has been found to be. There is no question of any legal doctrine being applied, it is a question of fact, pure and simple. Principles of equity can at most be invoked in assessing evidence. Given the conduct of the British Government over a century, by way of its acts of acquiescence, recognition, acknowledgement and admission, Britain or its successor cannot as a matter of equity be allowed to deny what the British Government has maintained all along.

India, after pointing out the element of uncertainty which is implied in the application of equity, adds: If equity had been specifically referred to in the Agreement of 30 June, 1965, and the Tribunal had been asked not to find on a question of fact, but to draw what in its judgment is a proper line, then the question of equity would enter into the solution of the case, and the Tribunal would be permitted to make a dent or a twist in the border line, because it thinks it fairer. It is true that the Tribunal has to determine the border "in the light of [the Parties'] respective claims and evidence produced before it" (sub-paragraph (ii) of Article 3 of the Agreement), but that does not mean that a Party by invoking equity can invest the Tribunal with jurisdiction to vary an established fact. The "claim" is to a particular boundary.

Pakistan states: The Tribunal has ruled that equity forms part of the International Law to be applied in this case. Therefore, the alignment of the boundary must be tested by principles of equity. It would, for instance, be entirely repugnant to equity and good conscience, and create an untenable position, to allow India to encroach upon Pakistan at the inlets of the Thar Parkar sector of the Rann. The many difficulties that would arise if Kutch could erect fortifications and establish customs houses at places situated many miles within the District of Thar Parkar, for instance close to Virawah, or on some of the roads crossing inlets of the Rann, were recognised already in 1885 by the Deputy Commissioner of Thar Parkar (Pak. Doc. B.9).

Pakistan stresses that the distinction sought to be drawn by India between "the boundary where it is" and "the boundary where it should be", is inapplicable to the facts of this case. Pakistan agrees that the task of the Tribunal is to find "the boundary where it is", but argues that a boundary is the limit of the sovereignty of a State, and if a map shows the alignment of the boundary elsewhere, then that map needs to be corrected to show where "the boundary should be."

* * *

**AGREEMENT ON THE RULES OF PROCEDURE FOR THE
DEMARCATON OF THE BOUNDARY TO BE DETERMINED
BY THE TRIBUNAL**

The Agent of India and the Agent of Pakistan have agreed to the following procedure for demarcation of the boundary between India and Pakistan in the Gujarat-West Pakistan sector in accordance with the Award of the Indo-Pakistan Western Boundary Case Tribunal (Constituted Pursuant to the Agreement of 30 June, 1965).

1. The basis of demarcation shall be the alignment of the boundary as delineated by the Tribunal on maps to be annexed to the Award. Each Government should be supplied with two sets of these maps duly authenticated by the Tribunal.

2. Each Government shall nominate its Representative to be in overall charge of the demarcation work and intimate to the other Government and the Tribunal the name and address of such Representative.

3. The demarcation will be done jointly by a composite team consisting of an Officer-in-Charge, nominated by each Government, and other equal number of Indian and Pakistani personnel.

4. The Representatives of the two Governments shall meet at Delhi not later than two weeks after the Award is rendered to discuss and decide upon the following matters :

- (i) The strength of the team.
(It is not possible to give the exact number of personnel composing the team at this stage as the strength of the team will depend upon the alignment of the boundary and the quantum of work involved which can be ascertained only after the Award is rendered).
- (ii) The design and specifications of the boundary pillars and traverse pillars, the number and spacing of pillars.
(The design and specifications of the boundary pillars will depend upon the alignment of the boundary and the nature of the terrain. The pillars may be of cement concrete, stone or masonry according to the requirements of the terrain).
- (iii) Detailed operational instructions for the guidance of the field staff.
(Such operational instructions have to be necessarily finalised only after the nature of the alignment is known).
- (iv) Any other matters which requires consideration for effective demarcation work.

If the Representatives of the two Governments do not agree upon any of the above matters, either Government shall immediately report to the Tribunal the matters in difference for the decision of the Tribunal.

5. The personnel of the demarcation team shall be made available for demarcation work by each Government not later than one week of the decision regarding its strength.

6. The first task of the demarcation team shall be to ascertain if any control points exist and are available. These control points should be supplemented, wherever necessary, in order to determine the pillar positions on the ground in accordance with the alignment of the boundary. If control points do not exist or are not available, a fresh series of triangulation or traverse will be carried out and control points determined and the pillar positions located with the help of these points.

7. Simultaneously with the location of the pillar positions, pillars shall be emplaced at each position. (It shall not be necessary to emplace pillars in any portion of alignment if boundary pillars already exist therein). Each Government shall supply equal number of pillars according to designs and specifications as determined and members of the team representing each Government (hereinafter referred to as 'Party') shall place equal number of pillars.

8. After the boundary pillars are emplaced in proper positions, final Theodolite Traverse of secondary accuracy shall be run to provide co-ordinates of all the boundary pillars. With the help of these co-ordinates, a plane-table survey shall be carried out quarter mile astride the boundary alignment on 4"=1 mile scale. The plane-table shall contain particulars similar to those appearing in the plane-tables of the Sind-Rajasthan Boundary Survey.

9. (a) With the help of the plane-table sections, fair-drawn originals shall be prepared, the work being shared by the two Parties equally. The fair drawn originals prepared by a Party shall be retained by it.

(b) Duplicates shall be prepared of the plane-table sections. Each Party shall be given half of the originals of the plane-table sections and the duplicates of the remaining half of the plane-table sections.

(c) Each Party shall print the fair-drawn originals retained by it and on the reverse of each printed copy shall be entered in print all details pertaining to the boundary pillars, their numbers, co-ordinates, mutual bearings and distances. The final printing shall be undertaken after exchanging proof corrections. Each Party shall supply to the other Party one hundred printed copies of each of these strip maps.

10. Every field record shall be authenticated by both the Officers-in-Charge and other officers of each Party responsible for the record.

11. Fifteen copies of the strip maps shall be authenticated by the Plenipotentiaries of both the Governments, five of them being retained by each

Government and the remaining five being submitted to the Tribunal for record.

12. The two Officers-in-Charge shall jointly prepare a report of the progress of demarcation every month in quadruplicate and forward two copies to each of the Representatives of India and Pakistan, who shall retain one copy each and submit the other copy to their respective Governments for transmission to the Tribunal with their remarks, if any, for the Tribunal's information. If, in the course of the demarcation work, any difficulty arises, the same shall be referred by either Government to the Tribunal who shall give such directions as they deem fit, if necessary after hearing both the Governments.

13. Joint calibration of tapes and Hunter Short Bases shall be carried out at the Geodetic and Research Branch, Dehra Dun (India). Two officers of Pakistan designated by the Government of Pakistan shall be allowed by the Government of India to visit Dehra Dun for about a week to carry out such joint calibration.

14. Each Government shall grant visas to the Representative and the members of the demarcation team belonging to the other Government for entry into its territory for the entire period of field operations or for the entire period of demarcation work, as required, and shall also allow transport used by them to enter into and depart from its territory without any restrictions.

15. Wireless communications between the two Officers-in-Charge and other members of the demarcation team employed in field jobs shall be provided by their respective Governments to facilitate communications inter se.

16. Each Government shall provide suitable escorts to members of the Party of the other Government for safety and security arrangements on its territory.

17. On the assumption that the Award will be rendered on 1 November 1967, the two Governments shall endeavour to have the field work completed by 31 March 1968 and to have the strip maps submitted for authentication by the Plenipotentiaries of the two Governments by 31 May 1968.

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CONCLUSIONS

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A consolidated draft of the Introduction and the nine Chapters was distributed to the Parties on 20 October 1967. Later, in the autumn of 1967, each of the Parties submitted written comments on this draft to the Tribunal and to each other. Each of the Parties thereafter in like manner submitted counter-comments on the observations made by the opposite Party. The final text of the foregoing part of this Award has been determined by the Tribunal. In this redrafting process, the Tribunal has taken into consideration all the proposals for amendments, additions and exclusions thus made in writing by the Parties. The Tribunal has applied the principle of incorporating to the greatest extent possible the suggestions made by each Party.

The circumstances now referred to, and the paramount interest in speedily obtaining an exhaustive, accurate and fair account of all facts and arguments, have unavoidably resulted in a certain amount of repetition and overlapping in the various Chapters and Sections.

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DISSENTING OPINION OF JUDGE ALEŠ BEBLER

The terms of reference of the Tribunal.

The Tribunal is called upon to determine where the boundary between Pakistan and India in the West Pakistan/Gujarat area lay, when the Indian Independence Act of 1947 came into force and its provisions were put into practice both with regard to partition of British India and to accession of Indian States to one or the other of the two Dominions. This follows undoubtedly from the Agreement of 30 June 1965 and the position of the Parties as defined in their Memorials and oral statements.

Sind became a part of Pakistan on 15 August 1947 under the said Act, and the Act further provided that the Province of Sind as it existed on 18 July 1947 was to form part of Pakistan.

Kutch acceded to India on 16 August 1947, Suigam on 15 August 1947, Wav on 31 August 1947 and Jodhpur on 11 August 1947.

Thus the critical date appears to be subdivided into five critical dates, all of them falling within a short interval of six weeks' time. As no events of importance occurred in this interval it could be said that the critical date is one date, with a slight duration of six weeks, or that the last of the above dates, 31 August 1947, is the critical date superseding the other ones. The practical consequences of either choice would be the same.

Since the Tribunal has to determine the alignment of the boundary between India and Pakistan on the critical date, in 1947, it has to refrain from taking any position inconsistent with this definition of its competence. Therefore :

(a) If the Tribunal finds that there was no boundary at the critical date or that the boundary was not complete, it cannot supply a boundary of its own making or complete of its own making an incomplete boundary.

A boundary is—in our times—normally a conterminous boundary. Unless there is between States a territory with a well-defined legal status under generally accepted rules of International Law (condominium, trusteeship and the like), all boundaries are usually conterminous. Blank spaces in maps have disappeared long ago. Generally speaking there are no longer any boundary disputes concerning the partition of territory between States which is admittedly no man's land.

In our case it is also common ground that the boundary is conterminous.

Nevertheless Pakistan says that, if the Tribunal finds that the boundary is not fully conterminous, the Tribunal should determine a conterminous boundary "on the basis of rules and principles applicable in such circumstances".

It has to be held with respect to this request of one Party that the Tribunal has not the power to do so. It cannot invent a boundary, a normal, conter-

minous boundary, where such boundary did not exist on the critical date, or partition territory which belonged to neither Party on the critical date.

On the other hand, Pakistan submits also that the whole width of the Rann, without being a condominium, formed a broad belt of boundary between territories on opposite sides of the Rann and that the question of reducing it to a widthless line, though raised, has never been decided, and requests the Tribunal to determine this widthless line.

The Tribunal is not aware of a large tract of land measuring nearly 9,000 square miles and forming a belt of boundary in this area. But even should the Tribunal find that this last assertion is correct, it would not have the power to draw the "widthless line" because, except for terminology, it would be inventing a boundary alignment which did not exist on the critical date and partition a no man's land not partitioned before that date.

Both requests of Pakistan have to be rejected as going beyond the terms of reference of the Tribunal.

(b) If the Tribunal finds that the alignment of the boundary was different at some other dates in the past, from the alignment at the critical date, it has to disregard such previous alignments as superseded and therefore irrelevant.

Any alignment of the boundary under consideration in the past, distant or near, is irrelevant if it did not remain valid till the critical date. All modifications of the boundary in the past, if they remained valid till the critical date, are, on the contrary, to be taken into account and the boundary has to be determined as modified at such occasions.

This point has considerable importance because of the different attitudes of the Parties with respect to the one formal modification of the boundary alignment in the past, in 1914.

The attitude of Pakistan is that the legal validity of the 1914 transaction is questionable and that Pakistan accepts it for the purpose of this case only because it was acted upon, and only for the portion of the boundary defined in the transaction as the new boundary and not as to its possible implications for the rest of the boundary.

From the above point of view the only question to be examined is whether the modification of 1914 was, or was not, in force at the critical date. If it was in force it has to be taken fully into account by the Tribunal. If it was not, the boundary was at the critical date the same as before the modification and the modification is irrelevant for the Tribunal.

The same has to be said on all other possible modifications of the boundary in the past, modifications of which the Tribunal has no evidence before it, but which it has to admit as a hypothesis.

Therefore the evidence on the alignment of the boundary which is relevant for the Tribunal's decision is only evidence on the alignment of the boundary at the critical date, in 1947, and not on any other possible past alignment,

Evidence regarding a past alignment could be of interest only if presented in corroboration of the evidence for the alignment as it existed at the critical date.

(c) *Geographical circumstances concerning the disputed area have only the value of evidence for this or that alignment of the boundary on the critical date.*

The most debated geographical circumstance in the case was the peculiar nature of the Rann. The Pakistan side called it a "marine feature", i.e. a surface akin to a lake or land-locked sea, the Indian side called it a land surface, marsh or desert or both. It was treated by the British as a peculiar surface most akin to a marsh and not to a lake or to a land-locked sea.

But in all events—even if it were proven that the Rann is a "marine feature", that the boundary was inside this "marine feature" and that particular rules of establishing a boundary in such "marine features" existed—this circumstance would nevertheless have to be considered as irrelevant for the case. It could only have played a role when the boundary was being determined in the past, before the critical date; if this circumstance was then taken into account in one sense, the boundary was determined to run a certain way, if it was taken into account in some other sense, the boundary was determined to run another way; now it is where it was in 1947 in all events.

The same has to be said as to the contention of Pakistan that the Rann, once a part of the sea, was formed by accretion and that it should therefore be divided between the riparian States. If there was accretion in the past, then this could and might or might not have been taken into account at the time when it occurred or later. In no event can it be taken into account now. The boundary is what it was on the critical date, whether certain principles were applied to it in the past or not.

The varying geographical circumstances can be and have to be considered as part of the evidence for this or that alignment of the boundary if it lay in the Rann; in no event can any principle which could have been applied in the past to determine the boundary be applied now, if it was not applied when the boundary existing on the critical date came into being.

It is therefore admissible to argue that the boundary, if it was in the Rann, lay at the critical date, along one line or another, and include geographical circumstances in the evidence as circumstances which could have been among the reasons why the boundary was determined to run along that line rather than another.

The Tribunal may consider geographical circumstances only to this extent.

(d) *All events in the past concerning the boundary in question or related to the issue of the boundary have only the value of evidence for the alignment of the boundary on the critical date.*

Past events were in this case of great importance for one main reason. As India submitted an impressive amount of evidence that Kutch and British authorities held the boundary under consideration to be where India claims it to be

and as this evidence showed the boundary to be there with great clarity at least from 1870 on, Pakistan relied very much upon events previous to this date. It submitted that the boundary between Kutch and Sind was in the middle of the Rann at the time of the British-Kutch Treaty in 1819, at the time of the British conquest of Sind, and later, and that there is no proof that it was shifted at any subsequent date.

Therefore—such was Pakistan's conclusion—the boundary was, at the critical date, in 1947, where it was in the past.

The burden of proof Pakistan took on its shoulders was twofold :

- (i) that the boundary was in the past where it claims to be now;
- (ii) that the boundary was never shifted from there, i.e. that it was never shifted under such circumstances that the shift was binding on Pakistan (with the exception of the boundary rectification of 1914, accepted under reserve).

India, while relying above all on evidence dating from 1870 on, submitted evidence and arguments to the effect that even in 1819 the boundary was where India puts it now.

Thus the year 1947 as the critical date was upheld by the Parties and the events of the past were treated merely as evidence that the boundary was, in the past, just where it was on the critical date.

The Tribunal has to appraise the presentation of past events in this light.

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The nature and the geographic position of the Rann.

The consideration of the question of the nature of the Rann did not advance the case very much. It proved beyond doubt that the Rann has been and is a peculiar surface which deserves the specific name of Rann, repeated nowhere else. It proved that it is most akin to a marshland, fitting into the classical definition that marsh is what is not wet enough to navigate and not dry enough to farm.

As there is apparently no general rule in International Law as to whether a marsh in a border area has to be partitioned between two or more neighbours and if so, how it should be cut into parts, and as apparently such a rule never existed, there is no conclusion to be drawn, from the fact that the Rann is a marsh, as to the probable application of such rules to a possible partition of the Rann which may have taken place at some time in the past.

Even if Pakistan had proved its case that the Rann is akin to a lake or an inland sea, the situation would in this respect not have been different. There are no internationally accepted rules and there apparently never existed any rules as to how such a water surface should be divided. All writers on the subject stress that a boundary in such surfaces and even in rivers can run one way or another according to the relevant treaties, arrangements or other legal sources which determine a boundary.

But if the nature of the Rann did not carry the matter further, its geographic position, which was not much discussed, does throw a considerable amount of light on the subject.

Pakistan stressed "that the Rann sweeps round the mainland of Kutch as a belt of varying width, isolating it as an island from the mainland of the Indo-Pakistan sub-continent".

In this formula an important circumstance is set out which had multiple consequences relevant to the case in the past. An island State is normally prompted to control the sea around it and would not like this sea to be controlled by others, because in the latter case the island State would be at the mercy of the master or masters of the surrounding sea.

For an analogous reason the State of Kutch, though not an island State, manifested from its emergence the propensity to control all the marshland surrounding it on all sides, all the Rann or, more correctly, all the Ranns, the Great Rann as well as the Little Rann, in all their parts.

This tendency was, by and large, successful. It was so, above all, again for geographic reasons. The geographic position of Kutch is extremely propitious for the ambition to control the Rann. This is particularly evident as regards the upper part of the Rann—the Great Rann.

The Great Rann is dominated by the mainland of Kutch. A glance at a map is sufficient to prove the correctness of this proposition. The most extensive grass-covered tract in the Rann itself, the Banni, is a part of Kutch. It was, significantly, often called simply "the Rann", and thus identified with it, because it is economically the most important component part of it. The largest bets—Pachham, Khurir and Beyla—are Kutchi bets. They dominate the central part of the Rann with their central position and their rocky heights. The loftiest mountain on Pachham Bet is the loftiest mountain of the whole area.

The Banni and the aforesaid three largest bets are the only permanently inhabited parts of the Great Rann. Thus the only permanent inhabitants of the Great Rann are Kutchis.

This was even more true in the past, before the great earthquake in 1819. Till that date a well-cultivated tract of land extended on both banks of the River Khori, from the proximity of what is now the western part of the mainland of Kutch northward up to the northern edge of the Rann. In this tract of land, called the Sayra, which, according to some testimony, extended up to Ghariwah (located near the top of the vertical line), lay, as its central settlement, the river-port and town of Sindri. Sindri was situated in the northern part of the Great Rann (at 24° 6' of north latitude).

To the south of Sindri there were in the Sayra several villages or hamlets whose names are preserved: Bitaree, Chitriaree, Changasir, Pallia, Kotro, besides the most known site—Sando.

The only entrance into the area of the Great Rann by water, from the sea, is through the mouth of Khori Creek. This entrance is, by its geographic posi-

tion, controlled by Kutch. On the Kutch side of it the dry land is inhabitable and inhabited. The opposite shore is not. The largest harbour and the only town in the mouth of the Khori Creek is the Kutch harbour and town of Lakhpat.

For all the above reasons the Rann of Kutch, and most consistently the Great Rann of Kutch, has always been called the Rann of Kutch and never the Rann of any other geographic or political entity abutting upon it.

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Some lessons of distant history.

The debate on the wars between Sind and Kutch from the time they had become distinct political entities to the time of the advent of the British in their area led to the following final conclusions :

1. There were in those two or three centuries invasions of one neighbour's territory by armed forces of the other neighbour, with crossings of the Rann by these forces, in both directions.
2. A Sind Ruler once established a garrison on the southern edge of the Rann and kept it there for some years. It also happened that Kutch established temporary military outposts and a fortified place on the northern edge of the Rann.
3. The Rann was crossed more often by the Sindis than by the Kutchis; Kutch was more often invaded by Sindis than was Sind by Kutchis.

This last point was the foundation for the thesis of Pakistan that there was a "current of history" in the direction from Sind to Kutch which could be construed as an element for a historic title in favour of Pakistan.

Such reasoning is not convincing. Mere invasion, even the most successful, cannot possibly create a title to territory by itself. Invasions in the distant past could have been, and were in some places, the starting points of an evolution that terminated in sovereignty over a given territory by the original aggressor State. But in between there had to be quite a number of other elements. The naked fact that a neighbour was the more aggressive one in the past has no legal consequence whatsoever. If the behaviour of France and Germany in the past is compared, it was the latter who was the more aggressive, but no one draws from this fact any conclusion as to the territorial rights of those two neighbours over their respective border areas.

In our case it is significant that Sind, the more aggressive neighbour, met regularly with fierce resistance on the side of Kutch and some battles on Kutch soil were extremely bloody. The great battle of Jarrah, in 1762, was a massacre of Kutchis. The Sind army, estimated at 80,000 men, commanded by the ruler of Sind, Ghulam Shah Kalhora, in person, met there the greater part of the armed forces of Kutch. The account of the battle, as reproduced in the most often quoted book on Kutch history (Rushbrooke Williams' *The Black Hills*), is like a passage from Homer. It reads :

"The great expedition made the perilous passage of the Rann successfully but their water only just held out and their commissariat broke

down. They were in acute distress when they reached Kutch territory. They made a forced march to Nara, where they hoped to find supplies. But the place was deserted; all food had been carried away and the walls had been blocked with stones. The plight of the invaders was desperate; the army was thirsting almost to death: a single glass of water sold for a rupee. . . . The local population was stubbornly hostile, and Ghulam Shah Kalora could find neither guides nor information. . . .

“The King of Sind, having completed his preparations for the attack, advanced to the foot of Jhara hill. He caused a number of cows to be collected and had them driven ahead of his troops in the expectation that the instinct of the animals would lead them to choose practicable tracks which the soldiers could follow. It was in the small hours of the morning, on the tenth day of the bright of the moon of Magsar, Samvat 1819 (A.D. 1762) that the second battle of Jhara began. There was a heavy mist: friend could hardly be distinguished from foe. The cows which the Sindhis drove in front of them took the brunt of the first volleys of the defenders and before the Kutchis could reload, the Sindhis were among them. A specially heavy cannon commanded the main path into the camp: the Kutchi troops had great faith in its deadliness. But when it was fired, a great misfortune overtook the defenders. According to one version, the cannon burst, spreading confusion among the warriors who had clustered round it in great numbers to watch the execution which it would do among the attackers. . . .

“The Kutchis fought heroically; there were even women battling side by side with the men in a passion of patriotism. But there had been no large-scale warfare in Kutch for more than a century and the bhayyad nobility had had little practice in combining their individual bands of clansmen into an efficient army. The Sindhis, on the other hand, after centuries of perpetual warfare and constant invasion, were well skilled in all tactical combinations and accustomed to fight according to a previously concerted plan. In the confusion caused by the disaster to the cannon all order foresook the Kutchi ranks. Small groups fought heroically but they lost touch with one another in the fog and were overwhelmed, one by one, by the superior discipline of the Sindhis. The slaughter was terrible: Diwan Jivan Seth, the heroic Lakha of Vinjan, the Thakor of Nara, with his three sons, and scores of other leaders, fell on that fatal morning. But they had sold their lives dearly; the losses on the Sind side were heavy. Kutchi historians claim that 100,000 persons perished on the hill of Jhara in the most frightful disaster of which the records of their country take notice.”

What historic title can the side guilty of such a war draw from its guilt? Evidently none.

The significant lesson of these times was the situation in the area when the period of wars between the two neighbours was over and the British extended their dominion over Kutch in the years 1816-1819. There was no garrison or

post of either of the neighbours on the opposite side of the Rann. There was, however, a fortress with a garrison, a harbour and a customs outpost of Kutch right in the Rann. It was situated at Sindri, on the Khori River, some 12—15 miles from the northern edge of the Rann and approximately twice as many miles from its southern edge. Still farther to the north, approximately five miles from Sindri, at a place called Kaeera Nulla, there was—according to some testimony—one more Kutch outpost. This one was very close to the northern edge of the Rann, some 7—10 miles from it.

The existence of Sindri-fort and of Kaeera Nulla outpost symbolises a situation which comes close to military and administrative control of the Great Rann by Kutch, a control to the extent the nature of the Rann permits: both outposts controlled the two most frequented ways from Sind to Kutch, the way by water and the way by track, and they did so in the northern portion of the Rann, rather near its northern edge.

The suzerain and its vassals.

The relationship between the British as the Paramount Power on the sub-continent, presents as such in the area in question in fact from the very first years of the 19th century and legally from the treaties with Kutch in 1809, 1810, 1816 and 1819 and the Indian States, such as Kutch, was made a subject of debate by Pakistan with regard to its legal implications. It was common ground that the relationship fell into the category known as relationship between a suzerain and its vassals. But what exactly this relationship amounted to, and what exactly it meant particularly in territorial questions, was far from being common ground.

In this respect it should be said that Pakistan's theory that International Law did not apply to the relationship between suzerain and vassals in this case is entirely unacceptable. The relationship of suzerain and vassal is by definition a branch of International Law. In every current book on International Law there is a Chapter on this peculiar relationship, containing proposed definitions thereof and giving examples of relevant relations in modern times.

Oppenheim, for instance, has this to say on the subject (Eighth Edition of his International Law, edited by Lauterpacht, Vol. I, Part I, Chapter I, p. 188, Section VI, entitled "Vassal States") :

"Suzerainty is a term which was originally used for the relation between the feudal lord and his vassal; the lord was said to be the suzerain of the vassal, and at that time suzerainty was a term of Constitutional Law only. With the disappearance of the feudal system, suzerainty of this kind likewise disappeared. Modern suzerainty involves only a few rights of the suzerain State over the vassal State which can be called constitutional rights. Suzerainty is by no means sovereignty. It is a kind of international guardianship, since the vassal State is either absolutely or mainly represented internationally by the suzerain State. The subject is now of mere historical importance as there are no longer any vassal States in existence. Egypt, which was for a time a vassal State of Turkey, provided the best example of this kind of protectorate.

“The fact that the relation between the suzerain and the vassal always depends upon a special case, excludes the possibility of laying down a general rule as to the international position of vassal States. The vassal State has no relation with other States since the suzerain absorbs these relations entirely; yet the vassal remains nevertheless a half-sovereign State on account of its internal independence. This was the position of the Indian vassal States of Great Britain, which had no international relations whatever, either between themselves or with foreign States. Yet instances can be given which demonstrate that vassal States can have some subordinate international position.”

And Oppenheim adds in a footnote :

“Egypt and Bulgaria as Turkish vassals sent and received consuls as diplomatic agents; Egypt acquired [1898] condominium with Great Britain over the Sudan; Bulgaria fought a war with Serbia . . . [1885].”

Oppenheim fails to focus his attention on the peculiar suzerain-vassal relationship which prevailed in India under British rule. Had he done so he would undoubtedly have pointed out the notorious fact that the distinction between British India and India of the Princes or the Indian States of India derived from two different means employed by Great Britain to govern the sub-continent : direct administration for the former and treaty-relations between Great Britain and Indian Princes for the latter. The bases of the latter relationship were treaties, by definition an instrument of International Law. A treaty cannot be entered into and cannot be held to be valid and binding if it is not a transaction between two subjects of International Law. Commissioners of provinces of British India could not enter into treaty-relationships with Great Britain. Only rulers, as sovereigns of States, could do so. In other words: if vassal States in India had their relations with other States entirely absorbed by the suzerain, their relations with the suzerain were clearly and undoubtedly those of two subjects of International Law, being based on and defined by an international transaction, by a treaty. No doubt, the treaty curtails the sovereignty of the vassal, it is a treaty instituting a relationship characterised by inequality, but it is nevertheless a treaty and not a law or an ordinance.

Pakistan, which advanced the thesis that International Law was not applicable relied on the two British authors who wrote about legal aspects of British rule in India—Ilbert and Tupper. These two authors formulated a theory according to which International Law did not apply to relations between suzerain and vassals in India. Pakistan adopted this theory. By doing so it disregarded :

- (a) that the two authors, while explaining their thesis, illustrated it exclusively by reference to the absence of relations between the vassal and other States than the suzerain; they explicitly reserved the sphere of suzerain-vassal relations from the general formula; they stressed that the Paramount Power was “scrupulously respecting all treaties and positive engagements with Native States” and that its relations with the vassals “must be determined by the positive engagements subsisting between them”;

- (b) that the authors, thus, fell into an inextricable contradiction viz., that the Paramount Power respected treaties and engagements with States to whom International Law did not apply and who, therefore, were not subjects of International Law and logically could not be parties to any treaty;
- (c) that the two authors were both advocates of one side in the described relationship, i.e. of the suzerain; it is the suzerain's point of view which they formulated and propagated; this is particularly noticeable in their sub-thesis on the subject, which is the assertion that the Paramount Power can use principles of International Law at its option, as a matter of grace.

One can understand that advocates of the suzerain in those times brought forward such an illogical theory. But one should not expect an independent lawyer to accept such a theory nowadays.

It is evident that the suzerain and the vassal were unequal both in rights and in fact. But their inequality in rights has to be considered as strictly defined and limited by treaty-provisions, as were their other rights and obligations defined by treaties. The two sides were, therefore, equal in rights in one fundamental respect: they were both equally bound by the treaties. In this sense they were both bound also by International Law. They had both to observe one of its fundamental principles : *pacta sunt servanda*.

Naturally, they could in practice violate treaty obligations. Who cannot, be he equal or not with his partner? And then they had to be prepared for political consequences, very different ones, but nevertheless very real ones. The vassal had to be prepared to face the scorn of the suzerain and to risk sanctions that could go as far as his loss of the throne. The suzerain had to be prepared for other kinds of sanctions, the mildest of which was loss of face and of confidence, and even this could not have been a sanction to be taken lightly.

It follows from the above considerations that the principles of International Law which presuppose fully sovereign States as the subjects of International Law to whom they have to be applied cannot be applied to subjects of International Law who are not fully sovereign. This is evident. But the reverse is equally evident, and could be formulated thus : whatever principle of International Law is not in contradiction with the status of a state which is not fully sovereign can and should be applied, e.g. as regards territorial integrity. It can and should be applied because there is no reason for not applying it, while there is every reason why it should be applied. By every reason I mean all those reasons which make International Law necessary and indispensable for the intercourse between Nations.

In our case, the legal basis of the peculiar suzerain to vassal relationship between Britain and Native States being the treaties between the two, principles of International Law can and should be applied in every respect except in those respects in which they are expressly replaced by clauses of the treaties. The sovereignty of the vassals is curtailed by those treaties. Thus the curtailment itself depends on the validity of the treaty, an international transaction par excellence,

a transaction liable to rules and principles of the law of treaties, a cardinal chapter of International Law. There can be no more curtailment other than the treaty expressly stipulates. Any curtailment beyond the clauses of the treaty has to be regarded as a breach of International Law, of the law of treaties, which knows of no more important principle than the principle of restrictive interpretation of clauses imposing obligations on the parties to it.

These considerations lead to the conclusion that India was perfectly right in her submission that such principles of International Law as acquiescence and recognition in general, and in boundary matters in particular, were applicable to the relationship between suzerain and vassals in India under British rule. They were applicable because they were not in contradiction with the treaties—in our case with the treaties between Britain and the Indian States abutting upon the Rann. They were not excluded from those treaties either explicitly or implicitly and were not replaced by any clause of those treaties.

They were, in consequence, undoubtedly applicable.

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A treaty and a proclamation.

The Treaty between the British and the State of Kutch, concluded in 1819, has to be interpreted in the light of the foregoing considerations. It was equally binding on both sides. The British guaranteed the territorial integrity of Kutch and Kutch undertook "not to commit aggression on any Chief or State" and to submit accidental disputes with such Chiefs or States "for adjustment to the arbitration" of the British.

Pakistan argues, on this issue, on the basis of the same conception. It admits that obligations under an international transaction such as this treaty were mutual, that the treaty was binding on both parties and that, consequently, the British guarantee was to be taken as real and not as a guarantee at British option and as a matter of grace, a fake guarantee.

The argument of Pakistan is that the obligations had one important practical effect: the "freezing" of the territory of Kutch, i.e. the impossibility for Kutch to extend its territory, except through British arbitration, in any direction, be it to the south, where the neighbours were British vassals—Gujarat and Kathiawar—be it to the north, where the neighbour was Sind, a State independent of the British and rather hostile to them.

India contends that the obligation to submit disputes to British arbitration could concern only disputes between Kutch and other British vassals—in practice Gujarat and Kathiawar—while it could not in good logic apply to Sind, a State in such relations with the British that (i) it would not accept British arbitration and that (ii) the British were not interested in protecting it against possible encroachments of Kutch.

This reasoning is convincing from one more point of view: The choice of the method for adjustment of "accidental disputes". It is arbitration and only arbitration. If disputes with States completely outside British control or hostile to the

British were envisaged, the choice of the method would not be confined to such arbitration, the most unlikely to be accepted as a device for the settlement of disputes by the other side. Arbitration by the British, under the circumstances of 1819, was tantamount to acceptance of British paramountcy. It was imposed in a treaty of vassalage, the treaty with Kutch, as a means of controlling foreign relations of this vassal State. How could it be expected that any neighbour of such a vassal, which was itself not a vassal, would submit to British arbitration and would accept that there be no other mode of settlement in case of a dispute? In other words, if disputes with non-vassals were envisaged, the method of good-offices or possibly of mediation would be the logical method to be mentioned in a treaty and not arbitration.

The connection between vassalage and arbitration is clearly brought out by Tupper (Chapter II., para. 20) when this author writes :

“It is a consequence of the political isolation of Native States that no State can be permitted to make war upon another, and that the British Government is the arbiter of State disputes. A Ruling Chief who sends a hostile armed force into the territories of another Ruling Chief commits a breach of allegiance to the British Crown. And seeing that the States are bound to submit disputes ‘inter se’ to the decision of the British Government, it is an inference from this principle that the British Government is free to take such steps as may be necessary to inquire into and determine their disputes and to punish the persons guilty of the offences out of which the disputes may have arisen.”

At the end of the Chapter the author summarised this point in rule six which reads : “The British Government is the arbiter of interstatal disputes” (i.e. of disputes between Indian States).

In our case, in the case of the Treaty of 1819, we see how this rule, formulated by Tupper towards the end of the 19th Century, came gradually into being as the system of vassalage extended over the sub-continent. It was one of the means both for the control of the foreign relations of the States made vassals and for the establishment of peace between them. These aims of the British in the area under consideration were clearly manifested already in the previous Treaties between the British and Kutch, the Treaties of 1809 and 1816.

Aitchison, the author of the official compilation of Treaties between the British and their vassals, when explaining the sense of the Treaties of 1809 and of 1816 (edition of 1892, Vol. VII., part II, pages 2 and 3 of the Narrative) says :

“In October 1809, Treaties (No. I.) were concluded with Fateh Muhammad on behalf of the Rao, and with Hansraj, by which they renounced all claim to interfere in the countries to the East of the Gulf of Kutch and the Ran, and engaged to suppress piracy and to exclude Europeans and Americans from their possessions. . . . Notwithstanding repeated remonstrances, those engagements were not kept; piracies were not suppressed. Retaliation was more than once threatened, and in 1813 a British officer was deputed to insist on immediate compliance with the demands of the British Government. . . . No restraint was put on the lawless inhabitants of Wagher, who made constant inroads into

Gujarat and Kathiawar, and after repeated remonstrances on the part of the British Government, it became necessary to move a force into Cutch. In 1816 a Treaty (No. II.) was concluded, by which the Rao agreed to pay indemnity for the losses caused by inroads from Wagher. . . .”

In short, all the attention is directed to the normalisation of relations between States made vassals previously, Gujarat and Kattyawar, and the new vassal—Kutch. No mention is made of the relations between the new vassal and countries outside British control, in this case—Sind.

Thus started in this area the policy the final shape of which can be seen in the above rule of Tupper.

If this is kept in mind, then it becomes obvious why the Treaty of 1819 does not establish a formal connection between the British obligation to guarantee the territorial integrity of Kutch and the obligation of Kutch to submit territorial disputes to British arbitration. Thus the text of the treaty permits the interpretation that the guarantee extends to the territory of Kutch as it was on the day of the conclusion of the treaty, while Kutch was entitled to expand at its own risks and peril beyond that territory at the expense of non-vassal States. In such a case the newly acquired area would not be covered by the guarantee but would nonetheless be Kutch territory. There is nothing in the treaty that would prevent such a situation. Evidently, the British would protect their vassal in any event if he were in trouble with a neighbour hostile to the British, for political reasons, be they legally bound to do so or not.

When, on the contrary, one tries to analyse the effect of the treaty of 1819 in the light of the thesis that International Law and principles of International Law did not normally apply to the peculiar Indian suzerain to vassal relationships, then the territorial clauses of this treaty lose all their meaning. Britain is not bound by the principles of *pacta sunt servanda*, and therefore is not bound by the treaty and its clauses. It can abide by them or not at its own *bon plaisir*. Such a legal situation would mean that, as for territorial clauses of the treaty, Great Britain could protect the integrity of Kutch if it so chose or deny its protection if it so chose. It is evident that, in such hypothesis, all difference between territory belonging to Kutch at the time of the treaty and any newly acquired territory disappears. Britain could have protected the one territory or the other, or not, equally at its own free will, or could have appropriated one or the other territory, again at its own free will.

It is evident, from this example, that the whole structure of suzerain to vassal relationships in India would have fallen to pieces, had the foundation of it, the principle of International Law that *pacta sunt servanda*, not been applicable.

If the Proclamation of Queen Victoria in 1858 had any meaning as a public statement engaging the State on behalf of which it was made, it had precisely the meaning opposite to the thesis that the above principle of International Law was not binding upon Britain. It seems evident both from the historic point of view, as an effect of the great lesson which the so-called mutiny was, and from

the point of view of the choice of words if taken at their face value, that this and only this was the meaning of the Proclamation. It proclaimed the intention of the Paramount Power, through its most authoritative representative, scrupulously to maintain "all Treaties and Engagements" made by or under the authority of the East India Company and rejected in solemn terms any intention of extension of the territorial possessions or the intention of sanctioning any encroachment on the territory of "others"—which term evidently meant the Princes.

Counsel for Pakistan correctly interpreted the essence of the proclamation with respect to territories of Indian States by saying that the British policy, under this proclamation, could be defined in the words: "What is ours we will protect it but we will not go and encroach on others! This has remained through the British period and is the keynote of the relationship with Indian States."

Here Pakistan also accepted the position that Britain held itself bound by a legal act, a solemn Proclamation of the Queen, as it held that treaties between Britain and Indian States bound both sides as equally subject to the principle that *pacta sunt servanda*.

What the attitude of Britain as expressed in Queen Victoria's Proclamation could not have meant was the reversal of British policy, suggested by Pakistan, in the sense that the administrators of India on behalf of Britain were invited to be, from the proclamation onwards, biased in favour of Indian States to the detriment of British India so as not to apply treaties and engagements, and Queen Victoria's Proclamation, on points which represented obligations for Indian States. Such is the point in the Proclamation which said that "we will permit no aggression upon our dominions or our rights to be attempted with impunity", which meant that what was British India was to be respected by Indian Princes as British territory and defended by British administrators as British territory against any encroachment by Indian Princes.

This evident sense of the Proclamation excludes any possibility of intentional lack of clarity on the part of British authorities about what is and what is not British Indian territory; it excludes situations in which a territory might be declared to belong to an Indian Prince by the British authorities though they knew that territory to be a part of British India, thus creative, on the side of the Indian Prince, a temporary illusion that his State was larger than Britain admitted it to be.

If a Prince had to be favoured or gratified with a grant of territory, till then a part of British India, this could always have been done in good form and only thereby would it have the expected political effect.

In other words: I accept India's argument that it is not a possible construction of Queen Victoria's Proclamation that the British Crown proclaimed a desire to remain inactive or silent or give a mandate to its administrators to remain inactive or silent in the face of an assertion of title by an Indian State to territory which was British territory.

Cession of British Territory.

Whether grants or, in legal language, cessions of British territory to Indian States were possible and under what conditions, was one of the issues in the case. It was raised by Pakistan whose fundamental thesis could be summed up in the following four propositions :

- (a) in 1819, at the moment of the "territory freezing", the Sind-Kutch boundary lay in the middle of the Rann;
- (b) in 1843, with the conquest of Sind by the British, every square inch of Sind territory became British territory; the Sind-Kutch boundary became the British-Kutch boundary and it lay in the middle of the Rann;
- (c) to be on the critical date, in 1947, where India claims it to have been, this boundary would have had to be shifted from the middle of the Rann to its northern edge, in other words, the northern half of the Rann, a large portion of British territory, would have had to be ceded to Kutch, to an Indian State;
- (d) there is no trace of such a cession, which would require an Act of the Crown of England in Parliament or at least of the Crown of England in Council.

Thus, for the Tribunal, two questions arise. One is the question of where the boundary was located in 1819 or 1843 and, therefore, whether a cession of territory ought to have intervened if the boundary is found to have been located, in 1947, on the northern edge of the Rann. The second question is whether the boundary, if located in the middle of the Rann in 1819 and 1843, could have shifted later to the northern edge by grant of British territory to the Indian State of Kutch, i.e. by cession of Crown territory.

To deal first with this second question, one has to consider the essence of cession and the form of it.

As to the essence, there can be no doubt that Britain could have ceded British-Indian territory to an Indian State. Britain was the internationally recognised full sovereign of British India and as such it could dispose freely of British-Indian territory, as it could dispose freely of any other territory belonging to the British Crown. The Proclamation of Queen Victoria in 1858 made no difference in this matter. Until this date the Company exercised all its territorial rights on behalf of the Crown, and after this date the Crown was invested with and exercised territorial rights without intermediary. Before as after 1858 British Indian territory was legally Crown territory.

As to the form, the question is less simple.

The assertion of Pakistan is that not the smallest slice of territory once considered as British by the British could become territory of an Indian State "until the British Crown, by a conscious, deliberate and unequivocal act, makes a formal transfer of it according to a constitutionally recognised mode" (proposition 12 of Pakistan Chart 40) and that this mode in "strict theory of the

British Constitution is that British territory cannot be alienated except through the intervention of Parliament. The King in Council, the Sovereign in Council, the Executive, cannot do so, it must be Parliament, i.e. the King, the House of Lords, and the House of Commons—the King in Parliament must be the level for alienating British territory”.

One cannot now, apropos of an adjudication, submit this question to scrutiny in the light of the unwritten British Constitution and then apply this Constitution in its “strict theory” to the case under consideration. This would lead the Tribunal to act as the Privy Council of Britain before 1947, i.e. to validate or invalidate such or such an act of British authorities performed before 1947. On this question only one position can be adopted and it is the following: whatever act emanating from British authorities was considered as valid by the British must be considered as valid by the Tribunal; what was invalidated by them must be considered as invalid—but no more.

Therefore, any modification of boundary, whether implying cession of British territory or not, made by the British while they were the Paramount Power, and in force at the critical date, in 1947, must be held to be fully valid today.

In these circumstances it is interesting for the Tribunal but irrelevant for its decision to determine whether and to what extent the otherwise so pragmatic and expedient British manifested some propensity for strict formalism when British territorial rights were in question.

The witness on this, as on all legal aspects of British rule in India, Tupper, (see his Chapter VIII entitled Cessions and Boundaries) writes :

“Just as the Paramount Power is the authority which can determine what is State territory and what is part of British India, so the same Power is likewise the only authority by which cessions of British Indian territory can be made to Native States, by which questions of sovereignty can be decided as between one State and another, and by which boundaries can be fixed between two or more States or between a Native State and British territory. It is true that there is no statutory provision contained in any Act of Parliament expressly conferring upon the Executive Government of India power to declare whenever necessary whether any particular territory is or is not part of British India, and to make the declaration absolutely conclusive of the fact in all courts of justice.”

Tupper deals in a separate paragraph (para. 244) with the question of the “Practice of the Government of India in making cessions of territory in time of peace” and refers in this respect to the Rampur case and to the Bhaunagar cession case. He writes :

“In the Rampur and Bhaunagar cessions cases not less than 49 cases were examined in which the Government of India between the years 1782 and 1873, inclusive, had ceded territory to Native States.... The thirty-six cases collected in the Bhaunagar case clearly established during the ninety years, 1782 to 1873, a continuous practice of ceding British

territories in times of peace by the Executive Government without the intervention of Parliament, for reasons of convenience by way of exchange or in recognition of services. . . .

“Of the 49 cases included in the two lists [which were examined] in 20 cases the cessions were made under treaty; and in the residue, most frequently by *sanad*, as also by documents of various descriptions, by mere letter, by *Kharita*, by ‘engagement’ or ‘agreement’ or ‘settlement’ or ‘memorandum of agreement’. Generally it may be said from an examination of these lists that the Government of India has habitually made cessions of territory by a variety of instruments to Native States; that the cessions have included both territory subject to British laws, and assigned or confiscated or recently acquired territory which has never been under British legislation, and that the cessions have been arranged in time of peace from motives of convenience or policy, and especially in reward for services, as in the distribution of confiscated lands which took place after the Mutiny” (op. cit. para. 244 in fine).

The rule Tupper deduces from the examined cases reads :

“No cession of British Indian territory may be made without the previous approval and sanction of the Secretary of State for India acting on behalf of her Majesty’s Government. But unimportant transfers of territory, such as relate to a delimitation of a previously doubtful or disputed border or carry out some comparatively trifling readjustment of frontier for purposes of administrative convenience, may, in accordance with past practice, be sanctioned by the Government of India”. (op. cit. rule 6 in para. 259).

As can be seen, in attempting to deduce a rule from the practice, Tupper does not see any necessity for going higher than one Cabinet Minister, the Secretary of State for India, for any cession, be it an important one, while for delimitation of previously doubtful or disputed borders with cessions of “unimportant” portions of territory he considers the Government of India to be a high enough authority. The Crown in Parliament, the Crown in Council, or simply the Parliament is not as much as mentioned.

It was, accordingly, quite possible that the Sind-Kutch boundary, as one of the boundaries between British India and an Indian State, could have been the object of a “delimitation”—because “doubtful or disputed”—in such a way that this “delimitation” amounted i.a. to an “unimportant transfer of territory” (i.e. British Indian territory to the Indian State of Kutch) “sanctioned by the Government of India” and not referred to the Secretary of State. This could have happened “by a variety of instruments”, the preparation, the sanctioning and the issue of official maps under the authority of the Government of India being evidently not excluded.

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The Origin of Boundaries.

It is a common belief that international boundaries are determined only by international treaties, which contain their description and depiction. This belief is based on the obvious fact that, being the limits of the territories of sovereign

States, they are the results of an agreement of these States—an agreement which most commonly takes the form of a treaty.

There is no doubt that an international boundary ranks high among matters which cannot be settled otherwise than by agreement between neighbouring States concerned. One could, in good logic, go as far as to suggest the axiom that a boundary is there where the neighbouring States have agreed it to be. The agreement may have been entered into with more or less of freedom of will, it may have been forced on one side by force of arms, in a war and through the victory of one neighbour over the other, but it must have been accepted, when peace was restored, by both sides, the victorious and the defeated to be looked upon as the boundary by the community of nations.

But some other aspects of this question are much less obvious and their scrutiny shows the limits beyond which the above common belief is not valid.

These aspects turn on the question of the legal origin of boundaries.

If one disregards the legal character of boundaries in the distant past, such as the unilaterally dictated limits of the Roman Empire, the *limes*, or the vaguely defined wide border zones or *marks* of the Middle Ages, also mainly imposed by powerful rulers upon their neighbours, one has to recognise that modern continuous boundaries between sovereign States emerged from the darkness of the past mainly by custom. In Europe some date from Roman times—the boundary between Italy and Yugoslavia is roughly the Roman *Limes Longobardicus*. Some date from the Middle Ages as one-time boundaries of territories belonging to this or that feudal lord. But whether such boundaries have a venerable age or not, it was not until the second half of the 19th century that anyone had the idea of including a description of a boundary inch by inch in a treaty and of attaching a detailed map to it. Detailed and reliable maps did anyhow not exist until that time. The description of an old, stable boundary could nowhere be found. The description of a new boundary—such as the boundaries of Napoleonic entities of Europe—were defined in treaties by an enumeration of traditional smaller entities: provinces, duchies, counties, baronies, etc., rarely accompanied by rough sketches. The boundaries of these entities were considered as “well known”, i.e. customary boundaries. They were later depicted, for practical purposes, on maps with no legal sanction.

It is interesting to note that even the most modern international Treaties, the Treaties of Versailles and of Saint-Germain of 1919-1920 and the Treaties of Paris of 1946-1947, do not describe all the boundaries agreed upon at those conferences. They describe only the modified portions of those boundaries. As annexures one can find maps where the entirety of the new boundary is drawn. But, since it is stipulated that in case of a discrepancy between description and depiction the description is to be held as decisive, one may well ask what exactly a description means where it simply specifies that from a given point the boundary follows the pre-war alignment of the boundary between the neighbours concerned, and that pre-war boundary was never previously described inch by inch, but was the traditional boundary between the mediaeval baronies!

In Latin America, as is well known, the contemporary sovereign States agreed on the principle of *uti possidetis*, thus accepting as the origin of their boundaries the boundaries between parts of the one-time Spanish colonial Empire, between this Empire and the Portuguese Empire and between the Spanish Empire and other foreign possessions. The fact that this or that Latin American republic inherited the territory of this or that Spanish viceroyalty, audiencia or other unit had no legal consequences. The republic was the result of a war of national liberation and could have carved its territory out of the former oppressors' possessions according to any imaginable principle, be it geographic, economic, cultural or linguistic, or without any principle, by the use of force against its new neighbour, another similar republic. The new boundary would then have had to be agreed upon by the new neighbours. But now the new republics agreed to accept the boundaries of colonial administrative divisions for practical reasons. Thus they accepted in the majority of cases boundaries which were not the result of international treaties and had no international significance. They were accepted as facts belonging to tradition. Besides, these boundaries were ill defined. The well known American geographer, S. W. Boggs, writes about these boundaries :

“Although most of the twenty-five boundaries have their roots well back in the colonial history of the continent, none of the Spanish provincial boundaries had been demarcated and none of them had been defined with such exactitude, when the process of emancipation began, that they could be adopted by the newly formed republics without difficulties in interpretation. Most of the boundaries have been defined since 1850 and many of them within the last fifty or sixty years.” (International Boundaries, p. 74).

The newest free countries, emerging from a colonial past, the countries of Africa, have adopted a similar attitude. In the Charter of the Organisation of African Unity, adopted at the first Conference of African Unity in Addis Ababa in 1965, one reads (Article III, Principles):

“The Member States, . . . solemnly affirm and declare their adherence to the following principles: . . . 3. respect for sovereignty and territorial integrity of each State and for its inalienable right to independent existence; . . .”

Since they were all born within the boundaries of administrative units of the colonial epoch, the principle of respect for their integrity expresses the readiness of African States to accept the boundaries of colonial administrative boundaries as their national boundaries. This is a repetition of the Latin American *uti possidetis*. Again, old boundaries are adopted as factual boundaries, and they become boundaries of States. Such boundaries may have been, before the colonial period, boundaries of Indian States, whose successor—after a long interruption—this or that new State might be. But this distant past is not mentioned in the Charter and old pre-colonial boundaries are not mentioned either. New boundaries are simply the continuation of the immediately preceding colonial situation.

One cannot fail to observe how very wise this decision of the Africans was. If the opposite attitude had been taken, this could have had the most tragic

consequences. One has only to imagine a decision that the colonial boundaries were to be done away with, that their alignment was to be of no consequence and that the new States should determine their respective boundaries anew by bilateral negotiations. This would inevitably have opened a Pandora's box of conflicting interests and territorial aspirations and would have led straight to a series of the most bitter disputes and possibly of armed conflicts.

One could find many similar examples in Asia.

The above examples point to the conclusion that it is in practice rather the exception that an international boundary be described inch by inch and scientifically depicted in an international treaty. The rule is the opposite: boundaries are not described or only partly described in treaties; they are not always completely depicted in treaties even in recent times; they are mostly traditional "well known" limits of sovereign States.

Yet they do exist. Described or not, depicted or not, they exist. They have an international legal existence in all cases—described and depicted in treaties or not. They are universally considered as binding the neighbours. The crossing by armed forces of a boundary which was never as much as mentioned in a treaty is as much a violation of the neighbour's integrity as if the boundary were described inch by inch and depicted in a treaty between the two neighbours.

Therefore, the axiom suggested above, that a boundary is there where the neighbouring States agreed it to be, has to be completed by saying that the neighbours could have entered into such an agreement in a variety of ways and by far not only by treaties. Africans entered into such an agreement with a kind of manifesto of all African States, Latin Americans by widely adopting a guiding principle and most other States by simply regarding a traditional boundary alignment as the boundary.

Why are all those boundaries, not born in treaties, binding boundaries? Where resides their legal force? It is obvious that the legal force of such boundaries is the result of an agreement of the neighbours expressed in their lasting acceptance of a given boundary alignment, be it a tacit acceptance or an outspoken one. The case of a tacit acceptance has acquired, in legal doctrine, the technical term of acquiescence, and the outspoken one the technical term of recognition.

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Acquiescence in and recognition of boundaries.

It follows from the above that principles of International Law governing boundaries which were not determined by Treaties are of great importance in international life. They govern thousands and thousands of kilometres of international boundaries.

The present case has to do with such a boundary. The Sind-Kutch boundary, except for its westernmost portion, was never formally determined by a Treaty. Yet it was an international boundary, a boundary between British India and the Indian State of Kutch (and some minor Indian States).

This fact was common ground of both Parties. Pakistan, while insisting that International Law did not apply to the suzerain-vassal relationship, never vacillated in the position that the Indian States, Kutch and others, were, for Britain, *foreign* countries to which British territory could not be freely ceded. The boundary between British and foreign territory could therefore only be an international boundary.

There is no valid reason why principles of International Law applicable to international boundaries should not be applicable to this particular international boundary also.

One can, on the other hand, question the modalities of application of the general principles of International Law governing boundaries, not determined in treaties, inasmuch as the Sind-Kutch boundary was an international boundary of a peculiar character : it was a boundary between the territory of a fully sovereign State, Britain, and a not fully sovereign State, a vassal of the suzerain Britain.

To clarify this point it is useful to examine more closely the applicable principles of International Law, the principles of acquiescence and of recognition (with their corollaries such as estoppel, prescription, etc.)

The most recent important case of international adjudication in boundary matters, the case concerning the Temple of Preah Vihear (Cambodia v. Thailand) before the International Court of Justice, gave this important judicial body a fresh opportunity to ponder those principles and to apply them. They became the essential basis of the Court's decision. It was said, in the text of the decision, that :

"In general, when two countries establish a frontier between them, one of the primary objects is to achieve stability and finality. This is impossible if the line so established can, at any moment, and on the basis of a continuously available process, be called in question and its rectification claimed. . . ."

Here it was made clear that the principles which the Court applied—mainly the principles of acquiescence and recognition—had their justification in their function of barriers to irresponsible challenge of or claims regarding an established boundary—acts detrimental to relations between States whose common interest is stability and finality of their borders.

One could add that stability and finality of all borders—if they do not contradict higher principles of International Law—is in the common interest of the whole international community.

In his separate opinion the Vice-President of the Court, M. Alfaro, gave a remarkable analysis of the principles applied by the Court—principles to which he, in his own words, attributed great weight.

M. Alfaro considers the above-mentioned principles as one principle with multiple aspects and multiple effect. He calls it, in Spanish, "*doctrina de los actos propios*", or in English, "the principle of the binding effect of a State's

own acts with regard to rights in dispute with another State" and has "no hesitation in asserting that this principle, known to the world since the days of the Romans, is one of the 'general principles of law recognized by civilized nations'...".

M. Alfaro defines this principle by saying that :

".. its substance is always the same: inconsistency between claims or allegations put forward by a State, and its previous conduct in connection therewith, is not admissible (*allegans contraria non audiendus est*). Its purpose is always the same: a State must not be permitted to benefit by its own inconsistency to the prejudice of another State (*nemo potest mutare consilium suum in alterius injuriam*). *A fortiori*, the State must not be allowed to benefit by its inconsistency when it is through its own wrong or illegal act that the other party has been deprived of its right or prevented from exercising it (*nullus commodum capere de sua injuria propria*). Finally, the legal effect of the principle is always the same: the party which by its recognition, its representation, its declaration, its conduct or its silence has maintained an attitude manifestly contrary to the right it is claiming before an international tribunal, is precluded from claiming that right (*venire contra factum proprium non valet*).

"The acts or attitude of a State previous to and in relation with rights in dispute with another State may take the form of an express written agreement, declaration, representation or recognition, or else that of a conduct which implies consent to or agreement with a determined factual or juridical situation.

"A State may also be bound by a passive or negative attitude in respect of rights asserted by another State, which the former State later on claims to have. Passiveness in front of given facts is the most general form of acquiescence or tacit consent. Failure of a State to assert its right when that right is openly challenged by another State can only mean abandonment to that right. Silence by a State in the presence of facts contrary or prejudicial to rights later on claimed by it before an international tribunal can only be interpreted as tacit recognition given prior to the litigation. This interpretation obtains especially in the case of a contractual relationship directly and exclusively affecting two States. Failure to protest in circumstances when protest is necessary according to the general practice of States in order to assert, to preserve or to safeguard a right does likewise signify acquiescence or tacit recognition: the State concerned must be held barred from claiming before the international tribunal the rights it failed to assert or to preserve when they were openly challenged by word or deed."

M. Alfaro considers that the principle does not exhaust itself in the sphere of evidence. He says :

"In my judgment, the principle is substantive in character. It constitutes a presumption *juris et de jure* in virtue of which a State is held to

have abandoned its right if it ever had it, or else that such a State never felt that it had a clear legal title on which it could base opposition to the right asserted or claimed by another State. In short, the legal effects of the principle are so fundamental that they decide by themselves alone the matter in dispute and its infraction cannot be looked upon as a mere incident of the proceedings."

Speaking of the utility of the principle M. Alfaro says that "the principle is also rooted in the necessity of avoiding controversies as a matter of public policy (*interest rei publicae ut sit finis litium*). By condemning inconsistency a great deal of litigation is liable to be avoided and the element of friendship and co-operation is strengthened in the international community."

M. Alfaro continues by demonstrating that the International Court of Justice, the Permanent Court of International Justice or Arbitration Tribunals have applied or recognised this principle in a number of cases. He quotes twenty-two cases, but says, at the end of his text, that there are many more.

Some aspects of the principle or some conditions for its application mentioned by M. Alfaro are obviously applicable under all circumstances in boundary disputes, be the neighbours fully or not fully sovereign. Such an aspect of the principle is the binding effect of express agreement or express recognition on the neighbour who is the author of such express agreement or recognition.

That express agreement or express recognition was binding on the neighbour who was fully sovereign, i.e. Britain, cannot be doubted. It is a consequence of the elementary good faith that had to be expected of the Paramount Power, particularly after Queen Victoria's Proclamation in 1858, the essence of which was the solemn engagement of the Paramount Power to be true to its obligations vis-a-vis its partners in treaty relationship with this Power. Such was the firm resolve of the Paramount Power. Why then should a principle of International Law not, in addition to this resolve, have been applicable to its conduct? Why should this Power have been absolved from its obligation to treat its treaty-partner, the vassal, with good faith and be declared entitled to use bad faith? To what end is International Law created by the community of nations, if this could be its effect? Its use in this relationship would have been precisely to protect the vassal from possible tendencies of the suzerain to disregard its obligations.

As to the vassal's obligations to hold itself bound by its own express agreements and express recognition, one sees quite well the possibility that such agreements or recognitions could be the result of the suzerain's pressure on the vassal, the weaker partner. But there is no principle of International Law that could be invoked against pressure and to obtain the invalidation of engagements entered into by vassals under duress. Vassalage itself was a relationship accepted under pressure or duress, and yet it was internationally recognised. Later on it disappeared through the victory—speaking in terms of International Law—of the principles of self-determination of peoples and sovereign equality of nations large and small (Charter of the United Nations). But for the period

during which unequal relations existed and were recognised as legally valid, all legal effects of these unequal relationships have to be held as having been valid too.

In other words : every express agreement and express recognition of Britain in favour of Indian States was binding upon Britain and every agreement and recognition of Indian States in favour of Britain was binding upon those Indian States.

Neither of the Parties in the present case, as successor State, one of Britain and the other of Indian States, can now repudiate the legal consequences of any express agreement or express recognition of the State whose successor it is.

In more explicit terms this conclusion means that express agreement to or express recognition of a boundary with British India by the State of Kutch precludes the Republic of India from claiming any portion of the territory beyond the boundary expressly agreed to or expressly recognised by the Indian State of Kutch prior to 1947; and vice-versa, express agreement to or express recognition of a boundary with the Indian State of Kutch by the British (sovereign in Sind) precludes the Islamic Republic of Pakistan from claiming any portion of territory beyond the boundary expressly agreed to or expressly recognised by the British (sovereign of Sind) prior to 1947.

The application of the principle of acquiescence and recognition, or the unique principle of the "binding effects of a State's own acts" in cases where express agreement or express recognition is lacking, presents more difficulties. M. Alfaro puts these cases under the titles of "passiveness before adverse acts", "abandonment of rights" and "failure to protest".

It is evident that a passive attitude cannot be lightly relied on against the State whose attitude was passive. This can only be done with great care, and circumspection.

The analysis by M. Alfaro of six different cases of this category shows how thoroughly every time, the Court or the Arbitrator studied the circumstances of the case before drawing the conclusion that its passivity could be relied on against the State whose attitude was passive.

Two out of the six cases are in this respect particularly instructive.

Venezuelan Preferential Claims (1902).—It is said in the Award of the Tribunal of Arbitration :

"Whereas the Government of Venezuela until the end of January, 1903, in no way protested against the pretension of the Blockading Powers to insist on special securities for the settlement of their claims... Whereas the neutral Powers... did not protest against the pretensions of the Blockading Powers to a preferential treatment... Whereas it appears from the negotiations... that the German and British Governments constantly insisted on their being given guarantees... Whereas the Plenipotentiary of the Government of Venezuela accepted this reservation on the part of the allied Powers

without the least protest... For these reasons [*inter alia*] the Tribunal of Arbitration decides and pronounces unanimously.’”

Anglo-Norwegian Fisheries case (1951). The case is summarised, under the aspect here considered, by M. Alfaro in the following terms :

“...the International Court of Justice considered that the ‘prolonged abstention’ of the United Kingdom from protesting against the Norwegian system of straight base lines in delimiting territorial waters was one of the factors which, together with ‘the notoriety of the facts, the general toleration of the international community, Great Britain’s position in the North Sea, her own interest in the question, and her prolonged abstention would in any case warrant Norway’s enforcement of her system against the United Kingdom”.

The separate opinion of Judge Sir Gerald Fitzmaurice in the *Temple of Preah Vihear case*, although the opposite of that of M. Alfaro in its conclusions, is, with respect to the application of the principle of the binding effect of a State’s own acts to cases of passivity, fundamentally identical with the opinion of M. Alfaro. Sir Gerald Fitzmaurice writes :

“But if the plea of error or misapprehension is excluded, as I think it has to be..., I can place no other interpretation on Thailand’s conduct, considered as a whole, than that she accepted this particular line as representing the frontier in this region. Moreover, even negative conduct—that is to say failure to act, react or speak, in circumstances where failure so to do must imply acquiescence or acceptance—is, in my opinion, quite sufficient for this purpose, if the facts are clear”.

The accent on the concrete circumstances in which the passivity was manifested is in perfect keeping with the well known ancient principle of Roman Law : “*Qui tacet quam loqui potuit et debuit consentire videtur*”. The words “when he could and should speak” also point to the circumstances of the situation and have the effect that passivity binds the defendant if he is not prevented (potuit) from speaking and if he is besides, bound (debuit) to speak.

It is in the light of the above considerations that the attitude of the two neighbours in this case before 1947 must be put under scrutiny. When one of them asserted the boundary to have a certain alignment and the other disagreed with such assertion, was the second one in such a position that it “could and should” speak in order to save what it considered to be its territorial rights or was it not? Is its passivity on such occasions to be held against it—or its successor—if the concrete circumstances of its passivity are taken into account—or is it not?

Hic Rhodus, hic salta.

What were the relevant concrete circumstances of the passivity of the two neighbours before the critical date, in 1947?

One has here again to distinguish, naturally, between the full sovereign in Sind, Britain, and the not full sovereign in Kutch, a vassal of the Power which was the full sovereign of Sind.

1. It seems beyond doubt that, faced by repeated assertions of Kutch over a period of decades that the territory of the Rann belonged to it, British authorities representing the sovereign of Sind could if they had considered it to be British, have spoken; there was nothing to compel them to silence. As to the question whether they should have spoken it also appears that they should have done so; legally, under the regime of Treaties, it was certainly in keeping with the spirit of these treaties that territorial matters should be dealt with in a spirit of perfect loyalty; the vassal ought to know the extent of the Territory that is recognised as its possessions by the suzerain; besides, clarity in territorial matters was the only wise policy of the suzerain towards the vassal and was moreover a requirement of good and orderly administration of the Empire.

2. The vassal, Kutch, when confronted with an adverse assertion made by the suzerain and fully sovereign neighbour would obviously feel embarrassed to speak, but such embarrassment could only be a political one, an embarrassment of the weak before the strong, in short, the kind of embarrassment any weak State experiences before a strong neighbour in case of territorial pretensions of this neighbour; from the legal point of view there was nothing to prevent the vassal from speaking. As for the duty to speak in order to avoid undesirable legal consequences, one could argue that the weak neighbour's, the vassal's embarrassment in fact ought to be a reason for a presumption in his favour in the sense that his silence ought not to be interpreted with all that rigour with which it might be interpreted in cases of less factual inequality than the one prevailing between suzerain and vassals in India under British rule.

In other words, only one slight departure from the principle of the binding effect of a State's own acts is justifiable in the suzerain to vassal relationship in India under British rule in boundary matters, and this departure is in favour of the vassal State.

In explicit terms this departure means the following. The silence of the British, as the suzerain of Kutch and the sovereign of Sind, before an adverse assertion by the vassal, Kutch, is a fully convincing proof of its acceptance of or its acquiescence in the vassal's claim. The silence of the vassal, of Kutch, before an adverse assertion of the suzerain and neighbour, the Paramount Power, is, on the contrary, not a fully convincing proof of its acceptance of or acquiescence in the Paramount Power's will.

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The significance of authoritative statements.

Express agreements, express recognition, adverse assertions and similar statements which one has in mind in examining the issue of the alignment of an international boundary are naturally statements on behalf of States and binding on those States, statements made by persons or bodies entitled or authorised to speak on behalf of a given State, under the Constitution of that State, in its relations with other States, in its international relations, to which category of relations boundary matters evidently belong.

For an International Tribunal having to decide a boundary matter, only such statements can be held as relevant and only such statements can become

the basis of its decision. All other statements are to be looked upon merely as testimony to prove a material circumstance referred to by the Parties as a part of their evidence submitted to the Tribunal.

In the case under consideration, therefore, the question arose : who was entitled to speak on behalf of the State of Kutch so as to bind Kutch in its only foreign relations, i.e. in its relations with Britain, the suzerain, and Britain, the neighbour, and who was entitled to speak on behalf of Britain, the Paramount Power, so as to bind it in its relations with the Indian State of Kutch, as its vassal and as its neighbour ?

As for Kutch, the answer is simple. It was the Rao (King) or the Council of Regency, and the Dewan, the Prime Minister and only minister of the Rao. There was no Parliament, there was no Minister of Foreign Affairs. In the less important cases of Wav and Suigam the answer would be : The Thakores only and no one else, as there was no other authority.

As for Britain, the answer is less simple but it can be found by reference to the answer the Tribunal was given when it put to the Parties the question of who had the right to decide boundary matters on behalf of the Paramount Power and who had the right to settle boundary disputes between Indian States on behalf of the same Paramount Power. The answer—if combined from the answers of the two Parties and summarised—was that there was no statutory enactment governing the matter, but that the practice of the British shows, nevertheless, some general rules of which the most important was that boundary matters were dealt with by the higher authorities in India : The Governments of provinces or presidencies and the Government of India; reference in such matters was sometimes made to the Secretary of State for India in London for approval or confirmation.

Under the Government of India Act 1935, the outer boundaries of the Provinces could be altered only by the Crown by an Order-in-Council. Therefore, if the outer boundary of a province was conterminous with the boundary of an Indian State, the alteration of such a conterminous boundary would require the authority of an Order-in-Council. But this position prevailed only after 1935 and not before.

It seems evident that the authorities entitled to decide boundary matters and settle boundary disputes were entitled to bind the Paramount Power by their decisions or settlements, and to bind it in its both capacities, as suzerain and as sovereign, in territorial matters vis-a-vis both its vassals and its neighbours. If it were not so, decision on, or settlements of boundary issues would have been futile.

It follows that statements—in the above wide sense of the word—by the competent British authorities as so defined have to be taken as having been binding upon Britain.

Nevertheless, this position has to be applied with one reservation, namely a reservation concerning cases where a doubt is raised whether in a concrete issue

the British authority which took the decision or issued a Resolution was a high enough authority to do so.

The best illustration of this difficulty is the attitude of the Parties to this case with respect to the Resolution which embodied the border rectification between Sind and Kutch of 1914. The Resolution was sanctioned by the Government of India and was not referred for approval to the Secretary of State in London. Pakistan argues that the Resolution implied cession of territory and should therefore have been referred to the Secretary of State. India argues that there was no cession of territory but restitution of Kutch territory to Kutch as the rightful owner. It was, therefore, to use Tupper's words, a "delimitation of a previously doubtful or disputed border" and could be done without reference to the Secretary of State. In short, the divergence is one of appraisal of the merits of a concrete boundary issue and the competence of a given British authority to deal with the issue in view of these merits.

It appears impossible to raise such an issue before an international Tribunal which now has to adjudicate the issue of a boundary in India under British rule and expect such a Tribunal to decide whether a given British authority of those times—particularly an authority as high as the Government of India—acted within the limits of its power or trespassed these limits. Such a decision could only have been taken by the Privy Council in London before 1947. An international Tribunal now, after 1947, can only use, in this respect, a practical criterion which is the following: whatever act or transaction of a high British authority was held as valid by the British themselves, was followed up, carried out and acted upon by the British and by those subject to British rule in India, i.e. Indian States, and was never invalidated by higher British authorities or Courts, has to be held as having been valid and therefore evidently binding upon the Paramount Power.

Pakistan took essentially this position by accepting the validity of the 1914 Resolution "for the purposes of this case" because "it was acted upon by the British."

This position gives the fundamental appraisal of what is and what is not an authoritative statement for the purposes of international adjudication the necessary flexibility indispensable for the proceedings, which might otherwise become inextricably involved in questions of the legality and constitutionality of acts performed by the British administration in India.

As to the forms of acts which fall into the category of authoritative binding statements and are relevant for the present case, the following should be mentioned as the most prominent:

1. *The bilateral agreement of 1914*, a unique transaction in the Sind-Kutch boundary issue; it is, for this reason a sub-category by itself; it was agreed upon by an exchange of letters and of a map; the consent of the Paramount Power was expressed by the Resolution of the Government of Bombay. It is important to note that the Presidency of Bombay at this time included the Province of Sind and that the Government of Bombay had political superintendence over

the State of Kutch. The said Resolution contained the decision on the boundary and was accompanied by a map on which the rectified boundary was shown; the consent of the State of Kutch was expressed in a letter written and signed by the Rao; it was addressed to the Political Agent, Kutch, i.e. to the representative of the Paramount Power; it mentioned the accompanying map; the Resolution was sanctioned by yet one higher British authority, the Government of India; the sanction was communicated in a letter written and signed by the Assistant Secretary to the Government of India, Foreign Department, and was addressed to the Secretary to the Government, Political Department, Bombay. It is said in this letter:

“The Government of India observe with satisfaction that the dispute between the Sind authorities and the Cutch Darbar has been settled by a compromise agreeable to both parties, and are pleased to accord their sanction to the rectification of the boundary line proposed in paragraphs 9 and 10 of your letter.”

This sanction was communicated to the Rao of Kutch through the Political Agent, Kutch.

The Resolution of 1914 has been acted upon ever since. The portion of the boundary expressly mentioned in the Resolution, the Sir Creek and the so-called blue dotted line, were depicted in all subsequent official maps as the boundary between Sind and Kutch in this sector.

Moreover, the Resolution was acted upon and implemented in 1924 by the erection of pillars not only along the blue dotted, horizontal line but also along the vertical, purple line up to its northern tip, the Badin-Jati-Rann trijunction.

2. *The Kutch Administration Reports* and similar official documents of Kutch, prepared in the capital of Kutch, Bhuj, under the direction of the Dewan, the Prime Minister, in the departments of the Darbar, the State Government. They were sent, through the Political Agent, the representative of the Paramount Power, to the Government of Bombay, the British Government of a province or presidency.

The Government of Bombay acknowledged the receipt of such documents, as a matter of routine, but examined carefully the content in the governmental departments. Remarks were drafted and often communicated to the Kutch Darbar through the Political Agent.

Such Reports and other similar documents were sent to the Foreign Department of the Government of India who also examined them. They were also sent to the Secretary of State in London. Thus they had a wide circulation in the highest quarters.

For the present case Kutch Administration Reports and similar official documents emanating from the Kutch Darbar, i.e. Rao and Dewan, have a paramount importance when they contain statements on territorial issues, which they invariably did.

The statement in such a document that the Great Rann of Kutch belongs to the State of Kutch has a manifold value. It was an assertion of the vassal Indian State of Kutch written for submission to the British Government of Bombay, i.e. to the British authority which represented Britain in both its capacities, that of the suzerain and that of a neighbour. It was the most manifest way of provoking a reaction from the British side. Therefore, the absence of any reaction against the said assertion—and there was no reaction—amounted to the clearest tacit acceptance of, i.e., acquiescence in, the Kutch understanding of its territorial extent by Britain both as suzerain and as neighbour.

Seen from another angle, the statement also was a recognition that all territories beyond those asserted to belong to Kutch belonged to its neighbours. The practical meaning of this recognition for the present case is the fact that no foothold beyond the northern edge of the Great Rann once in the possession of the Raos was now claimed by Kutch.

3. *Official documents of the Political Agent, Kutch* : Apart from not objecting to the description of the area of Kutch in the Kutch Administration Reports as “exclusive of the Rann” or “besides the Rann” or the assertions that the Rann formed part of the Kutch territory or that the Rann belonged to the Rao of Kutch, the Political Agent of the British Government, himself made Reports in which he gave the area of Kutch as “exclusive of Rann”. In 1887, he sent to the Governor of Bombay “Brief Notes on Kutch” for the perusal of the Governor of Bombay in which he mentioned the area of Kutch as exclusive of the Rann; he gave a similar description in Memos submitted by him to the Government of India on the Eve of the Visit of the Prince of Wales in 1875 and on the Eve of the Visit of the Viceroy in 1900.

4. *Official documents of the Government of Bombay* : The Government of Bombay not only did not object to the assertion in the Administration Reports that the area of Kutch was exclusive of the Rann but it adopted such description in many of its official documents. In 1901 it forwarded to the Government of India “Brief Histories of the Native States” under the political control of the Governor of Bombay, and in the History relating to Kutch the area of Kutch was described as “exclusive of the Rann”. A number of Bombay Administration Reports also use the same expression in describing the area of Kutch but a similar expression is not used in describing the area of Sind.

5. *Official documents and publications of the Government of India* : The Government of India, too, never questioned the assertion in the Kutch Administration Reports that the area of Kutch was exclusive of the Rann. Besides, it accepted that position in many of its documents and publications. “Aitchison’s Treaties” of 1864, 1876 and 1932, which are authoritative volumes published by the Political Department of the Government of India, describe the area of Kutch as exclusive of the Rann. In 1875-76, the India Office forwarded to the Government of India a copy of the Numerical Returns of approximate area, population etc. of Native States, desiring that the figures therein may be “carefully revised by the proper Department” of the Government of India and a

corrected copy transmitted to the India Office. The Government of India, after checking with the Government of Bombay, advised the India Office that the area of Kutch should be shown as "exclusive of the Rann". In 1887, the Government of India prepared for the information of the India Office a "List of Feudatory Chiefs and Nobles of India who were expected to be in England on the Occasion of the Celebration of the Jubilee of Her Majesty the Queen, Empress of India". This List described the area of Kutch as "exclusive of the Rann". A like description was given in "Brief History of Kutch Agency" prepared by the Government of India in 1905. Pakistan Map 92, prepared by McClenaghan when submitting to the Government of India his Report on the Export Trade Control Measures on the Kutch Coastline in 1941, shows the entire Rann within the Kutch territory and the Government of India did not object thereto.

6. *Official Records of the Secretary of State*: Statistical Abstracts from 1866 to 1881, presented by the Secretary of State to both Houses of the British Parliament, describe the area of Kutch as "exclusive of the Rann"; no such expression is used in defining the area of Sind. The Secretary of State submitted to the British Parliament the States Enquiry Committee (Financial) Report 1932, which contains a map showing the entire Rann outside Sind. The map was approved by the Secretary of State. The Secretary of State also accepted the advice of the Government of India that the numerical returns of approximate area, population etc. state the area of Kutch as "exclusive of the Rann".

7. *Official publications of the Western India States Agency*: The 1928 and 1935 editions of "The Ruling Princes, Chiefs and Leading Personages in the Western India States Agency" prepared and published by the Western India States Agency describe the area of Kutch as "exclusive of the Rann" and the maps appearing in these publications show the Rann within the Western India States.

8. *Official publications of Sind*: Sind Gazetteers of 1874, 1876, 1919, 1920 and 1926 describe the co-ordinates within which the Hyderabad District, the Thar Parkar District and the Karachi District as well as the Diplo Taluka, the Mithi Taluka and the Nagar Parkar Taluka were situated. These co-ordinates show that no part of the disputed area in the Rann fell within these districts or talukas.

9. *Maps*: In the present case the most important documents of this sub-category are *maps* issued by the competent department of the Government of India, the Survey of India Department.

These maps are, by definition, documents issued by a department of the Government of India in its quality as such a department and not merely as a body of cartographers at the service of that Government. The production of the maps was undertaken in the closest co-operation with other departments of the same Government, such as the Departments for Foreign and Political Affairs (i.e. relations with Indian States), for Home Affairs, for Transport, for Defence, for Agriculture etc. The work of the Survey Department was controlled by the

Governor-General and his office and his instructions were followed by the Survey Department. At times proof copies were submitted for his approval. On external boundaries, which include boundaries where British Indian territory ended and the territory of this or that Indian State commenced, the opinion of the Foreign Department was decisive. A note of 25 May 1900 of the Governor-General and Viceroy of India, Lord Curzon, read on this subject: "... Still more strongly would I lay it down that the Survey Department shall issue no such maps without the recorded sanction and assent of the Foreign Department."

The maps, once produced, were widely circulated. In an uncontradicted submission of India it was said "different maps issued by the Survey of India in various series have been circulated for nearly a century to the whole spectrum of the Government, including the Secretary of State, the Governor-General, the Provincial Governments, Commissioners of Divisions, Collectors, Magistrates, etc."

The maps were used all over India for all purposes of the Government, Military, Political, Administrative, Revenue etc.

It has to be stressed here that the Secretary of State for India in London was regularly provided with maps of some importance issued by the Survey of India. In a list of recipients dated 1924 there is also the War Office in London, besides the India Office, i.e. the office of the Secretary of State for India.

Before the publication of the maps and when the maps were in proof stage, the proofs were sent on various occasions to high governmental authorities. Before a new edition of a map suggestions and rectifications were invited from these authorities.

Certain maps of the greatest importance were produced by the Survey of India under the supervision not only of the Governor-General but also of the Secretary of State. Such is the case of the 32-mile maps of India. For new editions, proof-copies were prepared after several years of collecting and incorporating critical remarks on the preceding edition.

"When the publication was approved, a complete set of proofs in ten copies, was sent to the Secretary of State for India in London. He also made remarks that had to be incorporated. New proofs were produced and sent to London. When the final approval was received from London, only then the Surveyor General's Office published the new edition".

Such was the submission of India which, after some misunderstandings were clarified, Pakistan accepted as correct.

If all this is kept in mind, not the slightest doubt is permitted that such publications as maps of the Survey of India and more particularly maps issued after express approval of the Secretary of State for India or the Government of India were not only binding on Britain in all its capacities but were intended to be binding. They can be assimilated to very solemn proclamations of the Paramount Power's position on what is whose territory in India, what is British India, what is the territory of this or that Indian State and what is a "tribal

area" etc., as well as on what are the external boundaries of the British Indian Empire.

What, in view of these circumstances, is the meaning of the thesis of Pakistan that the maps of the Survey of India are "erroneous" in that they depict the Sind-Kutch boundary in such a way as to include 3,500 square miles too few in British India? It can only mean that, for reasons certainly well known to the British, they did not claim any more territory than they depicted as British. Who can come now, nearly a century after the first map of the Survey of India with the boundary at the northern edge of the Rann, and more than half a century after the first high ranking 32-mile maps of India with the same boundary, and say :

"Britain was wrong in claiming the territory it did claim in those maps. It had good ground to claim more. It made an error. And therefore its claim has to be held as not binding its successor-States. They can now claim more than Britain did at that time!"

This is evidently an untenable position. Not only can the British claim of a century or half a century ago not now be augmented by a successor-State, not only is the claim binding on the successor as a claim, it is binding as an agreement concluded in those times between Britain as the Sovereign of British India with its neighbours, the Indian States. The claim-line of Britain, as depicted in such maps, was submitted to the Indian States precisely in the form of those very official maps. And the States, in our case Kutch, Wav and Suigam, took cognisance of the British claim and accepted it by not reacting. They understood it—particularly Kutch—as the express recognition of the boundary alignment as claimed by Kutch itself by Britain as the sovereign of Sind, the neighbour, and simultaneously as a confirmation of the correctness of the Kutch claim by Britain as its suzerain. Thus the boundary alignment as shown in these maps became a boundary agreed upon by the neighbours through mutual express recognition, sanctioned by the Paramount Power, and for all these reasons binding on them and on their legal successors.

10. *The definition of the boundaries of Sind in 1935* : This definition was a unique act and is therefore, like the 1914 Resolution, a sub-category by itself. It was a definition provided for the purpose of the Government of India Act, 1935, by which Sind was separated from the Presidency of Bombay and made a separate Governor's Province. The definition was intended to appear in the Order-in-Council implementing the Government of India Act with respect to Sind. The task of preparing a draft schedule setting out the boundaries of the new Province of Sind and an Index Map showing those boundaries was entrusted to the Surveyor General of India who fulfilled this duty. He prepared a description of the boundaries of Sind, which for the relevant portion, read :

"Thence southward it follows the western boundary of this State [Jodhpur] to its junction with the States of the Western India Agency on the northern limit of the RANN of KUTCH. Thence the Province boundary follows the

northern boundary of the STATES of the WESTERN INDIA AGENCY westward until it again meets the Arabian Sea”.

The Surveyor General also prepared a map, called the Index Map of Sind Province. The Government of India sent the draft description and the map for comments to the Commissioner in Sind and to the Government of Bombay who gave their consent. The descriptive schedule did not finally appear in the Order-in-Council as it was felt that this was unnecessary for an “independent area” and as Sind whose “boundaries are clear” (statement by the Under Secretary of State for India in the British Parliament). The Index Map also appears not to have been annexed to the Order-in-Council, but it was approved by all competent authorities, and the alignment of the boundary shown therein has not been deviated from since then.

This description and depiction of the conterminous Kutch-Sind boundary as lying roughly along the northern edge of the Great Rann is to be appreciated as a confirmation of the agreement perfected through the above enumerated acts. The Paramount Power gave once more its sanction to this agreement and did so at a very high level, in the British Parliament.

The definition by way of description of the boundaries is clear and positive and along with the Index Map constitutes as *strong evidence as is possible* of a boundary accepted and recognised by the British. It is conclusive of the question. It is a clear confirmation of the other evidence which points to the same fact and clinches the issue.

Thus the agreement between Kutch and the British became an international bilateral agreement similar to international bilateral agreements on all other boundaries which are not settled by a Treaty. In theory such an agreement cannot be altered except by a new agreement between the neighbours concerned. It cannot be altered unilaterally.

It is evident that in the concrete case of a boundary between Britain and a vassal of the size of Kutch, the boundary could have been altered by an apparent bilateral agreement, imposed on Kutch by the British through the necessary amount of political pressure. But Britain did not alter the agreement in this or any other way open to it as the powerful Paramount Power. It remains true to the agreement till the end of its rule in India.

The process of crystallisation and consolidation.

Like most traditional boundaries everywhere, the Sind-Kutch boundary was once, in the beginning, ill defined. The 18th Century armed inroads across the Rann and temporary footholds of one neighbour on the other neighbour's side of the Great Rann show that there was no agreed limit of the two States, that there was no defined boundary at that time. From this situation to the one in 1947, when there was a well defined boundary between the two neighbours, a process which could be called one of crystallisation took place. Its stages, traceable in the submitted evidence, could be summarised as follows.

1802—1843

When the British irruption into Kutch history, in the first years of the 19th Century, occurred, Kutch had recovered from its misfortunes of the previous Century. There had been no new Sind invasion of the mainland of Kutch for twenty years. Kutch was strong enough to have its armed forces—under Fateh Mohammed—cross the Great Rann to pursue bandits on the Sind side of it. Kutch did not attempt to re-establish outposts on that side of the Rann, but was ready to defend itself well. It offered to the new power a treaty of alliance. In 1802 the Dewan went so far as to submit to the British a draft of such a treaty with the first article calling the alliance “offensive and defensive”. Treaties were then effectively concluded in 1809, 1810, 1816 and 1819.

What Kutch was at that time, we know. Besides the mainland and the now inhabited parts of the Rann, the Banni and the three large bets of Pachham, Khurir and Beyla, there was the then also inhabited Sayra with its central settlement, Sindri, the only human settlement in the Great Rann ever to have deserved the name of *town*.

The rest of the Rann was, as far as was possible from the above position, evidently controlled by Kutch rather than by Sind. It was a time when Kutch did not feel and was not at the mercy of its northern neighbour. It felt secure under the protection of the British who had guaranteed the integrity of its territory by the Treaty of 1819. (For an incursion of a Sind detachment into Luna, the Amirs apologised to the British.)

What the prevailing spirit on the Kutch and British side in those times was, is shown by the fact that only one year after the last-mentioned Treaty, in 1820, the British undertook a punitive expedition into the desert of Thar, *i.e.* beyond the northern edge of the Rann. On this occasion they did not wish to wage war with the Amirs of Sind and therefore assured them that they intended only to punish bandits. But with an expedition beyond the northern edge of the Rann they certainly manifested their intention to control the Great Rann. As they had no territory of their own, but were in this part of India only as allies and protectors of the vassal state of Kutch, it was evident on behalf of Kutch that they wished to control and did control the Great Rann.

What is remarkable in the correspondence between the British and the Amirs is the emphasis of the British on their assurances to the Amirs that they had no intention of extending their territories “beyond the Rann”. These assurances show that the Rann was not a part of Sind as there was no mention of its crossing in these letters.

From this point of view the Memoirs of Alexander Burnes, the Assistant Resident in Kutch, written in 1829, make interesting reading. Burnes thinks in military terms and appreciates highly the dominant position of the rocky heights of the three largest bets—Pachham, Khurir and Beyla—over the whole surrounding countryside; he suggests the establishment on them of a “strong line of outposts” in order to “secure the country from any future disturbances”.

There is no evidence to tell us what the line of British outposts on the lofty rocks of the bets of Kutch was like. But there is every likelihood that it was efficacious and that the British—through this device and others—secured the country from disturbances. There is in this whole period no attempt of Sindi armed forces to cross the Rann and after the “punitive expedition” of 1820 even private bandits from Sind did not appear any more in Kutch. The British protector protected the whole of Kutch well, its mainland and its surrounding Rann.

What is, in the light of the above, the weight of the argument of Pakistan that a few months before the conclusion of the fourth British-Kutch Treaty, the one of 1819, the State of Kutch lost the fort and town of Sindri because it was destroyed by an earthquake and because a lake was formed around it, a lake whose waters covered a part of what was once the prosperous Sayra? It is difficult to grasp why sovereignty should be lost over a place only because it is transformed by a natural disaster.

Besides, there is evidence to the effect that the Lake of Sindri, formed by the earthquake, was held after the earthquake still to belong to the Rao.

The witness for this is J. G. Lumsden, Political Agent in Kutch in 1844, and his testimony on this point has the form of a map. The map is coloured with 35 different washes and colour ribands and is intended to show the distribution of lands among the Rao and the feudal lords, the Bhayad. The Lake of Sindri is mentioned first, on top of the legend; there one sees a quadrangle surrounded with a pink riband and the explanation: “this colour lake of his Highness the Rao”. On the map a wide tract of land, with Sindri still marked as a fort, and including approximately what must have been the Sayra and a tract on the western bank of Khori Creek, approximately what Pakistan calls the Lower Delta Lands, has the colour of the Rao’s possessions. The northern limit of the Rao’s possessions in the Sayra District is approximately the northern edge of the Rann. Besides the mainland of Kutch, the Banni (spelt Bunnee) and the three large bets of Pachham, Khurir and Beyla as well as a group of four more bets are shown as belonging to the Kutch Bhayad. The group of four bets is situated to the north of Pachham. The first is called Koosree, the second Gainda, the third Horonto. The fourth has no name but has the notice : attached to mainland before earthquake of 1819. This notice and the place on the map where the bet is situated permits the hypothesis that it is Dhara Banni.

This map is the most valuable pre-survey map. It is the only map of the pre-survey group of maps submitted to the Tribunal which was drawn by a Political Agent, Kutch. All other maps were drawn by occasional visitors or by geographers who never visited the region (or even India).

This map also shows how the Pax Britannica worked in that period of time. The Rann was so well protected that feudal ownership over bets on its extreme northern edge made some sense and was worthwhile recording and depicting.

About 25 years after the Treaty of 1819, the situation in this respect, in respect of Sindri-lake, is unchanged. The Rao writes in 1844 a Yad (Memoran-

dum) to the Political Agent in Kutch where he complains about his unsuccessful attempts to clear the salt lake of Sindri or to drain it so that the Sayra could again be used for cultivation. He asks the Sarkar, the British Government of Sind, to assist him in his endeavours to cut a canal through the sand hills to the north of Sindri—apparently through the Allah Bund—so that sweet water would flow in the area of Sindri. He promises to raise the money for cutting the water course. It has to be observed that such efforts would not be made for a tract of land in a foreign country. Besides, the covering letter of the Political Agent—H. G. Roberts—forwarding this Yad to the Government of Sind contains the statement that “the sand hills mentioned by His Highness as well as Sindree, are within his dominions”.

In another letter of the same Political Agent and written the same year one reads the sentence :

“The ‘Ullah Bund’ was raised by the Earthquake of 1819, after our occupation of Cutch, and at the same time a flourishing Village called Sindree (still belonging to His Highness) was destroyed.”

1843—1855

The British protectors of Kutch never withdrew from the territories of the protected State of Kutch, but went beyond them. In 1843 they conquered Sind and made it a Governor’s province; a few years later they merged it with their other possessions in north west India as a division of Bombay Presidency.

The traditional boundary between Sind and Kutch, till then a front-line between hostile neighbours, lost this character and became a border between two portions of the British Empire, between a portion that was incorporated into British India and a portion that was under British suzerainty as an Indian State.

In the evidence submitted to the Tribunal this change appears very clearly. Instead of speaking of military outposts to secure the integrity of one sire against possible inroads of the other, documents speak of traffic problems, of track markings, road building, etc., in short, of problems characteristic of the initial stage of the peaceful co-existence of two neighbouring portions of an Empire under the same rule.

It is only natural that there was no formalism about such a boundary. When the question of erecting guide-stones across the Great Rann arose—it was in 1850—Sind, *i.e.* the British, sanctioned the expense. The atmosphere of the epoch is well felt when reading the 1850 correspondence between the Deputy Collector of a Sind sub-division, the Thar Parkar Collectorate, and the Political Agent in Kutch on this matter. Two British civil servants, one in charge of a part of Sind, the other representing the British in Kutch, write to each other. The one from Sind informs his colleague in his letter of 8 August 1850 that mounted police entrusted with transporting official mail have difficulties in finding their way across the Great Rann and concludes :

“I have under these circumstances to solicit your permission to erect 4 or 6 marks in the Rann for the guidance of travellers in general, and the

Tappalwallas [couriers] in particular; and to debit the cost of the same which will be but trifling to Govt: in the contingent bill for the quarter in which the disbursement is made;"

And the colleague from the other side of the Rann replies immediately, the very next day, on 9 August 1850 :

"In reply to your letter of the 8th Inst.I have the honour to acquaint you that I have transmitted a copy of it to the Commissioner in Scinde with an intimation that I have authorized you to incur the expense of erecting the requisite marks on the Rann in anticipation of sanction."

The sovereignty of Kutch over the Rann is here clearly recognised, since its permission for the erection of marks is sought in advance, but Kutch, on the other hand, gladly accepts that Sind covers the expense.

Kutch displayed—as was to be expected—greater care for the traffic and took upon itself the greater part of the expense. In 1854-1855 the Kutch side without sharing the trouble and the expense with the northern neighbour, built half way between Pachham and Baliari a resting house, a Dharamsala, with a deep well for drinking water and permitted the erection of guide-stones by the British along the same route. The Dharamsala and the well were built on Gainda Bet, in the very centre of the Great Rann, slightly above the 24th parallel (at approximately 24° 2').

1855—1870

But in spite of such friendly and co-operative relations between the two neighbours in their new style, and in spite of a traffic of postmen of the Empire instead of hostile armies or bandits, as in the past, and in spite of similarly excellent conditions on other borders of Sind, such as the Sind-Rajasthan or Sind-Jodhpur border, the British wanted to put more order in this part of their large Indian house. They wanted the Division of Sind to be scientifically surveyed and an accurate map of Sind to be produced showing all its boundaries, including the southern boundary, the one with Kutch.

And so, in 1855, a specialised agency of the British Indian Empire, the Survey of India, entered the scene of the Sind-Kutch boundary question. A party of surveyors, under Lieutenant Macdonald, arrived in Sind with the task of surveying the whole division. The party was at work from the above-mentioned year, 1855, till 1870, when it completed its task.

There is clear evidence before this Tribunal that the survey of Macdonald was the survey of Sind as a political, administrative entity and that, therefore, its final product, the map of Sind, Indian Map B-3, shows, on the whole, as the outer boundaries of Sind its outer boundaries as a political, administrative unit. The map has the title "The Province of SIND, 1855-1870, Scale 16 miles=1 inch. . . . Compiled in the Office of the Surveyor General of India from the latest Revenue Surveys based on the Gt. Triangulation. Calcutta 1876.", and the legend at its bottom ; "Published under the direction of Colonel H. L.

Thuillier, C.S.I., F.R.S. Surveyor General of India, Surveyor General's Office Calcutta Sept. 77." In the left corner of the bottom one reads: "Surveyed by Captains, John Macdonald, Donald Macdonald, H. B. Tanner. W. Lane Esq. and Assistants 1855 to 1870."

Everything is said on the map: by whom and when the underlying survey work was done, by whom it was compiled, under whose authority it was published and what it depicted—the Province of Sind.

Yet the question was raised whether this and some previous Macdonald maps, which show parts of Sind on a larger scale (Indian Map B-2 Series) and were the basis for the compilation work referred to on Indian Map B-3 (above quoted), show, in the southern sector, the political boundary of Sind or something else. Pakistan argued that they do not, or rather that they depict in this sector as the outer boundary of Sind a line which was not the outer boundary of Sind. It was a line which in fact was no more than the southernmost boundary of all the southernmost Sind villages and this was not necessarily the same as the southern boundary of the province.

According to Pakistan, this occurred in the following way. The surveyors enquired, in these villages or dehs, only about village boundaries and depicted them. Villagers did not indicate, as included in their dehs, useless wasteland of no value and of no significance for revenue purposes—portions of the Rann adjacent to their dehs. And the surveyors, therefore, did not depict such land. But this land, while outside the boundaries of dehs, as understood by the local population, was not necessarily outside Sind Province. It could easily have been a part of the State of Sind in the Amirs' time and therefore inherited by the British. Boundaries including such portions of the Rann were not inquired about and were subsequently not depicted. Boundaries of dehs, adjacent to the Rann, were, instead, mistaken for province boundaries and depicted on maps as such. This was the origin of the great error that continued to repeat itself in practically all official maps up to the end of British rule in India, in 1947.

Is this argument convincing and, if so, to what extent and in what sense?

India in its counter-arguments stressed that the surveyors had instructions to survey all land whatever its quality, fertile or waste, and that they did so not only in the interior but also on the periphery of Sind. It proved this point with documents and maps, e.g. with sheet 97 of B-2 and some sheets on the Sind-Jodhpur border. But this argument, although not without weight, is not conclusive. It does not prove that there could not be some wasteland, in the particular case of the northern part of the Great Rann, which was not deh land and therefore not indicated by villagers as their land, yet land that was a part of Sind.

But there are several reasons why the hypothesis of Pakistan has to be definitely rejected.

The surveyors spent no fewer than 15 years in Sind. During this time they were in contact not only with villagers but also with their chiefs, the patels. They collaborated and had to collaborate with Sind authorities at all levels without

exception, from village patels to the Commissioner of the whole Province and his staff. It is therefore impossible to believe that they were never informed about tracts of land, lying beyond the village borders of the southernmost chain of villages, which were not included in village territories because they were useless wasteland but belonged to the southernmost talukas, districts or collectorates or directly to Sind, and had belonged in the past to the Amirs—less interested in farming than in warfare, in defence—if such tracts of land had existed. As the surveyors did not survey and depict such tracts of land, as they never even mentioned the existence of such land as a separate category, it may be safely assumed that such land did not exist.

The mandate of the surveyors was that they should survey the whole of Sind and in fact they did survey the whole of Sind. In recommending to the Surveyor General of India and to the Governor of Bombay the need for a survey of Sind, the Commissioner referred to the topographical survey of the province; both the Government of India and the Government of Bombay made a similar reference. The Government of India referred to the scope of the work as “a complete and comprehensive survey and measurements...of the whole Province from one end to the other”. In a letter of 1864, the Secretary of State wrote to the Government of India as follows :

“I approve of your determination to continue the Topographical Survey of Sind, the want of good maps of the Province having long been felt as a serious public inconvenience.”

At the end of their labours they reported that they had surveyed the whole of Sind. They made no reservations whatsoever. If they had noticed a discrepancy between the southern boundaries of the southernmost dehs and the southern boundary of Sind, they would have reported this peculiarity. They would have said that they did not depict the southern boundary of the Province, which they were for some reason unable to do, and depicted only the southern boundary of the southernmost dehs. They never made such a reservation. They submitted the final product of their work as the final product of the survey of Sind, and not of the survey of the land cultivated by the inhabitants of Sind and included in their dehs. The map of Sind, published by the Survey of India, Indian B-3, was called a map of Sind and not otherwise.

It is to be observed here that the Macdonald line does not in any way separate useful land from waste. In Jati Taluka, along the vertical line on sheet 97 of Indian Map B-2, there is definitely wasteland on both sides of the boundary line; the wasteland to the west of the vertical line is surveyed as part of Sind. On the contrary, in Mithi Taluka, in the midst of the roughly horizontal line along the northern edge of the Rann, there is a densely populated area on the Sind side of the line while on the southern side there is valuable pasture land which was the subject of a special case by Pakistan. The villagers from the Sind side took, as a document submitted by Pakistan said, “since time immemorial” their cattle there for grazing. The land in question is Dhara Banni and Chhad Bet. Yet the same villagers, who indicated to the Macdonald survey party what their deh’s territory was, did not include this area, their pastureland, in their deh’s territory. Why not? There can be but one explanation: while

grazing their cattle on the bets in the Rann (if and when they grazed there) they know that they grazed on foreign territory, beyond the boundary of their country, and that therefore, obviously, this pastureland was not a part of their deh's territory.

This last point illustrates clearly what the object of the survey with respect to boundaries was. The surveyors had to ascertain the limits of Sind and not of useful land of Sind.

By doing so on the basis of indications by villagers and in close permanent touch with higher authorities, the surveyors ascertained the real boundary of Sind, *i.e.* the limits of the territory which traditionally belonged to Sind, where State authority of Sind was traditionally displayed.

That is why they showed the boundary thus ascertained on most maps with the symbol of a province or State boundary.

The Macdonald maps were widely circulated among the various Governmental authorities from the Secretary of State for India to the Collectors in Sind. As the survey was proceeding annually, maps ready at the end of the year were sent to the Collectors concerned.

The Survey of India, by publishing maps of Sind based on Macdonald's sheets, confirmed the results of the surveyors' findings and gave them the weight of an authoritative Statement made by the Government of India.

Macdonald's line in this sector—and in others—was repeated in practically all subsequent official maps. It was the line acted upon by all authorities, and particularly by the two neighbours. With the exception of its westernmost portion, rectified in 1914, it was never contradicted. Again with the exception of the 1914 incident, concerning only a small portion of this line, it never came under dispute. It was generally admitted and recognised as the boundary between British India and Kutch. *And its alignment followed the northern edge of the Rann, in line with India's submission.*

Therefore one can say that the process of crystallisation of the Sind-Kutch boundary came to an end with the end of Macdonald's work and the confirmation of Macdonald's findings by the Survey of India Department.

1870—1914

After the Sind-Kutch boundary was ascertained by the Macdonald survey party, the Survey of India published separate sheets of its final product on the unchanged original scale of Macdonald's final sheets, *i.e.* on a 1 inch to 1 mile scale. There were seven sheets; six of them were published in 1871 and the remaining seventh sheet in 1872.

The Sind-Kutch boundary, scientifically ascertained and depicted, was published under the authority of a Department of the Government of India, circulated over the sub-continent and in London. As it was not contradicted one has to consider that it was a recognition by the Paramount Power.

From this time on one has, therefore, to divide events and occurrences concerning the Macdonald alignment of the boundary into two distinct categories: events and occurrences which confirm this alignment and those which seem to contradict it.

The *confirmation* of the Macdonald alignment of the boundary took several different forms.

(a) The Survey of India issued a number of *maps* showing the Macdonald alignment of the Sind-Kutch boundary. Such were the *Indian Atlas Series* and later the *Quarter-inch sheets*, published from 1872 till 1943 in a continuous flow; they were, as their name reveals, on a 4 miles to 1 inch scale, and were the standard maps for the everyday use by the whole British administrative machine in India; they were published under the authority of the Government of India. Such were, above all, the maps with the highest rank because they were prepared with the greatest care and intended for the use of the highest level of the administration of India—maps of the whole sub-continent on a 32 miles to 1 inch scale usually called the 32-mile map of India. During the period under consideration four editions of this map were published; copies of three editions—of 1889, 1898 and 1908—were submitted to the Tribunal and had the Macdonald alignment. The third edition of the 32-mile map of India was approved by the Secretary of State; when the task of revising this edition was undertaken, the Foreign Secretary to the Government of India approved that edition without any changes in 1901. When the fifth edition of the 32-mile map of India was under preparation in 1915, the Government of India checked its proof and suggested certain amendments. That edition was reprinted in 1922 and 1928. While the earlier editions show the boundary between Sind and Kutch by symbols along the northern edge of the Rann, the fifth edition and its reprints also show the Rann in colour as falling within Kutch territory. The Macdonald alignment appeared also on maps of parts of Sind, the *Taluka maps*, showing the boundaries of the southernmost talukas (groups of dehs under one chief, the Mukhtiarkar) which stop on the edge of the Rann, where the Macdonald line runs; on maps prepared in 1886 by the Sind Revenue Survey; on a “Map of Sindh to accompany the Sind Gazetteer” of 1873, etc.

All but the last edition of an official compilation of Treaties between the British and Indian Princes, the compilation of C.U. Aitchison entitled “A collection of Treaties, Engagements and Sanads”, had as an enclosure a map of India on a 32 miles to 1 inch scale. This collection bears the note that it was published “under the Authority of the Foreign and Political Department” of the Government of India. The accompanying map had the Macdonald alignment of the boundary.

(b) A new *survey* of the Sind-Kutch boundary by a Party of the Survey of India under Major *Pullan* which undertook to survey the State of Kutch. The Party ascertained, as the northern boundary of Kutch, roughly the same line as Macdonald’s teams did, thus confirming Macdonald’s alignment of the Sind-Kutch boundary. The survey was carried out in the years 1879—1886 and the maps produced by it, with particular clarity the annual Index Charts of

the survey party, indicated the northern State boundary as practically identical with the Macdonald line till the last season of work; the General Report of the Survey of India for this season states that the field operations of Pullan's Party "were continued till 31 March 1886, and they comprised the completion of the topographical survey of Cutch with its adjacent 'Ran' . . .". The two maps on record based on Pullan and published by the office of the Survey of India "under the instructions of Lieut.-Gen. J. T. Walker. . . Surveyor General of India" in 1882 and "under the direction of Colonel G. C. De Pree, S. C., Surveyor General of India" in 1886 (Ind. Maps B-47 and B-48) have roughly the Macdonald alignment of the Sind-Kutch boundary.

(c) Another new *survey* of a part of the same boundary from the Sind side by a Party under the Superintendent of Survey C. F. *Erskine* in 1904-05. It was a checking, after roughly 40 years, of the Survey work of Macdonald in parts of Karachi and Hyderabad districts of Sind. The maps produced by this Party show the Sind-Kutch boundary in the western part of the northern edge of the Rann. They have roughly the same alignment as Macdonald with a few slight corrections. The most striking two corrections are that they include in Sind a tract of land on the south-eastern side of what is usually called the second loop, a tract of land called Sinatri Dhand, and that they include in Sind a tract of land to the south of the central part of the village Rahim Ki Bazar, evidently as results of careful inquiry among the population about the territory of their dehs at that time. For the rest the Macdonald line is confirmed by this resurvey.

(d) Official *publications* of the Kutch Darbar, of the Bombay Government and of the Government of India indicating, in different forms, that the Great Rann belonged to Kutch. Such were the *Kutch Administration Reports* which were published annually with great regularity from the year 1872-73 on and mentioned the Rann as a part of Kutch State by indicating the area of Kutch as being 6,500 (later corrected to 7,616) square miles "exclusive of" or "besides" the Rann, i.e. not reckoning this peculiar barren part of the country, or by stating, in so many words, that the Rann was "included" in Kutch or that it "belonged to the Rao"; one such Report by the Political Agent appeared already in 1855. Such were the *Bombay Administration Reports* with indications of the area of Kutch as 6,500 or, later 7,616 square miles "exclusive of", "besides" or "independent of" the Rann. Such were the *Statistical Abstracts* annually prepared by the Secretary of State's Office in London, to be "Presented to both Houses of Parliament by Command of Her Majesty"; those abstracts, available for the years 1866-67 to 1880-81, carry the same indication, i.e. that the area of Kutch was 6,500 square miles "exclusive of the Rann".

It has to be noted here that, as was stressed by India in the proceedings, Bombay Administration Reports do not contain any mention of the Rann when describing Sind and the Statistical Abstracts of the Government of India when giving data on Sind never mention the Rann of Kutch.

During the period under consideration some events or occurrences took place which, according to Pakistan, are in *contradiction* with the Macdonald alignment of the boundary or otherwise cast some doubt on the correctness of that alignment.

(e) In 1875-1876 a correspondence took place between, on the Sind side, the Political Superintendent of Thar Parkar, the Mukhtiarkar of Diplo Taluka (district under that Superintendency) and the Commissioner in Sind, about the alignment of the boundary; the issue was reported to the Bombay Government and this Government referred it to the Political Agent in Kutch, who in turn, referred it to the Kutch Darbar. As the Rao of Kutch had just then died, the Kutch Darbar desired that the matter might not be considered at that stage. The Bombay Government thereupon passed a Resolution. Soon afterwards the Dewan of Kutch desired the Vahivatdars in Kutch to collect information regarding the boundary between Sind and Kutch.

The correspondence, of a dozen or so letters, proves that :

- (i) it was very inconvenient for all concerned that the Sind-Kutch boundary was not demarcated on the ground with boundary marks;
- (ii) the two local officials consulted had divergent views about where the limits of State authority lay; the Mukhtiarkar of Diplo considered that "in the days of the Mir Sahibs [Amirs], on this side of Gainda in the Rann whatever theft of duties was committed was settled by the Government of Mir Sahibs; beyond Gainda in the State of Darbar of Kutch Bhuj", *i.e.* that the authority of Sind at the time of the Amirs in matters of theft of duties extended to Gainda Bet; the Vahivatdar of Bhuj had much more to say and stated that the Vahivat of Kutch extended over the whole Great Rann; he enumerated acts of what he called Vahivat, namely : guide stones had been fixed at Kutch expense, the resting place at Gainda had been constructed by Kutch, Kutch collected taxes on the sale of cattle from Sind and other places in the Rann, hides of stray animals dying in any place in the Rann were taken over by the lessee of Drobanda in Kutch, the inhabitants of Kutch grazed their herds of cattle in the various bets in the Rann and collected grass "while foreigners had no right to bring their cattle on these bets", in former times [before the earthquake of 1819] transit duty had been levied at Sindri by the Kutch State and a Thana [police post] of Kutch had also been maintained at Sindri for the guidance of travellers, there had also been a Thana of Kutch at Kanjarkot in the Rann [a few miles from Rahim ki Bazar] and Sindree, Kanjarkot, Sarafbela Bet, Gainda Bet, Dera Bet, Bawarla Bet and Mota Biar Bet were under Kutch.
- (iii) it was, therefore, desirable that the boundary be accurately demarcated, and first steps to this effect were taken : the Political Superintendent of Thar Parkar and the Political Agent in Kutch were to meet.
- (iv) as the Rao of Kutch died, the whole matter was postponed and, the Government of Bombay in a Resolution said :

"Government regret that for reasons stated the demarcation in question must be postponed till next season."

After this postponement, the matter was not revived again and the major part of the boundary was never demarcated on the ground by boundary marks.

(b) Under standing orders of the Government, it was a part of the duty of every Magistrate between whose division and Indian Territory there was a surveyed or demarcated boundary line to inspect the demarcated boundary line yearly. Accordingly, the Assistant Collector of the Tanda Sub-Division of the Hyderabad District proceeded to ascertain the boundary line in 1884 but, as there were no marks, he reported that he could not ascertain the exact locality where the boundary line between his Division and Kutch "was laid down". He added, however : "All I can find out is that it is somewhere in the Rann". The Collector forwarded the Report to the Commissioner who made the following endorsement :

"The Collector of Hyderabad is requested to explain more fully what the doubt is. From the map of the Hyderabad District it appears that the Rann of Kutch is the southern boundary of the Hyderabad District."

On the suggestion of the Assistant Collector, the Collector made a reference to the Superintendent of Trigonometrical Survey asking him about the exact position of the boundary line between the Hyderabad District and the State of Kutch as he was "unable to find it on the ground or on any maps in my possession". After further correspondence, the Deputy Superintendent of the Trigonometrical Survey stated that since Tando was a sub-division of Hyderabad, the Hyderabad District touched on the Rann of Kutch. He sent tracings to the Collector who reported to the Commissioner that from the tracings it was observed that there were no boundary marks but that the Rann itself was the boundary. The Commissioner thereupon stated to the Collector that it appeared that there was no demarcated boundary laid down between the Tando Sub-Division and Kutch and asked for information regarding the lands lying between the "defined dehs" and the Rann which were British territory. The Collector replied that "the lands lying between the defined dehs and the Rann are entirely waste and uninhabited and have never been cultivated and no one lives there for want of water". Subsequently, the Commissioner informed Major Pullan, who was at this time surveying the area, that so far as he could ascertain the actual line of boundary between Sind and Kutch had never been surveyed, that the Trigonometrical Survey map did not show the limits of the Province of Sind towards the Rann of Kutch but merely the limits of the defined dehs or village lands beyond which there were stretches of waste and uninhabited sand and that Major Pullan should take care that "the actual boundary namely the Rann itself is shown as the boundary as no portion of Cutch Territory is on the Northern side of the Rann". Major Pullan replied that he was "fully aware that the Cutch State owns no land on the Northern border of the Ran".

The general purport of the correspondence is that the boundary between Hyderabad District and Kutch did not bear any marks, that the Commissioner at one stage felt on the basis of the Trigonometrical Survey maps, that the southern boundary of the Hyderabad District was on the edge of the Rann, but that he later considered that the Rann itself was the boundary as "no portion of

Cutch Territory is found on the Northern side of the Rann". No enquiry, however, was actually made whether any part of Kutch territory was in fact on the northern side of the Rann and the Commissioner's opinion that the Rann itself was the boundary was not justified.

(c) in 1885, when the Survey of Kutch under Pullan was nearly completed, this surveyor engaged in an inquiry whether the Sind-Kutch boundary really lay along the northern edge of the Rann as Macdonald had shown it and as he himself had shown it in the maps produced till this date. The inquiry provoked a correspondence of half a dozen letters between Pullan, the Deputy Collector of Thar Parkar, the Political Agent in Kutch, the Commissioner in Sind and two Departments of the Government of Bombay, the Political one and the Revenue one. The correspondence proves that :

- (i) the Deputy Collector of Thar Parkar and the Commissioner in Sind thought that the "northern half" of the Great Rann belonged to Sind and the "southern portion" to Kutch, and that the people on both sides "perfectly understood" this and appreciated fully the grazing and other privileges involved in such division;
- (ii) the Political Agent in Kutch knew definitely that the contention of Kutch State was, on the contrary, that "the Rann is a part of Cutch";
- (iii) the Government of Bombay disliked the issue and was desirous to discontinue the epistolary discussion;
- (iv) Pullan interpreted the wish of the Government in such a way that he discontinued putting State-boundary symbols in his maps;

In short—the two British administrators in Sind disagreed with the boundary alignment as hitherto shown in official maps, including those being produced at that moment by Pullan. Their letters to the Government of Bombay had the effect that a few maps came to be issued by Pullan without any boundary symbol.

The British administration of Sind and that for the whole area, embracing Kutch and Sind, the Government of Bombay, did not pursue the matter any further. Kutch and Bombay Administration Reports continued to mention the Rann as a part of Kutch and the Survey of India put boundary symbols in subsequent reprints of Pullan's maps.

(d) When Erskine was surveying the Jati Taluka of the Karachi District in 1904-05, he inquired of the Commissioner, according to the usual procedure, regarding the boundary between Jati Taluka and Kutch. As the boundary of Kutch was involved, the Commissioner felt that he should consult the Kutch Darbar through the Political Agent of Kutch. Accordingly, he wrote to the Political Agent that the boundary between Jati and Kutch was the vertical line from the western trijunction and thereafter the Khori Creek and he desired the Political Agent to obtain confirmation of this boundary line from the Kutch Darbar. The Political Agent, however, instead of consulting the Kutch Darbar,

wrote back to the Commissioner that he was aware that "the Darbar claim that not only does the northern bank of the Khori Creek including Kotri belong to them, but also the land to the south and west of this Creek" and further that the Darbar also claimed the whole of the Rann of Kutch and were prepared to prove it. He suggested that the question should not be opened as it would raise the whole issue of the boundaries of Sind and Kutch. The Commissioner nevertheless sought the advice of the Government of Bombay, stating that "the boundary between Sind and Cutch and the question of rights in the Rann of Cutch will have to be settled one day or other" and "the sooner the matter is taken up the better". The reply of the Political Department of the Government of Bombay, dated 23 November 1905, was that "the question might well be left alone till we are forced to take it up".

Pakistan contends that this correspondence shows that the boundary between Sind and Kutch was not established and was pending in 1905. Reliance is particularly placed on the reply of the Political Department of the Government of Bombay. This reply cannot be construed in the way Pakistan seeks to do. In 1901, the Chief Secretary to the Government of Bombay had, in answer to the request of the Government of India, submitted to them a brief history of Kutch, in which he had described the area of Kutch as 6,500 square miles, exclusive of the Rann, the area of which was about 9,000 square miles. In February 1905, the Government of India asked the Political Department of the Government of Bombay to submit revised up-to-date information regarding Kutch and the Political Department of the Government of Bombay replied that the history sent in 1901 was up-to-date. There is also a reference to an unofficial note of the Government of Bombay, dated 26 April 1905, which included the Rann of Kutch in the State of Kutch. Thus, when the Political Department of the Government of Bombay informed the Commissioner in Sind that the question of the boundary between Sind and Kutch "might well be left alone", the Political Department very well knew that the entire Rann of Kutch was a part of the territory of Kutch. Against this background, the letter of the Political Department can hardly be construed as conveying that the Sind-Kutch boundary was not established and was pending. As the Political Agent, Kutch, stated, the Kutch Darbar was likely to claim the northern bank of the Khori Creek and also some land to the south and west of the Creek and it was because of this that the Government of Bombay felt that the question might be left alone.

It must therefore be held that, before and after these incidents, the Macdonald alignment of the boundary was confirmed by all competent authorities.

1914

The rectification of the Sind-Kutch boundary through the Resolution of the Government of Bombay dated 24 February 1914 was a major event in the Sind-Kutch boundary issue in British times and has a great importance for the present case.

It has first to be noticed that the proceedings, which started with complaints of the Commissioner in Sind in 1907-1908 against incidents which he considered

encroachments by Kutch on Sind territory, lasted six years. They were conducted by the Bombay Government, representing the Paramount Power as such. The Commissioner in Sind was treated as representing the Paramount Power in its capacity of sovereign over Sind, a part of British India. Kutch, the vassal State, was obviously represented by its Government, the Darbar. Thus the two neighbours were put on an equal footing. They were both asked to state their case. As Kutch claimed the rectification, it was the Kutch side that was asked to state its case first and to submit a map. Then the Kutch representation was submitted to Sind and Sind was asked to comment. The Government of Bombay then examined the Kutch representation and the Sind comments and worked out a compromise proposal. This proposal was submitted to the Parties. They both agreed. Then the compromise was submitted to the Government of India for sanction. The sanction given, the compromise was published under the form of a Resolution of the Government of Bombay in 1914.

These proceedings were called the seeking of "a friendly understanding or compromise, based on the materials available", i.e. on evidence by the Parties.

As for the evidence, the basic documents were the Kutch representation and the Sind comments.

The main evidence of Kutch was : At some period subsequent to 1809, Kutch exercised jurisdiction over or enjoyed revenue of some kind from some portions of the disputed area; in 1862 the Sind authorities did not question the Kutch ownership of a portion of the area in dispute in which salt deposits were situated and Kutch was extracting salt; admittedly, Kutch erected a beacon in 1906 near the mouth of the Sir Creek without any objection from Sind authorities; the khati (creek) near the beacon was widened and deepened under the orders of Kutch.

The case of Sind was : Guneg in the disputed area was the frontier station of Sind for collection of taxes; the road (a postal runner's foot track) as far as Kotri rest house was maintained by the Sind authorities. The Station of the Great Trigonometrical Survey in the disputed area was maintained at the cost of Sind.

In the Report of Bombay to the Government of India it was added, on the last two points of Sind, that Kutch also appeared to have spent money on the maintenance of the same postal track and that Kutch maintained another survey station in the same area.

Thus the evidence examined concerned acts of administration performed by the Parties in the disputed area.

The Resolution of 1914 divided the disputed area by a new line, a line that is identical with the Kutch claim-line along the Sir Creek, from its mouth to its top, and then departs from this claim line, the green line, and follows "the blue dotted line due East until it joins the Sind boundary as marked in purple on the map."

This entirely new line, different in this sector from the Macdonald line, is accepted by both Parties in this case. The Parties differ, on the other hand, very profoundly on the question of the implications to be drawn from the Resolution as to the rest of the boundary.

Pakistan suggests that the blue dotted line, following closely the 24th parallel, confirmed the principle of a half and half division of the Rann.

This point of view has to be discarded. No principle of a half and half division of the Rann was proved over to have existed and the 1914 Resolution does not mention such a principle. The Resolution says that the blue dotted line "joins the Sind boundary as marked in purple on the map." The purple line is the Macdonald line, i.e. the Sind-Kutch boundary. Saying that the new line joins here the old one cannot mean anything else than that the boundary should follow the old line from this point on, that from this point on it is not modified.

The statement in the Resolution thus confirms the Macdonald alignment of the boundary for the rest of it.

The Pakistani contention that the vertical line is called, in the Resolution, the Sind boundary and not the Sind-Kutch boundary, and that it is therefore meant to be a boundary between Sind and the Rann as an entity about which there was a distinct dispute between the two neighbours, is also not convincing. The purple line, i.e. the Macdonald line, never was anything else than the Sind-Kutch boundary.

Besides, there was no dispute between Sind and Kutch about the Great Rann. Different opinions of officials, low or high, about where the boundary ought to be, as they appeared in 1875 and in 1885, did not constitute disputes. They were opinions and no more. In the negotiations lasting six years, from 1907-08 to 1914, there was ample possibility to clarify whatever territorial matter between the two neighbours might have been regarded as open, but no trace can be found of a claim on the Sind side, the side which could be the claimant in the Great Rann, the side possibly opposed to the line on the map used in the case, the Macdonald purple line.

A thorough analysis of this unique transaction reveals the following aspects of importance for the present case :

1. The boundaries of Sind were shown in Indian Map B-44 by a purple line. The Kutch Dewan claimed the area from the top of the Sir Creek to the trijunction point of Jati and Badin Talukas in Sind and the Rann of Kutch as indicated by the green line on the map; the Sind authorities, on the other hand, were claiming that the boundary should follow the purple line from the mouth of the Khori Creek to the top of the Khori Creek and from there due north to the trijunction point. The compromise arrived at was to leave to Sind the triangle formed by the three following points; top of the Sir Creek, the meeting point of the blue dotted line with the purple vertical line and the trijunction, being the meeting point of the green line and the purple vertical line.

2. From the trijunction point, the purple line running along the northern edge of the Rann till it meets the trijunction point of Jodhpur, Sind and Kutch, was recognised by the Sind authorities, the Government of Bombay and the Government of India as representing the Sind boundary. Such recognition implies that the only dispute between Kutch and Sind was as regards the territory which lay between the Sir Creek and the Khori Creek and that the southern boundary of Sind along the northern edge of the Rann represented by the purple line was undisputed. Had this not been the position, reservations would have been made by the Sind authorities, the Government of Bombay and the Government of India and both the compromise and the Resolution would not have been drafted in the way they were.

3. The Kutch Darbar sent a map which showed the boundary as running along the Rann, the two loops and the north-south line down to the top of the Khori Creek and which also showed the green line as indicating what the Kutch Darbar claimed as an adjustment to be made in the boundary. At no stage was any question raised by the Government of Bombay as to the correctness of the line as shown from west to east. In fact the Government also maintained that the upright line was the boundary.

4. In all the correspondence which took place between the parties, no one disputed, not even Sind, that the vertical line was the boundary all along. The point in dispute was whether Kutch was entitled to claim any area to the west of this vertical line. If this vertical line was not the boundary at all and there were "lower delta lands" to the east of this vertical line which were a part of Sind, one would surely have expected the Sind authorities to ask how Kutch could possibly claim something to the west of this vertical line when it was not entitled to the territory even to the east of that line. The decision was reached after six years of discussion and no one suggested that this vertical line was not the boundary.

5. As regards the yellow riband, it enclosed the mainland of Kutch and no inference can be drawn therefrom that the Rann did not belong to Kutch; there is a portion of the Rann, also enclosed in yellow, which was admittedly a part of Kutch and it follows therefore that the yellow line was not intended to indicate the State boundary. There is also a boundary symbol running all the way along the purple line but there is no such boundary symbol along the edge of the mainland of Kutch.

6. At no stage did anyone complain of the correctness of the map or suggest that the boundary was different from what was shown on the map or that the boundary was not determined.

7. The attitude of the British Government was that all along the Rann the boundary was undisputed; a claim was raised to the lands at the western end and the dispute related to that end; the only pending boundary question was the question relating to the western end.

8. The Resolution established the boundary to which earlier maps had all referred—not only a part of the boundary but the boundary as a whole. It

was the British case that the boundary had been well settled all over but Kutch said that so far as its claim was concerned the boundary required readjustment. There was at no stage any question about a dispute as to the boundary from the trijunction eastwards.

9. The boundary which had throughout been recognised, had existed as a traditional, known boundary, was amended or rectified in one particular. The foundation of the agreement of 1914 is a consensus of both parties that there is a boundary existing but that in one respect it requires to be rectified.

10. The words used by all the parties concerned are "rectification of the boundary"; the word "rectification" of the boundary suggests that it is a correction of an existing boundary.

Thus the Resolution of 1914 confirms the alignment of the boundary as ascertained by Macdonald for all the rest of the Sind-Kutch border area, the rectification of a portion of the boundary alignment being identical with a statement that the rest of the boundary does not need to be touched.

1914—1947

In the Sind-Kutch border issue, the period from the 1914 Resolution to the end of British rule in India is a period of consolidation.

The Kutch Administration Reports after 1910-11 used the formula that the area of Kutch was "7,616 square miles, besides the Rann, which belongs to the Rao". They did so till 1931 when they introduced, with a correction of the figure to give effect to the 1914 Resolution, the formula that the area of Kutch was "8,249.5 square miles exclusive of the Rann of Kutch, which forms part of the Kutch State territory." This formula was repeated till the Reports ceased to be published in 1945.

The Government of Bombay, the prime recipient of these Reports, made no remark. In its own reports it continued to mention the area of Kutch as "exclusive of the Rann".

The Survey of India issued maps where the Sind-Kutch border was shown as in the past, with the Macdonald-Erskine alignment but with the 1914 correction in its westernmost portion.

The most important map was a new—the fifth and last—edition of the 32-mile map of India, issued in 1915 with the express approval of the Government of India and reprinted in 1922 and 1928. The quarter inch maps also continued to show the Macdonald-Erskine line and also introduced the 1914 correction. They were published continuously till 1943.

In 1924 boundary pillars were erected along the so-called blue dotted line and the vertical portion of the purple line to its northern end, the so-called trijunction. The initiative for this was the Rao's, but Sind co-operated throughout the proceedings. The Parties entrusted with the work were mixed, Sind-Kutch Parties. The expenses were shared by both sides half and half,

Pakistan's submission, that this operation as far as the vertical line was concerned was unauthorised, is not convincing.

The Government of Bombay and the Commissioner in Sind had agreed to the demarcation on the ground and an authorisation from the Government of India was neither requested nor was it necessary. No remonstrance of higher authorities was put on record.

The suggestion of Pakistan, that the vertical portion of the line demarcated with boundary pillars is a line dividing Sind territory from the Rann which was not recognised as Kutch territory, is also not convincing. The part of the Rann to the west of the vertical line had been clearly recognised as Kutch territory since 1870. The authorities participating in the operation of erecting boundary pillars had no doubt about that. In their correspondence the Sind side called the whole portion of the boundary to be demarcated "the rectified boundary between the Kutch State and British territory." It is inconceivable that Kutch could have been associated with the demarcation operations if the demarcation was to have been within Sind territory, demarcating one part of Sind from another, or a part of Sind from no man's land.

In 1935, on the occasion of the creation of Sind as a Governor's Province, the question of the description and the depiction of the outer boundaries of Sind was the object of some correspondence as mentioned above. It was not the alignment of the boundary that was debated at that time; it was only the question of whether a description and a depiction, prepared by the Surveyor General of India, was to appear in the Order-in-Council creating the new province, or whether this was superfluous. The alignment of the boundary was known. It was as described and depicted by the Surveyor General. The Government of India did its best to have the description and the depiction checked by all competent authorities. It sent both the draft description and the map to the Government of Bombay for comments; the Government of Bombay, in turn, sent them to the Commissioner in Sind. The Commissioner, in consultation with the Superintendent of Land Records in Sind, made some alterations in the description which are not material for our purpose. No comments were made by them on the relevant portion of the description and the Index Map. After the Government of Bombay received the revised draft definition and the Index Map from the Commissioner in Sind, they suggested some other minor alterations, which also are not material for our purpose, and returned the revised description and the Index Map to the Government of India.

When the Government of India forwarded to the Government of Bombay the draft definition and the Index Map prepared by the Surveyor General of India, it evidently applied its mind to them and was satisfied that the description and the Index Map represented the correct position; otherwise it would not have passed on the draft description and the Index Map to the Government of Bombay. The Government of Bombay and the Commissioner in Sind also applied their minds to the definition and the Index Map since they suggested certain alterations. Thus the relevant portion of the definition and the Index

Map were approved by all competent authorities and the alignment of the boundary shown therein has not been deviated from since then.

The definition by way of description of the boundaries is clear and positive and along with the Index Map constitutes conclusive evidence of the boundaries of Sind accepted and recognised by the British. It is a clear confirmation of the other evidence which points to the same fact and clinches the issue.

The Sind-Kutch boundary, by that time, was well consolidated.

During the period under consideration there were two occasions on which the correctness of the traditional boundary alignment was doubted by some local officials in Sind.

The first such occasion was as follows. In 1926, the Kutch Darbar decided to levy a tax on the grazing of cattle in Chhad Bet. The Raj Mahajans and patels of some villages of Sind petitioned the Commissioner in Sind against the levy, contending that they had not paid any tax before. The Commissioner in Sind forwarded the petition to the Collector of Thar Parkar for action. The petitioners contended that Chhad Bet was within Sind territory. The Collector called for information from the Deputy Collector, the Superintendent of Land Records in Sind and the District Superintendent of Police and directed :

“In default of any information we will continue to regard half the Rann as belonging to British and half to Kutch.

“In this case petitioners can be informed that they should not pay any fees but tell the Kutch Jamadar to go to blazes.”

The Superintendent of Land Records asserted that the map sent by him showed the boundary between the British territory and the Kutch State—Dhara Banni and Chhad Bet lying outside British territory in these maps; and yet the Collector's office surprisingly observed that “the maps practically show no boundary”. The District Superintendent of Police replied that no offences committed in Chhad Bet and Dhara Banni had been reported to the Diplo Police Station; the Collector, however, directed the Sub-Inspector of Police “to submit a proper report”. No such additional report was received. The Deputy Collector replied that the people at Chhad Bet and Dhara Banni did not reside there permanently but resided only for a portion of the year to graze the cattle and that the births, deaths and epidemics there were recorded by the Diplo Taluka office. In spite of this information, the Collector ordered that he should continue to regard half the Rann as belonging to the British and half to Kutch and that the petitioners should not pay any grazing fees to Kutch authorities. He made no reference to the Commissioner before passing this order. The Collector's order was dated 31 December 1927.

It has to be recorded here that the same Commissioner, when asked a few years earlier, in 1922, to make suggestions, if any, for the reprinting of the 32-mile map of India, had not pointed out that Dhara Banni and Chhad Bet were wrongly shown therein as lying outside Sind, and that the Collector's order was directly contrary to the information received by him. His order was an arbitrary act.

The second occasion was as follows.

During the last survey of the area, the Survey of *Osmaston* in 1938-39, the Mukhtiarkar of Nagar Parkar contended that half of the Rann was a part of Sind. He admittedly based his contention on the orders of the Collector of Thar Parkar dated 31 December 1927. In his Report to the Deputy Collector, the Mukhtiarkar stated that there was nothing to support the Sind case to half the Rann. The Mukhtiarkar of Diplo reported that the Collector's orders were the only guide to trace half the Rann as belonging to the British while the Mukhtiarkar of Mithi stated that the village staff and authorities were under the impression that half the Rann belonged to Sind because of the Collector's orders of 1927 and that there was no record to support those orders. The Deputy Collector frankly informed the Collector that it was ever since the Collector's orders of 1927 that the local authorities had been considering half the Rann as falling within the territorial jurisdiction of Thar Parkar District and that there was no documentary evidence in support of the contention. The Collector confessed that there were no Government orders under which half the Rann was to be regarded as belonging to the British Government. Thus, all the authorities of Thar Parkar District entertained grave doubts regarding the validity of the Collector's orders of 1927 and were treating half the Rann as belonging to Sind only on the basis of these orders, which, in fact, were not only unauthorised but also contrary to evidence before the Collector. The Government of Sind was not consulted either before or after the Mukhtiarkar made the claim to half the Rann. *Osmaston* himself, after a detailed and thorough inquiry, came to the conclusion that the claim was frivolous. Mr. Strong, who was placed in charge of the Survey Party during *Osmaston's* absence on leave, was obviously ignorant of this decision when he proposed to omit the boundary from the maps.

The entire confusion arose as a result of the wrong orders of the Collector in 1927. In any event, the claim made by the Mukhtiarkar on the basis of these orders cannot affect the conclusive position which the Government of India had, in consultation with the Government of Bombay and the Commissioner in Sind, taken only three years earlier, in the definition of the boundaries of the Province of Sind and in the Index Map, that no part of the Rann belonged to Sind.

Notwithstanding the claim made to a half of the Great Rann by the Mukhtiarkar of Nagar Parkar during *Osmaston's* Survey and notwithstanding the footnote in the maps prepared on the basis of *Osmaston's* Survey, the subsequent maps published by the Survey of India disregarded the claim and continued to publish maps showing by appropriate symbols the Sind-Kutch boundary as lying along the northern edge of the Rann. Such maps are Indian Maps B-32 (1939), B-36 and B-37 (1943), B-38, B-39 and B-53 (1945), B-40 (1946) and B-26 (1947). Pakistan Map B.92 of 1941, prepared by Mr. McClenaghan for the Export Trade Control Enquiry, and Pakistan Map B.78 of 1945, also show the same position. There is other documentary evidence subsequent to *Osmaston's* Survey supporting India's claim line. Kutch Administration Reports continued to describe the area of Kutch as "exclusive of the Rann which belongs

to Kutch" and these Reports were forwarded to the Government of India up to 1944-45; India has exhibited the notes recorded by the Government of India on the Kutch Administration Report for 1941-42, which, though detailed, do not object to the description of the area of Kutch as exclusive of the Rann belonging to Kutch. In 1944-46, Mr. Hawes, Secretary to the Government of Sind in the Public Works Department and Chief Engineer of Sind, prepared schemes at the instance of the Rao of Kutch for irrigation projects in Kutch and treated the southern tip of the western loop as the border between Sind and Kutch. The "Post-War Development Schemes" 1945, published by the Government of Sind, indicates that the northern edge of the Rann was the southern border of Sind. In an inter-departmental meeting of the Government of India held in 1946 for opening a railway link to Sind, the Resident of Baroda and Western India States observed: "The Radhanpur-Nugger Parker-Badin alignment would bring this along the northern border of Kutch", indicating that he considered that the Rann of Kutch lying below this alignment was within the territory of Kutch.

Thus, almost up to the year of Independence, all concerned treated the Sind-Kutch boundary as being as claimed by India. The historical boundary which was perhaps lacking exactitude in alignment, gradually came to be crystallised and consolidated in the course of time and was recognised by all higher British authorities and by Kutch till the eve of Independence; this boundary is in accordance with the claim line of India.

Thus the boundary between Sind and the Indian States abutting upon the Rann was determined in its entirety when the day of Independence arrived in 1947.

Display of State authority.

Both Parties in the present case rely on instances of display of State authority in the area under consideration.

Such instances were most often called instances of jurisdiction. It is proposed to use the term "display of state authority" as more appropriate.

The "New English Dictionary on Historical Principles", Oxford 1901, defined jurisdiction with four propositions: "1. Administration of justice; exercise of judicial authority, or of the functions of a judge or legal tribunal; power of declaring and administering law or justice; legal authority or power. 2. Power or authority in general; administration, rule, control. 3. The extent or range of judicial or administrative power; the territory over which such power extends. 4. A judicial organization; a judicature; a court, or series of courts, of justice."

In view of points 2 and 3 it is evident that the Parties, used to English legal terminology, have used the word "jurisdiction" in the sense of display of State authority in general. Yet in view of all other notions covered by the same expression, under points 1 and 4 above more particularly, the word jurisdiction suggests a particular importance to State activity in the judicial field, while in territorial and boundary matters all fields of State activity are equally relevant.

For these reasons the term "display of state authority" will here be used for what the memorials of the Parties and their other submissions call "jurisdiction".

Evidence concerning display of State authority is of great importance for the present case, as it is, in principle, of great importance in every territory or boundary case, for the obvious reason that a State boundary, by definition, is the limit of that State's territory which in turn means the limit of territory where the State concerned displays its authority.

It was suggested above, in the section on the origin of boundaries, that a boundary is where two neighbours agreed it to be. If now the aspect of a boundary as the limit of the display of State authority is added to the definition of the boundary, then the following maxim could be proposed; the ideal boundary is the line where both criteria for the definition of a boundary coincide. In other words; the limits of the territories of two neighbours as agreed upon by them ought to be the same as the limits of their respective display of State authority. If these limits are not quite the same, there is room for dispute.

In our case, India submits that both limits coincide. That is why India's position was, from the beginning, that there is no dispute. Pakistan, on the contrary, submits that the two limits do not coincide. Its case is, essentially, if not in the phraseology of its submission, that the display of State authority by Sind extended beyond the line agreed upon as the Sind-Kutch boundary by the two neighbours in British times.

Because of this fundamental difference India relies on instances of display of State authority only as a confirmation of the agreed boundary alignment, while Pakistan relies on them as an independent source of title.

In other words : Pakistan's claim is a claim to what doctrine calls a "historic title".

This being so some guidance can be looked for in international legal practice and doctrine concerning historic title.

The contemporary doctrine on historic titles is based on a number of cases of international arbitration and adjudication in territorial or boundary matters before the Permanent Court of International Justice, the International Court of Justice or ad hoc Arbitrators. Among them are some famous cases such as the Legal Status of Eastern Greenland case (Denmark v. Norway) in 1933, the Anglo-Norwegian Fisheries case (United Kingdom v. Norway) in 1951, the Antarctica cases (United Kingdom v. Argentine; United Kingdom v. Chile) in 1956, the Minquiers and Ecrehos case (United Kingdom v. France) in 1953, the Grisbadarna case (Norway v. Sweden) in 1909 and, the most famous of all, the Las Palmas Island case (United States v. Netherlands) in 1928, before an individual Arbitrator, Judge Huber.

From these cases doctrine extracts the main requirements for the formation of an historic title. These requirements are divided into two groups under the following two headings : effective display of State authority and acquiescence.

Here we are interested primarily in the notion of effective display of State authority. From the above cases of international adjudication it can be deduced that effective, *i.e.* real and not fictitious, display of State authority must, in order to constitute a title, have certain qualities and, above all, the qualities of continuity, of intention, of manifestation of State sovereignty and of possession "a titre de souverain".

On *continuity*, what doctrine has to say is that this yardstick has to be applied *cum grano salis* in such a sense that continuity "cannot be expected to be the same in inhabited or uninhabited regions" (Judge Huber); one has to be "satisfied with very little in the way of the actual exercise of sovereign rights. . . in the case of claims to sovereignty over areas in thinly populated or unsettled countries" (Award on Eastern Greenland case). But the nature of the area under dispute having been taken into account, a reasonable degree of continuity is in all events indispensable. What is discarded in cases of uninhabited areas is the need to prove an uninterrupted possession in time and space, while it is held necessary that a certain regularity in the display of State authority be proven. In other words, continuity is a relative notion but it cannot be reduced to practically nothing. It has to be regular in spite of its intermittence.

On *intention*, the old Roman *animus*, what doctrine has to say is that it is an indispensable requirement for the formation of a title. Judge Huber said: ". . . a claim to sovereignty based not upon some particular act or title such as a treaty of cession but merely upon continued display of authority, involves two elements each of which must be shown to exist: the intention and will to act as sovereign and some actual exercise or display of such authority."

The most normal way for a State of manifesting its intention is through domestic acts of legislation. In this respect the Anglo-Norwegian Fisheries case is most often quoted as a case where the International Court of Justice considered the Norwegian domestic acts called Norwegian Delimitation Decrees, and their promulgation and application by Norway, as a decisive proof of the intention of Norway to act as the sovereign over the fishing grounds. The same court similarly appraised the significance of various acts of legislation promulgated by the Falkland Islands Government with a view to regulating whaling and sealing in the disputed areas of the Antarctic, in the Antarctica cases.

On *manifestation* of the display of State authority, doctrine underlines that it will depend very much on circumstances and the character of the territory in question. Judge Huber said that it will ". . . assume different forms, according to conditions of time and place".

If the Minquiers and Ecrehos case is taken as indicative, because of some similarities with the present case, the manner in which the International Court of Justice appraised different forms of activity which, in the Parties' submissions, constituted manifestations of display of State authority could be borne in mind. The Court accepted as such manifestations the following acts of the British side: criminal proceedings, inquest on corpses, registration of fishing boats, visits of customs officials, registration of contracts of sale of real property, establishing of a customs house, taking of census, works and constructions: slipway,

signal post, mooring buoy. The Court rejected the British submission that salvage services to ships should be regarded as such a manifestation and rejected the submission by France that the following activities constituted such manifestations : hydrographical survey, subsidy of mayor to erect a house, hydro-electric projects, sole charge of lighting, erection of provisional beacons.— It can hardly be doubted that in the appraisal of the Court it was not so much each individual act which was appraised as relevant or not relevant, as the totality of them, in their quality and quantity.

On possession "à titre de souverain" doctrine stresses the distinction between State and private activity, between activity of persons who are in the service of the State or otherwise authorised to act on its behalf and persons who do not have these qualities.

It is stressed in this respect that the decision of the International Court of Justice in the Anglo-Norwegian Fisheries case clearly rejected fishing by private fishermen as a source of title by not even referring to it in its Award in spite of the fact that the question of fishing played an important role in the submissions of the Parties. The two Judges who dissented mentioned fishing, but both in a negative way. One of them expressed the opinion "that individuals, by undertaking enterprises on their own initiative, for their own benefit and without any delegation of authority by their Government, cannot confer sovereignty on the State, and this despite the passage of time and the absence of molestation by the people of other countries" (Hsu Mo). The second wrote : "A rule of law that appears to me to be relevant to the question of historic title is that some proof is usually required of the exercise of State jurisdiction, and that the independent activity of private individuals is of little value unless it can be shown that they have acted in pursuance of a licence or some other authority received from their Governments or that in some other way their Governments have asserted jurisdiction through them" (McNair).

In the *Minquiers and Ecrehos* case the United Kingdom Memorial submitted as one of its sources of title that "...for more than a hundred years Jersey fishermen, with the support and encouragement of the Jersey authorities, have regularly carried on fishing operations from the Ecrèhos on the basis that they were British territory". Yet the Award did not mention fishing activities, thus rejecting these activities as a source of title.

This case is interesting for the present one in which a similar activity, grazing of cattle, has been invoked.

In a lesser known case of international adjudication cattle grazing played a prominent part. It is the case called *Fixation de la frontière de l'Alpe de Craivarola* (Italy v. Switzerland) in 1874 before a mixed Commission arbitrale italo-suisse, composed of an Italian, a Swiss and Judge George P. Marsh of the United States of America, as umpire. The Italian side referred, in its argument, to cattle grazing of its citizens, villagers from two Italian communes on the otherwise uninhabited pastures of the Alpe, more than 2,000 metres above sea level. The umpire decided in Italy's favour. But in the Award he did not hold the grazing itself as decisive. He mentioned a number of arguments of

the Parties, accepting some and rejecting others. He accepted, for instance, the Italian argument that the pastureland was purchased in 1554 by the villagers on the Italian side who could produce original contracts of purchase of that remote time; that the Italian villagers, accompanied by their police planted border marks around the pastureland; that they had been grazing their cattle on this land for four full centuries "uncontested and undisturbed". The umpire rejected the main Swiss argument that the Alpe should be attributed to Switzerland "pour raison de convenance", *i.e.* for practical reasons; these practical reasons were the easier accessibility of the Alpe from the Swiss side and the fact that it lay on the Swiss side of the watershed, reasons the Swiss side had called reasons of "political geography".

It is interesting that, in spite of all the above arguments which the Italian side put forward in addition to that relating to grazing, the Award of Judge Marsh is still contested in Switzerland as ill founded (see critical analysis by Professor Paul Guggenheim in La Fontaine).

What is less stressed by doctrine, but cannot be in doubt is the question of the capacity of persons who are not private individuals and who perform acts of administration, and the like, in a disputed area. As this question is of some importance in the present case, it should be stressed here that there can be no doubt that international jurisprudence does not admit as acts "*à titre de souverain*" acts of local officials of which the State, *i.e.* the Government, whose servants they are, is not aware or acts which go beyond the competence of such officials. The expression "*à titre de souverain*" itself is clear enough to exclude such acts. Local officials cannot perform acts of sovereignty on their own; they cannot have the "intention and will to act as sovereign", to use the expression found in the judgment of the Permanent Court of International Justice in the Legal Status of Eastern Greenland case, or have the "pretensions to be the sovereign of the territory", to use the expression of Waldock in his analysis of the Falkland Islands Dependencies case.

In the present case one more distinction is relevant. It is the distinction between acts of local British Officials stationed in Sind when representing Britain as the Sovereign of Sind and when representing Britain as the Paramount Power over the whole of India. It is evident that acts of these officials when representing the Paramount Power cannot be taken as acts "*à titre de souverain*" on behalf of Sind, *i.e.* of a part of British India.

Such a confusion would most certainly be contrary to the concept of acts "*à titre de souverain*" as evolved by international case-law and doctrine.

In other words : Acts of local British officials in Sind could engage Britain as the sovereign of Sind only if those officials acted in their capacity of officials of Sind, *i.e.* of British India, and only if their acts were in keeping with the "intention and will" of the Government of India to act as sovereign over the territory where the acts were performed.

In short, the subject of requirements for the formation of an historic title constitutes a very well furnished chapter both of international case-law and of

doctrine. This is understandable if one considers that the qualities required of the display of State authority are the logical corollary of acquiescence. The qualities of the display of State authority have to be such as to exclude to the utmost the possibility that they remain unnoticed by other States and particularly by the State or States who could be the rival claimant or the rival claimants to the same territory. What international case-law and doctrine are after, in this respect, are maximum guarantees for the less active rival, that he be not taken by surprise, *i.e.* faced suddenly by a title someone else has acquired surreptitiously, behind the back of the international community and, particularly, behind his own back. The display of State authority should, therefore, be such as to be certainly noticed. It is this quality which then gives to the passivity of the other side its legal effect. Passivity under such circumstances and only under such circumstances is what can be called—acquiescence.

If we consider now, in the light of the above considerations, the evidence on display of State authority in the area under consideration, *i.e.* the part of the Great Rann of Kutch lying between the two claim lines of the Parties in this case, we have to stress, first of all, that we are requested, in a certain sense, to perform work already performed before us, in the past, before the critical date, by those concerned with this boundary. India requests us to examine the case from this angle, with the submission that such an examination will prove that such work was done in an objective and fair way, while Pakistan submits that such an examination must lead to the conclusion that the work was done in the past in a biased and unfair way, detrimental to Sind.

The fact that this work was done can hardly be questioned or doubted. The British, as soon as they became the suzerain of Kutch, took the whole Great Rann as the Rao's dominion, *i.e.* as a territory where Kutch normally displayed its authority. And they treated it that way throughout their era, till 1947. When, in the process of crystallisation of a precise alignment of the boundary, scientific surveys were carried out, the surveyors enquired carefully about the situation regarding display of State authority. Macdonald in 1855-1870 did his best to find the exact limits of the southernmost administrative units of Sind, tantamount to the limit of the display of State authority of Sind (equal to British at that time). The same was done by surveyors of all subsequent surveys. They depicted the outer boundaries of British-Indian Sind and of the Indian State of Kutch as boundaries which were the limits of display of State authority of the two neighbours. What else could have been the understanding, for instance, of Pullan, when he surveyed the Great Rann in co-operation exclusively with Kutch authorities, with Kutch technical assistance, accompanied by Kutch police? The slight doubt about the correctness of the boundary in which the same Pullan was involved was a doubt about the limits of the display of State authority, as the correspondence of the year 1885 clearly demonstrates. The next survey, that of Erskine, in 1904-05, was also primarily concerned with limits of the southern Sind dehs. Erskine did his best to check them anew, nearly half a century after Macdonald. And where he found a different situation in display of authority, he corrected the boundary alignment. The most important event concerning the Sind-Kutch boundary, its rectification in

1914, can be understood only in the light of the foregoing. The procedure in this case was intended solely to ascertain with greater care than had been done before where the limits of the two sides were with regard to their respective display of State authority. It was found that the Rao displayed such authority traditionally beyond what was till then held to be the Kutch-Sind boundary. In consequence the boundary was rectified so as to coincide with the limits of the display of State authority of the two neighbours. The last British survey, the survey of Osmaston in 1938, found that a discrepancy might exist between what was then the boundary in the north-eastern part of the Rann and the respective limits of the display of State authority by Sind and Wav or Sind and Kutch. Osmaston enquired and, having found that there was no such discrepancy, drew the old boundary alignment again.

But, as the request for a re-examination of this aspect of the boundary is made, the Tribunal has to do its best to comply with this request, keeping in mind that it is an extremely arduous task if for no other reason than because of the distance both in time and in space. While Macdonald was on the spot and enquired about what was, at that moment, the limit of authority of the local patels—and therefore of the local mukhtiarkars etc.—in the village in which he spent his days and nights, this Tribunal is expected to perform the same task a hundred and more years after Macdonald and far from the terrain in question, simply relying on a few old papers the reliability of which is often to be doubted.

On the other hand, the request is helpful in one respect. It confirms the permanency of the criterion for the determination of the boundary which can be observed throughout the history of the Sind-Kutch boundary-making. It was always the criterion of display of State authority. As the instances just enumerated show, at all stages of the process of crystallisation it was this criterion that was considered by all concerned as applicable and was applied. From Macdonald through Pullan and the correspondence of 1885, through Erskine, through the boundary rectification of 1914 to Osmaston, always it was the same criterion. And the same criterion appears now, in the present case, with the submission by the Parties of instances of "jurisdiction" as evidence for the alignment of the boundary.

The difficulty pointed out by Judge Huber, the difficulty of what is called intertemporal law, thus does not arise in this case. The same principle was regarded as valid by all concerned throughout the period under consideration, from the emergence of a permanent Sind-Kutch boundary around the year 1800 till the present case, in 1966-1968.

The above mentioned facts are frequently misinterpreted in the present case in an attempt to prove that maps, even the most official ones, have no evidentiary value.

The thesis is the following: when the Sind-Kutch boundary was seriously questioned, as occurred in 1907-1914, the authorities involved did not refer to the latest official map as the paramount evidence for the solution of the

question raised. They did not discard every doubt about the boundary alignment by referring to such a map. They inquired, instead, about jurisdiction and manifested thereby a disregard for the map.

This is far from being convincing. The fact that the correctness of the boundary alignment as shown in the latest official map gave rise to an inquiry about jurisdiction does not mean that the map was of no value, but means the opposite. It means that as a rule such a map showed correctly the limits of jurisdiction of the two neighbours but might contain an error in a particular sector. The goal of the inquiry was to find out whether there was such an error in the map or not, i.e., whether there was, in the particular sector, a discrepancy between the map and the regular, traditional and admitted limit of display of State authority of the two neighbours. If the discrepancy was not proven, the map would be confirmed. If it was proven, as was the case in 1914, the alignment of the boundary would be rectified in the subsequent edition. This is exactly what occurred in the 1915 edition of the 32-mile map of India.

In other words : if the alignment of the boundary as shown in the official map is questioned, it is not in the questioned map that the answer to the question is looked for; it is looked for in the field of display of State authority.

This proceeding does not devalue official maps as evidence for the boundary alignment, but on the contrary enhances their value as evidence which was the result of the greatest care of all authorities concerned.

Evidence on display of State authority.

The evidence on display of State authority or alleged display of State authority is relevant only as far as it concerns the area under consideration in the strict sense of the word, i.e. the area between the two claim lines of the Parties, and as far as it concerns the period of time before the critical date, i.e. before August 1947.

The number of cases or instances submitted by the Parties is impressive. Pakistan submitted a chart of instances on which it relied, a chart of exactly 996 instances, out of which 39 are post-critical date instances.

If these instances of Pakistan and instances relied upon by India are reduced according to the two criteria of space and time mentioned above and grouped and summarised into a reasonable number of items, the picture of this aspect of the case turns out to be the following :

I. Evidence submitted by Pakistan.

1. A letter from the Collector of Continental Customs and Excise to the Revenue Commissioner, Northern Division, of 1845, which refers incidentally to "the right which we find exercised by the Scinde Darbar on the produce of the salt in the greater Rann";

2. The sanction for the erection of marks and guide stones across the Rann by the British in 1850-1855.

3. A total of 846 entries from local registers in Diplo Taluka attesting cultivation by Diplo people of lands on a canal called Darya Kharo, allegedly on the Kutch side of the boundary as conceived by India, at a distance of a few miles; the entries date from the years 1864-1872;

4. The letter of the Mukhtiarkar of Diplo of 1875 asserting that "in the days of the Mir Sahiba, on this side of the Rann whatever theft of duties was committed was settled by the Government of the Mir Sahibs; beyond Gainda in the State of Darbar of Kutch Bhuj", i.e., that the authority of the Amirs of Sind in matters of theft of duties extended to Gainda Bet;

5. A letter of the Thar Parkar Political Superintendent, of 1878, remarking that Vighokot was a site in the Diplo Taluka worth showing to H.E. the Governor on the occasion of his visit;

6. An entry in a Diplo Taluka record, dated 1893-1894, that Wijokot (Vighokot) and Kanjikot (Kanjarkot) were antiquarian remains in the taluka;

7. The correspondence of 1878 between officials in Sind, in which the District Magistrate of Thar Parkar in a letter addressed to the Acting Commissioner in Sind asserted that the British had maintained order "on our side [of the Rann] at least..." and the Acting Commissioner thereupon, issued an order that "the old arrangement must be adhered to, and the Rann, for Police duties, be considered British territory...";

8. A place called Shakurji Kandi is mentioned in two instances of 1910 and 1921-1922 as being in Diplo Taluka;

9. The establishment, by the British, of a customs line called the "Northern and Sind-Cutch Frontiers Preventive Lines" in 1934. The customs line, following roughly the northern edge of the Rann, zig-zags across the boundary as shown in a map prepared in 1941 (Pak. Map 92), and three of its outposts appear on this map to be located slightly to the south of this boundary, including the outpost of Ding Naka. From this time on, officers of the Central British Customs Organisation apparently patrolled regularly in the Rann in the neighbourhood of the mentioned customs outposts. The outpost at Ding Naka is said to have been maintained till 1954;

10. A letter of the Deputy Collector of Thar Parkar of 1938 in which it is said that "... our Magistrates in charge of Nagar Parkar, Diplo and Mithi Talukas have been exercising their jurisdiction as Criminal Courts as far as half the Rann in question";

11. Sind-British police and Sind judicial authorities were active in three criminal cases committed in the vicinity of Rahim ki Bazar allegedly across the boundary as conceived by India, in 1939, 1940 and 1945, respectively; two of them were committed in or near Ding;

12. An offence committed near Vighokot in 1940 resulting in a trial by a Diplo Magistrate;

13. One instance of assault near Bhanian Bet (Biar Bet) dealt with by the First Class Magistrate in Diplo in the year 1945. Biar Bet is some eight miles south of the edge of the Rann;

14. The grazing of cattle and camels belonging to villages on the Sind side of the northern edge of the Great Rann on pastures situated on Dhara Banni and Chhad Bet. This grazing went on in Pakistan's submission "from time immemorial" and the mentioned tracts of land were "the main grazing ground for the inhabitants of the areas of Sind in their vicinity". The earliest instance of grazing in Chhad Bet recorded in the evidence is dated 1889-1890. The grazing continued, again in Pakistan's submission, until 1956. Kutch interfered with the grazing by levy of tax for the first time in 1926-1929 and later from 1937 onwards. The Sindi farmers at times refused to pay "panchari", i.e. tax for grazing to Kutch authorities, and were, in this refusal, encouraged by the orders of the Collector of Thar Parkar in 1927 who directed that the villagers should be informed that they should pay no fees, but "tell the Kutch Jamadar to go to blazes" when the representative of Kutch State requested payment of fees.

In the evidence Dhara Banni and Chhad Bet are not always both mentioned; most often Chhad Bet alone is mentioned.

Pakistan's essential point in this matter is that the grazing as a constant practice of the inhabitants of Sind was in conformity with their understanding of the alignment of the boundary.

An analysis of these instances shows the following :

- (a) A certain number of instances concern spots which are not or are most probably not located to the south of the boundary line as conceived by India. Such instances are those under items 3, 8, 9 and 11.

As for the instances under item 3, a total of 846 instances, representing the bulk of all the evidence submitted by Pakistan, they concern a place called Darya Kharo which was never located with certainty. The cultivation, as evidenced, took place in the years 1846-1870, i.e., during Macdonald's Survey, but it is not shown in Macdonald's maps. Since it was a cultivable and revenue-yielding tract of land in the possession of Sindri villagers, the villagers must most certainly have shown it to Macdonald, and Macdonald must undoubtedly have included it in the limits of his survey. Therefore the only possible conclusion is that Darya Kharo tract is situated to the north of the Sind-Kutch boundary as conceived by India.

As regards item 8, in the Pakistan Jurisdictional Map, Shakurji Kandi is stated to be the same as Lake Shakur. Such a lake is not to be found on any of the maps. A place called Shakur is shown on Indian Map B-11 but there is no lake and it is shown on the Sind side of the boundary line.

The case of item 9 concerns three outposts of the British customs administration which, although slightly to the south of the Macdonald

line, form part of the customs line which lies in its entirety roughly along the northern edge of the Rann.

The three instances of police jurisdiction under item 11 are all three located in the vicinity of Rahim ki Bazar, which is roughly the border line.

- (b) One instance is evidence not contemporary with the event. It is the case under item 4, the statement by a mukhtiarkar made in 1875 about the Amirs rights to settle cases of theft of duties, i.e. about events which occurred a whole generation earlier; the statement may easily be simple hearsay.
- (c) Two instances are assertions that the whole Great Rann and not only the northern part of it was under British jurisdiction. Such are the instances under item 1, concerning the rights to salt reserve by the Amirs "in the Great Rann" and under item 7 to the effect that "the Rann, for police duties, be considered British territory". These statements are evidently erroneous and do not correspond to the case of Pakistan.
- (d) One other instance about the Amirs' rights, the instance under item 1, is close to being contemporaneous. It is a statement dated 1845 to the effect that the Amirs exercised the right... on the produce of salt in the Greater Rann. As far as this statement concerns the disputed area, it certainly did not mean that salt was collected over large areas but most probably in the inlets of the Rann along its northern edge or along the edge itself. Anything more would have been recorded as a very noticeable economic activity. In any event, the British did not inherit any Amirs' rights to the salt revenue in the Rann, as the establishment of their salt preventive line in 1934 clearly proves. The line followed roughly the northern edge of the Rann.
- (e) Two instances are of no significance and are casual statements. Such are the instances under item 5 that the ruin of Vighokot in the Rann should be shown to the Governor, or under item 6, to the effect that the Diplo Taluka register contained Vighokot and Kanjarkot as places in this taluka.
- (f) One instance is a sweeping assertion by a Sind official not corroborated by concrete cases on record. It is under item 10 and is to the effect that Sind Taluka criminal courts exercised jurisdiction "as far as half the Rann".
- (g) Two instances are quite solitary, each having occurred in a given place once in a period of over a hundred years. Such are the instances concerning Vighokot, Kanjarkot, Biar Bet, Karim Shahi and Barya Bet under items 12 and 13 above. The last mentioned spot, Barya Bet was never located as it does not appear on any map. The offence near Karim Shahi was investigated also by the Kutch Police.
- (h) Three instances concern acts of general administration by the British as the Paramount Power over the whole of India. Such is most

evidently the instance under item 2, i.e. the sanction for erection of marks and guide stones across the Rann for the benefit of carriers of imperial mail and general traffic. Such is also the instance under item 7 with the statement that the "Rann, for police duties, be considered British territory".

As for this last statement, it is evidently correct only in the sense that the British police extended their activity over the whole of the Empire. This activity was very much felt in the area of Sind and Kutch.

A case, extremely enlightening in this respect, was submitted to the Tribunal. It occurred in 1923 and was essentially the following. A strong gang of "dacoits" (bandits) operated in the area embracing the eastern part of the Great Rann and its vicinity in all directions : Sind, Kutch, Palanpur, Kathiawar. The British organised a police force of several hundred men of mixed composition, Sind and Kutch among some others. With their headquarters at Rapar, in Kutch (Wagur District), the several detachments of the force were spread all over the threatened area, mostly on the mainland of Kutch; the Sind detachment of 25 sowars (mounted police) was stationed in Gedi, in Kutch, and the Kutch party of about 80 men in Lakhadia, also in Kutch, and yet another party of 60 men at Gadojar, equally in Kutch.

Of the same character is also the instance under item 9 as far as it concerns the patrolling of the British Customs officials in the Rann from their outposts situated at its northern edge.

(i) Concerning the most debated instance, the one under item 14 on Dhara Banni and Chhad Bet, the following has to be stressed. It is common ground that the cattle of Sind inhabitants were grazing in this area at least from 1843. But this activity of private individuals of Sind does not amount to display of State authority. Pakistan, however, says that the grazing activity was "protected by the State". Reliance is placed in support of this contention firstly on the Collector's orders of 1927 that the Sind people should not pay the grazing fee levied by Kutch. The Collector's order was : "In this case petitioners can be informed that they should not pay any fees but to tell the Kutch Jamadar to go to blazes." This order, exhorting Sind people to defy Kutch authority, is not an act of display of authority on the part of Sind over the area. It is said that the grazing activity was carried on by the Sind inhabitants under police protection and three reports, Pakistan Documents B.341, B.327 and B.162, are cited by Pakistan in support of this contention. Pakistan Document B.341 refers to the presence of a couple of policemen at a meeting held unquestionably in the interior of Sind. Pakistan Document B.327 mentions the presence of two police constables in Dhara Banni where cattle were grazing but does not establish the presence of any policemen in Chhad Bet. Pakistan Document B.162 is a post-Independence report and is not relevant. Thus, the single instance of the presence of the police constables in Dhara Banni, the object of which is not known, cannot be regarded as sufficient to reach the conclusion that the grazing activity of Sind inhabitants in Dhara Banni and in Chhad Bet was "police-protected". On the other hand, the evidence of India, to be discussed hereafter, convincingly shows that Kutch was exercising

sovereignty over Dhara Banni and Chhad Bet before, during and after the years of these three reports.

To summarise the above analysis it has to be said that the instances of alleged display of State authority by the British Indian Province of Sind over the disputed area or parts of it are not conclusive. As far as they are not entirely meaningless, they do not satisfy the requirements under International Law for constituting a historic title to the whole or parts of this area.

First : they are far from being *regular* or *continuous*. As far as they establish acts of Sind organs, they are sporadic both in time and in space.

Second : they are, in so far as they show some regularity, such as the instances of patrolling by customs officials, evidently acts of British authorities as authorities of the Paramount Power and therefore could not possibly express the *intention*, the *animus*, of British India to assert itself as the sovereign over territory not belonging to British India, to establish an adverse possession against the sovereign Indian State of Kutch; this would in any event be in contradiction with the guarantee of integrity of dominions granted to Kutch under the Treaty of 1819 and confirmed by the Proclamation of 1858.

Third : they are, as far the most emphasised instance, the practice of grazing of Sind cattle in Dhara Banni and Chhad Bet, is concerned, evidently activities of private persons who could not act "a titre de souverain"; they might constitute a case for an international servitude of an economic character, but this was not the claim of Pakistan.

Fourth : as manifestations of State authority, they are without exception performed without the Government of India being even aware of them; not one item shows that the related act was performed at the instance of the Government of India as the sovereign of British India, i.e. of the British Indian Province of Sind.

What is evidently the great weakness of the Pakistani case in this whole matter is the fact that the intention, the *animus*, is completely lacking, at least after 1843. The Amirs might have had some aspiration to be the masters of a part of the Rann, but the British, after 1843, did not show the slightest intention of incorporating the Great Rann into their Province, or later Division, of Sind.

On the contrary, by not reacting to the Kutch Administration Reports where the whole Great Rann was declared to the Kutch, by publishing the same information in official Government publications and, most particularly, by publishing official maps with the boundary alignment along the northern edge of the Rann, the British negated most emphatically every suspicion that they wished to incorporate the Rann into British India.

They did so even in the field of display of State authority mentioned by Pakistan—by establishing a salt preventive customs line along the northern edge of the Rann as the outer boundary of British India.

It is therefore ascertained that this very important requirement, the *animus*, did not exist on the part of the British and, this requirement being essential, it should

be held that the evidence submitted by Pakistan on display of State authority by the British as sovereigns of Sind over the northern half of the Rann does not establish a title for Pakistan to that area.

Are Dhara Banni and Chhad Bet an exception? The grazing in these two bets constitutes certainly, for this particular portion of the area under consideration, a circumstance to be taken seriously. It has lasted long, maybe over a century, maybe more.

As purely private activity, even when lasting very long, cannot by itself constitute a title, the question must be asked whether the part played by Sind authorities gives the private activity of grazing some quality which could result in the grazing being considered as similar to or as entailing display of State authority. Encouragement by the orders of the Collector has been evidenced, not an encouragement to graze, this was not necessary, but an encouragement not to pay panchari to Kutch authorities. It is more than doubtful whether such encouragement is equivalent to display of State authority over the pastures. One case of presence of one or two British policemen in the pastures was mentioned in a report, but it was not made clear for what purpose the police visited the pastures. In any event, there was only one such case in Dhara Banni during the whole long period of time, while in Chhad Bet there was none. If this is display of State authority, it is certainly not much of it.

As for the animus, it is very evidently lacking for Dhara Banni and Chhad Bet. They constituted such a substantial and characteristic portion of the Great Rann, lying in the upper part of its very centre, that they could not simply be overlooked in the descriptions or in the data about the extent of the Rann published in administration reports, or neglected by surveyors who surveyed Sind, if they were Sind territory. Yet they are nowhere mentioned, whether as a portion of the Rann outside Kutch State, as an exception, or whether as a part of Sind.

Moreover, precisely the grazing instances show the lack of animus on the British-Sind side. Kutch was, from 1926, rather persistent in displaying its State authority over Dhara Banni, Chhad Bet and another small bet called Pirol Valo Kun by imposing panchari on the grazing of cattle and dispatching its agents to the pastures to levy the imposed panchari. Yet the Sind Government never complained to Kutch authorities against this activity and they never challenged the right of Kutch to levy panchari, evidently admitting that Kutch had the right to levy panchari or any other tax on territory belonging to it.

It is, then, both from the point of view of the required possession "a titre de souverain" and of the required intention to be the sovereign, on the part of the British, that Pakistan cannot establish a title to Dhara Banni, and Chhad Bet any more than to the rest of the disputed area.

All in all, as evidence which could be a foundation for the modification of a boundary so clearly determined and recognised by all authorities concerned, a boundary agreed upon by the neighbouring States and acted upon by them for more than a century, this evidence has to be rejected.

II. Evidence submitted by India

1. The existence, till after 1762, of the rice-producing tract of Sayra in the Rann; it is common ground that it was Kutch territory; the tract extended to Garee Wah at the top of the vertical line;

2. The existence, till the earthquake of 1819, of the Kutch Customs house and military outpost in the fortress of Sindri, in Sayra, at 24° 6' of north latitude; this also is common ground;

3. Testimony about one more Kutch Customs house at the same epoch, at Kaeera Nulla, some 5-6 miles to the north of Sindri;

4. The pre-survey map, Indian Map B-54, prepared by the Political Agent, Kutch, in 1843, showing the possessions of the Rao and his Bhayad; the map shows the Sayra tract and various bets in the Rann including Dhara Banni and Chhad Bet as belonging to the Rao;

5. Correspondence to the effect that the Rao was planning in 1844 to drain the lake of Sindri, formed as a consequence of the earthquake of 1819; in the same year, the Political Agent in Kutch acknowledged Sindri to be belonging to Kutch;

6. The Report of the Bhuj Vahivatdar of 1876 in which the whole of the Great Rann is reported as falling under the Kutch "vahivat"; this is illustrated by the already mentioned construction of the Dharamsala at Gainda Bet; the existence of a Kutch thana in Kanjarkot; the levy and collection of taxes on the sale of animals in the Rann; the lease of hides of dead animals in the Rann; and the grazing of Kutch cattle on bets in the Rann; thirteen bets are enumerated by name, seven or eight of which are bets situated to the north of the Pakistan claim line and which include Dhara Banni;

7. A scheme suggested by the Dewan of Kutch in 1880 in connection with the project of establishing a salt preventive line; the scheme included the establishment of a customs post at Dhara Banni;

8. The fact that, during Pullan's Survey, in 1879-1886, his party was accompanied and assisted by Kutch police;

9. The Kutch Administration Report for 1889-1890, mentioning that the police of Kutch exercised jurisdiction over the whole of the Rann;

10. A letter emanating from high British military authorities, dated 1899, in which the Great Rann of Kutch is mentioned as Kutch State territory and as falling under the Deesa military district;

11. The establishment by the British in 1934, under the name "Northern and Sind-Cutch Frontiers Preventive Lines", of a customs line running roughly along the northern edge of the Rann, which is a confirmation of the fact that Kutch, including the Great Rann, remained outside the salt preventive arrangement of the British;

12. The request of the Survey of India for permission from the Kutch Darbar to carry out triangulation in the area of Kutch including the Great Rann; the event relates to three seasons of survey work—1934-35, 1935-36 and 1937-38;

13. Kutch authority over Dhara Banni and Chhad Bet as shown in the following events relating to these bets :

Until 1926, there was no restriction on cattle grazing in Dhara Banni and Chhad Bet, but the Kutch Darbar levied in that year a tax for grazing cattle in these two bets. While some of the graziers, encouraged by the orders of the Collector of Thar Parkar of 1927, resisted payment of the tax, some others did pay the tax during the period 1926-1929. In this period the Kutch Darbar excavated a tank and dug a well at Chhad Bet. The tax was collected by the Khavda Thanadar who was assisted by a peon. In 1941, a Tajvijdar for Chhad Bet was appointed by Kutch and the police of Pachham were expected to help him. A Kutch thana was established at Chhad Bet in the same year. Notwithstanding the resistance of the Sind graziers, recovery of tax was made. In 1945, the right to recover the tax in Dhara Banni, Chhad Bet and Pirol Valo Kun was given on lease to one Node Sadi Rao. The lessee did collect tax despite opposition on the part of the graziers; the cattle in respect of which the tax was not paid were impounded but later released on payment of tax and penalty. In 1948-1949, during a fodder famine in Kutch, the Kutch Darbar decided to bring grass from Chhad Bet and a contract was given for pressing bales of grass at Chhad Bet. On the expiry of the lease of Node Sadi Rao, Chhad Bet was leased to two other persons and the lease continued till 1956. A large number of account books of the Khavda Thanadar and as many as 72 applications produced by India establish beyond doubt that grazing tax was recovered, and that defaulting cattle were impounded and released on payment of tax and penalty.

The appraisal of the above summarised evidence of India presents no difficulties. As a corroboration of what was said by Kutch in its Administration Reports, which was the clearest possible expression of the animus, and of what the Paramount Power said in official notes and publications of the Government of Bombay and the Government of India, more particularly in the form of official maps, which was the clearest possible expression of recognition, the evidence of the display of Kutch State authority over the whole of the Great Rann, and accordingly over its northern part up to the northern edge of the Rann, is absolutely sufficient.

It has to be concluded, therefore, that the test of display of State authority gives a result in favour of the claim of India.

Summary and findings

The appraisal of the entirety of the evidence submitted by the Parties can be summed up in the following propositions :

1. The Tribunal is called upon to determine where the boundary between Pakistan and India in the West Pakistan/Gujarat area lay when the Indian Independence Act of 1947 came into force and its provisions were put into practice both with regard to partition of British India and to accession of the Indian States to one or the other of the two Dominions, i.e., during the six weeks between 18 July 1947, the date of the Act, and 11 August 1947, the date of accession to India of Jodhpur, the last Indian State abutting upon the

Great Rann of Kutch to accede to India, these six weeks being, thus, the "critical date" in the present case.

In other words, the Tribunal has to determine the boundary, at the critical date, between the Province of Sind, which was allotted to Pakistan under the Indian Independence Act of 1947, and the Indian States abutting upon the Great Rann of Kutch, all of which acceded to India.

2. The case of Pakistan is that this boundary lay roughly along the middle of the Great Rann and the case of India is that it lay roughly along the northern edge of the Great Rann; thus, the area in dispute is the northern half of the Great Rann.

3. It is common ground that the Rann of Kutch was not a "no man's land" and also that the boundary between Sind and the Indian States abutting upon the Great Rann was a conterminous boundary.

4. If the boundary is found to lie along a particular alignment, the Tribunal is not competent to alter the alignment by reference to any considerations.

If, as finally contended by Pakistan, the Rann of Kutch were found to form a broad belt of boundary, the Tribunal is not competent to reduce the broad belt of boundary to a "widthless line", as urged by Pakistan, because—but for terminology—it would be inventing a boundary which did not exist.

5. The Rann of Kutch is a peculiar surface, most akin to a marsh or swamp. No general binding rules exist in International Law or existed in India under British rule as to how such a surface must be divided between neighbours if it were established that the boundary between them lay within it, and no general and binding rule appears to have ever been applied to the determination of the boundary between Sind and Kutch in the Rann of Kutch area.

6. The Rann of Kutch, particularly the Great Rann of Kutch, is by its geographic position a part of Kutch. As far as habitable, it has always been and is still inhabited only by Kutchi people. The largest human settlement ever to have existed in the Great Rann was the Kutchi town of Sindri lying in the northern half of the Great Rann in the Kutch district of Sayra. Therefore, the Rann of Kutch always bore this name, viz., Rann "of Kutch", and never any other.

7. In the distant past, particularly in the 18th century, the Great Rann was crossed on many occasions by hostile armies in both directions. This occurred more often in a southerly direction and resulted in invasions of Kutch by Sind forces and fierce defensive wars by Kutchi forces against the invaders. When this period came to an end, towards the close of the 18th century, the normal situation, the one dictated by geography, was restored. The Great Rann was controlled by the State of Kutch up to its northern edge. The town of Sindri was its garrison and customs outpost. There was another Kutch customs post at Kaeera Nulla, some miles to the north of Sindri.

8. With the Treaty of 1819, Kutch became a vassal of Britain. From this time on, British armed forces, as forces of the suzerain, protected Kutch,

including the whole Great Rann, as a part of their vassal's territory, the integrity of which was guaranteed under the said treaty. They did so through a system of outposts on the largest bays in the Great Rann and through punitive expeditions against Sindi bandits beyond the northern edge of the Great Rann.

9. From this time on, the relations between the British and Kutch were those of suzerain and vassal as defined in specific clauses in treaties; these clauses replaced certain rules governing the intercourse of nations under International Law; rules of International Law not replaced by such clauses remained valid and equally binding on both partners.

10. Such principles of International Law as acquiescence and recognition in general and in boundary matters in particular were applicable to the relationship between suzerain and vassal in India under British rule; even apart from International Law, these principles governed the relations between British India and the Indian States.

11. Britain having guaranteed the integrity of Kutch territory by the Treaty of 1819 and the territory having at that time included the whole of the Great Rann, Britain could not take any part of the Great Rann away from Kutch at a subsequent date without violating its obligations under that treaty and, by the same token, of the fundamental rule of International Law of *pacta sunt servanda*.

12. The Treaty of 1819 cannot be construed as "freezing" the territory of Kutch in the sense that Kutch could not have expanded between 1819 and 1843 at the expense of Indian States not vassals of Britain.

13. With the Proclamation of Queen Victoria in 1858, the British undertook the most solemn engagement that they intended to be true to all their obligations towards Indian States and very expressly and particularly regarding their respective territories. From this Proclamation on, it becomes unthinkable that Kutch territory should have been reduced by British administrators or, which comes to the same, that British Indian territory should have been extended at the expense of Kutch territory by these administrators.

14. It is not a possible construction of Queen Victoria's Proclamation that the British Crown proclaimed an intention to remain inactive or silent or gave a mandate to its administrators to remain inactive or silent in the face of an assertion of title by an Indian State to territory which was British territory.

15. When the British occupied Sind in 1843, they made it a part of British India. The status of Sind territory became, thus, essentially different from the status of the territory of Kutch. It was British Crown territory. The British were, therefore, free to dispose of this territory by making cessions of parts of it to Indian States, in the present case to the State of Kutch or other contiguous Indian States. While it was only for the Crown to cede any portion of this territory, unimportant transfers thereof, relating to a delimitation of a previously doubtful or disputed border, could, however, be sanctioned by the Government of India in a variety of ways.

16. There was indeed no cession of British Indian territory to the Indian State of Kutch in the disputed area. The well-established fact that unimportant transfers of territory relating to a delimitation of a previously doubtful or disputed border could be sanctioned by the Government of India is nevertheless of significance in this case, because the Sind-Kutch border, roughly along the northern edge of the Rann, although a well-known and historically established border, was not defined inch by inch until 1870. The process of defining it inch by inch could and perhaps did involve unimportant transfers of portions of territory from the British to Kutch and such transfers would be valid, the maps showing the precise alignment of the border which had the sanction of the Government of India.

17. It must be excluded, however, that, through this procedure, cessions of British Indian territory were made to the Indian State of Kutch. The British Government were vigilant in regard to their possessions in India. After Sind became a part of British India, they were as vigilant about the territory of Sind as about their other possessions in India. Queen Victoria's Proclamation contained the clearest possible mandate to British administrators and everyone else in India that British Indian territory should not be encroached upon.

18. The only logical conclusion to be drawn from the above circumstances is that the British depicted the Sind-Kutch border in detail along a line which was, by and large, the traditional Sind-Kutch boundary as it had come to be established before their advent.

19. Any formal rectification of this boundary made by the British, like the one made by the Government Resolution of 1914, and in force at the critical date, in 1947, must be held to be fully valid today.

20. International boundaries have usually emerged by custom. They have become gradually well determined by mutual acquiescence and/or recognition by the neighbours concerned. Beginning with the second half of the 19th century some such boundaries or parts of them were defined by treaties which contained their description and depiction. Mutual acquiescence and mutual recognition are therefore the most general origin of existing international boundaries. Very many of them still nowadays have no other legal foundation for their validity. *Ex facto jus exitur*.

21. Boundaries between British Indian territory and territory of Indian States within the British Indian Empire were international boundaries and as such subject to rules of International Law governing boundary matters. As for the Sind-Kutch boundary—with an exception in one sector—there never existed a formal and express agreement for its definition. It was agreed upon through the usual mechanism of mutual acquiescence and mutual recognition.

22. Every express agreement and express recognition of the British Government in favour of Indian States was binding upon the British Government and, similarly, every agreement and recognition of Indian States in favour of the British Government was binding upon those Indian States.

23. On the Kutch side, the Great Rann was officially treated as Kutch territory in Kutch Administration Reports. On the British side, the same was done in a number of official notes, letters and publications of the Government of Bombay, the Government of India and the Secretary of State. The most eloquent documents of the Government of India on the alignment of the Sind-Kutch boundary roughly along the northern edge of the Great Rann are the official maps published by a Department of this Government, the Survey of India Department. These documents are authoritative statements from both sides on the common boundary between Kutch and British India. It has therefore to be held as proved that the boundary alignment along the northern edge of the Rann was agreed upon by mutual acquiescence and mutual express recognition.

24. While the treatment of the Great Rann as belonging to Kutch meant that the boundary ran roughly along the northern edge, it became more precisely defined through a process of crystallisation and consolidation. In this process, scientific surveying of the border areas played a prominent part. It was brought to an end with the first survey of the whole of Sind by a party of the Survey of India in 1855—1870, the survey known as Macdonald's Survey, and the publication of its final product by the Survey of India in 1871 and 1872.

25. Since then, the Sind-Kutch boundary as drawn by Macdonald, for its main portion strictly along the northern edge of the Rann, has been repeated in all subsequent official maps. This alignment was checked by survey parties three more times—in 1881—86, in 1904-05 and in 1937-38—and was confirmed in its entirety with insignificant variations. The great care in checking the whole alignment is clearly illustrated by the survey of 1904-05 when a slight correction of the alignment was introduced. The Macdonald alignment appeared in all known editions of the map of the highest standing, the 32-mile map of India, which were produced by the Survey of India Department in consultation with all relevant Departments of the Government of India; one of the editions had the approval of the Secretary of State for India. The last reprint of the last edition is dated 1928. The Macdonald line appears also in the Index Map of the Province of Sind of 1935. It was repeated thereafter in all official maps till the end of British rule in India.

26. Thus, the Macdonald alignment of the boundary stood the test of time and withstood all vicissitudes of the internal history of the British Indian Empire from the time it first appeared, in 1870, till the end of British rule in India in 1947, i.e. for 77 years. Throughout this period its correctness was never challenged or doubted either by the Government of India, or by the Government of Bombay, or, after 1935, by the Government of Sind.

27. On two occasions, in 1885 and 1905, the Sind Commissioners raised doubts about the alignment along the northern edge of the Rann but the Government of Bombay did not support them. The alignment was generally accepted as perfectly correct before as well as after these incidents. On a few occasions, the Macdonald boundary alignment was questioned by lower authorities on the Sind side, who, at times, expressed the opinion that the boundary lay inside the Rann. But these authorities did not press the question with the Government.

28. A serious doubt appeared on the contrary about the Macdonald alignment of the boundary in its westernmost portion, i.e., the portion where the alignment does not follow the northern edge of the Rann. Here the alignment drawn in 1870 was rectified in 1914 through a compromise based on proofs about display of State authority by the Rao of Kutch and by Sind. This compromise confirmed implicitly the rest of the boundary alignment. It was followed up, in 1924, with erection of boundary pillars on the ground along the new portion of the boundary and also along a portion of the previous, i.e. of the not rectified, boundary. Thus the Macdonald alignment was, for this portion, confirmed explicitly by its demarcation on the ground.

29. On the eve of the creation of Sind as a Governor's province under the Government of India Act, 1935, the definition of the boundaries of Sind and an Index Map showing the territory of Sind were prepared. These had the tacit approval of the Government of India and the express approval of the Government of Bombay and the Commissioner in Sind. Although they were not actually used, they form conclusive evidence of the boundary between Sind and the States of Western India.

It is inconceivable that the boundaries of Sind were kept vague and uncertain when Sind was created a Governor's province; the Under Secretary of State declared in the British Parliament that the boundaries of Sind were "clear". He no doubt had in mind the boundaries of Sind as shown in all official maps.

30. The inhabitants of Sind villages lying beyond the northern edge of the Rann used to graze their cattle on three bets in the Rann, lying close to the northern edge of it. In this activity Sind authorities were not involved, while Kutch authorities levied a symbolic grazing tax (panchari) from 1926 on, although the recovery of this tax was resisted by the graziers. Kutch established in 1941 a police outpost (thana) on one of those bets, on Chhad Bet; a revenue officer (tajvijdar) was also appointed by Kutch.

The grazing of Sind cattle on the three bets in the Rann, being a purely private activity, would not constitute display of State authority. It might constitute the basis of a claim for an international servitude on the neighbour's territory; but Pakistan did not formulate such a claim.

31. The boundary line between two neighbouring States is the line where the display of State authority of the two neighbours meets. In this case, the Sind-Kutch boundary as agreed upon through mutual recognition of the two neighbours and depicted in all official maps, widely distributed and continuously used for the purpose of administration over decades, would be the meeting point of display of State authority of Sind and Kutch. Pakistan, however, contends that the display of authority by Sind actually extended to the middle of the Rann, contrary to the recognised and depicted boundary along the northern edge of the Rann.

The display of British State authority in the Rann, as far as it was not an activity of the British as the Paramount Power over the whole of India—as in the case of patrolling by customs officials—was sporadic both in time and in space and evidently lacked the most elementary requirements for the establishment

of a historic title, i.e., continuity, intention and possession "*à titre de souverain*". It is, therefore, far from sufficient to disturb the recognised and depicted boundary.

On the other hand, the instances cited by India regarding display of authority by Kutch confirm the boundary as recognised by the two neighbours and depicted in official maps.

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On all the above grounds, respectfully dissenting from the opinion of my two colleagues, I find that the boundary between India and Pakistan in the West Pakistan/Gujarat border area lies along the northern edge of the Great Rann as shown in the latest authoritative map of this area, i.e., the Index Map of the province of Sind of 1935 (Indian Map B-45).

(Ales Bebler)

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PROPOSAL OF MR. NASROLLAH ENTEZAM

(submitted on 17 November 1967)

INTRODUCTION

It would not be an exaggeration to state that the case before us is unique. One has seen a number of controversies arising in connection with the liquidation of colonial empires, either between the colonial powers and the former colonies or between the former colonies themselves—but no controversy of this nature. To describe the characteristic feature of the actual dispute certain explanations seem necessary.

In the political system of British India the relations between the Suzerain Power and the vassal States were particular in character; the principles which regulated these relations bore little resemblance to the principles recognised by International Law applicable to relations between States, or even to those principles which applied to colonial rule in general.

The sovereignty of the Indian States was much more limited than that of States within the framework of a protectorate. Apart from restrictions in sovereignty imposed by treaties with the Indian States, it was recognised and admitted that, every time a controversial issue arose between one of the Indian States and the Government of British India, it was the latter which, by virtue of its unfettered powers, settled the issue at its discretion. This decision of the Government was final and binding: the term "Paramount Power", therefore, had a real meaning.

Another feature of this political system is worth recalling as it, in my opinion, constitutes the reason for a policy which would appear to be paradoxical.

To cope with the political awakening of the peoples of the sub-continent and the independence movements which began to appear among them, the Government of India could have found no better allies than the rulers of Indian States who were in favour of the maintenance of the status quo. The Government of India as well as the British Government in London did their utmost not only to dispel the apprehensions of the Princes but also to gain their sympathy by putting them under obligation.

Hence, the Government of British India, after the famous Proclamation of Queen Victoria, abandoned its policy of expansion at the cost of the territories of the vassal States. It went even further—every time the Princes requested a rectification of boundaries the said Government did its best either to satisfy the claims of the rulers (as was the case in 1914) or to leave the matter alone, especially when the claims concerned a barren and economically uninteresting area.

When such cases appeared before the Paramount Power it was not interested in dealing with them. What possible value could the Government derive from

determining, at the expense of an Indian State, a boundary in an area so completely desolate and barren as the Rann? Prudence and wisdom recommended that such problems should be left in suspense as long as the State concerned did not press for their solution.

This is the logical explanation of the attitude of the Government of India with regard to the delimitation of the boundary in the Rann area which was never defined and settled in spite of the numerous requests of the Sind authorities. Whenever these authorities or the survey officers raised the question of delimitation of the boundary, the Government replied along these lines : for political reasons we do not want the question of the boundary to be raised unless the Kutch State insists upon it and forces the issue. And the Kutch Darbar, which knew perfectly well that by such an action it stood only to lose, wisely abstained from bringing forward its claim.

This state of affairs explains why the boundary between Sind and Kutch, which in the opinion of well-informed people and by tradition, usage and custom was in the middle of the Rann, was never delimited.

The evidence in this case taken as a whole clearly indicates that the boundary dispute between Sind and Kutch existed and continued till 1947. Neither the maps, nor even the Resolution of 1914, as will be explained later on, put an end to this dispute. It is thus up to the Tribunal to delimit the boundary.

It is untenable to say that the task of the Tribunal is limited to the recognition of the one or the other line proposed by the Parties in their argumentation and that the Tribunal is not competent to decide a third line. The boundary lines as argued by India and Pakistan are only claims. It is thus for the Tribunal to find out the extent of sovereignty of each of the Parties in the Rann and delimit the boundary between India and Pakistan accordingly.

In doing so the Tribunal will not exceed the limits of its sphere of competence but fulfil the very task which has been assigned to it.

A NOTE ON SOME ASPECTS OF THE CASE

I. Claims of the Parties

India claims that the whole of the Rann as defined by India belonged to Kutch while Pakistan maintains that a part of that area (which it calls the upper lands and the lower delta lands) is a part of the land of Sind and not of the Rann, and that the northern half of what it calls the "Rann proper" belonged to Sind.

II. Nature of the Rann

A great deal of stress was laid by the Parties on the question as to the nature of the Rann. India tried to establish that it is land while Pakistan maintained that it is a marine feature. From the evidence submitted by the Parties it is established that the Rann is something different from land. In the very early stages the Tribunal decided that the depth of water, the period during which water remains in the Rann and the source of such water were not really material. So far as the nature of the Rann is concerned the geographical or the scientific aspect is not really relevant. What matters is how those concerned with the Rann regarded it. From the evidence on record, it is established that all those who were concerned with the Rann regarded it as something different from land.

III. The relevant date and the critical date

The relevant date is 1947. Since, however, it is expressly admitted by India that in the disputed region Kutch remained till 1947 what it was in 1819, and it is not asserted by Pakistan that Sind gained any territory in the disputed region after 1819, the critical date is 1819. Pakistan did claim that the exercise of jurisdiction by it between 1947 and 1956 is an independent source of title. This claim would need to be considered separately, if necessary.

IV. Extent of the Rann on the critical date

India's stand is that the area up to the vertical line and south of the blue dotted line up to the Sir Greek is all Rann. Pakistan claims that the Rann is as shown in the Claim Map of Pakistan. India claims the Rann which belonged to Kutch in 1819. According to Pakistan the Rann as claimed by India did not exist in 1819. This is supported by the fact that not only maps but texts show that the western limit of the Rann was the Khori River. Even according to India, Sayra Land existed in 1819. Almost all the authorities are definite that this strip of land was on the eastern bank of the Khori River. The 1819 Rann could not, therefore, extend beyond the Khori River.

V. Claim of Kutch to the Rann in 1819

India pleaded that, as it was difficult to find evidence after the lapse of about a century and a half, the Tribunal might take into consideration subsequent evidence as a proof of the position as it was in 1819. Subsequent evidence, however, would be of assistance only if there were no reliable contemporary

evidence. In this case there is a mass of contemporary evidence, including treaties, their interpretation by the Parties to these treaties, investigations, decisions, maps and accounts. It shows clearly that in 1819 the Rann was regarded as a boundary, and its whole width did not belong to Kutch.

VI. Comments on certain categories of evidence

(1) *Gazetteers* : Both sides have placed reliance on Gazetteers. Some are in favour of India and some in favour of Pakistan. The Gazetteers are only compilations from borrowed material. Such material was particularly scanty and unverified in respect of local conditions in the early stages of history of the East India Company. It can, therefore, hardly be of much assistance.

(2) *Maps* : Maps have been classed into basic and compiled maps. The former were those which were prepared by survey officers after conducting a survey on the spot. The latter were those prepared from basic maps. If there is a difference between the two categories, the authority for making a modification in the compiled maps (as compared with the basic maps) has to be seen before compiled maps can override basic maps.

India put forward maps prepared by the Surveyor General of India, especially those which show that the limit of Sind was the northern edge of the Rann of Kutch. There are differences of detail so far as these maps are concerned, but India has argued that, by and large, they go to show that the northern edge of the Rann of Kutch was the southern limit of Sind. In order to show what reliance should be placed on such maps, Pakistan has traced the history of maps prepared by the Surveyor General of India. The main attack by Pakistan on India's argument, however, has assisted in the demonstration that the basic maps of the 19th century did not show the boundary of Sind nor any conterminous boundary between Sind and Kutch.

The first regular survey, which was a combined revenue and topographical survey, was conducted by Captain Macdonald. Except in parts of Thar Parkar, Macdonald confined the survey to those areas for which thakbust maps had been prepared by the settlement officers. The latter confined their operations to areas which were defined dehs.

The next survey conducted in the region was by Pullan. India has tried to use this survey to show that Pullan surveyed the Rann because he, as well as his superior officers, regarded the Rann of Kutch as belonging to Kutch. Such an inference is sought to be drawn from a number of statements and entries made in the survey records, but Pullan himself explained that he had carefully refrained from showing or even suggesting a boundary between Sind and Kutch.

The next survey was by Erskine. He did show a boundary between Sind and Kutch. The evidence produced, however, goes to show that Erskine took his boundaries from the "settlement maps" which were the village revenue maps, but there is nothing to show what authority he had for treating such boundaries as provincial boundaries.

The next survey was by Osmaston. He made a prolonged enquiry as to the Sind-Kutch boundary, but then decided to show the taluka boundary of the old maps as the Sind-Kutch boundary. Since it is admitted that he had no authority to decide a boundary dispute, the fact that he showed the taluka boundary as the Sind-Kutch boundary cannot take the matter further.

Maps are only secondary evidence. Only such maps are primary evidence as are prepared by the surveyor on the spot by observation. Even they are primary evidence only of what a surveyor can himself observe.

The material point about the compiled maps is that, if the basic map did not show any provincial boundary, how did a compiled map come to show it? The position might have been clear if files or history sheets had been produced to show how the boundary came to be shown on some of the compiled maps, but India was not able to produce any files or history sheets.

(3) *Index Map of 1935* : This Index Map was prepared by the Surveyor General of India. It showed the boundary of Sind along the northern edge of the Rann. This map was sent to the Bombay Government which consulted the Commissioner in Sind. The Commissioner in his turn consulted the Director of Land Records, Sind. It was reported that the alignment was in accordance with the existing maps. The Deputy Commissioner, Thar Parkar, and those local officers who had been exercising jurisdiction to the south of the northern edge of the Rann, were not consulted. This map was never acted upon. When said in Parliament that the boundaries of Sind were clear, he also described Sind as the "Muslim Unit" which had perhaps been established before any other. The reference is clearly to the Sind of the Amirs and may even be stretched to include the Sind of the days of Mohammed Bin Qasim. At that very time it was stated that the absence of a notification had not interfered with the exercise of Sind jurisdiction. Sind authorities continued to exercise such jurisdiction in the northern half of the Rann after the preparation of the Index Map as they had done before. The Index Map is like a discarded draft. When the boundary dispute was taken up by Osmaston in 1938-1939, nobody mentioned that the boundaries had already been determined in the 1935 Index Map. No reference was made to it in subsequent years nor was it mentioned in the lengthy correspondence which followed between India and Pakistan after Independence.

(4) *Kutch Administration Reports* : India has laid a great deal of stress on the Kutch Administration Reports which either give the area of Kutch as exclusive of the Rann or state that the Rann belongs to or is owned by the Kutch State. First, these are admissions in one's own favour. Second, a statement regarding the ownership of the Rann appeared in the Kutch Administration Reports only after the Bombay Government decided in 1875 to hold a conference to determine the question of the boundary between Sind and Kutch. Third, some of these Reports dated as late as 1943, 1944 and 1945 state that the northern limit of Kutch is 24° of north latitude.

(5) *Bombay Administration Reports* : There are two categories of Bombay Administration Reports. One set contains what is known as the standard chapter

while the other Reports are those which do not have such a standard chapter. In the other Reports, it is indicated that for areas, etc., reference should be made to the standard chapters. There are three consecutive Bombay Administration Reports which state that the Rann belongs to Kutch. Such statements are not contained in any standard chapters. After the year 1905 the Bombay Administration Reports ceased to make any such statements and they were never repeated afterwards.

These Administration Reports also give the area of Kutch as exclusive of the Rann. India has argued that the Tribunal should hold that the word "exclusive" really meant that the whole Rann was a part of Kutch. I do not think so. Kutch claimed the Rann but it had not been determined as to how much of the Rann belonged to Kutch. If no reservation was made by using the word "exclusive", the Kutch claim would have been prejudiced. It was, therefore, thought only just and equitable that, when giving the area of Kutch, it should be stated that it was exclusive of the Rann, so as not to prejudice the Kutch claim. In some standard chapters the area of Kutch was stated to be exclusive of a portion of the Rann. Some Administration Reports limit the territory of Kutch to 24° of north latitude.

The standard chapters for the years 1911-1912 and 1921-1922 give the area of Kutch as exclusive of a portion of the Rann. These are the last of the standard chapters.

(6) *Statistical abstracts* : Statistical abstracts were sent to the Secretary of State and were laid before Parliament. In abstracts relating to years following 1875 the area of Kutch was mentioned as being exclusive of the Rann. From the correspondence produced, however, it is clear that before 1875 the abstracts sent to the Secretary of State did not show the area of Kutch as exclusive of the Rann. In 1875 a reference was received from the Secretary of State by the Government of India and it was passed on to the Bombay Government. The Acting Chief Secretary suggested the use of the words "exclusive of the Rann" with reference to the area of the Kutch State. The intention evidently was not to prejudice whatever might be the claim of Kutch. The same Acting Chief Secretary two months later asked Kutch to state what boundary it claimed in the Rann.

(7) *The 1914 dispute* : The relevant correspondence between the Political Assistant and the Commissioner in Sind shows that the question of the lands to the north and west of Khori Creek was regarded as distinct from the question of the rights in the Rann. During the consideration of the land dispute only the Collector of Karachi was consulted. Neither the Collector of Hyderabad nor the Collector of Thar Parkar was ever brought into the picture. After the Government's decision no copy was sent to either of them. Even after the erection of pillars, the Collector of Thar Parkar, his officers and the people continued to regard and treat the northern half of the Rann as belonging to Sind.

An important aspect of the 1914 decision is that Government rejected the evidence consisting of maps and documents and gave a decision in favour of Kutch on the basis of the supposed instances of exercise of jurisdiction.

VII. Estoppel

India was asked to say if its stand was that Kutch could increase by estoppel. India did not claim that it could, but relied on estoppel as a rule of evidence. The Bhowuggar decision by the Privy Council, however, shows that cession of territory could only be made in clear and unambiguous terms. No amount of inferences or implications and no length of silence could ever result in the cession of British territory.

VIII. Upper lands and lands of the lower delta

Pakistan claims that what it calls "the lands of the lower delta" and "upper lands" were part of the mainland of Sind when the British conquered it in 1843. Pakistan has placed reliance on a number of pre-survey maps and descriptions which show that the Khori River was the western limit of the Rann. It is true that the pre-survey maps are not as scientific as the maps prepared by the Surveyor General of India, but they clearly show the physical feature, traces of which are to be seen in the survey maps themselves—namely the bed of Khori River—to be the limit of the Rann. These maps may not be technically as accurate as the post-survey maps, but they do depict the position as it stood then. Again these maps are supported by numerous texts. From the evidence it is seen that the "lands of the lower delta" formed part of Tando Mahomed Khan District and the "upper lands" formed part of Thar Parkar District.

IX. Pakistan Maps 1 and 4

In support of its claim, Pakistan has relied on Maps 1 and 4. These maps are not scientifically prepared but they do convey the concept of the maker so far as the political extent of Sind and Kutch respectively is concerned. These maps were prepared by the British at a time when Kutch was their ally and Sind was in the opposite camp.

X. Evidence of inhabitants of the region, and persons who explored the Rann

Willaims found the Rann ending at the Khori River. Miles found islands farther away from Kutch than half-way in the Rann as belonging to other coastal States. Alexander Burnes says that Kutch ended 17 miles north of Bhuj. Well informed persons of Thar Parkar said in 1875 that Sind extended to the middle of the Rann. The Collector of Thar Parkar in 1885 said that the inhabitants of Thar Parkar had always considered that to be so. The Commissioner in Sind in 1885 said that the position was well understood in the region.

In 1926 the inhabitants of the villages of the Thar Parkar District said that they had been grazing their cattle for a very long time in Chhad Bet. The Collector said that the northern half of the Rann would continue to be considered British.

XI. Grazing

It is admitted that since at least 1843 the inhabitants of the villages of Thar Parkar District have been grazing their cattle in areas now claimed by India as the

Rann. (In the case of Keswala Bet a period of four years was considered sufficient to create sovereign rights.) This grazing was protected by the Sind administration which collected a tax on the ghee produced by the animals which grazed in the Rann.

XII. Precedents supporting Pakistan's claim

As already mentioned, all those concerned with the Rann of Kutch have regarded it as something different from land. In the disputed region, Sind is on one side and other coastal States are on the other. Sind has always claimed and controlled that half of the Rann which is nearest to it.

There are precedents which demonstrate that whenever there was a dispute between two coastal States, the intervening Rann was found to be divided half by half. The enquiry conducted by Miles, the Keswala Bet decision, the Poong Bet decision, the Nara Bet decision, the Kennedy award, all establish that point. These cases were decided on their own facts, and it was found in each case that the existing factual position conformed to a pattern of a median line.

These precedents indicate the existence of a regional custom under which the rules of median line and nearness of the shores are applied in the Rann.

XIII. Exercise of jurisdiction

Both India and Pakistan have cited instances of jurisdiction to show their control over the Rann. Most of the instances cited by India relate to a period well after Independence. No instances of exercise of jurisdiction were mentioned by India in the correspondence which was carried on between the two countries for several years. The instances cited by India relate to the crossing of the very boundary which is in dispute.

The instances cited by Pakistan are more than 1400 in number and are of several categories. Several relate to grazing which has already been mentioned.

Then there are instances relating to cultivation on Darya Kharo. This cultivation was undertaken with the permission of the Sind authorities, but instead of paying land revenue to it the cultivators used to pay lease money. India suggests that this cultivation must have been in undisputed Sind territory and surmises that Darya Kharo must be a canal to the north of the disputed territory. But there is no trace of any such canal and the only bed marked on any of the survey maps as Darya Kharo is in the disputed territory.

Then there are instances relating to activities by the police, which could not perform any function unless the area concerned was British. An area could be British only if it was a part of a British province, and the only province of which the disputed area could be part was Sind.

There are instances of exercise of control by customs officials. The Acts under which such control was exercised could by law only be enforced by the Central Government and not by a Provincial Government. What is relevant, however, is that those Acts could only be enforced in territory that was British,

and therefore their enforcement in the northern half of the Rann is proof that the northern half of the Rann was treated as British territory. By law they could not be enforced in Kutch. The Rao however did not object to their enforcement in the northern half of the Rann. The explanation offered for the Rao's omission to do so—that he regarded that enforcement as beneficial to himself—is contrary to the fact that the operation was directed against the Rao.

Then there are instances of jurisdiction by Sind Magistrates. Since they were Sind officials, their authority could only be exercised in an area which was a part of Sind. There are also instances concerning public works.

The factual aspect of the instances of jurisdiction has not been challenged.

XIV. Chhad Bet

Instances relating to Chhad Bet reveal a very interesting state of affairs. These instances clearly establish the total absence of Kutch before 1926. According to India it was in 1926 that an energetic Thanedar took it into his head to establish State control over what he regarded as Kutch territory. If Kutch is supposed to have owned the Rann in 1819, it is surprising that it took 107 years to produce such a Thanedar.

These documents also show that, in spite of two years' efforts, the Kutch officials could do nothing as the Thar Parkar people maintained that they were grazing their cattle in British territory and were not bound to pay anything to Kutch as they were paying ghee tax to the Sind authorities. The venture was given up as hopeless.

For a period of nearly ten years, there was no activity from the Kutch side and the Sind graziers continued to graze their cattle in the northern half of the Rann without any objection or obstacle from the Kutch side.

In 1937-1938 attempts were renewed. This period coincides with the time when Osmaston started his survey and the Sind, Kutch and Wav representatives placed different claims before him. These attempts, however, met the same fate.

A few years later, there were renewed activities and this time the Kutch officials tried the use of force. A case was, however, registered with the Sind police and extradition proceedings were started against the Kutch officials who were alleged to have used criminal force.

The Kutch Darbar then (1945) gave a lease to one Node Sadi Rao, but all he could succeed in doing was to harass travellers and demand grazing fees from them. He found it perilous to visit the area where the Sind graziers grazed their cattle.

The admission by India that the residents of Sind grazed their cattle in Chhad Bet at least from 1843 shows moreover that the whole Rann, as defined by India, was not in the possession of Kutch. Since the position of Kutch was strengthened and not weakened by its connection with the British in 1819, the possessions of

Kutch could not be less in 1843 than they were in 1819. In fact, since Sind was in possession of Khurir about 1816, the question of Kutch having access to any place north of Khurir could not arise. In 1819, Kutch was even unable to prevent the Khosa raids on its territory from across the Rann.

XV. Vertical Line

Lucas was clearly mistaken when he said that the vertical line was shown on all maps after 1837. The fact that so many maps of that period have been produced on which it is not shown demonstrably establishes the error. The further fact that not a single map before 1870 has been produced which shows it implies that none was found, otherwise such a map would have been produced at least by the Party that contends that Lucas was not mistaken. The fact that none was found moreover means in all probability that none exists, because the Parties have evidently carried out exhaustive research in all likely places. Historical records show that even when Sayra existed as a part of Kutch territory it did not cross the Khori River at any point. The question therefore of a vertical line to the west of the Khori River dividing Sind from Kutch could not then arise. The pre-survey maps clearly show the "delta lands" extending all the way to the west of the Khori River. At the time of Macdonald's Survey, the river only marked the eastern limit of Jati Taluka. It is clear that it was never the Sind-Kutch boundary.

XVI. Karim Shahi

The Ministry of External Affairs of the Government of India referred to the Indo-Pakistan border near Karim Shahi, in a formal communication sent to Pakistan by the Government of India through its High Commissioner. This is a clear admission at least of the *de facto* position in 1955.

XVII. The Maharao's admissions

In 1855 the Rao said that Gainda Bet was the limit of Kutch in the Rann.

In 1866 he said that by the Treaty of 1809 Kutch had accepted the Rann as its boundary.

In 1876 he produced a map in which the only area marked "Rann" shown as a part of Kutch was Banni.

XVIII. Locally recognised boundary

India maintains that the Sind-Kutch boundary along the northern edge of the Rann was locally recognised and traditionally known. These words were used in connection with the boundary in the north-west part of India where the boundary as accepted by the people was given preference. The evidence here is clear that the boundary recognised by the people, officers and all concerned lay in the middle of the Rann. The boundary claimed by India is only the line misconstrued by later members of the Survey Department as the boundary.

XIX. No man's land

The Salt Department of the Government of India were of the opinion that the Rann was no man's land. That would not mean that, because it was no man's land, it could go to India. Nor would it mean that, if this was the position, the Tribunal should let the Rann remain undisposed of. The Parties have agreed that the Tribunal has to decide the matter finally, and, even if it be assumed that the Rann was no man's land, the Tribunal will have to apportion it between India and Pakistan.

XX. Was the boundary in the Rann between Sind and Kutch, ever settled (i.e., is the dispute pending) ?

In 1875 Kutch was asked to state what boundary it claimed. Kutch asked for time. No claim was stated. The question was postponed for a year. It was not settled then.

In 1885 the Government of Bombay directed that the question of boundary in the Rann between Sind and Kutch be not raised. Pullan requested that the survey authorities be informed of the boundary, when determined. It was not settled then.

In 1898, the Commissioner in Sind said that for police purposes the Rann would be regarded as British, until the question was decided. It was undecided till then.

In 1903, the Commissioner in Sind said that prima facie Sind rights extended to the centre line of the Rann. No settlement had evidently taken place before then.

Although it is asserted that in 1914, the Government of India, the Government of Bombay and the Commissioner in Sind proceeded on the basis that the "Rann" to the east of the vertical line was Kutch territory, it is not claimed that anything had happened between 1903 and 1914 to convert rights that might be British into Kutch rights. It is admitted that the 1914 Resolution itself did not settle the question.

Again, although much stress has been laid on the implication of the erection of pillars on the northern half of the vertical line, it is not claimed that, if the vertical line was in fact not the Sind-Kutch boundary, it would get converted into the Sind-Kutch boundary by the erection of pillars. It is clear that the boundary was not settled then.

In 1926 the Collector of Thar Parkar, after enquiry, came to the conclusion that the boundary was still unsettled and continued to regard the northern half as Sind. Kutch efforts to gain a foothold on Chhad Bet were stoutly resisted. The question was not settled then.

In 1939 the Collector of Thar Parkar asked that the boundary be shown as disputed. Osmaston incompetently purported to take a decision. India admitted that he had no lawful authority to decide a territorial dispute. It is thus not claimed that the dispute was settled then.

In 1941, the Dewan of Kutch said "there is now no dispute", which means that the existence of the dispute up to 1941 is acknowledged. It is not claimed that anything has happened since that might have settled it.

It is clear that the dispute is now pending and has to be settled in these proceedings.

PROPOSAL

India at the time of Independence in 1947 consisted of British Indian provinces, collectively called British India, Indian States, and certain areas that were neither British India nor Indian States. The Indian Independence Act of 1947 divided British India between two new States—India and Pakistan. By two separate amendments of the existing law, the Indian States were left free to become a part of India or of Pakistan at their option. No specific provision was made regarding the future of the areas that were neither British India nor Indian States.

By the operation of the Indian Independence Act itself the British Indian province of Sind became a part of Pakistan, and by its own act the Indian State of Kutch became a part of India.

Between the south of the land of Sind and the north of the land of Kutch lies a unique tract called the Rann. India claims that the whole of this tract was a part of Kutch when Kutch became a part of India, and that the present boundary between India and Pakistan "runs roughly along the northern edge of the Rann". Pakistan claims that the Rann is a belt of boundary between coastal States separated by it, which when reduced to a line of boundary yields an alignment equidistant from opposite shores, running roughly along the 24th degree of north latitude. Both sides agree that Sind and Kutch meet in a conterminous line of boundary. Both sides further agree that, except for an area of 550 square miles in the west, to the south of a line running parallel to the 24th degree of north latitude but two minutes short of it, transferred from Sind to Kutch, Kutch remained what it was in 1819, the year when its territories were guaranteed by Treaty. They are further agreed that except for the aforesaid area of 550 square miles, Sind remained what it was in 1843, the year when it was conquered by the British. India at first pleaded that all that it was necessary to find was the extent of Sind on 18 July 1947 (the date mentioned in the Indian Independence Act), and that whatever was found to be outside Sind would automatically be India by operation of the Indian Independence Act, even though it were found not to be Kutch, because it would then be "a part of British India that was not allotted to Pakistan". Pakistan pointed out that, to be "British India", the area in question by definition would have to be a part of a British Indian province and the only British Indian province of which any part of the Rann could be a part was Sind. Pakistan therefore contended that, if the Rann or any portion of it were in fact found to be neither a part of Sind nor a part of Kutch, it would be terra nullius, which in the absence of any other claimant (as is the case) must be deemed to be apportioned between India and Pakistan. At later stages of the case, India practically withdrew this pleading and nothing further need, therefore, be said in respect of it.

The problem therefore reduces itself to determining the extent of Kutch in 1819 because, as soon as that is determined, it follows by logical steps that Sind in 1819 began where Kutch ended; since in 1843 Kutch was the same as in 1819,

Sind in 1843 (the year of its conquest by the British) was what it was in 1819; and since both Sind and Kutch remained the same till 18 July 1947 (except for the 550 square miles that are not material for this purpose), the boundary between Sind and Kutch on that date was what it was in 1819. Pakistan, however, introduced a further element by contending that the instrument of accession of Kutch to India dated 11 August 1947 was invalid, that the date on which Kutch effectively became a part of India was 4 May 1948, when it merged with India, and that the exercise of jurisdiction by Pakistan in the northern half of the Rann during the interval, between 15 August 1947 and 4 May 1948, had destroyed any claim of Kutch to the northern half of the Rann before Kutch became a part of India. Being of the view that the period of less than nine months that is involved is much too short for such a claim to be put forward, I do not think it is necessary to determine whether Kutch became a part of India simultaneously with the establishment of Pakistan or a little later. Pakistan further contended that it had exercised jurisdiction over the northern half of the Rann between the date of its Independence (15 August 1947) till a de facto change in status quo in 1956, and that this independent exercise of jurisdiction gives Pakistan an independent source of title to the northern half. The need for examining the validity of this contention would arise only if in the first instance it were found that the northern half was not Sind on the day of the Independence of Pakistan. It follows then that the boundary between India and Pakistan in 1947 would be where the boundary between Sind and Kutch lay in 1819.

I therefore turn to the question of the true position of the boundary between Sind and Kutch in 1819.

European explorers did not have any contact with the Rann till the beginning of the 19th century. The British geographers of the 18th century had erroneously supposed that the Rann was the southern extremity of a sandy desert stretching all the way (nearly 600 miles) from the foot hills of the Himalayas to the hills of Kutch. This concept was portrayed in the maps of Rennel, 1788 (Pak. Map 106) and Arrowsmith, 1804 (Pak. Map 139) and was reflected in a Gazetteer of 1815, by Walter Hamilton. On direct contact being made with the area by British officers, it was learnt that local tradition regarded the Rann as a transformed condition of a once navigable sea. In June 1819, the region was shaken by a violent earthquake. The phenomena observed and objects discovered in consequence of that convulsion confirmed the view (which is accepted by both Parties) that the Rann was once a sea. Nor is it disputed that, in its present condition, for one part of the year the Rann is covered with salt water, and for another part of the year it is mostly free from water.

It is clear that, so long as the Rann was a sea, it could not but be a natural boundary between coastal States separated by it. It is also clear that in its present condition, whether wet or dry, it is an effective barrier between those States. No evidence or suggestion is forthcoming as to how, why or when it could possibly have ceased to be a boundary between those States. Walter Hamilton, however, in an attempt to adjust his description of 1815 in the light of the more recent discoveries (as understood by him), issued a new version of

the Gazetteer (published in 1820), in which he said that Kutch was in two parts, the mainland of Kutch and the Rann of Kutch. An examination of the rest of his revised version shows that it is not clear what exactly he wanted to convey, because in one place he refers to the Banni (which is undoubtedly a part of Kutch) as the Rann. In another place he refers to the Rann as separating Chilchakaun (Thar Parkar) from Kutch. In still another place, he actually admits that the Rann is the boundary between Kutch and Gujarat. Apart from the fact that, taken with other portions of his revised version his meaning is ambiguous, none of the available sources on which his revised version purports to be based bears him out on the point. He does not claim any direct knowledge, nor indeed could he have had any. In the absence of an authentic source, his statement (being the first of its kind since none earlier was found by the Parties) carries little weight.

Authentic sources, on the other hand, establish that in 1819 (after which year admittedly Kutch did not expand, except for an area to the north and west of Khori Creek which is not relevant for this purpose) the whole width of the Rann did not belong to Kutch.

The first clauses of the two Treaties of 1809 (Pak. Doc. A.1) acknowledge that Kutch troops are not to cross that which lies between Kutch and Gujerat—the Rann and the Gulf. They read :

First Treaty :

“As friendship exists between the government of the Honourable Company and the government of ... Guikwar ... on the one part and the government of... [Kutch]...on the other, it is agreed that no troops shall cross to the country to the east or opposite side of the Gulf and Runn lying between Kutch and Guzerat, nor shall any claim or interference be there-in maintained.”

Second Treaty :

“As friendship exists between the government of the Honourable Company and the government of the ... [Guikwar] ... on the one part, and the government of... [Kutch] ...on the other, I [Hunsraj] do hereby agree that no troops shall cross to the country on the opposite side of the Gulf and Runn (lying between Kutch and Guzerat). ...”

The fourth clause of the Treaty of 1816 (Pak. Doc. A. 2) similarly places the States on either side of the Rann on equal footing (with a further concession in favour of the British against Kutch). It reads :

“The subjects of the Kutch State shall on no account cross the Gulf or Runn for hostile purposes, neither shall they cross to act against the subjects of the Honourable Company or those of Sreemunt Peishwa or the Guikwar. The subjects of the aforesaid three governments shall (in like manner) not cross the Gulf or Runn for hostile purposes against the Rao's subjects. The fort of Anjar, etc., having been ceded to the Honourable Company, no objections exist to troops and stores crossing the Gulf or Runn for that place.”

MacMurdo, who was the author of this Treaty (1816), reporting to Government on the clause quoted above, says (Pak. Doc. B. 272) :

“The third and fourth articles appear to require no remark as they Embrace the objects laid down in my instructions, and Reflecting on the objects of Government in entering Cutch, I had few scruples in engaging that the allied Governments should consider the Run and Gulph as their boundary.”

In order to devise effective measures against smuggling across the Rann, Miles, the Political Agent in Palanpur, was obliged to conduct an enquiry in 1823 into the existing position with regard to the “bets” in the Rann. He found (Ind. Doc. A-87) that the bets, other than those nearest to Kutch, did not belong to Kutch.

Commenting on the salt rights in the Rann, the Collector of Continental Customs of Excise stated in 1845 that the salt rights in the Great Rann were exercised as a royal right by the Amirs of Sind (Pak. Doc. B.264/Ind.)—which could not be the case of the whole Rann belonged to Kutch.

In a dispute over Keswala Bet, lying in the middle of the Rann, decided by Jacob in 1856 (Ind. Doc. TA-26), Kutch did not even suggest that the whole width of the Rann belonged to Kutch and that, therefore, no question of any part of any bet belonging to any other States could arise. On the other hand, it tried to support its claim on the basis of possession. Jacob, however, found that in the year of guarantee (1819) no one could be said to have been the proprietor and that what lay to the east of a line through the middle of Keswala Bet was not Kutch.

In a representation made to the Government of Bombay in 1866 (Pak. Doc. B.305), the Ruler of Kutch said :

“... the Treaty of A.D. 1809 was entered into between the British, Gackwar, and the Kutch Governments. By it the Gulf and Runa are laid down as the boundaries ...” (p. 21).

In a dispute over another island called Poong Bet, in 1867, again it was found that what lay to the east of a line through its middle was not Kutch. On this occasion also Kutch did not seek to support its claim on the basis that the whole width of the Rann belonged to Kutch.

In the face of this authentic material, it is not possible to attach any weight to the four further statements that were made during this period to the effect that the whole of the Rann belonged to Kutch—by Walter Hamilton himself in 1828, by Captain Grant in 1836, and by Thornton and Raikes in 1854—unsupported as they are by any source.

It is evident from the writings of Alexander Burnes and his brother James Burnes (Ind. Docs. A-5, A-6 and C-2) that the Rann formed the boundary of Kutch as also of the other States along its shores. Havelock’s description of the Kutch frontier (Ind. Doc. A-15, 1827) also confirms the same conclusion. Elphinston’s despatches in 1820 (Ind. Docs. A-90 to A-93) are intelligible on the same basis. Williams’ description in 1820 (Ind. Doc. A-11) points in the

same direction. MacMurdo's explanation of the fourth clause of the Treaty of 1816 (Pak. Doc. B.272, already quoted), and the Maharao's interpretation of the first clause of the Treaties of 1809 (Pak. Doc. B.305, already quoted) expressly indicate that the Rann was the boundary between Kutch and certain other coastal States.

In this state of the evidence, it would not have required any further consideration to come to the clear conclusion that in 1819 the whole Rann did not belong to Kutch and that the Rann itself was then, as also thereafter, the boundary between Kutch and the other States separated from it by the Rann, had it not been for the pleading of India that certain subsequent events are also relevant for deciding what the position in 1819 was. I turn, therefore, to those events.

An official scientific survey of Sind was completed in 1870 by Captain Macdonald, as a result of which a map (also called the Trigonometrical Map) of Sind was prepared. The printed sheets relating to the relevant area published as a result of this survey (Indian B-2 series and Pak. Map 137) have a dash-dash symbol between the area marked as the Rann and areas marked with names of parts of Sind. It is the case of India that this dash-dash symbol separates Sind from Kutch. In further support of this position, India, in the second round of oral hearings, produced from the Survey of India records a field book of one of Macdonald's assistants in which entries exist to the effect that the northern end of what, in these proceedings, has been referred to as the vertical line, is a trijunction between Jati and Badin Talukas of Sind with the Lakhpat Taluka of Kutch, and that the area lying to the south of what in these proceedings has been referred to as the two loops, up to the Rann, is "Kutch Bhooj". Pakistan called upon India to produce from the same records the corresponding field book in which the vertical line was covered, to see how its northern end was there described and it was found that in that field book (Pak. Doc. B.388/Ind.) it was described as being the trijunction of Jati and Badin Talukas of Sind with the Rann of Kutch. Pakistan further pointed out that Lakhpat Taluka of Kutch had never been described in any document or map as extending up to that point, and that the area of Lakhpat Taluka given in the Kutch records (Ind. Doc. C-50) would exclude any area beyond the mainland of Kutch from being a part of that taluka.

We know that Macdonald described Kutch territory as "foreign" and asked for permission to enter it near Lakhpat. He evidently was not aware that it could even be suggested that Lakhpat extended to the northern end of the vertical line or that to the south of his loops lay Kutch territory, or this would have been reflected in his conduct or expression; but even a remote suggestion of that kind is conspicuous by its absence from his reports. Indeed, his conduct in transferring at will a part of the land surveyed from the main circuit to the Rann sub-circuit shows the contrary assumption. (Ind. Doc. TA-3).

Moreover, three years after the publication of the Trigonometrical Map of Sind, the Government of Bombay, at the instance of Sind authorities, decided that the Sind-Kutch boundary in the Rann should be determined, and called upon Kutch to state where it claimed that boundary to be (Pak. Doc. B.171/Ind.).

In view of the death of the Rao soon afterwards, Kutch asked for time, showing that no one thought that the Sind-Kutch boundary was already determined. In 1884, the Deputy Collector of Tando Division, in pursuance of certain standing orders, went looking for the boundary between the area under his charge and the State of Kutch, and reported that all he could find was that the boundary was somewhere in the Rann (Pak. Doc. B.359). After some further enquiries, Erskine, the Commissioner in Sind, who himself had been intimately concerned at one stage with the survey as a result of which the Trigonometrical Map of Sind was produced, wrote the letter quoted in Chapter V (Pak. Doc. B.376) saying that what the Trigonometrical Map of Sind showed was not the boundary of Sind, "but merely the limits of defined dehs or village lands", and that it would be necessary "to take care that the actual boundary namely the Rann : itself is shown as the boundary". In view of the inability of the Deputy Collector of Tando Division (who was the officer administratively concerned), in spite of specific efforts, to find how far south the area of Sind extended (or in other words, how far north the area of Kutch extended), and the remarks of Erskine, the entries to the contrary to be found in the field book (Ind. Docs. TA-74 to TA-76) contain clearly unreliable information. The dash-dash line on the Trigonometrical Map, called for convenience the Macdonald line, has been fully discussed in Chapter V. Whatever else it might mean, it certainly is not, and in fact does not purport to be, the Sind-Kutch boundary.

This conclusion is fully confirmed by the events of the following year summarised in Chapter VIII as the 1885 Incident. The Government Resolution (Pak. Doc. B.10) and Pullan's explanation (Pak. Doc. B.11) take for granted that the boundary between Sind and Kutch had yet to be determined. It is further supported by the events of 1897, when islands of the Nara Bet chain were disputed between Sind and Suigam, showing on the one hand that the Macdonald line was not regarded as the boundary of Sind, and on the other that Kutch did not intervene to say then that a dispute between two strangers over a part of the Rann was meaningless since "the whole Rann belonged to Kutch". It is also confirmed by the ruling of the Commissioner in Sind in 1903 that the rights of Sind extended to at least the centre line of the Rann. (Pak. Doc. B.381). The 1926 and 1938 incidents (summarised elsewhere) also demonstrate that the Macdonald line was never regarded as the Sind-Kutch boundary. It was pointed out, however, that Macdonald in his reports had said that he had surveyed the "whole of Sind" and that, therefore, notwithstanding all the other evidence, it must be found that what he omitted to survey could not be Sind. To this there are three answers. First, that Macdonald was drawing a distinction between Sind and the Rann, and from that it would not follow that, according to him, there could be no Sind rights in the Rann. Secondly, that Macdonald's opinion as to how much was Sind cannot affect the vested rights of Sind in whatever was in fact Sind. And thirdly, that the true test of what was Sind (applied later by the Maharao himself—Ind. Doc. A-31), namely whether it was or was not subject to the sovereignty of the Amirs, was a matter regarding which no enquiry was made by Macdonald. Five years later (1875), when such an enquiry was made, it was reported that the jurisdiction of the Amirs had extended into the Rann. There is also the further answer that what Macdonald surveyed (except in Diplo,

Mithi and Nagar Parkar) was boundaries of dehs as marked out by villagers in settlement operations.

I am, therefore, of the opinion that the first "subsequent event", namely, Macdonald's Survey and the Trigonometrical Map of Sind does not assist in determining the extent of Kutch in 1819. It does not even assist in determining the extent of Sind (in the relevant region) either at the time of survey or earlier.

The remaining "subsequent events" are an impressive mass of Kutch Administration Reports, Bombay Administration Reports, statistical abstracts, data supplied on the occasion of official visits, Gazetteers and officially prepared maps, the Resolution of 1914 and the subsequent demarcation and erection of pillars, the Index Map and the description of the Sind boundary prepared in 1935-36, etc. They have all been summarised under appropriate heads. The point made in respect of all of them is that express and implied statements by Kutch that the Rann belonged to Kutch were allowed to remain uncontradicted by the British; that several implied and some express statements to that effect were made by the British themselves; and that maps were officially prepared by the British showing the Rann as a part of Kutch. The political system of the British being what it was, (the Bhowuggar Case), it is not claimed that, if Kutch did not include the whole Rann in 1819, any of these "subsequent events" would have the effect of later adding it to Kutch. On the contrary, as already mentioned, it is expressly admitted by India that in the disputed region Kutch did not increase after 1819. What is claimed is that "the subsequent events" are evidence to show that Kutch in 1819 in fact was what the later statements (as interpreted by India) accept it to be.

But evidence of acceptance of a demonstrably erroneous position cannot be better evidence of the true position than the evidence of the true position itself. If MacMurdo in 1816 had no difficulty in having the Rann acknowledged as a boundary between Kutch and Gujerat, and Miles found in 1823 that in the Rann the islands nearest to the Palanpur, Gujerat, Dhrangadhra and Morvi coasts did not belong to Kutch, then the fact that a Secretary of the Bombay Government did not contradict a statement in a Kutch Administration Report, made by the Dewan of Kutch in 1876, that the whole of the Rann belonged to Kutch, cannot be better evidence of the true position in 1819 than the evidence of MacMurdo and Miles.

Since, however, particular emphasis was laid on the silence of the political officers, the statements of some officials of the British administration, the statistical data where, with respect to the area of Kutch, the reservation is made that it is "exclusive" of the Rann, the Resolution of 1914 (and the subsequent erection of pillars in 1924) and the events of 1935-36 when Sind was set up as a separate Governor province, it is desirable that I should advert to them specifically.

As for the reservation "exclusive of the Rann", it does not necessarily mean that its use is compatible only with an undisputed title vesting in Kutch to every part of the Rann. That an undisputed title vested in Kutch to every part of the Rann is a proposition contradicted by the very documents on which India relies, and is not even asserted in the Indian Memorial itself. In fact it is admitted that

the north-eastern corner probably did not belong to Kutch. Several other parts of the Rann have now been shown (and even conceded) not to have been parts of Kutch. Statistical data relating to some of the other coastal States, inconsistent with the implication that the entire Rann was part of Kutch, are forthcoming. It is now conceded that the implication of the reservation is merely that "by and large" the Rann belongs to Kutch. But once it is found that a clear title to the whole is not implied, the reservation ceases to be of any assistance in the determination of a dispute as to a particular part.

India argues that silence of the British in the face of assertions by Kutch that the Rann belonged to Kutch, and statements of some of the officials of the British administration themselves to the same effect, amounted to acquiescence on the part of the British. Pakistan replies that in the British Indian political system no new rights could be created in favour of vassal States except by actual conferment by the Paramount Power through constitutionally valid means. India rejoins that it does not rely on that silence and those statements as creating new rights, but by way of estoppel as a rule of evidence.

Since I am not a lawyer by training, the technicalities of the law of estoppel, as discussed by the Parties, are mostly beyond my depth. As a matter of commonsense, however, one thing seems clear to me. If some British officials said that the Rann belonged to Kutch, and others said it was "no man's land", and still others exercised jurisdiction in half of it on behalf of Sind, and still others apportioned parts of it between different coastal States; if the Administration Reports of Kutch saying that the whole of the 9000 square miles of the Rann belonged to Kutch, and the administration reports of some of the other coastal States saying that a part of those 9000 square miles belonged to one or the other of those coastal States were left equally uncontradicted; if one Gazetteer gave the area of Kutch "exclusive of the Rann" and another "exclusive of a portion of the Rann"; if in spite of the absence of any reservation as to the Rann in respect of the area of a coastal State, a portion of the Rann did admittedly belong to that State; if statistical abstracts, without reservation relating to the area of a State owning a part of the Rann, were laid before the Parliament along with those of Kutch with a reservation; then which of these mutually inconsistent positions are the British supposed to have acquiesced in and which of them is to be taken to be the one in relation to which they are supposed to be estopped? Another thing that to my lay mind seems clear is that what is expressed in deeds corresponds far more accurately to what is in the mind than what is expressed merely in words. In the diplomatic field, with which I am familiar, that would seem obvious. Even more obvious to me is the fact that silence of a political officer is hardly ever equivalent to assent. Unless, therefore, silence in the face of an erroneous assertion, or a statement in words of an erroneous position, were claimed to be by themselves sources of new rights (which in this case they are not), I cannot see how, as a rule of evidence, they could form the basis for a finding contrary to reliable evidence. If the Ruler of Kutch had been misled into altering his position to his detriment by reason of a belief induced in him by the Paramount Power that he was the master of the whole Rann, it might have been argued on grounds of equity (though, in the context of the Indian

Political system, it could not be accepted) that it would be unjust to deprive him of that mastery after he had so altered his position. But such is neither the case, nor he claim. I have no doubt that these "subsequent events" do not acquire any greater reliability, in the face of the authentic evidence that contradicts them, merely by being labelled "acquiescence" or "estoppel".

The point made in respect of the 1914 Resolution is that the Sind Administration, the Government of Bombay and the Government of India evidently so conducted and expressed themselves as to imply clearly that they were settling the dispute on the basis that Kutch already was the master of the whole Rann to the east of the vertical line, and was now claiming also the area of nearly 1000 square miles to the west of that line as shown by the green line on the map submitted by the Rao. Since here, also, the Resolution is not claimed as a source of title over the Rann and is being used only as evidence of what the British officials of 1914 believed the true position of 1819 to have been, this evidence, like the rest of its kind, is of no consequence in the face of better evidence of that position which happens to be available. Moreover, the assumption that such an implication arises from the conduct or expression of all the British officials of those times is far from clear. The Salt Department never regarded the Rann as belonging to Kutch, and its view was confirmed by the Government of India. Kennedy did not regard the whole Rann as belonging to Kutch and that view was confirmed by the Government of India and the Secretary of State. Abud made a clear distinction between the claim of Kutch to lands beyond the Khori Creek and its claim to the whole Rann (Pak. Doc. B. 113). Morison treated the question of the rights in the Rann as distinct from the rectification of the boundary then under discussion. In 1934, the Secretary to the Resident in the States of Western India said that "so far no authoritative pronouncement has ever been made as to jurisdiction in the Rann; in fact, the thorny question has intentionally been disregarded". (Pak. Doc. B.325). In spite of the existence of later maps showing by a double riband what is now said to have been implied (namely that the whole Rann belonged to Kutch) (Ind. Maps B-9, B-10, B-11), the Rao selected as his claim map a mosaic (Ind. Map B-44 and the Pakistan Resolution Map) made from older maps on which a Sind boundary was marked by a single riband in the north of the Rann and the Kutch boundary by another single riband in its south, and the Resolution of 1914 drew a distinction between "the Sind-Kutch boundary" which it laid down, and "the Sind boundary" which it mentioned as the terminus of that boundary.

A further point made in relation to the demarcation of the boundary consequent upon the Resolution of 1914 is that when the blue-dotted line was demarcated and pillars erected on it, similar pillars were also erected from the junction of the blue-dotted line with the vertical line, northwards along the vertical line up to its northern end, for which half the expense was borne by Kutch, showing that those engaged in the erection of pillars regarded that portion of the vertical line to be a part of the Sind-Kutch boundary. If, in the political system of British India, the erection of boundary pillars itself could have become a source

of new rights, it might have been unnecessary to enquire further whether the pillars on the vertical line were erected on an erroneous assumption or correctly. Since, however, it is not even claimed that the erection of pillars by itself could or did create a new title, the relevance of this piece of evidence is of the same category as the rest of the "subsequent events" which are alleged evidence of the true position of 1819, and this evidence also must yield to better evidence of the true position.

In this connection there is, however, one point that needs to be noticed. According to Pakistan, territory that had or might have once become British could only be transferred to non-British hands in peace time by the Crown, at least in Council (i.e. by the Secretary of State) if not in Parliament, and by none else. The powers that the Government of India had exercised to make "minor boundary adjustments without reference to the Crown" were of doubtful constitutional validity where they involved cession of territory, however small, that might be British. The settlement of 1914 was not a boundary "adjustment" at all, but a one-sided surrender of territory, and it certainly was not "minor" as it involved 550 square miles. It was, therefore, an invalid transaction. Yet Pakistan has chosen to accept as effective the transfer of the 550 square miles of territory to Kutch in consequence of that Resolution by the Government of India without reference to the Crown. Pakistan says that it has refrained from challenging its effectiveness, in spite of its invalidity, because it has been acted upon. But does not the same reasoning apply to the vertical line? At first sight it seems to, but further reflection shows that it does not. To the south of the blue dotted line is a defined area that was actually transferred by a Notification to Kutch and has been in its possession ever since. Its formal incorporation into Kutch was reflected in all statistical statements. Administrative adjustments were made, as is apparent from the ratio of Kutch policemen to the total area of Kutch after its transfer (given in the Kutch Administration Reports). Nothing of the kind ever happened with reference to any area east of the vertical line. The first attempt to gain a foot-hold in any part of the northern half of the Rann did not occur till 1926, and then it was firmly resisted. It was finally declared by the Collector of the area concerned in Sind that the northern half would continue to be regarded as British. That attempt was in Chhad Bet, far removed from the vertical line. The first attempt to come to an area closer to the vertical line (Pirol Valo Kun) was made in 1946, through a private contractor; the narrative of the abortiveness of his efforts is given elsewhere. Moreover, in the 1914 Resolution, the acceptance of the Commissioner in Sind is mentioned only in relation to the blue dotted line, and the authority of the Government of India covers only that line. The erection of the pillars was not referred to the Government of India. If therefore some pillars were erected which are not warranted by the Resolution of the Government of India, and some were erected which were so warranted, the two would not be on a par. As evidence of the true position of 1819, the erection of pillars on the vertical line does not add to the validity of that line.

The proceedings of 1935-36 and the statement made by Butler, the Under-Secretary of State for India, at the time of the setting up of the Province of

Sind, again are not put forward as a source of a new title for Kutch, but only as evidence of the true size of Kutch in 1819. In the first place, those proceedings were not concerned with Kutch at all but with Sind, and their use, for the purpose of indirectly determining the size of Kutch in 1819, is based upon the latent assumption that whatever was not Sind in the south, in 1936, was Kutch in 1819, which is not well-founded. In the second place, the draft description was merely a translation into words of the existing position on maps and as such added nothing to the evidentiary value of those maps. If the boundary depiction on those maps was unreliable, its description in words was equally so. In the third place, the draft and Index Map were, for whatever reason, discarded, and what was put down in the law, instead, was that Sind continued to be the same as it was before, which, when related back, means that Sind was all that the Amirs had. As for Butler's statement in Parliament, all he said was that the boundaries of Sind were "clear", whatever that might mean. But he also said that Sind was the Muslim unit that had perhaps been established before any other in the sub-continent. In any case, statements in Parliament are not relevant for the interpretation of the words of a statute, and this statement does not throw light on the size of Kutch in 1819.

Moreover, within two years of those events (1938), we find the Survey authorities making serious enquiries as to where the southern boundary of Sind lay, showing unmistakably that the department that had drawn the Index Map and the schedule of boundaries in 1935 did not regard the events of 1935-36 as having any bearing on that boundary. The further fact that, in the course of that prolonged enquiry, no one even so much as referred to those events confirms, if confirmation is needed, that the other officials concerned also did not regard those events as being relevant to the enquiry.

One other "subsequent event" needs to be specifically noticed—the 32-mile map of India. It was said that it was "authoritative". Since, like the other evidence of this category, it was offered not as a source of a new title but only as evidence of the true position in 1819, it is not necessary to examine the claim that it is authoritative for the definition of "purely British" territory. Suffice it to say that in the controversy of 1938-1939 (as also in earlier controversies between Sind authorities and Kutch) no one even so much as mentioned the 32-mile map of India.

I find, therefore, that, while evidence of "subsequent events" might have been of some assistance in the absence of better evidence, it is of no consequence in the face of better evidence that is available. In this view of the matter, it is not necessary to examine whether the interpretations put on the various statements and maps and inferences sought to be drawn from them by India are in all cases correct. In some they are, in some they are not.

The contention that the Rann itself is the boundary, between coastal States separated by it, is borne out by the numerous descriptions in words and depictions in maps that describe or portray it as a separating or bounding entity. In regard to the texts that describe Kutch as bounded or bordered by the Rann,

India points out that Sind, or parts of Sind, are similarly described as bounded or bordered by the Rann. That in fact brings out the precise point. The Rann stands in an identical relationship to the States bounded by it, which can be the case only if its width is regarded as a broad belt of boundary (or no man's land, which is not the case of either Party). This view of the boundary is consistent with all other evidence that is reliable. It is consistent, moreover, with the history of the tract and its nature. India contends that distant history is irrelevant, but in my opinion in so far as it contradicts the assertion of India that the Rann has always belonged to Kutch, it is particularly relevant. If the whole width of the Rann could not belong to Kutch in distant or historical times, how, when and by what process did it begin to belong to Kutch? It is impossible to imagine how, on drying up, a sea bed could become exclusively a part of one or another coastal State. The state of exercise of jurisdiction also confirms it. It appears that, while the political officers allowed assertions of Kutch that the whole Rann belonged to Kutch to remain unchallenged, and some of the officials of British India expressed similar views, others, who actually performed acts on behalf of British India, continued to exercise jurisdiction in the northern half of the Rann. India argues that the omissions to contradict the assertion of Kutch, and the expression of similar views by some British officials, must be regarded as overriding the exercise of jurisdiction. In my opinion however, if there is an inconsistency between simple verbal assertions and actual performance of functions, it is the actual performance that must override the verbal assertions to the contrary.

I have therefore no hesitation in finding that the Rann itself was the boundary between coastal States, and that, as between Sind and the other coastal States including Kutch, that boundary was never reduced to a line; our task now is to reduce it to a line of boundary between India and Pakistan. On this view of the matter, it is unnecessary to consider the further argument of Pakistan that exercise of jurisdiction by it in the northern half of the Rann after 1947 is an independent source of title.

Once it is found that the Rann itself is the boundary, two questions arise :

- (i) Which Rann is today to be regarded as the boundary? . . . the Rann of 1819, the Rann of Macdonald's Survey, the Rann of Pullan's Survey, the Rann of Erskine's Survey, the Rann of Osmaston's Survey, the Rann of 1947, or the Rann of today? and
- (ii) In the width of the boundary, namely the Rann, where does the widthless line lie that accurately defines the alignment of the meeting points of coastal jurisdictions?

Pakistan has argued that the relevant contours of the Rann are those of 1819. For this purpose, Pakistan has produced many pre-survey maps to show that what Pakistan calls the upper lands and the delta lands in dispute were then a part of the land of Sind and that it was only in consequence of Macdonald's Survey that they came to be regarded as parts of the Rann. If my finding had been that the whole Rann belonged to Kutch in 1819, it would have been necessary to determine with accuracy the parts which were then not included in the Rann,

because it would have been highly anomalous if a part of Sind were to get converted into Kutch merely because a surveyor regarded it as physically no longer land. However, since I have come to the conclusion that the Rann as a natural feature itself forms the boundary between the States that it divides (like a lake or a large river), the only importance of the alignment of its coast line lies in its effect on the accurate line of boundary. To me, it seems legitimate (and convenient) for this purpose to take the contours of the Rann as they are shown in the latest pre-partition survey maps, instead of trying to reconstruct them as they must have been in 1819. There is a practical difficulty in doing that. It is established that before the earthquake (16 June 1819) a tract known as Sayra extended northwards from the mainland of Kutch, up to at least Sindri if not to Kaeera Nulla, which was longitudinally separated from Sind by the Khori River. It is known that the earthquake submerged Sindri and a part of what Pakistan calls the delta lands, obliterated whatever was left of Sayra and of Khori River, except traces of its bed, threw up an embankment later called Allah Bund, and caused other extensive topographical changes in the area. Pakistan argues that, since Sindri had disappeared by being submerged in June, the Treaty of 1819 did not cover it. But strictly speaking, by being submerged, Sindri could no more become Sind than the delta lands could become Kutch. If then an attempt were to be made to reconstruct the earlier conditions, Sayra would have to be reconstructed. For doing that, the available material is wholly inadequate. Pakistan Map 5 is the only one which has a vague outline suggesting its extent, but even in that map its shape beyond the edge of the lake can only be guessed. It appears to me permissible to regard both Sayra and the part of the delta lands in dispute where the lake was formed to have merged into the width of the boundary which is now to be reduced to a widthless line, and to regard the vertical line as the western limit of that boundary.

Pakistan claims that the northern part of what it calls the delta lands in dispute, and most of what it calls the upper lands in dispute are even today an extension of the mainland of Sind. The evidence of continuous grazing by the inhabitants of Sind in Dhara Banni is clear. In its oral submissions India in fact admitted that Dhara Banni was too far away to be a grazing ground for Kutch. [This admission incidentally shows that the report of the Bhuj Vahivatdar in 1876 (Ind. Doc. A-66) asserting the contrary is an unreliable report]. The grazing rights in bets nearest to the Sind coast would appertain to that coast. Even if Dhara Banni were to be regarded as a bet (which in my opinion it is not) it would in equity be a part of Sind because of those rights. On the evidence, it is established that Piro Valo Kun, Dhara Banni and Chhad Bet are valuable grass lands (particularly Chhad Bet) and that the cattle of Sind have always grazed on them. Since they are contiguous to Sind, it would make no difference, from the point of view of their being part of Sind, whether they are regarded as part of the mainland of Sind or as part of the width of the boundary, but for determining the widthless line to which the boundary is to be reduced the answer to that question would be relevant. Looking at the topography carefully in the survey maps and taking it with other evidence, I am of the view that, starting from the northern end of the vertical line and proceeding eastwards, the southern edge of Allah Bund can be regarded as the limit of the mainland of Sind up to

69° 15' of east longitude. To the east of this point the southern edge of Allah Bund itself and most of the tract to its north appear to be "runny", enclosing the raised grounds marked as Nadewali, Sarfbelo and Talocha Doi on Pakistan Map 40. It appears more correct to regard these raised grounds as bets even though they are joined to the land to their west by a small neck, since their straggling extent is very much larger than the neck that forms the connection. Cutting across that neck, and another to its north, the limit of the mainland of Sind, from the point on the southern edge of Allah Bund where longitude 69° 15' east intersects it, can be regarded as going northwards in a smooth curve, following the edge of the "runny" tract in Pakistan Map 40, turning east at 24° 17' of latitude till Dhara Banni is reached, and then running round Dhara Banni. Chhad is a small portion of Dhara Banni jutting out to the west. Since its width is narrower at the point where it begins to jut out, it is possible to regard it as a bet attached by a small neck to Dhara Banni. Since, however, its length and general size are not unduly large in proportion to that neck, it might properly be regarded as a part of Dhara Banni. It does not appear to be necessary to choose between those two ways of regarding Chhad Bet because this would not affect the determination of the widthless line of boundary.

On the Kutch side, I would regard Pachham and Bela as parts of the mainland of Kutch, but Khurir as an island in the Rann.

My answer to the first question is that the Rann which may be taken as forming the boundary today is bounded in the west by the vertical line, in the east by the Gujerat-Palanpur coast, and in the south and north by the edge of the mainlands of Kutch and Sind respectively, as described above.

We turn now to the second question. It is demonstrated in Pakistan Map 104 that, apart from his view of the northern part of the chain of Nara Bet islands (which will be considered presently), the enquiry conducted by Miles in 1823 showed that the bets in the eastern part of the Great Rann and the Little Rann belonged to the coast to which they were nearest, and fell on either side of a line drawn equidistant from opposite shores. The line drawn to divide the Keswala Bet, in 1860, is again equidistant from opposite shores. So also is the line drawn to divide Poong Bet in 1867. Peile, while dealing with the Kutch-Morvi disputes, said in 1876 that "where Cutch has the western shore and Kathiawar the eastern, a line should be drawn up the Rann, equidistant from either margin, and this should be the boundary". (Pak. Doc. B.282). Kennedy, deciding the Kutch-Morvi disputes in 1898, said that "the rule, as already stated, is half and half across the Rann". No precedent to the contrary has been shown. It seems to me clearly established on the basis of precedent that the wide boundary of the Rann has invariably been reduced to a line in its middle, equidistant from its opposite shores, on each occasion where it was necessary to reduce it to a line.

On principle also, whether the Rann is regarded as accretion of land to its opposite shores, or as a natural uniform width of something that is not land dividing the lands on either side, it would automatically reduce itself to a middle line, equidistant from its shores, whenever it is to be reduced to an accurate line of boundary.

In pre-British times, it seems that no attempt was ever made to determine accurate lines of boundaries in the Rann. Certain fixed points appear to have been accepted by custom as lying on the boundary. There are, however, two British maps of that period—Pakistan Maps 1 and 4—which show a line of boundary between Sind and Kutch. Pakistan Map 1 pictorially indicates that the boundary is an artificial line slightly to the south of the 24th parallel. Pakistan Map 4 follows a supposed course of the Luni River. During the British times, the question of ascertaining the accurate line of boundary appears to have been raised for the first time in 1875. It was then found that, while the line lay in the middle, only a few spots here and there had been fixed by custom as lying on it. One of those points, Mianji di Chan, is not described with sufficient accuracy to be ascertainable. All that can be said about it is that it was 24 miles from Rahim ki Bazar, which would put it roughly in the middle. Another point a half mile north of the Dharamsala on Gainda Bet is ascertainable. It accords with what the Rao had himself said in 1854, when the Dharamsala was being constructed. The correspondence that was then exchanged (Ind. Docs. A-70 and A-71) shows that the Rao regarded Gainda Bet as the limit of his territories and the place where the Dharamsala was to be built, on his side of the limit.

In 1885, the Collector of Thar Parkar said that the centre of the Rann had always been considered to be the border, and the grazing lands and islands had been treated as belonging to the side to which they were nearest (Pak. Doc. B.9), and the Commissioner in Sind said that this position was well understood all round the Rann (Pak. Doc. B. 378).

In 1897, the Nara Bet chain of islands was disputed between the Palanpur coast and Sind, and it was decided (Ind. Doc. A-88) that two islands of that chain, Nara and Parpatana Bets (lying nearest to the Palanpur coast), did not belong to Sind. (It will be noticed that this is divergent from the view Miles—Indian Document A-87—took in treating the entire chain as one island depending on the Palanpur coast. The explanation probably is that in 1823 Sind was hostile territory and the British had little to do with it).

In 1903, the Commissioner in Sind said that the rights of Sind extended to the centre line of the Rann (Pak. Doc. B. 381).

In 1927 and 1938 the Thar Parkar administration in Sind repeatedly asserted that the Sind jurisdiction extended to the middle of the Rann. (Pak. Docs. B. 20, B. 24).

In 1955, the Government of India acknowledged (Pak. Doc. B. 105) that its border with Pakistan was near Karim Shahi, which is a place lying approximately in the middle of the Rann.

There appear to be two alternatives for determining the accurate line of boundary. The Western Terminus is agreed upon. There is also an agreement relating to the Eastern Terminus from which that terminus can be ascertained; in my opinion it is Becher's point. The first and perhaps the proper alternative is to take the technically most perfect and the most recent maps of the area

and, treating the limits of the Rann to be as already described, to mark out a line from the east that runs equidistant from opposite shores, till it meets the mid-point of the vertical line in the west.

The second, and for practical purposes, the more convenient solution, is to connect the known points together with straight lines departing as little as possible from the middle. This would mean joining the Western Terminus to Karim Shahi, and Karim Shahi to the point a half mile north of the Dharamsala on Gaiinda Bet, in straight lines; then proceeding eastwards parallel to the lines of latitude up to longitude $70^{\circ} 30'$ east, and joining the intersection to the mid-point between Parpatana Bet and the bet immediately to its north, and prolonging it farther eastwards by two minutes of longitude; then connecting the point so obtained to Becher's point in another straight line.

OPINION OF THE CHAIRMAN

By agreement of the Parties, the question to be resolved by the Tribunal is the alignment of the boundary between the two termini, which are indicated on the Award Map (Map C) by "WT" for the Western Terminus, and by "ET" for the Eastern Terminus. It is the case of both Parties that the Tribunal is not bound to adhere to either claim line if it concludes on the evidence on record that the boundary lies elsewhere, between the extremes of those lines.

Two preliminary points need to be disposed of before the main aspects of the case are examined. Pakistan submits that the Diplomatic Note of the Indian Ministry of External Affairs to the High Commissioner for Pakistan in India, dated 28th July 1955, amounted to an admission by India that at the relevant time the border between India and Pakistan lay near Karim Shahi (see Chapter IX). The statement cannot in the context of the related correspondence, which finally led to the present dispute, be understood as an admission of the alignment of the boundary. The significance of the passage in the Note is not, in view of the letter as a whole and of the protracted diplomatic correspondence, greater than any other piece of evidence showing the extent of patrolling at any particular moment between the date of Independence and 30th June 1965. The Note by itself therefore is not of such a character as to conclusively affect the case of India.

Similarly, no decisive importance can be attached to the statement made in the Pakistan Note presented during the Indo-Pakistan Minister Level Conference on the Western Border Issues, held in January 1960, that before 1762 the whole of the Rann up to its northern extremity, and even beyond, including Rahim ki Bazar and Virawah, fell within Kutch jurisdiction (see Chapter III). In the context where it appeared, this pronouncement was merely an argument referring to certain historical accounts and cannot be construed as an admission binding upon Pakistan and precluding the Tribunal from reaching an independent conclusion on the matter.

The greater part of the disputed territory falls in the Great Rann. The nature of this tract has been discussed in Chapter II with reference to the submissions and arguments of the Parties on that topic. The question whether the Rann on the whole is most closely akin to land, or to what Pakistan has termed a "marine feature", has no decisive bearing on the determination of the issues in the case. For the purpose of this opinion, it needs only to be observed that the Rann is a unique geographical phenomenon.

Pursuant to the Agreement of 30 June, 1965, the Tribunal is called upon to determine the border between India and Pakistan in the light of their respective claims and of the evidence produced before it. The Agreement does not include

a rule analogous to the principle known as *uti possidetis*, under which the administrative or other boundaries existing on a postulated historical date are to be ascertained and given effect by the Tribunal, nor have the Parties later agreed on such a date. It is true that one important element of a notion of this kind is common ground and therefore binds the Tribunal, viz. the agreement between the Parties that the boundary between India and Pakistan is a conterminous boundary, and that the disputed territory must therefore belong to one or other of them and cannot belong to any third party. It does not necessarily follow from this proposition, however, that the territory cannot at any relevant time have had an undefined status.

In view of what has now been said, the territorial dispute which the Tribunal is called upon to decide does not differ in essence from other like disputes in which opposing claims have been made in reliance upon conflicting testimony, and where a judgment has to be rendered on the relative strength of the cases made out by two parties.

While the Parties have not expressly joined in accepting a precise critical date, their pleadings and arguments embody a wide measure of agreement on certain dates or years as having particular relevance.

One such date is 13 October 1819, when the East India Company concluded the last of the three Treaties with the Rulers of Kutch. Both Parties submit that the boundary of Kutch has remained unchanged since the Treaty of 1819. In tracing the historical evolution, 13 October 1819 has therefore for both Parties been an important date. India, however, also maintains that the boundary after 1819 may have become crystallised and consolidated.

Both Parties have developed their cases with primary reference to and in reliance on evidence relating to the long period of British rule on the sub-continent. The attitude and actions of the British Government, both as Suzerain Power and as territorial sovereign at various times during this epoch have on each issue been deemed by both Parties to be of crucial significance. For that reason, the time of Independence is of decisive importance.

With regard to the period after 1947, the main difference between the Parties' cases is that Pakistan relies upon certain acts of jurisdiction as constituting additional, independent sources of title to the disputed territory, while India denies that they are of such character.

Pakistan, at a late stage in the proceedings, introduced the argument that the rights claimed by Pakistan are those of the people of the Muslim unit which was conquered by the British in 1843 and then, as it were, restored to the Muslim State of Pakistan in 1947. According to this submission, Sind would have been held in trust by the British Government in a capacity of territorial sovereign incapable of acting as such, while Sind itself would have been a fettered sovereign possessing latent territorial rights; the dispositions of Great Britain during the century of its administration of Sind would in such an eventuality be without effect in this case. However, this submission was not pressed by Pakistan in

argument, and it is not compatible with its case as a whole. While the principle of which it is an illustration is of interest, application of such a principle would be difficult and would introduce an element of instability in the relationship between nations which for a long time have been under foreign domination.

However, one cannot escape noting the somewhat strange consequence of history that in this case Sind will be constrained to suffer from possible indifference and neglect on the part of the British to safeguard and maintain Sind's proper territorial interests.

In the context of the constitutional system of India during British times, the very concept of sovereignty, and the distribution and exercise of sovereign functions was complex.

The constituent elements of sovereignty, as evolved in practice on the sub-continent during the relevant time, must be understood in order to permit a proper appreciation of the import of the evidence.

It appears from Tupper's treatise, which was a compilation of the decisions of the Government of India in political cases, that the Government was faced with decisions requiring analysis and application of the concept of sovereignty primarily in cases calling for a delimitation of various elements of the sovereign authority of rulers of Indian States. For the system which had evolved in India was one of

"...local autonomy of a number of small States under a central power charged with the duties of settling inter-statal disputes and maintaining the general peace of the country—a position common enough in India, both in the past and in the present, and one which implies that certain rights of sovereignty are exercised by the central and certain other rights of sovereignty by the local authorities." (Tupper, *Indian Political Practice*, Vol. I, 1895, p. 217).

At one time, the issue arose whether the Province of Kathiawar was subject to British laws. In that instance, principal aspects of the distribution of sovereignty came into clear focus and were discussed by Sir Henry Maine, to whom it fell to consider the case in 1864. The central issue was the actual and proper extent of distribution of sovereign powers between the British Government and the numerous local chiefs in Kathiawar. In a Minute of 22 March 1864, Sir Henry initially established that sovereign rights are divisible and that "...there is not, nor has there ever been, anything in international law to prevent some of those rights being lodged with one possessor, and some with another". (*op. cit.*, p. 44). In India, Sir Henry continued: "...there may be found every shade and variety of sovereignty but there is only one independent sovereign—the British Government". (*op. cit.*, p. 45). On the mode of actual distribution of sovereign rights in India, Sir Henry pronounced:

"The mode or degree in which sovereignty is distributed between the British Government and any given Native State is always a question of fact,

which has to be separately decided in each case, and to which no general rules apply." (*ibid.*).

It may be noted that Tupper added that "there are certain circumstances which would in every case, justify the interposition of the Paramount Power" (*op. cit.*, p. 44).

In the context of discussing the question of how to distinguish State territory from territory which was part of British India, Tupper initially observed :

"Though part of the British Empire, State Territory is treated as foreign territory for the purposes of British laws. It is that to which British laws do not extend of their own force, and over which a chief exercises hereditary authority of the nature of limited sovereignty, those rights of sovereignty which he does not exercise being vested in the British Government." (*op. cit.*, p. 251).

Tupper then enumerated various tests which ought to be applied in determining whether a territory was State territory or a part of British India. In this context, he no doubt had in mind cases where a whole territorial unit was in issue, as distinguished from the actual extent of territorial units. The principles enunciated by him nevertheless provide an important clue to the practice of the British Government in determining issues turning upon notions of territorial sovereignty. It is for this reason worth observing that, according to Tupper, the overall general principle to be applied was usage :

"The question of sovereignty or no sovereignty must be decided in each particular case on the whole evidence available which bears on the relations of the Chief with the British Government and on the treatment extended by that Government to him and to his territory. We must look to the documents, if any, which set forth those relations, and to any declarations of policy on the part of the British Government which may throw light on them. Above all things, we must look to usage, to the relations in fact and practice established between the parties; for usage must be the guide where documents are silent, and if there is a conflict between the documents and the usage, the usage must prevail." (*ibid.*).

The political system in India during British times in eminent measure evolved as a matter of practical experience in response to the exigencies of each period. The rich spectrum of innumerable shades and degrees of sovereignty designed to be exercised variously and in entangled combinations by local chiefs and sovereigns, and by the ever present Paramount Power, strikingly illustrates the flexibility and pragmatism inherent in the British administration of India.

Tupper's conclusions on the tests to be applied in determining whether a territory was State territory or a part of British India read as follows :

"The really essential questions are what have we said and what have we done? . . . What have been our declarations of policy? Have we expressly or by implication announced an intention of leaving the Chief to conduct the government subject to some specified, or customary but unspecified, degree of

control? Have we habitually allowed the Chief, in virtue of his hereditary position and without investing him with powers under our law, to exercise functions of government,—for instance, to administer justice, collect revenue and impose taxes, to maintain troops or police, or other public establishments? Have we abstained from applying our laws to the territory and from bringing it under the jurisdiction of the ordinary courts? Is the territory called a State in official documents? Is it included in Foreign or State territory in our statistical returns? Do we assume it to be foreign territory for the purposes of our laws,—of the Prisons Act, for example, of the Foreign Jurisdiction and Extradition Act, of the Civil Procedure Code? . . . Did we omit the territory from the list of Scheduled Districts framed in 1874? . . .; Not one of these tests would be conclusive if applied by itself; even the habitual exercise of the functions of government might leave the question doubtful if the functions exercised were very petty. . . . But if several of these tests pointed to the same conclusions, we could hardly err. . . ." (*ibid.*, pp. 251-2).

It is established in the present case that the Maharao of Kutch enjoyed exclusive territorial and jurisdictional sovereignty over all his dominions, subject only to those restrictions of general applicability in the British Indian Empire which were inherent in the status of Kutch as a vassal in relation to the Paramount Power. There is for this reason no question of a conventional division of the various remaining sovereign functions between the State of Kutch and the Paramount Power. There was, however, such division, e.g., in respect of the Estate of Suigam, whose rulers were "non-jurisdictional Thakores", i.e., territorial sovereigns deprived of the power of exercising criminal jurisdiction in their proper territory.

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Reducing the case to its basic elements, three main issues are to be resolved by the Tribunal.

The first is whether the boundary in dispute is a historically recognised and well-established boundary. Both Parties submit that the boundary as claimed by each of them is of such a character.

The second main issue is whether Great Britain, acting either as territorial sovereign, or as Paramount Power, must be held by its conduct to have recognised, accepted or acquiesced in the claim of Kutch that the Rann was Kutch territory, thereby precluding or estopping Pakistan, as successor of Sind and thus of the territorial sovereign rights of Great Britain in the region, from successfully claiming any part of the disputed territory. One question which arises in considering this issue is the true meaning of "the Rann" in the context of related documents.

The third main issue is whether the British Administration in Sind and superior British authorities, acting not as Paramount Power but as territorial sovereigns, performed acts, directly or indirectly, in assertion of rights of territorial sovereignty over the disputed tract which were of such a character as to be sufficient in law to confer title to the territory, or parts thereof, upon Sind, and thereby upon its successor, Pakistan; or, conversely, whether such exercise of sovereignty on the part of Kutch and the other States abutting upon the Great Rann, to whose

rights India is successor, would instead operate to confer title on India to the territory, or to parts thereof.

Did there exist in the disputed region a recognised and well-established boundary at the time of the emergence of India and Pakistan as independent nations, and, if so, what was its alignment? In analysing the evidence relating to this question, the first point requiring consideration is whether the so-called vertical line between the Western Terminus and the Western Trijunction had been and is settled in a definitive fashion.

As described in Chapter VIII, this line was demarcated with pillars in 1924 jointly by the Administration in Sind and the Maharao of Kutch, the expense being shared equally between Sind (with the sanction of the Government of Bombay) and Kutch. The vertical line was demarcated together with the horizontal blue dotted line that was undisputedly laid down as a boundary between Sind and Kutch by the Resolution of the Government of Bombay of 24 February 1914. It has not been suggested that any difference was made in the demarcation proceedings between the horizontal line and the vertical line, or that the whole work, which to judge from all contemporary documents was both arduous and costly, was not viewed as one indivisible undertaking. If any further proof is required of the fact, *prima facie* evident though it is in the circumstances, that the British authorities clearly understood the pillars to represent a delimitation of British and Kutch territory, it may be found in the references to the "the Sind-Cutch boundary" in the relevant correspondence. Moreover, the Superintendent of Land Records in Sind, who was in charge of the demarcation on the Sind side, in a letter of 12 July 1923 to the Collector of Karachi (Ind. Doc. TA-16) expressly referred to the Western Trijunction as being one between Jati and Badin Talukas and "the Cutch State". In a report of 10 January 1924 (Ind. Doc. TA-17), he also referred to the "trijunction of Badin and Jati Talukas and the Cutch territory in the north". The vertical line as a boundary between Sind and Kutch was never questioned thereafter either by the British or by Kutch.

It is true that the erection of the pillars was prompted originally by representations of the Rao and that the vertical line, in distinction to the horizontal line, was not expressly and unequivocally encompassed by the wording of the Resolution of the Government of Bombay, embodying the compromise settlement which had previously been sanctioned by the Government of India. Whatever may have been the motive of the Rao in proposing an extension of the demarcation so as to include the vertical line, the acceptance of this proposal by the Commissioner in Sind, and the subsequent conduct of the Administration in Sind and of the Government of Bombay, coupled with the absence of any censure or other action then or later on the part of higher British authorities, are necessarily such as to preclude Pakistan from claiming that this demarcated boundary be put in issue. It is not open to the Tribunal to disturb a boundary settled in this manner by the British Administration and accepted and acted upon by it, as well as by the State of Kutch, for nearly a quarter of a century.

In my opinion, therefore, the portion of the boundary between the Western Terminus and the Western Trijunction lies along the vertical line as demarcated

on the ground, and the pillars standing there mark the boundary between India and Pakistan.

In India's submission, the Resolution of 24 February 1914 presupposed and was based on the existence of an established boundary running roughly along the northern edge of the Great Rann. It is not possible to interpret the Resolution so extensively as to imply a determination of rights in the whole of the Great Rann. The matter disposed of in the Resolution was confined to the territory claimed by the Rao, which was delimited by a green line on the relevant map (Ind. Map B-44); the easternmost point of this line was the aforesaid trijunction. There are no inquiries in the file concerning the Great Rann as a whole. Nor is it possible to draw such far-reaching conclusions by mere inference from the appearance on Indian Map B-44 of a purple line with a dash-dot symbol along the northern edge of the Rann, particularly since the same riband and the same symbols are used to mark internal administrative boundaries within Sind. Hence, the Resolution and the map are recognised as a binding determination only of the portion of the boundary up to the Western Trijunction.

No evidence and no convincing arguments have been adduced by either Party for showing, even as a matter of probability, that the Great Rann as a whole fell under the exclusive sovereignty of either Kutch or Sind in the 18th century, or indeed in more remote historical times. In the last decades of the 18th century, armies repeatedly crossed the Rann from either side. These military expeditions, though at times culminating in ferocious battles, resulted at most in the establishment of short-lived outposts in alien, hostile territory. If, at the time of the appearance of the East India Company in the area, the sovereigns of either Sind or Kutch had permanently held territories on both sides of the Great Rann in firm control, a strong implication would arise that the intervening tract, barren and uninhabitable though it was and is, would have been under the same dominion; however, such was not the case.

The pleadings and arguments of the Parties, and the historical documents brought in evidence by them, unfold, as the fragmentary pieces are assembled, the contours of the political situation in the region at the time when the East India Company gained a foothold there. Kutch was torn by internal rivalries among the Bhayad, which had left the Rao in only nominal control of parts of his realm. The Amirs ruled over a Sind split into three almost autonomous provinces, Thar Parkar not even being regarded as part of "Sind proper".

Separating these feudal kingdom was the Great Rann. It could not but constitute a formidable physical barrier cutting the territories surrounding it apart from one another.

It is not unreasonable to assume that in the fluid political situation thus prevailing in the region in the beginning of the 19th century, given the limited means of communication then existing, the Rann proper was in fact viewed as itself forming the boundary between the adjacent lands. This theory, alluded to as a suggestion in Pakistan's first oral argument, was made the principal basis of

Pakistan's case in its second oral argument. In fact, boundaries having the character of broad belts of territory are a well-known historical phenomenon.

The Sayra lands, at least up to and including Sindri which were submerged in the earthquake of 16 June 1819, admittedly were Kutch territory. Pakistan has argued that Kutch sovereignty over Sayra lapsed when it was destroyed. Had Sayra been an island in the high seas, this argument might have been cogent. The transformation of a territory from cultivable land to a lake, or to a swamp, marsh or desert, cannot, however, by itself affect established sovereign rights over it.

Apart from Sayra, no evidence on record is such as to permit the conclusion to be drawn that in 1819 the dominion of either the Amirs or the Rao extended over the Great Rann. The Treaty of 13 October 1819 did not expressly define the territory of Kutch, nor had the previous Treaties of 1809 and 1816 done so. The undertaking by the Rulers of Kutch in the latter Treaties that their troops would not cross the country on the opposite side of the Gulf and the Little Rann was, as pointed out in Chapter III, understood by a later Rao as equivalent to laying down the Gulf and the Rann as the boundaries of Kutch; MacMurdo, who negotiated the Treaty of 1816, employed the same terminology in alluding to the clause in question. While these statements related only to the Little Rann, nothing indicates that they would not be equally valid for the Great Rann.

In my opinion, it is thus established beyond doubt that Sayra belonged to Kutch and that the portion of the Rann which replaced it after the earthquake remained Kutch territory, but no proof has been given of the status of the remaining parts of the disputed territory in 1819 which is a sufficient basis for holding that it was then either Sind or Kutch.

Hence, it is my conclusion that the boundaries in the Rann had not then been determined even though there must have existed some limits in space to the sovereign rights of the neighbouring countries. My notion as to the true state of such limits during this epoch is akin to Pakistan's conception of the Rann as forming a broad belt of boundary. This accords with the pronouncement made on 21 November 1884 by Erskine, later Commissioner in Sind, that the actual boundary was the Rann itself (see Chapter V), echoing the statement to the same effect made by the Collector of Hyderabad in his letter to the Commissioner of 7 August 1884 (see Chapter VIII).

It appears likely that, in and after 1819, the potential control over the disputed territory, in terms of military and police power, lay with the British, and India so submits. Had the occasion arisen for the British to protect Kutch against an invasion from Sind, they would no doubt have defended Kutch territory in their capacity of allies of the Rao. However, this never happened, and the activities in fact undertaken were of a different nature, most closely similar to police surveillance; illustrations thereof are the instances of intermittent exercise of power against roving "banditti". The British obviously then were and acted both as an ally of Kutch and as an independent sovereign power in the region, let alone a power in emergence. While the British connection with the Rann at the time, loose and indistinct as it appears to have been, cannot in law be equated

with genuine display of State authority, it would be fallacious to assume that the British could not act as independent sovereigns until they acquired the territory of Sind in 1843, which was then immediately brought under exclusive British Government administration.

It is argued by Pakistan that if the sovereignty of Kutch did not in 1819 extend over the disputed territory, it follows by a series of logical steps that Sind then began where Kutch ended and that the boundary between Sind and Kutch on 18 July 1947 was what it was in 1819. India in its main argument shares the view of Pakistan that Kutch did not increase after 1819, but argues conversely that the whole Rann at that time formed part of Kutch. However, issues of territorial sovereignty do not turn upon logical deductions from abstract precepts or postulates, valid though they may be *per se*.

With respect to the period between 1819 and the publication of the maps in Macdonald's Survey (1871), I must declare that I attach little weight to the statements of various authors who have described the Rann as an entity separating Sind and Kutch, or bounding Kutch or Sind, respectively. Most of these passages describe geographical or topographical features of the region and cannot be interpreted in a political sense. Even were they to be read as such, they would not be of material value in assessing sovereign rights because of their indefiniteness and the preponderance of other and more recent evidence of greater inherent significance.

One publication in the relevant period appears to be of more substantial importance than the others, *viz.* the East India Gazetteer by Walter Hamilton. The 1820 and, particularly, the 1828 edition of this work support India's case since they describe Kutch as consisting of two portions, one being the Rann. However, the map attached to the 1820 edition (Pak. Map 140) is not in keeping with the text as it seems to depict the Rann as a separating entity. The treatise by Hamilton, even if it constituted a remarkable scholarly achievement, is, moreover, a secondary source of authority, and several crucial texts relied upon by the author in support of his thesis are not on record. Being the sole seemingly unequivocal statement dating from this time for the proposition that the Rann was recognised as forming part of Kutch, it cannot be deemed conclusive when examined in the context of the political situation then prevailing in the region.

Most of the pre-survey maps described in Chapter V were produced in the same period. Because of demonstrable inaccuracy, vagueness and inconsistencies, they are generally such as not to be accorded great weight. The only feature which recurs sufficiently often to establish a pattern or trend in these maps is the depiction of the Rann as a "marine feature" and as a "separating entity"; they sometimes also show certain bays as possibly falling under the dominion of sovereign entities abutting upon the Rann. Even India states that "in the course of history it is highly probable that the nearer State will occupy [an] island". The depiction of the Rann as an entity of its own in these maps is in consonance with the conclusion reached by Jacob in his report on the Keswala Bet dispute that no one could be said to have been the "proprietor" of this bet "during the year of guarantee" (which must have meant in 1819 and onwards). The notion of the

Rann as constituting no man's land persisted for a long period of time, up to 1938, as is evidenced by the statements quoted in Chapter VII.

The first of the maps which indisputably showed the main portion of the Rann as belonging to Kutch was produced in 1878 (Ind. Map B-46). However, no other map with such a clear depiction appeared for a long time thereafter.

The main body of evidence relied upon by the Parties which has a major bearing on relevant issues in the case relates to a period beginning about 1870, and ending at the partition of the sub-continent. At the inception of this period, political conditions in the region had crystallised and were to remain essentially unchanged until Independence. On the northern side of the Great Rann was the Province of Sind, which had become a part of British India and hence was under direct and exclusive British sovereignty. On all the other sides were Indian States under British suzerainty. Great Britain ruled as Paramount Power, but the Indian States were permitted a varying measure of internal autonomy, including exclusive territorial, if not always jurisdictional sovereignty. There was thus a clear distinction between British territory and the territory of Indian States, and there must have existed the possibility of territory having an undetermined status, for the system was not conceptually closed.

The evidence falls into several broad categories, mainly dealt with separately in the various Chapters of this Award: maps, non-cartographical evidence, such as official pronouncements and statements in the form of administration reports, etc., incidents when boundaries in the region were put in issue, and exercise of acts of authority in disputed territory. This material will now be examined seriatim; its total impact on the alignment of the boundary will thereafter be discussed in a concluding section.

I will first examine the maps produced in the various surveys and the other maps described in Chapter V.

The Parties agree that Macdonald's Survey was a combined revenue and topographical survey. India contends that the maps produced in this survey showed a southern boundary of Sind running roughly along the northern edge of the Rann and that this was a conterminous boundary between Sind and Kutch, authoritative for Sind, but not, in the absence of an agreement on its part, for Kutch. Pakistan maintains that the boundaries were village boundaries, as the primary object of the undertaking was to make a rough survey for revenue purposes. The kind of inquiries undertaken by the surveyors, the essential elements of which are undisputed between the Parties, support Pakistan's view. No evidence on record establishes that the surveyors in drawing the maps even attempted to inquire into the actual or historical extent of civil and criminal jurisdiction exercised by Sind authorities, or to ascertain where Government functions were otherwise exercised by the British or by adjacent Indian States.

On the consolidated map (Ind. Map B-3), which may be viewed as the final result of the survey, the name "Kutch" significantly is indicated merely on its mainland, and the Rann is called "Rann of Kachh". On the Indian Map B-2

series also, the Rann proper is so marked. Significantly Erskine, later Commissioner in Sind, stated in his aforementioned letter that Macdonald's maps "did not show the limits towards the Runn of Cutch of the Province of Sind but merely the limits of defined dehs or village lands . . .". Moreover, Sheet 92 of Indian Map B-2, on which the Macdonald line runs north of Rahim ki Bazar, thus leaving the only important settlement on the northern side of the Great Rann (undisputedly a Sind village) in what according to India's interpretation of the line would have been Kutch territory, reinforces the conclusion that the boundary appearing on Macdonald's maps was something else than a Province or State boundary. The Indian interpretation of Macdonald's line would also mean, that great portions of what is marked as Mahomed Khan's Tanda at that time belonged to the State of Kutch—which is unlikely.

The line on the maps produced in Macdonald's Survey for these reasons cannot in my opinion have represented a conterminous boundary between Sind and Kutch.

Pullan's Survey was a survey of Kutch undertaken in co-operation with the State of Kutch. He reported to the Government of Bombay, and naturally also to his superiors in the Survey of India. There are indications that Pullan's initial conception was that the Great Rann was Kutch territory and that his task was to survey it as such. It would therefore seem not unreasonable to assume that, as India submits, Pullan in fact during the relevant period did survey the Rann as forming part of Kutch.

The question of what may have been in Pullan's mind or, for that matter, what he in fact did between 1880 and 1885 is, however, irrelevant in view of the correspondence of 1885, set out in Chapter VIII, during which the Resolutions of the Government of Bombay of 3 July and 7 August 1885 were passed. In the course of this correspondence, the Commissioner in Sind forcefully stated that the northern half of the Rann pertained to Sind and that "if any more defined boundary than now exists is required it should merely consist of boundary pillars as near the centre of the Runn as possible"; he advised, however, against "any hard and fast delimitation". Pullan, in response to the Resolution of 3 July 1885, stated that he had carefully abstained from laying down or even suggesting any boundary between Kutch and Sind. This statement may have to be taken cum grano salis, as Pullan would naturally be inclined to defend himself against the inference that he had acted under a misapprehension. The essential point to note is, however, the attitude of the Political Department of the Government of Bombay, set out in said Resolution, that it did "not desire that any "question of boundaries in the Runn between the Province of Sind and the Cutch State should be raised". It is impossible to maintain that this decision of the Government meant that the boundary was settled and defined in such a manner that the question of its alignment was not open for discussion.

It has not even been contended that the Government of Bombay in passing the two Resolutions of 1885 exceeded its competence and that the decisions for

that or any other reason were not final and authoritative. No boundary between Sind and Kutch in the Rann shown on maps from that period could therefore possibly constitute an established and settled boundary between Sind and Kutch recognised as such by the British Government. The conclusion thus is inescapable that such an interpretation cannot be placed on any of the maps produced by Pullan himself. Moreover, by the same token, the Resolutions definitely confirm that the line on Macdonald's maps did not represent an established conterminous boundary between Sind and Kutch recognised as such by the British Government.

The maps produced in Erskine's Survey of 1904-1905 cover a minor portion in the western sector of the disputed territory, extending eastwards up to the vicinity of Rahim ki Bazar. The alignment of the boundary shown on these maps south of the Western Trijunction has no direct relevance here in view of my conclusion set out above relating to the vertical line. East of said Trijunction, the maps show what the sheets define as a Province or State, or only State boundary, lying roughly as claimed by India. Indian Map B-11 also indicates that this boundary was intended by the map maker to be a conterminous boundary between Sind and Kutch, since the Rann south of Sinatri Dhand is marked "Cutch". Erskine's sources of information are not fully known, but it seems as if the advice of the Superintendent, Trigonometrical Survey, was decisive. It was given while a reference to the Government of Bombay was still pending.

However, the material on record concerning Erskine's Survey also contains the correspondence between the Commissioner in Sind, the Political Agent in Kutch and the Government of Bombay, which is summarised in Chapter V. It will be examined in another context. At this point, I observe only that although the boundary symbols shown on Erskine's maps according to the maps themselves do constitute a depiction of a Province or State boundary, which on Indian Map B-11 is, moreover, conterminous between Sind and Kutch, the Governor-in-Council of the Government of Bombay, as stated in the letter of 23 November 1905, upon inquiry declared that he did not wish to consider the question of the alignment of the boundary but desired to leave the question open. It cannot against the background of this decision be said that such a boundary, whatever its alignment, was one recognised on the part of the British Government as an established boundary. The Dewan of Kutch stated in his formal representation of 21 March 1911 to the Political Agent in Kutch that the boundaries on Erskine's maps could not be binding on the State of Kutch. Consequently, neither of the parties concerned at the time when Erskine's maps were made and published regarded the symbols appearing on them as authoritative.

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The fourth and last survey of sections of the disputed territory was Osmaston's Survey, which covered, i.e., the eastern parts of Thar Parkar District. It is undisputed that his maps show a conterminous boundary between Sind and the States of Western India having an alignment largely corresponding to India's claim line.

Prior permission of the State of Kutch to carry out this survey "in Cutch State" was sought and obtained by the Office of the States of Western India; the index maps to which this correspondence related indicate only areas situated above the 24th parallel and reaching up to the northern edge of the Rann.

From the documentary evidence relating to Osmaston's Survey, a few points emerge as being of particular significance.

The final maps produced by Osmaston state in a footnote that the boundary had been taken from "the old maps". The immediate reason for the inclusion of this footnote was the letter of the Collector of Thar Parkar of 2 October 1939. This letter, which is the latest indication of the attitude on the part of the highest official dealing with this survey on the Sind side, proposed, in order to overcome Mr. Strong's proposal, of 23 August 1939, to omit the boundary from the modern survey maps, that "the boundary may be shown as in the old maps, by means of a special symbol and a footnote be made indicating that it is in accordance with the old records, but is in dispute". However, Osmaston did not go so far as to adopt the suggestion to mark the boundary as disputed.

The "old maps" from which the boundary was taken were Survey of India maps and taluka maps based on them. The only previous scientific surveys of the relevant areas which had been undertaken were those of Macdonald and Pullan. In respect of the maps produced in those surveys, I have already held that the boundary lines appearing thereon do not represent the alignment of an established conterminous boundary between Sind and Kutch recognised as such by the British Government.

The question nevertheless arises whether Osmaston's decision on marking a boundary, investing it with the status of a conterminous boundary between Sind and the States of Western India, by itself amounted to a conclusive new determination of the matter.

It will first be recalled that it is agreed between the Parties that Osmaston was not competent to decide a genuine boundary dispute, had one existed. Was there such a dispute concerning the boundary drawn by Osmaston between Sind on one side and Kutch and Wav on the other side?

The correspondence exchanged in the course of Osmaston's Survey prompts an initial observation, viz. that the documentary material on the basis of which various opinions were expressed by officials on different levels was demonstrably incomplete. The boundary at issue is today for the first time subject to an exhaustive judicial inquiry admitting in evidence all documents on both sides. The Tribunal has at its disposal a more reliable and complete collection of documents than any official dealing with the Great Rann during British time ever had the benefit of reviewing.

At the meeting on 22 January 1938, the Mukhtiarkar of Nagar Parkar, acting on instructions of the Deputy Collector of Thar Parkar, stated that half the Rann was British territory, while the Survey Superintendent of Kutch claimed that the whole Rann belonged to Kutch State. The position taken by the

Mukhtiarkar "on behalf of the British Government" was endorsed by the Deputy Collector in a communication to the Collector.

During the next stage of the matter, i.e. in the investigations of immediately traceable files made on both sides in response to Osmaston's letters of 19 May 1938, the following positions were taken.

The Resident for the States of Western India, when asked to indicate the correct alignment of the external boundaries between, i.a., Sind and Kutch in the Rann, responded, in a letter written by the Secretary, that he could not comply with the request since the boundaries were "apparently in dispute". This letter was sent after the letter of the Dewan of Kutch of 5 March 1938, asserting rights over the whole Rann, must have been received, and after issue of the letters requesting permission of Kutch to carry out Osmaston's Survey on "Cutch territory". It may also be noted that the Agent to the Governor-General in the States of Western India in 1934 had taken part in the preparation of Indian Map B-52, which depicts the northern boundary of Kutch by and large in conformity with India's claim line (see Chapter V).

On the Sind side, the Deputy Collector, by his letter of 8 August 1938, similarly maintained that the boundary was not settled but "that ever since the issue of the said orders [the Collector's Order of 20/31 December 1927] we have been considering half of the Rann as falling within the territorial jurisdiction of Thar Parkar District". He added that "in older times and up to 1875, as it appears from the report of the then Mukhtiarkar of Diplo...dated 22nd June 1875...right till today half of the Rann on all sides between our district and the States has been regarded as belonging to British". However, the Deputy Collector also expressed the personal opinion that "in the absence of any documentary evidence in support of our contentions, our case is rather weak". The Superintendent of Survey and Land Records restricted himself to comparing the current taluka maps with the Survey of India maps from which their boundaries had originally been reproduced. He, as well as the Collector, remarked that said boundaries "stand unaltered as originally taken from the Survey of India maps". It is impossible to attribute any other meaning to these letters than that they simply confirmed that no change had been made in the taluka maps on record. Neither of the two officials concerned could, in the light of the documents before them, have intended to verify the material accuracy of the boundaries appearing on the maps, and Osmaston did not so interpret their letters as he replied that "under the circumstances the question remains undecided".

What Osmaston did thereafter was to compare the alignment of the taluka and district maps sent to him by the Superintendent with the Survey of India maps from which the boundaries on the former had been taken. Finding them to agree, he decided that the boundary was "correct and undisputed". The relevant Survey of India maps were those based on Macdonald's Survey. According to the records, no new elements were taken into account by Osmaston in deciding upon the alignment of the boundary in his maps; it is notable that

he did not expressly refer to the degree sheets and the 32-mile map of India. It also follows, in appraising his actions on their merits, seen in isolation from such considerations of a broader nature as may have a bearing on the overall evidentiary value of maps issued by the Survey of India, that Osmaston's boundaries cannot have any constitutive effect or significance of their own.

In short, a review of the whole record pertaining to Osmaston's Survey shows that no document indicates that any official, save the Kutch authorities, was of the view that the whole Rann was Kutch territory, or indeed that the boundary was settled and established and recognised as such by the British Government.

It may well be that Osmaston, in reaching his ultimate decision, had before him some of those Survey of India maps which for about two decades had depicted a conterminous boundary in the region, notably the degree sheets published in 1921 and subsequently as well as the fifth edition of the 32-mile map. This circumstance might reinforce the weight of his decision but must at the same time diminish the evidentiary value of those maps since, if they were deemed to be authoritative, the elaborate inquiry and correspondence in which Osmaston engaged himself would have been superfluous.

My conclusion therefore is that the boundary appearing on the maps produced in Osmaston's Survey does not represent the alignment of an established conterminous boundary between Sind and Kutch, or other States forming part of the States of Western India, explicitly determined as such by the British Government. The importance of this boundary in the context of the case as a whole will be dealt with below.

Accordingly, in my opinion none of the original survey maps made of the disputed territory depict such a boundary therein.

The arguments and evidence set out in Chapter V under the heading of "The Authority of the Survey of India", largely relate to the meaning of the concept "authority to draw boundaries". It is obvious that it was the duty and function of the Survey of India to draw boundaries on maps, to ascertain their alignment, and to make required changes therein by reference to such material as may from time to time have been relevant for purposes of survey and map-making. No legislative or administrative regulations have, however, been produced to show that the Survey of India had final authority to draw boundaries intended to be binding in a political sense. It is inherently improbable that it had such authority, and in fact the very opposite is proved by those instances on record where express approval or sanction of specific maps was given by the highest agencies of the British Government in India (such as of the 32-mile map of India, and the Index Map of 1935), upon which India lays considerable stress. The files relating to the several incidents in which the boundary in dispute came under consideration before Independence (summarised in Chapter VIII) furthermore confirm that, as a matter of British constitutional and administrative practice and policy, the maps produced by the Survey of India were not regarded as authoritative in the sense of being data of decisive

weight for the purpose of ascertaining or determining sovereign rights. In the written proceedings resulting in the Resolution of 1914, which in their initial stages were conducted as a judicial inquiry objectively assessing territorial rights, evidently the depiction of boundaries on previously existing maps was deemed by both sides to be of minor significance. Similarly, in the documents on record in the instances concerning bets in the Rann, summarised in Chapter VI, reference to and reliance either by the British Government or by the Indian States concerned on maps as evidence of title to disputed territory is absent.

In the context of the political system which existed in pre-partition times, it is therefore clear that maps issued by the Survey of India were not as such regarded as instruments by which either the British Government or Indian States were bound, or which could per se be viewed as constituting authoritative acts determining sovereign rights. If the depiction of a boundary upon inquiry was found to be erroneous, not only could the Survey Department itself modify it without reference to higher authorities; the political departments of both the Government of Bombay and the Government of India or judicial authorities could and did decide issues concerning such boundaries without attaching conclusive significance to Survey of India maps of any kind.

None of the so-called compiled maps or the Sind taluka maps, which by and large incorporate the boundary depiction adopted in the so-called "basic" original survey maps, can against this background have independent significance except on either of two grounds. First, it may be argued that extraneous circumstances such as express approval or other forms of official sanction by authorities outside and above the Survey Department, invested the maps with a greater degree of authority than would be conferred upon them by the mere fact of their issue. Second, the cumulative effect of the publication of official maps, in conjunction with other acts or omissions by the British authorities, and the interpretation placed on the maps by those concerned at the time, might be such that the maps must be given decisive weight in determining the issues confronting the Tribunal. The second proposition will be examined later; a few observations will be made here on the first thesis.

India places special reliance on two maps, viz. Indian Maps B-44 and B-45. My conclusions on the former have already been given in the context of dealing with the Resolution of 1914. The Index Map (Ind. Map B-45) will be considered below in the context of the related documents. Here will be examined the various editions of the 32-mile map of India, and particularly the fourth and fifth editions, Indian Maps B-51 and B-16.

The feature of this map, apart from its wide circulation, which is said to confer upon it a greater degree of authority than is possessed by other maps, is the fact that it was scrutinised in detail and expressly approved by the Foreign and Political Department of the Government of India; the (second and) third editions received the prior approval also of the Secretary of State. No evidence on record indicates, however, that the boundary at issue was at any time subject to especial scrutiny in the process of the production of the 32-mile map. The

documents brought in evidence establish only that it was at one time debated whether "dry Rann" should be coloured as a marsh or as a lake, and eventually the former solution was adopted.

The boundary determination in 1914 was reflected in the fifth edition, upon instructions of the Foreign Department. It is argued by India that the silence on the part of the Foreign Department on this occasion concerning the rest of the boundary must imply that the boundary alignment along the northern edge of the Rann was thereby expressly approved and sanctioned by the Government of India. The entire boundary had, however, been depicted with a pink riband and dot-dot symbols already in the third edition of 1898, a method of depiction that was repeated in the reprint of 1901, and again in the fourth edition of 1908, in which a yellow riband was added in two sectors. This circumstance did not prevent the British Administration from entertaining on its merits the claim of the Rao, which resulted in the Resolution of 1914, thereby admitting by unequivocal governmental action that a boundary thus depicted in maps approved by the Secretary of State could be disputed. The fact that the dispute between Kutch and Sind was ultimately resolved as a matter of compromise rather than of right does not invalidate the effect of this action, as the file clearly shows that a friendly settlement was chosen in preference to arbitration for reasons of expediency and because of doubt as to the likely outcome of a judicial or quasi-judicial inquiry and determination. None of the officials concerned (including the Government of Bombay and the Government of India) even referred to the 32-mile map as having any bearing on the matter; much less was the depiction of a boundary along the Khori Creek in then existing editions of the said map considered to bar an examination of the merits of the Darbar's claim.

Another circumstance which tends to diminish the inherent weight of the 32-mile map, upon which Pakistan has placed considerable emphasis in oral argument, is the change in the alignment of the loops, made in the fifth edition in comparison with previous editions. The absence of any instructions of other departments of the Government of India to effect such a change indicates that it was made within the Survey of India. It would be an inconsistency to ascribe determining weight to the approval by the Secretary of State of the third edition of the 32-mile map, while recognising without question such a change in the alignment of the boundary in the fifth edition which did not receive similar approval.

The 32-mile map therefore cannot in my opinion be ranged in a category essentially different from the survey maps. The same applies, a fortiori, to other compiled maps, such as the degree sheets.

The evidentiary value of all maps together will be examined below in another context.

The foregoing exposition has presented an appraisal of various aspects of the question whether the boundary at issue was an established boundary, the main alignment of which was recognised by all parties concerned before 1947. I will

now consider, in chronological order, the evidence relating to the several occasions in the pre-partition period on which the boundary between Sind and Kutch, or Sind and other Indian States abutting upon the Rann, was in issue.

The incident of 1875-1876 (discussed in Chapter VIII) reveals that neither the Commissioner in Sind, nor the Government of Bombay, nor the Political Agent in Kutch had any available information concerning the alignment of the boundary between Thar Parkar District and Kutch. It is significant to note, incidentally, that it did not occur to any of these officials that the maps of Macdonald, which had been published a few years earlier, constituted an authoritative source of information in this respect.

The Political Superintendent, Thar Parkar, assumed that the boundary was "in the Rann" and officially transmitted the statements made by the Mukhtiarkar of Diplo concerning the limits of the territories purportedly accepted locally by those acquainted with the region. The reports of this official seem to indicate that the boundary between Diplo and Kutch lay at Gainda Bet. In any event, the correspondence shows that in 1876 the alignment of the boundary between Thar Parkar District and Kutch was far from certain, and that it would not be correct to say that an established boundary along the northern edge of the Rann in that district existed and was recognised as such by the British Administration or the States concerned.

The correspondence of 1884 (summarised in Chapter VIII) is remarkable for the vagueness and uncertainty as to the definition of the boundary between Hyderabad District and Kutch that was then attempted. It contains also the significant statement of the Collector interpreting the tracings examined by him to mean that "the Rann itself is the boundary", and the acknowledgement by the Commissioner in Sind that no demarcated boundary had been laid down between the Tando Sub-Division and Kutch, both of which strongly suggest that, in so far as British authorities were concerned, there did not exist an established, even roughly defined boundary between Sind and Kutch in the region at that time.

My conclusions on the correspondence of 1885, resulting in the two Resolutions of the Government of Bombay of 3 July and 7 August 1885, have already been given. There is considerable force in the proposition that these decisions "wipe out everything right up to 1886". If so, undoubtedly the Resolutions must also, as Pakistan maintains, have an effect for a period subsequent to 1885.

The material relating to the correspondence of 1905 is mentioned in Chapter V. The matter then considered was the demarcation of the boundary between Jati Taluka and Kutch, and as noted above the inquiry was made in connection with Erskine's Survey.

In his letter of 3 October 1905 to Commissioner Morison, Lieut-Col. Abud first predicted the claim of the Rao that was later in fact made and ultimately resulted in the boundary determination in 1914. He thereafter made it clear that the Rao in addition claimed the whole of the Great Rann. In this context, Abud made the interesting observation that "they [the Kutch Darbar] say they are prepared to prove it and it is certain that this assertion has been made on

paper in administration reports and other documents without contradiction or query". Since in Abud's opinion the proposal of Morison to demarcate the boundary would "raise the whole question of the boundaries of Sind and Cutch, not only there [north and west of Khorī Creek] but also elsewhere, and possibly might give rise to prolonged discussion and enquiry", he would not even allow the papers to go into his office and would prefer not to broach the matter with the Kutch Darbar or "open the question" at all.

In forwarding a copy of this letter to the Government of Bombay, Morison expressed a different view in stating that "the boundary between Sind and Cutch and the question of rights in the Rann of Cutch will have to be settled one day or other, and my opinion is that the sooner the matter is taken up the better".

It was on the basis of these papers that the Governor-in-Council of the Government of Bombay declared that "the question might well be left alone till we are forced to take it up". It has already been remarked that it is impossible to say in the light of this ruling of the Governor-in-Council that at that time there existed a boundary between Sind and Kutch in the disputed region which was recognised on the part of the British Government as an established boundary.

The correspondence now considered foreshadows the distinction between the territorial claim which was eventually resolved by the Resolution of 1914 and the question of the rights in the Great Rann as a whole. As previously explained, no support can be found in the file concerning the boundary determination in 1914 for an intimation that the broader issue of the limits between Sind and Kutch east of the Western Trijunction was at all considered. Nor did the British at Rajkot so regard it, as appears, *inter alia*, from paragraph 7 of the note of the Secretary to the Agent to the Governor-General in the States of Western India of 2 June 1934 (Pak. Doc. B. 325).

Lieut.-Col. Abud's letter also demonstrates, however, that the Rao of Kutch may have conceived of the demarcation of the boundary along the vertical line up to the Western Trijunction as creating a circumstance potentially operating in his favour with respect to the alignment of the boundary east of said Trijunction. It will be recalled that, after the settlement in 1914 had been arrived at, it was the Rao who proposed that the portion of the boundary between the Western Terminus and the Western Trijunction should also be demarcated, even though said portion was not directly encompassed by the terms of the Resolution. The Tribunal is not called upon to pass on the issue whether the acceptance on the part of the British authorities of that proposal was or was not justified as a matter of legal rights as they then stood; this government act was one which in these proceedings must be recognised as having conclusive validity and effect. It is, however, to be noted that the Rao himself may, rightly or wrongly, as a matter of conviction, or as a matter of argument, have interpreted the acceptance to demarcate the vertical line as meaning that his claim to the whole of the Great Rann had thereby been confirmed and recognised by implication. Nevertheless, it was only by a letter dated 24/26 May 1947 that the Dewan of Kutch proposed to the Chief Secretary to the Government of Sind that "pillars on the boundary

line already determined beginning from the Trijunction up to the end of the Sind-Kutch boundary in the east should be erected during the next cold season" (Pak. Doc. A. 5).

In my opinion, it must be concluded that the correspondence of 1905, as well as the material pertaining to the 1914 Resolution, including the erection of pillars in 1924, show that east of the Western Trijunction the boundary was still not determined at the relevant time but remained in a state of uncertainty. Perhaps no more revealing proof of this fact can be found than the letter and office notes contained in Pakistan Documents B. 324 and B. 325, relating to the establishment of a Customs Preventive Line, which demonstrate that, as late as 1934, even after careful investigation, none of the British officials concerned could give a clear answer on what the division of rights was in the Great Rann between the British Government and the State of Kutch.

The incident of 1926-1927 will be discussed in another context. It may be remarked however, that a few days before the petition of the Sind villagers, which was the origin of this incident, was sent to the Commissioner in Sind in 1926, the Kutch official responsible for establishing "vahivat" on Dhara Banni and Chhad Bet (the Thanedar of Khavda) reported to the Kutch Revenue Commissioner that "there are no means whatsoever here in the Office for knowing to what extent is the boundary of this Rann". He added that "a sketch map of this boundary prepared at a glance is attached herewith. It is requested that it may be seen and instructions are sought up to what extent we should regard (our) limits to be" (Pak. Doc. B. 131/Ind., Pak. Doc. B. 289). The Thanedar of Khavda, 18 years later, wrote to the Revenue Commissioner that "[t] here is a map prepared for this boundary But it has not been received till now. It is very much needed on such occasions". (Pak. Doc. B. 145/Ind.).

The next incident which calls for consideration here is that of 1935, i.e., the occasion of the constitution of Sind as a Governor's Province. The Government of India (Constitution of Sind) Order, 1936, defined Sind in the following terms :

"In the Act and in this Order 'Sind' means the territory known at the date of this Order as the Division of Sind, and the boundaries of that Division shall be the boundaries of Sind."

None of the papers produced in the process of drafting this legislative instrument, which was enacted in implementation of the Government of India Act, 1935, can be interpreted in a manner that gives the description another meaning than that which follows plainly from the words used in it, viz., that the boundaries of the Province of Sind should remain what they were before the Order. Authoritative though the definition undoubtedly is, it merely confirms the existing status quo, which in my opinion was that the boundary in the disputed region was not recognised and established at the time, and it can have no substantive significance, unless some fact intervened from which it follows that an explicit determination of the boundary was made prior to its adoption.

The draft of a Schedule setting out the boundaries of the Province of Sind with reference to an attached Index Map, both of which had been prepared

by the Surveyor General of India, were sent by the Additional Joint Secretary to the Government of India for comments to the Chief Secretary to the Government of Bombay by letter of 31 October 1935.

The Schedule no doubt described the boundary as lying along the northern edge of the Great Rann, for even Pakistan admits that if the words of the draft Schedule are read with reference to the map, as they were intended to be read, they can have but one meaning. India submits that the Schedule was prepared by the Government of India, and on this assumption argues that the draft implies a sanction on the part of that Government of the alignment of the boundary. It is, however, clear from the letter of 31 October 1935 that both enclosures had been prepared by the Surveyor General and that they were merely forwarded to the Government of Bombay for its comments. At that stage at least, therefore, it cannot be said that the Government of India took any position in the matter, and no special significance can be attached to the action on the part of the Surveyor General which would give to the map in question a greater degree of authority than to other maps issued by his Department.

Upon receipt in Bombay, the papers and the map were forwarded to the Commissioner in Sind who, without taking any position in the matter, solicited the views of the Superintendent of Survey and Land Records in Sind. The examination by the latter, therefore, was the first substantive inquiry into the question. The Superintendent's reply, contained in his letter to the Commissioner of 28 November 1935, with which a revised draft of the Schedule was enclosed, indicates clearly the nature of the review undertaken by the Superintendent: he had compared the description of the boundaries of the new Province of Sind with the maps contained in the Head Record Office and had found them to agree, except in certain particulars which are irrelevant in this case. This review, consequently, in fact means only what is apparent from the evidence on record, viz., that the Index Map and the Schedule attached to it showed a boundary of Sind that roughly conformed with the alignment of a boundary on previous maps.

The Report with enclosures of the Superintendent of Land Records in Sind was forwarded by the Commissioner in Sind to the Chief Secretary to the Government of Bombay with some comments which mainly referred to those of the Superintendent. This endorsement, it has been argued, constituted an official recognition by the highest authority in Sind of the alignment of a boundary conforming to that now claimed by India. However, there is nothing to indicate that the scope of the examination on the part of the Commissioner was greater than was called for in the circumstances or, in particular, that it did in any aspect go beyond the review, strictly limited in nature, that had been undertaken by the Superintendent of Land Records.

The restricted purport of the inquiry made by the Superintendent of Land Records, which was thus endorsed by the Commissioner in Sind, was clearly understood by the Government of Bombay, for in its Report to the Government of India dated 9 December 1935, with which it forwarded copies of the aforesaid letters and their enclosures, the Chief Secretary to the Government of Bombay

pointed out that "the description of the boundaries of the new Province of Sind has been found to agree with the maps maintained in the Head Record Office, Sind...". This letter, therefore, simply reproduced the terms used by the Superintendent of Land Records.

By the time that the letter of the Government of Bombay was received by the Reforms Office of the Government of India, and in fact even before the Superintendent of Land Records had prepared his letter above referred to, the Secretary of State in London had proposed in a telegram of 12 November 1935 that a Schedule to the Order defining the boundaries of Sind was not necessary. In response to this suggestion, the telegram of 3 December 1935 was sent from the Viceroy (Reforms Office) to the Secretary of State, in which it was suggested that the words "and the boundaries of the said division shall be the boundaries of the Province of Sind" be added to paragraph 3 of the draft Order in Council which was under consideration.

A review of the evidence summarised in Chapter VIII therefore shows that the Secretary of State in London proposed that no schedule and map should be used and adopted and that the previous boundaries, whatever they may have been, should remain. The other high British authorities who were consulted, viz. the Commissioner in Sind and the Government of Bombay, both by way of endorsement, did not undertake an examination which went beyond formally comparing the Schedule and the Index Map with previously existing Survey of India maps. Nor were the views of Indian States concerned solicited, which would have been required in the event a determination of Province or State boundaries had been contemplated.

Against this background, no further conclusion can in my opinion be derived from the correspondence preceding the issue of the Sind Order in Council than that which follows from a literal reading of the text itself, viz. that the position in respect of the boundaries of Sind was to remain unchanged.

Already on previous occasions the British had shown that they did not attach overriding importance to certainty and finality with regard to the sovereign rights in the Rann.

The last occasion on which the boundary at issue became the focus of inquiry before Independence was in the course of Osmaston's Survey. The relevant aspects of this incident and the related correspondence have already been reviewed. It may be added here, however, that none of the parties which at that time submitted conflicting claims to parts of the disputed territory seems at any time to have made reference to the files and documents produced in connection with the issue of the Sind Order in Council a few years previously as having relevance for the question of the alignment of the boundary; nor do the officials concerned on the Sind side, the surveyors of the Survey of India, or that Department itself appear to have done so. It is impossible to escape the conclusion that the construction now sought to be placed upon these documents was at no time recognised or propounded by the British Government or even by the States of Kutch and Wav, which lodged claims to the disputed territory.

The foregoing analysis has been made with a view to resolving the first main issue arising in the case, viz. whether the boundary in dispute is a recognised and well-established boundary. The evidence relating to the two most important processes in which such a boundary, if settled and confirmed, would doubtless have been so recognised, does not support such a conclusion. These processes are the four scientific surveys of the region, and the instances in which the boundaries in this region were specifically scrutinised and discussed. All the evidence pertaining to those processes points to the conclusion that there did not exist at any time relevant in these proceedings a historically recognised and well-established boundary in the disputed region. Other documents lend additional support to this view, and a brief reference to some of them shall now be made.

In 1885, when the Government of Bombay passed an explicit Resolution in the matter, under the heading "Boundary Disputes :— Claim of the Cutch Durbar to the Sind side of the Runn" (Pak. Doc. B.10), the same Government also stated in another Resolution concerning a salt matter that the British Government "control [led] the Rann, which is waste" (Pak. Doc. B.310). The latter Resolution, dated 21 December 1885, was drafted by Mr. J. B. Peile who in another matter which arose in 1886, stated that "the Runn is no man's land" (Pak. Doc. B.310).

In 1897, it appears that the Collector of Salt Revenue on behalf of the Revenue Department of the Government of Bombay maintained that "there was no authoritative statement on record which defined either sovereignty or jurisdiction in the Rann and it was suggested that this very difficult question should be left alone..." (quoted from the summary given in 1934, in Pak. Doc. B.325, of a document not on record). The Acting Commissioner in Sind took note of this attitude of the Bombay Salt Department in the course of the correspondence concerning the Nara and Parpatana Bets which arose in the same year (see on this incident Chapter VI). Advocating that the bets were British territory, he stated in a letter of 17 June 1897 that "the Deputy Commissioner seems to be of the opinion that there is no definite boundary settled yet". He added that he believed that "the Salt Department have collected a good deal of evidence adverse to the supposition that the Runn can be claimed by Suigam or any other riparian owner..." (Pak. Doc. B.313). The Government of Bombay by its Resolution of 1897 stated that the bets had never formed part of Thar Parkar District and that the proprietary rights therein vested in the Suigam Thakores.

Referring to this Resolution, the District Magistrate of Thar Parkar observed in the following year, 1898, that while it "disposes of the question regarding the Beyts it does not specify the boundary of this dist: along the Rann of Kutch". He added that "I have been unable to ascertain that the exact boundary has ever been laid down..." (Pak. Doc. B.315). He asserted, further, that "the Rann itself (apart from the 'Beyts' in which there were more or less valuable rights to be contested) has been looked on as a 'no man's land' in which on our side at least we have maintained order" (ibid). It was in response to this letter that the Acting Commissioner in Sind wrote that "the old arrangement must be adhered to, and the Rann, for Police duties, be considered British territory until

the question [i.e., the boundary of British territory along the Rann] is settled. . .” (Pak. Doc. B.47).

Next, in 1903, the Commissioner in Sind declared, in a matter concerning fishing, that “prima facie the rights of the Sind authorities extend up to at least the centre line of the Rann” (Pak. Doc. B.381).

The correspondence ending with the 1914 Resolution has already been dealt with, and the file of 1934 concerning the establishment of a Customs Preventive Line has also been mentioned; both of these confirm that at the relevant times a historically recognised and well-established boundary cannot be said to have existed. Between those dates, several official reports made in the course of the 1926 incident indicate that the Sind officials then concerned did not regard the boundary as definitely fixed.

Even later in time are the documents emanating from both Kutch and Sind in the years 1944–1946 and relating to an extradition case (see Chapter IX, Section 15.11). They show that a dispute about the boundary still existed on the eve of Independence.

I will now proceed to an examination of the second main issue to be resolved in the case. This is whether Great Britain, acting either as territorial sovereign, or as Paramount Power, by its conduct must be held to have recognised, accepted or acquiesced in the claim of Kutch that the Rann was Kutch territory, thereby precluding Pakistan, as successor of Sind and thus of the territorial sovereign rights of Great Britain in the region, from successfully claiming any part of the disputed territory.

While the Rao of Kutch several times laid claim to the entire area of the Little Rann, he formulated an explicit representation addressed to the British authorities in respect of the whole area of the Great Rann only once, it being my opinion that his claim which eventually resulted in the Resolution of 1914 neither explicitly nor implicitly had such wide import. The sole representation was the letter of the Dewan of Kutch to the Resident for the States of Western India, dated 5 March 1938, which is quoted in Chapter V; the terms of that letter, however, were such as to imply that Kutch sovereignty over the Rann was taken for granted.

The claim for this reason is analogous to the unilateral declarations or assertions to the same effect made in Kutch Administration Reports (see Chapter VII). These Reports will now be discussed.

Leaving aside the first Reports on Record, which were prepared by the Political Agent in Kutch, and which are therefore at most to be viewed as statements of opinion, as the Political Agent had no authority to represent the State or to make claims on its behalf, the descriptions of the territory of Kutch contained in 24 Reports prepared by the Dewan and issued as from and subsequent to that for 1876-1877 explicitly stated that the Rann belonged to the Rao or formed part of Kutch, while 23 further Reports gave the area of Kutch as “independent of the Rann” “exclusive of the Rann”, or “besides the Rann”

without such additional qualification. It can only be a matter for conjecture to say whether the proposal made in 1875 to demarcate the boundary between Thar Parkar and Kutch caused the description in the Report for 1874-1875, which was prepared by the Political Agent, and which gave the area of Kutch as a whole as "area including the Rann and islands in it, of about 9,000 square miles", to be reformulated in the Report for 1876-1877. The latter, which was the first Report prepared by the Dewan, defined the area as "6,500 square miles, exclusive of the Rann, which is, 9,000 square miles, belonging to His Highness".

Whatever significance or effect ought to be attributed to these declarations made in the name of the Rao, their prima facie meaning is clear in one sense since, of the various interpretations argued by Pakistan to be possible, only one is reasonable in the circumstances: "exclusive of the Rann" and similar expressions must be read as a contention that the Rann was Kutch territory. In another sense, the statements are, however, notably vague. The "Rann" is not defined, and if both the Great Rann and the Little Rann were intended, the statements were unfounded, or at least incomplete, as admittedly the whole of the Little Rann did not belong to Kutch; indeed, India states that even small portions in the eastern part of the Great Rann were or could have been the territory of other States. Again, if Dhara Banni and Chhad Bet and other areas which now in India's submission form part of the Great Rann are and were in fact at each relevant time rather to be viewed as extensions of the mainland of Sind, the assertion that "the Rann" belonged to the Rao could have no bearing in relation to such fringe areas. This would be the case even in the event that the concept of "the Rann" were interpreted in favour of Kutch so as automatically to include all the bets therein situated. The latter position, however, demonstrably did not obtain in either the Great or the Little Rann in the period to which the Kutch Administration Reports relate.

No evidence indicates that the competent British authorities took issue with the assertions made in the Kutch Administration Reports, or classified them as being incorrect. In fact, insofar as the documents on record show, the British never commented at all upon the statements regarding the area of Kutch. Significantly, in 1885, when the assertions had been made by the Rao for about a decade, the Commissioner in Sind remarked that he had "heard nothing of the claim alleged to have been put forward on behalf of the Cutch Darbar and [could] hardly believe that such a preposterous pretension [was] ever likely to be seriously pressed" (Pak. Doc. B.10).

India submits that constitutive effects must be deemed to follow from the fact that the assertions made by the Kutch Darbar were not contradicted by the Political Agent, who by reason of his presence in Kutch had intimate knowledge of the affairs of Kutch, nor by the Government of Bombay, to whose political superintendence the Kutch State was entrusted, nor by the Government of India and the India Office, who were fully aware of these assertions. India also submits that the Government of Bombay, as well as the Government of India, recognised in their own records that the territory of the Rao of Kutch included the whole of the Rann. If the latter contention were proved, it naturally would

outweigh the former, as greater importance must be attached to an explicit acceptance and recognition than to one which is merely tacit and implied.

Until 1924, the Political Agent in Kutch, who was the representative of the British Government and who exercised an important influence over the administration of Kutch, functioned under the direction, control and supervision of the Government of Bombay. With the creation of the Western India States Agency in 1924, the office of the Political Agent was abolished, and the Government of India assumed the political superintendence previously exercised by the Government of Bombay.

The Bombay Administration Reports were issued annually during the existence of the Bombay Presidency, and a number of them, dating from 1871-1872 until 1923-1924, are submitted in evidence. Four of the six Standard Chapters in the Reports on record stated that Kutch extended no further northwards than up to the 24th degree of north latitude. The Standard Chapters for the years 1911-1912 and 1921-1922 gave the area of Kutch as 7,616 square miles "exclusive of a portion of the Rann", while two previous Standard Chapters (for 1872-1873 and 1901-1902) included no reference to the area of Kutch, another (for 1882-1883) stated it to be 6,500 square miles, while yet another (for 1892-1893) gave it as "6,500 square miles exclusive of the Rann". Although the Current Chapters in 20 Reports contained no reservation for the Rann in the area statements of Kutch, the Current Chapters in 29 Reports, from 1872-1873 to 1923-1924, gave its area as "exclusive of", "independent of", or "besides" the Rann, and three of them (those for 1903-1904, 1904-1905 and 1905-1906) stated in addition that the Rann belonged to the Rao.

The observations made in the context of the Kutch Administration Reports on the correct interpretation of a phrase such as "exclusive of the Rann" apply in equal measure to the same words as used in the Bombay Administration Reports. While the simultaneous statements in the Standard Chapters that Kutch extended only up to the 24th degree of north latitude are noteworthy, they do not substantially detract from the persuasive force of India's submission that the words must be construed as an acceptance on the part of the Bombay Government of Kutch sovereignty over the Great Rann as a whole.

The Statistical Abstracts from the period of 1866-1881, submitted by India in evidence, invariably state the area of Kutch with the reservation in a footnote "exclusive of the Rann". The correspondence between the Government of India and the Secretary of State in 1875-1877 illustrates the care with which the statistical returns were compiled and examined and thus confers particular weight upon the relevant footnote. Tupper, as will have been seen from a passage quoted earlier, also considered the inclusion or exclusion of a territory in statistical returns as a test for determining whether it was British or State territory. The footnote in the Statistical Abstracts must, for these reasons, be construed as an act of recognition on the part of the highest British authorities that the Rann was Kutch territory, "the Rann", however, having the same somewhat imprecise meaning as in other similar statements previously discussed.

Further statements of like import, which are significant as constituting official acknowledgements by the competent British authorities that the Rann was Kutch territory, are those contained in the Gazetteers of the Bombay Presidency for 1880, 1905 and 1914. While the 1880 edition also described Kutch as extending up to the 24th degree of north latitude only, the two later editions stated, with a degree of precision which admits of but one construction, that the total area of 9,000 square miles of the Rann belonged to Kutch.

In this context should finally be mentioned certain other important official, or semi-official, publications which contain analogous statements concerning the extent of Kutch territory.

Among the Imperial Gazetteers, those for 1881, 1885, 1908 and 1909 contained a reservation for the Rann in giving the area of Kutch, but the edition for 1885 simultaneously stated the northern limits of Kutch (including the Rann) to extend only up to the 24th degree of north latitude. Some other editions of the Imperial Gazetteer stated that the limits of Kutch "exclusive of a portion of the Rann" extended northwards to said latitude.

Another authoritative source of reference is Aitchison's Treaties. Three of the four editions of this book on record contained a reservation for the Rann in giving the area of Kutch.

In regard to the evidence bearing on the second main issue which has so far been set out, special significance must be attached to those statements made by the competent British authorities in official Government publications which acknowledged that the Rann constituted Kutch territory. While the Bombay Administration Reports did not invariably contain a reservation for the Rann in stating the area of Kutch, the Statistical Abstracts on record did so without exception.

An inconsistency is noticeable in official documents and communications of the Government of Bombay in the year 1905. Pakistan stated that around the years 1903—1906, "a kind of short interval of intensified confusion" occurred. Besides the Bombay Gazetteer of that year, the Unofficial Note of 1905 (which is not on record, but which is referred to in a file of 1934 from the Western India States Agency) stated that the Government of Bombay considered that the Rann was included in and formed part of Kutch (see Chapter V). In direct contradiction with these two statements was the decision of the Governor in Council of Bombay of 23 November 1905, referred to above, which explicitly directed, on the basis of papers clearly presenting the issues, that "the question [i.e. of a settlement of the boundary between Sind and Kutch and of the rights in the Rann] might well be left alone till we are forced to take it up". Hence it would appear that, in the year 1905, the various departments of the Government of Bombay did not conceive of and apply a co-ordinated and uniform policy as regards the Rann of Kutch.

Official statements by the Government of Bombay and higher British authorities recognising that the Rann was Kutch territory continued, however, to be made, and with increasing uniformity and frequency, in the period after 1905.

Thus, the 1914 edition of the Gazetteer of the Bombay Presidency repeated the statement made in the 1905 edition. Even more significantly, the maps published under the direction of the Surveyor General of India soon after 1905 began to show a boundary along the northern edge of the Rann as conterminous between Sind and Kutch. Thus, Erskine's Indian Map B-11, published in 1907, significantly marked the area south of Sinatri Dhand as "Cutch". A number of various editions of different maps on varying scales thereafter and until the partition of the sub-continent clearly indicated a conterminous boundary between Sind and Kutch, or Sind and the States of Western India, having an alignment by and large conforming to India's claim line.

It is, in my opinion, established that after the publication of Indian Map B-11, the following maps beyond doubt did depict a conterminous boundary of the said character, referring in whole or in part to the boundary at issue in these proceedings: the fifth edition of the 32-mile map of India, published in 1915 under the direction of the Surveyor General of India (Ind. Map TB-22), and reprints thereof made in 1922 (Ind. Map TB-23) and 1928 (Ind. Map B-16); the quarter inch or degree sheets, published under the direction of the surveyor General of India, in 1921 (Ind. Maps B-17 to B-20), 1925 (Ind. Map B-21), 1927 (Ind. Map B-22), 1936 (Ind. Map B-30), 1942-43 (Ind. Maps B-36, B-37 and TB-1 to 5) and 1946 (Ind. Map B-40, being a mosaic made in that year in preparation for a degree sheet); the maps included in the 1928 and 1935 editions of Aitchison's Treaties (Ind. Maps TB-13 and B-52); the map illustrating the position of Ports owned by Indian States, included in the Report of the Indian States Inquiry Committee (Financial) of 1932, presented by the Secretary of State for India to the British Parliament (Ind. Map B-28); the Index Map of 1935, as read with either of the two successive accompanying draft Schedules of Boundaries (Ind. Map B-45 and Ind. Doc. A-35); the maps produced in Osmaston's Survey, published in 1939 under the direction of the officiating Surveyor General of India (Ind. Maps B-33, B-34 and B-35), supplemented with Osmaston's plane-table section of 1938 (Ind. Map TB-28); the Southern Asia Series of 1944 (Ind. Map B-38), published under the direction of the Surveyor General of India; the 1928 and 1945 editions of the Map of India and Adjacent Countries (Ind. Maps B-25 and B-53), published under the direction of the Surveyor General of India; the 6th edition of the Road Map of India of 1945, printed at the Survey of India Offices (Ind. Map B-39); and the reprint in 1947 of Sind Survey Maps (Ind. Map B-26).

Among the maps enumerated above, particular weight must be attached to the degree sheets published in 1921 and subsequently and to the fifth edition of the 32-mile map.

In conclusion, the maps listed above do depict with striking uniformity a conterminous boundary lying along the northern edge of the Rann and a few of them were seen and approved by the highest British authorities.

I have stated earlier that, in my opinion, there did not exist at any time relevant in these proceedings, a historically recognised and well-established boundary in the disputed region. This notwithstanding, the statements and the maps now

referred to constitute acts of competent British authorities which—if viewed as being in response to claims by Kutch or other Indian States that the Rann was Indian State territory—may be interpreted as acquiescence in, or acceptance of, such claims, and which—if viewed as unilateral, administrative acts not prompted by such representations—may amount to a voluntary relinquishment, whether conscious or inadvertent, of British territorial rights in the Rann.

The absence of a demonstrable connection between representations of the Rao of Kutch or rulers of other neighbouring Indian States and the British administrative acts in question leads me to conclude that the acts constitute a relinquishment of potential rights rather than an explicit acceptance of claimed rights. Hence, it may be argued that, being in the nature of unilateral acts conferring benefits upon a third party, as it were, of grace, or by policy and not as of right, the actions should be restrictively interpreted in favour of the conceding party and its successor in title. An important guiding factor in a determination of the precise legal effects of the relevant administrative acts would then be whether and to what extent the third party beneficiary acted in reliance upon them, or remained passive.

A final answer to these questions will be deferred until the third main issue arising for determination in this case has been examined. This issue, which will now be discussed, is—subject to Pakistan being precluded from claiming the disputed territory on account of the British acts of relinquishment referred to above—whether the British Administration in Sind and superior British authorities, acting not as Paramount Power but as territorial sovereigns, performed acts in assertion of rights of territorial sovereignty, directly or indirectly, over the disputed tract which were of such a character as to be sufficient evidence in law to have conferred title to the territory, or parts thereof, upon Sind, and thereby upon its successor Pakistan; or conversely, whether the evidence of such exercise of sovereignty on the part of Kutch and the other States abutting upon the Great Rann, to whose rights India is successor, would instead operate to confer title on India to the territory, or to parts thereof.

Territorial sovereignty implies, as observed by Judge Huber in the *Island of Palmas* case, certain exclusive rights which have as their corollary certain duties. In adjudging conflicting claims by rival sovereigns to a territory, all available evidence relating to the exercise of such rights, and to the discharge of such duties, must be carefully evaluated with a view to establishing in whom the conglomerate of sovereign functions has exclusively or predominantly vested.

The rights and duties which by law and custom are inherent in, and characteristic of, sovereignty present considerable variations in different circumstances according to time and place, and in the context of various political systems. The sovereign entities relevant in this case prior to Independence were, on both sides of the Rann, agricultural societies. The activities and functions of Government—leaving aside the military organisation—were in their essence identical in Sind and Kutch, being limited mainly to the imposition of customs duties and taxes on land, livestock and agricultural produce in the fiscal sphere, and to the main-

tenance of peace and order by police and civil and criminal courts and other law enforcement agencies in the general public sphere.

In these societies, at the times relevant in these proceedings, the borders between territories under different sovereignty still marked a strict division of economic rights as well as of Government functions. Significantly, ownership by an Indian ruler of agricultural property could imply and carry with it such a measure of sovereignty over it as to include taxing authority, and civil and criminal jurisdiction. This explains why the "Rao's dominions" was synonymous with "Kutch territory". The Rao of Kutch, as remarked earlier enjoyed a wide measure of sovereign prerogatives, while other territorial sovereigns in the region retained so few elements of sovereignty that their status was more closely similar to that of mere private landholders.

Because of the close dependence of the taxation system on the land and the agricultural production even in Sind, State and private interests coincided and were necessarily so closely assimilated with each other that it would be improper to draw as sharp a distinction between them as it called for in the context of a modern industrial economy. The sole important revenue, apart from customs duties, derived from the land, and was earmarked for the State and the landholder in fixed proportions.

It is in the light of these facts and circumstances that the evidence relating to acts of "jurisdiction" in the northern half of the Rann has to be analysed. The object of such an appraisal is to define and delimit with the greatest possible accuracy which of the two contending sovereigns, being before Independence mainly the Rao of Kutch and the British Government in Sind, respectively, and after Independence India and Pakistan, in actual fact enjoyed the rights of sovereignty over the disputed territory, and which of them carried the burden of discharging the duties inherent in sovereignty in that territory at each relevant period of time.

The evidence dating from the period before the last decade of the 19th century, besides that related to the Sayra lands and to grazing, does not afford a firm basis for concluding that either Sind (whether under the rule of the Amirs or of the British) or Kutch predominantly performed acts of sovereignty over the disputed territory.

This is so in regard to the documentary evidence concerning the utilisation of the salt resources in the Rann proper which is referred to in Chapter IX, Section 6. Moreover, the British control over salt resources on the sub-continent was viewed as the outflow of an imperial prerogative, and not as an exercise of sovereign territorial rights, and the "control" over the Rann referred to in the salt Resolution of the Government of Bombay of 1885 was likely intended to signify control merely over the salt resources in the Rann. Furthermore, the letter of the Collector of Salt Revenue in Sind of 30 June 1897 implies that the extraction of salt in Sind was confined to the rich natural deposits of salt in what he referred to as British tracts adjacent to the Rann "which [were] guarded by a Salt Preventive Establishment". (Pak. Doc. B. 313).

The statement by the Mukhtiarkar of Diplo Taluka in 1875 that, before 1843, a conterminous limit of jurisdiction between Sind and Kutch lay at Gainda Bet was hearsay in character and cannot be deemed conclusive proof of the point. The assertions made by the Bhuj Vahivatdar in 1876 to the effect that a large portion of the Rann and numerous specified bets were Kutch territory, similarly are not corroborated by direct evidence, and in the circumstances no conclusive weight can be attached to them.

Nor can much guidance be found in the correspondence in the 1850's concerning the erection of road marks and the construction of a well and a rest house on Gainda Bet. In particular, the Memorandum of the Rao of 27 December, 1854 cannot now, in the context of the broad issues in this case, be given the effect of a binding admission by him that the boundary between Kutch and Sind lay at Gainda Bet, even if certain words in the Memorandum might, *prima facie*, admit of the interpretation to such effect urged by Pakistan.

Similarly, the instances referred to in Chapter IX, Section 3.03, even if they indicate that all public works (roads, road marks and dharamsalas) required and possible to execute in the area of the Rann were carried out by Sind in the relevant decades of the 19th century, are too scanty and imprecise to be considered truly indicative of exercise of sovereignty at various times over the vast tract at issue. I am moreover inclined to accept the Indian argument that the construction and maintenance by Sind authorities of rest houses, etc., did not, in the circumstances, presuppose that the sites were situated in British territory and that they were in any event for the benefit of travellers generally.

I have declared in a previous context that the Sayra lands, at least up to and including Sindri, were Kutch territory and did not cease to be so by being assimilated with the Rann in and after the earthquake of 1819. The record indicates that the territory denoted by Pakistan as the "jutting triangle" similarly, at some time, was converted from a fertile district, including settlements at Kanjarkot and Vighokot, into Rann. However, neither in respect of that district as a whole, whatever its actual extent, nor in regard to Kanjarkot and Vighokot, is there any evidence on record showing whether and when, historically, they fell under the sovereignty of the rulers of either Sind or Kutch. The references made to the ruins existing at those places in a few documents relied upon by Pakistan lend no support to the suggestion that they were viewed by the British authorities concerned as being situated in Sind at the relevant time.

Evidence has been introduced to show that, in the general area of the "jutting triangle", settlements of Sind existed outside the boundary claimed by India. On consideration of all the documents and arguments on record, I do not deem it proved that the entries indicating cultivation on the Diplo portion of "Darya-i-Dharo" in 1867—1869 related to territory situated outside said boundary, nor that "Shakurji Kandi" was so situated. A place called "Shakur" is, however, indicated on Indian Map B-11 just outside the boundary marks, on the eastern side of the Dharo Puran River. This, no doubt, is or was a Sind settlement.

The documentary evidence pertaining to "Ding", "Ding Mian" and "Dhing Naka" establishes no more, in my opinion, than that a British customs outpost, referred to again below, was situated not far outside the boundary claimed by India. The location of the outpost may be assumed to have been that indicated as "Dhing Naka" on the related official map (Pak. Map 92).

Certain other documents pertaining to the general area of the "jutting triangle" indicate that fishing ponds or lakes may have been situated outside the boundary claimed by India. Of particular significance would have been evidence supporting the assertion that leases for fishing were granted by the Government of Sind in respect of a lake situated six miles south of Rahim ki Bazar. This contention is not, however, proved. Nor is there any evidence on record which constitutes proof of the cultivation at a place seemingly situated in the vicinity of said lake, which is referred to in Chapter IX, Section 2.04. The ponds referred to in Chapter IX, Section 4.02 cannot be identified.

In the jutting triangle lies Pirol Valo Kun. The sole map on which this area appears is the "Sketch Showing Relevant Places" submitted by India as Indian Map B-1. This depiction must be deemed binding upon India, and I will consider the area to be situated south-east of Kanjarkot, its southern edge lying midway between Kanjarkot and Vighokot. The evidence shows that Kutch did not make any appearance in this area until 1946, and then only abortive attempts were made by the sons of the lessee, Node Sadi Rau, to go there in order to collect Panchari. They reported that they did not even dare to stay overnight in the place. While no specific evidence has been submitted which proves any activities undertaken by Sind subjects in Pirol Valo Kun, the reports of the Kutch lessees establish that Sind inhabitants engaged in grazing there.

In this context, lastly, I may note that the statement in an appendix to the Indian Diplomatic Note of 9/11 May 1955, which is referred to in Chapter IX, Section 1.03.2, must be understood and treated, not as an admission having binding effects upon India, but as a submission equivalent to an argument presented in the course of the proceedings before this Tribunal.

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In regard to the territory between the "jutting triangle" and the Western Trijunction, there is no evidence on record which, in my opinion, clearly establishes any activities by either Party. (A possible instance may be the incident in 1903, referred to in Chapter IX, Section 4.01.1, where the Commissioner in Sind considered that Kutch did not have jurisdiction over some fishing ponds situated at an unidentifiable point in the Rann five miles outside the limits of Badin Taluka). Here, however, are to be noted the report and map of Mr. Howes which indicate that he, who was Secretary to the Government of Sind in the Public Works Department and its Chief Engineer, as late as a few years prior to Independence adopted the position that point 75 on Indian Map B-55, situated at the southern tip of the western loop, lay at the border between Sind and Kutch. This premise was stated in the process of planning important public works, and the fact that the project envisaged was not eventually realised

does not diminish the force of the assumption as to existing territorial limits on which that project was planned to be executed.

The view of Mr. Howes is to a certain extent corroborated by a statement made in a committee report included in the book *Post-War Development Schemes*, published in 1945 by the Government of Sind. This statement, which is referred to in Chapter VII, described a strip on which the plantation of forests was recommended as a "strip along the Sind-Kutch border from Rahim ki Bazar via Adhegam to Berano" (Ind. Doc. TC-48).

The principal evidence of acts of sovereignty performed in the disputed territory falls into four categories, viz. customs, police surveillance and police jurisdiction, criminal jurisdiction, and the material relating to Dhara Banni and Chhad Bet (some of which overlaps with the evidence included in the other categories).

With regard to customs (see Chapter IX, Section 14), it is established that Kutch retained autonomy in the field of foreign trade and that the right to levy customs fell within the sphere of its exclusive determination. As it maintained lower tariffs than British India, goods were smuggled through Kutch over the Rann and into Sind and elsewhere. To prevent this illicit traffic, customs outposts were set up in 1934 along the "Northern and Sind-Cutch Frontiers Preventive Lines". Three of the outposts admittedly were situated south of the boundary claimed by India, at Dhing Naka, Karali and Jattrai.

It is established that officers of the Central British Customs Organisation patrolled in the Rann, that a number of offences against salt regulations were detected in the Rann and that offenders were prosecuted and fined. It is not necessary to render a conclusion on the submission by Pakistan that the jurisdiction of the British Customs was by law confined to British territory and that the customs officials had no competence to act outside British India, as it is in any event clear that the British Customs had no right to perform functions on Kutch territory if not expressly permitted to do so. For this reason, it must be assumed that the customs outposts established at the aforementioned places, and notably at Dhing Naka and Karali, would have been conceived of by the competent British authorities as located in territory falling under British jurisdiction and thus as British territory. The evidence relating to the actual patrolling is, however, not sufficient, consistent or precise enough to show with any degree of exactitude what areas were within the beat of the British customs staff.

The evidence relating to post-independence activities of the Pakistan Customs, which predominantly had the reverse object of preventing the export of goods from Pakistan to India, indicates only in a general way patrolling and enforcement in territory adjacent to outposts such as Ding, Jattrai and Vingi. Furthermore, some instances of patrolling or interception may represent "hot pursuit", both before and after Independence.

The evidence on customs activities shows, in all, that both before and after Independence such Government functions were exercised by British and Pakistan Customs staff south of the boundary claimed by India in an area bordered in the west by the eastern loop and in the east by the Dhara Banni

sector. It is, however, not established that customs patrolling regularly and consistently took place in a broad sector of the disputed territory within those limits, and it must therefore be assumed that the main activities were confined to areas in the relative vicinity of the customs outposts.

With regard to police surveillance and police jurisdiction, the submission that the police of Kutch exercised jurisdiction over the whole of the Rann (see Chapter IX, Section 10.01) is not corroborated by evidence and is in fact disproved by the evidence on record.

It is common ground between the Parties that the establishment of police on the British side was exclusively a provincial concern. Hence, evidence of British police activities must, in the absence of special arrangements, be deemed to illustrate exercise of territorial sovereign functions, in distinction to imperial functions. The order of the Acting Commissioner in Sind in 1898 affirmatively shows that both in the last decades of the 19th century, and for some period thereafter, the Rann was considered British territory for police purposes. The order cannot, however, *per se* be deemed to have had such an extension in time as submitted by Pakistan but must in default of specific documentation to the contrary be seen as operative only over a period reasonably close to the year in which it was issued.

Among the specific instances of investigation by Sind police of offences committed in disputed territory, the two cases of 1939 and 1945 referred to in Chapter IX, Section 11.02 both relate to the Ding customs outpost or its vicinity. Ding, then, clearly was understood as falling under Sind police jurisdiction.

The instance of 1945 summarised in Chapter IX, Section 11.03, is not clear-cut. The murdered person was a British customs officer, assassinated 15 miles south of Ding in the course of exercising his duties. In that case, the Kutch Police Commissioner stated in a communication to the Sind police that the territory of Kutch commenced immediately after leaving the Ding outpost, evidently also implying that the territorial and jurisdictional limits coincided.

The jurisdiction of the police forces is further illustrated by the instances of exercise of jurisdiction by criminal courts, as some accused persons brought to trial were arrested or seized in disputed territory, or as the offences for which they were indicted took place in such territory.

No evidence on record shows that the courts of Kutch or other Indian States exercised jurisdiction over the disputed territory (outside the area of Dhara Banni and Chhad Bet).

On the Sind side is to be noted the important statement made by the Deputy Collector of Thar Parkar on 20/21 May 1938 (see Chapter V) that "our Magistrates in charge of Nagar Parkar, Diplo and Mithi Talukas have been exercising their jurisdiction as Criminal Courts as far as half the Rann in question". However, in the absence of a satisfactory measure of corroborative evidence, this general statement cannot be regarded as conclusive proof of the

assertion made by the Deputy Collector. The evidentiary value of the assertion also is somewhat diminished by the statement of the District Superintendent of Police, Thar Parkar, who in the dacoity matter transpiring in 1923, while complaining of slowness and inaction on the part of Kutch Police, stated that :

“...the Rann belongs to Cutch, State and if the Cutch Police had followed up the tracts they would not only have been able to locate the gang but would also possibly have been able to cripple it with the assistance of the Nagar Parkar Police.” (Ind. Doc. A-68).

The documentary evidence set out in Chapter IX, Section 12.02 establishes that Sind police and criminal jurisdiction extended in 1940-1945 to the vicinity of Vighokot in a case of dacoity.

No definite conclusions can be drawn from the instance of 1945 referred to in Chapter IX, Section 12.03, and relating to the outpost Khadai, because of the imprecise geographical indications. Furthermore, the instance may have been in the nature of—“hot pursuit”.

The case of an assault in 1945 on Biar Bet, set out in Chapter IX, Section 12.04, has been argued also to be analogous to “hot pursuit” for the reason that the police constable, when assaulted, was engaged in pursuit of people illegally smuggling goods from Sind to Kutch. However, it is significant that, in this instance, it was specifically stated in the Diplo Police Station case diary that the area of Biar Bet was “situated in the jurisdiction of Thanedar Police Khadai of taluka Diplo of Government”. Moreover, the accused—who was eventually acquitted for lack of evidence—was arrested and surrendered by the Kutch police to the Sind authorities. Biar Bet, therefore, evidently was treated by the authorities concerned in both Kutch and Sind, as late as 1945, as falling under Sind police and criminal jurisdiction.

In summary, on the evidence on record it may be taken as positively established that, in this century, prior to independence, outside Dhara Banni and Chhad Bet (which will be treated presently), the police and criminal jurisdiction of Sind authorities over disputed territory extended, in the sector between the eastern loop and Dhara Banni, to Ding, Vighokot and Biar Bet. There is, however, no evidence which affirmatively proves in a conclusive fashion that the jurisdiction of Sind police and Sind courts encompassed areas west of the eastern loop, or east of Chhad Bet. Conversely, no proof is offered that Kutch either assumed or exercised such jurisdiction over any part of the disputed territory (leaving aside Dhara Banni and Chhad Bet).

The instances cited in Chapter IX, Sections 12.05 and 13 do not materially assist in clarifying where the limits of police and criminal jurisdiction of India and Pakistan lay at each relevant time after Independence.

I will now proceed to an examination of the documentary evidence relating to Dhara Banni and Chhad Bet.

It is established that these areas have not at any time been cultivated and have not been the site of any permanent habitation, that they contain extensive

grazing grounds, and that, at least since 1843 and until 1956, inhabitants of nearby villages in Thar Parkar District grazed large herds of cattle on Chhad Bet. It is also established that residents in Sind alone used the grazing grounds on Dhara Banni and Chhad Bet at all relevant times. Further, Kutch did not exercise any active jurisdiction over Dhara Banni and Chhad Bet before 1926.

The grazing fees which Kutch decided to collect in 1926 were conceived of by the Dewan of Kutch as a nominal tax, and the levy was treated by him as an act of exercise of Government authority. It was also so understood by the Sind people who filed a petition for relief with the Commissioner in Sind; in their view, the imposition of panchari squarely raised the issue of where the boundary lay between Thar Parkar and Kutch. In their petition of 1 July 1926, they described the boundary of Thar Parkar as "being up to" Kerdahi, Biria and Bamarala and the boundary of Kutch as situated about 12 miles away from their villages. The Mukhtiarkar of Diplo, upon hearing the petitioners, reported that they had "no self knowledge of the boundary limits" but they indicated to him the boundary on a sketch map. It is not established that this map is identical with a hand-drawn sketch submitted in evidence. Similarly, the Collector of Thar Parkar, to whom authority to dispose of the matter had been given by the Commissioner in Sind, dealt with the question as being one of ascertaining the true alignment of the boundary between Thar Parkar and Kutch.

The file of the Collector's office in the matter shows that contradictory opinions were expressed on the two questions of whether a settled boundary in fact existed, and, if so, what its alignment was. The maps relied upon by the Superintendent of Land Records as a basis for his opinion were evidently interpreted differently by him and by the official in the Collector's office who scrutinised the statement. The latter remarked that the maps practically showed no boundary of the British territory and Kutch in the Rann. It is not known precisely with reference to what material the Collector eventually reached his final decision on the petition. However, the purport of his order of 20/31 December 1927 clearly was that the areas of Dhara Banni and Chhad Bet were British territory and that the petitioners were to be informed that no tax was leviable by Kutch.

It would appear from the documents on record that the collection of panchari by Kutch was discontinued not long after the Collector's order was issued at the end of 1927. A period of some 12 years thereafter elapsed before Kutch revenue officials again started to collect panchari on Dhara Banni and Chhad Bet.

In 1944, in the course of engaging in such activities, a Kutch patrol tied and left on the ground in Chhad Bet a resident of the Sind village of Bandho who was grazing cattle and maintained that he had the right to do so since the territory was British; the companions of the villager were arrested and taken to Khavda. The territorial issue became the focus and sole object of the inquiries subsequently made and official actions subsequently taken in this case both in Sind and Kutch.

The Thanedar of Khavda, who was the immediately responsible officer in Kutch, noted that "the main dispute is about the boundary" and reported to his

superior that Chhad Bet was Kutch territory, while the Sind police, and subsequently the First Class Magistrate of Diplo and the District Magistrate of Thar Parkar, concluded that a *prima facie* case had been made out against the Kutch officials, for wrongful confinement and beating. There could be no other basis for the demand by the said Magistrates that extradition be requested of the Kutch officials than that the territory of Chhad Bet was considered to be British territory. The request for extradition, which was eventually issued by the Secretary to the Resident for the States of Western India, stated that "...if the Kutch Darbar have no objection, arrangements may kindly be made for the surrender...". There is no reason to assume that this expression signified an intimation that the basic premise of the request may have been lacking, *i.e.* that *prima facie* an offence had been committed on what was considered British territory.

The opinion that Chhad Bet was Kutch territory was clearly expressed in the internal reports of the Revenue and Police Commissioners of Kutch. It is, however, an open question whether this view was ever officially communicated by the Dewan of Kutch to the appropriate British authorities. On a lower level, the Kutch Sub-Inspector of Police had, however, made a statement to such effect to the Diplo Police in the first stages of the case.

Hence, in this instance, which transpired in a period shortly before Independence, the British local authorities advised the villagers concerned that Chhad Bet was Sind territory. Moreover, the courts of Sind acted on the basis that the territory belonged to Sind, and the Office of the Resident for the States of Western India officially requested extradition of Kutch officials for having committed a *prima facie* offence of wrongful confinement and beating in British territory. It is not established that the request for extradition was in fact opposed by Kutch *vis-a-vis* the British, or that the stand taken by the British authorities concerned was reversed. On the evidence on record it must therefore be concluded that in 1945 and 1946, thus shortly before Independence, these British authorities considered Chhad Bet to be Sind territory and took official action *vis-a-vis* Kutch on such basis. It is, however, not established that this position was accepted by the Kutch authorities; on the contrary, the documents indicate that the Kutch Darbar deemed Chhad Bet to be Kutch territory.

The activities of Node Sadi Rau, who was engaged as a Kutch lessee by a contract of 18 July 1945, have been described in Chapter IX, Section 15.12. Pursuant to the terms of the contract, he was to be provided with a metal badge indicating State authority. The lease significantly included a clause pursuant to which he was to be indemnified in the event of becoming indicted in criminal actions in the course of collecting grazing fees "from persons outside Kutch territory". The lessee did collect such fees to some extent, and on many occasions impounded cattle from people who refused to pay, which resulted in the filing of 72 applications for release of such cattle. It is, however, clear that he was met with considerable resistance by those on whom he endeavoured to levy the tax within the territory covered by the lease, *viz.* Dhara Banni, Chhad Bet and Pirol Valo Kun. In November 1944, the Thanedar of Khavda had

reported that the refusal by the Sind villagers to pay panchari was endorsed by the British authorities. Lessee's report of October 1945 also indicates that the resistance displayed in Dhara Banni and Chhad Bet on the two occasions described therein was made in the presence and with the support of British police officers.

With reference to Dhara Banni and Chhad Bet, I deem it established that, for well over one hundred years, the sole benefits which could be derived from these areas were enjoyed by inhabitants of Sind. It is not suggested that the grazing as such was subject to British taxation. Such limited evidence as there is on record seems, however, to justify the assumption that the task of maintaining law and order was discharged by the Sind authorities; it is not even suggested that the authorities of Kutch at any time viewed such a task as forming part of their duties. The Kutch Tajviidar of Chhad Bet stated in a revealing letter of 26 March 1940 that "it is seen that the people of foreign territory have assumed a form of administration on this bet and have for a long time established their foothold" (see Chapter IX, Section 15.10.3). Whatever other Government functions were required with respect to these outlying grazing grounds, on which herds of cattle were from time to time shepherded, were apparently undertaken by Sind. Thus, the births, deaths and epidemics occurring there were recorded by the taluka office in Diplo. It is not shown that Kutch at any time established a thana on Chhad Bet.

The collection by Kutch of grazing fees must be viewed as an exercise of Government functions in the period before 1945, despite the fact that the actual presence of Kutch police is not proved and that the tax collectors do not appear to have been themselves invested with general police authority; their jurisdiction was strictly fiscal. It is established that these measures were instituted in 1926 and were discontinued about two years later, were reassumed for a brief period of time in 1942, were seemingly discontinued in connection with the extradition case, and were thereafter again instituted in a different form under the lease executed in the summer of 1945. At no time were these tax levies fully effective, as is evidenced by the small amounts recovered, which fell far short of the expenditure incurred in the collection. More significantly, during each of the three phases, the imposition of the levy was opposed, not only by the local villagers, but by the British Government authorities concerned. The first phase resulted in the order of the Collector, acting on the authority of the Commissioner in Sind, that payment of fees should be refused. The second phase led to the indictment and demand for extradition of Kutch officials for having arrested Sind villagers who contended that the territory was British; then also the Khavda Thanedar noted that British authorities "impressed upon the minds of the people of the villages... that the limits of Chhad bet do not belong to this sacred State..." (Pak. Doc. B.145/Ind.). During the third phase, lastly, the lessee—who worked under a Kutch contractual indemnity clause protecting him against criminal indictment—encountered the opposition of a party furnished with British Government weapons and accompanied by Sind police. The third phase began shortly before Independence. Taken in all, these activities by Kutch cannot be deemed to have constituted continuous and effective exercise

of jurisdiction. By contrast, the presence of Sind in Dhara Banni and Chhad Bet comes as close to effective peaceful possession and display of Sind authority as may reasonably be expected in the circumstances. Both the inhabitants of Sind who used the grazing grounds, and the Sind authorities, must have acted on the assumption that Dhara Banni and Chhad Bet were British territory.

India submits that it attributes little value to the instances of display of authority after Independence. I share this view.

The three main issues which fall to be considered in this case have been defined above. The evidence relevant in determining those issues has been discussed with a view to delimiting and evaluating its purport and weight. The vertical line between the Western Terminus and the Western Trijunction has been established as being the boundary between those points; this portion of the boundary therefore does not require further discussion.

As stated at the outset in this Opinion, the territorial dispute which the Tribunal is called upon to decide is one in which opposing claims have been made with reliance upon conflicting testimony, and where a judgment has to be given on the relative strength of the cases made out by the Parties. The dispute is one of great complexity. It is also one in which the claims and the evidence adduced in support of them are in respect of certain parts of the territory at issue almost evenly balanced. The ultimate determination therefore is both difficult and in exceptional measure dictated by considerations which do not heavily outweigh those considerations that would have motivated a different solution.

An analysis of the first issue arising in the case has yielded the conclusion that a recognised and well-established boundary did not exist in the disputed region east of the Western Trijunction on the eve of Independence. The absence of such a boundary does not in the context of this case imply that the disputed territory was terra nullius. According to the joint submissions of the Parties, the Rann of Kutch in modern times could only have formed part of the territory of a sovereign whose territory abutted upon it. Since the Rann until recently has been deemed incapable of permanent occupation, the requirement of possession cannot play the same important role in determining sovereign rights therein as it would have done otherwise. Therefore, special significance must be accorded to display of other State activities and to attitudes expressed or implied by one or several of the sovereign entities abutting upon the Rann in regard to the actual extension of their respective dominions.

It will have been seen from statements of authorities quoted earlier in this Opinion that the overall general principle that would apply during the British epoch in determining issues turning upon notions of territorial sovereignty was usage.

Pakistan has argued that the determination of sovereign rights over the Rann and the bets therein is governed by a regional custom which evolved and became recognised in the nineteenth century. The instances which are cited in support

of this proposition are set out in Chapter VI. From them, it is said, the principle can be deduced that the bets in the Rann and the territory of the Rann itself were recognised and acknowledged to appertain to the territorial units abutting upon the Rann to the shores of which such bets and such territory of the Rann were nearest. Even though a rule to this effect may have been applied in the determination of specific cases, notably in the Kennedy Valuation Judgment which was rendered half a century before Independence, the evidence does not in my opinion establish the existence of a constant and uniform usage or even of a general rule applied as binding in the area of the Great Rann in distinguishing British territory from that of Indian States. A principle of nearness of shores therefore is not proved to be applicable in this case.

The case of India rests in essence upon three grounds. The first is the fact that the assertions made by the Rao of Kutch that the Rann was his territory were not contradicted by the British authorities for a period of about 75 years prior to Independence. The second ground is that for a long period of time, extending over three-quarters of a century, Great Britain as Paramount Power in the sub-continent took official action by which it acknowledged that the Rann of Kutch was Kutch territory. Third, in more recent times, as from about the beginning of this century and until the eve of Independence, such action on the part of the British Government in India gradually assumed the more precise form of the depiction on maps of a conterminous boundary between Sind and Kutch, or between Sind and the States of Western India, along the northern edge of the Great Rann, roughly in accordance with India's claim line. This evidence will now be appraised.

There is no doubt some force in the argument that, if the British authorities concerned, and in particular the Government of Bombay, had considered the Rao's statements in the Kutch Administration Reports unfounded, they would have had to make this view express, lest a territorial claim on the part of the British be in some measure prejudiced. However, the Rao's statements, made in the briefest fashion possible in the statistical section of routine annual reports on the affairs of Kutch, were not and cannot have been understood as a claim in the true sense of the word. They were mere assertions or pretensions of an abstract nature and did not serve as a basis for any Government action taken by the State of Kutch. It is true that the greater part of the disputed territory is a barren tract incapable of habitation and of any but intermittent use for limited purposes, and that the requirement of occupation, as remarked earlier, is less essential in relation to such a territory. Nevertheless, it is significant that the State of Kutch did not establish even a token presence in the northern half of the Great Rann between 1819 and the demarcation of the vertical line in 1924; the two isolated reports of the Bhuj Vahivatdar made in 1876 do not constitute proof of such a presence of Kutch either then or in earlier times. Hence, while the Rao of Kutch stated that the territory was his, and while the British showed indifference and did not protest against this, the Rao did not act in reliance upon his assertions. Consequently, at least up to the year 1926, when the first agents of the Government of Kutch rode into Dhara Banni and Chhad Bet, the claimed title of Kutch to the territory rested solely on a negative ground and did not

have a foundation in concrete Government action. No benefits of the assumed extension of territorial dominion were enjoyed by the State; nor were any sovereign duties discharged by Kutch. The first ground upon which India's claim to title rests is for these reasons fragile.

The statements made on the British side that the Rann was Kutch territory carry greater weight. They may amount to a voluntary relinquishment of potential British territorial rights, and statements to the effect that one does not possess a right are no doubt more significant than statements to the opposite effect. The form in which these acknowledgments were made, however, was largely the same as that in which the Rao's assertions were expressed. The Bombay Administration Reports and the Gazetteers of the Bombay Presidency contained a mass of information on various topics relevant to the administration in the years to which they related, as well as on topics of general interest. They were not administrative acts, but encyclopedic reference books. The passages relied upon in these proceedings occurred in lists of area statements included in those books. In the more relevant Statistical Abstracts, the reservation that the Rann was Kutch territory appeared in the form of footnotes referring to the area of Kutch in a list of the areas of a great number of States. It is difficult to envisage a more insignificant form of Government action than such a footnote.

Nevertheless, the statements that the area of Kutch was given "exclusive of the Rann", etc., were made and were repeated, though in some cases in more explicit terms than in others. As remarked earlier, the attitude was most clearly expressed in the Bombay Gazetteers for the years 1905 and 1914 in which it was stated that the total area of 9,000 square miles of the Rann belonged to Kutch.

Many passages of this nature which were published both on the Kutch and the British side characteristically referred to "the Rann" without specifying what this term meant. It is by no means obvious that "the Rann" necessarily included the bays situated therein, for much of the evidence on record which relates to the nineteenth century establishes that a distinction was made in practice between rights to the bays and rights in and to the Rann proper, and it is not a foregone conclusion to assume that an area like Dhara Banni—Chhad Bay, either subjectively or objectively, can at the time of each statement have been deemed to constitute a bay in the Rann. Furthermore, it appears quite possible that, upon enquiry, that area as well as the jutting triangle and other marginal areas would have been recognised and treated as forming an extension of the mainland of Sind, and as not being encompassed by the expression "the Rann" used in the publications in question. Any uncertainty in this respect ought properly to be resolved in favour of Pakistan. The reason therefor is that the claim made by Kutch must, because of the form in which it was made, and because it was unsupported by other action, be interpreted restrictively, to the disadvantage of the claiming party and the statements issued by the British authorities must be understood in like fashion and cannot in the circumstance be extensively interpreted.

The second ground on which India's claim to title rests is stronger than the first, but likewise limited in effect.

The uncertainty and vagueness as to details inherent in the assertions of the Rao and in the acknowledgments by the British that the Rann was Kutch territory are removed in the maps which indisputably depict a conterminous boundary between Sind and Kutch, or Sind and the States of Western India, having an alignment which conforms by and large to India's claim line. They form the third and most convincing ground of India's case. These maps were published by the Survey of India from 1907 and onwards with increasing frequency. In the course of time, such a conterminous boundary appears to have become a constant feature on all maps produced by that Department for the variety of purposes that maps are intended to serve. They were also widely distributed, and to the highest British authorities. Because of the nature of the depiction, there could hardly be any doubt in the minds of those examining the maps that they implied and expressly acknowledged that British territory ended on the northern side of the Great Rann, and that the Great Rann formed part of Kutch or of other Indian States abutting on the Rann.

However, they were maps, and in the context of the political system in India during British times, the evidence on record leaves no room for doubt that none of the maps produced in this case was a conclusive and authoritative source of title to territory, except Indian Map B-44, on which the boundary determination made in the Resolution of 1914 was authoritatively depicted. However, as held earlier, this depiction with a blue dotted line covered only a portion of the boundary at issue. An overall assessment of the evidence on record concerning the methods applied in making ground surveys and in preparing basic maps, and the processes by which such maps, and particularly the subsequent compiled maps, were produced, examined, approved and continuously modified gives a clear picture of the true status of the relevant maps. This may be said to have been that the boundary in dispute as depicted cannot have been intended to offer more than a rather tentative indication of the actual extension of sovereign territorial rights. As such, the alignment of this boundary did not represent material accuracy but merely gave a clue to existing positions valid in the absence of other guides. When, however, the true extension of sovereignty over a territory became the subject of investigation and inquiry, and especially of an exhaustive judicial inquiry, the evidentiary value of the maps was lessened as far as the relevant boundaries were concerned, and they were made to yield to evidence of superior weight, particularly evidence of exercise of jurisdiction. This conclusion inescapably follows from an examination not only of the enquiries which are treated in Chapter VI, but particularly of the cases where parts of the boundary now at issue became the object of investigation and discussion: the boundary demarcation correspondence in 1875-1876, the correspondence concerning the boundary between Hyderabad District and Kutch in 1884, the incident of 1885 culminating in the two Resolutions of the Government of Bombay in that year, the correspondence in 1905 on the boundary between Jati Taluka and Kutch, the claim resulting in the boundary determination by the Resolution of 1914, the incident of 1926-1927 leading to the Collector's

order, the inquiries made in the course of Osmaston's Survey, and the actions taken in Sind which led to the demand for extradition of Kutch officials in 1945. On none of these occasions were maps deemed by the responsible British Government officials as determinative of those sovereign rights which were subject to discussion and enquiry.

Some of the maps which do depict a conterminous boundary as aforesaid are inconsistent in so far as they show minor portions of the boundary variously. It is known that these variations were made by the Survey of India without consulting or obtaining sanction from the authorities solely competent to decide political matters.

Persuasive evidence though the maps showing a conterminous boundary may be at first glance for the proposition that they constituted a relinquishment by the British of such territorial rights in the Rann as—absent the maps and the statements previously referred to—the British might have asserted on legal grounds in the disputed territory, they are therefore in the circumstances of the present case not conclusive support for a positive claim to sovereign title on the part of Kutch and the other Indian States abutting upon the Rann.

The three grounds on which India's claim is based have the feature in common of being acts of relinquishment by the British of such territorial rights as Sind might have asserted in the Rann. These acts on the part of the British leave, as it were, the disputed territory, or the greater part thereof, in the hands of the sovereign or sovereigns who by reason of geographical proximity were there to receive it.

What are the bases of the title claimed by Pakistan?

I have already concluded that no principle of law in the nature of a regional custom operates to confer title upon Pakistan to the Rann of Kutch on the grounds of nearness of shores or equidistance.

Evidence relied upon by Pakistan shows that, over the same period of time as the statements and the maps on which the title claimed by India is based were issued, the Sind authorities explicitly gave expression to the view that half of the Great Rann, or roughly the territory now in dispute, was British territory. Such a position was taken, significantly, in instances where the matter at issue was subject to especial scrutiny. These instances were the following.

In the course of the enquiries made at the request of the Commissioner in Sind in 1875, the Mukhtiarkar of Diplo stated that the rest house on Gainda Bet was fixed as the boundary of the Thar Parkar District and Kutch. The Political Superintendent of Thar Parkar accordingly reported to the Commissioner in Sind that there were "here and there certain spots in the Rann which are by custom generally accepted as showing the line of boundary between this district and Cutch" (Pak. Doc. B.168/Ind.).

In 1884, the Assistant Collector of Mahomed Khan's Tanda reported to the Collector of Hyderabad that all he could find out about the boundary line between that division and Kutch territory was that "it is somewhere in the Rann."

The Collector then reported to the Commissioner in Sind as his opinion that "the Rann itself is the boundary". Reference has already been made to the fact that Erskine, later Commissioner in Sind, adopted this view in identical terms in his letter to Pullan of 21 November 1884, in which it was also stated that "no portion of Cutch territory is found on the Northern side of the Rann" (Pak. Doc. B.376).

In the next year, 1885, Watson, Deputy Collector of Parkar, reported to the Commissioner in Sind that although apparently Kutch contended that the whole of the Rann was part of its territory, "the natural boundary between Sind and Kutch is without doubt the centre of the Rann and this has always been considered to be the border by the people of Thar and Parkar. . . ." (Pak. Doc. B.9). In forwarding this report to the Government of Bombay, Commissioner Erskine characterised the Kutch claim to the whole of the Rann as preposterous and expressed doubts that it was "ever likely to be seriously pressed". The Commissioner added that :

"It is perfectly well understood by the people on both sides of the Rann that the northern half of the Rann pertains to Sind and the southern portion adjoining Cutch territory to Cutch and part to Gujerat and the grazing and other privileges involved in such division are fully appreciated by the people. If any more defined boundary than now exists is required it should merely consist of boundary pillars as near the centre of the Rann as possible." (Pak. Doc. B.378).

The letter of the Acting Commissioner in Sind of 1898, which has previously been quoted in this Opinion, stated by way of a formal order that the Rann should be considered British territory for police duties; this was in response to an enquiry of the District Magistrate of Thar Parkar in which the latter had affirmed that law and order had been maintained by Sind authorities "on our side [of the Rann] at least".

In 1903, the Commissioner in Sind pronounced that "prima facie the rights of the Sind Authorities extend to at least the centre line of the Rann" (Pak. Doc. B.381).

In the course of the 1926 incident, the Collector of Thar Parkar decided that "in default of any information we will continue to regard half the Rann as belonging to British and half to Kutch". (Pak. Doc. B. 223).

Referring to this statement, the Mukhtiarkar of Nagar Parkar said in his written statement delivered at the meeting held in Nagar Parkar on 22 January 1938 in the course of Osmaston's Survey that "half of Kutch-jo-Rann belongs to British Territory and the remaining half of it adjacent to various states to those State authorities" (Pak. Doc. B.24).

The statements now referred to which were made subsequent to 1903 emanated from rather subordinate officials. They were, however, officials who had direct and intimate knowledge of actual conditions and of locally recognised boundary conceptions. At the same juncture of history, the acknowledgments in various forms by higher British authorities to the effect that the Rann of Kutch

was Kutch territory began to appear. Taken as statements, if unaccompanied by any action, the pronouncements to the effect that the boundary lay in the middle of the Rann—or the previously described statements that the boundary was in dispute or not settled—cannot outweigh the evidence to the opposite effect upon which India's claim rests. Clear and unequivocal though the statements relied upon by Pakistan are, they weaken but cannot invalidate India's claim.

The last question which remains to be considered is whether the evidence relied upon by Pakistan showing the display of State activity is of such a character as to rebut the presumption created by the evidence adduced by India.

My first conclusion on this evidence is that it has not been established that Sind exercised continuous and effective jurisdiction and authority over the whole of the disputed territory. However, I have already stated that Kutch did not do so either, if indeed at all.

The only sectors of the disputed territory in relation to which the evidence of Pakistan bears the conclusion that active State authority was exercised by Sind lie in the area from the eastern loop up to and including Chhad Bet. Within this area, the southernmost places in which jurisdiction is proved to have been exercised are Vighokot and Biar Bet. Each of those two places is, however, referred to solely in one single instance, and one instance of exercise of jurisdiction cannot be taken as a basis for delimiting the true extension of territorial sovereign rights. The position is different in respect of a portion of what Pakistan has referred to as the "jutting triangle", within which a number of instances establish a continuous presence in recent times at and in the vicinity of Ding and Kanjarkot. There also the area of Pirol Valo Kun is situated. In a sector bounded to the south by the southern limit of Pirol Valo Kun, not only is there a total absence of effective Kutch activity, but there is a consistent exercise of sovereign rights and duties by Sind authorities, and activities of residents of Sind, in one instance taking the form of a permanent settlement at Shakur.

The remaining sector within the area described above in which authority, in this instance exclusively for the protection of activities of private individuals, is shown to have been displayed by Sind authorities in a manner which is not sporadic but consistent and effective, is Dhara Banni and Chhad Bet.

As stated earlier, the activities undertaken by Kutch in these areas cannot be characterised as continuous and effective exercise of jurisdiction. By contrast, the presence of Sind in Dhara Banni and Chhad Bet partakes of characteristics which, having regard to the topography of the territory and the desolate character of the adjacent inhabited region, come as close to effective peaceful occupation and display of Government authority as may reasonably be expected in the circumstances. Both the inhabitants of Sind who openly used the grazing grounds for over one hundred years and the Sind authorities must have acted on the basis that Dhara Banni and Chhad Bet were Sind territory.

Against the background of other evidence produced by Pakistan, decisive importance must be given to the Sind activities displayed in the sector of Rahim ki Bazar and in Dhara Banni and Chhad Bet.

Reviewing and appraising the combined strength of the evidence relied upon by each side as proof or indication of the extent of its respective sovereignty in the region, and comparing the relative weight of such evidence, I conclude as follows. In respect of those sectors of the Rann in relation to which no specific evidence in the way of display of Sind authority, or merely trivial or isolated evidence of such a character, supports Pakistan's claim, I pronounce in favour of India. These sectors comprise about ninety per cent of the disputed territory. However, in respect of sectors where a continuous and for the region intensive Sind activity, meeting with no effective opposition from the Kutch side, is established, I am of the opinion that Pakistan has made out a better and superior title. This refers to a marginal area south of Rahim ki Bazar, including Pirol Valo Kun, as well as to Dhara Banni and Chhad Bet, which on most maps appear as an extension of the mainland of Sind.

These findings concern the true extent of sovereignty on the eve of Independence. I do not find that the evidence presented by the Parties in relation to the post-independence period is of such a character as to have changed the position existing on the eve of Independence.

For the reasons now given, and with due regard to what is fair and reasonable as to details, I conclude on the great issue before me that the boundary between India and Pakistan lies as follows. Reference is made here to the Award Map (Map C). Because of the imprecise topographical features in the region and the impossibility of exactly delimiting many acts of State authority, the boundary must sometimes be represented by approximate straight lines.

The portion of the boundary between the Western Terminus (marked as "WT") and the Western Trijunction (marked as Point "A") shall lie along the vertical line as demarcated on the ground. In the sector between the Western Trijunction and Point "B" on Map C, the boundary will be that which was laid down in the most recent survey of that region, being Erskine's Survey; in that sector the maps of Erskine form part of the composite Map C. From Point "B", which is the easternmost point of the eastern loop as appearing on Indian Map B-11, the boundary shall go in a straight line to Point "C", which is indicated as "Sadariaja Got" on Map C, and from there straight east-northeast until at Point "D", in the vicinity of the reported Karali outpost, it shall reach the boundary symbols appearing on a recent map of that sector, Indian Map B-26, which also forms part of Map C. From Point "D" it shall follow the boundary symbols until Point "E", which is defined in the next paragraph.

The boundary around Dhara Banni and Chhad Bet will be straight lines drawn from or through certain basic points. These shall be the southernmost (G) and easternmost (H) points of Chhad Bet, as appearing on Indian Map B-33, and two traverse stations marked on Indian Map B-48 as small circles, one lying at a distance of approximately 5.8 miles south of Baliari next to the mark "5 r", and the other lying at a distance of approximately 1.7 miles south of the letters "D" and "H" in "Dhara Bani". The boundary shall go in a straight line through the middle of the first-mentioned circle and touch the second circle as depicted on Map C. Point "E" lies where that line reaches the boundary

symbols on the northern edge of the Rann. From Point "G", the boundary shall go straight west until at Point "F" it reaches the straight line originating at Point "E". From Point "G" it shall proceed to Point "H", touching the outer points of the two tongues of land as depicted on Map C. From Point "H", the boundary shall go in a straight line north-northeast until it reaches the boundary symbols appearing on the most recent survey map of that sector, Indian Map B-33. That point is called Point "K".

As from Point "K", and until the Eastern Terminus, the boundary shall follow the boundary symbols appearing on the other maps and the plane-table section which form part of Map C, being Indian Maps B-33, B-34, B-35, Pakistan Map 103 and Indian Map TB-28, with the following deviations (Indian Map TB-28 of 1938 being chosen in preference to Pakistan Map 137 of 1881, which choice in my opinion finds support in the "Minutes of the Meeting held at Lahore and Amritsar from 25th to 28th March 1959 in connection with the Demarcation of Rajasthan (India)—West Pakistan Boundary") :

(a) The two deep inlets on either side of Nagar Parkar will constitute the territory of Pakistan. Already in 1885, the Deputy Commissioner of Thar Parkar pointed out that if these inlets were to be considered Kutch territory,

"[a] glance at the map will show that Parkar would be a peninsula almost entirely surrounded by Kutch territory. The Kutch State could erect fortifications and establish Custom houses at places situated many miles within the district for instance close to Veerawah, or on some of the roads which, crossing inlets of the Rann, lead from one part of this district to another". (Pak. Doc. B.9).

In my opinion it would be inequitable to recognise these inlets as foreign territory. It would be conducive to friction and conflict. The paramount consideration of promoting peace and stability in this region compels the recognition and confirmation that this territory, which is wholly surrounded by Pakistan territory, also be regarded as such. The points where the boundary will thus cut off the two inlets are these :

At the western inlet, the boundary will leave the boundary symbols indicated on Indian Map B-34 at the point marked thereon as "26", more precisely where the cart track is indicated as departing from the edge of the Rann in a southeasterly direction. This point is indicated as Point "L" on Map C. On the other side of the inlet, the point will be that where the camel track is indicated on Indian Map B-34 to reach the edge of the Rann; that point is indicated as Point "M" on Map C. Between Points "L" and "M", the boundary shall be a straight line.

The boundary will cross the eastern inlet at its narrowest point in a straight line between Points "N" and "O" marked on Map C.

(b) The boundary marked by symbols along the outer edges of the peninsula of Nagar Parkar and up to the Eastern Terminus is a jagged one. As such it is unsuitable and impracticable as an international boundary. The boundary shall accordingly lie in conformity with the depiction on Map C between the

outer points on jutting-out tongues of land from Point "M" and until the Eastern Terminus, marked as "ET" on Map C.

At no point between the two Termini shall the alignment of the boundary as above described be such as to include in India territory not claimed by India, as defined by the depiction of India's claim line on Map A.

It might be added that the boundary proposed by me for the greater part of its length roughly coincides with the boundary proposed by my learned colleague, Mr. Bebler.

(Gunnar Lagergren)

* * *

Opinion of Mr. Entezam :

In an early stage I considered that Pakistan had made out a clear title to the northern half of the area shown in the Survey Maps as the Rann. I have now had the advantage of reading the Opinion of the learned Chairman, and in the light of it I concur in and endorse the judgment of the learned Chairman.

(Nasrollah Entezam)

* * *

The alignment of the boundary described in the Opinion of the Chairman and endorsed by Mr. Entezam has obtained the required majority. It is therefore the boundary determined by the Tribunal.

*

Done at Geneva, this nineteenth day of February, nineteen hundred and sixty-eight.

(Gunnar Lagergren)

(Nasrollah Entezam)

(Ales Bebler)

(J. Gillis Wetter)