INDO-PAKISTAN WESTERN BOUNDARY TRIBUNAL

INDO-Pakistan Western Boundary (Rann of Kutch) Between India and Pakistan

Dissenting Opinion of Judge Aleš Bebléř

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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, conterminous
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 made 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.
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.

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.

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 IndoPakistan 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 con-
trolled 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. The 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 position, 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.

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 the 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 was 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 forsook 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—19. 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 Khor 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 subcontinent, presents as such in the area in question in fact from the very first years of the nineteenth 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 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 Suzeain, 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 the 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 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, he be 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 Indian 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 what 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.

_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 aggressions 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 of 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 \textquoteleft inter se\textquoteright 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 1918, we see how this rule, formulated by Tupper towards the end of the nineteenth 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 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 the 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, out we will not go and encroach on others! This has remained throughout 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 creating, 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;
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;

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;

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 acts, 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 reUte 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 so 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.e., 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.

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 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 conterminous 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 nineteenth
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 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—20 and the Treaties of Paris of 1946—47, 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 the 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

"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.

**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 western-most 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 estab-
lished 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 sium 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 juridicial 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 22 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 is 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-à-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 treatypartner, 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 studies the circumstances of the case before drawing the conclusion that its passivity could be relied on against the State whose attitude was passive.

Two 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).** This 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 of 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 in 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 régime 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 to be interpreted with all the 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 or of 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.

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 both its capacities, as suzerain and as sovereign, in territorial matters vis-à-vis both its vassals and its neighbours. If it were not so, decisions on, or settlements of, boundary issues would have been futile.

It follows that statements — in the above 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 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 Bedin-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 is 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 McClenghan 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 coordinates 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 subcategory 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 of 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 the 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 chiming 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 remained 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 eighteenth 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 nineteenth 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 20 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 positions, 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, is 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 presurvey 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 (Memorandum) 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 side 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 coexistence 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 Gvt: 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 1854-55 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—Rajastan 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 southern-most boundary of all the southern-most 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 inquired, 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 southern-most 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 southern-most 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 southern-most 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 a 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 dictated 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 knew that they grazed on foreign territory, beyond the boundary of their country, and that therefore, obviously, this pastureland was not 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 western-most 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 finding 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 southern-most talukas (groups of dehs under one chief, the Mukhtiarkar) which stop on the edge of the Rann, where the Macdonald fine runs; on maps prepared in 1886 by the Sind Revenue Survey; on a "Map of Sindh to accompany the Sind Gazeteer" 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—86 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 re-survey.

(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 squares
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 and 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.

(a) In 1875—76 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 states 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 Drobana 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 Rann”.

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 Run”. No inquiry, 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—08 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 1915.

These proceedings were called the seekings 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 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 ever 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 that 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 as "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 western-most 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 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 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 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 to 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 enquiry, 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 foot-note 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), B40 (1946) and B-26 (1947). Pakistan Map B.92 of 1941, prepared by Mr. McLanaghan 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 of 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 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 a 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 territorial 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, 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 à 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 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 Ecresos 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 Ecrèhos 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 à 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 of 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., 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 may not be 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 inquired carefully about the situation regarding display of State authority. Macdonald in 1855—70 did his best to find the exact limits of the southern-most 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 inquired 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 in both time and in space. While Macdonald was on the spot and inquired 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—68.

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—14, 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 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 is 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 salt in the greater Runn";

(2) The sanction for the erection of marks and guide stones across the Rann by the British in 1850—55;

(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—72;

(4) The letter of the Mukhtiarkar of Diplo in 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—94, 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—22 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 Bhanjiar 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 Dhar 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—90. 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—29 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 of Dhar 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—70, 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 Amir's 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 edges 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 Lakhadria, 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 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 orders 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 as 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 à 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 be Kutch, by publishing the same information in official Government publications and, most particularly, by

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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 policeman 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 *à titre de souverain* and of the required intention to be the sovereign, on the part of the

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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 five or six miles to the north of Sindri;
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;

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;

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 the bets in the Rann; 13 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;

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

The fact that, during Pullan's Survey, in 1879—86, his party was accompanied and assisted by Kutch police;

The Kutch Administration Report for 1889-90, mentioning that the police of Kutch exercised jurisdiction over the whole of the Rann;

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;

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

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Kutch, including the Great Rann, remained outside the salt preventive arrangement of the British;

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 related to three seasons of survey work - 1934—35, 1935—36 and 1937-38;

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—29. 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 paid were impounded but later released on payment of tax and penalty. In 1948—49, 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:

(I) The Tribunal is called upon to determine where the boundary between

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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 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 ever have 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 its name, viz., Rann "of Kutch", and never any other.

(7) In the distant past, particularly in the eighteenth 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 eighteenth 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.

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(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 bets 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 parties.

(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 ro the State of Kutch or other conterminous 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.
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.

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.

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.

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.

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 nineteenth 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.

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.

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.

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—

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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—70, 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 nonhem 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 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 the 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 western-most 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 these 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

CONCLUSIONS - DISSENTING OPINION OF JUDGE ALES BEBLER 501 by Kutch confirm the boundary as recognised by the two neighbours and depicted in official maps.

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).

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.

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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 Creek 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 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 nineteenth 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 of 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 inquiry 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 produced 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—39, 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—12 and 1921—22 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 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.

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Rann. In 1875 a reference was received from the Secretary of State by the Government of India and it 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 Khor 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 Bhownuggar 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 the 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

Williams 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 others. 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 inquiry 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.

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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 Dayra 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—38 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.

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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 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 that "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 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.
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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 inquiry, 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

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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

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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 nineteenth century. The British geographers of the eighteenth 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.

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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 Chilcha-kaun (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 the... 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 subject 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."

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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 Gulp 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 and 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 if 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 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 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. William’s 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 Maharo’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.

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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, “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 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

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inquiries, 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 Runn: 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 inquiry was made by Macdonald. Five years later (1875), when such an inquiry 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) were 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.

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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 Bhownuggar 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 Gujarat, and Miles found in 1823 that in the Rann the islands nearest to the Palanpur, Gujarat, 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 comer 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

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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 9,000 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 9,000 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 the 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 1,000 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 inquire 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 foothold 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 Undersecretary 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 subcontinent. 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 inquiries 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 inquiry, 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 inquiry.

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 is to say that in the controversy of 1938—39 (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 assertions 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 Khorı River. It is known that the earthquake submerged Sindri and a part of what Pakistan

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calls the delta lands, obliterated whatever was left of Sayra and of the Khorı 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 Pirol 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 the 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, Sarbelo 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

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it as a bet attached by a small neck of 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 inquiry 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 Runn, 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 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 midpoint 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 Gainda Bet, in straight lines; then proceeding eastwards parallel to the lines of latitude up to longitude 70° 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.