ARBITRATION

BEFORE

THE HONORABLE EDWARD D. WHITE

CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

OF THE DIFFERENCES BETWEEN

THE REPUBLIC OF PANAMA

AND

THE REPUBLIC OF COSTA RICA

ANSWER

ON BEHALF OF THE REPUBLIC OF PANAMA TO THE ARGUMENT SUBMITTED ON BEHALF OF THE REPUBLIC OF COSTA RICA

ARBITRATION

BEFORE

The Honorable Edward D. White

Chief Justice of the Supreme Court of the United States

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AND

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Answer

on behalf of the Republic of Panama to the Argument submitted on behalf of the Republic of Costa Rica

ANSWER

On behalf of the Republic of Panama to the Argument submitted on behalf of the Republic of Costa Rica.

The voluminous argument and the great mass of books and maps submitted on behalf of the Republic of Costa Rica are both so remote from the subject of this Arbitration that it becomes desirable, before considering them, to state again the question which is submitted to the present distinguished Arbitrator, that there may be clearly in view the standard by which the relevancy and value of all arguments and proofs adduced in this proceeding must be tested and decided.

By the question submitted, as defined in the Convention signed on March 17th, 1910, the scope of this Arbitration is conclusively fixed and defined. Beyond that question there is no controversy before the Arbitrator, nor can any Award be made; and no argument and no proof can have any relevancy or force which does not tend directly to determining the answer to it.

That question is defined with a clearness and exactness which leave no room for doubt or dispute, in Article I of the Convention as follows:

> "*What is the boundary between Panama and Costa Rica under and most in accordance with the correct interpretaiion and true intention of the Award of the President of the French Republic made the 11th of September, 1900?*"

The words are familiar to all persons connected with this Arbitration in any way. This is the question, and the only question, which the present distinguished Arbitrator was asked to decide; this is the only question which he consented to decide. But, familiar as the words are, we have thought it useful here to produce them again, for it is from this point that we must start in considering the argument of Costa Rica. To ask the Arbitrator to make an award which shall be anything but an answer to this specific question is to ask of him what he is neither authorized nor has consented

to do. Not the boundary as an abstract, undetermined question is concerned, but only and exclusively the boundary under the Loubet Award.

If any doubt were possible as to the meaning of the question as formulated in the Convention (although language cannot be clearer) it would be dispelled by the remainder of Article I. which states the controversy which gives rise to this Arbitration.

> "The Republic of Panama and the Republic of Costa Rica, although they consider that *the boundary between their respective territories designated by the Arbitral Award of His Excellency the President of the French Republic* the 11th of September, 1900, *is clear and indisputable in the region of the Pacific* from Punta Burica to a point beyond Cerro Pando on the Central Cordillera near the ninth degree of North latitude, *have not been able to reach an agreement in respect to the interpretation which ought to be given to the Arbitral Award as to the rest of the boundary line* and *for the purpose of settling their said disagreements* agree to submit to the decision of the Honorable Chief Justice of the United States" * * *

Their only disagreement is thus stated to be be as to the *interpretation* of a part of President Loubet's Award. Where both found it clear, no question is raised nor exists; it is only the interpretation of the remainder of the Award which causes any disagreements and it is only "*said disagreements*" which are submitted, now, to arbitration. It is, then, only to obtain an authoritative *interpretation* of the Loubet Award that this Arbitration was constituted and the question submitted, framed. Were it possible to argue anything else from any other words in the Convention, this would be a complete answer. The only question which can be raised is: what is the boundary awarded by President Loubet?

Now it is not too much to say that not a word in the long and elaborate argument for Costa Rica, not a word in the many volumes, not a line in the numerous maps which she has submitted as proofs, has any tendency, even, to assist in an answer to this question.

A large part of the argument is taken up with matters of history anterior to the Loubet Award. We need not consider whether this historical matter is accurate and complete or not. Whatever of force any of it ever had was undoubtedly presented to President Loubet by the learned and distinguished representatives of Costa Rica on the arbitration before him. Here, at any rate, it has no relevancy. This Arbitration begins with his award as if there

had never been a fact or a document relating to this boundary (except the conventions under which he acted) before that event. Whatever argument might be made by any one for one or another line, based upon matters before the Loubet Award, no such argument can be invoked now. That Award is, as we said in our former Statement, an absolute *datum*, so far as this Arbitration is concerned. Its entire correctness cannot be questioned here.

It is, no doubt, true that reference might be made to any events or documenst preceding the Loubet Award, if any obscurity were found in it which such events or documents might serve to elucidate; but that is not, in fact, the case. The argument of Costa Rica is addressed, not to elucidating the Award, but to showing it to be erroneous; not to making plain what President Loubet decided, but to proving that he should have decided otherwise. Indeed, in this part of their argument, the learned representatives of Costa Rica appear, by implication, to admit that the Award is plain and needs no elucidation, for they constantly contend that it is unjust aud without foundation in fact. Unless they were clear as to what line the Award fixed, they could hardly complain of it as erroneous.

But, at any rate, there is no pretence that the argument for Costa Rica serves, or is intended to serve, to aid in determining the " correct interpretation " or the " true intention " of the Loubet Award. The sole purpose of that argument is to show that the Loubet Award is erroneous; and that is a question not before the present Arbitrator.

The Convention of Arbitration, so far from authorizing any review or modification of the Loubet Award, prohibits it, by the form in which the question submitted is expressed. Not what *should have been* the Award of President Loubet, but what *was* his Award, properly construed and applied, is the question, and the only question, before the Arbitrator. Language cannot be plainer, and we are at a loss to understand why the learned representatives of Costa Rica should have devoted so much space and time to an argument which, even if it were well-founded, could not avail. Whatever their motive, the fact remains that such an argument is wholly irrelevant to the present arbitration.

Another considerable part of the Argument for Costa Rica is devoted to an attempt to show that the Loubet Award is void for defect of *ultra petita*, based upon two contentions: *first*, that some of the territory awarded by President Loubet to Colombia had never been really in dispute, but had always

been the undisputed territory of Costa Rica; *second*, that some of that territory lay outside the line proposed, on that arbitration, by Dr. Silvela, one of the counsel for Colombia, though the Silvela line would have given Colombia vastly more territory, as a whole, than President Loubet, in fact, awarded her.

The logical conclusion from this contention would be that the Loubet Award is void; but, while Costa Rica asserts that such is the case, she formally disclaims any demand for its annulment. [1] Such a demand, indeed, she cannot make. The Conventions of 1886 and 1910, as well as her conduct ever since the Award, cut her off from any such contention.

She does, however, make this assertion of *ultra petita* the ground for requesting the present Arbitrator to award a line different from that of the Loubet Award and so substantially to disregard it. This course differs from an annulment of the Award only in form. The result is the same whether the Award be declared void or so defective as to require a total change in the only parts now under consideration, in order to avoid *ultra petita*. It will be seen from a consideration of the alternative lines which Costa Rica requests [2] that neither of them has the least resemblance to the line awarded by President Loubet. Neither can be the boundary "under and most in accordance with" the Loubet Award, which under the Convention of 1910, the present Arbitrator is to fix. Both of them are new lines not based upon that Award and which are asked by Costa Rica, not because the Loubet Award at all justifies them or because they at all accord with it, but because she argues that they are lines which are just and in accordance with what President Loubet should have awarded (in her view) but did not award. An award of one of these lines is asked "as the most just and equitable boundary".[3]

Thus the alternative boundaries asked by Costa Rica are neither of them intended to be lines resulting from the Loubet Award but altogether different lines, inconsistent with it and based, not upon anything which President Loubet awarded or decided, but upon the theory that his decision was erroneous.[4]

We need not point out again how completely at variance with the purpose and object of this arbitration such a request is, and how entirely foreign to the question here

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[1] Argument for Costa Rica p. 270.
[2] Argument for Costa Rica, pp. 340, 454–456.
[3] *Ibid.* p. 454.
[4] Argument for Costa Rica, pp. 332, 340.

to be considered are arguments based upon the abstract desirability of one boundary or another. For the present we desire only to note that this contention, as an argument for disregarding the Loubet Award, does not tend to the solution of the question submitted to arbitration, that the terms of the Convention and Costa Rica's conduct make it impossible of consideration now, and that it is a subject not submitted to the present Arbitrator, not consistent with the terms of the submission to him and which he would find himself not authorized to consider.

Another considerable part of the argument submitted for Costa Rica is devoted to an attempt to show that the Loubet Award is insensible in itself, and so inapplicable to the natural features of the country that it is impossible to apply it, even approximately.

We shall have occasion to consider more in detail this part of the argument, which has, we believe, no seriousness. We desire to note here only that this argument, too, if it could succeed, would have the effect of making any decision by the Arbitrator impossible. If the Loubet Award were really so obscure in its terms that it could not be given an intelligible meaning or so at variance with the natural features of the country that its true intention could not be discerned, then no award would be possible on this arbitration.

The functions of the present distinguished Arbitrator are confined to an application of the existing Loubet Award. In no case is he to fix the boundary apart from that Award, nor has he ever been asked or consented to assume such a task. If it were conceivable that he should find, as Costa Rica contends, that the Loubet Award could not be applied, he could only declare that fact; and with that declaration this arbitration would end.

The Argument for Costa Rica goes into vague speculations, as to President Loubet's general intentions,[1] but with these we have, on this arbitration, nothing to do. It is the "correct interpretation and the true intention" of the *Award* only, with which we are concerned. If we were morally satisfied that President Loubet had intentions which the Award does not express, those intentions could not be taken into account. The case would be like that with which all courts are familiar and which so often arises under a will, where the Court may plausibly conjecture that the testator did not intend the result which the language of the will necessarily produces, but can only say, "*licet quod voluit sed non dixit*," and enforce the will as it is written.

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[1] Argument for Costa Rica, p. 333.

We are concerned here only with a *text*, its interpretation and its application. We may have recourse to any of the ordinary guides to that interpretation and application, if anything doubtful or ambiguous be found in it, but beyond that we may not go. So far from a demonstration (if that could be made), that this text is insensible or incapable of application, clearing the way for a determination of the boundary, apart from it, the result would be that *no* boundary could be determined and that this Arbitration must be barren and end without any award.

Thus, no part of the Argument submitted for Costa Rica is directed toward the only question involved on this arbitration, that is, the true boundary under the Loubet Award. It is entirely made up of argument to show that the Loubet Award is erroneous, void and unintelligible, that it should be disregarded and that the arbitrator should fix a boundary without regard to it. The two alternative boundaries, one of which Costa Rica asks the Arbitrator to adopt, do not profess, even, to accord with the Award of President Loubet. What Costa Rica asks of the Arbitrator is that he shall wholly disregard and refuse to do what was submitted to him by the Convention of Arbitration, and that he do what the Convention gives him no authority to do.

In the process of reaching this extraordinary and impossible result, the Argument for Costa Rica finds it necessary to impugn and attack every person or body which has had to do with the subject since the original submission of the boundary question to President Loubet. That distinguished Arbitrator, the Commission which aided him in his task, the Commission of Engineers appointed on the present Arbitration, the geologist of that Commission, are all alike attacked and criticized. All were in error, all failed in their duty. The results reached by none of them favor Costa Rica, therefore these results are all erroneous.

But one conclusion is possible from this remarkable attitude on the part of Costa Rica and that conclusion is hardly denied. The Argument for Costa Rica is substantially a confession, that, while Costa Rica promoted this arbitration, she never had any doubt of the true meaning and application of the Loubet Award but used a pretended doubt in hope of wholly overthrowing it.

What would have been her attitude had she been really in doubt as to the meaning and application of the Award ? Obviously and necessarily she would have endeavored to find a solution, and would, in her argument, have sought to show that her solution was in accordance with the Award. She would have wasted no time in idle historical reviews to demonstrate the erroneous character of the Loubet Award,

nor in equally idle accusations against President Loubet and his commission, of ignorance and unfairness for having made such an Award. Still less would she have tried to make the Award void or unintelligible or have appealed to the Arbitrator to disregard the obligations of his high office, both by omission and commission ; by not deciding the question which he had consented to decide and by deciding a question never submitted to him.

The fact could not be made plainer that, upon the real question submitted to the present Arbitrator, Costa Rica has nothing which she can say. *There is not, and never has been, any doubt in anybody's mind as to the meaning and application of the Loubet Award, nor where the line described in that Award lies.* Costa Rica has no more doubted than did Colombia or than does Panama. Indeed, the root of all the difficuly is that she did not doubt. By no process of casuistry could she make that line really doubtful nor pretend that it could be drawn so that it would not deprive her of territory which she was determined not to lose or surrender.

Though Costa Rica had pledged her national honor to accept the Award of President Loubet, "whatever it may be," she preferred to break that pledge rather than give up what she must resign if she kept it. It will be seen more clearly, when we come to a full consideration of her argument, how unfounded are her objections to the Loubet Award. Her real objection was and is that which every defeated litigant has to the judgment entered against him ; but that objection she could not avow.

Despite her solemnly expressed promise Costa Rica would not abide by the Award and has never, to this day, surrendered her hold upon territory to which, under that Award, she has no right. Finally, pressure from the United States compelled her to furnish some excuse for her conduct, and she pretended a difficulty as to the exact meaning and application of the Award. This led to the present Arbitration, but now Costa Rica substantially admits that the difficulty alleged was a mere pretense. She never had any doubt as to the meaning of the Award nor the line which it fixed ; she has no theory to propose as to the true line under the Award ; she will not have the Award nor any line under it ; and what she asks is the discarding of the Award and the fixing of a new line to suit her.

That, however, she cannot have. The question of the validity or correctness of the Loubet Award is not before the Arbitrator, nor is the question of the proper boundary, had that Award not been made, between Panama and Costa Rica. Into none

of these questions has the Arbitrator any occasion to inquire, nor could the answer to any of them affect the Award which he is to make. Not only morally, as a matter of good faith, but strictly and legally, Costa Rica is bound by the present Convention to a complete acceptance of the Loubet Award. The line fixed by that Award is the only line which can be considered.

It is curious circumstance, and one which may well cause doubt as to the seriousness of the Argument which we are considering, that the treatment of the question which Costa Rica there attempts to make fundamental, is so summary. The Argument is, indeed, voluminous, but a great part of it is taken up with the attempt to dissuade the Arbitrator from following the Loubet Award—the only thiug he was asked or has consented to do.

If it were possible for such an attempt to succeed and if it were conceivable that the Arbitrator should be willing to do as Costa Rica wishes and fix a boundary without regard to the Loubet Award, then he would have to consider *de novo*, the same question which President Loubet decided. Volumes were required to contain the arguments, and vast accumulations of documents and maps to furnish the proofs which Costa Rica thought it necessary to adduce before President Loubet. Here she submits some of these volumes of argument, which failed to convince President Loubet before, and some of the former maps and documents. Perhaps she produces them all (for Panama is not in a position to know what was presented to President Loubet). If she has done so she presents only what failed to satisfy him of the justice of her claims and her new argument upon this subject, long as it is, is but a fraction of one volume of the former arguments. It is apparent that, if Costa Rica expected the present Arbitrator to reverse the decision of President Loubet and reach a different result, she would have felt it necessary to produce more proof and more elaborate argument than she produced before. If, when there was no decision against her, so much was required, certainly far more would be required to induce an Arbitrator to reverse a decision, solemnly made after long study and examination. But substantially no more has been produced.

This appears to us to show that, conscious of the fact that the present Arbitrator could not and would not depart from the Loubet Award and select another line than that designated therein, Costa Rica has never expected any such result. Her argument is not intended to convince nor to win an award. It is a mere form of argument which it was not worth while to elaborate, and its only real office is to cover the nakedness of Costa Rica's indefensible refusal to accept the Loubet Award.

Therefore we have here a further proof of Costa Rica's real attitude and real thought. She has no doubt as to the line of the Loubet Award, therefore she does not discuss it, except in a futile effort (to which we shall refer later), to make it out to be unintelligible. She offers no theory as to the meaning of the Award at all, because only one construction is possible and that so plain as to admit no argument for any other, and to make her past conduct inexcusable. But in order to make the appearance of having some other ground for her course than a mere refusal to comply with an Award which she had bound herself to accept, she sets up this contention for a line different from that of the Award, and professes to support it by a relatively slight and summary argument.

It is true that her position is sufficiently disclosed by the fact that she will not even attempt to discuss the only question before the present Arbitrator and confines herself to two questions not before him: the validity and the correctness of the Loubet Award. But the fact that, even upon these subjects, the argument is really only perfunctory, emphasizes the fact and shows the more clearly that Costa Rica has not and has never had any excuse for her breach of the Convention of 1886, and is merely endeavoring now to hide, by words, the flagrancy of that breach.

It is noteworthy, and affects the whole contention of Costa Rica, that she does not seek to invalidate the Award *in toto*, but only in so far as it is not satisfactory to her. On the Pacific side the line of the Award is nearly as favorable to her as the line which she proposed. Punta Burica, the Pacific terminus of the line of the Award, is close to the mouth of the Chiriqui Viejo, which Costa Rica proposed as the end of the line on that ocean, but a considerable distance from the mouth of the Golfito which Colombia proposed for the same purpose; and the line of the divide between the Chiriqui Viejo and the affluents of Golfo Dulce, from the cordillera to the ocean, fixed by the award, was very near that of the Chiriqui Viejo, proposed by Costa Rica, but very far from that proposed for Colombia. Therefore, Costa Rica accepts this part of the line of the Award, but seeks to repudiate so much of it as lies toward the Atlantic beyond Cerro Pando. Panama, of course, acquiesces in this acceptance, because she maintains the absolutely binding validity of the whole line of the Award, but asserts that that whole line, in its entirety, must also be accepted.

The line from Cerro Pando to the Pacific was not accepted by Panama as a line entirely satisfying her aspirations nor as a line adopted as a compromise, but simply and solely as the line of the Loubet Award. It was accepted because Panama, as the

successor to the obligations as well as the rights of Colombia concerning this boundary, is resolved to respect those obligations and to accept, without question or debate, the Award of President Loubet, to which her national honor as well as that of Costa Rica is pledged.

If it were to be said that Costa Rica's attitude involves, not a repudiation of the Award but its modification, and that she may therefore accept such parts of it as in her opinion need no change, the answer is that an attempt by her to obtain a revision or amendment of the Award would involve a breach of her treaty with Colombia no less flagrant than an attempt to repudiate it.

Article IV. of the Convention of 1896 provides:

> "The award of the Arbitrator, *no matter what it may be*, shall be considered as a perfect and binding treaty as between the High Contracting Parties, *and shall not admit of any appeal.* Both Parties bind themselves to its faithful fulfillment, *and they waive any appeal against the decision, pledging thereto their national honor.*"

If Costa Rica could be considered as not repudiating the Award, her conduct in calling for a revision of it would be precisely that appeal against it of which both parties agreed that it should not admit, which both waived, and which both pledged their national honor not to take.

Colombia and Panama have steadfastly kept this engagement, though President Loubet denied Colombia a vastly greater amount of her claim than he did Costa Rica. If Costa Rica be considered now as appealing to the present Arbitrator to alter the Award of President Loubet, she stands in the position of openly violating her treaty engagements no less than by wholly refusing to be bound by the Award at all.

Nor would the present distinguished Arbitrator be authorized to review, amend or correct the Award without the express revocation, by agreement of the parties, of this provision of the Convention of 1896.

It cannot be contended that the Convention of 1910 had any such effect. On the contrary that Convention is based upon the complete acceptance of the Loubet Award according to its "correct interpretation and true intention." That Award, as it stands, is the unchangeable standard to which any line fixed upon this arbitration must conform.

The convention of 1896, therefore, having declared that the Award made under it " shall not admit of any appeal," and that provision being still in force, not modified nor abrogated, it would not be in the power of any Arbitrator or tribunal to entertain or consider an appeal from it, even if one of the parties so far disregarded its agreement as to take an appeal which it had formally waived. The effect of the provision quoted is to make the Award itself incapable of revision or modification.

It is as if, in litigation between private persons, an appeal were taken from some decision from which, by law, no appeal lies. The court to which the appeal is taken will refuse to consider it because the nature of the decree is such that no appeal from it can be allowed. So, here, an immunity from review is inherent in the Loubet Award and until, by the plain agreement of the parties, that provision be changed, no appeal against it can be entertained anywhere.

We shall consider, later, the functions and jurisdiction of the present Arbitrator under the Convention of 1910. What we say now, is that, the parties having never agreed to an abrogation or modification of the provision of the Convention of 1896 to which we have referred, any action which should amount to entertaining an appeal against the Award cannot be taken.

We find, then, that the Argument for Costa Rica is confined to appealing to the Arbitrator for relief against the Award, when, by the very terms of the convention under which the Award was rendered, it admits of no appeal. We find, further, that so far from proposing any line as according with the Loubet Award, the Argument contends that no line can be drawn under it, because the Award, besides being void for *ultra petita* and other defects, is insensible and impossible to reconcile with the real geographical situation.

Therefore, as we have already said, the whole argument is irrelevant to the only question before the Arbitrator, namely, what is the boundary " under and most in accordance with the correct interpretation and true intention " of the Loubet Award ? Costa Rica's first contention is that the question cannot be answered, because the Award fixes no line. The only result of this contention, could it have any effect and were it well founded, would be the complete failure of this arbitration.

Costa Rica then goes further and asks the Arbitrator to answer a question not submitted to him, namely, what should President Loubet have decided to be the boundary ? That is the same thing as asking the present Arbitrator to consider, *de novo,* the question which President Loubet decided, except as to that portion of the

boundary which lies between Cerro Pando and the Pacific. Thus, as we have said, she asks the Arbitrator not to do what, under the Convention, he was chosen and has consented to do, and to do what he has not been asked nor consented to do.

This involves such a misconception of the scope of this Arbitration as argues not merely a misconstruction of the terms of the Convention which is incomprehensible, but a lack of acquaintance with the history of its making and the discussions and correspondence which preceded it, which it is as difficult to understand. It becomes necessary, therefore, to consider this vital preliminary question first and to point out how impossible it is that either the request of Costa Rica to disregard the Loubet Award or to fix a boundary different from that which it describes, should be entertained by the Arbitrator.

The Scope of the Present Arbitration.

We submit, with the present argument, an argument prepared by His Excellency Dr. Belisario Porras, now President of Panama, when he was Minister of Panama at Washington, at the opening of this Arbitration, and which we respectfully request may be taken as a part of this argument. It deals exhaustively with the question of the scope of this arbitration. We have already, in connection with our first statement, submitted some of the documents to which Dr. Porras refers and we submit others in a separate compilation which also include the letter from the Minister of the United States at Panama to the Secretary of State of that Republic, dated January 2d, 1909, with the copy of cablegram from the Secretary of State of the United States enclosed with that letter and the cablegram of the United States Minister at Panama in answer thereto; the letter of the Secretary of State of the United States to the Minister of Panama at Washington, dated November 2d, 1909; the letter of the Minister of Panama to the Secretary of State, dated February 21, 1910; and the memorandum of the same Minister to the Secretary of State, dated March 10th, 1910.

These further documents, not necessary at the time when Dr. Porras prepared his argument, it becomes desirable to introduce in view of certain statements in the Argument for Costa Rica which they will serve to correct.

To the argument of Dr. Porras concerning the proper construction of Article I of the Convention of Arbitration there is nothing to add. We believe that, as we have

said in our first Statement, its meaning is perfectly clear and involves the absolute acceptance of the Loubet Award, by both parties, as binding upon both and not to be impeached, for any defect of *ultra petita* or otherwise, even if any such existed.

But clear as is this meaning, from the language of the convention, its certainty is further reinforced by the other documents in the course of the negotiations leading to it.

By the cablegrams annexed to the letter of the American Minister at Panama to the Secretary of Foreign Affairs of Panama, of January 2d, 1909, it appears that Costa Rica then proposed that two questions be submitted on this arbitration: *First*, the validity of the Loubet Award; *Second*, if it be found valid, its meaning and through what points the line under it should be drawn. It also appears that Panama categorically refused to submit the validity of the Award to arbitration, but expressed willingness to arbitrate its meaning and the exact location of the line under it.

It further appears, from the other documents submitted, that Panama never wavered in this position, but made it the condition *sine qua non* of arbitration at all, that the absolutely binding force of the Loubet Award should be admitted. Even the Department of State of the United States was induced to urge upon Panama that she consent to broaden the scope of the arbitration so as to include, if not the validity of the Loubet Award, at least its correctness, and make possible a modification of it, should a case for such modification be shown. But the Goverment of Panama declined to accede to this suggestion, which it was, constitutionally, without power to accept (since the Constitution of Panama makes the line of the Loubet Award, the boundary of the Republic), and refused to arbitrate any question but the interpretation and application of the Loubet Award as it stood and without modification.

By the identic Memorandum addressed to the Special Representatives of the two Republics by the Secretary of State of the United States on March 1st, 1910, to which the Argument for Costa Rica refers, the position of Panama was accepted and adopted and the question for arbitration was formulated, much in the form ultimately adopted, except in one respect.

The question as suggested by the Secretary of State was as follows:

> "What is the boundary between the Republics of Panama and Costa Rica under and most in accordance with the true interpretation and correct

intention of the Loubet Award *in the light of all the historical, geographical, topographical and other facts and circumstances surrounding it as well as under the established principles of international law.*"

As actually embodied in the Convention this was modified so as to read :

> " What is the boundary between Panama and Costa Rica under and most in accordance with the correct interpretation and true intention of the Award of the President of the French Republic made the 11th of September, 1902 ?
>
> In order to decide this the Arbitrator will take into account all the facts, circumstances and considerations which may have a bearing upon the case, as well as the limitation of the Loubet Award expressed in the letter of His Excellency Monsieur Delcassé, Minister of Foreign Relations of France, to His Excellency Señor Peralta, Minister of Costa Rica in Paris, of November 23, 1900, that this boundary line must be drawn within the confines of the territory in dispute as determined by the Convention of Paris between the Republic of Colombia and the Republic of Costa Rica of January 20, 1886."

It is said in the Argument for Costa Rica that the parties agreed subsequently that these two forms are equivalent, but this is a complete error, due, no doubt, to lack of familiarity with the history of the question and the documents concerning it.

Not only are the two forms not equivalent, but the differences between them are important and intentional and are due to Panama's refusal to accept the form originally proposed.

In his memorandum to the Secretary of State of March 10, 1910, the Special Representative of Panama said :

> " It is with great satisfaction that the undersigned notes the recognition by the Secretary of State of the force and validity of the reasons which require the Government of Panama to insist upon a strict adherence to the Loubet Award as a necessary prerequisite to any arbitration to which that Government can constitutionally be a party.
>
> " It is the understanding of the undersigned, from the memorandum to which reference is made, that this attitude is accepted as the necessary basis for any further proceeding, and with this in view, the undersigned begs to submit the following additional views and considerations upon the subject of the memorandum."

And also :

> " With respect to the question to be arbitrated, the undersigned believes that that question would be accurately stated as follows : ' What is the boundary between the Republica of Panama and Costa Rica under and in accordance with the correct interpretation and true intention of the Loubet Award ' ?
>
> " The arbitrator will, undoubtedly, in the course of his examination of this question, take into account all the circumstances and facts which may, in his view, properly have a bearing upon his decision, but the undersigned submits *that the enumeration suggested of the considerations which the arbitrator shall take into account would extend the scope of the arbitration beyond the determination of the question of fact, to-wit, the exact location of the line as fixed by the award, which is all that has been proposed, and might lead to a departure from or modification of the Loubert Award, which the undersigned does not understand to be within the scope of the proposed arbitration and to which it would be beyond the power of the undersigned or his Government to agree,* for the reasons heretofore given."

It will be noted that the question itself is, in the convention, expressed exactly as was suggested in this letter, and the part which we have italicized in the form proposed originally by the Secretary of State of the United States, omitted.

It will also be noted that, so far from the reference to the matters which the Arbitrator is to take into account, as stated in the convention, being the equivalent of what was omitted from the form of the question as originally proposed, the reverse is the case. The omission was due precisely to the fact that the words omitted were objectionable and that a change in meaning was required, and that change consisted precisely in eliminating these words, in framing the question as it now stands in the convention, and in stating the matters to be considered by the Arbitrator in the form desired by Panama.

The letter to which we refer also contains the following :

> " Since the acceptance of the Loubet Award must form the basis of the arbitration, the convention of arbitration, it is respectfully submitted, should in first place, stipulate anew that acceptance by both parties, and should state that the object of the arbitration is confined to the interpretation and application of the Loubet Award. It being understood as a part of that

> award, as expressed in the letter of M. Delcassé to Señor de Peralta, Minister of Costa Rica at Paris, November 23, 1900, 'that, in conformity with the terms of Articles II and III of the Convention of Paris of January 20, 1886, this boundary line must be drawn within the confines of the territory in dispute as they are determined by the text of said articles."

By this it appears that the inclusion of the letter of M. Delcassé to Señor de Peralta in the enumeration of the matters to be taken into account by the Arbitrator was at the request of Panama and that the statement in the Argument for Costa Rica that it was the latter republic who requested it is another error.

By all these documents and by the argument of Dr. Porras it is made clear that not only will not the terms of the present convention admit of such construction as will make the validity or correctness of the Award subjects within the scope of this Arbitration, but that this language was adopted precisely to that end and that the exclusion of these subjects was deliberate and intentional.

Costa Rica formally requested that the validity of the Loubet Award be one of the questions submitted to the Arbitrator; Panama refused, and Costa Rica receded from her position. Panama insisted "upon *a strict adherence to the Loubet Award as a necessary prerequisite to any arbitration*" and that the convention should be so framed that "*the object of the arbitration is confined to the interpretation and application of the Loubet Award;*" and Costa Rica acquiesced.

After all this for Costa Rica to ask the Arbitrator to consider and determine matters which were thus definitely and finally, after consideration and debate, excluded from this Arbitration, is impossible. The language of the convention does not permit it, but even if it were capable of a construction which would bring before the present Arbitrator the validity or correctness of the Loubet Award, or anything else except the interpretation and application of that Award, the result would be equivalent to a breach of faith with Panama. She would have been led into the discussion of questions which she has refused to discuss, to put in arbitration matters which she refused to arbitrate, Costa Rica's acceptance of her terms for this Arbitration would become a mere trick to entrap her, and her government would be put in the position of violating the provisions of her Constitution.

Happily no such result is possible. Neither Panama, who made the Convention, nor the United States, under whose auspices it was made, were so careless or inept as to leave any opening for such a stratagem, were it attempted, to avail. The language

of the convention is too precise and definite to admit of the possibility of raising, under it, any question of the validity or correctness of the Loubet Award, or any other question except as to its "correct interpretation and true intention." Its perfect correctness and absolute validity cannot, under this convention, be for a moment questioned.

We must assume that the learned representatives of Costa Rica were not aware of the negotiations and communications preceding the actual conclusions of the Convention to which we have referred. The present counsel for Panama had the honor of collaborating in the negotiation and formulation of the Convention of 1910 and the present counsel for Costa Rica had not that opportunity of becoming personally familiar with the circumstances attending the making of that Convention. Had they been so, good faith would, undoubtedly, have precluded their endeavoring, even, to enlarge the scope of this Arbitration so as to include matters which it was expressly intended to exclude, or to compel Panama to submit for adjudication subjects which she had made it a condition of her entering the Arbitration at all, should not be submitted.

We must also suppose that, in view of these negotiations and communications, Costa Rica will not persist in her request that the Arbitrator disregard the Loubet Award or that he modify it or fix a boundary without reference to it. Whatever her view is as to the possibilities of interpretation of the Convention (and we believe that it is clear that these possibilities do not include any such range of questions) good faith will prevent any further attempt to carry it so far.

It is, therefore, we believe, conclusively demonstrated, *first*, that upon this Arbitration neither the validity nor correctness of the Loubet Award can be questioned and, *second*, that the sole question before the Arbitrator is to define the line which that Award, correctly interpreted, fixes.

"Ultra Petita."

While the objection of *ultra petita*, made by Costa Rica to the Loubet Award, cannot be considered, upon this Arbitration, in so far as it is meant to impair the validity of the Award as a whole, it might, nevertheless, if well founded, have a bearing on the result of the Arbitration.

By the Convention the Arbitrator is to take into account the limitation of the Loubet award, expressed in the letter of M. Delcassé to Señor de Peralta, "that this

boundary line must be drawn within the confines of the territory in dispute as determined by the Convention of Paris between the Republic of Colombia and the Republic of Costa Rica of January 20, 1886."

If it were true that the line as awarded by President Loubet lay, in any part, outside the confines of the territory determined by the Convention of 1886, while his Award could not be considered as at all invalidated by that fact, it might affect the exact location, by the present Arbitrator, of some part of the line, in fixing a boundary which should agree with the true intention of the Award.

Such a situation, however, does not exist, as we pointed out in our first statement for Panama, and an examination of the grounds upon which the Argument for Costa Rica bases the contention that it does, demonstrates the fact with particular clearness.

The argument for Costa Rica, on this point rests upon two distinct grounds : *first*, that some of the territory awarded by President Loubet to Colombia had never been in dispute and was the unquestioned property of Costa Rica, which Colombia had never even claimed ;[1] *second*, that in a printed argument presented to President Loubet on behalf of Colombia, Dr. Silvela, one of Colombia's advocates, had proposed a line which would not give her the extreme upper portion of the valley of the Sixaola or Tarire, all of which valley President Loubet awarded to Colombia.[2]

We have already noted that these contentions involve an admission that the Award is clear and intelligible and that the line fixed by it is precisely that which Colombia always maintained and which Panama still maintains. It is impossible to say that an unintelligible award or one impossible to reconcile with the geographical features of the country, shows the defect of *ultra petita*. If it cannot be determined what it awards, it cannot be maintained that it awards too much. Nor, if it be not clear that the " true intention " of the Award was to give to Colombia the whole valley of the Sixaola or Tarire, can it be said that it was erroneous in awarding it. Therefore these contentions of Costa Rica necessarily involve, as a glance at any map will show, a concession that the line of the Award is the line which Panama maintains.

But even accepting, as Panama does, this concession on the part of Costa Rica, the conclusion of *ultra petita* by no means follows, but is manifestly wholly unfounded.

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[1] Argument for Costa Rica, pp. 329-332.
[2] *Ibid* pp. 265, 267, 376.

Upon the first of Costa Rica's grounds for asserting *ultra petita* we must note that, in the first place, it is based upon a misquotation, several times repeated, of M. Delcassé's statement. He is quoted as saying that "the line must be drawn within the confines of the territory in dispute," but, in the quotation, his phrase is cut off there and its full meaning is not expressed.[1] "The territory in dispute *as determined by the Convention of Paris between the Republic of Colombia and the Republic of Costa Rica, of January 20th, 1886*," was the expression of M. Delcassé; and it does not lend itself to the argument for Costa Rica on this point.

Upon this incomplete version of M. Delcassé's statement it is argued for Costa Rica that it may be shown, *aliunde*, what territory was, in fact, in dispute, and thus the jurisdiction of President Loubet as an Arbitrator may be limited to that territory, and his Award impeached or limited, if it go beyond it.

We can hardly think that such an argument is made seriously, nor that it calls for serious refutation, easy as refutation would be. In this form, it is enough to say that the argument lacks all relevancy because it is based upon an imperfect quotation of M. Delcassé, and a correction of the quotation destroys the argument.

The Argument for Costa Rica goes on, however, to consider the effect of the definition of the territory in dispute contained in the convention of 1886. By that convention it is stated, by way of defining the territory in dispute, that

"ARTICLE II.

> "The territorial limit which the Republic of Costa Rica claims, on the Atlantic side, reaches as far as the Island Escudo de Veragua and the River Chiriqui (Calobébora) inclusive; and on the Pacific side, as far as the River Chiriqui Viejo, inclusive, to the East of Point Burica.
>
> The territorial limit which the United States of Colombia claims reaches, on the Atlantic side, as far as Cape Gracias á Dios, inclusive; and on the Pacific side, as far as the mouth of the River Golfito in Gulf Dulce."

"ARTICLE III.

> "The arbitral award shall confine itself to the disputed territory which lies within the extreme limits already described". * * *

The argument for Costa Rica is not clear on this point. In part it is made up of arguments that Colombia could not have had any valid claim to territory as far as

[1] Argument for Costa Rica, pp. 177, 182.

Cape Gracias á Dios or, if she had, it could have been only to the shore, and not even to that, below the northern boundary of Costa Rica; in part by attempts to draw fanciful lines between the terminal points mentioned in the convention of 1886, and contentions that the mention of these points involved these lines; and in part by arguments, of the same sort as those used in connection with the incomplete quotation from M. Delcassé, that if it be shown, *aliunde*, that any of the territory within the limits named in the convention of 1886 had not been a subject of dispute, such territory would be outside the scope of President Loubet's jurisdiction and any boundary entering it would involve *ultra petita*.

With the first of these classes of arguments we have nothing to do. The merits of Colombia's claims are not to be discussed here. Colombia and Costa Rica submitted the boundary between them to the arbitration of President Loubet by a convention which defined their respective claims as fully and accurately as they deemed necessary. What led to the particular definition is now wholly immaterial, and equally so is it, what basis there was for the claims on either side. We do not suppose that any argument based on supposed historical matter anterior to the convention of 1886 can be seriously intended, upon the question of the scope of that arbitration. That must be determined by that convention alone. It is express in its terms, it is the only rule of the case, and it is not to be conceived that any one supposes that its provisions can be changed in meaning or effect by any extraneous matter whatever. We decline to go into any discussion of the nature or basis of Colombia's claim reaching to Cape Gracias á Dios, whether it was well or ill founded, whether it ought to have related to the whole country or only to the coast, or any other matter concerning it. Such a discussion must necessarily be idle and can have no bearing, even the remotest, upon the case in hand.

The argument for Costa Rica contends constantly, with much detail of historical matter in support of the contention, that at no time has there been any question of Costa Rica's undoubted right to all territory on the left bank of the Sixaola and of the Yorquin, that Colombia never, at any time, asserted any claim to any of that territory and that, consequently, no territory beyond the Sixaola could ever have been " territory in dispute " within the meaning of the Conventions under which President Loubet acted.[1]

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[1] Argument for Costa Rica, pp. 238, 257, 269, 343–360.

To all this there is one conclusive answer which no historical learning or research is needed to discover and which no such learning or research can overthrow. It is found in Article II. of the Convention of 1886, already quoted, and is contained in these words:

> "The territorial limit which the United States of Colombia claims reaches, on the Atlantic side, as far as Cape Gracias á Dios."

That was the limit fixed by the Convention of Arbitration for the claims of Colombia. Cape Gracios á Dios lies, as we have already noted, far north of the northern boundary of Costa Rica. Therefore Costa Rica entered upon the arbitration before President Loubet knowing that Colombia claimed her entire Atlantic littoral and an undefined territory in the interior. The line proposed by Señor Silvela was strictly within this claim. Whether that line was the correct boundary or not, it did not go beyond the territory the right to which Costa Rica had consented to submit to arbitration. The Award of President Loubet is likewise within the territory which is all, necessarily, "territory in dispute". Yet Costa Rica now attempts to maintain that, though she joined in submitting to President Loubet the title to all territory on the Atlantic side up to her northern boundary, he exceeded his power by fixing a boundary a few miles beyond the Sixaola!

If, in fact, no territory beyond the Sixaola was ever in dispute and no Award going beyond that river could be made, why was not the Sixaola named as fixing the extreme limit of Colombia's claim? Why was Cape Gracias á Dios named if there was no "territory in dispute" beyond the Sixaola? There is no answer to these questions.

The fact is that Colombia's claim did include most of the Atlantic side of Costa Rica, with all its littoral, and Colombia, evidently, insisted that her entire claim should be included in the Arbitration. Had Costa Rica been unwilling to allow this claim to be considered, she should, and undoubtedly would, have insisted that the Convention be so limited as to exclude it. Had she been unwilling to consider any lands beyond the Sixaola as "territory in dispute", she would not have consented to arbitrate any claim of Colombia which went beyond that river. But she did. She accepted a convention which authorized the Arbitrator as much to pass upon her title to the left bank of the Sixaola as to the right; to lands between the Sixaola and her northern frontier as much as to the lands between

the Sixaola and the Chiriqui. Now, when the Arbitrator has awarded to the other party territory beyond the Sixaola, she cannot say that he exceeded his powers. She could not say so had he awarded her whole Atlantic littoral to Colombia.

But even so much argument is more than is necessary. There are the words of the Convention of 1886 and they are a conclusive answer to the contention of Costa Rica. They are the law of the arbitration before President Loubet, and Costa Rica cannot be heard to say that he could award Colombia nothing beyond the Sixaola, when she went before him and joined in asking his award upon a claim of Colombia which found no limit until it reached Cape Gracias á Dios, save that no territory of any third power could be awarded.

The second of the points discussed for Costa Rica is also one which does not justify discussion. No interior lines connecting the extreme points of the respective claims, in the Convention of 1886, are specified in that convention, and that is conclusive of the matter. No one can supply what the Convention omitted. If we were to conjecture, we should naturally suppose that neither party was willing to commit itself to any internal line. But no one is at liberty to conjecture. The fact is that the two countries restricted President Loubet only as to four extreme terminal points and left him absolutely free in every other respect. To attempt to fancy internal lines which were never mentioned nor suggested in that Convention is a proceeding too futile to be considered.

We come, then, to the third of the points argued for Costa Rica, namely, that by showing that Costa Rica had held undisputed possession of territory within the limits specified in the convention of 1886, it would be shown that such territory was not within the scope of President Loubet's jurisdiction and so the award, by him, of any line which lay in such territory, would constitute an extralimitation of his powers.

As little as the argument for Costa Rica upon the other two points, can this be taken seriously.

If the convention of 1886 had, like that of 1880, contained no definition of the claims of either party, it would be obvious that President Loubet would have been at liberty to set the boundary wherever he should think fit. No location of it could be *ultra petita*. When the convention of 1886 stated the extreme claims of the parties, upon either ocean, and provided that the Award should be confined " to the disputed territory which lies within the extreme limits already described," it imposed upon the

Arbitrator the limitation which it stated, and no other. It declared, further, by that act, that all the territory between these limits was disputed territory. Therefore, as we have pointed out in our first Statement, if President Loubet fixed, as he did, a line, the Atlantic terminus of which lay between the mouth of the River Chiriqui and the northern boundary of Costa Rica, and the Pacific terminus of which lay between the mouth of the Chiriqui Viejo and that of the Golfito, he could not exceed his powers as to the territory in which the line ran. Such a line must be within the disputed territory as defined by the Convention of 1886.

To contend, now, that this definition of the Convention of 1886 was no definition, that this statement of the claims of the respective parties meant nothing, and that the real limitation of the Arbitrator's jurisdiction was to territory not defined in the Convention nor anywhere else, so that it would be impossible to know, with certainty, when the Award had been made, whether it was valid or not, is so beyond the scope of rational argument that we cannot suppose the contention serious.

If it be so, it is sufficient to point out that the Convention of 1886, and that alone, is the measure of President Loubet's powers, and that, if there could be any question under it as to what was " territory in dispute," that would necessarily be a part of the subject for arbitration submitted to him, and his finding, upon that point, necessarily involved in the determination of the boundary, would, therefore, be conclusive.

Evidently, as is shown by the line proposed by Dr. Silvela for Colombia, upon the arbitration before President Loubet, which forms the second ground upon which Costa Rica seeks to maintain her objection of *ultra petita*, Colombia was far from accepting the view which Costa Rica now asserts. That line, if adopted by President Loubet, would have awarded Colombia a vastly greater amount of territory which the present contention of Costa Rica would exclude from the former arbitration, than that which gives rise to her present complain t

If, then, there were any possibility of admitting Costa Rica's contention as to " territory in dispute " under the Convention of 1886, it is plain that there was no agreement as to the actual territory within that designation. Therefore President Loubet must have decided what was " territory in dispute " under the Convention of 1886, in order to be able to determine the boundary. There would then have been two questions before him: *first*, within what territory was he at liberty to draw the line; and, *second*, what line should be drawn. His decision would be as binding on

the one point as on the other. An error, if any there were, in his conclusion upon either, could not involve *ultra petita.*

But this whole contention of Costa Rica is utterly inadmissible. It is contrary to every principle of law and reason and does not deserve so much consideration as we have given it. The convention of arbitration is the sole measure of the jurisdiction of an arbitrator and limitations not clearly and definitely expressed in it, do not exist.

The construction of the Convention of 1886 now set up by Costa Rica would turn the whole arbitration before President Loubert into a farce and would make that Convention a mere trap both for that distinguished arbitrator and for Colombia. If by such methods the results of international arbitrations could be nullified, they would soon cease.

The second ground upon which Costa Rica bases her assertion that there is a defect of *ultra petita* in the Loubet Award is, if that be possible, of even less substance than the first.

It is that Dr. Silvela, in his argument for Colombia, before Presidet Loubet, proposed a line which, starting on the Pacific at the mouth of the Golfito, ran, in its first course, in a straight line to a point beyond the Tarire or Sixaola, and so intersected that river in its upper course and left the extreme upper part of its valley to Costa Rica. By the Silvela line all the Atlantic littoral occupied by Costa Rica, and a great part of the interior, would have been awarded to Colombia. The Loubet Award wholly disregarded this line, but did award the whole valley of the Tarire or Sixaola to Colombia. Thus the extreme upper end of that valley, which would have been awarded to Costa Rica, had the Silvela line been adopted, was, in fact, awarded to Colombia. Costa Rica now contends that such an award gave Colombia territory which she conceded to belong to Costa Rica, because the line proposed by Dr. Silvela would have left it to her, and that, therefore, to award it to Colombia was *ultra petita.*

Again we find it difficult to suppose the argument to be seriously made. The powers of an arbitrator, as we have already said, are determined by the convention under which he acts and by that alone. This is elementary. To suppose that they can be modified, abridged or restricted by mere passages in the argument of an advocate of one of the parties before him is a notion so extraordinary that its mere statement should be its sufficient refutation. No concession, if any

were made in such an argument, could bind the Arbitrator nor lessen his authority or jurisdiction. Within the limits of the convention under which he acts he is supreme. Neither by claim nor concession is it in the power of any advocate of any party to lessen his authority.

Nor is it possible to say that Dr. Silvela's line involved any concession of Costa Rica's absolute right to the upper end of the valley of the Tarire or Sixaola. He proposed the line which he thought the proper one and which, if adopted, would have given her that territory, but that, in its nature, was necessarily conditioned upon the acceptance of his line as a whole.

His line not having been adopted at all, he would have been quite entitled to urge a different method of solving the boundary problem (had he the opportunity) and he would not have been debarred from proposing one which should give Colombia the whole valley by the fact that his first proposal left a small portion of it to Costa Rica. Not even Dr. Silvela himself would be thought inconsistent in such a course. The Arbitrator did not adopt his line in any part, and it would be absurd to say that he could not award what he found to be the true line, because the parties would thereby get, respectively, in some places more and in some places less than Dr. Silvela's line would have given them.

Even could Dr. Silvela's description of the boundary which he proposed be held to involve an admission as to the ownership of any part of the territory in question, and to have any binding force, it would be only an admission. That is, it would be, at most, but proof from which President Loubet might have found the right of Costa Rica to the territory north and west of that line to be conceded by her adversary. Even if it were conclusive proof, the action of President Loubet, in not giving it due effect (had such been the case) would have been, at most, an error, but would have had nothing to do with *ultra petita*. It would have been like any other error which an arbitrator may commit in not giving due weight to proofs advanced. This error is wholly different from *ultra petita*. That is a question of exceeding his mandate and deciding matters not submitted to him; this would be an error in not correctly deciding matters submitted to him. The one, under some circumstances, might affect the validity of his award; the latter can never do so. There is no error of any sort in this case, but had there been any in respect of any conclusions it could never have been in the way of departure from, but only in the manner of exercising the Arbitrator's powers.

But it is hardly necessary to dwell longer upon this point. The Argument for Costa Rica rests upon the fundamental fallacy that it assumes that arguments of an advocate can restrict the powers of an arbitrator and prevail over the provisions of a convention between two nations. It would have no force, even were this conceded, but this basal error makes it needless to examine it further.

Thus, we believe, it is apparent that the objection of *ultra petita* to the Loubet Award is wholly unfounded. President Loubet is not open to the charge of having exceeded his mandate. His Award conforms exactly to the terms of the submission to him. The line which he described is drawn wholly within the disputed territory as defined in the Convention of 1886, and he is open to no criticism as having, in his decision, in any way gone beyond the question which Colombia and Costa Rica asked him to decide and his decision upon which they pledged their national honor to accept and fulfill.

The Contention That the Loubet Award is Insensible and Inapplicable.

As we have said, if the fact were that the Award of President Loubet were insensible and inapplicable, so that the true boundary awarded by it could not be determined, there would be an end of this Arbitration. To propose a line not that described in the Award is not within the functions of the present Arbitrator.

This precise question arose in the arbitration between Great Britain and the United States of the northeastern boundary between their territories under the treaty of 1782–83, before the King of the Netherlands. The arbitrator found it impossible to determine the question or to decide which of the lines proposed by the two parties was most in accordance with the treaty, and therefore proposed a line himself. His award was rejected as *ultra petita*, because he had been requested, not to fix a line himself, but to determine the meaning and application of the treaty with respect to the boundary.[1]

In this case, therefore, if the contention of Costa Rica, that no boundary can be determined as that intended by the Loubet Award, could be maintained, that would be the conclusion of the matter. Costa Rica's request that the Arbitrator go on and fix a line himself could not be granted. For the Arbitrator so to do would be *ultra petita*.

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1. 7 Moore, Dig. Int. Law 59; 1 Moore, Int. Arb. 137–138.

No occasion for such a question can, however, arise. The attempt to show the Award insensible or inapplicable is, perhaps, the least well founded of all the contentions of Costa Rica. At any rate, it is, we venture to say, totally without support in reason.

Here again we note that, as in so many other instances, the Argument for Costa Rica is inconsistent and self-contradictory.

The greater part of that argument assumes, without difficulty, that the Award is clear and the boundary described in it, plain.

The whole argument for *ultra petita* rests upon and, with full definition, undertakes to show exactly what territory under the Award would fall to Panama, and is based upon an elaborate attempt to demonstrate that some of this territory had been the undisputed property of Costa Rica.[1] To do this the Argument examines the history of government and settlement upon the left bank of the Sixaola or Tarire, demonstrates that the Award gives the whole valley of that river to Panama, including the subordinate valleys of all its tributaries, and including also the extreme upper end of the valley, of a pointed shape, which the Argument repeatedly calls "the dagger of the Award".[2] The whole of so much of the argument on this point as rests upon the line proposed by Dr. Silvela would lose all meaning unless it were plain that, under the Award, this region belongs to Panama.

The same course of reasoning is employed by Costa Rica to show that the Award is erroneous and unjust. The history of the whole region is discussed at length and it is pointed out wherein the injustice alleged consists and exactly what territory is improperly, in Costa Rica's view, given, by the Award to Colombia.[3]

All these contentions, whatever their merit or lack of merit otherwise, fall at once to the ground, the moment it is asserted that the Award is insensible or incapable of application. If it be true that the Award cannot be so construed as to disclose a clear meaning or that its meaning is such as does not fit and cannot be intelligibly applied to the actual geographical situation, then there can be no *ultra petita* and no injustice. If it be impossible to fix *any* boundary under the Award, then it cannot be said that the boundary intended by it is, on any ground or for any reason, improper.

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1. Argument for Costa Rica pp. 264. 269-270.
2. *Ibid*, pp. 267, 274, 275, 334.
3. *Ibid* pp. 335-360.

Nor are these objections of Costa Rica such as can stand together. The objections of *ultra petita* and injustice might be consistent with each other. That is, Costa Rica might maintain at once that the Award is invalid and that, if valid, it is unjust. But she cannot maintain that it is both unmeaning and unjust. If unjust, it must have a plain meaning ; if unmeaning, it cannot be unjust.

The Argument for Costa Rica, therefore, necessarily admits that the Award fixes a clear and definite boundary, and, further, necessarily admits that this boundary is the one claimed by Panama, for no other would furnish the ground on which Costa Rica bases her charge of injustice, or even of *ultra petita.*

Why does Costa Rica say that the Award is unjust ? Because it awarded to Colombia the whole valley of the Tarire or Sixaola which Costa Rica asserts has always been hers without dispute, at any rate so far as concerns everything on the left bank and above the mouth of the Yorquin on both banks. Why does she charge *ultra petita ?* For the same reason. That objection would be, even on Costa Rica's theory, utterly groundless, *unless the Award gave Colombia the whole valley of the Sixaola or Tarire and its tributaries.* Equally would the charge of injustice lose its foundation, unless that is the result of the Award.

When, therefore, Costa Rica devotes most of her elaborate argument to theses necessarily based upon the existence of a definite and clear boundary fixed by the Award and that precisely the boundary which Panama asserts to be the true boundary under the Award, it is a strange inconsistency for her to contend, in another part of her argument, that the Award is so insensible and inapplicable that it is impossible to determine from it what boundary it fixes. The two contentions destroy each other.

But Costa Rica does more than impliedly to admit that the boundary awarded by President Loubet is clear and plain ; she asserts it. Thus in the Argument for Costa Rica it is said that

> " *On the face of the Award the frontier would appear to be unequivocally marked out in terms positive and conclusive, as though they were to be enforced in that region without further discussion.*"

The only reason assigned for not accepting that boundary is the argument that M. Delcassé's letter amounts to a declaration that the Award is not to be considered conclusive,[1] an argument which cannot be taken seriously but which we shall consider, later, more at length.

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[1] Argument for Costa Rica, p. 179.

So the Argument for Costa Rica further says:

> " Taking the Award literally, what it says concerning the Sixaola River and the islands near the coast to the east and southeast of Punta Mona, and even those as far off as the Escudo de Veragua, is enough to warrant its interpretation in the sense of having adjudicated to Colombia that *immense territory* that belonged to Costa Rica from the line of the Escudo de Veragua, and the Chiriqui, or true Culebras where Colombia by force installed her canton of Bocas del Toro which she proceeded to extend along the costal region of Talamanca as far as the right bank of the Sixaola in its lower course. The Award also overstepped the Sixaola boundary and halted only at Punta Mona ".[1] (Italics in original.)

These concessions are, we believe, substantially enough to conclude the question which is to be answered on this arbitration. If the Award unequivocally marks out the frontier, and that in such fashion as to award Colombia all the territory up to the Punta Mona line and this be (as in the passages quoted, it is) openly conceded by Costa Rica, then both parties are agreed that the " correct interpretation and true intention " of the Loubet Award are what Colombia always maintained and what Panama now maintains.

We need not pause here over the curious contention of the Argument for Costa Rica that M. Delcassé's letter amounts to a revocation of the Award. That question we shall feel compelled to discuss, more at length, later, because the Argument for Costa Rica lays so much stress upon it, although we feel that the mere statement of it should be enough for its refutation. Apart from that, we take note here that Costa Rica admits that the Loubet Award marks out a boundary " in terms positive and conclusive " and that, " taking the Award literally " it gives Panama the territory which she claims.

Can there be any substantial question left as to such an Award ? It is admitted to be clear on its face and to have the meaning, taken literally, which Panama gives it. No reason is assigned for not taking it literally, as we understand the Argument for Costa Rica, except that it is *ultra petita*, because no territory beyond the Sixaola was really " in dispute " (although the Convention of 1886 declares everything to be in dispute to Cape Gracias á Dios) and because one of Colombia's advocates before President Loubet asked a line which, while including

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[1] *Ibid*, p. 264.

a great deal more than the Award covers, would have excluded a little which is within its terms; that it is unjust and erroneous; and that the Arbitrator, shortly after making the Award, declared it erroneous and really no award at all.

The first of these objections we have already considered and we believe that we have shown that it is unfounded. With the second we have nothing to do. This Arbitration is not to revise President Loubet's Award but to interpret and apply it. If, then, the third objection be shown to be without force, we have, substantially, a concession by Costa Rica that the Award is clear and its meaning plain.

Panama agrees entirely with what she understands to be the contention of Costa Rica as to the true boundary under the Award, that is, that it gives to Panama the entire valley of the Sixaola or Tarire and of all its tributaries on both banks, although she wholly denies the consequences which Costa Rica seeks to draw as to the results of such a boundary in any other than a territorial sense. She considers it too plain for argument and only requiring to be pointed out, that such a boundary is not *ultra petita* and, while the question of justice or injustice is irrelevant here, that if there be injustice it is not toward Costa Rica. But she does not deem it proper for her, as standing in the place of one of the parties to the arbitration before President Loubet, to criticise or impugn this Award in any way. In her view that Award is sacred, so far as the parties are concerned, and she respects it as such.

Panama, however, even if she did not consider her national honor bound to the maintenance of the Loubet Award, would not involve herself in Costa Rica's inconsistency. To her, a contention that the Award is meaningless or inapplicable is not to be conceived. She considers that the Award is so plain and clear and its application to the geographical situation so simple and obvious as not to admit of any doubt or even argument.

The argument for Costa Rica on the point now under consideration, taken in connection with her opposite view upon the other points to which we have referred, constitutes a striking demonstration of the correctness of this position. When really construing the Award and arguing from it, Costa Rica, without debate, reaches the same construction and application for which Panama contends; when attempting to show that the Award has no meaning, she finds the difficulties insuperable; and her argument to that end, when examined, accomplishes nothing.

The "Grammatical Analysis of the Loubet Award".

We shall not discuss the verbal criticism of the award found on pages 166 to 172 of the Argument for Costa Rica. It is impossible to take it seriously. We can only say that we are astonished to find anything so trivial in an argument upon a serious question. It is unworthy the dignity of the occasion and of the parties, and we cannot but feel that we should be ourselves lacking in due respect to the Arbitrator if we were to ask him to devote his time and attention to a serious discussion of it.

It is impossible even to discuss an argument, the purpose of which is to show that the language in which President Loubet expressed his Award is unmeaning and unintelligible. Apart from the evident absurdity of such a contention, in view of the perfect clearness of the Award, it involves an imputation upon the intelligence of that distinguished Arbitrator which ought not to be even suggested.

The Delcassé Letter.

The analysis of the correspondence between Señor de Peralta and M. Delcassé, found on pages 172 to 188 of the Argument for Costa Rica, appears to be intended to demonstrate that the Award of President Loubet is no Award at all, that he did not fix a boundary, but merely left it to Colombia and Costa Rica to fix one for themselves and that the letter of M. Delcassé amounted to a revocation of the Award in so far as it described any boundary.

This part of the argument, while not so trivial as the "Grammatical Analysis," is, nevertheless, sufficiently plainly beyond any reasonable view and devoid of foundation, to dispense us also from any necessity of answering it. We desire, however, to call attention to some errors contained in it which would be enough, we believe, to dispose of it, had it any force otherwise.

In the first place the conclusion which Costa Rica seeks to reach in this part of her argument is, in itself, impossible. A mere consideration of that feature alone shows that no argument which leads to such a result can be sound.

It is no less than an absurdity to suppose that within two months after President Loubet had rendered his solemn Award his Minister of Foreign Affairs should declare that the Award means nothing and that the whole matter is remitted to some decision to be reached by the parties as if no Award had been made.

It cannot, surely, be necessary to refute an argument which leads to such a result. Yet unless that result be reached, all that is said in the Argument for Costa Rica on this subject is not merely useless but frivolous. To that end alone does it tend and if it does not show this, it shows nothing to affect the question here. This part of the Argument, therefore, is condemned by its very purpose. It leads to an absurdity, therefore it cannot be accepted.

Bnt the steps by which this impossible conclusion is reached are as faulty as the conclusion is irrational.

In the first place there is inserted on page 176 a faulty translation of M. Delcassé's letter, the errors in which would not be important were not the effort made, in the subsequent course of the argument, to draw from them a meaning wholly different from that intended.

M. Delcassé, in this translation, is made to say that, in accordance with Articles 2 and 3 of the convention of 1886, the boundary must be drawn within the limits of the territory in dispute "*as they are found to be from the text of said Articles.*"

In fact, the expression of M. Delcassé was "*as they are determined by the text of said Articles*", and that is the form in which it appears in Article I of the Convention of 1910.

The difference gives rise to an argument by Costa Rica that Articles 2 and 3 of the Convention of 1886 do not fix the limits of the territory in dispute, but still leave room for her contention that some other determination may be shown to be the true one, and thus the validity of the Award be made dependent upon circumstances extraneous to the conventions under which it was made. A true translation makes that contention, inadmissible in itself, wholly impossible. If the limits are "*determined*" by the Convention of 1886, no argument for a further or different determination can be made.

The second mistranslation is that M. Delcassé is made to say that it is on the principles stated by him that Colombia and Costa Rica "will have to proceed in the material determination of their frontiers".

What, in fact, he said, was that in accordance with those principles "it is for the Republics of Colombia and Costa Rica to proceed to the physical delimitation of their frontiers".

The difference would not be important if it were not used by Costa Rica as a foundation for an argument which is, of itself, not legitimate. In the course of that argument the error in translating the French word " *materiel* " by " material " is in part corrected by the use of the correct translation, " physical ", but the argument still persists.

It must be obvious that whether M. Delcassé said " physical demarcation ", " physical determination " or " physical delimitation ", the meaning is the same. The expression refers only to a *physical* act, that of laying out and marking a line upon the ground, and it cannot mean anything else.

Considering in detail the eight points into which the Argument for Costa Rica divides the results of its analysis of M. Delcassé's note, we believe that they will be found so wholly devoid of merit as hardly to admit of serious discussion.

We regret sincerely the frequent use of such expressions which we have felt ourselves compelled to make in the course of this answer. We are desirous of treating the Argument for Costa Rica with all respect and would not willingly lack in due deference to that Republic nor to her learned Counsel. But the position which Costa Rica has seen fit to take, which involves the repudiation of the Loubet Award and the defeat, and not the fulfillment, of the object of the present Arbitration, has forced her to arguments which cannot be properly characterized otherwise than as we have done.

To attempt to repudiate indirectly an Award nominally accepted requires attacks upon it of a kind not to be supported by real and serious arguments.

To endeavor to show that so solemn a writing as the Award of President Loubet is so expressed as to have no intelligible meaning ; that he and his Commission of Study, after long investigation, made an Award which is so totally inapplicable to the geographical situation with which they were dealing as to be impossible to harmonize with it; or that, after the Award was rendered, his Minister of Foreign Affairs practically revoked it and declared it to be erroneous, are contentions so out of all reason that it is impossible that serious arguments can be found to support them.

To try, further, to show that an Arbitration, the sole purpose of which is to interpret and apply the Loubet Award, may be turned into one to consider the validity of that Award, to amend or alter it or to make a new boundary independent of it, is a task equally impossible, and equally incapable of support by serious argument.

Her attitude, therefore, has compelled Costa Rica to resort to arguments of a different kind and, much as we regret the necessity for doing so, we cannot properly discuss them without pointing out, as to each of them, its true character.

The *first* of Costa Rica's contentions respecting M. Delcassé's note relates to this statement that "for lack of precise geographical data the Arbitrator has not been able to fix the frontier except by means of general indications."

This statement, the Argument for Costa Rica says, "cannot be explained except as an indirect recognition of *manifest and essential error* in the sentence." [1] The italics are in the original.

Can this be seriously said? Is it possible seriously to debate such a contention? Is it even conceivable that, shortly after a formal Award, the Arbitrator (for M. Delcassé spoke for President Loubet) should admit, directly or indirectly, a "manifest and essential error" in his award? Such a supposition is not to be entertained for a moment.

Even if such a thing were possible, to attempt to show it by the passage quoted would be utterly futile. By no construction can such an inference be drawn from it.

No detailed maps of the region existed until the recent survey made by the Commission of Engineers appointed in the present Arbitration. The maps before President Loubet showed a central cordillera and a counterfort or spur extending from the cordillera to Punta Mona, the former forming the divide between the Atlantic and the Pacific and the latter closing on the North the valley of the Sixola or Tarire. The details of courses, distances and convolutions of these elevations were not indicated nor exactly known. Therefore President Loubet simply indicated the counterfort and the cordillera as forming the boundary. Lack of *precise* geographical data prevented, as Mr. Delcassé said, a more detailed description. Only the actual delimitation would furnish such data, but the indication given was perfectly clear and precise for the purpose of such delimitation.

All this is so plain that we find it impossible to understand how anything else can be made of it. What process of reasoning could lead to the conclusion deduced by Costa Rica we are unable to conceive. At any rate we believe it to be perfectly clear that such a conclusion is impossible.

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[1] Argument for Costa Rica, p. 179.

The *second* proposition advanced by Costa Rica as resulting from M. Delcassé's letter is " that the task assigned to the Arbitrator remained *unfulfilled;* that the controversy in great part was still open and that the judgment rendered was, therefore, lacking in finality. " [1] The italics, again, are in the original.

What has been said as to Costa Rica's first proposition is equally applicable to this. By it the Arbitrator is made to say, through M. Delcassé, that his Award was no award, and did not decide the question submitted to him. That is too far from possibility to be debated.

The argument by which this result is reached is no less extraordinary and unreasonable. Because the boundary is not described in detail, it is argued that it is not described at all. Because, for purposes of delimitation, details must be ascertained which the Award does not mention, the Award is fatally defective. This is not serious argument. No description would be so precise as to cover every particular, nor need it be. If a cordillera or a counterfort be described as forming a boundary and it be clear what counterfort or cordillera is intended, there can be no further definition needed for a definite and conclusive award. It would almost never be possible for an Arbitrator provided with maps on an ordinary scale, to trace upon them the exact boundary, nor is there any reason why he should do so. That is the task of commissions of delimitation, and all that an Arbitrator need do is to indicate in general terms where the boundary is to run and leave to such a commission to locate the exact line.

That is what President Loubet did in this case, and that his indication was perfectly clear is admitted even by Costa Rica, for in her argument it is expressly stated that

> " On the face of the Award the frontier would appear to be unequivocably marked out in terms positive and conclusive."[2]

We have noted that this admission completely overthrows all that part of her argument which is contained in what is designated as a " Grammatical Analysis of the Loubet Award."[3] But upon the point now under consideration it is no less conclusive against her. If the Award positively and unequivocally

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[1] Argument for Costa Rica, p. 180.
[2] *Ibid.*, p. 179.
[3] *Ibid.*, pp. 166–172.

marks out the frontier, then it completely fulfills the requirements of the arbitration. If it can be applied to the actual geographical situation (and in this part of the argument for Costa Rica that question is not raised) no more can be required. All minor points will be settled by a commission of delimitation and there can be none which would not be easily so settled. To try to make doubtful an Award admitted to be clear on its face, because it designates the boundary only by "general indications" (a fact which is also plain on the face of the Award, if no one had said it), is futile.

The *third* proposition of Costa Rica concerning M. Delcassé's letter is that, in saying that it would be inconvenient to trace upon a map a line which President Loubet had to describe in general terms for lack of detailed geographical data, he "placed in suspense" the "decisions of the Award."[1]

Again arises the conclusive answer to all this matter, that it is impossible to take seriously a contention that the Arbitrator, shortly after making his Award, declared it to be no award at all. The unreason of the conclusion makes the arguments for it unimportant. No argument which leads to such a result can be sound.

But again the weakness of the argument equals the inadmissibility of the conclusion. If, the argument runs, President Loubet could lay down the boundary in general terms he could trace it on the map. If he could not trace it on the map he could not describe it in general terms.

Of course this is a complete *non sequitur*, and worse. M. Delcassé said, as plainly as possible, what is obvious to any one, viz: that lack of geographical details made it impossible to describe the boundary more in detail, and the same lack made it impossible to trace it on the map. This is perfectly plain and intelligible and does not in the least affect the clear and conclusive character of the Award. It is perfectly possible and perfectly clear to say that a certain counterfort shall form the boundary, while it might be quite impossible to trace the sinuosities of the summit of the counterfort on any available map. The two things have no relation such as to make one dependent on the other.

It is singular to note that the Argument for Costa Rica fails wholly to appreciate the circumstances surrounding this correspondence between Señor de Peralta and M. Delcassé.

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[1] Argument for Costa Rica, p. 182.

The letters of Señor de Peralta were in the highest degree improper. The first was a hardly disguised attempt to induce President Loubet to revoke his Award and make another more agreeable to Costa Rica. It was an offense against the dignity of that distinguished Arbitrator and a breach of all the proprieties of such a situation. M. Delcassé politely ignored it Then followed a second letter, more improper than the first and even insulting to President Loubet, for it distinctly intimated that he had violated his duty as an arbitrator. To this M. Delcassé replied by the letter which is so elaborately analyzed in the Argument for Costa Rica.

M. Delcassé would have been quite justified in being severe. In fact, he was polite, but this politeness appears to have been lost on Costa Rica. She had violated every rule of propriety and now she cannot understand why she was not answered in kind. She takes forbearance for weakness and a polite denial of what her envoy asked, as an actual acquiescence in some of her unfounded contentions.

Her argument that M. Delcassé, had he not agreed with Señor de Peralta, would have drawn the boundary on a map and have added to and explained the Award, and could not, out of mere courtesy, have written the note which he did,[1] shows a lack of comprehension which no one else can share.

The letters of Señor de Peralta were improper and the requests which they contained inadmissible. M. Delcassé simply declined to consider them. That he did so politely cannot be made into an acquiescence in them.

But the Argument for Costa Rica founds a *Fourth* Proposition[2] upon M. Delcassé's politeness, which proposition it bases upon a misquotation from his letter.

From the fact that M. Delcassé declined to discuss any of Señor de Peralta's statements and would not even notice his criticisms of the boundary described in the Award, it is sought to draw the inference that he admitted them to be juslified.

It must be unnecessary to point out that Arbitrators do not discuss their decisions after they have rendered them, nor answer questions as to whether they consider them proper. The award made is final and no Arbitrator would be so forgetful of his own dignity as to enter into a justification of it, even if a party so far disregarded pro-

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[1] Argument for Costa Rica, p. 182.
[2] *Ibid.*, p. 182.

priety as to complain to him of it. To attempt to draw an argument from the Arbitrator's declining, to amend, to discuss or further elaborate his award is impossible.

In support of this proposition, however, the Argument for Costa Rica quotes M. Delcasse, as we have noted, in such a manner, as, by the omission of the essential words, exactly to destroy his real meaning.

In this quotation the statement is made to read that " the frontier line *should be traced within the boundaries of the territory in dispute* ". This enables Costa Rica to argue (basing herself on her former contention that the Convention of 1886 did not define the territory in dispute but left it to be determined otherwise) that the question whether or not the line described in the Award was, in fact, within the territory in dispute, was remitted to the parties. Hence, it is argued, the question was left open, doubt was cast upon the correctness of the line of the Award and it might be invalidated if Costa Rica could show, apart from the provisions of any Convention, that it was drawn within territory not theretofore in dispute.[1]

But all this elaborate structure falls to the ground with the completion of the quotation from M. Delcassé. What he really said was:

> " But there is no doubt, as you observe, that, in conformity with the the terms of Articles 2 and 3 of the Convention of Paris of January 20, 1886, this boundary line must be drawn within the confines of the territory in dispute, *as they are determined by the text of said articles.*"

Thus, while politely agreeing with the only statement of Señor de Peralta on which agreement was possible, M. Delcassé took occasion to point out that what was " territory in dispute ". was defined conclusively by the Convention of 1886 and that no other definition could be allowed. In other words he expressly excluded the whole theory on which the argument for Costa Rica, concerning the meaning of " territory in dispute " is based, and destroyed (instead of supporting) that part of the Argument which we are now considering.

It would be, indeed, inconceivable that M. Delcassé should have declared (as is contended for Costa Rica) that the Award just rendered was so vague as to be unintelligible without further elucidation, so incomplete that its validity or exact effect could not be determined without an examination into historical antecedents which it does not designate, or, finally, absolutely incorrect. Any argument leading to such a

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[1] Argument for Costa Rica, p. 184.

result would constitute a *reductio ad absurdum*, and thus the argument for Costa Rica refutes itself.

But it is also plain that M. Delcassé's language admits of no such impossible construction and that nothing in his letter justifies the Costa Rican argument, even if the result which it reaches were not so contrary to all reason.

With the *fifth* proposition of Costa Rica deduced from M. Delcassé's letter,[1] we are happy to find ourselves in entire accord.

We entirely agree and have always contended that it is the Convention of 1886 and nothing else, which conclusively fixes the boundaries of the territory in dispute, for the purposes of the arbitration before President Loubet.

This proposition, however, necessarily destroys wholly the fabric of argument that the Award is invalid because of *ultra petita*, and so we have always insisted.

If, as we have steadily maintained and as Costa Rica here admits, the demands made for the parties on the arbitration before President Loubet cannot be considered in determining the "territory in dispute" before him, then the line proposed by Dr. Silvela is (as we have always argued) unimportant on that point. It does not serve, in any way, to fix the "territory in dispute," and the whole argument of Costa Rica based upon the fact that the Award gave Colombia some territory which she would not have had if Dr. Silvela's line had been adopted, falls to the ground.

The same thing is true of her argument that we must look beyond the Convention of 1886 to discover what is the "territory in dispute". But for that Convention there would have been no limitation of the jurisdiction of the Arbitrator. He would have been free to draw the boundary wherever he chose. The Convention of 1886 introduced the only limitation, and we have always contended that no other could be imagined or imposed. That limitation was that the boundary must not lie in the territory of any third power, that the terminal point on the Atlantic could not lie east of the Chiriqui nor north of Cape Gracias á Dios (which means north of the northern boundary of Costa Rica, since Cape Gracias á Dios is far north of that boundary) and that the terminal point on the Pacific could not be east of the Chiriqui Viejo nor north of the Golfito. Otherwise he remained as free as ever.

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[1] Argument for Costa Rica, p 184.

Since Costa Rica now argues, in agreement with us, that it is the Convention of 1886 which is controlling, no argument for *ultra petita* is left. It is vain to endeavor, by vague phrases, to save a contention that some other limitation is also to be considered. If the limitations of the Convention of 1886 are to be controlling they must be exclusive. If those limitations cannot be enlarged, neither can they be made more restricted; least of all when the purpose of so doing is to acquire a basis for impeaching the Award of a distinguished Arbitrator.

But that, on any question of *ultra petita*, the Convention of 1886 is the sole criterion, we entirely agree; and we differ from the learned counsel for Costa Rica only in insisting that the acceptance of this principle involves the acceptance of its consequences and removes the question of *ultra petita* from the case.

We do not, of course, concede that that question is at all before the present Arbitrator. On the contrary we maintain that by the very terms of the submission to him it is excluded and the absolute validity of the Loubet Award is affirmed so as to admit of no discussion. But were *ultra petita* an issue here to be considered, the terms of the Convention of 1886 dispose of it, plainly and forever.

The *sixth*, *seventh*, and *eighth* Propositions of Costa Rica with regard to M. Delcassé's letter relate to the physical determination of the boundary, which the Arbitrator, of course, committed to the parties.[1]

The Argument for Costa Rica indulges in much minute verbal criticism of language, but there is really no room for such subtleties.

Whether "delimitation" or "determination" would have been the better word for M. Delcassé to have used, the meaning is the same. President Loubet had made a counterfort, a cordillera and a divide which was neither, the boundaries. To delimit the boundary thus described it was necessary to ascertain the exact position of the crest of these several divides, throughout the line. This crest, when ascertained and located, would form the boundary. President Loubet had no detailed data which would enable him to do more than he did, but that was sufficient and perfectly clear. It was a mere work for surveyors and engineers to ascertain exactly where the line would run and M. Delcassé simply expressed the confidence of the Arbitrator that the parties would proceed to the detailed determination of that line amicably and in good faith.

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[1]Argument for Costa Rica, pp. 185-188.

That confidence has been deceived, for Costa Rica has refused to proceed at all, but M. Delcassé's meaning is perfectly clear.

The Argument for Costa Rica contains, however, certain statements so unjustifiable and devoid of foundation that we think it proper to note them.

The statement is made that President Loubet desired that the parties

> " should agree amicably like brothers, without contest, to the inevitable rectification of the frontier he declared, which technically could be annulled by the patent defect under which it labored, but which the losing party would be disposed to accept." [1]

It is difficult to preserve a proper moderation of language with regard to such a statement. It involves the imputation of such a lack of intelligence and of rational conduct both against President Loubet and M. Delcassé as is inconceivable.

According to this extraordinary statement President Loubet had made an Award which he knew to be invalid and incapable of standing at all without a modification, and his Minister of Foreign Affairs begged the parties to agree upon such modification as should make it possible to sustain the Award.

We are unable to understand how such a statement can be made in an argument which professes to be serious. No one could, for a moment, entertain such an idea as it sets forth. It might be dismissed without comment but for its extreme impropriety. To dignify it by discussion would be, of itself, to be lacking in respect to President Loubet, but we have felt that it ought not to pass wholly without notice.

Upon the same page of the Argument for Costa Rica is the statement that

> " As a result of the Delcassé note, which acknowledges the possibility that the territory in dispute might have been trespassed upon, the sentence eventually became impaired and the boundary it declared for that territory became subject to a future understanding between the parties. Two points remained for discussion between them which the Arbitrator could not decide."[2]

These two points are said to be whether the Arbitrator exceeded his powers and, if so, how the boundary could be readjusted so as not to trespass upon undisputed territory.

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[1] Argument for Costa Rica, p. 187.
[2] *Ibid.*, p. 187.

Such statements are to us incomprehensible. They are so utterly devoid of all basis that no serious discussion of them is possible. It would be impossible to believe, had they not been actually made and printed, that any one could put forth such a construction of the Delcassé note or make such contentions.

The Delcassé note "acknowledges" nothing. As we have several times said, it is merely a polite statement that President Loubet, having made his Award, would not discuss the subject further, and would neither modify, amplify nor comment upon it. It involved a rebuke, none the less plain because politely expressed, of the impropriety of such letters (and such requests as were contained in them) as those written by Señor de Peralta. The acquiescence in the latter's statement that the line must be drawn within the territory in dispute was merely a courteous way of reminding Señor de Peralta that the Convention of 1886 contained the only definition of the territory in dispute which could be considered, and that President Loubet was entirely aware of the limitations upon his jurisdiction. These things need no demonstration. The letter is so plain that any misunderstanding of it should be impossible.

But the conclusive answer to this, as to all that part of the Argument for Costa Rica which is based upon the letter of M. Delcassé, is the one which we have mentioned already; that it leads to an absurdity.

The ultimate proposition, stated in all its nakedness, is that, after a solemn arbitration in which volumes of arguments and documents and innumerable maps were examined and carefully considered, President Loubet rendered a formal award; and that, within a few weeks after his award was rendered, upon no other foundation than two letters of complaint from Señor de Peralta, he practically revoked his Award, declared it possibly erroneous, and left it to the parties to decide whether it was valid or not and to agree upon a line, substantially as if no award had ever been made.

The mere statement of this result invalidates the entire argument by which it is reached. To attribute to President Loubet, to the Commission of Studies by whom he was assisted and to M. Delcassé, such imbecility (for no less forcible word will suffice) is an impossibility which no argument can overcome. Whatever else might be conceived as possible, that cannot be. To put forward such a contention as a basis for any action or any conclusion of the present Arbitrator is to condemn the entire attitude of the party who does so; for no cause can be good which invokes such a defense.

Upon this single answer we might safely have rested with respect to this part of the Argument for Costa Rica, as we did upon a similar answer in declining to discuss the question whether the words of the Award had any intelligible meaning. As we felt it to be beneath the dignity of this Arbitration to discuss seriously whether President Loubet expressed his conclusions in intelligible language, so we might (and perhaps should) have declined to discuss seriously whether he admitted, immediately after making his Award, that it was erroneous and without real force or effect.

But the insufficiency of the arguments adduced for Costa Rica on this point equalled the impossibility of the conclusion which they were intended to attain, and we have thought it worth while to demonstrate that objection also, and to show, not only that the result was one which no arguments could justify, but also that the arguments are insufficient to justify any result, even had it been, in itself, reasonable. If, in so doing, we have unduly trespassed upon the Arbitrator's time and taxed his patience, we trust that we may be pardoned for following too long a path on which we were not the first to enter.

"The Present Arbitration."

Under this heading the Argument for Costa Rica first considers various matters leading to the present Arbitration. We have already dealt with this subject and see no occasion for adding to what we have said, except to make clear or correct certain points in the Costa Rican statement.

The Guardia-Pacheco treaty, which Costa Rica refused to ratify, appears to us to have no importance, in itself, with respect to the present Arbitration. It was an unsuccessful attempt at a compromise which had no consequences.

It is undoubtedly the fact that Costa Rica proposed to submit for arbitration the question of the validity of the Loubet Award and that the United States, in their desire for a settlement of the boundary (and yielding, no doubt, to the urgency of Costa Rica) sent the despatch a part of which is quoted on page 212 of the Argument for Costa Rica, stating that there was no intention of limiting the issue "to the mere interpretation of the Loubet Award." But it is also the fact (as we have already shown) that Panama absolutely and steadily refused to submit the validity of the Award to arbitration and refused to enter into any arbitration not confined to the interpretation and application of the Loubet Award.

The United States recognized the justice of Panama's attitude and it was precisely that attitude and the acceptance of it which gave rise to Secretary Knox's identic memorandum of March 1st, 1910. Costa Rica then abandoned finally any attempt to make the validity of the Loubet Award a question before the present Arbitrator or to extend this Arbitration beyond the interpretation of that Award.

The Argument for Costa Rica says that the Memorandum of Secretary Knox was " accepted by both parties." [1] Now it is to be borne in mind that the question for arbitration was formulated in that memorandum *after* Costa Rica had requested that the validity of the Award be also arbitrated and Panama had refused; and *after* the United States had suggested that the question for arbitration be made to extend further than " the mere interpretation of the Loubet Award " and Panama had declined to permit any extension. The Memorandum shows that the Secretary of State had precisely that situation in mind in making his proposition. That proposition Costa Rica says that she accepted. We confess that we cannot see how, if this be so, she can now, without a breach of good faith, argue, and request the Arbitrator to decide, the invalidity of the Loubet Award or ask him to modify that Award or do anything else than interpret it. The acceptance of Secretary Knox's Memorandum necessarily involved an abandonment of her previous and rejected demands. With what face can she now act and argue as if those demands had been granted, instead of being rejected, and as if she had maintained them, instead of abandoning them?

But the statement that Secretary Knox's Memorandum was accepted by *both* parties is not accurate. Panama, as we have already noted, was still not entirely satisfied with the wording of the question to be submitted to arbitration. Intent, always, and steadfast in her intention, that by no form of words should it be made possible to contend that anything but the mere interpretation of the Loubet Award should be submitted to arbitration, she suggested a modification of the question as formulated in the Memorandum, so as to prevent the possibility of enlarging the subject of arbitration by a hair's breadth, even, beyond that point.

In his reply to the Identic Memorandum, delivered on March 10th, 1910, Dr. Porras, the Representative of Panama upon this subject, said:

> " With respect to the question to be arbitrated, the undersigned believes that that question would be accurately stated as follows: ' What is the

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[1] Argument for Costa Rica, p. 214.

boundary between the Republics of Panama and Costa Rica under and in accordance with the correct interpretation and true intention of the Loubet Award'?

The arbitrator will, undoubtedly, in the course of his examination of this question, take into account all the circumstances and facts which may, in his view, properly have a bearing upon his decision, but the undersigned submits that the enumeration suggested of the considerations which the arbitrator shall take into account would extend the scope of the arbitration beyond the determination of the question of fact, to-wit, the exact location of the line as fixed by the award, which is all that has been proposed ; and might lead to a departure from or modification of the Loubet Award, which the undersigned does not understand to be within the scope of the proposed arbitration, and to which it would be beyond the power of the undersigned or his Government to agree, for the reasons heretofore given."

A comparison of this with Article I of the Convention of Arbitration will show that the views thus expressed were accepted by the Department of State and by Costa Rica and embodied in the Convention substantially literally.

We have referred to this before, but it is useful, we believe, to reproduce this quotation in connection with our particular examination of this part of the Costa Rican Argument.

It furnishes an additional evidence of the directness and openness with which Panama constantly pursued her purpose and the frankness with which she made her position always plain. It shows, moreover, even more clearly, that all parties understood that position and that on all sides it was clearly understood that this Arbitration should include but one question: the interpretation and application of the Loubet Award. The meticulous care with which Panama insisted upon excluding from the Convention any words which might, by any possible implication, seem to authorize a consideration, even, of any other question, could not be misunderstood by any one.

Costa Rica's attitude was one of acquiescence. She desired that the validity of the Loubet Award should be debated; Panama refused, and Costa Rica acquiesced. She desired that the boundary question, as a whole or in part, should be considered apart from the Loubet Award and a modification of the Award authorized if the Arbitrator should think it proper ; Panama refused, and Costa Rica acquiesced again. She preferred the form of question proposed by Secretary Knox as broadening a

little the scope of the Arbitration beyond the mere interpretation and application of the text of the Loubet Award ; Panama insisted on an amendment, for the express purpose of restricting the scope of the Arbitration, and Costa Rica acquiesced again.

Was this acquiescence of Costa Rica in good faith ? No one, we are sure, questioned or doubted it then. But now when we find her striving to import into this Arbitration these various questions, as explicitly excluded, in effect, as if the Convention had specifically provided that they should not be considered, and passing by, with almost total neglect, the one question which, under the Convention, is submitted to arbitration, it is hardly possible to escape a doubt. The result is, at least, the same as if Costa Rica had led Panama into an arbitration by promising to confine herself to one question and to abandon her attempt to raise any others, with the purpose of reviving the excluded questions as soon as the Arbitration was organized. That is, at any rate, what she has done, whether in bad faith or inadvertently.

It is, perhaps, unnecessary to consider this point nicely, for we are acting under a Convention which prescribes the question to be decided and bars the way to all attempts to raise any other questions. It is comparatively easy to refuse to obey an unfavorable award, but it is impossible to bring into an arbitration issues not within the terms of the convention under which it is held. The Arbitrator has power to exclude whatever is not proper to be considered. We may, therefore, assume the purposes or intentions of Costa Rica to be excellent, and rest upon the terms of the Convention, which forbid the consideration of the questions which she raised.

The Argument for Costa Rica completely overlooks the modification by the Convention of the question proposed by Secretary Knox and, through inadvertence, no doubt, wholly mis-states the fact. It says of the question as proposed in the identic memorandum :

> " This formula, proposed by Secretary Knox, and the formula finally incorporate sinto the treaty, were expressly declared by the parties, at the conference above-mentioned, to be *absolutely equivalent, or identical*, with no other difference than that resulting from their editing." [1]

We are not clear to what " conference " reference is made, but the letter of Dr. Porras to which we have referred shows that the statement is the reverse of the fact.

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[1] Argument for Costa Rica p. 223.

So far from the two forms being identical or the difference between them being merely one of "editing," they are materially different and the difference is due precisely to an intention to exclude the possibility of such a construction as that which Costa Rica now vainly strives to put upon the question.

Nothing could show more clearly than this effort of Costa Rica the wisdom of the modification which, at Panama's request, was made in the form of the question. The criticism might have seemed, at the time, almost hypercritical and the change suggested really unnecessary, though allowed *e majore cautela*. But now Costa Rica shows how she would have endeavored, had the question been left in the form first proposed, to make use of its language to broaden the scope of this Arbitration almost without limit. Happily the wise change in the question makes the effort unavailing and confines the controversy to its true limits, and Costa Rica is compelled, in her efforts to remove all limitations, to have recourse to the original language and ignore the change. But this she cannot do.

We confess ourselves unable to account for the statement of the Argument for Costa Rica that Dr. Porras

> "made it known that he accepted the formula suggested by Mr. Knox but that *to avoid redundancy* he proposed that the words 'in view of all the historical, geographical, topographical and other facts and circumstances surrounding it and in the light of the principles of international law' *be changed to the more comprehensive clause 'taking into account all the facts and circumstances and considerations that may have a bearing upon the case'*." (Italics in original).[1]

and that Señor Anderson for Costa Rica made no objection, "it being his understanding that the propositions were identical," but insisted that a reference be made to the letter of M. Delcassé.

The answer of Panama to the Identic Memorandum of Secretary Knox completely refutes all these statements. Not one of them is in accordance with the fact. As we have already twice noted, Dr. Porras objected to the form of question suggested by Secretary Knox on no such empty ground as "redundancy", but because it contained elements which might involve a broader scope to the Arbitration than

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[1] Argument for Costa Rica, p. 229.

Panama could accept. He did not suggest a "more comprehensive clause," but objected to any characterization of the question which might by any possible implication, make it include more than the mere interpretation and application of the Loubet Award.[1]

Panama did consent that the Convention should say that, in answering this narrowly restricted question, the Arbitrator should take into account all the facts, circumstances and considerations which may have a bearing on the case," for, as the answer to the Identic Memorandum says,

> "the Arbitrator will, undoubtedly, in the course of his examination, take into account all the circumstances and facts which may, in his view, properly have a bearing upon his decision,"

but she would not let these words be incorporated with the question, precisely in order that Costa Rica might have no excuse for arguing as she now does. The words to which the Argument for Costa Rica refers are placed in a separate paragraph of the Convention where they are at once superfluous and innocuous.

Nor is it the fact that it was Señor Anderson who insisted on the insertion in the Convention of the reference to M. Delcassé's note. There having been words on the part of Costa Rica suggesting a possible contention that the Loubet Award was void for *ultra petita*, Dr. Porras insisted upon a reference to M. Delcassé's letter, to bar (as we have shown in our first Statement that it does) any attempt to defeat this Arbitration and impeach that Award on such a ground.

It never was and never could have been Señor Anderson's understanding that the question stated in the Convention was identical with or equivalent to that proposed by Secretary Knox. He knew that it was altogether different and had been made different in words in order that it might be different in meaning. He knew that this difference in meaning consisted in narrowing, and not enlarging the scope of the negotiation. He knew that the reference in the Convention to M. Delcassé's letter was not suggested by him but by Dr. Porras. All these things were matters of discussion and debate in which, finally, the contentions of Panama prevailed, and it is with a natural astonishment that we see in the Argument for Costa Rica statements so diametrically opposed to the actual facts. It is to be regretted that Señor

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[1] *Ante*, p. .

Anderson, since he was not to represent Costa Rica upon this Arbitration, did not more fully and accurately inform those upon whom that duty was to fall.

As we have already said, the fact that the present counsel for Panama had the honor of coöperating in the making of the Convention of 1910 has given them full means of knowledge upon this subject, and information which the present representatives of Costa Rica evidently lack.

Such lack of information can alone explain the statements to which we have just referred, but it has an even more unfortunate result. It has led to the inclusion in the Argument for Costa Rica of a passage headed "Resultant Powers of the Arbitrator" [1] which wholly falls when once these misstatements of fact have been corrected.

Nothing could better demonstrate the wisdom of the modification in the form of the question to be submitted for arbitration, upon which Panama insisted, than this passage in the Argument for Costa Rica. Precisely the difficulties then apprehended are here exemplified. The Argument for Costa Rica first erroneously identifies the question stated in the Convention with that suggested by Secretary Knox, and then argues from that, that the whole question of the boundary, with only the most incidental reference to the Loubet Award, is before the Arbitrator for review. He is not to be "a mere humble interpreter, like the ordinary judge",[2] but is to modify the Award wherever he thinks that it should have been other than it was.

But with the correct statement of the facts concerning the question stated in Convention, all this fabric of argumentation falls. The language of the Convention itself refutes it for it states that the only difference between the parties is as to the "*interpretation*" of the Award; and it was necessary for Costa Rica to have recourse to the question suggested by Secretary Knox in order to have the least excuse for the extravagant theory of the scope of this Arbitration which she needed. But the Knox question was excluded precisely for the purpose of making such arguments impossible and when this is known, they can no longer be maintained.

We need not, therefore, examine these arguments in detail. Based upon a mistake of fact, they have no force. The position of a judge interpreting an instrument has not been usually considered so humble as the Argument for Costa Rica would

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[1] Argument for Costa Rica, pp. 230-236.

[2] *Ibid.*, p. 230.

make it. Indeed it has been generally thought one of the highest which exists, at least among civilized peoples. That high office is precisely that of the present Arbitrator. He is here to interpret and to apply. He is not here to revise, correct or annul. Such is not his office, and to argue before him that there is error in the Award, which it is his sole business to interpret and apply, is to beat the air.

We regret to see repeated in this part of the Argument for Costa Rica the utterly groundless assertions that President Loubet " confesses the deficiency of his work "[1] and that, according to M. Delcassé, he " evaded the duty with which he had been charged."[2]

Nothing could be further from the fact, nothing more utterly baseless. It is not worth while, it is not even consistent with the dignity of this Arbitration, to discuss here such statements. We give elsewhere more space to their refutation than they deserve, only because of the importance which Costa Rica appears to attach to them. But the intelligence and dignity both of President Loubet and of M. Delcassé need no defense from us and we are convinced that a mere perusal of the Award of the one and of the letter of the other will satisfy the present Arbitrator that such statements are beyond the field of serious consideration.

" Maximum Limit of the Territory in Dispute." [3]

The Argument for Costa Rica next proceeds to argue what, according to her theory, is the " Territory in Dispute."

Into this field, again, we shall decline to follow her. There is no room for such discussion. The Convention of 1886 furnishes the only admissible definition of the " territory in dispute," as M. Delcassé said, in his often quoted letter. No argument can be permitted to alter, add to or take from that definition in any way. There is not and never was any question as to what was the " territory in dispute " before President Loubet, nor any room for argument concerning it. It is equally evident that the boundary fixed by President Loubet does lie wholly within the territory in dispute as thus defined. There is, therefore, nothing germane to this arbitration, upon this point, left to be considered.

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[1] Argument for Costa Rica p. 235.
[2] *Ibid.* p. 236.
[3] Argument for Costa Rica, Chap. IV, pp. 237–257.

We desire here merely to note, as we have upon other subjects, certain errors and inaccuracies in the Argument for Costa Rica.

There is the repetition of an erroneous translation of M. Delcassé's note, which has, perhaps, no great importance. The Convention and M. Delcassé speak of "the confines of the territory in dispute as *determined* by certain articles of the Convention of 1886. The Argument for Costa Rica makes this "the limits of the territory in dispute *as they are found to be* from the text of said Articles." [1] The difference may be unintentional, but if it is intended to argue from the latter form that M. Delcassé spoke of the Convention of 1886 as only furnishing indications by which the territory in dispute might be otherwise ascertained, the error should be corrected. He spoke of the Convention of 1886 as *determining* the limits of that territory. If any argument as to the correct translation were otherwise possibly, it is cut off by the present Convention which uses the word "*determined*" in referring to M. Delcassé's note. For the purposes of this Arbitration, therefore, that must be taken to be what he said.

It is also stated that the boundary claimed by Costa Rica in the Convention of 1886 is a line formed by the Calobébora and Chiriqui Viejo Rivers.[2] A mere glance at the Convention of 1886 shows the error. Nothing is said of any internal line, or whether it does or does not follow these rivers. The Island of Escudo de Veraguas is also mentioned in that Convention as an extreme point of Costa Rica's claim "on the Atlantic." If that be taken, where is the line from it to be drawn? It is admitted that, even on Costa Rica's theory, her line, under the Convention of 1886, is indeterminate from the head waters of the Calobébora to those of the Chiriqui Viejo. Thus it is clear that the Convention of 1886 meant to fix only terminal points and not interior lines.

We shall not discuss the fanciful geometrical lines to limit Colombia's claims imagined in the Argument of Costa Rica.[3] They are all merely speculative and no valid inferences can be drawn from them. The Convention of 1886 does not deal with interior lines, but leaves them open. It is futile to try to imagine what interior lines would have been fixed, had any been. None were, in fact, fixed, and nothing

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[1] *Ibid.*, p. 238.
[2] Argument for Costa Rica, p. 238.
[3] *Ibid.*, pp. 239-241.

can come now of an attempt to supply what was omitted—and, it must be, intentionally omitted– from the Convention of 1886.

These considerations apply equally to the attempt to fix internal lines under the Convention of 1886, by reference to supposed historical matters.[1] That Convention limited President Loubet's jurisdiction as far as the parties thought necessary. Except as so restricted it left him absolutely free. It is idle to devise further limitations which the Convention would have contained, had they been intended, but which it does not contain. Our only guide must be the Convention itself. That is elementary. If a limitation is contained in the Convention it must be regarded; if it be not there, it cannot be imported. To devise a limitation not in the Convention and then to argue that President Loubet was in error and his Award invalid, because he did not observe it, is too fantastic a course to be considered seriously.

As little shall we consider that part of the Argument for Costa Rica which deals with the line proposed in the Arbitration before President Loubet by Dr. Silvela for Colombia.[2] That line has only this importance; that it shows that it was not then supposed that there was any such limitation of President Loubet's jurisdiction as Costa Rica now tries to invent. Obviously Dr. Silvela was not proposing a line which (as Costa Rica now asserts) was beyond the jurisdiction of the Arbitrator to grant and the award of which would have involved *ultra petita*. The line may have been right or wrong, but it could not have been one which the Arbitrator had no power to allow.

At any rate, the Silvela line has no importance now. It was totally disregarded by President Loubet. No part of it is incorporated into his Award. It was a request of counsel which was denied by the Arbitrator. It has no conceivable importance now, beyond that which we have mentioned, and cannot have any effect upon the present Arbitration.

"Questions Argued in the Loubet Arbitration and Their Solution."[3]

This is the heading of Chapter V of the Argument for Costa Rica.

Again we find nothing to be considered, except a few isolated passages.

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[1] Argument for Costa Rica, pp. 241–248.
[2] *Ibid.*, pp. 248–257.
[3] *Ibid.*, pp. 258–276.

Under some circumstances and if the Award were doubtful or ambiguous in its terms, some guide to its meaning might be conceivably found in considering the questions argued before President Loubet. But such is not the case here, and the utility of this barren re-statement of events supposed to have occurred long before the Arbitration, we confess ourselves unable to divine.

There is also a repetition of the oft-repeated attack upon President Loubet and M. Delcassé, unjustified, improper and absurd. There is the equally unfounded statement that to award to Colombia the upper valley of the Sixaola or Tarire must involve *ultra petita*,[2] though it is too obvious for argument that it does not.

Then follows a statement of what Costa Rica really seeks in this Arbitration. While contending that the Loubet Award might properly be declared void, the Argument says that she does not ask this, but that the present Arbitrator establish, instead of the boundary awarded by President Loubet,

> " A boundary that will be more in accord with justice in the light of the other antecedents, circumstances and considerations to which he must also give weight."[3]

That is, Costa Rica asks that the Arbitrator shall not construe nor determine the true intention of the Loubet Award, but that he shall discard that Award and fix a different boundary " more in accord with justice," as Costa Rica represents it.

Nothing could show more clearly how far Costa Rica is from adhering to the purpose of this Arbitration. Nothing could show more clearly how completely a pretence was her contention that the Loubet Award required elucidation or construction. Nothing, finally, could show more clearly that what she has been doing for the nearly fourteen years since the Award was rendered, is simply a wilful violation of her solemn engagement in the Convention of 1886 and a breach of her national faith.

She has, and has had, no doubt of the meaning or application of the Award ; she does not, and never did, suppose it invalid on any ground ; she was only dissatisfied with it and would not accept it, even though she had pledged her national honor to do so.

With the same disregard of all obligations she now asks that the Loubet Award, solemnly accepted again by the Convention of 1910, be disregarded, and that the

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[1] Argument for Costa Rica, p. 265.
[2] *Ibid.*, p. 265.
[3] *Ibid.*, p. 270.

present Arbitrator, instead of performing the only duty which is his, by construing and applying that Award, discard it and assume the duty, never committed to him, of fixing another boundary more in accord with what Costa Rica calls "justice."

She thus refuses to accept the Award of President Loubet, which, by the Convention of 1886, she had solemnly promised to accept "whatever it may be"; she makes the appeal against it, which, by the same Convention, she had, with equal solemnity, bound herself not to take; and she asks the present Arbitrator to discard, substantially, President Loubet's Award, and fix a different boundary from that determined by him, though she knows that Panama entered this Arbitration only upon condition that it be confined to the interpretation and application of the Loubet Award.

It is unnecessary to characterize such conduct. The open avowal of Costa Rica's purpose, however, makes it needless to argue further, in order to show what that purpose is. It discloses also the reason for the form which her Argument takes and the irrelevancy and futility of what it contains. It justifies the disregard of that Argument; for since Costa Rica admits that her purpose is to break down, and not to support, the Loubet Award; to procure the substitution of another boundary for that which the Award fixed, and not to interpret and apply the Award itself; it is evident that the Argument can have no relevancy here.

We are not here to determine the validity of the Loubet Award; that is conclusively established by the Convention under which this Arbitration is held. We are not to discuss the justice or correctness of that Award; that, too, is, in the same way, conclusively established. We are to consider only one thing; the interpretation and application of a valid and just award.

When, therefore, Costa Rica announces that the purpose of her Argument is to show only that the Loubet Award is invalid and unjust and to obtain a departure from it and a boundary different from that which President Loubet awarded, it is obvious that it must be irrelevant, as we find that in fact it is. Argument to show the Award invalid cannot help in interpreting it. Argument to prove it erroneous and unjust cannot be of assistance in its application. It is true that it must be given a meaning before it can be called unjust, but that becomes merely incidental in such an argument. Amid contentions that the Award has, on its face, no meaning, that, while it appears to have a meaning, M. Delcassé declared that it had none, and a mass of assertions as to negotiations,

abortive treaties and statements of officials and geographers for eighty years preceding the Award, there is no definite statement of what Costa Rica supposes the "correct interpretation and true intention" of the Loubet Award to be. From the nature of her objections to the Award it would appear that she does not differ from Panama on this point. Apart from the evident clearness of the Award itself, no other construction could serve for the contentions of Costa Rica as to invalidity and injustice. But, at any rate, the declaration of Costa Rica that she seeks, not the interpretation and application of the Loubet Award, but its overturning and the fixing of a different boundary explains and emphasizes the fact that her Argument is wholly irrelevant. She is not considering the question submitted to the present Arbitrator and her Argument, naturally and necessarily, does not apply to it.

It is hardly necessary to consider the part of the Argument for Costa Rica entitled "Criterion and Intent of President Loubet in the Decision of the Arbitration".[1]

This is as little relevant as the rest. It may be summed up as follows: President Loubet intended to make a just and correct award; he did not do so; therefore the Award is not in accordance with his intentions.

Of course no arbitral award could be binding if such arguments were admitted. Every arbitrator means to do right, every defeated party thinks that he has erred, and so every defeated party would argue that the award was not in accordance with the arbitrator's intentions. To allow any force to such an argument would lead again to a *reductio ad absurdum*.

In fact, we have nothing to do with President Loubet's abstract intentions. We are concerned only with what he did. He made an Award. We are to consider what that Award meant. Beyond that we cannot go. Even if he had errred, that could not matter now, and the question whether he was right or not is not here for consideration.

We need not, therefore, consider further these matters, which are wholly foreign to the present Arbitration.

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[1] Argument for Costa Rica, pp. 270–276.

"Opposition to the Line Indicated by the Punta Mona Spur."

This is the title of Chapter VI of the Argument for Costa Rica,[1] and here, again, are found the same characteristics as in the rest of the Argument; that is, it is not addressed to elucidating but to opposing the Loubet Award.

The very title of the chapter indicates its purpose. The Loubet Award defines one part of the line as formed by "the Punta Mona Spur", to use the concise phrase of the Argument for Costa Rica. The title of the chapter shows that its purpose is to *oppose* that line. The generality of the designation of the line opposed shows that Costa Rica is opposing *any* line "indicated by the Punta Mona Spur". That is, her argument is not intended to show what is the actual location intended by President Loubet for this line, but to show that he should not have awarded any such line.

The contents of the chapter justify its title, and thus, again, Costa Rica does not argue the only question here submitted for arbitration—the meaning and application of the Loubet Award—but devotes herself to the futile and irrelevant task of trying to impeach that award. The task is futile because, besides its impossibility, it deals with a subject which this Arbitrator is not empowered to consider; and it is irrelevant, because it has no bearing upon the only question which has been submitted to him. If the Award were erroneous, that fact would not concern him, for his office is only to interpret and apply it as it stands. For the purpose of such interpretation and application the correctness of the Award, in any respect, is entirely irrelevant, for it does not aid in determining its meaning.

It may be noted here, again, as we have had occasion to note with respect to all the rest of the Argument for Costa Rica, that Costa Rica is taking precisely that appeal against President Loubet's Award which the Convention of 1896 forbade and which, by that Convention, she solemnly waived and renounced. By constant iteration this breach of a solemn engagement may become so familiar as to be less striking than it was at first, but it ought not to be passed by without notice. It is a strange thing to see a party seek from one arbitrator an award based and conditioned upon her refusal to keep her promise to abide by the award of another arbitrator.

The same considerations which have dispensed us from the necessity of considering in detail the other parts of the Argument for Costa Rica are of the same effect

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[1] Argument for Cost Rica, p. 167.

here. We cannot discuss the correctness of President Loubet's Award in any respect. The terms of the Convention of 1910, under which this Arbitration is held, as well as due respect for that distinguished Arbitrator and for an international award, solemnly made, forbid. We are not here to revise or correct the Loubet Award. The purpose of this Arbitration is only to construe and apply it.

But we desire, as we have done with other parts of the Argument for Costa Rica, to comment upon and correct various statements in the chapter under consideration, which we think ought not to pass wholly without notice.

Much space is taken up in the Argument for Costa Rica by a labored attempt to show that the divide which closes on the north the valley of the Sixaola or Tarire is not a " counterfort " or " spur ", properly so called, but is formed by a series of isolated elevations connected by others less elevated; and there is much elaborate discussion of the exact meaning of " contrefort ", " counterfort ", " spur ", " valley " and other words. The purpose of all this is to show that President Loubet used the wrong words in describing that part of the boundary which runs from Punta Mona to the cordillera, and that, therefore, his Award cannot be applied or enforced.[1]

Now in the first place, it is, we believe, as we have said in our original Statement, perfectly immaterial whether the words used by President Loubet were technically accurate or not. If there be, as there certainly is, an elevation extending substantially from Punta Mona to the cordillera, forming the division between the waters which flow into the Sixaola or Tarire and those flowing into the next river to the north, it does not matter at all whether its most accurate technical designation is " counterfort ", " spur ", " divide " or anything else. No one can question that this is the elevation intended by the Award.

Nor can it be of any consequence whether, in strict accuracy, the elevation in question should be said to " close to the north " the " valley " or the " basin " or the " water-shed " of the Sixaola or Tarire. The meaning of the Award is no less clear, whichever word be used. Arbitrators are not required to conform to the nice distinctions of lexicographers in their use of words, under penalty of nullity of their awards if they fail to do so.

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[1] Argument for Costa Rica, pp. 278–334.

We confess that this discussion appears to us unworthy the dignity of this Arbitration. It is not a question of etymology or grammar which is under consideration, and we are unable to discover from the Argument for Costa Rica that any doubt exists or can be made as to what the Award means, which is the only matter of any importance.

It is to be borne in mind constantly that the real objection of Costa Rica is to the Award itself. Nothing could show more clearly than does the whole Argument for her, that no doubt as to the meaning of the Award nor as to its application to the actual geographical situation has caused her failure to comply with it. Pages are devoted to arguments based upon the assumption that its meaning and application are plain and are precisely those which Colombia and Panama have always maintained. Again and again it is affirmed that Costa Rica will not comply with the Loubet Award because she does not consider it right and just. Therefore it is that Costa Rica does not argue the meaning and application of the Award, except in repeated efforts to make it out to be insensible and impossible to apply.

If that were the case, then only two alternatives would remain: either the present Arbitrator would have to fix a boundary independently of the Loubet award or he must declare himself unable to answer the question submitted to him and the Arbitration must end without result. The former of these alternatives is not available. Under the present Convention of Arbitration no boundary can be fixed independently of the Loubet Award and no other boundary than that which that award fixes. Therefore only the latter of the two alternatives would be possible, and the present Arbitration would end without result. In that case, as Costa Rica is in possession of the territory belonging to Panama under the Loubet Award, she would remain in possession, she would continue her refusal to comply with the Loubet Award and no progress toward a final settlement would have been made.

It is impossible to avoid the suspicion that such may be Costa Rica's purpose, but, at any rate, the fact remains that, her real objection being her dissatisfaction with the result of the Award and not any doubt as to its meaning, she has necessarily addressed all her argument to overthrowing it and has not attempted to suggest an interpretation or application of tt which could be adopted and which would make possible compliance with it. She is resolved, and, indeed, admits it, not to comply with it in any way.

This attitude furnishes the key to the whole Argument for Costa Rica.

> " It has been her irrevocable decision *not to accept the Award insofar as, from a careful examination of its dispositions, it would result that it adjudicated to Colombia Costa Rican territory which was not in dispute and consequently* not submitted to the *jurisdiction of the Arbitrator.*"[1] (Italics in original.)

What was territory in dispute Costa Rica undertakes to decide for herself. President Loubet decided it by making his Award, and decided it in accordance with the Convention of 1886, which gave a conclusive definition of it. It is Costa Rica's "irrevocable decision" not to accept his decision. Will she be any more ready to accept the decision of the present Arbitrator? Apparently not, unless it be otherwise satisfactory to her. If her decision is "irrevocable" not to accept President Loubet's decision in this respect, it would apparently not be affected by an Award of another Arbitrator, which produced the same result. Costa Rica will accept no judgment but her own.

The part of her argument which we are now considering, however, has for its purpose the entire invalidation of the Loubet Award, from the cordillera to the Atlantic. This is to be accomplished by demonstrating that President Loubet should not have called the elevation extending from Punta Mona to the cordillera a "counterfort" but by some other name, and that he should not have said that it "closes to the north the valley of the Rio Sixaola or Rio Tarire," but that it closes the "basin" or "watershed" of that river. Had he chosen other words his award would have been clear and intelligible; because of his inaccurate designations it becomes impossible of application.

We have said, already, how unimportant such an argument appears to us. We now desire to show that, had the general thesis any force, there is nothing to support it.

In the first place the Argument for Costa Rica criticizes the Commission of Engineers for not saying whether or not they considered the elevation from Putna Mona to the cordillera a "counterfort" or not and argues that their failure to do so shows that they did not consider it a "counterfort."[2]

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[1] Argument for Costa Rica, p. 219.
[2] Argument for Costa Rica, p. 285.

The Argument singularly overlooks the fact that Commissioner Ashmead, the representative of Costa Rica on the Commission, has explained why the Commission designated this elevation throughout as a " divide."

> " In its deliberations and in letters to the engineers and geologist, this Commission has used the words " divide north of the Sixaola River " not with the intention of interpreting the meaning of clause X to be a divide, but rather to obviate the use to them of the words counterfort, buttress, and spur ; having considered these latter words as perhaps being a part of the matters to be arbitrated." [1]

The same course and, obviously, for the same reason, was followed by the Commission in their report. They were careful not to appear to trespass on ground reserved to the Arbitrator ; they thought it possible that the question whether the divide which bounded on the north the valley of the Sixaola or Tarire was technically a " counterfort " or not, might be one of the things which the Arbitrator was to decide, and so they avoided characterizing it themselves and called it simply a " divide."

No possible inference that they would have said that it was not a counterfort can be drawn from their report. Indeed from their adoption of the report of the geologist, who has no doubt that this divide is a counterfort, the inference would be that they were also of that opinion.

Commissioner Ashmead, appointed by Costa Rica, in his statement supplemental to the report of the Commissioner, found the question difficult to decide. but finally concluded that the " divide " is not, technically, a counterfort.[2]

Commissioner Hodgdon, appointed by Panama, found no difficulty in affirming the existence of precisely what is described in the Award and that it is the " divide " mentioned in the report.[3]

The Geologist of the Commission reached the same conclusion, though he does not use the word " counterfort " nor " spur ". But he finds a continuous elevation from Punta Mona to the cordillera in which any appearance of lack of continuity is due only to erosion.[4]

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[1] Report of Commission ; Ashmead's statement, pp. I, 2.
[2] *Ibid*, p. 4.
[3] Hodgdon's statement, p. 13.
[4] Report of Geologist to Commission, pp. 17-21.

Most of Commissioner Ashmead's statement is devoted to an argument against the report of the geologist and of course the argument for Costa Rica attacks the Geologist, the Commission and Commissioner Hodgdon. But Commissioner Ashmead stands alone and has no such authority as to prevail over all the rest. It would not be possible, we believe, to find that there was not a counterfort such as is described in the Award, if that particular designation were material. It would be certainly impossible on such a ground and in view of the actual geographical situation to adopt a theory which should result in invalidating the Award of President Loubet.

The small swamp back of Punta Mona is the subject of long consideration in the Argument for Costa Rica.[1] It is to be borne in mind that this swamp is insignificant in extent, being at most only from 1½ to 2½ kilometres in width, that it is, therefore, only upon maps on a large scale that it can be noted and so its existence would naturally not be known to President Loubet, that the Geologist of the Commission reports it as only covering a low saddle in the counterfort or ridge which runs from Punta Mona to the cordillera and of which Punta Mona forms a part, and that it is too unimportant to constitute a factor in so large a matter as this boundary.

It is true that the line drawn by the Commission across this little swamp is arbitrary. The true summit of the counterfort is hidden and so cannot be determined. As we have said in our original Statement, this appears to us to be a reasonable method of fixing this part of the line, but the matter is too unimportant to justify extended discussion. That any such petty detail could be made the means of impeaching President Loubet's Award is a proposition too unreasonable to be seriously discussed.

As we have said in our original Statement, President Loubet's meaning is perfectly clear. He intended that the boundary should begin at Punta Mona and should follow the elevation which bounds to the north the valley and watershed of the Sixaola or Tarire. If, to effectuate that meaning, a line must be defined across this little swamp, that is precisely such a detail as the present Arbitrator has been asked to supply. His office is to enforce the Loubet Award, not to overthrow it.

All these questions of "counterfort," "spur," "valley" and "swamp" are wholly unimportant, when once the Award is looked at in its broad intent and meaning.

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[1] Argument for Costa Rica, pp. 297–303.

Were that doubtful, recourse might be had to minor details to ascertain it, but it is not so. The meaning of the Award is plain and the recourse to details by Costa Rica is not intended to make it plainer but to obscure it and cloud its clearness. It is not so that such questions are to be considered or decided.

A conclusive answer, so far as Costa Rica is concerned, to so much of her Argument as is based on these verbal subtleties is one to which we have referred in our original Statement, but which it is proper here to state again. It is found in the letter of Señor de Peralta to M. Delcassé, to which the Argument from Costa Rica attaches so much importance from another point of view.

In that letter, written, as it states, " to avoid all possible confusion with respect to the intentions " of President Loubet, " as they appear from the arbitral award " and to give the interpretation which Costa Rica placed upon the Award, the boundary, as Costa Rica interpreted it, is described in detail. This description begins as follows :

> " The boundary between the Republics of Costa Rica and Colombia shall be formed by the counterfort of the cordillera which starts from Cape Mona on the Atlantic Ocean, and closes on the North the valley of the River Tarire or Sixaola."

These are the same words which the present Argument for Costa Rica declares to be insensible and inapplicable, but these are the words which she chose, in 1900, for a description of the boundary which should " avoid all possible confusion."

It is impossible, after this, to take seriously (if it were ever possible to do so) the " grammatical analysis " of the Award or the long discussion about the words " counterfort " and " valley " and the swamp back of Punta Mona, contained in the Argument for Costa Rica. She cannot be heard to say that any difficulty of any kind can arise from this language. She has herself affirmed that there is no such difficulty. She thus, herself, has shown her Argument upon these points to be devoid of all serious foundation.

The only possible escape from this position would be to say that Señor de Peralta, in his note to M. Delcassé, intentionally and wilfully used language which could not define the boundary and, while professing to propose a description which should " avoid all possible confusion " as to the boundary, in fact proposed one which

he knew would create inextricable confusion. If the present contention for Costa Rica, on this point, be at all justified, that must be precisely what Señor de Peralta did.

Costa Rica, therefore, must meet this dilemma; either Señor de Peralta endeavored to mislead the Arbitrator into describing an impossible boundary, or her present arguments are empty and entitled to no weight.

It is unnecessary to say that Costa Rica does not accept the former of these alternatives. It is, indeed, impossible of acceptance. To suppose that Señor de Peralta and the Government of Costa Rica would be guilty of such unworthy trickery is an idea not to be entertained.

But this involves, necessarily, the result that the description of the boundary in the Award, which is precisely the same as that used by Señor de Peralta (so far as the points now under consideration are concerned) is clear, plain and in accordance with the natural features of the country. Hence the whole elaborate structure of argumentation, now put forward by Costa Rica, to show that the Award is defective in these respects, falls to the ground and carries with it every objection which Costa Rica has made to the interpretation of the Award maintained by Panama. Señor de Peralta's note is the refutation of the Argument for Costa Rica.

"Defense of the Sixaola–Yorquin Line."

Chapter VIII of the Argument for Costa Rica bears this title. It might be expected that here would be found some attempt to show that this line accords with the Award of President Loubet, but, in spite of the title, such is not the case. There is, in fact, no "defense" of this line. The Argument for Costa Rica wholly and expressly abandons it and asks the present Arbitrator to award one of two wholly different lines.[1]

In what sense, then, is the expression "Defense of the Sixaola Yorquin line" nsed? Apparently only in the sense that to propose it was laudable in Costa Rica as

> "the expression of the *sacrifice* which Costa Rica was ready to make in order to bring an end to the question.[2] (Italics in original.)

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[1] Argument for Costa Rica, p. 340.
[2] *Ibid.*, p. 338.

We confess to the astonishment with which we have read this statement, made, apparently, without any consciousness of what it involves.

In the first place the statement necessarily means that when Señor de Peralta wrote M. Delcassé stating that Costa Rica interpreted the Award in the fashion which he stated, his statement was false. Costa Rica, according to this contention, never did, in fact, interpret the Award as Señor de Peralta said that she did. He was endeavoring to deceive M. Delcassé and to induce him to accept, as an honest interpretation, what was not an interpretation but a modification.

We have, indeed, ourselves had occasion to point out the impossibility of defending the boundary described by Señor de Peralta as an " interpretation " of the Loubet Award. That is obvious. But for Costa Rica to adopt, herself, the position that it was never supposed by her that the Loubet Award could be so construed and that the description of the boundary, called by Señor de Peralta an interpretation, was not an interpretation in good faith, is, at least, surprising. It is not usual to base an argument upon a statement of the former insincerity of the party making it.

In the second place it is strange to see this description called " the expression of the *sacrifice* which Costa Rica was ready to make." The word is singularly inappropriate.

Two powers had submitted a question to the arbitration of the President of the French Republic and had solemnly promised to abide by his decision. He had rendered his Award. One of the two powers is prepared to keep faith and accept and perform the Award. The other of them says that she will accept the Award only if it be made more favorable to her and calls this proposition a " *sacrifice !* "

There is no " sacrifice " in keeping faith. When the decision of a competent tribunal is rendered, to submit to it is not a " sacrifice ", It is only compliance with a duty which, between private persons, will be enforced by the government which instituted the tribunal, and, between nations, is ordinarily made certain by a just sense of the demands of national honor.

But to add to a refusal to comply with this elementary duty a proposal to accept a decision more satisfactory to the party refusing, and to call such a proposal a " sacrifice " is such a misuse of language and implies such an attitude on the part of Costa Rica as we hesitate to characterize.

Even this " sacrifice " Costa Rica will no longer make and the reasons given for her attitude are as extraordinary as her position itself. The argument for Costa Rica says :

> " But after Señor Peralta's note was written certain facts developed that permitted, and, indeed, forced Costa Rica to modify the interpretation she made at that time." [1]

What were these facts which exercised such a compelling force upon Costa Rica? The Argument informs us :

> " In the first place the uselessness of the excessive sacrifice made in order to settle the question ; after that the spirited protest of Costa Rican public opinion that called for the nullification of the Award, and the efforts of the Mediator to bring about a basis for agreement by giving Panama to understand that as the question then stood, *it could not be resolved by a mere interpretation.*"[2] (Italics in original.)

That is, Panama would not accept a modification of the Award, but insisted on Costa Rica's keeping the promise for which she had pledged her national honor ; public opinion in Costa Rica called for a repudiation of her solemn engagements ; and the attitude of the United States, at one time (subsequently completely abandoned) gave some hopes that if Costa Rica did repudiate her obligations, she might make a gain by doing so.

We doubt if any country has ever set forth such grounds for breach of its obligations. Is it to be asserted that a Convention of Arbitration is not binding upon a country unless the Award be satisfactory to her; that if the other party will not consent to a change in the Award, the award becomes without force; that a government is justified in repudiating (nay, is " forced " to repudiate) an award which its people do not like ; or that the prospect that a stronger, mediating power will support her efforts to escape from an unsatisfactory award, releases her from her obligation to accept it, solemnly assumed ?

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[1] Argument for Costa Rica, p. 339.
[2] *Ibid.*, p. 339.

The mere statement of these questions is enough to give their answer. Such contentions are the negation of all international law, of all international honor. They make an international arbitration a farce and conventions of arbitration waste paper. We confess that it is incomprehensible to us that such an attitude as that of Costa Rica should be openly avowed and still more so that it should be presented to an Arbitrator to support her new demands.

Yet these things constitute the whole foundation of the Argument for Costa Rica. As we have already pointed out, *ultra petita* is a mere pretense which a simple inspection of the Convention of 1886 sweeps away. It is only a device for making a legal point on which to hang a repudiation or modification of the Loubet Award. The pretended doubts or difficulties in the interpretation of the Award are equally without substance. Indeed the greater part of Costa Rica's complaints are based upon the view that there is no doubt and no difficulty, for they are based upon the acceptance of Panama's contention as to its meaning and would be wholly unfounded if that were not accepted.

Thinly disguised, sometimes, under a cloud of words, sometimes (as in the passages which we have been considering) avowed with cynical frankness, *Costa Rica's purpose is, not the interpretation, not the application, but the repudiation of the Loubet Award.* Therefore, as we have several times noted, she does not attempt to give a meaning to the Award nor express a theory as to how it should be practically applied upon the ground. There is nothing to discuss upon these points. The meaning of the Award was always clear, and if there ever was any doubt as to its practical application, there can be none left since the report of the Commission of Engineers. Costa Rica has no doubt upon either point. She does not desire to maintain the Award but to overthrow it, and all her prayers to the Arbitrator are to disregard it, not to conform to it.

This is made especially apparent in the two alternative lines suggested. Neither of them in the least accords with the Loubet Award, between the Atlantic and Cerro Pando. While called "interpretations," this is because the Argument for Costa Rica undertakes to give that word a meaning which it will not bear.

Starting from the unfounded assumptions, *first* that the broad question of the proper boundary is before the present Arbitrator and, *second*, that the intent of President Loubet is to be divined by the present Arbitrator, it goes on to a *third* assumption, equally unfounded, that the Award does not express the real intent of President

Loubet, because it is not what Costa Rica contends that it ought to be[1]. On this unsubstantial foundation the Argument proceeds to imagine two lines, either of which Costa Rica would accept, and calls them "interpretations" of the intent of President Loubet.

We shall not go again at length into the demonstration of the facts that the question of the abstract proper boundary is not involved upon this Arbitration at all, that the intent of President Loubet, except as expressed in his Award, is equally foreign to it and that it is utterly futile to attempt to attribute to him intentions contrary to or not expressed in the Award itself. We have already shown (if showing were needed) that Panama has never consented and will never consent to submit to arbitration the correctness or absolute validity of the Loubet Award; that the present Convention was drawn carefully to restrict, and does restrict, the question submitted, to the mere interpretation and application of the Loubet Award; that the "true intention" of the *Award* and not of President Loubet (if the latter could be supposed to differ from what the Award expresses and could be ascertained) is the only subject of this Arbitration; and that the Award is the only proof of what was intended by it.

But, in reality, even so much is superfluous and we do injustice to the learned representatives for Costa Rica in supposing that they do not recognize these things. No one who has even read the documents in the case can need to have them pointed out, far less those who have made a study of the subject.

When, therefore, Costa Rica proposes lines which begin at the mouth of the Changuinola or of the Sixaola and follow the beds of these rivers, we cannot doubt, even if she did not avow it, that she does not intend to be guided by the Loubet Award at all and proceeds upon the deliberate proposition of discarding it altogether.

Of course all this is wholly outside the scope of this Arbitration, and cannot be considered. We must again decline to discuss the long argument by which Costa Rica undertakes to show that such boundaries as she now proposes would have been proper. They are based upon statements of historical matter and documents anterior to the Loubet Award, and have no relevancy here.

Even if the present Arbitrator could be convinced that President Loubet should have awarded a different boundary from that of the Award, that is not a question

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[1] Argument for Costa Rica, p. 339.

here to be considered, nor which can affect his decision. As we have many times had occasion to point out, the question here is, not what boundary *should* President Loubet have awarded, but what boundary *did* he award. The whole Argument of Costa Rica is occupied solely with the former question and that is the reason for its irrelevancy. The second question, what boundary President Loubet did award, the only one here to be determined, the Argument for Costa Rica considers only in repeated attempts to show that President Loubet awarded *no* boundary or none that can be determined. Of course, as we have already noted, if that were so, the situation would be precisely that which arose under the arbitration of the Northeastern boundary of the United States with Great Britain, in which the arbitrator declared himself unable to decide the boundary under the treaty of 1782–83, and so traced a boundary himself. The award was *ultra petita*, since the arbitrator was asked, not to determine the absolutely proper boundary, but only to define the boundary as fixed by the treaty; and the arbitration ended in nothing. Such would be the case here if the Loubet Award were to be disregarded or modified as Costa Rica urges.

For the reasons stated, therefore, we cannot enter into the considerations by which Costa Rica attempts to show the abstract justice of the alternative boundaries which she suggests. Neither of them can be awarded upon this Arbitration, neither of them professes, even, to be within the Loubet Award, and therefore no discussion of either of them is authorized here.

We shall, however, as with regard to other parts of the Argument for Costa Rica which we have considered ourselves not authorized to discuss, as to their substance, note certain errors in that Argument which we think should be corrected. In doing this we shall not again refer to any repetitions of three leading errors which we have already considered so much at length that we believe that any further correction is unnecessary. These are: *first*, the statement that the Loubet Award is in any respect, *ultra petita; second*, that the Award does not fix any boundary or is defective in any way or that M. Delcassé's note admits any such thing; *third*, that it is within the scope of the present Arbitration to fix a boundary apart from that awarded by President Loubet or to modify his award. Any further discussion of these errors on the part of Costa Rica would be superfluous. We shall confine ourselves, accordingly, to one mis-statement.

It is said, in the Argument for Costa Rica, that the line described by Señor de Peralta was "accepted by Panama," because a part of the line fixed by the Guardia-Pacheco treaty (which never became effective because Costa Rica refused to ratify it) coincides with a part of the Peralta line.[1]

How this fact shows acquiescence in the Peralta line as a correct rendering of the Loubet Award we are at a loss to conceive. That such a supposition would be totally erroneous is to be seen from the preamble to the Guardia-Pacheco treaty, which is quoted in the Argument for Costa Rica, which recites that

> "*circumstances have profoundly changed, since the period when the arbitral judgment was delivered,* hereinbefore mentioned, to those of to-day; that these circumstances constrain the two Republics to *establish a frontier line that shall better accord with their present and future interests.*"[2]

Thus it appears that by the Guardia-Pacheco treaty it was intended to establish a *different* line from that of the Award, and it was this new line and not the line of the Loubet Award which was, in part, the same as the Peralta line.

The "Final Considerations" of the Argument for Costa Rica.

In Chapter X of the Argument for Costa Rica, entitled "Final Considerations", there are tabulated a series of conditions to which the Loubet Award must conform.[3] Except the first (that the boundary must not go outside the disputed territory) these are all purely fanciful. Some, no doubt, President Loubet did take into account, and some he may not have considered. But however this may be, as tests by which to try his award, they are worse than worthless.

It is true that we are not here to test his Award at all. Both Panama and Costa Rica have, by the convention of 1910, under which this Arbitration is held, affirmed anew its validity and correctness and removed those questions from the field of discussion. But if any test of the Award were to be made, no such conditions as those stated by Costa Rica could be of any use. On the contrary their adoption would amount to an annulment of the Award. They could never be applied without a com-

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[1] Argument for Costa Rica, p. 382.
[2] *Ibid.*, p. 427.
[3] *Ibid.* p. 424.

plete review of the whole subject which President Loubet considered and a determination, *de novo*, of what he determined. His Award would be discarded where it did not agree with the new conclusions reached and useless where it did, for the whole decision would be based upon the new conclusions.

We note this passage in the Argument for Costa Rica only because it serves to bring out in a more glaring light what is the true purpose of that Argument. The question submitted by the Convention is the " correct interpretation and true intention " of the Loubet Award, but Costa Rica proposes the abandonment of the award altogether.

The boundary is not the subject of this Arbitration. With the boundary, as such, we have nothing to do. The Award alone concerns us and the boundary is involved only because that is what the Award describes. What is to be considered here is only one simple question—what boundary does the Award describe? That and that only is the sole and exclusive subject for consideration. The manner in which Costa Rica proposes to deal with it is to discard the Award altogether and the answer which she proposes to the question is to describe a line which it is not even pretended is that of the Award. It is no wonder that the arguments in support of such a proposition are irrelevant to the true purpose of this Arbitration.

Conclusion.

We have thus reached the end of our examination of the Argument for Costa Rica, and while it is elaborate, learned and acute, we fail to find in it anything to invalidate the conclusions expressed in our original Statement.

In fact, that Statement and the Costa Rican Argument differ wholly in their purpose and as completely in their substance.

We applied ourselves to elucidate the meaning and purpose of the Award and the method of applying it to the actual geographical situation so as best to effectuate it. This, we conceive, is the sole object of this Arbitration.

The Costa Rican Argument does not consider this question, but devotes itself to showing *first* that the Loubet Award is erroneous and unjust; *second*, that it is void as *ultra petita; third*, that its language has no intelligible meaning; *fourth*, that it constitutes no award but leaves the boundary as unsettled as President Loubet

found it; and that the present Arbitration involves the fixing, not of the line of the Loubet Award, but of the line which that Award ought to have fixed, and an inquiry, not as to the meaning of the Award, but its correctness. The Arbitrator is therefore asked to award a boundary almost wholly differing from any possible construction of that fixed by President Loubet.

The fundamental question here is as to the scope of the present Arbitration and we believe that it has been conclusively demonstrated that the contention of Costa Rica is not only in direct conflict with the language of the Convention, but that the Convention was expressly and carefully worded so as to confine this Arbitration to the sole purpose of the construction and application of the Loubet Award. It has been shown that Costa Rica constantly struggled to bring within its scope precisely the questions which she is now trying to raise, that Panama as constantly and firmly refused to consent to such an Arbitration and that Costa Rica yielded and accepted the present Convention, knowing that by it these questions were excluded.

By that demonstration the whole argument for Costa Rica became, as we have frequently had occasion to say, irrelevant.

For nowhere in that Argument is there any pretence, even, of a rational interpretation of the Loubet Award, nor any attempt to describe any boundary different from that described by Panama which should accord with the Award.

The question being simply what is the boundary according to "the correct interpretation and true intention" of the Loubet Award, it is plain that the only relevant argument must be one which tends to show what is (and not what ought to be) the boundary fixed by the Award. Costa Rica declines to discuss this matter. Her nearest approach to it is to argue that no boundary is fixed by the Award. This does not aid in solving the question. The argument for the boundaries suggested in her argument is of no avail, for it is admitted, and, if it were not, is evident, that neither of these in the least agrees with the terms of the Award.

The Argument for Costa Rica amounts, therefore, to an admission that the line which Panama claims is the line of the Loubet Award.

But we are not left to this tacit admission alone. The Costa Rican Argument is one long complaint of the injustice of the Award, interspersed with contentions that it is *ultra petita*. Both are based upon the same ground and that is that the Award gives Panama precisely what she claims under it. Whatever complaints,

otherwise, Costa Rica might have devised, the fact is that her actual contentions are based solely on the assumption that the line claimed by Panama is the line of the Award. If that were not so the very facts upon which her arguments rest would be lacking and if the principles for which she contends were admitted, she would fail to show that they were violated. Thus Costa Rica substantially not only admits but asserts that the view of Panama, as to the "correct interpretation and true intention" of the Loubet Award, is correct.

Costa Rica is arguing two questions not before the Arbitrator; *first*, is the Loubet Award right; *second*, what, leaving the Loubet Award aside, ought to be the boundary. Neither of these questions has she the right to raise, and neither of them will Panama discuss. Costa Rica does not discuss the only question which is involved here, viz.: what is the boundary fixed by the Loubet Award. This is the only question argued by Panama. Therefore the two arguments are wholly divergent, based upon different premises and tending to different ends.

But while Panama admits nothing alleged by Costa Rica on the subjects which the latter argues, and simply declines to consider them, as irrelevant to the matter in hand, Costa Rica does not contest the arguments of Panama upon the real question for Arbitration, but accepts the correctness of her interpretation of the Award, and bases all her arguments upon it.

There is, therefore, nothing in the Argument for Costa Rica (excepting the inadmissible contentions, not to be taken seriously, that the Award has no meaning, fixes no line and cannot be applied) to countervail the arguments advanced for Panama and we respectfully submit to the Arbitrator that the Award requested for Panama in our original statement is proper and should be made.

EUSEBIO A. MORALES,
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