

SEPARATE OPINION OF SIR PERCY SPENDER

I agree that the Award is valid and that Nicaragua is under an obligation to give effect to it. Since however my approach to certain of the issues involved in these proceedings varies in some respects from that which the Court has adopted, I desire to state in summary form my views on the main issues.

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The validity of the Award depends initially upon the sovereign consent of the two States that an award may be made. The nature and the conditions of such consent are contained in the Gámez-Bonilla Treaty which was to be in force for a period of ten years.

Nicaragua has contended that this period of time began to run as from the date of signature of the Treaty and that accordingly the Treaty had expired at the time the King of Spain accepted the office of sole arbitrator and *a fortiori* when the Award was made.

I agree with the conclusion of the Court that the period of time that the Treaty was to be in force began to run as from the date of the exchange of ratifications made under Article VIII thereof.

This contention of Nicaragua is accordingly without substance.

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Nicaragua next contends that the King of Spain never possessed the capacity of a sole arbitrator; that what purported to be his appointment was in breach of the provisions of the Treaty and was totally devoid of all validity.

I do not find it necessary to determine whether the King's appointment involved any non-compliance with the provisions of the Treaty. Although I incline strongly to the view that the appointment was irregular, this contention of Nicaragua fails because that State is precluded by its conduct prior to and during the course of the arbitration from relying upon any irregularity in the appointment of the King as a ground to invalidate the Award.

Having failed to challenge the competency of the King as sole arbitrator before or during the course of the arbitration but, on the contrary, having invited him to make an award on the merits, Nicaragua was thereafter precluded from contesting the regularity of the appointment.

All the relevant facts relating to that appointment were known to it when it participated in the arbitration. Each State party to

the arbitration proceedings was entitled to place faith upon the deliberate conduct of the other State in the course of such proceedings. Nicaragua cannot be permitted to be placed in the position where, had the Award been satisfactory from its point of view, it could have accepted it, if not be free to disregard it as a nullity.

It would be contrary to the principle of good faith governing the relations between States were it permitted now to rely upon any irregularity in the appointment to invalidate the Award. Its conduct up to the moment the Award was made operated in my opinion so as to preclude it thereafter from doing so, irrespective of any subsequent conduct on its part.

I rest my opinion on this ground.

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As to the contentions of Nicaragua that the Award is null on the grounds of

- (a) Excess of jurisdiction
- (b) Essential error
- (c) Lack or inadequacy of reasons in support of the Award,

I agree that Nicaragua, by reason of its conduct subsequent to the Award being made, is precluded from relying upon any one of these contentions to invalidate the Award. I place particular importance upon the fact that Nicaragua, for many years after the terms of the Award became known to it, failed to raise any question whatever as to its validity.

I rest my opinion on this aspect of the case exclusively on the ground of preclusion. It is unnecessary to determine whether but for this preclusion any of these contentions of Nicaragua would have afforded a cause of nullity. To attempt to do so would be, in my view, an irrelevant excursion.

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Finally, I agree that the contention of Nicaragua that the Award, by reason of obscurities and contradictions alleged by it, is incapable of execution, is without substance. No reason appears which would prevent the Award being carried into effect.

(Signed) Percy SPENDER.