

**CASE CONCERNING THE ARBITRAL AWARD MADE BY
THE KING OF SPAIN ON 23 DECEMBER 1906**

Judgment of 18 November 1960

The proceedings in the case concerning the Arbitral Award made by the King of Spain on 23 December 1906, regarding the determination of the frontier between Honduras and Nicaragua, were instituted by Honduras against Nicaragua by an Application filed on 1 July 1958. Honduras asked the Court to adjudge and declare that Nicaragua was under an obligation to give effect to the Award; Nicaragua asked it to adjudge and declare that the decision given by the King of Spain did not possess the character of a binding arbitral award and that it was in any case incapable of execution. By fourteen votes to one, the Court held that the Award was valid and binding and that Nicaragua was under an obligation to give effect to it.

Judge Moreno Quintana appended to the judgment a declaration; Judge Sir Percy Spender appended a separate opinion and M. Urrutia Holguín, Judge *ad hoc*, a dissenting opinion.

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In its Judgment, the Court found that Honduras and Nicaragua had on 7 October 1894 concluded a treaty, referred to as the Gámez-Bonilla Treaty, under which a Mixed Boundary Commission was entrusted with the duty of demarcating the dividing line between the two countries (Article I), adhering, in so doing, to certain rules (Article II). The points not settled by the Commission were to be submitted to an arbitral tribunal composed of one representative of each of the two countries, and of one member of the Diplomatic Corps accredited to Guatemala to be elected by the first two (Article III). In case the diplomatic representative should decline the appointment, another election was to take place; when the membership of the Diplomatic Corps was exhausted, any foreign or Central American public figure might be elected, and, should that not be possible, the points in controversy were to be submitted to the Government of Spain or, failing that, to any South American government (Article V). The arbitral decision was to be held as a perfect, binding and perpetual treaty, not subject to appeal (Article VII). Finally, the Treaty was to be submitted to constitutional ratifications

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(Article VIII) and to remain in force for a period of ten years (Article XI).

The Mixed Commission succeeded in fixing the boundary from the Pacific Coast to the *Portillo de Teotecacinte* but, with regard to the frontier from that point to the Atlantic Coast, it could only record its disagreement (1900-1901). With regard to that latter section of the boundary, the King of Spain on 23 December 1906 handed down an arbitral award the operative clause of which fixed the common boundary point on the Atlantic Coast as the mouth of the principal arm of the River Segovia or Coco, between Hara and the island of San Pío where Cape Gracias a Dios is situated; from that point, the frontier was to follow the thalweg of the Segovia or Coco upstream until it reached the place of its confluence with the Poteca or Bodega continuing along the thalweg of the Poteca or Bodega until the latter joined the Guineo or Namasli to terminate at the *Portillo de Teotecacinte*, the *sitio* of the same name remaining within the jurisdiction of Nicaragua.

The Foreign Minister of Nicaragua, in a Note dated 19 March 1912, had challenged the validity and binding character of the Award. This had given rise to a dispute between the parties. After unsuccessful attempts at settlement by direct negotiation or mediation, the Organization of American States had been led to deal with the dispute which Honduras and Nicaragua had undertaken to submit to the Court under an agreement reached at Washington on 21 July 1957.

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Honduras alleged that there was a presumption in favour of the binding character of the Award as it presented all the outward appearances of regularity and had been made after the parties had had every opportunity to put their respective cases before the arbitrator; it contended that the burden lay upon Nicaragua to rebut that presumption by furnishing proof that the Award was invalid. Nicaragua contended that, as Honduras relied upon the Award, it was under an obligation to prove that the person giving the decision had been invested with the powers of an arbitrator, and it argued that the King of Spain had not been so invested.

In the first place, Nicaragua had argued that the requirements of Articles III and V of the Gámez-Bonilla Treaty had not been complied with in the designation of the King of Spain as arbitrator. The record showed that the two national arbitrators had designated the Mexican *Chargé d'affaires* in Central America (1899), and later the Mexican Minister to Central America (1902), as the third member of the arbitral tribunal but that these two had in turn left Guatemala. Thereafter, on 2 October 1904, the two national arbitrators had met with the Spanish Minister to Central America whom they appointed "to be the chairman of a meeting preliminary to the arbitration", and, "by common consent and the requirements of Articles III and IV of the Gámez-Bonilla Treaty having previously been complied with", the King of Spain had been designated as arbitrator. The Court concluded that the requirements of the Gámez-Bonilla Treaty as interpreted by the two national arbitrators had been complied with. Subsequently the Presidents of Honduras and of Nicaragua expressed their satisfaction at the designation of the King of Spain (6 and 7 October 1904), the acceptance of the latter was communicated to the two countries on 17 October 1904 and the Foreign Minister of Nicaragua expressed his gratitude to the Spanish Minister of State in a Note of 21 December 1904. In these circumstances the Court was unable to

hold that the designation of the King of Spain as arbitrator was invalid.

In the second place, Nicaragua had contended that the Gámez-Bonilla Treaty had lapsed before the King of Spain agreed to act as arbitrator (17 October 1904); it argued that the Treaty had come into effect on the date on which it was signed (7 October 1894) and that by virtue of Article XI it had lapsed on 7 October 1904. The reply of Honduras was that the Treaty had not come into effect until the exchange of ratifications (24 December 1896) and that it had consequently expired on 24 December 1906. There was no express provision in the Treaty with regard to the date of its entry into force but, taking into consideration its provisions with regard to the exchange of ratifications, the Court was of the view that the intention of the parties had been that it should come into force on the date of exchange of ratifications. It found it difficult to believe that the parties had had in mind an interpretation of the Treaty according to which it was due to expire five days after agreement was reached on the designation of the King of Spain as arbitrator (2 October 1904). If this were not the case, when confronted with the suggestion of the Spanish Minister to Central America on 21 and 24 October 1904 that the period of the Treaty might be extended, the two Governments would either have taken immediate appropriate measures for its renewal or extension, or they would have terminated all further proceedings in respect of the arbitration. The Court therefore concluded that the King's acceptance of his designation as arbitrator had been well within the currency of the Treaty.

Finally, the Court considered that, having regard to the fact that the designation of the King of Spain was freely agreed to by Nicaragua, that no objection was taken by Nicaragua to his jurisdiction, either on the ground of irregularity in his designation or on the ground that the Treaty had lapsed, and that Nicaragua had fully participated in the arbitral proceedings, it was no longer open to Nicaragua to rely on either of those contentions as furnishing a ground for the nullity of the Award.

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Nicaragua had urged that even under those conditions the Award was a nullity and Honduras had answered that the conduct and attitude of Nicaragua showed that it accepted the Award as binding and that in consequence of that acceptance and of its failure to raise any objection for a number of years, it was no longer open to Nicaragua to question the validity of the Award.

The Court recalled in the first place that, on 25 December 1906, the President of Nicaragua had sent a telegram to the President of Honduras in which he congratulated him on having won the day and observed that the irksome question of the delimitation of the frontier had been resolved in a satisfactory manner. Nicaragua had urged that the President was not then aware of the actual terms of the Award, but the Court pointed out that, from a telegram of the Minister of Nicaragua in Madrid of 24 December 1906, he had learned the course which the boundary line was to follow. In any event, the full terms of the Award must have become available to the Nicaraguan Government fairly soon since the Award was published in its Official Gazette on 28 January 1907. Even thereafter, the attitude of Nicaragua towards the Award had continued to be one of acceptance, subject to a desire to seek clarification of certain points which would facilitate the carrying into effect of the Award (the message of the President

of Nicaragua to the National Legislative Assembly of 1 December 1907, the Foreign Minister's report to the National Legislative Assembly of 26 December 1907, the decree of the National Legislative Assembly of 14 January 1908, etc.). No request for clarification had in fact been submitted to the King of Spain, and it was not until 19 March 1912 that the Foreign Minister of Nicaragua for the first time stated that the Arbitral Award was not "a clear, really valid, effective and compulsory Award".

In the judgment of the Court, Nicaragua, by express declaration and by conduct in conformity with Article VII of the Gámez-Bonilla Treaty, had recognized the Award as binding and it was no longer open to Nicaragua to go back upon that recognition. Nicaragua's failure to raise any question with regard to the validity of the Award for several years after it had become known to it confirmed that conclusion. However, even if there had not been repeated acts of recognition and even if its complaints had been put forward in proper time, the Award would still have to be recognized as valid. Nicaragua's first complaint was that the King of Spain had exceeded his jurisdiction by reason of non-observance of the rules laid down in Article II of the Gámez-Bonilla Treaty but the Court, having carefully considered the allegations of Nicaragua, was unable to arrive at the conclusion that the

arbitrator had gone beyond the authority conferred upon him. Nicaragua had also contended that the Award was a nullity by reason of essential error, but the Court held that the evaluation of documents and of other evidence appertained to the discretionary power of the arbitrator and was not open to question. The last ground of nullity relied upon had been the alleged lack or inadequacy of reasons in support of the conclusions arrived at by the arbitrator but, in the opinion of the Court, that ground was without foundation.

It had further been argued by Nicaragua that the Award was not in any case capable of execution by reason of its omissions, contradictions, and obscurities: Nicaragua had contended that the mouth of a river was not a fixed point and could not serve as a common boundary between two States and that vital questions of navigation rights would be involved; it had further argued that the delimitation in the operative clause left a gap of a few kilometres from the junction of the Poteca or Bodega with the Guineo or Namaslí up to the *Portillo de Teotecacinte*. In view of the clear directive in the operative clause and the explanation in support of it, the Court did not consider that the Award was incapable of execution.

For these reasons the Court arrived at the conclusion stated above.