

# A. R E C H T S P R E C H U N G

## I. Entscheidungen internationaler Gerichte

### 1. Ständige Schiedsgerichte

#### Entscheidung des Ständigen Schiedshofs

Arbitral award rendered in conformity with the special agreement concluded on January 23<sup>rd</sup>, 1925 between the United States of America and the Netherlands, relating to the arbitration of differences respecting sovereignty over the Island of Palmas (or Miangas). April 4<sup>th</sup>, 1928 <sup>1)</sup>

Gebietshoheit — Erwerbstitel — Erwerb durch Zeitablauf Vertragsauslegung — Rechte dritter Staaten — Befugnisse des Schiedsrichters.

1. *Gebietshoheit ist das Recht, auf einem Territorium unter Ausschluß jeden anderen Staates staatliche Funktionen auszuüben.*

2. *Bei Streit über die Gebietshoheit ist der Nachweis eines Erwerbstitels erforderlich.*

3. *Übt auf dem streitigen Gebiet der eine Staat tatsächlich staatliche Funktionen aus, so genügt dem gegenüber nicht der Nachweis eines Erwerbstitels, vielmehr muß das Fortbestehen der Gebietshoheit bewiesen werden durch den Nachweis, daß Staatsakte von dem Erwerber fortlaufend vorgenommen wurden. Ausschluß Dritter von der Vornahme von Staatshandlungen allein genügt zur Erhaltung der Gebietshoheit nicht.*

4. *Ständige, friedliche, d. h. nicht durch andere Staaten gestörte Ausübung der Gebietshoheit, steht einem Erwerbstitel, der erga omnes wirkt, gleich.*

5. *Kein Staat kann mehr Recht durch einen Vertrag übertragen, als er selbst hat.*

<sup>1)</sup> Nach der amtlichen Veröffentlichung des Bureau International de la Cour Permanente d'Arbitrage.

6. Kein völkerrechtlicher Vertrag darf so ausgelegt werden, daß dadurch über Rechte dritter Staaten verfügt wird.

7. Durch einen Vertrag zwischen zwei Staaten über ein bestimmtes Gebiet werden die aus Ausübung der Gebietshoheit durch einen dritten Staat diesem zustehenden Rechte, selbst wenn dieser auf Notifikation schweigt, nicht berührt.

8. Entdeckung allein, ohne spätere Vornahme von Staatshandlungen stellt nach heutigem Völkerrecht keinen endgültigen Rechtstitel auf Gebietshoheit dar.

9. Das Völkerrecht erkennt einen auf die Zusammengehörigkeit mit einem Staatsgebiet gegründeten Titel für die Gebietshoheit (*title of contiguity*) nicht an.

10. Der auf ständiger, friedlicher, nicht heimlicher und nicht für einen anderen Staat erfolgender Ausübung der Gebietshoheit beruhende Rechtstitel (*prescription*) geht dem Erwerbstitel vor.

II. Wird ein Schiedsrichter eingesetzt, um einen bestimmten Streitfall aus der Welt zu schaffen, so darf der Schiedsrichter kein *«non liquet»* aussprechen, sondern muß eine Sachentscheidung fällen, auch wenn keinem der beiden Streitteile der Nachweis seines Rechtstitels geglückt ist. Er hat dann zugunsten dessen zu entscheiden, für dessen Recht nach den nachgewiesenen Tatsachen die stärkere Vermutung spricht.

“An agreement relating to the arbitration of differences respecting sovereignty over the Island of Palmas (or Miangas) was signed by the United States of America and the Netherlands on January 23<sup>rd</sup>, 1925. The text of the agreement runs as follows:

Hare Majesteit de Koningin der Nederlanden en De Vereenigde Staten van Amerika;

Verlangend om in overeenstemming met de beginselen van het volkenrecht en toepasselijke verdragsbepalingen het geschil te beëindigen, dat de Hooge Contracteerende Partijen verdeeld houdt ten aanzien van de soevereiniteit over het eiland Palmas (of Miangas) gelegen ongeveer 50 mijlen ten Zuidoosten van Kaap San Augustin op het eiland Mindanao en ongeveer op 5° 35' Noorderbreedte en 126° 36' Oosterlengte van Greenwich;

Overwegende, dat dit geschil behoort tot de zoodanige, welke in de termen vallen om aan arbitrage

The United States of America and Her Majesty the Queen of the Netherlands;

Desiring to terminate in accordance with the principles of International Law and any applicable treaty provisions the differences which have arisen and now subsist between them with respect to the sovereignty over the Island of Palmas (or Miangas) situated approximately fifty miles south-east from Cape San Augustin, Island of Mindanao, at about five degrees and thirty-five minutes (5° 35') north latitude, one hundred and twenty-six degrees and thirty-six minutes (126° 36') longitude east from Greenwich;

Considering that these differences belong to those which, pursuant to Article I of the Arbitration Con-

te worden onderworpen ingevolge artikel 1 van het op 2 Mei 1908 tusschen de beide Hooge Contracteerende Partijen gesloten arbitrage-verdrag, dat verlengd werd bij de verdragen onderscheidenlijk van 9 Mei 1914, 8 Maart 1919 en 13 Februari 1924;

Hebben benoemd tot Hunne Gevolmachtigden teneinde het hiernavolgend compromis te sluiten;

Hare Majesteit de Koningin der Nederlanden: Jonkheer Dr. A. C. D. de Graeff, Harer Majesteits Buitengewoon Gezant en Gevolmachtigd Minister te Washington, en

De President van de Vereenigde Staten van Amerika: Charles Evans Hughes, Secretaris van Staat der Vereenigde Staten van Amerika;

Die na elkander hunne wederzijdsche volmachten vertoond te hebben, welke in goeden en behoorlijken vorm bevonden zijn, omtrent de navolgende artikelen overeengekomen zijn:

#### Artikel I.

Hare Majesteit de Koningin der Nederlanden en de Vereenigde Staten van Amerika komen hierbij overeen de beslissing van het hierboven genoemde geschil op te dragen aan het Permanente Hof van Arbitrage te 's Gravenhage. De arbitrale Rechtbank zal bestaan uit één scheidsrechter.

De scheidsrechter zal uitsluitend tot taak hebben uit te maken of het eiland Palmas (of Miangas) in zijn geheel behoort tot het grondgebied van den Staat der

vention concluded by the two high contracting parties on May 2, 1908, and renewed by agreements, dated May 9, 1914, March 8, 1919, and February 13, 1924, respectively, might well be submitted to arbitration;

Have appointed as their respective plenipotentiaries for the purpose of concluding the following special agreement;

The President of the United States of America: Charles Evans Hughes, Secretary of State of the United States of America, and

Her Majesty the Queen of the Netherlands: Jonkheer Dr. A. C. D. de Graeff, Her Majesty's Envoy Extraordinary and Minister Plenipotentiary at Washington;

Who, after exhibiting to each other their respective full powers, which were found to be in due and proper form, have agreed upon the following articles:

#### Article I.

The United States of America and Her Majesty the Queen of the Netherlands hereby agree to refer the decision of the above mentioned differences to the Permanent Court of Arbitration at The Hague. The arbitral tribunal shall consist of one arbitrator.

The sole duty of the Arbitrator shall be to determine whether the Island of Palmas (or Miangas) in its entirety forms a part of territory belonging to the United States

Nederlanden of tot dat van de Vereenigde Staten van Amerika.

De beide Regeeringen zullen den scheidsrechter aanwijzen uit de leden van het Permanente Hof van Arbitrage. Indien zij ten aanzien van die keuze niet tot overeenstemming mochten kunnen komen, zullen zij gezamenlijk tot den President van den Zwitserschen Bond het verzoek richten den scheidsrechter aan te wijzen.

#### Artikel II.

Binnen zes maanden na de uitwisseling van de bekrachtigingsoorkonden van dit compromis zal elk der beide Regeeringen aan de andere twee gedrukte exemplaren van eene memorie overleggen, waarin vervat zijn eene uiteenzetting van hare aanspraken en de bescheiden, die tot ondersteuning daarvan moeten dienen. Voor dit doel zal het voldoende zijn, dat de exemplaren ter doorzending afgegeven worden door de Nederlandsche Regeering aan de Amerikaansche Legatie te 's Gravenhage en door de Regeering der Vereenigde Staten aan de Nederlandsche Legatie te Washington. Zoo spoedig mogelijk daarna en uiterlijk binnen dertig dagen zal iedere partij twee gedrukte exemplaren van hare memorie aan het Internationaal Bureau van het Permanente Hof van Arbitrage doen toekomen, ter uitreiking aan den scheidsrechter.

Binnen zes maanden na afloop van den hierboven voor de overlegging van de memories aan partijen vastgestelden termijn zal het aan iedere partij vrijstaan om, desgewenscht aan de andere ter beant-

of America or of Netherlands territory.

The two Governments shall designate the Arbitrator from the members of the Permanent Court of Arbitration. If they shall be unable to agree on such designation, they shall unite in requesting the President of the Swiss Confederation to designate the Arbitrator.

#### Article II.

Within six months after the exchange of ratifications of this special agreement, each Government shall present to the other party two printed copies of a memorandum containing a statement of its contentions and the documents in support thereof. It shall be sufficient for this purpose if the copies aforesaid are delivered by the Government of the United States at the Netherlands Legation at Washington and by the Netherlands Government at the American Legation at The Hague, for transmission. As soon thereafter as possible and within thirty days, each party shall transmit two printed copies of its memorandum to the International Bureau of the Permanent Court of Arbitration for delivery to the Arbitrator.

Within six months after the expiration of the period above fixed for the delivery of the memoranda to the parties, each party may, if it is deemed advisable, transmit to the other two printed

woording van hare memorie twee gedrukte exemplaren van eene contra-memorie te doen toekomen en mogelijke bescheiden ter ondersteuning daarvan. De exemplaren van de contra-memorie zullen aan partijen en dertig dagen daarna aan den scheidsrechter uitgereikt worden op de wijze in de vorige zinsnede voor de overlegging van de memorie vastgesteld.

Op verzoek van eene of van beide partijen zal het aan den scheidsrechter vrijstaan om, na beide partijen gehoord te hebben en zich er van overtuigd te hebben dat er een gegronde reden voor dat verzoek bestaat, de bovengenoemde termijnen te verlengen.

### Artikel III.

Na de uitwisseling der contra-memories zal de zaak geacht worden gesloten te zijn, tenzij de scheidsrechter zich tot eene of beide partijen om verdere schriftelijke toelichtingen mocht wenden.

Voor het geval, dat de scheidsrechter zulk een verzoek tot eene partij mocht richten, zal hij dit doen door tusschenkomst van het Internationaal Bureau van het Permanente Hof van Arbitrage, dat een afschrift van zijn verzoek aan de andere partij zal doen toekomen. Aan de partij, tot welke het verzoek gericht is, zal een termijn van drie maanden voor haar antwoord toekomen, te rekenen van den datum van ontvangst van het verzoek van den scheidsrechter, welke datum door haar onmiddellijk aan de andere partij en aan het Internationaal Bureau medegedeeld zal worden. Dit antwoord zal aan de andere partij en

copies of a counter-memorandum and any documents in support thereof in answer to the memorandum of the other party. The copies of the counter-memorandum shall be delivered to the parties, and within thirty days thereafter to the Arbitrator, in the manner provided for in the foregoing paragraph respecting the delivery of memoranda.

At the instance of one or both of the parties, the Arbitrator shall have authority, after hearing both parties and for good cause shown, to extend the above mentioned periods.

### Article III.

After the exchange of the counter memoranda, the case shall be deemed closed unless the Arbitrator applies to either or both of the parties for further written explanations.

In case the Arbitrator makes such a request on either party, he shall do so through the International Bureau of the Permanent Court of Arbitration which shall communicate a copy of his request to the other party. The party addressed shall be allowed for reply three months from the date of the receipt of the Arbitrator's request, which date shall be at once communicated to the other party and to the International Bureau. Such reply shall be communicated to the other party and within thirty days thereafter to the Arbitrator in the manner provided for above for the delivery of memoranda, and the opposite party may if it

binnen dertig dagen daarna aan den scheidsrechter medegedeeld worden op de wijze hierboven voor de overlegging van de memories vastgesteld en de tegenpartij zal desgewenscht een verderen termijn van drie maanden hebben om daarop te antwoorden, welk antwoord op dezelfde wijze medegedeeld zal worden.

De scheidsrechter zal door tusschenkomst van het Internationaal Bureau aan beide partijen den datum aanzeggen, waarop de zaak in overeenstemming met het hierboven bepaalde gesloten is, voor zooverre de aanbieding van memories en bewijsstukken door iedere partij betreft.

#### Artikel IV.

Het zal aan partijen vrijstaan om in den loop van de arbitrage de Nederlandsche of Engelsche taal dan wel de landstaal van den scheidsrechter te gebruiken. Indien door een der partijen de Nederlandsche of Engelsche taal gebezigd wordt zal eene vertaling in de landstaal van den scheidsrechter worden overgelegd indien deze dit wenscht.

Het zal aan den scheidsrechter in den loop van de arbitrage vrijstaan zijn landstaal of de Nederlandsche of Engelsche taal te gebruiken en de uitspraak en de haar vergezellende motiveering mag in een dier talen worden gesteld.

#### Artikel V.

De scheidsrechter zal alle geschillen beslissen, welke in den loop van de arbitrage met betrekking tot de procedure mochten rijzen.

is deemed advisable, have a further period of three months to make rejoinder thereto, which shall be communicated in like manner.

The Arbitrator shall notify both parties through the International Bureau of the date upon which, in accordance with the foregoing provisions, the case is closed, so far as the presentation of memoranda and evidence by either party is concerned.

#### Article IV.

The parties shall be at liberty to use, in the course of arbitration, the English or Netherlands language or the native language of the Arbitrator. If either party uses the English or Netherlands language, a translation into the native language of the Arbitrator shall be furnished if desired by him.

The Arbitrator shall be at liberty to use his native language or the English or Netherlands language in the course of the arbitration and the award and opinion accompanying it may be in any one of those languages.

#### Article V.

The Arbitrator shall decide any questions of procedure which may arise during the course of the arbitration.

## Artikel VI.

Onmiddellijk na de uitwisseling van de bekrachtigingsoorkonden van het onderwerpelijk verdrag zal iedere partij aan den scheidsrechter eene som van een honderd pond sterling als kostenvoorschot ter hand stellen.

## Artikel VII.

De scheidsrechter zal binnen drie maanden na den dag, waarop hij de zaak voorzoover de aanbieding van memories en bewijsstukken betreft, gesloten heeft verklaard, schriftelijk uitspraak doen en drie geteekende exemplaren van die uitspraak bij het Internationaal Bureau te 's-Gravenhage nederleggen, waarvan één bestemd is voor het Bureau en één zoo spoedig mogelijk aan iedere partij overhandigd zal worden. De uitspraak zal vergezeld gaan van een uiteenzetting van de gronden, waarop zij berust.

De scheidsrechter zal in de uitspraak het bedrag van de kosten der procedure bepalen. Iedere partij zal haar eigen uitgaven en de helft van bedoelde kosten, benevens van het honorarium van den scheidsrechter betalen.

## Artikel VIII.

Partijen verbinden zich om de door den scheidsrechter binnen de grenzen van dit compromis gewezen uitspraak als finaal en beslissend te aanvaarden, waartegen geen hooger beroep openstaat.

Alle geschillen betreffende de uitlegging en de uitvoering van de uitspraak zullen aan de beslissing van den scheidsrechter onderworpen worden.

## Article VI.

Immediately after the exchange of ratifications of this special agreement each party shall place in the hands of the Arbitrator the sum of one hundred pounds sterling by way of advance of costs.

## Article VII.

The Arbitrator shall, within three months after the date upon which he declares the case closed for the presentation of memoranda and evidence, render his award in writing and deposit three signed copies thereof with the International Bureau at The Hague, one copy to be retained by the Bureau and one to be transmitted to each party, as soon as this may be done.

The award shall be accompanied by a statement of the grounds upon which it is based.

The Arbitrator shall fix the amount of the costs of procedure in his award. Each party shall defray its own expenses and half of said costs of procedure and of the honorarium of the Arbitrator.

## Article VIII.

The parties undertake to accept the award rendered by the Arbitrator within the limitations of this special agreement, as final and conclusive and without appeal.

All disputes connected with the interpretation and execution of the award shall be submitted to the decision of the Arbitrator.

## Artikel IX.

Dit compromis zal bekrachtigd worden met inachtneming van de door de Grondwetten van beide Contracteerende Partijen voorgeschreven vormen en van kracht worden onmiddellijk na de uitwisseling van de bekrachtigingsoorkonden, welke zoo spoedig mogelijk te Washington zal plaats vinden.

Ten blijke waarvan de wederzijdsche Gevolmachtigden dit compromis geteekend en van hunne zegels voorzien hebben.

Gedaan in dubbel in de stad Washington in de Nederlandsche en Engelsche talen, den 23 Januari 1925.

(L. S.) de Graeff.

(L. S.) Charles Evans Hughes.

## Article IX.

This special agreement shall be ratified in accordance with the constitutional forms of the contracting parties and shall take effect immediately upon the exchange of ratifications, which shall take place as soon as possible at Washington.

In witness whereof the respective plenipotentiaries have signed this special agreement and have hereunto affixed their seals.

Done in duplicate in the City of Washington in the English and Netherlands languages this 23<sup>rd</sup> day of January, 1925.

(L. S.) Charles Evans Hughes.

(L. S.) de Graeff.

## I.

The *ratifications of the above agreement* (hereafter called the Special Agreement) were exchanged at Washington on April 1<sup>st</sup>, 1925. By letters dated September 29<sup>th</sup>, 1925, the Ministry of Foreign Affairs of Her Majesty the Queen of the Netherlands and the Minister of the United States of America at The Hague asked the undersigned, Max Huber, of Zurich (Switzerland), member of the Permanent Court of Arbitration, whether he would be disposed to accept the mandate to act as sole arbitrator under the Special Agreement of January 23<sup>rd</sup>, 1925. The undersigned informed the Minister of Foreign Affairs of the Netherlands and the Minister of the United States of America at The Hague that he was willing to accept the task.

On October 16<sup>th</sup> and 23<sup>rd</sup>, 1925, the International Bureau of the Permanent Court of Arbitration transmitted to the Arbitrator the *Memoranda* of the United States of America<sup>2)</sup> and the Netherlands<sup>3)</sup> with the documents in support thereof. On April 23<sup>rd</sup> and

<sup>2)</sup> Memorandum of the United States, with appendix, 219 pages and 12 maps in folder.

<sup>3)</sup> Memorandum of the Netherlands with appendices, 83 pages, 4 maps and sketches and reproduction of photos in folder, British Admiralty Chart 2575, with inscriptions, six copies of diplomatic correspondence between the United States Department of State and the Netherlands Legation in Washington.



24<sup>th</sup>, 1926, the *Counter-memoranda* of the Netherlands<sup>4)</sup> and the United States of America<sup>5)</sup> with documents in support thereof were transmitted to the Arbitrator through the International Bureau.

Availing himself of the authority given him under Article III of the Special Agreement, the Arbitrator transmitted through the intermediary of the International Bureau of the Permanent Court of Arbitration to each party a list of points upon which he was desirous to obtain *further written Explanations*. This request was obtained by the Netherlands on December 24<sup>th</sup>, 1926 and by the United States of America on January 6<sup>th</sup>, 1927. The Arbitrator received through the intermediary of the International Bureau the Explanations of the Netherlands<sup>6)</sup>, with documents in support thereof on March 24<sup>th</sup>, 1927 and those of the United States of America<sup>7)</sup> on April 22<sup>nd</sup>, 1927.

On May 19<sup>th</sup>, 1927 the Arbitrator received through the International Bureau a memorandum of the American Government, dated May 2<sup>nd</sup>, 1927. The United States expressed the desire to make a *Rejoinder* as provided for in Article III of the Special Agreement "unless the Arbitrator prefers not to receive it, in which case none will be filed, unless one is filed by the Netherlands Government". At the same time the United States Government made an application for an extension of three months beyond the period mentioned in Article III for the filing of a *Rejoinder*, and invoked in support of this application the fact that the Explanations of the Netherlands were considerably more voluminous than the Memorandum, and contained a large mass of untranslated Dutch documents, and more than 25 maps.

The Netherlands Government had already on May 9<sup>th</sup>, 1927 declared that they renounced the right to submit a *Rejoinder*, making however the express reservation that they maintained the points of view which the American Explanations contested.

The Arbitrator, on the analogy of the rule laid down in the last paragraph of Article II, invited the Netherlands Government by a letter dated May 13<sup>th</sup>, 1927 and addressed to the International Bureau, to state their point of view in regard to the American application.

The Netherlands Government having declared that they had no objection to the extension of the time limit in conformity with the American application, the Arbitrator, in a letter to the International Bureau dated May 23<sup>rd</sup>, 1927, informed the Parties that the extension of three months beyond the period provided for in Article III for the filing of a *Rejoinder* was granted.

4) Counter-Memorandum of the Netherlands, with appendices, 95 pages and 1 map.

5) Counter-Memorandum of the United States with Appendix, 121 pages, 3 photos and 3 maps.

6) Explanations of the Netherlands, 146 pages and XX annexes (25 maps and sketches, reproduction of Dampiers' Journal, copies of entries of logbooks and biographical notice concerning the late Dr. Adriani).

7) Explanations of the United States, with appendix, 68 pages.

On October 21<sup>st</sup>, 1927 the Rejoinder of the United States<sup>8)</sup> was transmitted by the International Bureau to the Arbitrator.

No observation by either Party was made during the proceedings in regard to the fact that one of the documents provided for in the Agreement of January 23<sup>rd</sup>, 1925 was not filed within the time-limits fixed in the said Agreement.

On March 3<sup>rd</sup>, 1928 the Arbitrator informed the Parties through the International Bureau of the Permanent Court of Arbitration, that, in conformity with the last paragraph of Article III, *the case was closed*.

On this fourth day of April 1928, i. e. within the period fixed by Article VII, the three copies of the award are deposited with the International Bureau of the Permanent Court of Arbitration, at The Hague.

In conformity with the second paragraph of Article IV of the Special Agreement, the Arbitrator selected the *English language*. Having regard to the fact that geographical names are differently spelt in different documents and on different maps, the Arbitrator gives geographical names as shown on the British Admiralty Chart 2575, as being the most modern of the large scale maps laid before him. Other names and, if necessary, their variations, are given in bracket or parenthesis.

In accordance with Article VIII, paragraph 3, the costs of procedure are fixed at £ 140.

## II.

The *subject of the dispute* is the sovereignty over the Island of Palmas (or Miangas). The Island in question is indicated with precision in the preamble to the Special Agreement, its latitude and longitude being specified. The fact that in the diplomatic correspondence prior to the conclusion of the Special Agreement, and in the documents of the arbitration proceedings, the United States refer to the "Island of Palmas" and the Netherlands to the "Island of Miangas", does not therefore concern the identity of the subject of the dispute. Such difference concerns only the question whether certain assertions made by the Netherlands Government really relate to the island described in the Special Agreement or another island or group of islands which might be designated by the name of Miangas or a similar name.

It results from the evidence produced by either side that Palmas (or Miangas) is a single, isolated island, not one of several islands clustered together. It lies about half way between Cape San Augustin (Mindanao, Philippine Islands) and the most northerly island of the Nanusa (Nanoesa) group (Netherlands East Indies).

<sup>8)</sup> Rejoinder of the United States, with appendix, 126 pages, and 8 maps.

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*The origin of the dispute* is to be found in the visit paid to the Island of Palmas (or Miangas) on January 21<sup>st</sup>, 1906, by General Leonard Wood, who was then Governor of the Province of Moro. It is true that according to information contained in the Counter-Memorandum of the United States the same General Wood had already visited the island "about the year 1903", but as this previous visit appears to have had no results, and it seems even doubtful whether it took place, that of January 21<sup>st</sup>, 1906 is to be regarded as the first entry into contact by the American authorities with the island. The report of General Wood to the Military Secretary, United States Army, dated January 26<sup>th</sup>, 1906, and the certificate delivered on January 21<sup>st</sup> by First Lieutenant Gordon Johnston to the native interrogated by the controller of the Sangi (Sanghi) and Talauer (Talaut) Islands clearly show that the visit of January 21<sup>st</sup> relates to the island in dispute.

This visit led to the statement that the Island of Palmas (or Miangas), undoubtedly included in the "archipelago known as the Philippine Islands", as delimited by Article III of the Treaty of Peace between the United States and Spain, dated December 10<sup>th</sup>, 1898 (hereinafter also called "Treaty of Paris") and ceded in virtue of the said article to the United States, was considered by the Netherlands as forming part of the territory of their possessions in the East Indies. There followed a diplomatic correspondence, beginning on March 31<sup>st</sup>, 1906, and leading up to the conclusion of the Special Agreement of January 23<sup>rd</sup>, 1925.

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Before beginning to consider the arguments of the Parties, we may at the outset take as established certain *facts which, according to the pleadings, are not contested.*

1. The Treaty of Peace of December 10<sup>th</sup>, 1898 and the Special Agreement of January 23<sup>rd</sup>, 1925, are the only international instruments laid before the Arbitrator which refer precisely, that is, by mathematical location or by express and unequivocal mention, to the island in dispute, or include it in or exclude it from a zone delimited by a geographical frontier-line. The scope of the international treaties which relate to the "Philippines" and of conventions entered into with native Princes will be considered in connection with the arguments of the Party relying on a particular act.

2. Before 1906 no dispute had arisen between the United States or Spain, on the one hand, and the Netherlands, on the other, in regard specifically to the Island of Palmas (or Miangas), on the ground that these Powers put forward conflicting claims to sovereignty over the said island.

3. The two Parties claim the island in question as a territory attached for a very long period to territories relatively close at hand which are incontestably under the sovereignty of the one or the other of them.

4. It results from the terms of the Special Agreement (Article I) that the Parties adopt the view that for the purposes of the present arbitration the island in question can belong only to one or the other of them. Rights of third Powers only come into account in so far as the rights of the Parties to the dispute may be derived from them.

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The dispute having been submitted to arbitration by Special Agreement, each Party is called upon to establish the arguments on which it relies in support of its claim to sovereignty over the object in dispute. As regards the *order in which the Parties arguments should be considered*, it appears right to examine first the title put forward by the United States, arising out of a treaty and itself derived, according to the American arguments, from an original title which would date back to a period prior to the birth of the title put forward by the Netherlands; in the second place, the arguments invoked by the Netherlands in favour of their title to sovereignty will be considered; finally the result of the examination of the titles alleged by the two Parties must be judged in the light of the mandate conferred on the Arbitrator by Article I, paragraph 2, of the Special Agreement.

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In the absence of an international instrument recognized by both Parties and explicitly determining the legal position of the Island of Palmas (or Miangas), *the arguments of the Parties* may in a general way be summed up as follows:

The *United States*, as successor to the rights of Spain over the Philippines, bases its title in the first place on discovery. The existence of sovereignty thus acquired is, in the American view, confirmed not merely by the most reliable cartographers and authors, but also by treaty, in particular by the Treaty of Münster, of 1648, to which Spain and the Netherlands are themselves Contracting Parties. As, according to the same argument, nothing has occurred of a nature, in international law, to cause the acquired title to disappear, this latter title was intact at the moment when, by the Treaty of December 10<sup>th</sup>, 1898, Spain ceded the Philippines to the United States. In these circumstances, it is, in the American view, unnecessary to establish facts showing the actual display of sovereignty precisely over the Island of Palmas (or Miangas). The United States Government finally maintains that Palmas (or Miangas) forms a geographical part of the Philippine group and in virtue of the

principle of contiguity belongs to the Power having the sovereignty over the Philippines.

According to the Netherlands Government, on the other hand, the fact of discovery by Spain is not proved, nor yet any other form of acquisition, and even if Spain had at any moment had a title, such title had been lost. The principle of contiguity is contested,

The Netherlands Government's main argument endeavours to show that the Netherlands, represented for this purpose in the first period of colonisation by the East India Company, have possessed and exercised rights of sovereignty from 1677, or probably from a date prior even to 1648, to the present day. This sovereignty arose out of conventions entered into with native princes of the Island of Sangi, (the main island of the Talautse (Sangi) Isles), establishing the suzerainty of the Netherlands over the territories of these princes, including Palmas (or Miangas). The state of affairs thus set up is claimed to be validated by international treaties.

The facts alleged in support of the Netherlands arguments are, in the United States Government's view, not proved, and, even if they were proved, they would not create a title of sovereignty, or would not concern the Island of Palmas.

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Before considering the Parties' arguments, two points of a general character are to be dealt with, one relating to the substantive law to be applied, namely the rules on territorial sovereignty which underly the present case, and the other relating to the rules of procedure, namely the conditions under which the Parties may, under the Special Agreement, substantiate their claims.

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In the first place the Arbitrator deems it necessary to make some general remarks on *sovereignty in its relation to territory*.

The Arbitrator will as far as possible keep to the terminology employed in the Special Agreement. The preamble refers to "sovereignty over the Island of Palmas (or Miangas)", and under Article I, paragraph 2, the Arbitrator's task is to "determine whether the Island of Palmas (or Miangas) in its entirety forms a part of Netherlands territory or of territory belonging to the United States of America". It appears to follow that sovereignty in relation to a portion of the surface of the globe is the legal condition necessary for the inclusion of such portion in the territory of any particular State. Sovereignty in relation to territory is in the present award called "territorial sovereignty".

Sovereignty in the relation between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State. The

development of the national organisation of States during the last few centuries and, as a corollary, the development of international law, have established this principle of the exclusive competence of the State in regard to its own territory in such a way as to make it the point of departure in settling most questions that concern international relations. The special cases of the composite State, of collective sovereignty, etc. do not fall to be considered here and do not, for that matter, throw any doubt upon the principle which has just been enunciated. Under this reservation it may be stated that territorial sovereignty belongs always to one, or in exceptional circumstances to several States, to the exclusion of all others. The fact that the functions of a State can be performed by any State within a given zone is, on the other hand, precisely the characteristic feature of the legal situation pertaining in those parts of the globe which, like the high seas or lands without a master, cannot or do not yet form the territory of a State.

Territorial sovereignty is, in general, a situation recognised and delimited in space, either by so-called natural frontiers as recognised by international law or by outward signs of delimitation that are undisputed, or else by legal engagements entered into between interested neighbours, such as frontier conventions, or by acts of recognition of States within fixed boundaries. If a dispute arises as to the sovereignty over a portion of territory, it is customary to examine which of the States claiming sovereignty possesses a title — cession, conquest, occupation, etc. — superior to that which the other State might possibly bring forward against it. However, if the contestation is based on the fact that the other Party has actually displayed sovereignty, it cannot be sufficient to establish the title by which territorial sovereignty was validly acquired at a certain moment; it must also be shown that the territorial sovereignty has continued to exist and did exist at the moment which for the decision of the dispute must be considered as critical. This demonstration consists in the actual display of State activities, such as belongs only to the territorial sovereign.

Titles of acquisition of territorial sovereignty in present-day international law are either based on an act of effective apprehension, such as occupation or conquest, or, like cession, presuppose that the ceding and the cessionary Power or at least one of them, have the faculty of effectively disposing of the ceded territory. In the same way natural accretion can only be conceived of as an accretion to a portion of territory where there exists an actual sovereignty capable of extending to a spot which falls within its sphere of activity. It seems therefore natural that an element which is essential for the constitution of sovereignty should not be lacking in its continuation. So true is this, that practice, as well as doctrine, recognizes — though under different legal formulae and with certain differences as to the conditions required — that the continuous and peaceful display of territorial sovereignty (peaceful in relation to other States) is as good as a title. The growing insistence with which international law, ever since the middle of the 18<sup>th</sup> century,

has demanded that the occupation shall be effective would be inconceivable, if effectiveness were required only for the act of acquisition and not equally for the maintenance of the right. If the effectiveness has above all been insisted on in regard to occupation, this is because the question rarely arises in connection with territories in which there is already an established order of things. Just as before the rise of international law, boundaries of lands were necessarily determined by the fact that the power of a State was exercised within them, so too, under the reign of international law, the fact of peaceful and continuous display is still one of the most important considerations in establishing boundaries between States.

Territorial sovereignty, as has already been said, involves the exclusive right to display the activities of a State. This right has as corollary a duty: the obligation to protect within the territory the rights of other States, in particular their right to integrity and inviolability in peace and in war, together with the rights which each State may claim for its nationals in foreign territory. Without manifesting its territorial sovereignty in a manner corresponding to circumstances, the State cannot fulfil this duty. Territorial sovereignty cannot limit itself to its negative side, i. e. to excluding the activities of other States; for it serves to divide between nations the space upon which human activities are employed, in order to assure them at all points the minimum of protection of which international law is the guardian.

Although municipal law, thanks to its complete judicial system, is able to recognize abstract rights of property as existing apart from any material display of them, it has none the less limited their effect by the principles of prescription and the protection of possession. International law, the structure of which is not based on any super-State organisation, cannot be presumed to reduce a right such as territorial sovereignty, with which almost all international relations are bound up, to the category of an abstract right, without concrete manifestations.

The principle that continuous and peaceful display of the functions of State within a given region is a constituent element of territorial sovereignty is not only based on the conditions of the formation of independent States and their boundaries (as shown by the experience of political history) as well as on an international jurisprudence and doctrine widely accepted; this principle has further been recognized in more than one federal State, where a jurisdiction is established in order to apply, as need arises, rules of international law to the interstate relations of the States members. This is the more significant, in that it might well be conceived that in a federal State possessing a complete judicial system for interstate matters — far more than in the domain of international relations properly so-called — there should be applied to territorial questions the principle that, failing any specific provision of law to the contrary, a *jus in re* once lawfully acquired shall prevail over *de facto* possession however well established.

It may suffice to quote among several non dissimilar decisions of

Z. ausl. öff. Recht u. Völkerr. Bd. 1, T. 2; Urk.

the Supreme Court of the United States of America that in the case of the State of Indiana v. State of Kentucky (136 U. S. 479) 1890, where the precedent of the case of Rhode Island v. Massachusetts (4 How. 591. 639) is supported by quotations from Vattel and Wheaton, who both admit prescription founded on length of time as a valid and incontestable title.

Manifestations of territorial sovereignty assume, it is true, different forms, according to conditions of time and place. Although continuous in principle, sovereignty cannot be exercised in fact at every moment on every point of a territory. The intermittence and discontinuity compatible with the maintainance of the right necessarily differ according as inhabited or uninhabited regions are involved, or regions enclosed within territories in which sovereignty is uncontestedly displayed or again regions accessible from, for instance, the high seas. It is true that neighbouring States may by convention fix limits to their own sovereignty, even in regions such as the interior of scarcely explored continents where such sovereignty is scarcely manifested, and in this way each may prevent the other from any penetration of its territory. The delimitation of Hinterland may also be mentioned in this connection.

If, however, no conventional line of sufficient topographical precision exists or if there are gaps in the frontiers otherwise established, or if a conventional line leaves room for doubt, or if, as e. g. in the case of an island situated in the high seas, the question arises whether a title is valid *erga omnes*, the actual continuous and peaceful display of state functions is in case of dispute the sound and natural criterium of territorial sovereignty.

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The United States, in their Counter-Memorandum and their Rejoinder maintain the view that statements without *evidence* to support them cannot be taken into consideration in an international arbitration, and that evidence is not only to be referred to, but is to be laid before the tribunal. The United States further hold that, since the Memorandum is the only document necessarily to be filed by the Parties under the Special Agreement, evidence in support of the statements therein made should have been filed at the same time. The Netherlands Government, particularly in the Explanations furnished at the request of the Arbitrator, maintains that no formal rules of evidence exist in international arbitrations and that no rule limiting the freedom of the tribunal in forming its conclusions has been established by the Special Agreement of January 23<sup>rd</sup>, 1925. They hold further that statements made by a government in regard to its own acts are evidence in themselves and have no need of supplementary corroboration.

Since a divergence of view between the Parties as to the necessity and admissibility of evidence is a question of procedure, it is for the Arbitrator to decide it under Article V of the Special Agreement.



The provisions of Article II of the Special Agreement to the effect that documents in support of the Parties' arguments are to be annexed to the Memoranda and Counter-Memoranda, refers rather to the time and place at which each Party should inform the other of the evidence it is producing, but does not establish a necessary connection between any argument and a document or other piece or evidence corresponding therewith. However desirable it may be that evidence should be produced as complete and at as early a stage as possible, it would seem to be contrary to the broad principles applied in international arbitrations to exclude *à limine*, except under the explicit terms of a conventional rule, every allegation made by a Party as irrelevant, if it is not supported by evidence, and to exclude evidence relating to such allegations from being produced at a later stage of the procedure.

The provisions of the Hague Convention of 1907 for the peaceful settlement of international disputes are, under Article 51, to be applied, as the case may be, as subsidiary law in proceedings falling within the scope of that convention, or should serve at least to construe such arbitral agreements. Now, Articles 67, 68 and 69 of this convention admit the production of documents apart from that provided for in Article 63 in connection with the filing of cases, counter-cases and replies, with the consent or at the request of the tribunal. This liberty of accepting and collecting evidence guarantees to the tribunal the possibility of basing its decisions on the whole of the facts which are relevant in its opinion.

The authorization given to the Arbitrator by Article III of the Special Agreement to apply to the Parties for further written Explanations would be extraordinarily limited if such explanations could not extend to any allegations already made and could not consist of evidence which included documents and maps. The limitation to written explanations excludes oral procedure; but it is not to be construed as excluding documentary evidence of any kind. It is for the Arbitrator to decide both whether allegations do or — as being within the knowledge of the tribunal — do not need evidence in support and whether the evidence produced is sufficient or not; and finally whether points left aside by the Parties ought to be elucidated. This liberty is essential to him, for he must be able to satisfy himself on those points which are necessary to the legal construction upon which he feels bound to base his judgment. He must consider the totality of the allegations and evidence laid before him by the Parties, either *motu proprio* or at his request and decide what allegations are to be considered as sufficiently substantiated.

Failing express provision, an arbitral tribunal must have entire freedom to estimate the value of assertions made by the Parties. For the same reason, it is entirely free to appreciate the value of assertions made during proceedings at law by a Government in regard to its own acts. Such assertions are not properly speaking legal instruments, as would be declarations creating rights; they are statements concerning historical facts. The value and the weight of any assertion can only be estimated

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in the light of all the evidence and all the assertions made on either side, and of facts which are notorious for the tribunal.

For the reasons stated above the Arbitrator is unable to construe the Special Agreement of January 23<sup>rd</sup>, 1925 as excluding the subsidiary application of the above mentioned articles of the Hague Convention or the taking into consideration of allegations not supported by evidence filed at the same time. No documents which are not on record have been relied upon, with the exception of the Treaty of Utrecht — invoked however in the Netherland Counter-Memorandum — the text of which is of public notoriety and accessible to the Parties, and no allegation not supported by evidence is taken as foundation for the award. The possibility to make Rejoinder to the Explanations furnished at the request of the Arbitrator on points contained in the Memoranda and Counter-Memoranda and the extension of the time limits for filing a Rejoinder has put both Parties in a position to state — under fair conditions — their point of view in regard to that evidence which came forth only at a subsequent stage of the proceedings.

### III.

The *title alleged by the United States of America* as constituting the immediate foundation of its claim is that of *cession*, brought about by the Treaty of Paris, which cession transferred all rights of sovereignty which Spain may have possessed in the region indicated in Article III of the said Treaty and therefore also those concerning the Island of Palmas (or Miangas).

It is evident that Spain could not transfer more rights than she herself possessed. This principle of law is expressly recognized in a letter dated April 7<sup>th</sup>, 1900, from the Secretary of State of the United States to the Spanish Minister at Washington concerning a divergence of opinion which arose about the question whether two islands claimed by Spain as Spanish territory and lying just outside the limits traced by the Treaty of Paris were to be considered as included in, or excluded from the cession. This letter, reproduced in the Explanations of the United States Government, contains the following passage: "The metes and bounds defined in the treaty were not understood by either party to limit or extend Spain's right of cession. Were any island within those described bounds ascertained to belong in fact to Japan, China, Great Britain or Holland, the United States could derive no valid title from its ostensible inclusion in the Spanish cession. The compact upon which the United States negotiators insisted was that all Spanish title to the archipelago known as the Philippine Islands should pass to the United States — no less or more than Spain's actual holdings therein, but all. This Government must consequently hold that the only competent and equitable test of fact by which the title to a disputed cession in that quarter may be determined is simply this: "Was it Spain's to give? If valid title be-

longed to Spain, it passed; if Spain had no valid title, she could convey none”.

Whilst there existed a divergence of views as to the extension of the cession to certain Spanish islands outside the treaty limits, it would seem that the cessionary power never envisaged that the cession, in spite of the sweeping terms of Article III, should comprise territories on which Spain had not a valid title, though falling within the limits traced by the Treaty. It is evident that whatever may be the right construction of a treaty, it cannot be interpreted as disposing of the rights of independent third Powers.

One observation, however, is to be made. Article III of the Treaty of Paris, which is drafted differently from the preceding Article concerning Porto Rico, is so worded that it seems as though the Philippine Archipelago, within the limits fixed by that Article, was at the moment of cession under Spanish sovereignty. As already stated the Island of Palmas lies within the lines traced by the Treaty. Article III may therefore be considered as an affirmation of sovereignty on the part of Spain as regards the Island of Palmas (or Miangas), and this right or claim of right would have been ceded to the United States, though the negotiations of 1898, as far as they are on the record of the present case, do not disclose that the situation of Palmas had been specifically examined.

It is recognized that the United States communicated, on February 3<sup>rd</sup>, 1899, the Treaty of Paris to the Netherlands, and that no reservations were made by the latter in respect to the delimitation of the Philippines in Article III. The question whether the silence of a third Power, in regard to a treaty notified to it, can exercise any influence on the rights of this Power, or on those of the Powers signatories of the treaty, is a question the answer to which may depend on the nature of such rights. Whilst it is conceivable that a conventional delimitation duly notified to third Powers and left without contestation on their part may have some bearing on an inchoate title not supported by any actual display of sovereignty, it would be entirely contrary to the principles laid down above as to territorial sovereignty to suppose that such sovereignty could be affected by the mere silence of the territorial sovereign as regards a treaty which has been notified to him and which seems to dispose of a part of his territory.

The essential point is therefore whether the Island of Palmas (or Miangas) at the moment of the conclusion and coming into force of the Treaty of Paris formed a part of the Spanish or Netherlands territory. The United States declares that Palmas (or Miangas) was Spanish territory and denies the existence of Dutch sovereignty; the Netherlands maintain the existence of their sovereignty and deny that of Spain. Only if the examination of the arguments of both Parties should lead to the conclusion that the Island of Palmas (or Miangas) was at the critical moment neither Spanish nor Netherlands territory, would the question

arise whether — and, if so, how — the conclusion of the Treaty of Paris and its notification to the Netherlands might have interfered with the rights which the Netherlands or the United States of America may claim over the island in dispute.

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As pointed out above, the United States bases its claim, as successor of Spain, in the first place on *discovery*. In this connection a distinction must be made between the discovery of the Island of Palmas (or Miangas) as such, or as a part of the Philippines, which, beyond doubt, were discovered and even occupied and colonised by the Spaniards. This latter point, however, will be considered with the argument relating to contiguity; the problem of discovery is considered only in relation to the island itself which forms the subject of the dispute.

The documents supplied to the Arbitrator with regard to the discovery of the island in question consist in the first place of a communication made by the Spanish Government to the United States Government as to researches in the archives concerning expeditions and discoveries in the Moluccas, the "Talaos" Islands, the Palaos Islands and the Marianes. The United States Government, in its Rejoinder, however states that it does not specifically rely on the papers mentioned in the Spanish note.

It is probable that the island seen when the Palaos Islands were discovered, and reported as situated at latitude 5° 48' North, to the East of Sarangani and Cape San Augustin, was identical with the Island of Palmas (or Miangas). The Island "Meanguis" mentioned by the Spanish Government and presumed by them to be identical with the Talaos — probably Talautse or Talauer Islands — seems in reality to be an island lying more to the south, to which, perhaps by error, the name of another island has been transferred or which may be identified with the island Tangulandang (Tagulanda or Tahoelandang) just south of Siau (Siaoe), the latter island being probably identical with "Suar" mentioned in the same report as lying close by. Tangulandang is almost the southernmost of the islands situated between Celebes and Mindanao, whilst Palmas (or Miangas) is the northernmost. On Tangulandang there is a place called Minangan, the only name, as it would seem, to be found on maps of the region in question which is closely similar to Miangas and the different variations of this word. The name of "Mananga" appears as that of a place on "Tagulanda" in official documents of 1678, 1779, 1896 and 1905, but is never applied to the island itself; it is therefore not probable that there exists a confusion between Palmas (Miangas) and Minangan (Manangan) in spite of the fact that both islands belonged to Tabukan. However there may exist some connection between Minangan and the island "Meanguis", reported by the Spanish navigators.

The above mentioned communication of the Spanish Government does not give any details as to the date of the expedition, the navigators

or the circumstances in which the observations were made; it is not supported by extracts from the original reports on which it is based, nor accompanied by reproductions of the maps therein mentioned.

In its Rejoinder the United States Government gives quotations (translations) from a report of the voyages of Garcia de Loaisa which point to the fact that the Spanish explorer saw the Island of Palmas (Miangas) in October 1526.

The fact that an island marked as "I (Ilha) de (or das) Palmeiras", or by similar names (Polanas, Palmas) appears on maps at any rate as early as 1595 (or 1596) (the date of the earliest map filed in the dossier), approximately on the site of the Island of Palmas (or Miangas), shows that that island was known and therefore already discovered in the 16<sup>th</sup> century. According to the Netherland memorandum, the same indications are found already on maps of 1554, 1558 and 1590. The Portuguese name (Ilha das Palmeiras) could not in itself decide the question whether the discovery was made on behalf of Portugal or of Spain; Linschoten's map, on which the name "I. das Palmeiras" appears, also employs Portuguese names for most of the Philippine Islands, which from the beginning were discovered and occupied by Spain.

It does not seem that the discovery of the Island of Palmas (or Miangas) would have been made on behalf of a Power other than Spain; or Portugal. In any case for the purpose of the present affair it may be admitted that the original title derived from discovery belonged to Spain; for the relations between Spain and Portugal in the Celebes Sea during the first three quarters of the 16<sup>th</sup> century may be disregarded for the following reasons: In 1581, i. e. prior to the appearance of the Dutch in the regions in question, the crowns of Spain and Portugal were united. Though the struggle for separation of Portugal from Spain had already begun in December 1640, Spain had not yet recognised the separation when it concluded in 1648 with the Netherlands the Treaty of Münster — the earliest Treaty, as will be seen hereafter, to define the relations between Spain and the Netherlands in the regions in question. This Treaty contains special provisions as to Portuguese possessions, but alone in regard to such places as were taken from the Netherlands by the Portuguese in and after 1641. It seems necessary to draw from this fact the conclusion that, for the relations *inter se* of the two signatories of the Treaty of Münster, the same rules had to be applied both to the possessions originally Spanish and to those originally Portuguese. This conclusion is corroborated by the wording of Article X of the Treaty of Utrecht of June 26<sup>th</sup>, 1714, which expressly maintains Article V of the Treaty of Münster, but only as far as Spain and the Netherlands are concerned. It is therefore not necessary to find out which of the two nations acquired the original title, nor what the possible

effects of subsequent conquests and cessions may have been on such title before 1648.

The fact that the island was originally called, not, as customarily by a native name, but by a name borrowed from a European language, and referring to the vegetation, serves perhaps to show that no landing was made or that the island was uninhabited at the time of discovery. Indeed, the reports on record which concern the discovery of the Island of Palmas state only that an island was "seen", which island, according to the geographical data, is probably identical with that in dispute. No mention is made of landing or of contact with the natives. And in any case no signs of taking possession or of administration by Spain have been shown or even alleged to exist until the very recent date to which the reports of Captain Malone and M. Alvarez, of 1919, contained in the United States Memorandum, relate.

It is admitted by both sides that international law underwent profound modifications between the end of the Middle-Ages and the end of the 19<sup>th</sup> century, as regards the rights of discovery and acquisition of uninhabited regions or regions inhabited by savages or semi-civilised peoples. Both Parties are also agreed that a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled. The effect of discovery by Spain is therefore to be determined by the rules of international law in force in the first half of the 16<sup>th</sup> century — or (to take the earliest date) in the first quarter of it, i. e. at the time when the Portuguese or Spaniards made their appearance in the Sea of Celebes.

If the view most favourable to the American arguments is adopted—with every reservation as to the soundness of such view—that is to say, if we consider as positive law at the period in question the rule that discovery as such, i. e. the mere fact of seeing land, without any act, even symbolical, of taking possession, involved *ipso jure* territorial sovereignty and not merely an "inchoate title", a *jus ad rem*, to be completed eventually by an actual and durable taking of possession within a reasonable time, the question arises whether sovereignty yet existed at the critical date, i. e. the moment of conclusion and coming into force of the Treaty of Paris.

As regards the question which of different legal systems prevailing at successive periods is to be applied in a particular case (the so-called intertemporal law), a distinction must be made between the creation of rights and the existence of rights. The same principle which subjects the act creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words its continued manifestation, shall follow the conditions required by the evolution of law. International law in the 19<sup>th</sup> century, having regard to the fact that most parts of the globe were under the sovereignty of States members

of the community of nations, and that territories without a master had become relatively few, took account of a tendency already existing and especially developed since the middle of the 18<sup>th</sup> century, and laid down the principle that occupation, to constitute a claim to territorial sovereignty, must be effective, that is, offer certain guarantees to other States and their nationals. It seems therefore incompatible with this rule of positive law that there should be regions which are neither under the effective sovereignty of a State, nor without a master, but which are reserved for the exclusive influence of one State, in virtue solely of a title of acquisition which is no longer recognized by existing law, even if such a title ever conferred territorial sovereignty. For these reasons, discovery alone, without any subsequent act, cannot at the present time suffice to prove sovereignty over the Island of Palmas (or Miangas); and in so far as there is no sovereignty, the question of an abandonment properly speaking of sovereignty by one State in order that the sovereignty of another may take its place does not arise.

If on the other hand the view is adopted that discovery does not create a definitive title of sovereignty, but only an "inchoate" title, such a title exists, it is true, without external manifestation. However according to the view that has prevailed at any rate since the 19<sup>th</sup> century, an inchoate title of discovery must be completed within a reasonable period by the effective occupation of the region claimed to be discovered. This principle must be applied in the present case, for the reasons given above in regard to the rules determining which of successive legal systems is to be applied (the so-called intertemporal law). Now, no act of occupation nor, except as to a recent period, any exercise of sovereignty at Palmas by Spain has been alleged. But even admitting that the Spanish title still existed as inchoate in 1898 and must be considered as included in the cession under Article III of the Treaty of Paris, an inchoate title could not prevail over the continuous and peaceful display of authority by another State; for such display may prevail even over a prior, definitive title put forward by another State. This point will be considered, when the Netherlands argument has been examined and the allegations of either Party as to the display of their authority can be compared.

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In the second place the United States claim sovereignty over the Island of Palmas on the ground of recognition by Treaty. The Treaty of Peace of January 30<sup>th</sup>, 1648, called hereafter, in accordance with the practice of the Parties, the "*Treaty of Münster*", which established a state of peace between Spain and the States General of the United Provinces of the Netherlands, in Article V, deals with territorial relations between the two Powers as regards the East and West Indies (Article VI concerns solely the latter).

Article V, quoted in the French text published in the "Corps Universel Diplomatique du Droit des Gens", by J. Du Mont, Volume VI, Part I, 1728, page 430, runs as follows: 9)

"La Navigation & Trafique des Indes Orientales & Occidentales sera maintenuë, selon & en conformité des Octroys sur ce donnés, ou à donner cy-aprés; pour seureté de quoy servira le present Traicté & la Ratification d'iceluy, qui de part & d'autre en sera procurée; Et seront compris sous ledit Traicté tous Potentats, Nations & Peuples, avec lesquels lesdits Seigneurs Estats, ou ceux de la Société des Indes Orientales & Occidentales en leur nom, entre les limites de leursdits Octroys sont en Amitié et Alliance; Et un chacun, sçavoir les susdits Seigneurs Roy & Estats respectivement demeureront en possession et jouiront de telles Seigneuries, Villes, Chasteaux, Forteresses, Commerce & Pays és Indes Orientales & Occidentales, comme aussi au Bresil & sur les costes d'Asie, d'Afrique & Amérique respectivement, que lesdits Seigneurs Roy & Estats respectivement tiennent et possèdent, en ce compris specialement les Lieux & Places que les Portugais depuis

9) The English translation given in the Memorandum of the United States runs as follows:

TREATY OF PEACE BETWEEN PHILIP IV., CATHOLIC KING OF SPAIN  
AND  
THEIR LORDSHIPS THE STATES GENERAL OF THE UNITED PROVINCES  
OF THE NETHERLANDS.  
Anno 1648, January 30<sup>th</sup>.

#### Article V.

The navigation and trade to the East and West Indies shall be kept up and conformably to the grants made or to be made for that effect; for the security whereof the present treaty shall serve, and the Ratification thereof on both sides, which shall be obtained; and in the said treaty shall be comprehended all potentates, nations, and people, with whom the said Lords the States, or members of the East and West India Companies in their name, within the limits of their grants, are in friendship and alliance. And each one, that is to say, the said Lords the King and States, respectively, shall remain in possession of and enjoy such lordships, towns, castles, fortresses, commerce and countries of the East and West Indies, as well as of Brazil, and on the coasts of Asia, Africa, and America, respectively, which the said Lords the King and States, respectively, hold and possess, in this being specially comprised the spots and places which the Portuguese since the year 1641 have taken from the said Lords the States and occupied, comprising also the spots and places which the said Lords the States hereafter without infraction of the present treaty shall come to conquer and possess. And the directors of the East and West India Companies of the United Provinces, as also the servants and officers, high and low, the soldiers and seamen actually in the service of either of the said Companies, or such as have been in their service, as also such who in this country, or within the district of the said two companies, continue yet out of the service, but who may be employed afterwards, shall be and remain to be free and unmolested in all the countries under the obedience of the said Lord the King in Europe; and may sail, traffic and resort, like all the other inhabitants of the countries of the said Lord and States. Moreover it has been agreed and stipulated, that the Spaniards shall keep their navigation to the East Indies, in the same manner they hold it at present, without being at liberty to go further; and the inhabitants of those Low Countries shall not frequent the places which the Castilians have in the East Indies".



l'an mil six cent quarante & un, ont pris & occupé sur lesdits Seigneurs Estats; compris aussi les Lieux & Places qu'iceux Seigneurs Estats cy-après sans infraction du present Traicté viendront à conquérir & posséder; Et les Directeurs de la Société des Indes tant Orientales que Occidentales des Provinces-Unies, comme aussi les Ministres, Officiers hauts & bas, Soldats & Matelots, estans en service actuel de l'une ou de l'autre desdites Compagnies, ou aiants esté en leur service, comme aussi ceux qui hors leur service respectivement, tant en ce Pays qu'au District desdites deux Compagnies, continuent encor, ou pourront cy-après estre employés, seront & demeureront libres & sans estre molestez en tous les Pays estans sous l'obeissance dudit Seigneur Roy en l'Europe, pourront voyager, trafiquer & frequenter, comme tous autres Habitans des Pays desdits Seigneurs Estats. En outre a esté conditionné & stipulé, que les Espagnols retiendront leur Navigation en telle manière qu'ils la tiennent pour le present és Indes Orientales, sans se pouvoir estendre plus avant, comme aussi les Habitans de ce Pays-Bas s'abstiendront de la frequentation des Places, que les Castillans ont és Indes Orientales".

This article prescribes no frontiers and appoints no definite regions as belonging to one Power or the other. On the other hand, it establishes as a criterion the principle of possession ("demeureront en possession et jouiront de telles seigneuries . . . que lesdits Seigneurs Roy et Estats tiennent et possèdent").

However liberal be the interpretation given, for the period in question, to the notions of "tenir" (hold) and "posséder" (possess), it is hardly possible to comprise within these terms the right arising out of mere discovery; i. e. out of the fact that the island had been sighted. If title arising from discovery, well-known and already a matter of controversy at the period in question, were meant to be recognized by the treaty, it would probably have been mentioned in express terms. The view here taken appears to be supported by other provisions in the same article. It is stipulated therein that "les lieux et places qu'iceux Seigneurs Estats ci-après sans infraction du présent traité viendront à conquérir et posséder" shall be placed on the same footing as those which they possessed at the moment the treaty was concluded. In view of the interpretation given by Spain and Portugal to the right of discovery, and to the Bull *Inter Caetera* of Alexander VI, 1493, it seems that the regions which the Treaty of Münster does not consider as definitely acquired by the two Powers in the East and West Indies, and which may in certain circumstances be capable of subsequent acquisition by the Netherlands, cannot fail to include regions claimed as discovered, but not possessed. It must further be remembered that Article V provides not merely a solution of the territorial question on the basis of possession, but also a solution of the Spanish navigation question on the basis of the *status quo*. Whilst Spain may not extend the limits of her navigation in the East Indies, nationals of the Netherlands are only excluded from "places" which the Spaniards hold in the East

Indies. Without navigation there is no possibility of occupying and colonizing regions as yet only discovered; on the other hand, the exclusion from Spanish "places" of Netherlands navigation and commerce does not admit of an extensive interpretation; a "place", which moreover in the French of that period often means a fortified place, is in any case an actual settlement implying an actual radius of activity; Article VI, for instance, of the same treaty speaks of "lieux et places garnies de Forts, Loges et Chasteaux" (harbours, places, forts, lodgements or castles). For these reasons a title based on mere discovery cannot apply to the situation considered in Article V as already established.

Since the Treaty of Münster does not divide up the territories by means of a geographical distribution, and since it indirectly refuses to recognize title based on discovery as such, the bearing of the treaty on the present case is to be determined by the proof of possession at the critical epoch.

In connection herewith no precise elements of proof based on historical facts as to the display or even the mere affirmation of sovereignty by Spain over the Island of Palmas have been put forward by the United States. There is, however, one point to be considered in connection with the Treaty of Münster. According to a report, reproduced in the United States Explanations and made on February 7<sup>th</sup>, 1927, by the Provincial Prelacy of the Franciscan Order of Minors of the Province of St. Gregory the Great of the Philippines, the "Islands Miangis" ("Las Islas Miangis"), situated to the north east of the "Island of Karakelang" (most likely identical with the Nanusa N. E. of Karakelang, one of the Talauer Islands), after having been first in Portuguese, and then in Dutch possession, were taken by the Spaniards in 1606. The Spanish rule under which the Spanish Franciscan Fathers of the Philippines exercised the spiritual administration in the said islands, ended in 1666, when the Captain general of the Spanish Royal Armada dismantled all the fortified places in the Moluccas, making however before the "Dutch Governor of Malayo" a formal declaration as to the continuance of all the rights of the Spanish Crown over the places, forts and fortifications from which the Spaniards withdrew. There are further allegations as to historical facts in regard to the same region contained in a report of the Dutch Resident of Menado, dated August 12<sup>th</sup>, 1857, concerning the Talauer Islands (Talaud Islands). According to this report, in 1677 the Spaniards were driven by the Dutch from Tabukan, on the Talautse or Sangi Islands, and at that time — even "long before the coming of the Dutch to the Archipelago of the Moluccas" — the Talauer Islands (Karakelang) had been conquered by the Radjas of Tabukan.

According to the Dutch argument, considered hereafter, the Island of Palmas (or Miangas) together with the Nanusa and Talauer Islands (Talaud Islands) belonged to Tabukan. If this be exact, it may be considered as not unlikely that Miangas, in consequence of its ancient connection with the native State of Tabukan, was in 1648 in at least

indirect possession of Spain. However this point has not been established by any specific proof.

But the question whether the Dutch took possession of Tabukan in 1677 in conformity with or in violation of the Treaty of Münster can be disregarded, even if — in spite of the incompleteness of the evidence laid before the Arbitrator — it were admitted that the Talautse (Sangi) Islands with their dependencies in the Talauer- and Nanusa-Islands, Palmas (or Miangas) possibly included, were "held and possessed" by Spain in 1648. For on June 26<sup>th</sup>, 1714, a new Treaty of Peace was concluded at Utrecht, which, in its Article X, stipulates that the Treaty of Münster is maintained as far as not modified and that the above quoted article V remains in force as far as it concerns Spain and the Netherlands.

Art. X, quoted in the French text published in "Actes, Mémoires et autres pièces authentiques concernant la Paix d'Utrecht", vol. 5, Utrecht 1715., runs as follows:

"Le Traité de Munster du 30 janvier 1648 fait entre le feu Roi Philippe 4 & les Seigneurs Etats Generaux, servira de base au présent Traité, & aura lieu en tout, autant qu'il ne sera pas changé par les Articles suivans, & pour autant qu'il est applicable, & pour ce qui regarde les Articles 5 & 16 de ladite Paix de Munster, ils n'auront lieu qu'en ce qui concerne seulement lesdites deux hautes Puissances contractantes & leurs Sujets" <sup>10</sup>).

If — quite apart from the influence of an intervening state of war on treaty rights — this clause had not simply meant the confirmation of the principle of actual possession — at the time of the conclusion of the Treaty of Utrecht — as regulating the territorial status of the Contracting Powers in the East and West Indies and if, on the contrary, a restitution of any territories acquired before the war in violation of the Treaty of Münster had been envisaged, specific provisions would no doubt have been inserted.

There is further no trace of evidence that Spain ever claimed at a later opportunity, for instance in connection with the territorial rearrangements at the end of the Napoleonic Wars, the restitution of territories taken or withheld from her in violation of the Treaties of Münster or Utrecht.

As it is not proved that Spain, at the beginning of 1648 or in June 1714, was in possession of the Island of Palmas (or Miangas), there is no proof that Spain acquired by the Treaty of Münster or the Treaty

<sup>10</sup>) *Translation.* The Treaty of Münster of January 30<sup>th</sup>, 1648, concluded between the late King *Philip IV* and the States General, shall form the basis of the present Treaty and shall hold good in every respect in so far as it is not modified by the following articles, and in so far as it is applicable, and, as regards Articles 5 and 16 of the said Peace of Münster, these Articles shall only hold good in so far as concerns the aforesaid High Contracting Parties and their subjects.

of Utrecht a title to sovereignty over the island which, in accordance with the said Treaties, and as long as they hold good, could have been modified by the Netherlands only in agreement with Spain.

It is, therefore, unnecessary to consider whether subsequently Spain by any express or conclusive action, abandoned the right, which the said Treaties may have conferred upon her in regard to Palmas (or Miangas). Moreover, even if she had acquired a title she never intended to abandon, it would remain to be seen whether continuous and peaceful display of sovereignty by any other Power at a later period might not have superseded even conventional rights.

It appears further to be evident that Treaties concluded by Spain with third Powers recognizing her sovereignty over the „Philippines“ could not be binding upon the Netherlands and, as such Treaties do not mention the island in dispute, they are not available even as indirect evidence.

We thus come back to the question whether, failing any Treaty which, as between the States concerned, decides unequivocally what is the situation as regards the island, the existence of territorial sovereignty is established with sufficient soundness by other facts.

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Although the United States Government does not take up the position that Spanish sovereignty must be recognised because it was actually exercised, the American Counter-Case none the less states that “there is at least some evidence of Spanish activities in the island”. In these circumstances it is necessary to consider *whether and to what extent the territorial sovereignty of Spain was manifested* in or in regard to the island of Palmas (or Miangas). Here it may be well to refer to a passage taken from information supplied by the Spanish to the American Government and communicated by the latter to the Netherlands Legation at Washington, in a note dated April 25<sup>th</sup>, 1914. The passage in question is reproduced in the text and in the annex of the United States’ Memorandum, and runs as follows:

“It appears, therefore, that this Island of Palmas or Miangas, being within the limits marked by the bull of Alexander the Sixth, and the agreement celebrated between Spain and Portugal regarding the possession of the Maluco, must have been seen by the Spaniards on the different voyages of discovery which were made in these parts, and that it belonged to Spain, at least by right, until the Philippine Archipelago was ceded by the Treaty of Paris; but precise data of acts of dominion which Spain may have exercised in this island have not been found.

This is the data and information which we have been able to find referring to said island, with which without doubt, because of the small importance it had, the discoverers did not occupy themselves, neither afterwards the governors of the Philippines, nor the

historians and chroniclers, such as Herrera and Navarrette and the fathers Colin and Pastelle of the Society of Jesus, who refer in their works to the above mentioned data without detailing any information about the said island."

It further results from the Explanations furnished by the Government of the United States at the request of the Arbitrator that an exhaustive examination of the records which were handed over to the American authorities under Art. VIII of the Treaty of Paris, namely such as pertain to judicial, notarial and administrative matters, has revealed nothing bearing on the allegations made by natives of Palmas in 1919 to Captain Malone and Mr. Alvarez on the subject of regular visits of Spanish ships, even gunboats, and on the collection of the "Cedula"-tax. This being so, no weight can be given to such allegations as to the exercise of Spanish sovereignty in recent times—quite apart from the fact that the evidence in question belongs to an epoch subsequent to the rise of the dispute.

Apart from the facts already referred to concerning the period of discovery, and the mention of a letter which was sent on July 31<sup>st</sup>, 1604, by the Spanish pilot Bartolome Pérez from the Island of Palmas and the contents of which are not known, and apart from certain allegations as to commercial relations between Palmas and Mindanao, the documents laid before the Arbitrator contain no trace of Spanish activities of any kind specifically on the Island of Palmas.

Neither is there any official document mentioning the Island of Palmas as belonging to an administrative or judicial district of the former Spanish Government in the Philippines. In a letter emanating from the Provincial Prelacy of the Franciscan order of Minors mentioned above, it is said that the Islands of "Mata and Palmas should belong (deben pertenecer) to the group of Islands of Sarangani and consequently to the District of Dávao in the Island of Mindanao". It is further said in this letter that "the Island of Palmas, as it was near to Mindanao, must have been administered (debió ser administrada) spiritually in the last years of Spanish dominion by the fathers who resided in the District of Dávao". It results from the very terms of this letter, which places the "Islands Miangis" to the north east of the Island Karakelang ("Karekelan"), that these statements, which suppose the existence of Mata, are not based immediately on information taken on the spot, but are rather conjectures of the author as to what seems probable.

In the Rejoinder filed by the United States Government there is an extract from a letter of the Dutch missionary Steller, dated December 9<sup>th</sup>, 1895. It appears from this letter that the Resident of Menado, at the same time as he set up the Netherlands coat of arms at Palmas (or Miangas), had had the intention to present a medal to the native Chief of the island, "because the said chief, recently detained in Mindanao on business, would not let the commanding officer of a Spanish warship force the Spanish flag upon him". These

facts, supposing they are correct, are no proof of a display of sovereignty over Palmas (or Miangas); rather the contrary. If the Spanish naval authorities to whom the administrative inspection of the southern Philippine Islands belonged, were convinced that the Island of Palmas was Spanish territory, the refusal of the native chief to accept the Spanish flag would naturally have led either to direct action on the Island in order to affirm Spanish sovereignty, or, if the Netherlands rights had been invoked, to negotiations such as were the sequel to General Wood's visit in 1906.

As regards the information concerning the native language or knowledge of Spanish, even if sufficiently established, it is too vague to indicate the existence of a political and administrative connection between Palmas (or Miangas) and Mindanao.

In a telegram from General Leonard Wood to the Bureau of Insular Affairs, reproduced in the American Explanations, it is stated that "the administrative inspection of the islands in the south (i. e. of the Philippines), especially round their coasts, belonged absolutely to the naval Spanish authorities". As papers pertaining to military and naval matters were not handed over to the American authorities under the Treaty of Paris, the files relating to the said administrative inspection are not in the possession of the United States. The fact that not the ordinary provincial agencies but the navy were in charge of the inspection of the islands in the south, together with another fact, incidentally mentioned by Major General E. S. Otis, in a report of August 31<sup>st</sup>, 1899, namely the existence of a state of war or at least of subdued hostility amongst the Moros against Spanish rule, leads to the very probable — though not necessary — conclusion that the complete absence of evidence as to display of Spanish sovereignty over the Island of Palmas is not due to mere chance, but is to be explained by the absence of interest of Spain in the establishment or the maintenance of her rule over a small island lying far off the coast of a distant and only incompletely subdued province.

It has been remarked, not without reason, that the United States, having acquired sovereignty by cession only in 1898, were at some disadvantage for the collection of evidence concerning the original acquisition and the display of sovereignty over Palmas. The Arbitrator has no possibility of taking into account this situation; he can found his award only on the facts alleged and proved by the Parties, and he is bound to consider all proved facts which are pertinent in his opinion. Moreover it does not appear that the Spanish Government refused to furnish the documents requested.

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Among the methods of indirect proof, not of the exercise of sovereignty, but of its existence in law, submitted by the United States,

there is the *evidence from maps*. This subject has been very completely developed in the Memorandum of the United States and has also been fully dealt with in the Netherlands Counter-Memorandum, as well as in the United States Rejoinder. A comparison of the information supplied by the two Parties shows that only with the greatest caution can account be taken of maps in deciding a question of sovereignty, at any rate in the case of an island such as Palmas (or Miangas). Any maps which do not precisely indicate the political distribution of territories, and in particular the Island of Palmas (or Miangas) clearly marked as such, must be rejected forthwith, unless they contribute — supposing that they are accurate — to the location of geographical names. Moreover, indications of such a nature are only of value when there is reason to think that the cartographer has not merely referred to already existing maps — as seems very often to be the case — but that he has based his decision on information carefully collected for the purpose. Above all, then, official or semi-official maps seem capable of fulfilling these conditions, and they would be of special interest in cases where they do not assert the sovereignty of the country of which the Government has caused them to be issued.

If the Arbitrator is satisfied as to the existence of legally relevant facts which contradict the statements of cartographers whose sources of information are not known, he can attach no weight to the maps, however numerous and generally appreciated they may be.

The first condition required of maps that are to serve as evidence on points of law is their geographical accuracy. It must here be pointed out that not only maps of ancient date, but also modern, even official or semi-official maps seem wanting in accuracy. Thus, a comparison of the maps submitted to the Arbitrator shows that there is doubt as to the existence or the names of several islands which should be close to Palmas (or Miangas), and in about the same latitude. The St. Joannes Islands, Hunter's Island and the Isle of Mata are shown, all or some of them, on several maps even of quite recent date, although their existence seems very doubtful. The non-existence of the Island of Mata and the identity of the St. Joannes and Hunter's Island with Palmas, though they appear on several maps as distinct and rather distant islands, may, on the evidence laid before the Arbitrator, be considered as fairly certain.

The "*Century Atlas*" (Exhibit No. 8 of the American Memorandum) and the map published in 1902 by the *Bureau of Insular Affairs of the United States* (Exhibit No. 11), show "Mata I.", "Palmas I." and "Haycock or Hunter I". The Spanish map (Captain Montero), reproduced by the *War Department* of the United States (Exhibit No. 9) also mentions these three islands, although "Haycock I." and "Hunter I." are here different islands. The same is to be said of the map of the *Challenger Expedition* of 1885. The only large scale map submitted to the Arbitrator which, as appears from inscriptions on it,

is directly based on researches on the spot, is that attached to the Netherlands Memorandum (British Admiralty Chart No. 2575). Now this map shows neither an island of Mata, nor of Hunter, nor of any other name in the regions where they should be, according to the other maps, and Haycock Island is indicated at two points other than that adopted in "Exhibits Nos. 8 & 11". Whatever be the accuracy of the British Admiralty Chart for the details in question, these points show that only with the greatest caution use can be made of maps as indications of the existence of sovereignty over Palmas (or Miangas). The maps which, in the view of the United States, are of an official or semi-official character and are of Spanish or American origin are that of Captain *Montero* and that of the *Insular Department*, referred to above (Exhibits Nos. 8 & 11). The first mentioned gives for that matter no indication as to political frontiers, and the second only reproduces the lines traced by the treaty of December 10<sup>th</sup>, 1898. They have therefore no bearing on the point in question, even apart from the evident inaccuracies, at least as regards Hunter Island, which they appear to contain precisely in the region under consideration.

As regards maps of Dutch origin, there are in particular two which, in the view of the United States, possess an official character and which might exclude Palmas (or Miangas) from the Dutch possessions. The first of these, published in 1857 by M. Bogaerts, lithographer to the Royal Military Academy, and dedicated to the Governor of that institution, if it possesses the official character attributed to it by the American Memorandum and disputed by the Netherlands Counter-Memorandum, might serve to indicate that the island was not considered at the period in question as Dutch but as Spanish territory. Anyhow, a map affords only an indication — and that a very indirect one — and, except when annexed to a legal instrument, has not the value of such an instrument, involving recognition or abandonment of rights. The importance of this map can only be judged in the light of facts prior or subsequent to 1857, which the Netherlands Government alleges in order to prove the exercise of sovereignty over the Island of Palmas (or Miangas); these facts, together with the cartographical evidence relied upon in their support or submitted in connection with the question of the right location of the Island or Islands called "Meangis", will be considered at the same time as the Netherlands' arguments. While Bogaerts' map does not, as it stands, furnish proof of the recognition of Spanish sovereignty, it must further be pointed out that it is inaccurate as regards the group of islands marked "Menangis" and indicated on this map somewhat to the north of "Nanoesa", as well as in other points, for example the shape of Mindanao and the colouring of certain small islands.

The conclusions drawn in the United States Memorandum from the second map, i. e. the atlas published by the Ministry for the



Colonies (1897—1904) appear to be refuted by the information contained in the Netherland Counter-Memorandum. A copy of a detailed map from the same atlas is there shown which represents "P. Miangis (E. Palmas)" amongst Dutch possessions, not only by the coloured contours, but also because it indicates the Sarangani Islands as "Amerikaansch". The general map, on the other hand, reproduced as "Exhibit N<sup>o</sup>. 10" in the American Memorandum, excludes the former island from Dutch territory, by a line of demarcation between the different colonial possessions. There seems to be no doubt that the special map must prevail over the general, even though the latter was published three months later.

As to the special map contained in the first edition of the same atlas (Atlas der Nederlandsche Bezittingen in Oost-Indië [1883—1885]), where the "Melangies" are reproduced as a group of islands north of the Nanusa and distinct from "Palmas", the same observations apply as to Bogaerts' map, which is fairly similar on this point. The "Explanations" filed by the Netherlands Government make it clear that the authors of the map did not rely on new and authentic information about the region here in question, but reproduced older maps.

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In the last place there remains to be considered *title arising out of contiguity*. Although States have in certain circumstances maintained that islands relatively close to their shores belonged to them in virtue of their geographical situation, it is impossible to show the existence of a rule of positive international law to the effect that islands situated outside territorial waters should belong to a State from the mere fact that its territory forms the *terra firma* (nearest continent or island of considerable size). Not only would it seem that there are no precedents sufficiently frequent and sufficiently precise in their bearing to establish such a rule of international law, but the alleged principle itself is by its very nature so uncertain and contested that even Governments of the same State have on different occasions maintained contradictory opinions as to its soundness. The principle of contiguity, in regard to islands, may not be out of place when it is a question of allotting them to one State rather than another, either by agreement between the Parties, or by a decision not necessarily based on law; but as a rule establishing *ipso jure* the presumption of sovereignty in favour of a particular State, this principle would be in conflict with what has been said as to territorial sovereignty and as to the necessary relation between the right to exclude other States from a region and the duty to display therein the activities of a State. Nor is this principle of contiguity admissible as a legal method of deciding questions of territorial sovereignty; for it is wholly lacking in precision and would in its application lead to ar-

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bitrary results. This would be especially true in a case such as that of the island in question, which is not relatively close to one single continent, but forms part of a large archipelago in which strict delimitations between the different parts are not naturally obvious.

There lies, however, at the root of the idea of contiguity one point which must be considered also in regard to the Island of Palmas (or Miangas). It has been explained above that in the exercise of territorial sovereignty there are necessarily gaps, intermittence in time and discontinuity in space. This phenomenon will be particularly noticeable in the case of colonial territories, partly uninhabited or as yet partly unsubdued. The fact that a State cannot prove display of sovereignty as regards such a portion of territory cannot forthwith be interpreted as showing that sovereignty is inexistent. Each case must be appreciated in accordance with the particular circumstances.

It is however, to be observed that international arbitral jurisprudence in disputes on territorial sovereignty (e. g. the award in the arbitration between Italy and Switzerland concerning the Alpe Craivarola; Lafontaine, *Pasicrisie internationale*, p. 201—209) would seem to attribute greater weight to — even isolated — acts of display of sovereignty than to continuity of territory, even if such continuity is combined with the existence of natural boundaries.

As regards groups of islands, it is possible that a group may under certain circumstances be regarded as in law a unit, and that the fate of the principal part may involve the rest. Here, however, we must distinguish between, on the one hand, the act of first taking possession, which can hardly extend to every portion of territory, and, on the other hand, the display of sovereignty as a continuous and prolonged manifestation which must make itself felt through the whole territory.

As regards the territory forming the subject of the present dispute, it must be remembered that it is a somewhat isolated island, and therefore a territory clearly delimited and individualised. It is moreover an island permanently inhabited, occupied by a population sufficiently numerous for it to be impossible that acts of administration could be lacking for very long periods. The memoranda of both Parties assert that there is communication by boat and even with native craft between the Island of Palmas (or Miangas) and neighbouring regions. The inability in such a case to indicate any acts of public administration makes it difficult to imagine the actual display of sovereignty, even if the sovereignty be regarded as confined within such narrow limits as would be supposed for a small island inhabited exclusively by natives.

#### IV.

The *Netherlands' arguments* contend that the East India Company established Dutch sovereignty over the Island of Palmas (or Miangas) as early as the 17<sup>th</sup> century, by means of conventions with the princes of Tabukan (Taboekan) and Taruna (Taroena), two native chieftains

of the Island of Sangi (Groot Sangihe), the principal island of the Talautse Isles (Sangi Islands), and that sovereignty has been displayed during the past two centuries.

In the annexes to the Netherland Memorandum the texts of conventions concluded by the Dutch East India Company (and, after 1795, by the Netherlands State), in 1677, 1697, 1720, 1758, 1828, 1885 and 1899 with the Princes, Radjas or Kings, as they are indiscriminately called, of Tabukan, Taruna and Kandahar (Kandhar)-Taruna. All these principalities are situated in the Northern part of the Island of Sangi (Groot Sangihe or Sanghir) and, at any rate since 1885, include, besides parts of that island, also certain small islands further north, the Nanusa Islands — all incontestably Dutch —, and, according to the Netherlands, also the Island of Palmas, (or Miangas). These successive contracts are one much like another; the more recent are more developed and better suited to modern ideas in economic, religious and other matters, but they are all based on the conception that the prince receives his principality as a fief of the Company or the Dutch State, which is suzerain. Their eminently political nature is confirmed by the supplementary agreements of 1771, 1779 and 1782, concerning the obligations of vassals in the event of war. The dependence of the vassal State is ensured by the important powers given to the nearest representative of the colonial Government and, in the last resort, to that Government itself. The most recent of these contracts prior to the cession of the Philippines to the United States, that of 1885, contains, besides the allocation of powers for internal administration, the following provisions also, in regard to international interests: exclusion of the Prince from any direct relations with foreign Powers, and even with their nationals in important economic matters; the currency of the Dutch Indies to be legal tender; the jurisdiction over foreigners to belong to the Government of the Dutch Indies; the vassal is bound to suppress slavery, the White Slave Traffic and piracy; he is also bound to render assistance to the shipwrecked.

Even the oldest contract, dated 1677, contains clauses binding the vassal of the East India Company to refuse to admit the nationals of other States, in particular Spain, into his territories, and to tolerate no religion other than protestantism, reformed according to the doctrine of the Synod of Dordrecht. Similar provisions are to be found in the other contracts of the 17 and 18<sup>th</sup> centuries. If both Spain and the Netherlands had in reality displayed their sovereignty over Palmas (or Miangas), it would seem that, during so long a period, collisions between the two Powers must almost inevitably have occurred.

The authenticity of these contracts cannot be questioned. The fact that true copies, certified by evidently the competent officials of the Netherlands' Government, have been supplied and have been forwarded to the Arbitrator through the channels laid down in the Special Agreement, renders the production of facsimiles of texts and of signatures or seals superfluous. This observation equally applies to other documents

or extracts from documents taken from the archives of the East India Company, or of the Netherlands Government. There is no reason to suppose that typographical errors in the reproduction of texts may have any practical importance for the evidence in question.

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The fact that these contracts were renewed from time to time and appear to indicate an extension of the influence of the suzerain, seems to show that the regime of suzerainty has been effective. The sovereignty of the Netherlands over the Sangi and Talauer Islands is moreover not disputed. There is here a manifestation of territorial sovereignty normal for such a region. The questions to be solved in the present case are the following:

*Was the island of Palmas (or Miangas) in 1898 a part of territory under Netherlands' sovereignty?*

*Did this sovereignty actually exist in 1898 in regard to Palmas (or Miangas) and are the facts proved which were alleged on this subject?*

If the claim to sovereignty is based on the continuous and peaceful display of State authority, the fact of such display must be shown precisely in relation to the disputed territory. It is not necessary that there should be a special administration established in this territory; but it cannot suffice for the territory to be attached to another by a legal relation which is not recognized in international law as valid against a State contesting this claim to sovereignty; what is essential in such a case is the continuous and peaceful display of actual power in the contested region.

According to the description of the frontiers of the territory of Taruna annexed to the contract of 1885, the list of dependencies of Taruna on the Talauer Islands mentions first the different islands of Nanusa, and ends by the words "ten slotte nog het eiland Melangis (Palmas)", "and lastly the island Melangis (Palmas)".

The similar description of frontiers attached to the contract of 1899 states that the Islands of Nanusa (including the Island of "Miangas") belong to the territory of Kandahar-Taruna. If these two mentions refer to the Island of Palmas (or Miangas), it must be recognized that that island, at any rate nominally, belongs to the vassal State in question; it is by no means necessary to prove the existence of a special contract with a chieftain of Palmas (or Miangas).

However much the opinions of the Parties may differ as to the existence of proof of the display of Dutch sovereignty over the Island of Palmas (or Miangas), the reports, furnished by both sides, of the visit of General Wood, in January 1906, show that at that time there were at least traces of continuous relations between the island in dispute and neighbouring Dutch possessions, and even traces of Dutch sovereignty. General Wood noted his surprise that the Dutch flag was

flying on the beach and on the boat which came to meet the American ship. According to information gathered by him, the flag had been there for 15 years and perhaps even longer. Since the contract of 1885 with Taruna and that of 1899 with Kandahar-Taruna comprise Palmas (or Miangas) within the territories of a native State under the suzerainty of the Netherlands and since it has been established that in 1906 on the said island a state of things existed showing at least certain traces of display of Netherlands sovereignty, it is now necessary to examine what is the nature of the facts invoked as proving such sovereignty, and to what periods such facts relate. This examination will show whether or not the Netherlands have displayed sovereignty over the Island of Palmas (or Miangas) in an effective continuous and peaceful manner at a period at which such exercise may have excluded the acquisition of sovereignty, or a title to such acquisition, by the United States of America.

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Before beginning to consider the facts alleged by the Netherlands in support of their arguments, there are two preliminary points, in regard to which the Parties also put forward different views, which require elucidation. These relate to questions raised by the United States: firstly the power of the East India Company to act validly under international law, on behalf of the Netherlands, in particular by concluding so-called political contracts with native rulers; secondly the identity or non-identity of the island in dispute with the islands to which the allegations of the Netherlands as to display of sovereignty would seem to relate.

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The acts of the *East India Company* (Generale Geocroyeerde Nederlandsch Oost-Indische Compagnie), in view of occupying or colonizing the regions at issue in the present affair must, in international law, be entirely assimilated to acts of the Netherlands State itself. From the end of the 16<sup>th</sup> till the 19<sup>th</sup> Century, companies formed by individuals and engaged in economic pursuits (Chartered Companies), were invested by the States to whom they were subject with public powers for the acquisition and administration of colonies. The Dutch East India Company is one of the best known. Article V of the Treaty of Münster and consequently also the Treaty of Utrecht clearly show that the East and West India Companies were entitled to create situations recognized by international law; for the peace between Spain and the Netherlands extends to "tous Potentats, nations et peuples" with whom the said Companies, in the name of the States of the Netherlands, "entre les limites de leurdits Octroys sont en Amitié et Alliance". The conclusion of conventions, even of a political nature, was, by Article XXXV

of the Charter of 1602, within the powers of the Company. It is a question for decision in each individual case whether a contract concluded by the Company falls within the range of simple economic transactions or is of a political and public administrative nature.

As regards *contracts between a State or a Company* such as the Dutch East India Company and *native princes or chiefs of peoples* not recognized as members of the community of nations, they are not, in the international law sense, treaties or conventions capable of creating rights and obligations such as may, in international law, arise out of treaties. But, on the other hand, contracts of this nature are not wholly void of indirect effects on situations governed by international law; if they do not constitute titles in international law, they are none the less facts of which that law must in certain circumstances take account. From the time of the discoveries until recent times, colonial territory has very often been acquired, especially in the East Indies, by means of contracts with the native authorities, which contracts leave the existing organisation more or less intact as regards the native population, whilst granting to the colonizing Power, besides economic advantages such as monopolies or navigation and commercial privileges, also the exclusive direction of relations with other Powers, and the right to exercise public authority in regard to their own nationals and to foreigners. The form of the legal relations created by such contracts is most generally that of suzerain and vassal, or of the so-called colonial protectorate.

In substance, it is not an agreement between equals; it is rather a form of internal organisation of a colonial territory, on the basis of autonomy for the natives. In order to regularise the situation as regards other States, this organisation requires to be completed by the establishment of powers to ensure the fulfilment of the obligations imposed by international law on every State in regard to its own territory. And thus suzerainty over the native State becomes the basis of territorial sovereignty as towards other members of the community of nations. It is the sum-total of functions thus allotted either to the native authorities or to those of the colonial Power which decides the question whether at any certain period the conditions required for the existence of sovereignty are fulfilled. It is a question to be decided in each case whether such a regime is to be considered as effective or whether it is essentially fictitious, either for the whole or a part of the territory. There always remains reserved the question whether the establishment of such a system is not forbidden by the pre-existing rights of other States.

The point of view here adopted by the Arbitrator is — at least in principle — in conformity with the attitude taken up by the United States in the note already quoted above, from the Secretary of State to the Spanish Minister, dated January 7<sup>th</sup>, 1900 and relating to two small islands lying just outside the line drawn by the Treaty of Paris, but claimed by the United States under the said Treaty. The note

states that the two islands "have not hitherto been directly administered by Spain, but have been successfully claimed by Spain as a part of the dominions of her subject, the Sultan of Sulu. As such they have been administered by Sulu agencies, under some vague form of resident supervision by Spanish agencies, which latter have been withdrawn as a result of the recent war".

This system of contracts between colonial Powers and native princes and chiefs is even expressly approved by Article V of the Treaty of Münster quoted above; for, among the "Potentates, Nations and Peoples", with whom the Dutch State or Companies may have concluded treaties of alliance and friendship in the East and West Indies, are necessarily the native princes and chiefs.

The Arbitrator can therefore not exclude the contracts invoked by the Netherlands from being taken into consideration in the present case.

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As to the *identity of the island* in dispute with the islands "Melangis (Palmas)" and "Miangas" in the contracts of 1885 and 1899 respectively, this must be considered as established by the large scale map which was sent to the Governor General of the Netherlands Indies by the Resident of Menado in January 1886 and which indicates in different colours the administrative districts on the Sangi and Talauer Islands in almost complete conformity with the description of the territory of Taruna given in the annex to the contract of 1885, save that the name of Nanusa, applied to the group of seven islands by the contract, is there given to a single island of this group, usually called Merampi (Mehampi). This large scale map, prepared evidently for administrative purposes, of which a reproduction has been filed with the Explanations of the Netherlands Government, shows an isolated island "Palmas of Melangis" which, though not quite correct in size and shape and though about 46' too much to the south and 20' too much to the east, cannot but correspond to Palmas (or Miangas), since the most reliable detailed modern maps, in particular the British Admiralty Chart, show no other island but Palmas (or Miangas) between the Talauer or Nanusa Islands and Mindanao.

This comparatively correct location of the island is supported by earlier maps. The map edited at Amsterdam by Covens and Mortier at a date not exactly known, but certainly during the 18<sup>th</sup> century, shows at about the place of Palmas (or Miangas) a single island with the inscription "'t regte P<sup>o</sup> Menangus" (the right island Menangus) as distinguished from the "engelsche Eilanden Menangus" and from the group of the Nanusa. This map proves that before that time uncertainty had existed as to the real existence of one or several islands Menangus, an uncertainty evidently due in its origin to the mention of the existence of "Islands Meangis" made by the Englishman Dampier, in his book published in 1698.

In conformity with this statement by Covens and Mortier, the map contained in the book published in 1855 by the navigator Cuarteron shows a single island "Mianguis", not in exactly the place of the island in dispute, but distinct from the "Nanuse" and lying about midway between Cape San Augustin and the "Nanuse". Cuarteron's map shows "Mianguis" distinctly as a Dutch possession — by colour expressly indicated as relating to political boundaries; it is accompanied by geographical and statistical information and due to an author who travelled extensively in these parts (1841—1849), and against whose reliability not sufficient reasons have been given. Among other points the explanation gives for "Mianguis" the comparatively exact geographical location (latitude north  $5^{\circ} 33' 30''$  [Special Agreement  $5^{\circ} 35'$ ]); longitude east of Rome  $114^{\circ} 42' 00'' = 127^{\circ} 12' 53''$  east of Greenwich (Special Agreement  $126^{\circ} 36'$ ) and also detailed though evidently only approximative statistical information about the composition of the population. It further appears from Cuarteron's book that "Mianguis" is something apart from the Nanusa, though Cuarteron observes that the "Nanuse" Islands are little known by the geographers under the name of "Mianguis".

A proof of the fact that the Dutch authorities were quite aware of the identity of "Mianguis" with the island charted on many maps as "Palmas" is to be found in the reports of the Commander of the Dutch Government Steamer "Raaf" (November 1896) and of H. M. S. "Edi" (June 1898). These officers mention expressly the double name and give the almost exact nautical location of the island then visited.

One observation is however to be made. The island, shown on the maps and mentioned in the contracts, bears different names: Melangis, Mianguis, Mianguis, Mianguis. In different documents referred to in the Netherland Memorandum and Counter-Memorandum more than a dozen other variations of the name appear, although in the opinion of the Netherland Government they all concern the same island. These differences, sometimes considerable at first sight, are sufficiently explained by the statements of linguistic experts, produced by the Netherland Government. The peculiarity of the native language from which the name of the island is borrowed and the difficulty of transposing the sounds of this language into a western alphabet seem not only to make comprehensible the existence of different spellings, but to explain why precisely these variations have appeared. Differences of spelling are even recorded as such in documents as early as a letter, dated May 11<sup>th</sup>, 1701, of the Governor of the Moluccas and a report, dated September 12<sup>th</sup>, 1726. Moreover, the difference of spelling would not justify the conclusion that the more or less different names referred to different islands; for in the whole region in question no other island has been mentioned to which these names — or at least most of them — would better apply; for the Island of Tangulandang, with the place Minangan already referred to, is clearly distinguished from the island of Mianguis



in the documents of both the 18<sup>th</sup> and the 19<sup>th</sup> centuries relating to the dependencies of Tabukan.

No evidence has been submitted to support the supposition that the island, appearing on some old maps as "t regte Menangus" would be identical with Ariaga (Marare), which, according to a statement of Melvill van Carnbee, mentioned in the United States Memorandum, is uninhabited.

Great stress is laid in the Rejoinder of the United States on the fact that the Nanusa Isles or some Islands of this group are designated by several distinguished cartographers and navigators of the 19<sup>th</sup> century as "Islands Meangis" or by some similar name, and that amongst these cartographers and sailors some are Dutchmen, in particular Baron Melvill van Carnbee. This statement which is, no doubt, exact, cannot however prove that the island Miangas mentioned as a dependency of Tabukan or Taruna or Kandahar-Taruna is to be identified with the "Is. Meangis" and therefore with the Nanusa Isles. It is clear that the cartographers referred to apply the name of "Iles Meangis" or some similar name to a group of Islands. On the other hand, the island the identity of which is disputed can be but a single, distant, isolated island. The attribution of the name Meangis to the Nanusa seems to be an error, because the official documents laid before the Arbitrator which belong about to the same period as the maps mentioning the "Is. Meangis", make a clear distinction between the principal islands composing the Nanusa and the island of Miangas or Meangas or Melangis, though the latter is considered as "onderhoorig" of the Nanusa Isles. The identification of the Nanusa with "Meangis" Islands may be explained by the desire to locate somewhere the Meangis Islands, famous since Dampier's voyage. Seeing that up to very recent times an extraordinary inexactitude about the names and the location of the islands in precisely that part of the Celebes Sea is shown to exist by almost all the maps filed by the Parties, including the two maps of Melvill van Carnbee, an erroneous attribution of the name "Miangas", even by Dutch cartographers, is easily possible.

It is not excluded that the three "English Menangis Islands" which are located on some maps to the east of the "right Menangis" and of which a detailed map with indication of the depth of the surrounding sea has been filed, did in fact exist, but have disappeared in consequence of earthquakes such as reported by Quarteron.

Finally it may be noted that the information concerning Palmas or the other islands such as St. Juan, Mata, Hunter Island, which are to be identified with it, contains, except for the most recent period, nothing which relates to the population of the island; moreover all these names, given to the island, except Mata, may have been given by navigators who did not land or get into contact with the natives. Miangas however is a native name, which the inhabitants must have communicated to the chiefs to whom they were subject and to the navigators with whom they came in touch. The name of Miangas as

designating an inhabited place (*negorij*) is much older than the establishment of the more centralized village in 1892.

It results from these statements that, when the contracts of 1885 and 1899 mentioned, in connection with, but distinct from the Nanusa, a single island Melangis or Miangis as belonging to Taruna or Kandahar-Taruna, only the island in dispute can have been meant, and that this island has been known under these same or similar names at least since the 18<sup>th</sup> century. No plausible suggestion has been made as to what the single island "Miangas", the existence of which cannot be doubted, might be, if it is not the island in dispute.

The special map on sheet 14 (issued in 1901) of the "Atlas van Nederlandsch Oost-Indië (1897—1904), in showing "P. Miangis (Palmas E.)" as a Dutch possession in the place indicated in the Special Agreement, is in conformity with earlier maps and information, particularly with the Government's special map of 1886. Under these circumstances no weight can be given to the fact that on Bogaert's map of 1857 and in the atlas of Stemfort and Siethoff (1883—85), as well as on other maps, a group of islands called Meangis, or a similar name, appears.

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The preliminary questions being settled, the evidence laid before the Arbitrator, by the Netherland Government in support of its claim is now to be considered.

As regards the documents relating to the 17<sup>th</sup> and 18<sup>th</sup> centuries, which in the view of the Netherlands show that already at that date the Prince of Tabukan had not only claimed, but also actually displayed a certain authority over Palmas (or Miangas), the following must be noted:

The Netherland Government gives great weight to the fact that Dutch navigators who, in search of the islands Meangis mentioned by Dampier, were sailing in the seas south of Mindanao and whose reports are at least in part preserved, not only came in sight of Palmas (or Miangas), but were able to state that the island belonged to the native state of Tabukan, which was under Dutch suzerainty, as shown by the contracts of November 3<sup>rd</sup>, 1677, and September 26<sup>th</sup>, 1697.

The existence of Dutch rule would be proved by the fact that the Prince's flag — i. e. the Dutch East India Company's flag — was seen being waved by the people of the island when the Dutch ships *De Bye*, *Larycque* and *De Peer* were in sight of the island on November 21<sup>st</sup>, 1700, but were prevented from landing by the conditions of the sea. The commander of the *Larycque*, who had already sighted the island on November 12<sup>th</sup> of the same year, was instructed to make more precise investigations by landing, and he was able to do so on December 9<sup>th</sup> and 10<sup>th</sup>. Not only was the

Prince's flag again hoisted by the natives, but the inhabitants informed the sailors that the name of the island was "Meangis". They gave to the commander a document — lost since that time — which, dating from 1681 and emanating from Marcus Lalerio, the late king of Tabukan, whose existence and death are confirmed by the contract of 1697, stated the allegiance of the people of "Miangis" towards Tabukan. There exists however only an indirect report on this visit of December 10<sup>th</sup>, 1700, namely a letter dated May 11<sup>th</sup>, 1701, and sent by the Governor in Council of the Moluccas at Ternate to the Governor General and India Council. In this letter, based, no doubt, on information furnished by the commander of the Larycque, who had reached Ternate on December 29<sup>th</sup>, 1700, the Governor says that the island in question is the farthest of the Talauer islands and that its name, correctly spelt, is not "Meangis", but "Mayages".

These statements as well as the circumstance that all the reports without any mention of neighbouring islands, speak of a single island, the shape of which corresponds fairly with that of Palmas (or Miangas), would make it almost certain that the island in question is in fact Palmas (or Miangas), unless the nautical observations given in the report mentioned above (4° 49'; 4° 37'; 5° 9') might point to the Nanusa group, to which the allegiance with Tabukan would equally apply. These observations, though no doubt subject to error, would however seem to offer relatively more guarantee of accuracy than those based on the length of time taken to cover a distance at sea, mainly relied upon in the Netherlands Memorandum for the location of the island. Since, however, no other single island in those parts of the Sea of Celebes seems to exist, and since it is most unlikely that the navigators would on none of the three visits in November and December have sighted and mentioned neighbouring islands, there is at least a great probability that the island visited by the Larycque on December 10<sup>th</sup>, 1700, was Palmas (or Miangas).

The mention of an island "Meamgy", in connection with, but distinct from the Nanusa, appears again in a document, dated November 1<sup>st</sup>, 1701, concerning regulations as to criminal justice (suppression of vendetta and reservation of capital punishment as an exclusive prerogative of the East-India-Company) in the native State of Tabukan, to which the island visited December 10<sup>th</sup>, 1700, was reported to belong. The fact that the regulations for Tabukan are, by an express provision, declared applicable to the "islands of Nanusa and Meamgy thereunder included" proves that an island of the latter name was known and deliberately treated as belonging to the vassal State of Tabukan.

In a report of the Governor of Ternate, dated June 11<sup>th</sup>, 1706, the island "Miangas" is mentioned as the northernmost of the dependencies of the native States of Tabukan and Taruna, in connection with "Kakarotang" (Onrata or Kakarutan on the Brit. Adm. map), one of the Nanusa, and explicitly identified with the island first seen

by the Larycque on November 21<sup>st</sup>, 1700. Finally, another report of the Governor of Ternate, dated September 12<sup>th</sup>, 1726, mentions a decision on the question whether 80 Talauers (inhabitants of the Talauer islands) who had arrived at Taruna from the island "Meangas off. (or) Mejages" were subjects of Taruna or of Tabukan. This island is expressly identified with that which was visited in 1700 by the commander of the Larycque.

This documentary evidence, taken together with the fact that no island called Miangas or bearing a similar name other than Palmas (or Miangas) seems to exist north of the Talautse (Sangi) and Talauer Iles, leads to the conclusion that the island Palmas (or Miangas) was in the early part of the 18<sup>th</sup> century considered by the Dutch East India Company as a part of their vassal State of Tabukan. This is the more probable for the reason that in later times, notably in an official report of 1825, the "far distant island Melangis" is mentioned again as belonging to Tabukan.

In the documents subsequent to 1825, Miangas (Melangis) appears as a dependency of Taruna, another of the vassal States in the north of Sangi (Groot Sangihe), which already in 1726 had claimed the island as its own. The date and circumstances of this transfer are not known, but it must have taken place before 1858; for a report of the Governor of Menado, dated December 31<sup>st</sup>, 1857, mentions the Nanusa and "Melangis" as parts of Taruna. This state of things has been maintained in the contracts of 1885 and 1899. From the point of view of international law, the transfer from one to another vassal-State is to be considered as a purely domestic affair of the Netherlands; for their suzerainty over Tabukan and Taruna goes back far beyond the date of this transfer.

Considering that the contracts of 1676 and 1697 with Tabukan established in favour of the Dutch East India Company extensive rights of suzerainty over Tabukan and an exclusive right of intercourse with that State, and considering further that at least two characteristic acts of jurisdiction expressly relating to Miangas, in 1701 and 1726, are reported, whilst no display of sovereignty by any other Power during the same period is known, it may be admitted that at least in the first quarter of the 18<sup>th</sup> century, and probably also before that time, the Dutch East India Company exercised rights of suzerainty over Palmas (or Miangas) and that therefore the island was at that time, in conformity with the international law of the period, under Netherlands sovereignty.

No evidence has been laid before the Arbitrator from which it would result that this state of things had already existed in 1648 and had thus been confirmed by the Treaty of Münster. It suffices to refer to what has already been said as to this Treaty in connection with the title claimed by Spain. On the one hand, it cannot be invoked as having transformed a state of possession into a conventional title *inter partes*, for the reason that Dutch possession of the island

Palmas (or Miangas) is not proved to have existed at the critical date. On the other hand, it was stated that neither the Treaty of Münster nor the Treaty of Utrecht, if they are at all applicable to the case, could at present be invoked for invalidating the acquisition of sovereignty over Palmas (or Miangas) obtained by the Dutch at a date subsequent to 1648. It follows rather from what has been said about the rights of Netherlands suzerainty over Tabukan, in the early 18<sup>th</sup> century, and as to relations between Tabukan and Palmas (or Miangas), that the Treaty of Utrecht recognized these rights of suzerainty as comprising the radja of Tabukan amongst the "potentates, nations and peoples with whom the Lords States or members of the East and West India Companies are in friendship and alliance".

The admission of the existence of territorial sovereignty early in the 18<sup>th</sup> century and the display of such sovereignty in the 19<sup>th</sup> century and particularly in 1906, would not lead, as the Netherlands Government appears to suppose, by analogy with French, Dutch and German civil law, to the conclusion that, unless the contrary is proved, there is a presumption for the existence of sovereignty in the meantime. For the reasons given above, no presumptions of this kind are to be applied in international arbitrations, except under express stipulation. It remains for the Tribunal to decide whether or not it is satisfied of the continuous existence of sovereignty, on the ground of evidence as to its display at more or less long intervals.

There is a considerable gap in the documentary evidence laid before the Tribunal by the Netherlands Government, as far as concerns not the vassal-State of Tabukan in general, but Palmas (or Miangas) in particular. There is however no reason to suppose, when the Resident van Delden, in a report of 1825, mentioned the island "Melangis" as belonging to Tabukan, that these relations had not existed between 1726 and 1825.

Van Delden's report, as well as later documents relating to the 19<sup>th</sup> century, shows that Miangas was always considered by the Dutch authorities as belonging to the Sangi and Talauer Isles and as being in a particular connection with the Nanusa. An extensive report of the Resident of Menado, dated August 12<sup>th</sup>, 1857, gives detailed statements about the administrative organisation, including the names of the villages (negorijen) and districts or presidencies (djoegoeschappen) and the number and title and names of the native officials. The island "Melangis" goes with the Nanusa, but is distinct from the island "Nanoesa" (usually called Mehampi, after the chief village) and Karaton; it is administered by one "radja", who at that time was named Sasoe. This report leaves no room for doubt as to the legal situation of Melangis at that period, and is in conformity with the territorial description given for Palmas (or Miangas) in the contracts of 1885 and 1899 already mentioned, and also with a table, dated September 15<sup>th</sup>, 1889, showing the whole system of adminis-

trative districts in the Talauer Islands which are dependencies of the native principalities of the Sangi Isles.

It would however seem that before 1895 the direct relations between the island and the colonial administration were very loose. In a report on a visit paid to the island in November 1895 by the Resident of Manado, it is stated that, according to the natives, no ship had ever before that time visited the island, and that no European had ever been there; the Resident himself was of opinion that he was the first colonial official who went to Palmas (or Miangas); also the commander of H. M. S. "Edi", who patrolled the Celebes Sea in 1898, mentions that "in man's memory a steamer had never been at Miangas". The documents relating to the time before 1895 are indeed scanty, but they are not entirely lacking. A series of statements made by certain natives, chiefs and others, mostly of good age, whose memories went back far beyond 1906 — at least to 1870 — have been laid by the Netherlands Government before the Tribunal, two of them also in the native language used by the witnesses. It would seem to result from these depositions that the people of Miangas used to send yearly presents (*pahawoea*) to the radja of Taruna as token of their submission; even details about the distribution of the tribute to be collected are given. On the other hand the radja of Taruna was under the obligation to give assistance to the island in case of distress. A deposition made by a Dutch civil officer gives the list of 8 headmen who had been instituted either by the radja of Tabukan (probably Taruna) or by the Resident of Manado at Miangas until 1917.

Whatever may be the value of such depositions made all since 1924, they are at least in part supported by documentary evidence. Thus the list of headmen is confirmed as concerns the nomination of Timpala by a decree signed on September 15<sup>th</sup>, 1889, by the Resident of Manado. The most important fact is however the existence of documentary evidence as to the taxation of the people of Miangas by the Dutch authorities. Whilst in earlier times the tribute was paid in mats, rice and other objects, it was, in conformity with the contract with Taruna of 1885, replaced by a capitation tax, to be paid in money (one florin for each native man above 18 years.). A table has been produced by the Netherlands Government which contains for all the dependencies of the Sangi States situated in the Talauer Islands the number of taxpayers and the amount to be paid. There "Menagasa" ranks as a part of the "Djoegoeschap" (Presidency) of the Nanusa under the dependencies of Taruna, with 88 "Hassilplichtigen" (taxpayers), paying each Fl. 1.—.

It further results from a report of the Controleur of Taruna dated November 17<sup>th</sup>, 1896, that the people of "Melangis" paid their tax by selling products on the larger islands and thus getting the money with which the new tax was to be paid. The effective payment of

the tax is likewise confirmed by the commander of H. M. S. "Edi" in a report dated June 18<sup>th</sup>, 1898.

The report of the Controleur of Taruna referred to mentions the fact that on November 4<sup>th</sup>, 1896, a coat of arms was handed to the "Kapitein-laoet" (administrative head) of "Melangis", just as two days before, the same act had taken place at Karaton (Karatong), an island of the Nanusa. The report mentions that in both cases the native authorities were informed as to the meaning of this act. The distribution of coats of arms and flags as signs of sovereignty is regulated by instructions sanctioned by the Crown in 1843. The coats of arms placed at Miangas in 1896 were found in good state by H. M. S. "Edi" in 1898. The existence of a "vlaggestok" on the island is proved by sketches made in 1895 and 1898 by officers of the Dutch ships "Raaf" and "Edi".

The orders given, May 13<sup>th</sup>, 1898, to H. M. S. "Edi" which was to be stationed in the seas of North-East Celebes and Ternate leave no doubt that the task of the said vessel was to patrol these coasts and the Sangi and Talauer Islands, and, "if necessary, to make respected the rules for the maintenance of strict neutrality". The log-book of the ship proves that H. M. S. "Edi" twice visited Palmas (or Miangas) during the war, in June and in September 1898.

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As regards *the 20<sup>th</sup> century*, it is to be observed that events subsequent to 1906 must in any case be ruled out, in accordance both with the general principles of arbitral procedure between States and with the understanding arrived at between the Parties in the note of the Department of State, dated January 25<sup>th</sup>, 1915, and the note of the Netherlands Minister at Washington, dated May 29<sup>th</sup>, 1915. The events falling between the Treaty of Paris, December 10<sup>th</sup>, 1898 and the rise of the present dispute in 1906, cannot in themselves serve to indicate the legal situation of the island at the critical moment when the cession of the Philippines by Spain took place. They are however indirectly of a certain interest, owing to the light they might throw on the period immediately preceding. It is to be noted in the first place that there is no essential difference between the relations between the Dutch authorities and the island of Palmas (or Miangas) before and after the Treaty of Paris. There cannot therefore be any question of ruling out the events of the period 1899—1906 as possibly being influenced by the existence of the said Treaty. The contract with Kandahar-Taruna of 1899 runs on the same lines as the preceding contract of 1885 with Taurna, and was in preparation already before 1898. The system of taxation, as shown by the table of the years 1904 and 1905, is the same as that instituted in 1895. The headman Tim pala, instituted in 1889, was replaced by a new man only in 1917.

The assistance given in the island after the typhoon of October

1904, though in itself not necessarily a display of State functions, was considered as such — as is shown by the report of the Resident of Menado, dated December 31<sup>st</sup>, 1904 — that the island “Miangis”, which was particularly damaged, could only get the indispensable help through Government assistance („van Gouvernementswege”). Reference may also be made to a relation which seems to have existed already in former times between the tribute paid by the islanders to the Sangi radjas and the assistance to be given to them in time of distress by the larger islands with their greater resources.

## V.

The CONCLUSIONS to be derived from the above examination of the arguments of the Parties are the following:

The claim of the United States to sovereignty over the Island of Palmas (or Miangas) is derived from Spain by way of cession under the Treaty of Paris. The latter Treaty, though it comprises the island in dispute within the limits of cession, and in spite of the absence of any reserves or protest by the Netherlands as to these limits, has not created in favour of the United States any title of sovereignty such as was not already vested in Spain. The essential point is therefore to decide whether Spain had sovereignty over Palmas (or Miangas) at the time of the coming into force of the Treaty of Paris.

The United States base their claim on the titles of discovery, of recognition by treaty and of contiguity, i. e. titles relating to acts or circumstances leading to the acquisition of sovereignty; they have however not established the fact that sovereignty so acquired was effectively displayed at any time.

The Netherlands on the contrary found their claim to sovereignty essentially on the title of peaceful and continuous display of state authority over the island. Since this title would in international law prevail over a title of acquisition of sovereignty not followed by actual display of state authority, it is necessary to ascertain in the first place, whether the contention of the Netherlands is sufficiently established by evidence, and, if so, for what period of time.

In the opinion of the Arbitrator the Netherlands have succeeded in establishing the following facts:

*a.* The Island of Palmas (or Miangas) is identical with an island designated by this or a similar name, which has formed, at least since 1700, successively a part of two of the native States of the Island of Sangi (Talautse Isles).

*b.* These native States were from 1677 onwards connected with the East India Company, and thereby with the Netherlands, by contracts of suzerainty, which conferred upon the suzerain such powers as would justify his considering the vassal state as a part of his territory.



c. Acts characteristic of State authority exercised either by the vassal state or by the suzerain Power in regard precisely to the Island of Palmas (or Miangas) have been established as occurring at different epochs between 1700 and 1898, as well as in the period between 1898 and 1906.

The acts of indirect or direct display of Netherlands sovereignty at Palmas (or Miangas), especially in the 18<sup>th</sup> and early 19<sup>th</sup> centuries are not numerous, and there are considerable gaps in the evidence of continuous display. But apart from the consideration that the manifestations of sovereignty over a small and distant island, inhabited only by natives, cannot be expected to be frequent, it is not necessary that the display of sovereignty should go back to a very far distant period. It may suffice that such display existed in 1898, and had already existed as continuous and peaceful before that date long enough to enable any Power who might have considered herself as possessing sovereignty over the island, or having a claim to sovereignty, to have, according to local conditions, a reasonable possibility for ascertaining the existence of a state of things contrary to her real or alleged rights.

It is not necessary that the display of sovereignty should be established as having begun at a precise epoch; it suffices that it had existed at the critical period preceding the year 1898. It is quite natural that the establishment of sovereignty may be the outcome of a slow evolution, of a progressive intensification of state control. This is particularly the case, if sovereignty is acquired by the establishment of the suzerainty of a colonial over a native State, and in regard to outlying possessions of such a vassal state.

Now the evidence relating to the period after the middle of the 19<sup>th</sup> century makes it clear that the Netherlands Indian Government considered the island distinctly as a part of its possessions and that, in the years immediately preceding 1898, an intensification of display of sovereignty took place.

Since the moment when the Spaniards, in withdrawing from the Moluccas in 1666, made express reservations as to the maintenance of their sovereign rights, up to the contestation made by the United States in 1906, no contestation or other action whatever or protest against the exercise of territorial rights by the Netherlands over the Talautse (Sangi) Isles and their dependencies (Miangas included) has been recorded. The peaceful character of the display of Netherlands sovereignty for the entire period to which the evidence concerning acts of display relates (1700—1906) must be admitted.

There is moreover no evidence which would establish any act of display of sovereignty over the island by Spain or another Power, such as might counter-balance or annihilate the manifestations of Netherlands sovereignty. As to third Powers, the evidence submitted to the Tribunal does not disclose any trace of such action, at least from the middle of the 17<sup>th</sup> century onwards. These circumstances, together with the

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absence of any evidence of a conflict between Spanish and Netherlands authorities during more than two centuries as regards Palmas (or Miangas), are an indirect proof of the exclusive display of Netherlands sovereignty.

This being so, it remains to be considered first whether the display of state authority might not be legally defective and therefore unable to create a valid title of sovereignty, and secondly whether the United States may not put forward a better title to that of the Netherlands.

As to the conditions of acquisition of sovereignty by way of continuous and peaceful display of state authority (so-called prescription), some of which have been discussed in the United States Counter Memorandum, the following must be said:

The display has been open and public, that is to say that it was in conformity with usages as to exercise of sovereignty over colonial states. A clandestine exercise of state authority over an inhabited territory during a considerable length of time would seem to be impossible. An obligation for the Netherlands to notify to other Powers the establishment of suzerainty over the Sangi States or of the display of sovereignty in these territories did not exist.

Such notification, like any other formal act, can only be the condition of legality as a consequence of an explicit rule of law. A rule of this kind adopted by the Powers in 1885 for the African continent does not apply *de plano* to other regions, and thus the contract with Taruna of 1885, or with Kandahar-Taruna of 1889, even if they were to be considered as the first assertions of sovereignty over Palmas (or Miangas) would not be subject to the rule of notification.

There can further be no doubt that the Netherlands exercised the state authority over the Sangi States as sovereign in their own right, not under a derived or precarious title.

Finally it is to be observed that the question whether the establishment of the Dutch on the Talautse Isles (Sangi) in 1677 was a violation of the Treaty of Münster and whether this circumstance might have prevented the acquisition of sovereignty even by means of prolonged exercise of state authority, need not be examined, since the Treaty of Utrecht recognized the state of things existing in 1714 and therefore the suzerain right of the Netherlands over Tabukan and Miangas.

The conditions of acquisition of sovereignty by the Netherlands are therefore to be considered as fulfilled. It remains now to be seen whether the United States as successors of Spain are in a position to bring forward an equivalent or stronger title. This is to be answered in the negative.

The title of discovery, if it had not been already disposed of by the Treaties of Münster and Utrecht would, under the most favourable and most extensive interpretation, exist only as an inchoate title, as a claim to establish sovereignty by effective occupation. An inchoate title however cannot prevail over a definite title founded on continuous and peaceful display of sovereignty.

The title of contiguity, understood as a basis of territorial sovereignty, has no foundation in international law.

The title of recognition by treaty does not apply, because even if the Sangi States, with the dependency of Miangas, are to be considered as "held and possessed" by Spain in 1648, the rights of Spain to be derived from the Treaty of Münster would have been superseded by those which were acquired by the Treaty of Utrecht. Now if there is evidence of a state of possession in 1714 concerning the island of Palmas (or Miangas), such evidence is exclusively in favour of the Netherlands. But even if the Treaty of Utrecht could not be taken into consideration, the acquiescence of Spain in the situation created after 1677 would deprive her and her successors of the possibility of still invoking conventional rights at the present time.

The Netherlands title of sovereignty, acquired by continuous and peaceful display of state authority during a long period of time going probably back beyond the year 1700, therefore holds good.

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The same conclusion would be reached, if, for arguments sake it were admitted that the evidence laid before the Tribunal in conformity with the rules governing the present procedure did not — as it is submitted by the United States — suffice to establish continuous and peaceful display of sovereignty over the Island of Palmas (or Miangas). In this case no Party would have established its claims to sovereignty over the Island and the decision of the Arbitrator would have to be founded on the relative strength of the titles invoked by each Party.

A solution on this ground would be necessary under the Special Agreement. The terms adopted by the Parties in order to determine the point to be decided by the Arbitrator (Article I) presuppose for the present case that the Island of Palmas (or Miangas) can belong only either to the United States or to the Netherlands, and must form in its entirety a part of the territory either of the one or of the other of these two Powers, Parties to the dispute. For since, according to the terms of its Preamble, the Agreement of January 23<sup>rd</sup>, 1925, has for object to "terminate" the dispute, it is the evident will of the Parties that the arbitral award shall not conclude by a "non liquet", but shall in any event decide that the island forms a part of the territory of one or the other of two litigant Powers.

The possibility for the Arbitrator to found his decision on the relative strength of the titles invoked on either side must have been envisaged by the Parties to the Special Agreement, because it was to be foreseen that the evidence produced as regards sovereignty over a territory in the circumstances of the island in dispute might prove not to be sufficient to lead to a clear conclusion as to the existence of sovereignty.

For the reasons given above, no presumption in favour of Spanish

sovereignty can be based in international law on the titles invoked by the United States as successors of Spain. Therefore, there would not be sufficient grounds for deciding the case in favour of the United States, even if it were admitted, in accordance with their submission, that the evidence produced by the Netherlands in support of their claim either does not relate to the Island in dispute or does not suffice to establish a continuous display of state authority over the island. For, in any case, the exercise of some acts of state authority and the existence of external signs of sovereignty, e. g. flags and coat of arms, has been proved by the Netherlands, even if the Arbitrator were to retain only such evidence as can, in view of the trustworthy and sufficiently accurate nautical observations given to support it, concern solely the island of Palmas (or Miangas), namely that relating to the visits of the steamer "Raaf" in 1895, of H. M. S. "Edi" in 1898 and of General Wood in 1906.

These facts at least constitute a beginning of establishment of sovereignty by continuous and peaceful display of state authority, or a commencement of occupation of an island not yet forming a part of the territory of a state; and such a state of things would create in favour of the Netherlands an inchoate title for completing the conditions of sovereignty. Such inchoate title, based on display of state authority, would, in the opinion of the Arbitrator, prevail over an inchoate title derived from discovery, especially if this latter title has been left for a very long time without completion by occupation; and it would equally prevail over any claim which, in equity, might be deduced from the notion of contiguity. International law, like law in general, has the object of assuring the coexistence of different interests which are worthy of legal protection. If, as in the present instance, only one of two conflicting interests is to prevail, because sovereignty can be attributed to but one of the Parties, the interest which involves the maintenance of a state of things having offered at the critical time to the inhabitants of the disputed territory and to other States a certain guarantee for the respect of their rights ought, in doubt, to prevail over an interest which — supposing it to be recognized in international law — has not yet received any concrete form of development.

Supposing that, at the time of the coming into force of the Treaty of Paris, the Island of Palmas (or Miangas) did not form part of the territory of any State, Spain would have been able to cede only the rights which she might possibly derive from discovery or contiguity. On the other hand, the inchoate title of the Netherlands could not have been modified by a treaty concluded between third Powers; and such a treaty could not have impressed the character of illegality on any act undertaken by the Netherlands with a view to completing their inchoate title — at least as long as no dispute on the matter had arisen, i. e. until 1906.

Now it appears from the report on the visit of General Wood to Palmas (or Miangas), on January 21<sup>st</sup>, 1906, that the establishment of

Netherlands authority, attested also by external signs of sovereignty, had already reached such a degree of development, that the importance of maintaining this state of things ought to be considered as prevailing over a claim possibly based either on discovery in very distant times and unsupported by occupation, or on mere geographical position.

This is the conclusion reached on the ground of the relative strength of the titles invoked by each Party, and founded exclusively on a limited part of the evidence concerning the epoch immediately preceding the rise of the dispute.

This same conclusion must impose itself with still greater force if there be taken into consideration — as the Arbitrator considers should be done — all the evidence which tends to show that there were unchallenged acts of peaceful display of Netherlands sovereignty in the period from 1700 to 1906, and which — as has been stated above — may be regarded as sufficiently proving the existence of Netherlands sovereignty.

For These Reasons

The Arbitrator,

in conformity with Article I of the Special Agreement of January 23<sup>rd</sup>, 1925  
decides that:

The Island of Palmas (or Miangas) forms in its entirety a part of Netherlands territory.

Done at The Hague, this fourth day of April 1928.

Max Huber,

*Arbitrator.*

Michiels van Verduynen,

*Secretary General.*"

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