AWARD OF DON JOAQUIN FERNANDEZ PRIDA, ARBITRATOR IN THE MATTER OF THE SOUTHERN BOUNDARY OF THE TERRITORY OF WALFISH BAY. MADRID, 23 MAY, 1911 [1]

Titre sur un territoire — Annexion — Occupation — Actes constituant une occupation effective — Acquiescement et possession — Doctrine dite de " hinterland " — Interprétation de la Proclamation d'annexion — Eléments d'interprétation — Sens du terme « plateau » — Cartes géographiques considérées comme preuves — Valeur d'une déposition sur la foi d'autrui — Valeur d'une déposition faite par des natifs — La responsabilité de l'Etat et les actes officiels de ses fonctionnaires — Pouvoir de l'arbitre de déterminer sa propre compétence — Effet de la délimitation unilatérale d'une frontière.

DON JOAQUIN FERNANDEZ PRIDA, Senator of the Kingdom of Spain and Professor of International Law at the University of Madrid, performing the functions of Arbitrator conferred on him by His Majesty the King of Spain in pursuance of the Declaration of the 30th January, 1909, signed at Berlin by the Representatives of Great Britain and Germany, to settle the question pending between those Powers on the subject of the southern frontier of the British territory of Walfish Bay, has given in the said capacity, after having examined the facts and arguments adduced by the two parties, the following Award:

I. WHEREAS on the 12th March, 1878,[2] the Captain of the ship *Industry*, belonging to the British squadron, took possession, in the name of Her Majesty the Queen of Great Britain and Ireland, of the port and station of Walfish Bay and of certain adjacent territory, announcing by the necessary Proclamation that the annexed district was bounded as follows:

" On the south by a line from a point on the coast 15 miles south of Pelican Point to Scheppman's Dorp; on the east by a line from Scheppman's Dorp to Rooibank, including the plateau, and thence to 10 miles inland from the mouth of the Swakop River; on the north by the last 10 miles of the course of the Swakop River";

II. WHEREAS the said annexation and Proclamation were preceded by various preparatory documents emanating from the Cape Government, the Colonial Office at London, and other British authorities, amongst which documents a special series was constituted by those intended to fix the extent and boundaries of the territory which was to be annexed, together with the harbour of Walfish Bay, the following being especially noteworthy in that series:

(1.) The communication of the 23rd January, 1878, addressed by Lord Carnarvon to Governor Sir H. Bartle Frere, which states that " the British

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[1] *British and Foreign State Papers*, vol. 104, p. 50. See also: *Hertslet's Commercial Treaties*, vol. 26, p. 187; De Martens, *Nouveau Recueil général de traités*, 3e série, t. VI, p. 396; *Parliamentary Paper*, " *Africa, No. 1 (1911)* " Cd. 5857.

[2] *British and Foreign State Papers*, vol. LXIX, p. 1177.

flag should be hoisted in Walfish Bay, but that, at least for the present, no jurisdiction was to be exercised beyond the shores of the bay itself";

(2.) The telegram of the 23rd February, 1878, addressed by the Governor from King William's Town to Captain Mills, the Colonial Secretary, stating with regard to Walfish Bay that it would be preferable that the naval officer should, on the hoisting of the flag, proclaim sovereignty only over the station and the bay itself and a radius of 10 or 12 miles or so, according as it might appear necessary after consultation with Palgrave, it being added to these instructions that, although the author of the telegram proposed to ask for the increase of the territory annexed, it was understood that "for the present the annexation should be confined to the precise limits indicated by the Minister";

(3.) The communication of the 26th February, 1878, addressed by the Colonial Secretary of Cape Colony to the Senior Naval Officer at Simon's Bay, instructing him to direct the Captain of Her Majesty's ship *Industry* to proceed to Walfish Bay and hoist the British flag and take possession of the port, station and adjacent territory to a distance in the interior which he should determine in consultation with Mr. Palgrave if he were on the spot; and

(4.) The supplementary instructions addressed on the 28th February, 1878, by Captain J. Child Purvis to the Captain of the ship *Industry*, Richard C. Dyer, in which, among other things, he is told to consult with Mr. Palgrave "as to the exact amount of territory to be annexed";

III. WHEREAS on the date of the Proclamation of Annexation, Commander Dyer, in conformity with instructions received, drew up a short memorandum addressed to Commodore F. W. Sullivan, with the intention of explaining the circumstances of the annexation, and in which he states among other things: —

That, owing to the absence of Mr. Palgrave, he judged it necessary to decide for himself the extent of the territory to be annexed, "being guided generally by the telegram from Sir Bartle Frere, dated the 23rd February, and by the requirements of the Bay"; that he fixed the boundaries of the said territory in accordance with the information and advice of Mr. Ryden, representative of Ericsson and Co., of Capetown, and of other white people residing in the Colony; that "as there was no fresh water nor pasture in Walfish Bay," he considered it indispensable that there should be included in the annexation, if possible, a place containing both these things, and that "with this object he made a journey in a bullock-waggon to Rooibank, taking with him two officers as companions to view the plateau"; that "this place is considered with some differences of opinion as from 13 to 18 miles to the east of Walfish Bay, but that it is nine hours by wagon," and "is an oasis thickly covered with grassand scrub and well watered, and the nearest point available to supply the Bay with water and good pasture"; that "as there are no fixed points on the immediate coast, it was decided that the plateau of Rooibank and Scheppmansdorf to the south-east should be included in a line drawn from 15 miles south of Pelican Point to 10 miles inland from the mouth of the Swakop," and that the natives especially invited to be present at the annexation ceremonies and modestly entertained in honour of the solemnity were apparently very pleased and satisfied with the annexation, which was explained to them by means of an interpreter;

IV. WHEREAS on the 1st May, 1878, Commodore F. W. Sullivan sent to Sir B. Frere a copy of the memorandum mentioned in the preceding recital, accompanied by a communication in which he states that "the boundaries fixed by Commander Dyer appear reasonable";

V. WHEREAS, by Letters Patent dated at Westminster the 14th December, 1878, Her Britannic Majesty ratified and confirmed the aforesaid Proclamation of the 12th March of the same year, and authorized the Governor of the Colony of the Cape of Good Hope, with the assent of the Legislature, to declare by a new Proclamation that from the date fixed in it " the harbour, station, and territory of Walfish Bay," as demarcated by Commander Dyer, should be annexed to the said Colony;

VI. WHEREAS on the 25th July, 1884 [1] the Legislature of the Cape of Good Hope consented to the annexation to that Colony of the harbour or station of Walfisch Bay and of the surrounding territory, in virtue of which the Governor, Sir Hercules G. R. Robinson, proclaimed, on the 7th August of the same year,[2] the incorporation in Cape Colony and subjection to the laws in force there of the territory of Walfish Bay, and confirmed the demarcation of the same contained in former documents. and established there in addition a Court constituted by a resident magistrate;

VII. WHEREAS on the date of the 7th August aforementioned the zone on the West African Coast comprised between the mouth of the Orange River and the 26th parallel south latitude was placed under German protection; and, soon after, the adjacent coast comprised between the 26th parallel and Cape Frio, with the exception of the British territory of Walfish Bay;

VIII. WHEREAS in the month of March 1885 a Commission was appointed, entitled " the Mixed Claims Commission of Angra Pequeña and the West Coast," formed by Dr. Bieber as German representative and Judge Shippard as British representative, and the said Commission, after conducting an enquiry on oath, alluded to above, relative to the limits of Walfish Bay, signed on the 14th August of the said year 1885 a letter addressed to the High Commissioner, Sir H. Robinson, in which, with the object of correcting errors and deficiencies noticed in the determination of the boundaries, the following is stated: —

" The limits of the territory of Walfish Bay, laid down in Commander Dyer's Proclamation, and in the Letters Patent of 1878, in the Annexation Act of 1884, and in the Proclamation of the 7th August of the same year, should be corrected as follows: —

" 'Scheppmansdorf' should be designated as 'Scheppmansdorf' or 'Rooibank', and what has been called 'the Rooibank' should be 'Rooikop.' The Admiralty charts should also be corrected to agree with this. The eastern boundary, marked on Dr. Theophilus Hahn's map, published in 1879, and copied in Juta's map of 1885, is incorrect ";

IX. WHEREAS the Governor and High Commissioner, Sir H. Robinson, addressed a communication to Colonel Stanley, dated the 24th September, 1885, on the subject of the statement of the Mixed Commission quoted above, taking into account the mistakes pointed out in the text of the Proclamation of the 12th March, 1878, and the official documents reproducing it, observing, besides, that the mistake arose from Commander Dyer calling the hill near the centre of the eastern frontier " Rooibank" , when its name is really " Rooikop ", adding that Rooibank and Scheppmansdorf are two names for the same place, which is a township situated on both banks of the River Kuisip, remarking that there is no difference of opinion between the German and British Commissioners with regard to the real boundary of the territory of Walfish Bay on the eastern side, but that this boundary has been incorrectly described in the various

[1] *Ibid.*, Vol. LXXV, page 408. The Act was assented to on July 22 and promulgated on July 25, 1884.

[2] *Ibid.*, Vol. LXXV, page 407.

documents defining it, asking him further whether he considered himself to possess the necessary powers to publish a new Proclamation correcting the mistake alluded to; and stating finally that " nevertheless it might be convenient before publishing a new Proclamation or Letters Patent, to await the conclusion of the survey of the boundaries of the territory of Walfish Bay which the Colonial Government was carrying out at that moment, as it would be desirable that the boundaries of the plateau between Scheppmansdorf and Rooikop included in the territory should be defined with precision ";

X. WHEREAS the British Government, in agreement with the final observation contained in the communication quoted in the preceding recital, postponed the publication of new Letters Patent setting forth a complete and exact description of the territory of Walfish Bay until the conclusion of the labours of examination and survey which the surveyor (Mr. Wrey) was then carrying out on the spot by the orders of the Cape Government, the results of which labours with regard to the fixing of the boundaries could, according to a letter addressed by the Colonial Office to the Foreign Office on the 22nd October, 1885, be communicated to the German Government before the publication of the Letters Patent referred to;

XI. WHEREAS Mr. Wrey, after the termination of the work of inspection and survey which the Cape Government ordered him to undertake, drew up a report, dated the 14th January, 1886, accompanied by a map on which he marks out the territory of Walfish Bay by means of thirteen pillars designated by as many letters in alphabetical order in the following manner: —

Pillar A, situated at Pelican Point;

Pillar B, 15 geographical miles to the south of the former, near the coast;

Pillar C, behind the mission station at Rooibank;

Pillars D, E, and F, between the preceding pillar and Ururas, marking a line which separates the sand-hills from the left, or south, bank of the River Kuisip;

Pillar G, on the opposite side of the same river, coinciding with the extremity of the land asked for by by Messrs. Wilmer and Evensen in Ururas;

Pillar H, on the top of Rooikop, in the desert of Nariep;

Pillar J, on the top of the black rock called Nuberoff, situated on the south bank of the River Swakop, at a distance of 10 miles approximately from its mouth;

Pillars K, L, and M, following the general direction of the course of the Swakop towards the sea; and

Pillar N, in Walfisch Bay, in front of the Resident's house;

XII. WHEREAS, in accordance with the demarcation mentioned, the area now in dispute, *i.e.*, the fertile tract of the bed of the Kuisip, bounded by the mission station at Rooibank and the place called Ururas, some 5 miles distant from it, is included in British territory; which tract, in the judgment of Mr. Wrey, as it appears from his report quoted and the supplementary report dated the 31st August, 1889, is the only one whose natural features can correspond with the " plateau " spoken of in the Proclamation of the 12th March, 1878, since, although the word " plateau ", he says, is a term unsuited to the land referred to, the inspection and verification carried out made it impossible for him to refer to anything but the area or surface in question, that is to say, to the area which the waters of the Kuisip, which ordinarily run underground, cover when in flood from Rooibank to Ururas in one direction and from the desert to the boundary of the dunes or sand-hills in the other;

XIII. WHEREAS in his communication of the 8th June, 1886, Dr. Bieber, German Consul-General at the Cape, called the attention of the British authori-

ties to the action of Mr. Wrey, who (instead of stopping at Scheppmansdorf to draw the eastern frontier of the territory of Walfish Bay from that place to Rooikop) had beaconed the bed of the Kuisip as far as Ururas, in spite of the fact that the last-named place is not mentioned in the Act or in the Proclamation of Annexation;

XIV. WHEREAS, in reply to Dr. Bieber's communication, the following documents were furnished him amongst others: —

1. A report, addressed on the 22nd August, 1886, to the Ministry of Crown Lands by the Surveyor-General of the Colony of the Cape of Good Hope, Mr. Smidt, giving it to be understood that Mr. Wrey proceeded in accordance with instructions received, based in their turn on a memorandum by Judge Shippard, drawn up in June 1885, according to which the frontier-line should include the pastures of Scheppmansdorf as far as Ururas, and should continue thence to Rooibank, in order that in this way the whole of the plateau should be included in British territory;

2. A communication addressed by the Ministry of Crown Lands to the Colonial Office, dated the 1st September, 1886, in which it is stated that Judge Shippard's opinion should be ascertained as to Dr. Bieber's claim, in view of the circumstance that he had drawn up the memorandum which served as the basis of Mr. Wrey's instructions, and of the lack of precision in the terms employed in the Act of Annexation and in Commander Dyer's Proclamation, and because the fact of there being no mention of Ururas in the said documents makes it difficult to understand the reasons why Mr. Shippard considered that the southern boundary should be extended in an easterly direction to Ururas instead of stopping at Rooibank or Scheppmansdorf.

3. A report drawn up by Mr. Shippard on the 30th September, 1886, in consequence of what was indicated in the preceding document, in which he expresses his agreement with the demarcation carried out by Mr. Wrey, basing it on arguments which since they were accepted and reproduced in the British memorandum in the course of the arbitration proceedings, will have to be mentioned later, as also all the other arguments which are in an analogous position;

XV. WHEREAS, in his communication of the 20th October, 1886, Dr. Bieber, when invited to express his opinion as to the documents cited in the preceding recital, insists upon considering Mr. Wrey's demarcation inadmissible, alleging, in justification of this opinion, various reasons, the substance of which was incorporated afterwards in the German memorandum, which will be dealt with at the proper moment;

XVI. WHEREAS the Ministers of the Colony of the Cape of Good Hope, in minutes dated the 4th November, 1886, and the 25th July, 1887, showed their complete agreement, in spite of Dr. Bieber's observations, with Mr. Wrey's demarcation, and pressed in the first of the said documents for its approval, believing it to be in accord with the fixed intention of Her Majesty's Government, and adding in the second new reasons in support of the said demarcation;

XVII. WHEREAS at this juncture, Commander, afterwards Captain, Dyer was consulted by the British Government as to the reasons which had guided him in drawing up the Annexation Proclamation, and stated on the 14th September, 1887, that his principal object in mentioning the plateau above Rooibank was to include the pasture-land situated in the bed of the River Kuisip, as persons acquainted with the locality advised him, and that the adoption of the line drawn 15 miles south of Pelican Point carried out the intention of including Scheppmansdorf and the neighbouring pasture-lands;

XVIII. WHEREAS, since on the facts being made known, a considerable correspondence followed between the British and German Governments and the two parties did not arrive at a solution of the difficulty in the course of the negotiations, it was agreed to appoint a mixed commission consisting of Dr. Goering, as German representative, and Colonel Philips, as British representative, who, being unable to draw up a joint report, signed in January 1889 separate reports maintaining the original views of their respective Governments and agreeing only in recognizing, as each of the Commissioners stated separately —

1. That Mr. Wrey's and Dr. Stapff's maps represent accurately the position and topographical features of the ground;

2. That, if it is considered that the plateau in dispute is the river plain beyond Scheppmansdorf, it should be included as far as Ururas;

XIX. WHEREAS, when Captain Dyer, on being invited by the British Government to furnish a new report in reply to the observations and arguments formulated by Dr. Goering, stated on the 24th April, 1889:

That, although his first intention had been to carry out the annexation of Walfisch Bay strictly in accordance with the terms of the telegram sent by the Governor to Captain Mills on the 22nd February, 1878, it was decided, after a conversation with Mr. Ryden and others, and for the reasons explained in his letter of the 12th March of that year, to include Rooibank in the annexed territory:

That, having received information that pasture-lands existed in the neighbourhood of Scheppmansdorf to the south-east of Rooibank, and that it was desirable that they should be included in the annexation, he decided to include Scheppmansdorf entirely, as his principal reason for mentioning this place in defining the boundaries was to secure the plateau or lands which he understood to belong to it;

That, as there was no map of the interior, and reference could only be made to the ordinary map of the coast, he had not been able to mention concrete points, and had been obliged to rely on the experience of the persons resident at the bay and to their description of the places in question;

That he had no recollection of the conversation alluded to by Dr. Goering with reference to Mr. Koch, a witness of the annexation (according to which Captain Dyer had not accepted the advice to annex any part of the valley of the river beyond Scheppmansdorf, stating that he was not authorized to do so, and that he had already exceeded his instructions in drawing the boundary as far as that place), and that, on the other hand, it was difficult to understand Mr. Koch, whose statements, in the last resort, were sufficiently refuted by the fact that Scheppmansdorf had been included on his advice in the annexed territory, and by the fact that the said Mr. Koch had stated, before the Proclamation was published, that he was in agreement with the boundary laid down in it;

XX. WHEREAS, in view of the discrepancies revealed in the course of the discussion, of which mention has been made above, Article 3 of the Agreement signed at Berlin by the representatives of the British and German Governments on the 1st July, 1890 [1] contained the following provisions:

" The delimitation of the southern boundary of the territory of Walfish Bay is reserved for arbitration unless it shall be settled by the consent of the two Powers within two years from the date of the conclusion of this Agreement ";

[1] *Ibid.*, Vol. LXXXII, page 35.

XXI. WHEREAS on the two years mentioned in the Agreement of 1890 elapsing without the High Contracting Parties reaching an agreement about the limits of Walfish Bay, an effort was made nevertheless to solve the matter in dispute by appointing in 1904 a new mixed commission formed by Herr von Frankenberg, nominated by the German Government, and Mr. John J. Cleverly, as British representative, who also failed to settle the dispute, the German commissioner formulating on this occasion claims in regard to another part of the boundary not till then discussed, and considered by the British representative as foreign to the present controversy;

XXII. WHEREAS on the 30th January, 1909, the representatives of the High Parties interested in the matter signed a Declaration at Berlin, having, in accordance with the Agreement of the 1st July, 1890, recourse to His Majesty the King of Spain to designate from amongst his subjects a lawyer to decide as arbitrator the affair relative to the demarcation of the southern frontier of the British territory of Walfish Bay in accordance with the procedure laid down in the same Declaration;

XXIII. WHEREAS by the Royal Decree of the 7th March, 1909, published in the Gazette of Madrid of the 12th of the same month and year, His Majesty the King of Spain deigned to appoint the undersigned to exercise the functions of arbitrator alluded to in the preceding paragraph, the acceptation of which functions was verbally notified by the undersigned on the 19th of the month and year above mentioned at a meeting held at the Ministry of State at Madrid in the presence of the Minister of State and of the German and British Ambassadors;

XXIV. WHEREAS on the 29th November, 1909, and therefore within the space of twelve months laid down in Article 2 of the Declaration of Berlin of the 30th January of that year, the Ministry of State transmitted to the undersigned the memoranda in which the German and British Governments state and support their respective claims with regard to the question in dispute between them, the German memorandum being accompanied by four annexes containing authenticated copies of documents inserted in it and the British memorandum by a full-scale copy of Mr. Wrey's map already referred to;

XXV. WHEREAS the German memorandum, after reciting the history of the question, classifies the arguments in support of the claims advanced in it and the statement made of them, dividing them into various groups designated by as many letters in alphabetical order; examining in the first group, marked (A), the official statements of Captain Dyer interpreted in accordance with the usual technicalities and the topographical conditions of the territory of Walfish Bay; dealing in the second, marked (B), with the official statements of Captain Dyer considered in the light of the economic circumstances of the population, native and white, of the said territory, and further with what Rooibank, Scheppman's Dorp, and Ururas and their mutual connection are or imply: the third group, marked (C), being devoted to showing the discrepancy between the British views before and after 1885, with regard to the drawing of the boundary and to fixing the facts which favour the German views of claims, and to the consideration of the information obtained about them; discussing in the fourth, marked (D), the demarcation carried out by Mr. Wrey and the question of how far it is binding on Germany from the point of view of international law; formulating in the fifth, marked (E), the questions put by the German Government to the arbitrator; and completing all the arguments contained in the preceding groups by an appendix containing some British documents and a criticism of some of them;

XXVI. WHEREAS in the first group, marked (A), it is alleged —

That the word " plateau " employed in Captain Dyer's Proclamation always expresses the idea of a " high plain ", and designates besides in the present case, having regard to the text of the said Proclamation, a district included in the territory of Walfish Bay, by the eastern frontier starting from Scheppmansdorf;

That both conditions are fulfilled, if it is understood that the plateau in question is the Namib, since this is in actual fact a high plain situated to the north-east of Scheppmansdorf;

That the British magistrate at Walfish Bay, Mr. Simpson, alluded to the Namib, when on being questioned before the " Mixed claims Commission for Angra Pequeña and the West Coast ," he stated in a declaration of the 16th April ,1885, that " he had crossed *from Rooibank to the River Swakop by the plateau* " ;

That the Governor of Cape Colony, Sir Hercules Robinson, also employed the word " plateau " to designate the Namib, since, in a letter of the 24th September, 1885, addressed to Colonel Stanley, he had expressed the desire that the limit of the *plateau between Scheppmansdorf and Rooibank* should be accurately defined;

That the portion of the bed of the River Kuisip comprised between Scheppmansdorf and Ururas, and considered by the British Government as the plateau alluded to in Captain Dyer's Proclamation, neither complies with the condition of being a high plain (since it is a watercourse of lower elevation than the Namib and the dunes which serve as its boundary) nor with the condition of being included in the territory of Walfisch Bay by the eastern frontier starting from Scheppmansdorf;

That the impropriety of applying the word " plateau " to this part of the bed of the Kuisip is recognized by the British commissioner, Mr. Philips, when he says in his report of the 23rd February, 1889, that the use of the word " plain " to designate the country referred to " would have been more satisfactory as a technical term and less open to misinterpretation ";

That Mr. Wrey expresses a similar opinion when he says in his report of the 14th January, 1886, that the word " plateau " is an erroneous term as applied to the tract of land situated between Rooibank and Ururas;

That therefore the interpretation of Captain Dyer's Proclamation held by Great Britain implies the supposition that he made a mistake in the use of the most elementary geographical expressions which, in view of his profession, must have been familiar to him; whilst the interpretation put on it by Germany assumes that the text of the Proclamation is entirely correct, except for the confusion of Rooibank with Rooikop, and that the supplementary report, although less clear, leaves hardly anything to be desired;

That the intentions of Captain Dyer, to which his second letter or communication of the 14th September, 1887, refers, cannot be taken into account to decide the question unless they were expressed in the official Proclamation;

That as to the indication in the said report that the plateau is situated *above* Rooibank, this new word " above " is intelligible as referring to the Namib, which precisely is situated " above " Rooibank;

That if Captain Dyer had desired to include in British territory the flat pasture-land towards Ururas, as Mr. Wrey's demarcation includes it, he should have said so explicitly in his second letter when he had before him every kind of map;

That according to Captain Dyer's report dated the 12th March, 1878, the fact that there was in the coastal region no fixed point which could serve as a natural boundary was the reason which, combined with the wish of the colonists,

led to the interior of the country as far as Scheppmansdorf being included in the annexation, because this place was considered as one of the fixed points of the line which was to bound the territory of Walfish Bay on the land side;

That in the said report the words, " this place . . . is an oasis ", referred to Rooibank, and not to the plateau or to the part of the bed of the Kuisip between Rooibank and Ururas, because the plateau cannot be called " a place ", nor a strip arbitrarily taken in the bed of a river be designated by the word " oasis ", above all, when the vegetation on it is less luxuriant than on other contiguous strips;

That to carry out the desire of Captain Dyer to include in the annexation a territory where water and pasture were to be found, there was no need to go as far as Ururas, but that it was sufficient to draw the frontier from Scheppmansdorf, all the more so as between that place and Ururas, according to the evidence of the missionary Boehm, the pastures ordinarily end at the bed of the river, as it is always bare and grassless, although covered with trees;

That when in Captain Dyer's report the inclusion of the plateau " and Scheppmansdorf to the south-east " is spoken of, these words can be understood in a double sense: either that Scheppmansdorf limits the territory to the south-east, or that it is situated to the south-east of the interior plateau; and, finally,

That the phrase " including the plateau ", contained in the Proclamation of Annexation, and reproduced in the report of the same date, is a phrase simply used by Captain Dyer with the object of explaining the motive and manner of annexing a part of the interior of the territory which he incorporated in excess of his instructions and in accordance with his own views;

XXVII. WHEREAS in the second group of arguments, marked (B), it is alleged on the part of the German Government:

That Captain Dyer, in deciding to annex a district containing fresh water and pasture, only had regard to the interest of the white colonists resident at Walfish Bay, without considering at all the convenience of the native population, especially that of not dividing the so-called " grazing commonage " of Rooibank, used by the inhabitants of Scheppmansdorf, since there is not the slightest allusion to it in his explanatory report, although he might have given it as a further reason in justification of his breaking his instructions;

That from the whole context of the Proclamation of Annexation is deduced the intention of establishing in the neighbourhood of Scheppmansdorf not a vague boundary pending further decision, but strict and absolutely precise limits as required by the instructions emanating from Captain Purvis, which directed Commander Dyer to fix in the Proclamation of Annexation, after consulting with Mr. Palgrave, the exact quantity of territory which was to be annexed;

That the place called Rooibank, near Scheppmansdorf, which designates the country surrounding a spring, near a red vein of granite which crosses the Kuisip, is of an undecided character, its extent depending on individual views and on the greater or lesser quantity of pasture used for the cattle belonging to persons residing there, it being understood, until it is expressly stated otherwise, that the boundary between Rooibank and Ururas is half-way between the wells which give names to the two points;

That the mention in Captain Dyer's Proclamation of the place called Rooibank has no bearing on the question of boundaries, since " the Rooibank " spoken of in it is not a place or settlement, but a hill or a large rock some distance from the Kuisip;

That, on the contrary, when it was a question of establishing a fourth fixed point in the description of the south-east corner of the annexed territory,

Captain Dyer (who intentionally avoided the use of the expression " Rooibank ", the indefinite character of which was known to him through his relations with the natives) had mentioned Scheppmansdorf expressly twice, a name which expresses neither less nor more than the mission station situated in Rooibank, consisting of two houses near together;

That there can be no question of a village in the district of Scheppmansdorf, and that this name only indicates that when the station founded by the missionary Scheppman in 1845 was consecrated, there was a hope, which was afterwards not realised, that a native hamlet would be formed round it;

That the British assertion that the territory of the tribe of the Topnaars extended as far as Ururas and ought not to be divided or split up, as it would be if the frontier were drawn in the position claimed by Germany, is refuted by the circumstance that the Topnaar Hottentots are really nomads living along the whole course of the Kuisip right into German territory, at least as far as Hudaob, whence it follows that the territory of the said tribe was divided after the annexation of Walfish Bay, whether the frontier was fixed at Scheppmansdorf or Ururas;

That " the village " and " grazing commonage " of Scheppmansdorf repeatedly cited by Great Britain, assuming that the latter extends to Ururas, do not really exist, since, with one very special exception, life in common in the manner suggested by a village does not correspond with either the character or the mode of living of the Hottentots, nor can there be any question of grazing commonage without the antecedent condition of a juridical community to which it could be attributed;

That the British supposition that the pretended grazing commonage at Scheppmansdorf ought to have been included in the annexation, since otherwise the " inhabitants of the village " would not have shown satisfaction at it, as Captain Dyer expressly says they did in his report of the 12th March, 1878, is a supposition founded on an incomplete quotation of the passage in the report, which alludes not to the " inhabitants of the village of Rooibank ", but to natives whose habitual residence is not stated (" summoned from some distance "), which natives, on the other hand, if they displayed joy at the act of annexation, did so in any case, given their fondness for Cape brandy, on account of the entertainment in which they took part and not because the ceremonies, of which the entertainment formed a part, were intelligible to them;

That the declarations made by the witnesses, Mr. Simpson and the Rev. J. Boehm, in 1885 before the mixed commission on the subject of the grazing commonage of Scheppmansdorf or Rooibank, the meaning of the name Awahaus and the identity of Ururas and Rooibank were full of contradictions;

That, in proof of this, on comparing the said declarations, it is noticed with regard to the first that the witness Simpson states successively that " he does not believe that any community was indicated by the name of Rooibank " (answer to question 384), that " if the grazing commonage includes all the plateau it would include Ururas " (answer to question 395), and that " the commonage of Rooibank extends to Ururas, where a certain number of Bastards have gardens given by Mr. Palgrave and the magistrate who was the witness's predecessor, which Bastards were in the habit, when the grass was finished at Rooibank, of sending their cattle along the river to Ururas, considering it as the pasture of Rooibank " (answers to questions 408 and 409);

That, with regard to the second, the witness Mr. Simpson declares that the place called Awahaus is designated by the name of Ururas (answer to question 381), whilst the witness Boehm states that Rooibank is the translation of the Namaqua name " Awahaus " (answer to question 421);

That, with regard to the third, Boehm declares that Rooibank, Ururas, and Scheppmansdorf are near one another (answer to question 422), and declares afterwards that Rooibank or Scheppmansdorf and Ururas are not very close, but are from three to four hours apart (answer to question 426);

That, with regard to the last, Simpson declares that it would be difficult to say that Rooibank is Ururas (answer to question 404), and Boehm affirms that he has heard it said that they are scarcely half a day apart (answer to question 425), adding immediately that the commissioner to whom the witness is speaking could cover the distance which separates them in some three hours (answer to question 426); and, finally,

That, whatever attitude is adopted towards these statements, so divergent one from the other, and towards their testamentary value in the present case, nevertheless it is not explained why, if Captain Dyer understood by " plateau " the bed of the Kuisip and the " commonage " and desired to include in the annexation the strip of valley midway between Scheppmansdorf and Ururas, he did not mention this last name, which was generally known to the natives, in the text of the Proclamation — a name which he did not insert, nevertheless, in the said text, in order to exceed as little as possible the instructions received by him, and in view of the fact that the principal pastures and springs of Scheppmansdorf were situated below that place, above which Captain Dyer did not desire to annex any territory, in spite of the fact that the agent Koch and the trader Ryden advised him to do so, as stated, in connection with the evidence of the former, in Dr. Goering's report alluded to in recital XVIII of this arbitral decision;

XXVIII. WHEREAS in the third group of arguments, marked (C), it is alleged:

That till the year 1885 it was admitted by the British authorities that the district situated between Scheppmansdorf and Ururas, now claimed by Cape Colony, did not belong to the territory of Walfisch Bay;

That this is proved by the English maps made before the date mentioned, as according to them British territory extends only to Scheppmansdorf, since, although it is true that the eastern boundary shown on the maps published by the Admiralty is marked " approximate boundaries of the station of Walfisch Bay ", this indication of the boundary being approximate refers only to the circumstance that the proposal put forward by the Angra Pequeña and West Coast Mixed Commission was then awaiting a decision, the object of the proposal being to change the word " Rooibank " employed in Dyer's Proclamation and substitute for it the word " Rooikop ";

That a second proof is furnished by a contract for the concession of mining rights signed the 4th August, 1883, in which Rooibank, " within the limits of the territory of Walfish Bay ", is designated as the limit of the mining area granted. In view of the fact that the contract had been signed before a British magistrate, this description could not be explained if England already held the view that the territory extended not only to Rooibank but also to Ururas, and it would also be impossible to explain, if this was the view held, the declaration made by Mr. Deary before the mixed commission, confirmed by the evidence of Mr. Evensen, that the mining concessions were beyond Rooibank and outside British territory;

That in the same sense as the preceding proofs a third proof is constituted by the fact that, before Walfish Bay was declared an open port, the goods destined for Damaraland and the adjacent territory inland were disembarked at Sandwichhafen, and conveyed thence to their destination behind the church of Scheppmansdorf without paying customs dues and without the British authorities raising any objection to such expeditions, or to the storing of the goods in the

warehouse of the trader Wilmer, situated 1,600 metres to the east of the mission station at Scheppmansdorf, all of which goes to prove that at that time the belief prevailed that the territory of Walfish Bay did not extend beyond the said station eastwards;

That a fourth proof analogous to the preceding ones is to be found in the attitude adopted by the British magistrate, Mr. Simpson, on the occasion of a murder committed by the chief of the Hottentots, Jan Jonker Afrikander, who hanged a Berg Damara from a tree situated, according to a report written by the same Mr. Simpson, and dated the 18th March, 1885, in " German territory ", " at some 600 yards from Rooibank (Scheppmansdorf) ", from which it follows that the magistrate considered the eastern boundary of the territory of Walfish Bay, in the valley of the Kuisip (the only ground on which there are trees within the said territory), to be very close to Rooibank and not to Ururas, or, what is the same thing, he thought the bed of the Kuisip, which extends from the neighbourhood of Scheppmansdorf as far as Ururas, beaconed later by Mr. Wrey and now claimed by the British Government, to be German territory; that the sworn declarations of the missionary J. Boehm, of the trader J. Sichel, of the farmer G. Evensen, and of Dr. W. Belck confirm as a whole the German assertion that, until the date of Mr. Wrey's survey, both the British authorities and the colonists living in that locality, who were acquainted with the question of the boundaries, understood that the eastern frontier of the territory of Walfish Bay passed near the church at Scheppmansdorf, or, more precisely, crossed a water-hole situated some 100 paces to the east of the mission-house, and that no one thought of extending the said territory to Ururas;

That the missionary Johannes Boehm, in a declaration made on the 30th April, 1909, by the request of the German Government (after various considerations about Scheppmansdorf, and saying that this place, " about 1½ kilom. in extent, previously called Awahaus — the red bank — Rooibank ", is the " principal place of the Namas or Hottentots ", although without the fixed limits proper to European villages or populated places, and " without exact limits for the community or tribe "), attests in effect that, as he had heard the missionary Daniel Cloete, a witness of the annexation, say, Captain Dyer had laid down the eastern boundary of Walfish Bay " near a well situated at some 100 paces to the east of the mission-house " of Scheppmansdorf; that this had also been the unanimous opinion of the people on the subject of the drawing of the boundary, as it was also the unanimous opinion that the phrase " including the plateau " contained in the Proclamation of Annexation referred to the Namib; that the best pastures of the district which Captain Dyer wished to include in British territory are situated to the west of Scheppmansdorf; that to transfer the boundary more to the east had no visible object, unless it was desired to annex more river sand or a larger and entirely barren strip of the Namib; that when once the customs were established in Walfish Bay the goods landed at Sandwichhafen were conveyed to Damaraland by the route above Scheppmansdorf without paying dues of any kind and without protest from the British authorities, although it must be noticed that such an importation of goods could not be considerable, and lasted besides only a short time, because the customs at Walfish Bay produced so little that they were not sufficient to maintain one functionary; and, finally, that Mr. Wrey continued his survey beyond the limits admitted until then, carrying it up-stream as far as Ururas, by which the only road possible for the transit of goods coming from Sandwichhafen was cut, and the business was abondoned by the trader Wilmer, a British subject who was dedicating himself to it, and in whose opinion Mr. Wrey's demarcation implied a usurpation of German territory;

That the trader Joseph Sichel, in a declaration made on the 28th May, 1909, made the same statement: That till the arrival of Surveyor Wrey it was the common opinion of the inhabitants of the colony that the south-eastern extremity of British territory was " near the church of Scheppmansdorf ", " which place is generally called Rooibank "; that the traders Wilmer and Evensen, who were habitually engaged in the traffic mentioned in the preceding paragraph, " had their house and store to the east of the mission station of Scheppmansdorf some ten minutes' walk " (1½ to 2 kilom.), and they considered that this house lay within German territory, as is proved by the name Wilmerseck, chosen by them for their establishment, a name whose final syllable is the German word " eck " which means " corner "; and, finally, that the traffic carried on by the firm of Wilmer and Evensen made considerable competition with the traders of Walfish Bay;

That Dr. Waldemar Belck, in a declaration made at the request of the German Government on the 6th August, 1909, also states: That the word " Namib " means in Hottentot a high plain or plateau; that the place in which the mission-house of Scheppmansdorf is situated is always called by the natives Rooibank, and does not constitute a fixed village in the European sense, because the huts of the Topnaars (who live there in considerable numbers, as they did when the witness visited the spot in the month of November 1884), are habitually abondoned by the majority of the families living in them as soon as the gathering of the fruit of the nara is finished; that the house, or rather the church, of the mission mentioned so many times was generally considered in 1884 as the limit of British territory; that the goods landed years before in Sandwich Harbour were conveyed to the interior duty free by Rehoboth Bastards, without protest from the British authorities, who allowed them to pass through the neighbourhood of the mission station at Rooibank, which proves that those authorities considered the territory of Walfish Bay to terminate there, as did also the persons who were resident in the locality or who were acquainted with it; that after the month of November 1884 the traders of Walfish Bay, and among them Mr. Carington Wilmer, also began to transport goods from Sandwich Harbour, to Rooibank to avoid paying customs dues; that the British magistrate, Mr. Simpson, on being repeatedly asked to state whether objection would be raised to this transporting to goods as far as Frederiksdam (a point near the frontier of the territory, not clearly determined then), had avoided a precise answer, whilst as regards Rooibank he had raised no difficulties and had confined his vigilance to stopping smuggling into the district which extends to the property of the mission, where, in the opinion of all, German territory began, and consequently the jurisdiction of the British authorities ceased; that, as regards Frederiksdam, the witness after fixing its position astronomically, was confirmed in his presumption that the said place was within German territory, although very near the British southern boundary, this being the reason why he instructed the agent Koch to put up a notice of a purely private character, with the words " territory of Lüderitz ", at a certain distance from this boundary, so as to be sure of remaining in German territory; and that a new proof that the British authorities considered that the territory of Walfish Bay ended near the property of the Rooibank mission was furnished by the fact that in January 1885 the resident magistrate did not arrest or pursue as a deserter a Cape police constable who, after abandoning his duty, stayed for four days a little beyond the mission buildings secure that no one could molest him, as he was on territory under German jurisdiction;

That the farmer George Evensen testifies in a declaration made on the 14th June, 1909, that according to general opinion, and the intentions attributed

to Captain Dyer, the southern and eastern limits of the territory of Walfish Bay meet approximately at the spot occupied now by the Scheppmansdorf missionhouse at Rooibank; that the house inhabited by the witness and his partner, Mr. Wilmer, in 1885 (it stood south-east of the mission buildings according to a sketch presented by the former) was constructed on ground which, in the opinion of all, was German, the magistrate at Walfish Bay included, since he did not demand from Messrs. Wilmer and Evensen the payment of customs dues nor of any other impost on the goods that they conveyed to the said house from Sandwichhafen; that the tree on which Jan Jonker Afrikander hanged a Berg Damara early in 1885 was situated some 200 metres to the south-east of the house inhabited by the witness, and in territory undoubtedly German, according to the common opinion at that time; and that where the mining concession contract mentioned in paragraph 4 of this recital contains the phrase" Rooibank within the territory of Walfish Bay ", it means, in the opinion of the witness, who took part in the drafting of the document, that " the western corner of the concession ought to coincide with the southern boundary of the territory of Walfish Bay ";

That, lastly, when in 1885 the British view was modified as to the situation of the boundaries in the Kuisip Valley and the authorities dissociated themselves from the earlier general opinion attested in the preceding declarations, they repudiated Mr. Shippard's mistake in thinking that Ururas was the same as Awahaus, the native name of Rooibank, and in addition they invoked, among other reasons, to justify the extension of British territory to Ururas, the consideration urged by Mr. Wrey that the land at the end of this territory (*i.e.*, of that limited to the east by the boundary pillars (F) and (G) mentioned in recital XI of this award) had been asked for by the Europeans Wilmer and Evensen, whose private rights in the land granted, as was shown above, indisputably enjoyed British protection; to which it may be answered that such an invocation of the private interests of subjects which would naturally remain equally guaranteed under German administration cannot have any value in the decision of a boundary question;

XXIX. WHEREAS in the fourth group of arguments, marked (D), it is stated:

That the pillar (B) set up by Mr. Wrey 15 miles south of Pelican Point is not properly placed, since this distance of 15 miles which separates it from pillar (A) was measured, as stated by the German commissioner Von Frankenberg in 1904, in geographical nautical miles of 1,852.8 metres, instead of being in statute miles of 1,609 metres, with the result that the line (A-B) is increased from 24.1 to 27.8 kilom. approximately, or by 3 kilom. 700 m.;

That against the propriety of the use of nautical miles in drawing the line (A-B) the fact is to be urged that surveys are carried out in statute miles all over the British Empire, and also the circumstance that this measure was used to determine the distance between the points or pillars (J and M), situated on the south bank of the River Swakop, since according to Mr. Wrey's map they are 15.35 kilom. apart when they ought to be 18-53 kilom., if the 10 miles which ought to separate them were taken as maritime or nautical miles;

That, having regard to the terms of the Anglo-German agreement of the 1st July, 1890, according to which the demarcation of the southern frontier of Walfish Bay is reserved for arbitration, since point (B) constitutes the starting point of this frontier and forms an integral part of it the German Government submit to the decision of the arbitrator the question whether the position of point (B) with regard to point (A) should be fixed by statute miles or nautical miles; and, finally,

That both with regard to the question, the merits of which have been discussed, and in general terms, the German Government consider the demarcation carried out by Mr. Wrey without the co-operation of a German representative as null and ineffective from the point of view of international law; for when the said demarcation was carried out the territory of Walfish Bay was surrounded on the land side not by the territory of nomad tribes as in 1878, but by that of a European Power, and the boundary was consequently an international one and could not be fixed by an administrative act of one of the interested States without it being necessary for the two limitrophe Powers to proceed in agreement;

XXX. WHEREAS the German Government, on the strength of the preceding considerations, propose to the arbitrator in section (E) of their memorandum:

1. That the survey and demarcation of the southern frontier of the territory of Walfish Bay, carries out by Mr. Wrey in 1888 by the instructions of the Government of Cape Colony in a unilateral manner without the co-operation of a representative of the German Government, should be declared null and of no effect;

2. That the southern boundary of the territory should be fixed in the following way:

The boundary should start at a point on the coast of the Atlantic Ocean, 15 statute miles (1,609 metres) south of a boundary pillar placed at Pelican Point, and should run thence in a straight line towards the most southerly point of the western side of the present property of the Scheppmansdorf Mission, which property is in this way included in British territory, since its southern and eastern boundaries coincide with those of the said territory; from the extreme north of the eastern side of the mission's farm or property, the boundary of the territory should run in a straight line across the valley of the Kuisip above the Namib plateau towards Rooikop, or point (H) on Mr. Wrey's map;

3. That the portion of the boundary of Walfish Bay mentioned in paragraph 2 should be surveyed afresh conjointly by both parties, and provided with durable pillars by experts authorized by the Powers interested and within the space of time fixed by the award;

XXXI. WHEREAS various documents of British origin are inserted in the appendix to the German memorandum and some of them are criticized, and whereas it is unnecessary to mention their contents or the arguments used to refute them, since in the statement of the arguments and replies presented by the High Parties interested in the matter, during the course of the arbitral proceedings, both have or should have proper influence on the decision of the question pending;

XXXII. WHEREAS the British memorandum, after duly stating the history of the question, advances the following arguments, divided into thirteen groups or sections numbered correlatively, in order to demonstrate the correctness of the demarcation carried out by Mr. Wrey:

(*a*) That the question at issue refers above all to the interpretation of the phrase " including the plateau ", used in the Annexation Proclamation and the documents confirming it, which phrase indicates the desire of the author of the Proclamation to include an area of value which otherwise would remain outside the boundary laid down, or, in other words, the desire that the line traced from Scheppmansdorf to Rooibank (Rooikop) should be diverted to include something which would not be included by a straight line between the two points, and which, as it could not be defined exactly on that occasion for lack of maps and exact information, was indicated by the term " plateau ";

(*b*) That it is not claimed by Germany that the phrase " including the plateau " lacked all meaning, but that her contention is that by this phrase Captain Dyer alluded to the fact that a straight line from Scheppmansdorf to Rooibank (Rooikop) did include in the annexed territory a plateau, *i.e.*, a portion of the extensive and elevated desert of the Namib; but that against this interpretation it should be observed that the small portion of the Namib included by such a line would be a plateau separated from the large tract of desert of which it forms a part, and an insignificant part, whilst if by plateau is understood the whole or larger part of the Namib, the line in question would cut it and not include it, so that the phrase employed thus becomes inappropriate, nor is the fact explained of special mention being made of ground without any value, which, in the first case, in addition, was already clearly within the boundaries laid down;

(*c*) That the hypothesis advanced by Germany of the Namib being the plateau referred to in the Proclamation of Annexation is in open discord, given the extreme aridness and absolute valuelessness of that desert, with the intentions shown by Captain Dyer in 1878, and in later documents, according to which the object of the annexation was to provide the annexed territory with drinkable water and pasture;

(*d*) That Captain Dyer's report, dated the 12th March, 1878, and his letters of the 14th September, 1887, and the 24th April, 1889, extracts of which are given in recitals III, XVII, and XIX of this award, prove that his intention was to include in the annexed territory the ground now in dispute, and that the use of the phrase " including the plateau " was dictated by this intention; and, further, that this was proved by the researches carried out in 1885 by Mr. Wrey, who, as he says in his report of the 31st August, 1889, cited in recital XII, knew, by the evidence of Mr. Ryden, a witness of the annexation, and by that of other persons who were present at it or remembered it, that Commander Dyer, in view of the statements made to him about the value as pasture-land of the area under discussion, had included it in the territory annexed;

(*e*) That the appearance of Rooibank makes it a striking object in the midst of the desolation which surrounds it, since, although it is lower than the Namib desert situated to the north and the sand-hills to the south, it appears to dominate both without its being noticeable that on rare occasions it is converted into a river-bed; that whoever rides over the desert in the neighbourhood of Rooibank sees at the level of his eyes the tops of the trees growing on the disputed plain; that to Captain Dyer, on his journey across the desert on his way to the mission station, this ground must have appeared, in comparison with its arid surroundings, isolated and dominating; that if it is argued that an essential attribute of a plateau is that it should present a dominating aspect with regard to its surroundings, it can be held that this condition is fulfilled by the Rooibank; that although the application of the word " plain " to the area under discussion would have been more in accordance with the ordinary use of language, it cannot be pretended, in view of what has been said, that the use of the word " plateau " by Captain Dyer implies a grammatical or etymological impropriety, since that word is correctly applicable to an extent of land more or less isolated which presents the appearance of flatness in comparison with its surroundings; that the idea of flatness is always connected with that of "plateau", whilst height is an ordinary, but not essential, attribute of the term; and, finally, that when Captain Dyer described as a plateau the plain of Rooibank, which did not show any sign of the passage of a river, which was conspicuous for its fertility, and was 300 feet above the level of the sea, he was clearly influenced by the

fact that the residents on the coast from whom he received the information which guided him called this land a plateau;

(*f*) That the Dutch word " plaat ", which may have been used amongst the inhabitants of the bay to designate the Rooibank, and a word that does not carry with it the idea of height, probably led to the employment of the word " plateau ", which is its nearest equivalent in English; that before the acquisition by Germany of territorial rights in South-West Africa, the area to-day in dispute was called " the plateau of Rooibank " in British official documents, as is proved by a despatch of the 14th January, 1882, in which the Governor of the Cape of Good Hope, describing the territory of Walfish Bay, says of it that for the space of 15 miles, reckoned from the sea, it is nothing but a desert formed by sand flats and dunes " until you arrive at the plateau of Rooibank "; and that an analogous proof of earlier date than the beginning of the boundary question is afforded by the reply of the magistrate, Mr. Simpson, on the 16th April, 1885, who, when questioned before the " Angra Pequeña and West Coast Claims Commission ", called the area which extends from the mission station up to and including Ururas " the whole of the plateau ";

(*g*) That the phrase employed by Captain Dyer in his report of the 12th March, 1878, " the plateau of Rooibank and Scheppmansdorf to the south-east ", does not imply that the plateau is situated north-west of Scheppmansdorf, but that it alludes to the fact that both places lie in the south-east part of the annexed territory; because it is notorious that, at the north-west of Scheppmansdorf, there is neither to be found the plateau of Rooibank nor anything the physical aspect of which corresponds with the description of the oasis annexed by Captain Dyer;

(*h*) That there is no doubt that in order to solve the question at issue, and in particular to know the intention with which the author of the Proclamation employed the words " including the plateau ", the best witness must be Captain Dyer himself. His evidence, as has been seen, not only was entirely in agreement with the official report on the annexation, but also proved the correctness of the demarcation made by Mr. Wrey, and is in its turn corroborated by the physical aspect of the area in dispute and of the surrounding country, as well as by the sworn declarations of different people, declarations which may be summed up in the following form:

(i) Daniel Exma Dixon, 60 years of age, declares that he has known the territory of Walfisch Bay perfectly since 1861; that he was there on the date of the annexation, and was present when Captain Dyer was urged to annex grazing land beyond the mission station; that on the following day he conducted Dyer and the officers who accompanied him to Rooibank, and showed the former from the top of a sand-hill the grazing lands beyond the mission station towards the Ururas and indicated the position of that point; that Rooibank includes the whole bed of the river from the mission station up to Ururas, and that Dyer said that the boundary would run past that place; that a later effort to induce Dyer to extend the demarcation was unsuccessful; that between the mission station and Walfish Bay there are no pastures properly so called, so that if Rooibank were excluded from the territory the colony would have none; and, finally, as the water to the west of the mission station is brackish it is not as good as that found on the Ururas side;

(ii) Hendrik Petros, an old native, states that he was present at a conversation between Dyer and the deceased Piet Haibib, the chief of the tribe of the Topnaars, in whose territory Rooibank was situated, and that he heard Haibib agree to the annexation being extended as far as Ururas and Dyer declare that British territory would be extended to Ururas;

(iii) Willem, a native of about 65 years of age, states that he was present at Rooibank with Dixon and others at the time of Dyer's visit (Dyer in the course of his journey reached Zwartbank, the witness believed) and that he heard it agreed between Dyer and Piet Haibib that British territory should be extended to Ururas;

(iv) John Englebrecht, a native about 75 years old, states that he was present at the interview between Dyer and Haibib, and heard the latter consent to the cession of his territory as far as Ururas;

(v) Jan Sarop, an old native, states that a few days after the annexation he was informed by his chief, Piet Haibib, that the Englishman had annexed the territory as far as Ururas, that there was not sufficient pasture to the west of the mission station, and that both he and his father had always used the pasture at Rooibank;

(vi) Old Jim, *alias* Zacharias, a native of from 70 to 75 years old, asserts that two weeks after the annexation he was informed by Piet Haibib that it extended as far as Ururas, and adds that he recollects that a certain Outate had been arrested in Ururas by a British police officer;

(*i*) That at the time of the annexation Captain Dyer had no map of the interior, and could not define with accuracy particular spots; that amongst primitive tribes of nomad tendencies like those which inhabit South-West Africa, the names of places do not possess a fixed and definite meaning which is characteristic of European names; that Rooibank (a Dutch translation of the Hottentot word " Awahaus ") is the term long employed to indicate the plain of the Kuisip between the mission station and Ururas; that Scheppmansdorf was originally the name given by the missionaries to the mission station founded in 1842 in the Rooibank area, but that it applied afterwards to the whole area which was considered and made use of as the property and grazing commonage of the natives living in the mission station or in its neighbourhood; that the evidence given in 1885 before the mixed commission shows that the names Rooibank and Scheppmansdorf are in actual practice the same, and are used indiscriminately or with very little distinction to designate the tract of country extending between the mission station and Ururas; but this last word, as Mr. Wrey stated, " is merely the native name given to a large watering place for the cattle grazing between Ururas and Rooibank ", a name which does not express precise limits, and is applied by the natives to a certain part of the Scheppmansdorf lands; that the German Consul-General, Dr. Bieber, in his communication of the 8th June, 1886, stated that Awahaus, Rooibank, and Scheppmansdorf are names of the same place; that the word " Rooibank " can therefore be substituted for the word " Scheppmansdorf " wherever it appears in the Annexation Proclamation, and Commander Dyer's demarcation can be amended accordingly, as was proposed by the mixed commission of 1885, whose joint report is referred to in Recital VIII of this award; that as Rooibank or Scheppmansdorf forms an extensive area, it is impossible to fix a point within it for the termination of the line under discussion, but that the difficulty disappears, thanks to the words " including the plateau ", if by plateau be understood a definite area situated in the eastern or southern extremity of the former; and, finally, that the German member of the Philips-Goering Commission of 1889 agreed that if the plateau of Dyer's Proclamation were the area now in dispute the boundary line should run as far as Ururas;

(*j*) That the natives who inhabit Rooibank live and always have lived in the vicinity of the mission station, and from time immemorial have made use of the area under discussion to provide themselves with the means of subsistence,

to cultivate patches of ground, and to have at their disposal pasture, water, and fuel; that it is beyond doubt that all this extent of territory has been, in fact, an indispensable adjunct to a British village; that the natives have gardens in the tract in question, and that their cattle is pastured and watered ordinarily southwards as far as Ururas; that it is highly improbable that Commander Dyer failed to include in the boundary of the annexed territory and to place under a single jurisdiction the whole of the lands in which the natives of the country were interested; that Commander Dyer, advised as he was by persons acquainted with the locality, had the intention, as he says in his letter of the 14th September, 1887, of including in the annexation the native pasture-lands; and that according to his letter of the 24th April, 1889, he understood that the plateau annexed belonged to and formed part of Scheppmansdorf;

(*k*) That to the west of the mission station there is no adequate pasture-land or fuel supply, so that Dyer's intention " to annex an oasis thickly covered with grass and scrub and well watered " could not be carried out by drawing the boundary line in the position claimed by the German Government; but the presence of the tree called the " anna ", whose pods provide excellent food for cattle, makes of Rooibank a pasture-land of great value, whilst on the opposite or western side those trees do not exist, nor does the vegetation required for keeping cattle; that the water found in the river-bed between the mission station and the coast is brackish, and lacks the good qualities of Rooibank water; that, in addition to Mr. Wrey's report and the evidence of Mr. Dixon and Jan Sarop, mentioned above, as to the importance of the pastures situated to the east of the mission station and of the relative worthlessness of the land on the opposite side, these statements are corroborated by Dr. T. C. Sinclair and Mr. George Gale, the latter being the owner of herds grazing at Rooibank. Both are very well acquainted with the territory in dispute, and their respective assertions lend force to the other arguments employed in this memorandum; and, finally, that to the west of the mission station the bed of the Kuisip no longer offers that definite aspect which distinguishes it from the surrounding territory, an aspect which is characteristic of Rooibank, and justifies the application to it of the term " plateau ";

(*l*) That Great Britain exercised full jurisdiction over the territory in dispute before the acquisition by Germany of any territorial interest in South-West Africa, and also between the date of such acquisition and the commencement of the present controversy; that before the controversy commenced Great Britain protected the natives resident in Rooibank during the tribal wars carried on in Damaraland, and took the responsibility of preventing, by constant care and vigilance, their participation in such conflicts; that on the 16th April, 1885, Mr. Simpson, the resident magistrate at Walfish Bay, stated before the Angra Pequeña and West Coast Claims Commission the following: " It has always been understood that the Rooibank commonage extends to Ururas, and the people who live there have always made use of it. A certain number of Bastards have gardens there, given them by Mr. Palgrave and by my predecessor, and the said Bastards have been wont, when the grass was finished at Rooibank, to send their cattle along the river to Ururas "; that, according to the criminal register of the resident magistrate at Walfish Bay, he exercised jurisdiction at Ururas in 1882, and punished by flogging and imprisonment a person convicted of having stolen a sheep at that place; and that as a new proof of the exercise of sovereignty at Ururas may be cited the arrest there by a British officer in 1884 of one " Outate ", an incident mentioned in the statement of Old Jim, *alias* Zacharias, already quoted ;

(*m*) That the British settlement of Walfish Bay was acquired and its limits defined before any civilised nation thought of annexing the adjacent territory, for which reason it did not appear urgent to specify the boundary exactly until the neighbouring country was placed under the sovereignty of Germany; that in 1884 the British Government applied, without being asked, the doctrine of the " hinterland " in favour of Germany, abstaining, in spite of favourable circumstances and pressure brought to bear, from occupying the land in the interior bordering on German territory, which at that time comprised a zone of 20 miles only, reckoned from the coast line; and that therefore a reciprocal recognition of the said doctrine can be advanced against the present claim of the German Government, especially taking into account that this claim disputes an area actually annexed and effectively occupied by Great Britain before the existence of any German territorial right;

XXXIII. WHEREAS the British memorandum, the arguments in which are summed up in the preceding clauses, contains as appendices various documents of different descriptions supporting or amplifying the preceding statements without advancing any fact or argument of importance, as far as the decision of the question at issue is concerned, which in substance has not been already stated;

XXXIV. WHEREAS, on the 30th July, 1910, within the space fixed by Article 3 of the Declaration of Berlin of the 30th January, 1909, the replies in which each of the High Parties answers the memorandum previously presented by the other were handed to the Minister of State of His Catholic Majesty by the representatives of Germany and Great Britain, the German reply being accompanied by annexes containing authentic copies of the documents inserted in it and two copies of Dr. Stapff's map of the lower valley of the Kuisip, all of which documents were without delay officially transmitted to the arbitrator;

XXXV. WHEREAS in the German reply the following considerations or facts are advanced which are not contained in the preceding recitals:

1. That the argument which runs through the whole of the British memorandum, that the territory under discussion ought to belong to Walfish Bay because of its value to this possession, is an argument which, apart from the exaggeration involved by the supposition that the said territory is the only useful portion of the colony, would authorise the German Government to claim it on account of its importance for the service or development of the police station at Ururas;

2. That in the decision of the present dispute the statements of Captain Dyer contained in the Annexation Proclamation and in his report of the same date should alone be taken into account, but not what he said in much later statements;

3. That neither the Governor nor inhabitants of Walfish Bay ever made use of the territory under discussion for grazing sheep or working oxen;

4. That the word " Rooibank " which the mixed commission of 1885 proposed should be added to that of " Scheppmansdorf " in the text of Captain Dyer's Proclamation can only be admitted as explanatory and supplemental, although the authority of the proposal is recognised, but not as a substitute for the other word, whose greater precision does not allow the attribution to it of the different meanings (" commonage or pasture ", " river-bed ", "valley ", " oasis ", " patch of ground ", and " plateau "), which the British memorandum attributes to the term " Rooibank ";

5. That the use of the phrase " including the plateau " found in the Proclamation of 1878 is not only explained on the grounds stated at the proper moment in the German memorandum, but is also explained because at the time of annexation there were no maps of the territory;

6. That the Namib is not absolutely worthless as is claimed by England, but, as the British commissioner, Colonel Philips, remarked in his report of the 23rd January, 1889, " it has the advantage, owing to the hardness of its surface, that it can be crossed more easily and rapidly than the river plain ";

7. That the fact that an area presents notable or salient features in comparison with its surroundings or as contrasted with them, as may happen in the case of Rooibank, does not justify its description as a " plateau ";

8. That the Dutch phrase " de plaat " supposed to be used by the inhabitants of Walfish Bay to designate the valley of the river between Scheppmansdorf and Ururas, and which it is thought probable that Captain Dyer translated by the word " plateau ", is a phrase whose use in this particular sense is denied, according to their recent statements or reports, by Hugo Köhler, Administrator at Swakopmund, George Evensen, the District Commissioner Von Frankenberg, and the missionary Johannes Boehm, all of them knowing the bay well, and also the adjacent territory and its inhabitants;

9. That when Captain Dyer speaks in his report explaining the annexation of " an oasis thickly covered with grass and scrub " it is not because he had orders or the intention to annex it, but because the words quoted are a mere supplementasy description, and at the same time a defence of his exceeding the proper boundaries when he settled the extent of the annexed territory;

10. That Rooibank is too far from Walfish Bay for people living at the bay to go there for drinking water, and that the brackish water found to the west of Scheppmansdorf is useful and beneficial for cattle;

11. That the tree from which Jan Jonker hanged the Berg Damara was situated in the middle of the bed of the Kuisip and within the territory in dispute to-day, and it is impossible that it could have stood at the place marked with a red cross on the map facing p. 74 of the British memorandum, since in the said place there are only bare sand-hills without trees or scrub of any kind, all of which is expressly attested by the farmer George Evensen in a new statement made on the 9th March, 1910;

12. That the evidence of the Topnaar Hottentots, made use of by Great Britain, deserves no credit not only on account of their natural inclination to deviate from the truth, but also on account of the effect produced upon them by appearing before the authorities and of their ignorance of what an oath means; this statement being confirmed indirectly by the qualities attributed to the Topnaars by Mr. Wrey in his report, and directly by the evidence of the employé of the Mining Syndicate of South-West Africa, Eugene von Broen, in a recent statement;

13. That, according to the declaration made on the 22nd March, 1910, by the German sergeant of police, Carl Leis (ordered, as he says, to ascertain whether any of the natives living on the bank of the Kuisip could make a statement with regard to the taking possession of the territory), approximately one month earlier the missionary Schaible asked the Hottentot Gottlieb, called also Jan Sarop, whether he was at Rooibank at the time of the annexation, and he answered that at that time he was at Walfish Bay, and added, in reply to fresh questions, that, with the exception of Piet Haibib, the only person who was living ordinarily at Rooibank was a Hottentot now deceased;

14. That the evidence of Von Broen, dated the 21st March, 1910, is in agreement with the evidence of Carl Leis. Von Broen states that he had heard from the lips of a native that all the natives of the country who were present at the annexation were dead, believing that this was said after the death of Piet Haibib " about a year ago ";

15. That, in view of this, the evidence of the old Topnaar Hottentots, Hendrik Petros, Willem (an old native policeman in receipt of a pension from the Cape Government), and John Engelbrecht, inserted in the British memorandum, cannot be accepted, at least in the sense that the witnesses were present at Captain Dyer's visit to Rooibank;

16. That the Hottentot Willem in his declaration also falls into the error of supposing that Captain Dyer and his companions were in Ururas and Zwartbank in 1878, when they did not go beyond Scheppmansdorf;

17. That the credibility of the witness Mr. Koch, which was incidentally questioned in the British memorandum on the ground of statements made by Mr. Shippard, cannot be impugned, as it was, out of mere personal considerations, above all in the case of an individual who, during the long years in which he was successively a landing agent and in the service of the Rhenish Missionary Society and of the German Government in Swakopmund, did nothing to justify in the least the bitter criticism of Mr. Shippard;

18. That, in contradistinction to what was done in the British memorandum in the matter of Ludwig Koch's evidence, care has been taken in the German memorandum not to set up a similar precedent, although an unfavourable opinion could have been expressed on the subject of the witness Daniel Dixon, whose first statement, made on the 16th March, 1892, and examined at length in the appendix to the German memorandum, raises, as therein stated, such questions that value of any kind can hardly be attached to it;

19. That communication between Sandwichhafen and Scheppmansdorf for the transport of goods is not only possible (in spite of what is said by Dr. Sinclair in his report inserted at the end of the British memorandum), but is proved by the fact that this route was covered in a few hours by German troops, a fact mentioned by Von Broen in his report of the 21st March, 1910;

20. That the bed of the Kuisip between Scheppmansdorf and Ururas never was a plateau, as is stated in Dr. Sinclair's report referred to, and such a story was refuted long ago by the investigations of the eminent geologist, Dr. Stapff, published, as a commentary on the map of the lower valley of the Kuisip, in the copy annexed to the present reply;

XXXVI. WHEREAS in the reply of the British Government the following facts and arguments are added to those contained in their memorandum:

1. That the letter of the 12th August, 1885, signed by Dr. Bieber and Mr. Shippard, and cited in recital VIII, proves, by saying that " the eastern boundary marked on Dr. Theophilus Hahn's map, published in 1879 ", is incorrect, that the German commissioner of that time thought the frontier which the German Government now claim, that is to say, the frontier formed by a straight line from the mission station to the Swakop, erroneous;

2. That Mr. Simpson's statement cited in the German memorandum, that he " had crossed from Rooibank to the Swakop River by the plateau ", does not necessarily signify that he meant the Namib by " plateau ", but that it may refer to the fact of his having crossed in this journey the river plain, starting from the mission station; that, however, in any case it is undeniable that in the same circumstances in which Mr. Simpson made the statement alluded to, he

also asserted, as it was stated in the proper place, that " the whole of the plateau " contains or includes Ururas, by which name he designated the territory in dispute to-day;

3. Nor does Sir Hercules Robinson's letter referred to in recital XXVI, in which the desire is expressed that the boundaries of the " plateau between Scheppmansdorf and Rooikop " should be defined precisely, justify the contention that that word referred to the Namib, but, on the contrary, shows that the writer's mind was dominated by the idea that the plateau alluded to, little known then on account of the lack of maps, was a definite area susceptible of demarcation, conditions which do not apply to the part of the Namib situated to the west of the Scheppmansdorf-Rooikop line; and it ought to be added to all this that Sir H. Robinson's despatch of the 14th January, 1882, cited in paragraph (*f*) of recital XXXII, makes use of the phrase " plateau of Rooibank " to designate the territory now in dispute;

4. That when Captain Dyer was recently consulted with reference to the meaning attributed to his former statements in the German memorandum, he declared on the 9th June, 1910, that in the year 1878 he proceeded from Walfisch Bay to Rooibank, where he was told he would find the pasture and water necessary for the use of the station; that he made the journey in a bullock-wagon driven by Dixon and arrived at the mission station on a fine, clear day, which made it possible to see at a considerable distance; that Mr. Ryden, who accompanied him, showed him from a sand-hill in a south-easterly direction a wide, flat space of some miles in extent where there was water, and that his intention in using the term " plateau " was to include that space within the annexed territory; that Dixon made some remarks to him about Zwartbank, but that he did not pay much attention to them, because they were vague and contradictory; that he does not recollect any allusion to Ururas, nor does any such name appear on the map of the coast; that in fixing the boundary he was entirely guided with regard to distances by the Admiralty chart, which was drawn to a scale of nautical miles; and that all the colonists appeared entirely satisfied with the demarcation, and they showed themselves so expressly a year afterwards when he made a new visit to Walfish Bay;

5. That on the same date as the former statement Mr. Sandys, the official paymaster of Her Majesty's ship *Industry* and the companion of Captain Dyer in his visit to Rooibank, corroborated all the details testified to by the latter;

6. That the German observations contained in recital XXVI, according to which it is curious and remarkable that Commander Dyer, in his second letter or communication of the 14th September, 1889, did not cite Ururas, if he understood that the grazing flats, included in the annexed territory, terminated there, and say that the plateau was situated " above Rooibank ", are observations which are answered by remarking that Ururas was not marked on the map used by Dyer for the annexation, and that the bed of the Kuisip rises continually and gradually from Walfish Bay towards the interior;

7. That the hypothesis or argument mentioned in the last paragraph of recital XXVI, that Captain Dyer used the phrase " including the plateau " to justify his having delimited territory in excess of his instructions, is not only not in accord with the evidence given by him and fails sufficiently to explain the phrase quoted, but disregards the extent of the discretional powers conferred on the official entrusted with the annexation, and which he had perforce to exercise by himself owing to the absence of Mr. Palgrave;

8. That the evidence of the missionary Boehm cited in the German memorandum to prove that the bed of the Kuisip, to the east of the mission station, is

barren except for trees, and does not contain the grass, pastures, and water to which Captain Dyer alluded, disregards the importance of the tree called the " anna " as regards the feeding of cattle, and is contradicted besides by statements by Mr. Simpson, Surveyor Wrey, Captain Dyer, Mr. Dixon, Jan Sarop, Dr. Sinclair, and George Gale, to be found in their proper places in the preceding recitals;

9. That the invitation given to the natives to attend the ceremony of annexation is a proof that care was taken of their interests, and therefore of the stretch of pasture-land which they used for their cattle, which stretch prolonged to Ururas is not excessive, after all, even for the needs of the white population resident at Walfish Bay; that the Topnaars, although partly nomad, have always formed, as it appears from the evidence already cited, a native community in the neighbourhood of the mission station, which was established there precisely for this reason; and that there does not exist the slightest proof that, as is insinuated by Germany, the satisfaction of the natives of the country at the annexation was stimulated by alcohol, for this satisfaction was testified to by Captain Dyer and corroborated by other evidence produced in the British memorandum;

10. That against the German statements that the extent of the place called Rooibank never can be determined, because it depends on individual opinions, and that with this word Captain Dyer's Proclamation does not designate a place but a physical feature, such as a mountain or rock, two facts are to be invoked: the firm opinion of the natives, who consider that their pastures extend to Ururas, and the South African custom of deriving the name of extensive areas from some natural feature;

11. That the Admiralty charts cited in the German memorandum, as is stated in recital XXVIII, to prove that until the year 1885 the British authorities thought that the district now under discussion was outside the territory of Walfish Bay did not show exact but only approximate boundaries, as is expressly stated on them, because it was necessary to wait until they could be fixed by an inspection of the plateau, as Captain Dyer, for lack of a map of the interior, had neither been able to fix them precisely nor had indicated them on the map which he used;

12. That the argument in the German memorandum immediately following the preceding one, and based on the contract of the 4th August, 1883, with regard to the concession of mining rights, is to be met with this reply: That the term Rooibank is the name of an extensive tract of land which reaches to Ururas; that the act of the British magistrate in legalising the deed does not indicate his agreement with its contents; that there is nothing in the agreement to show that the contracting parties, Messrs. Wilmer and Evensen, failed to understand, as Mr. Simpson the magistrate did, that Rooibank extended to Ururas, and that both places were situated within the British boundaries; that, on the contrary, it is proved that the said gentlemen admitted these facts, since in 1885, during Mr. Wrey's visit of inspection, they petitioned the Cape Government for two lots of territory in Rooibank and another lot in Ururas; that Mr. Wilmer understood the territory of Walfish Bay to continue to Ururas, as Mr. Wrey makes it clear in his affidavit of the 25th June, 1910; and, finally, that the circumstance that the mining concession alluded to was outside Rooibank, and bounded by the south bank of the Kuisip, is in no way opposed to the claims of Great Britain;

13. That the fact of goods being transported from Sandwich Harbour to Damaraland by the back of the church at Scheppmansdorf and of their being

stored in its vicinity without paying duty, cited in the German memorandum as a proof that the British authorities did not consider formerly that the district now in dispute formed part of the territory of Walfish Bay, are facts as to which the following observations must be made: That it was only during the short period between the 17th August, 1884, and the 13th August, 1885, that customs duties were levied at Walfish Bay, and that, therefore, there was no object in avoiding their payment; that it is possible that during this time some contraband trade may have been carried on in an extreme corner of the territory at a considerable distance from the place where the authorities resided and without the magistrate being able to prevent it, owing to the smallness of the police force at his disposal, but that in any case the existence of such a trade would only prove that the value of the goods carried was too insignificant to justify the establishment of a custom-house on the Kuisip, a consideration corroborated by the evidence of the missionary Boehm, mentioned in recital XXVIII, in which it is stated that the " importation of goods could not be considerable and lasted besides only a short time, because the custom-house at Walfish Bay produced so little that it was not sufficient to maintain one functionary "; that, on the other hand, the lack of precise boundaries could make Mr. Simpson doubtful whether the store or depôt of Messrs. Wilmer and Evensen, situated, according to a sketch shown by the latter, to the south of the mission buildings, was or was not within British territory, since a comparison between the said sketch and Mr. Wrey's plan shows that the place in which Mr. Evensen lived in 1885 was on the boundary-line (C—D) near a place where the valley of the Kuisip cutting that line forms an extensive " kloof " with trees and other vegeation to which the word "corner" (" eck "), used in Mr. Sichel's declaration, may refer; and, finally, that the German statement that Messrs. Wilmer and Evensen conveyed their goods, before Walfish Bay was declared an open port, to a depôt situated 1,600 metres to the east of the mission station (that is to say, within the territory now in dispute) is inexact, for it appears from the evidence of Mr. Evensen himself that his residence was transferred to the place the position of which coincides with that of the depôt referred to towards the year 1886, a time when the Customs had already been suppressed;

14. That the incident of the murder committed in the month of March 1885 by Jan Jonker, used by Germany to maintain that the place where the victim was hanged was within the district now in dispute, in spite of Mr. Simpson's recognition that it was outside British territory, rests on the totally unfounded hypothesis that there are no trees in the Kuisip valley outside the lines laid down as the boundary by Mr. Wrey; that the British Government maintain against this hypothesis, with the authority of Mr. Simpson, that the Berg Damara was hanged by Jan Jonker from a tree situated outside the boundary mark (C), 600 yards from the mission station; that the existence of trees in this place has been proved in the preceding paragraph of this recital; and that Mr. Simpson's statements are confirmed by Mr. Evensen's evidence, cited in the German memorandum, which asserts that the tree from which the body of the man was hanging stood *at some 200 metres to south-west of the witness's house*, which was situated then, as is also noticed in the preceding paragraph, on the boundary line uniting the pillars (C) and (D):

15. That as the uninterrupted claim of England to the bed of the Kuisip as far as Ururas and the constant exercise of sovereignty over this territory is established in the British memorandum, the statements adduced in section (C) of the German memorandum are rebutted, most of which statements, on the other hand, although based on sufficient evidence, would only prove that

Mr. Simpson was ignorant of the exact position of the boundaries or misunderstood the Proclamation of Annexation, without its being possible in any case for the case of Great Britain to be prejudiced thereby;

16. That the evidence of the missionary Boehm, in which he refers to the circumstances of the annexation in 1878, is merely incorrect or hearsay, because the witness was not transferred to Walfish Bay till 1883;

17. That it is impossible to rely on the accuracy of the declaration of the trader Sichel as to the position of Messrs. Wilmer and Evensen's store, which at the moment to which the witness refers was situated on the boundary line half-way between the pillars (C) and (D); and that, on the other hand, there is an indication that Mr. Sichel himself admitted the extension of British territory to Ururas by the fact that the firm Martens and Sichel, in which he was a partner, asked the Government of the Cape through the resident magistrate for three lots, two of them in Rooibank and the third in Ururas, which is bounded on one of its sides by the line (F—G) in Mr. Wrey's plan:

18. That a great part of the evidence of Dr. Belck is also hearsay or rumour; that, with regard to the statement of this witness as to the position of Fredericksdam and the boundary post or beacon which was ordered to be placed at this point, it is to be noted that the said beacon was afterwards pulled down, and that the German Colonial Company, after having formulated a protest, recognized in a letter dated the 29th January, 1887, addressed to Prince Bismarck, and officially transmitted by him to the British Government, that he ought to withdraw the complaint against " the removal of the beacon indicating the German frontier which had been put up at Fredericksdam in accordance with data supplied by Dr. Belck, because more exact data showed that the said place is in fact situated in British territory "; that such a statement prevented further discussion as to the position of Fredericksdam with regard to the boundary, and any difficulty from arising as to the correctness of that part of the southern frontier of Walfish Bay, until the Commissioner Von Frankenberg raised the question again in 1904; and, finally, that in spite of the private character which Dr. Belck ascribed to the boundary beacon mentioned above it is very clear that the German Colonial Company considered it as a frontier mark or sign;

19. That the fact that the policeman referred to by Dr. Belck at the end of his declaration was not pursued or arrested proves nothing, since there is no evidence that the resident magistrate knew his whereabouts or desired to compel him to continue his service after his desertion;

20. That the part of Mr. Evensen's declaration referring to Captain Dyer's intention is based solely on hearsay, and that his partner, Mr. Wilmer, thought differently about the matter, according to Mr. Wrey's affidavit of the 25th June, 1910, in which he says that Mr. Wilmer considered the evidence of the natives who lived at the time of the annexation to be in conformity with the opinion firmly held relative to Captain Dyer's action, the evidence being that the water and the pastures in the area extending between Rooibank and Ururas were unreliable, that the whole area is run over by their cattle, belongs to their lands, and is subject to the common rights of their tribe;

21. That the origin of the boundary question cannot be ascribed to a supposed confusion on Mr. Shippard's part between the names Awahaus and Ururas, because the assertion is based on an unofficial suggestion, written on the 1st September, 1886, on the back of a communication or letter, and Mr. Shippard, in a report on the 30th of the same month and year, proves most completely that he had not fallen into the error or confusion supposed, because

he defines clearly the terms " Awahaus ", " Rooibank ", and " Ururas "; to all of which it is necessary to add that the British Government have never founded any argument on the hypothesis of Ururas and Awahaus being identical:

22. That according to Captain Dyer's statement, mentioned in section 4 of this recital, he used nautical miles in the settlement of the boundaries of the territory; that Surveyor Wrey understood this to be the case; and that point (J) on the northern frontier was fixed on Nuberoff Kop on account of the fact that this hill forms a natural eminence situated more or less 10 miles from the mouth of the Swakop, and that it was believed that Captain Dyer had referred to it, as Mr. Wrey says in his sworn declaration of the 25th June, 1910, and as Mr. Simpson equally declared before the mixed commission of 1885, observing also that the point chosen was reckoned to be a little less than 10 miles from the coast;

23. That, apart from the indisputable fact that Captain Dyer referred to nautical miles, as it was to be expected, in his description of the annexed territory, the British Government do not admit the existence of any question other than that relative to the frontier between Scheppmansdorf and Rooikop, including the plateau; because this was the point in dispute at the date of the Anglo-German Agreement of 1890, and it would involve a departure from the spirit of this Agreement to import into the controversy new claims like those formulated by the German Commissioner, Von Frankenberg, in 1904, and rebutted immediately by the British commissioner, Mr. Cleverly, claims which were not authorised then by the German Government, and are raised afresh now after thirty years of continuous and effective occupation on the part of Great Britain when it had been always understood and recognised since 1885, that the interpretation of the phrase " including the plateau " was the only matter in dispute, and when the correctness of the British frontier at Fredericksdam had been admitted, as stated in section 18 of this recital;

24. That the thesis that the demarcation of the territory of Walfisch Bay carried out in 1885 ought to have been made jointly by the German and British Governments, having regard to the contiguity of their respective possessions, cannot be admitted, because, as that territory was acquired and its boundaries fixed in a general way years before any civilized nation had established itself in the adjacent region, the only thing lacking, at the time of Mr. Wrey's survey, was a precise survey of the boundaries proclaimed previously, with regard to which demarcation the fact that another Power had come to occupy the neighbouring district could not exercise any influence or require any co-operation; and that in so far as the authority of international law can be invoked to decide the present dispute it comes to the support of the British claim, because the civilized nation acquiring territorial rights in a region where another is established must respect in its entirety the position of the latter, and any doubt as to whether it acquired, or wished to acquire, a certain area must be settled in favour of the first occupant;

25. That, in conclusion, the British Government maintain that Mr. Wrey's demarcation represents exactly the boundaries of the territory of which Great Britain took possession on the 12th March, 1878; that Britain has always held this view without any change of opinion; that she has exercised full and uninterrupted sovereignty over the area named from the date of the annexation; that the drawing of the boundaries as proposed and defended by the German Government would deprive the British station of ground used until the Agreement of 1890 and indispensable to the needs of the inhabitants of the Colony;

and that the German Government have not succeeded in rebutting the proofs of these contentions adduced by the British Government;

XXXVII. WHEREAS the arbitrator undertook, the better to understand the question at issue, to make an ocular inspection of the territory in dispute, and whereas he visited the spot towards the end of the year 1910 and at the beginning of 1911, accompanied by the German commissioner, Herr van Frankenberg, and the British commissioner, Mr. Lansdown, and examined for the length of time that he considered necessary the aspect, conditions, and boundary of the district in dispute, asked for and heard the necessary explanations of both commissioners, and endeavoured as far as posssible, in agreement with them, to go over the ground in the direction followed by Captain Dyer in 1878, in order to obtain impressions similar to those obtained by that officer, and to judge of his intentions with the best guarantees of accuracy:

I. Considering that there are two fundamental questions which it is necessary to examine in this award: (1) Whether the southern limit of the territory of Walfish Bay ends in the proximity of the mission church of Scheppmansdorf, or, on the contrary, whether it should be prolonged to Ururas in accordance with Mr. Wrey's survey; (2) whether this southern boundary should begin at a point 15 nautical miles or 15 statute miles from Pelican Point;

II. Considering that the two questions should be examined separately, having regard to the varied character of the arguments which can be invoked for their solution, and in view of the fact that, as regards the second question, one of the High Parties asserts that it was provided for by the Agreement of the 1st July, 1890, and is therefore included in the present controversy, whilst the other denies this;

III. Considering that both questions must be solved in conformity with the principles and positive rules of public international law, and, where they fail, in conformity with the general principles of law, since neither the said Agreement of 1890 not the supplementary Declaration of Berlin of the 30th January, 1909, in any way authorize the arbitrator to base his decision on other rules, and it is notorious, according to constant theory and practice, that such authority cannot be presumed;

IV. Considering that since, with regard to the first of the questions indicated, both parties recognize that its solution depends on the interpretation placed on the phrase "including the pluteau", contained in the Annexation Proclamation of the 12th March, 1878, and later official documents confirming it, it is necessary to determine the interpretation which should be placed on those words, utilizing the general principles of law, which are the same as the principles of international law, and according to which it is necessary to consider, in order to determine the intention which inspires an arrangement or act, the grammatical value of the terms used, the consequences which result from understanding them in one sense or the other, and the facts or antecedent circumstances which contribute to explain them;

V. Considering that, in order to attribute to the phrase quoted the value which belongs to it in law, it is necessary in the first place to decide what the Annexation Proclamation or its author, Commander Dyer, understood by the word " plateau ", that is to say, whether he understood the high plain of the Namib as is asserted in the German case, or a portion of the valley of the River Kuisip comprised between the houses of the Scheppmansdorf mission and Ururas as is maintained in the British case;

VI. Considering that, even if it is admitted that by " plateau " is ordinarily understood " a high plain ", this secondary attribute of " height " is essentially

relative, inasmuch as there are places called " plateaux " lying lower than the surrounding country, as is shown by the slightest examination of the use which is made of this word, not only amongst common people, but amongst persons of undoubted competence, who, in geographical descriptions, speak of terraced plateaux, of plateaux dominated by the adjacent mountains, and even in one case of a plateau which a contemporaneous writer says " descends " between two chains of mountains to form the beginning of a river-bed;

VII. Considering that it follows from this that the greater elevation of the plain of the Namib as compared with the adjacent plain of the Kuisip is not in itself a sufficient reason to suppose that Commander Dyer necessarily referred to the former when he spoke of " the plateau " which was to be included in the annexed territory;

VIII. Considering, further, that a sufficient reason for asserting that Commander Dyer alluded to the Namib by the word " plateau " is not afforded by the statement in the Annexation Proclamation that the territory of Walfish Bay should be bounded " to the east by a line from Scheppmansdorf to Rooibank, *including the plateau* ", which only shows that the plateau in question must be included in the territory *by the eastern frontier*, which starts from Scheppmansdorf; because, without denying anything, it is very clear that, even if by " plateau " is understood, not the Namib, but the district comprised between the Scheppmansdorf Mission and Ururas, and it is therefore admitted that the southern frontier should be prolonged to this last point (which is regarded as the end of the Scheppmansdorf pastures), the plateau in question must always be in the south-eastern corner of the annexed territory, and will be included in it not only by the southern frontier, but also by the eastern, as required by the Annexation Proclamation;

IX. Considering that the phrases used by Mr. Simpson and Sir Hercules Robinson, and cited in the German memorandum to prove that in the year 1885, before the question of the boundary arose, the Namib was called a plateau by those British authorities, are phrases which, besides admitting of a different interpretation, as is shown in the reply of Great Britain, do not set aside the fact, which is amply evidenced, that Mr. Simpson, at the same date, and Sir H. Robinson in 1882, called the territory now under discussion " a plateau ", a fact which deprives an argument based on the hypothesis that that word was only used to designate the Namib of all its force;

X. Considering that, although Captain Dyer, in his report explaining the annexation, spoke of " the plateau of Rooibank and Scheppmansdorf to the south-east ", it does not necessarily follow from these words that Scheppmansdorf is situated to the south-east of the plateau nor the plateau to the north-west of Scheppmansdorf (in which case it would be necessary to understand by " plateau " the Namib); because, as it is admitted in the German memorandum, the words quoted can be taken also in the sense of merely indicating that Scheppmansdorf is on the south-east of the annexed territory, which neither fixes its position with regard to the plateau nor excludes the possibility of understanding the phrase as an allusion to the fact that both places lie to the south-east of the territory;

XI. Considering that, on the supposition that " the plateau " is the Namib, it would not be possible to explain what Commander Dyer wrote in his report of the 12th March, 1878, viz., that he made " a journey in a bullock-wagon to Rooibank ", taking with him two officers to accompany him " in the examination of the plateau ", because, in order to examine the plateau, assuming the Namib was thereby meant, it was not necessary to go to Rooibank, since hours

before reaching that point he would have begun to cross " the plateau ", and could take into consideration its characteristics as far as he considered that they offered any interest from the point of view of the annexation;

XII. Considering that, on the hypothesis that by plateau the Namib was meant, it would be impossible to explain the words used by Commander Dyer in the report mentioned in the preceding consideration, which words immediately followed those quoted in that consideration, *i.e.*, " *this place is an oasis* ", words which must refer to the word " plateau " which immediately precedes them, since the demonstrative pronoun " this " can only be properly used in this way, as the use of another pronoun or expression would be grammatically necessary to refer to a word farther from it in the phrase;

XIII. Considering that against this grammatical interpretation it cannot be argued that the word " place " cannot properly refer to a " plateau ", and it must be supposed, therefore, that it refers to some other term in the text quoted; because the word " place " has a sufficiently wide meaning both in English and other European languages to designate a space, position, or locality of very varied extent and conditions;

XIV. Considering that, without prejudice to examining later the real meaning of the phrase " including the plateau ", around the interpretation of which a great part of the question at issue revolves, the difficulty is at once noticed of reconciling the use of that phrase with the hypothesis repeatedly advanced that the Namib is the plateau alluded to by Captain Dyer; because if by plateau is to be understood the part of the Namib situated to the west of the Scheppmansdorp–Rooikop line, it is well known that the said line includes that district in the annexed territory, with the result that the phrase becomes absolutely superfluous, and if by plateau is understood the whole Namib in general it is evident that the Scheppmansdorf–Rooikop line *cuts* it and does not *include* it, so that the phrase in question becomes entirely inappropriate;

XV. Considering that if the hypothesis that the word " plateau " alludes to the Namib in the Annexation Proclamation is discarded, and the hypothesis is examined that the said word refers to a portion of the Kuisip valley, it is impossible to cite against this hypothesis Colonel Philips's statements that this district can be designated in a more satisfactory manner by the term" plain " than by the term " plateau ", nor Mr. Wrey's that that term is an erroneous designation as employed in the Annexation Proclamation; because, although such statements imply a criticism of the word used by Commander Dyer, they do not throw doubt on the fact that " plateau " refers to the bed of the river, nor do they justify the deduction that a mistake impossible in the case of a person of his competence is thereby attributed to the author of the Proclamation, since the statements do not prejudice in any way the question whether he used the term "plateau" of his own initiative or whether he confined himself to respecting or translating another term already used by the inhabitants of the territory;

XVI. Considering that, although it is held to be fully proved that the witnesses, Messrs. Kohler, Evensen, Frankenberg, and Boehm, mentioned in recital XXXV, paragraph 8, of this award, never heard the inhabitants of Walfish Bay use the Dutch phrase " de plaat ", which is supposed to be the origin of the use of the word " plateau " as a designation of the territory under discussion, the said witnesses neither assert nor can assert anything of their own knowledge as to whether the phrase " de plaat " or the term " plateau " were employed at the time of the annexation in the sense mentioned, since at that time none of them was living in the territory;

XVII. Considering that Mr. Simpson, when he appeared in 1885 before the mixed commission, and Sir Hercules Robinson, in his despatch of the 14th January, 1882 — that is to say, before the question of the boundary arose, and more than a quarter of a century before the statements of the former witnesses — called the strip of the valley of the Kuisip under discussion a plateau, and that the word does not appear to be taken from the Annexation Proclamation in either of the two statements, as they are found in the case, and that the possibility is not excluded that its employment was authorized by the general use of language;

XVIII. Considering that there is nothing to justify the contention that Captain Dyer, in his report of the 12th March, 1878, used the word " plateau " as a description, which he considered exact, of the territory now under discussion, and not as a more or less special name consecrated by custom, and which it was his business not to correct but to repeat, since he had not sufficient reason to reject it as absurd;

XIX. Considering that, for the reasons explained, it cannot be asserted that the criticism passed on Mr. Philips and Mr. Wrey with regard to their use of the word " plateau " as referring to a portion of the Kuisip valley implies the attribution to Mr. Dyer of incompetence and error only admissible on the hypothesis, which has not been proved, that he used the term " plateau " for the first time in the sense of which we are speaking;

XX. Considering that Captain Dyer's statement in his second report of the 14th September, 1887, that the plateau was situated " above Rooibank ", cannot be cited against the assumption that the term " plateau " in the Annexation Proclamation referred to the valley of the Kuisip, because, besides these words being sufficiently explained in later reports of Mr. Dyer, which must be considered to have the same weight as evidence as his report in 1887, the statement in this last report is perfectly applicable to the bed of the Kuisip, which rises constantly and gradually towards the interior from the coast and runs on above Rooibank within the zone in dispute, this name being understood in the sense which will be stated and justified later on;

XXI. Considering that, in view of the terms in which Commander Dyer expresses himself in his report of the 12th March, 1878, the importance of which as regards the solution of the question pending, in contrast to what is the case with other later reports, is not disputed by either of the High Parties interested in the matter, it is to be understood that, if the natural meaning of the words is not strained and the order in which they appear is attended to, the lack of " fresh water and pasture in Walfish Bay " and the necessity of including in the annexation " a place which contained both things " was the motive which determined his " journey to Rooibank " in order to examine " the plateau " which " is an oasis thickly covered with grass, with a good water supply, and the nearest available to provide the bay with water and good pasture ", from which it necessarily follows that a greater or smaller part of the valley of the Kuisip was what Commander Dyer desired to designate and did designate by the word " plateau ", since within the annexed territory the characteristics required to comply with the description cited can only be found in the river bed;

XXII. Considering that, Mr. Dyer's words being thus understood, the fact that he made a journey to Rooibank to examine the plateau is explained, because the pasture-land and well-watered country which the plateau contained, and with the annexation of which we are dealing, could only be found at Rooibank;

XXIII. Considering that, this point having been established, the phrase " this place is an oasis " becomes also intelligible because the German memorandum ends by recognizing the possibility, which in any case would be evident, of calling Rooibank an oasis when its fertility is compared with the rest of the annexed territory — a comparison which, even if not explicitly indicated in Captain Dyer's words, may be supposed to have been present in his mind, as it would be in the mind of anyone who, after travelling for long hours over a poor or barren country and over the desolate plain of the Namib, enters the district of Rooibank, which is covered with grass and well wooded;

XXIV. Considering the featureless character of the bed of the Kuisip from the neighbourhood of Scheppmansdorf, the regularity of its broad surface, its noticeable height, which contributes to diminish the impression which the Namib might cause as the dominating height (when the trees do not hide it), and the absence from it of any channel indicating the superficial passage of the waters of a river, explain how it was called " plateau ", that is to say, " elevated plain ", although its elevation was less than that of the Namib, which bounds it to the north, and of that of the sand-hills which surround it on the south;

XXV. Considering that if the previous arguments are admitted, and therefore that, with more or less propriety as to the use of the word, but with no uncertainty as to the intention, what is called " plateau " in the Proclamation of Annexation is part of the valley of the Kuisip, the principal problem still remains undecided, namely, that relative to its extent and limits, or, in other words, whether the said plateau should be understood as ending near the old church at Scheppmansdorf or, on the contrary, should be prolonged to Ururas;

XXVI. Considering that against the prolongation of the plateau to Ururas the omission of any mention of this locality, both in the Proclamation and in the report of the 12th March, 1878, and even in the second report of Mr. Dyer, dated the 14th September, 1887, cannot be urged; because, with regard to the two first the omission is easily explained, since neither does the name " Ururas " appear in the map of the coast used for the annexation, nor is it clear that Commander Dyer knew of it at that time; and with regard to the second report, it was natural that its author did not wish to use, in explanation of his intentions, a name which he had not had in his mind when he carried out those intentions;

XXVII. Considering that it cannot be maintained either, in the sense set out, that Scheppmansdorf is a fixed point constituted by the mission buildings, in such a way that the mention of it in the Proclamation of 1878 is sufficient to warrant the claim that the eastern frontier of the annexed territory should be traced close to them; because all the information obtained with regard to this matter, and even the very declarations of the German witnesses, agree that Scheppmansdorf is something indefinite and vague; the missionary Boehm saying in effect, as was stated in recital XXVIII, that this place is about a " kilometre and a half in extent ", that it was called previously Awahaus or Rooibank, and that it is the principal place of the Namas and Hottentots, although lacking the fixed character common to European hamlets or villages and the " exact limits for the community or tribe "; the trader, Joseph Sichel, asserting that Scheppmansdorf is ordinarily called Rooibank (whose undefined character is expressly recognized in the German statements), and Dr. Belck expressing himself in analogous terms;

XXVIII. Considering that, though the witnesses mentioned think that the eastern frontier of the territory ought to pass close to the church of Scheppmansdorf, the words transcribed prove that their opinion is not based on the fact that Scheppmansdorf being a fixed point, which is the question at issue at this

moment, but that it is an opinion maintained after recognizing as clearly as possible, as we have seen, that that place has no precise limits, or, in other words, is exactly the opposite to what a fixed point represents;

XXIX. Considering that the words employed by Mr. Dyer in his report of the 12th March, 1878, " there being no fixed points on this immediate coast, it was determined that the Rooibank plateau and Scheppmansdorf to the south-east should be included in a line drawn from 15 miles south of Pelican Point to 10 miles inland from the mouth of the Swakop River ", cannot be interpreted in the sense that Scheppmansdorf was considered at that date as a fixed point and chosen for lack of fixed points in the coastal region to establish the boundary of the territory, because against this interpretation the following arguments militate:

(i) That if it is understood that Scheppmansdorf is designated as a fixed point in the sentence which is being discussed, this is no reason for not attributing the same character and function to the plateau of Rooibank, which is mentioned immediately before and is governed grammatically by the same verb — a sequence which nevertheless seems to be avoided, or which it is not desired to deduce from the interpretation which is impugned;

(ii) That, far from its appearing that the plateau and Scheppmansdorf are both fixed points, as follows from what has been said, they embrace a considerable area;

(iii) That the mere fact that the author of the report refers to the *inclusion* of Scheppmansdorf and the plateau of Rooibank within a line indicates that neither the former nor the latter are to be taken as fixed points, but as places of greater or less extent situated *inside* the frontier, and which therefore cannot be points on it marking or indicating its direction precisely;

(iv) And, finally, that it is much more natural, simple, and logical to understand, in consonance with what precedes, that the lack of fixed points on the coast is invoked in Mr. Dyer's report in order to justify the extension of the western frontier of the territory along the "immediate coast" being determined in miles and not by means of places or physical features;

XXX. Considering that, in order to maintain that the plateau and the territory of Walfish Bay end near the church of Scheppmansdorf, it is impossible effectually to assert the existence, in the portion of the bed of the Kuisip situated to the west, within undoubted British territory, of grazing ground and water sufficient for the needs of the white colonists resident in the bay; because, in addition to this assertion not being proved, to its being openly contradicted by one of the High Parties, and to its prejudicing the solution of questions which will have to be examined later, it is very clear that the relation between the needs of the colonists and the extension of the pasture-land depends on circumstances and considerations both diverse and variable, and does not offer by itself alone a sure criterion to solve the problem, all the more so that at the time of the annexation it is reasonable to suppose that the probable development of the British station was thought of, although there is no datum to-day for a calculation how far the forethought of Mr. Dyer and his advisers extended in regard to the matter;

XXXI. Considering that the fact that the British Admiralty charts before 1885 show that the eastern frontier starts at Scheppmansdorf and not at Ururas does not constitute a recognition of the thesis that the territory of Walfish Bay ought to finish in the vicinity of the Scheppmansdorf mission buildings (with the result that " the plateau ", as understood in the previous considerations, would end there); because, from the moment that the note " approximate

boundaries of the station of Walfish Bay " is found on the said charts, the uncertainty prevailing as to those boundaries is demonstrated without any doubt, an uncertainty which is perfectly explicable in the days before Mr. Wrey's survey when the topographical data were lacking which were necessary to mark on a map the exact extent of the plateau which Mr. Dyer expressly mentioned when he described the frontiers of the territory;

XXXII. Considering that the supposition cannot be admitted that the phrase " approximate limits of the station of Walfish Bay ", found on the Admiralty charts before 1885, must be explained not in the manner set out in the preceding consideration, but as an allusion to the fact that the proposal of the Mixed Commission of Angra Pequeña and the West Coast was then awaiting a settlement, a proposal which was designed to change the word " Rooibank " employed in Mr. Dyer's Proclamation and to substitute for it the word " Rooikop ", because it is sufficient to observe that, as this proposal was made on the 14th August, 1885, the Admiralty charts published in previous years could not allude to it;

XXXIII. Considering that the fact that the magistrate, Mr. Simpson, gave his authority to a contract in which it was stated that the limit of the said territory was at Rooibank cannot be taken as a proof that the British authorities formerly took a different view from what they do to-day as to the eastern frontier of the territory of Walfish Bay, and believed it to be near the church at Scheppmansdorf and at a distance from Ururas; because, even assuming the assent of the magistrate to what was stated by the parties to the contract, it is certain that he did not compromise to any extent his more or less firm opinion with regard to the boundaries by agreeing to Rooibank being designated as a point on the frontier, as it was a name which admittedly implied an area and its extension as a grazing ground to Ururas was affirmed by Mr. Simpson before the mixed commission of 1885, and its use in the contract referred to invalidates the argument in question, since the assertion that Rooibank signifies " at the side of or near the mission buildings of Scheppmansdorf " would be opposed to the whole general tenor of the German argument;

XXXIV. Considering that this sense of space and indefiniteness implied by the word " Rooibank " is implicitly recognized by the parties signing the contract by their placing with significant insistence after the word " Rooibank " the words " within the limits of the territories of Walfish Bay ", showing very clearly that nothing precise is indicated by the word " Rooibank ", and that what they referred to was a line crossing or touching the lands of Rooibank and serving as the frontier of British territory;

XXXV. Considering that the transport of goods from Sandwich Harbour to Damaraland via the back of the church at Scheppmansdorf and the storing of them in its vicinity without paying customs duty does not constitute evidence of the same value as the former evidence, because this proceeding can be explained as a case of smuggling of little importance, of short duration, and difficult for the authorities at Walfish Bay to know of or to prevent;

XXXVI. Considering that as a matter of fact the small importance of the smuggling is recognized by the declaration of the missionary Boehm, cited by Germany, that its short duration follows not only from the fact, supported by documentary evidence, that customs duties were established in Walfish Bay on the 17th August, 1884, and ceased on the 13th August, 1885, but also from the declaration of the German witness Dr. Belck, who affirms that the carrying of the goods began after the month of November of the first of the years mentioned, and that the difficulty of knowing of and stopping a traffic such as the

one we are dealing with was due to the distance between Scheppmansdorf and Walfish Bay and to the vigilance required to stop all contraband in a comparatively extensive zone;

XXXVII. Considering that to complete the case the explanation of these proceedings as a case of contraband is not the only one possible, because it is to be seen from the sketch presented by the witness Mr. Evensen, and reproduced in the German memorandum, that the house which he lived in with Mr. Wilmer during the year 1885 was situated to the south-east of the former church at Scheppmansdorf, and at a distance which (comparing the dimension of the sketch with the scale, approximately twice as large, of the map which faces the first page of the German memorandum) does not allow the inference that the house was at times a depôt for goods within the limits beaconed by Mr. Wrey; by which reasoning it is clear that the transport of goods disembarked at Sandwich Harbour would have been effected across territory undeniably German, and could not have been prevented by the British authorities;

XXXVIII. Considering that the force of the preceding reasoning is in no way diminished by the fact that some witness or other, such as the trader Joseph Sichel, supposes that the depôt of merchandise belonging to Messrs. Wilmer and Evensen was situated more than 1½ kilom. to the east of the mission station, from which it could be deduced that it was situated within the disputed territory, because, apart from the fact that nobody could know better than Mr. Evensen the situation of his own house and store, and apart from the fact that nobody took the trouble as he did to sketch it, it is easily understood that Messrs. Wilmer and Evensen, having lived after 1886 at a different place from where they lived in 1885, confusion between the two might arise in the minds of outsiders, and goods might be supposed to be stored in one place which, during the levy of customs duties in Walfish Bay, were really kept in the other;

XXXIX. Considering that, to judge by the argument, based on the admission of the magistrate, Mr. Simpson, that the tree from which Jan Jonker Afrikander hanged a Berg Damara shepherd stood on German territory 600 yards from Rooibank (Scheppmansdorp), the data at the disposal of both parties are deficient and even contradictory, so that it is impossible to fix with certainty the exact point where the murder was committed;

XL. Considering that this is very largely due to the vagueness as to the names Rooibank and Scheppmansdorf, as they are understood and as Mr. Simpson understood them in some of his stamteents before the mixed commission, a vagueness which enables the distance to be reckoned as 600 yards from the mission buildings, and also from a place situated more to the east or near the line drawn by Mr. Wrey;

XLI. Considering that if the distance of 600 yards is measured in a southerly direction from different points at Rooibank, near the straight line which serves as the boundary of the territory, and joins boundary pillars (C) and (D) set up by Mr. Wrey, trees on which the Berg Damara might have been hanged are found within this distance (growing in the kloof mentioned in paragraph 13 of recital XXXVI, and therefore in German territory), just as the man might have been hanged, as is claimed by Germany, from one of the trees in the Kuisip valley standing to the east of the Scheppmansdorf mission;

XLII. Considering that if the German Government maintain firmly, in accordance with information derived from their officials, that the scene of the murder was on the disputed territory, the British Government assert with equal firmness and persistency, referring to Mr. Simpson's statements, that the said

line is outside the line (C-D), though without determining its position more than approximately;

XLIII. Considering that the evidence of Mr. Evensen with regard to this question is inconsistent, because, from his statement of the 14th January, 1909, it follows that the tree from which the Berg Damara was hanged was some 200 metres to the south-west of the house inhabited by the witness, which house in its turn stood at that time to the south-west of the Scheppmansdorf church (an assertion which supports the British case), whilst the evidence given on the 9th March, 1910, corroborates the German view, as he then stated that the murder took place in the territory now in dispute;

XLIV. Considering that, for the reasons given, it cannot be regarded as proved that Mr. Simpson's statements respecting the scene of the crime imply the admission that the eastern frontier of Walfish Bay passed very close to the church at Scheppmansdorf, where, accordingly, it would be necessary to suppose the grazing flats, included by Mr. Dyer in the annexation, terminated;

XLV. Considering that, even assuming that it was proved, in spite of all that has been said in the preceding considerations, that the magistrate Mr. Simpson had admitted, in connection with the contents of a contract, the transport and storing of goods duty free and the commission of a crime, that the eastern frontier of the territory of Walfish Bay passed close to the church at Scheppmansdorf, such an admission would only express an opinion which, even if it were an echo of other more general opinion held at that time, cannot be accepted until it is shown by an investigation analogous to that which is taking place in connection with this award to be in consonance with the Proclamation of Annexation of 1878 and with the acts and documents by which it must be interpreted, and considering that the rights of Great Britain cannot in any case be prejudiced by the error which one of her officials may have fallen into, as he lacked the representative character indispensable to bind the State, in this matter, by his words or acts;

XLVI. Considering that the evidence constituted by the sworn declarations of Messrs. Boehm, Sichel, Evensen, and Belck, cited in the German memorandum to show that until 1885 both the British authorities and the colonists resident in Walfish Bay who were acquainted with the boundary question understood that the eastern frontier of the territory passed close to the church at Scheppmansdorf, is evidence like that advanced by Great Britain in the opposite sense, the value of which, being in favour of the High Party which invokes it, should be weighed more carefully than is necessary when it is unfavourable to that party, and, starting from the basis, as has been done till now, that this method is in accordance with the rules of sane criticism, in conformity with the leading system in modern law, and the only one acceptable in the proceedings of an international arbitration, in which no principle or positive rule imposes any other limit on the powers of the arbitrator;

XLVII. Considering that all the evidence alluded to has been produced out of Court, in the sense that the arbitrator has not been able to conduct any cross-examination and without being disputed, inasmuch as the party prejudiced by it has not cross-examined the witnesses either, circumstances which, though they do not deserve blame, and appear easily explicable in the present case, certainly diminish the value of the evidence;

XLVIII. Considering that to judge by the respective assertions of the two parties, the witnesses brought forward by one or the other depend in some way or other, by reason of nationality, residence, or office, on the State in whose favour they are giving evidence — a fact which, though it does not properly

constitute a legal objection, is a ground for a reasonable presumption that they may accentuate their assertions, whether they wish it or not, in a definite sense;

XLIX. Considering that the four German witnesses, Messrs. Boehm, Sichel, Evensen, and Belck, speak of the boundaries established by Mr. Dyer, not by personal and first-hand knowledge of the facts of annexation, but referring to what they have heard other people say, and that, in giving evidence as to the opinion of those persons, they simply give evidence as to public opinion or rumour supported by indirect testimony, and therefore weak and dangerous:

L. Considering that these statements and common report are inconsistent not only with the evidence of Dixon, Hendrik Petros, Willem, Engelbrecht, Jan Sarop, and Jim, adduced by Great Britain, but also with the evidence given by Mr. Wrey, alluded to at the end of paragraph (*d*) of section XXXII, with the last statements of Captain Dyer, and with what Mr. Sandys declared on the 9th June, 1910, in confirmation of some of the statements by the last named;

LI. Considering that, though the value of this British evidence is questionable, because some of it is based on hearsay and some of it emanates from natives whose credibility is disputed, because mistakes are noticed in it, because the credibility of the witness, Mr. Dixon, is placed in doubt, and because the value of statements made by Mr. Dyer subsequent to 1878 have been denied, it is certain: —

(i) That the majority of the witnesses mentioned speak of the boundaries with a direct knowledge of the facts of the annexation and not by a mere reference to other persons;

(ii) That neither the evidence of the German sergeant of police, Carl Leis, nor that of Von Broen, respectively mentioned in paragraphs 13 and 14 of recital XXXV, is a sufficient proof that the native witnesses Hendrik Petros, Willem, and Engelbrecht, were not present as they allege, and as it is supposed they were in the first paragraph mentioned, when Captain Dyer visited Rooibank; because Carl Leis merely states, *on the authority* of Jan Sarop, that at that time only two Hottentots, now dead, resided *ordinarily* at Rooibank; and because Von Broen confined himself to stating with glaring vagueness and indecisiveness that he heard *some native* say that all the natives of the country who were present at the annexation were dead, and that he believes that it was said *about a year ago*;

(iii) That whatever the characteristics of the native race that inhabits the territory of Walfish Bay, and the general traits attributed to it may be, it is not possible entirely to deny the value of the evidence given by the individuals belonging to it, above all, when these statements are confirmed by similar statements by Europeans;

(iv) That if the Hottentot Willem is mistaken in declaring that Captain Dyer was at Ururas and Zwartbank in 1878, the German witness Sichel is also mistaken, as was shown in consideration XXXVIII, with regard to the storing of the goods transported on account of Messrs. Wilmer and Evensen, and the view of the missionary Boehm that the transfer of the boundary of the territory farther east of the church of Scheppmansdorf would only have as its object the annexation of a greater quantity of *river sand* is also erroneous;

(v) That even if the evidence of Mr. Dixon is discarded on account of the criticism levelled at him in the German case, just as for an analogous reason the evidence of Mr. Koch must be discarded as it is impugned in the British memorandum, it is imperative to add to the statements of the natives mentioned

those of Messrs. Dyer, Wrey, and Sandys; since, though with regard to Captain Dyer it has been pointed out that his statements subsequent to the date of annexation lack the decisive value of his earlier ones, they nevertheless also constitute an element of opinion worthy of consideration, though it must be recognised that, like all the rest, they are impaired by deficiencies and lack full force as evidence;

LII. Considering that the conflict between the German evidence and that of Great Britain is sufficient to prevent its being considered proved that, as is maintained in the former, it was the common opinion until 1885 that the eastern frontier of Walfish Bay passed near the church of Scheppmansdorf, and that it is best to suppose, for the sake of the credit of both sets of witnesses, that, even at that time, the news of the Proclamation of Annexation raised a difference of opinion which foreshadowed the question now at issue, and that each view is reflected in the evidence of the High Party which brings it forward;

LIII. Considering that after examining and testing the arguments expounded to prove that " the plateau ", as it has been defined above, and with it the territory of Walfish Bay end at the mission buildings at Scheppmansdorf, it is clear that the prolongation of both in an easterly direction to Ururas is required by the topographical conditions of the region; for if this region can be called a plateau as far as the church at Scheppmansdorf by reason of its height and the regularity of its wide surface, it can be so termed all the way to Ururas, since it does not lose either of these characteristics, nor in general its direction and shape, till it reaches that place, authorising the supposition, unless something else disproves it expressly, that such a topographical unity cannot be divided on pain of dividing the plateau which Commander Dyer wished to include, taking the natural meaning of his words, in its entirety and not partially;

LIV. Considering that this topographical unity of " the plateau " as far as Ururas was recognized by the German commissioner, Dr. Goering, as was said at the end of recital XVIII, and that it is confirmed by Mr. Simpson in his statements made before the mixed commission of 1885, before the boundary question arose, when in answer to a question by the British commissioner he says that if the grazing commonage includes the *whole of the plateau* it would also include Ururas;

LV. Considering that the declaration with which we are dealing, like all those made before the mixed commission, has special value on account of its date and because the two parties are represented in the report, and it is not possible to discredit them generally on the pretext of contradictions attributed to the witnesses, since those pointed out in the last paragraphs of recital XXVII are explained (with the exception of an erroneous interpretation in the name " Awahaus ") by noting that, as Mr. Simpson himself indicates, the names " Rooibank " and " Scheppmansdorf " have a wide meaning in which they are identical, and a more limited one in which they represent something different, and the apparent contradiction in the replies only disappears when they are referred, according to their nature, sometimes to one and sometimes to the the other of the two senses explained;

LVI. Considering that the whole plateau, whose topographical untiy and consequent extension to Ururas is emphasized in the preceding considerations, is pasture land with plenty of water, since there exist or have existed to the east of the church at Scheppmansdorf wells and gardens, also a large area covered with " quickgrass ", as Mr. Wrey's map indicates, and a considerable number of trees which afford, in addition to fuel, valuable fodder for cattle, such as the anna — circumstances which, if taken in conjunction with the

obvious intention of Mr. Dyer to provide water and good pasture for the station of Walfish Bay and with the fact of his having been advised in this matter by persons knowing the locality, render any interpretation difficult which would result in this grazing ground being divided, since in the conception of this word, as in the conception of " plateau ", there is a sense of unity whose division in case of doubt cannot be presumed;

LVII. Considering that, whether or no there existed in Captain Dyer's mind the initial intention of considering the interests of the natives in the matter of the extent of the grazing grounds which were to be annexed, there is no doubt that in all the hypotheses advanced the place where they habitually have their dwellings in the vicinity of the mission house at Scheppmansdorf was included in British territory, and this being so it was not natural that Captain Dyer should annex a more or less primitive population and fail to annex the adjoining pasture zone, on which the said population keeps its cattle and secures to itself, its conditions being as aforesaid, the principal elements of life;

LVIII. Considering that the constant existence at Scheppmansdorf of a village or small native population, which is the basis of the preceding reasoning, is perfectly proved not only by British evidence of later date than the boundary controversy, but also by the declarations of Mr. Simpson before the mixed commission of 1885, by the missionary Boehm, who calls that place " the principal place of the Namas and Hottentots ", and by Dr. Belck, who states that there were at the place a number of huts, as there were in 1884, though the majority of the inhabitants are accustomed to abandon them after the gathering of the fruit of the nara;

LIX. Considering that the natives residing at Scheppmansdorf feed their cattle along the valley of the Kuisip, sharing the pastures, which in different forms (for example, quickgrass and fruit of the anna) and with some variety, depending on places and seasons, extend to Ururas, without the existence of this community, which was recognised by Mr. Simpson before the mixed commission of 1885 and vigorously asserted on the British side and supported by a diversity of evidence, appearing to be contradicted in a direct and definite manner by the German witnesses;

LX. Considering that, though the cattle belonging to the inhabitants of Scheppmansdorf may have grazed or may sometimes graze beyond Ururas, it is not proved that this happens habitually, and in any case it must be held that such cattle were therefore on ground already designated by another name, for which reason it is necessary to recognize that the pastures referred to in the preceding considerations, as well as the plateau, terminate at Ururas;

LXI. Considering that both the plateau and the pastures in question can be called without distinction " the plateau or pastures of Scheppmansdorf or Rooibank ", when once both names are completely identified in common usage in the sense explained, as numerous depositions prove, and especially the evidence given before the mixed commission of 1885 and the joint letter signed on the 14th August of the same year by Dr. Bieber and Judge Shippard, in which the correction of the boundaries of the territory laid down in Commander Dyer's Proclamation is suggested, with the object that Scheppmansdorf should be designated " Scheppmansdorf or Rooibank ";

LXII. Considering that the prolongation of the plateau of pastures of Scheppmansdorf to Ururas explains satisfactorily the terms of the proclamation of the 12th March, 1878, because, as Scheppmansdorf was therein indicated as the limit of British territory and the name was known to be somewhat vague,

inasmuch as it applied to land extending some miles, it was necessary to add something to make the frontier more precise; and this necessity was the origin of the use of the words " including the plateau ", by which it was desired to indicate beyond doubt, in the only possible way, as there were no maps, that the boundary would have to be laid down, not at the beginning nor in the middle of the lands of Scheppmansdorf, but where its pastures terminate, and with them the plateau whose annexation was desired;

LXIII. Considering that the explanations, based on the phrase " including the plateau " being superfluous, and on an attempt to justify the theory that Captain Dyer annexed territory beyond his instructions in extending the territory of Walfish Bay to Scheppmansdorf, are much less probable than the explanation in LXII, because with regard to the first the repetition of the expression in Commander Dyer's report explaining the annexation shows that he considered its employment indispensable, and with regard to the second the following arguments contribute to rebut the hypothesis which it expresses:

(i) That the instructions received by Commander Dyer from his superiors left him full liberty to include all that he did include in the annexed territory, since they authorized him in the first instance, as was said in recital II, to proclaim sovereignty over a radius of 10 or 12 miles *or so*, as it appeared to him necessary after consultation with Palgrave, and authorized him some days afterwards, with still more latitude, to take possession of the territory adjacent to Walfish Bay to a distance inland which he was to fix in consultation with Mr. Palgrave if he was there, it being evident that the absence of Mr. Palgrave forced Commander Dyer to settle by himself the extent of the territory to be annexed and to substitute for Mr. Palgrave's advice information obtained from the white colonists inhabiting the bay;

(ii) That the letter from Commodore Sullivan, cited in recital IV, which states that the boundaries laid down by Commander Dyer " appear reasonable ", proves that he was not considered in any way to have exceeded his instructions;

(iii) That a mere glance at the map is enough to show that, taking the harbour at Walfish Bay as the centre, the radius which connects it with Nuberoff is longer than the one connecting it with the mission buildings at Rooibank and a little shorter than the one connecting it with Ururas, for which reason Captain Dyer's delimitation, supposed to be in excess of his instructions, would affect both extremities of the territory without his anxiety to justify his action in one case, and not in the other, being explained;

LXIV. Considering that the effective occupation and the exercise of jurisdiction on the part of Great Britain over all the disputed territory before the boundary question arose are indicated by different acts which are not impugned, such as the grant of gardens by the resident magistrates at Walfish Bay and of the lands in Rooibank and Ururas for which the traders, Messrs. Wilmer and Evensen, petitioned the Cape Government, as also the punishment of an illegal act and the arrest of an offender at Ururas;

LXV. Considering that if, for the reasons explained, the prolongation of the territory of Walfish Bay to Ururas is admitted as correct, it is unnecessary to invoke the hinterland doctrine in support of the British claim, a doctrine which, further, would not be applicable to the case in discussion, because the taking possession of the said territory and its antecedents indicate the intention of including the land annexed within precise limits, with the implicit renunciation of all intention to extend them, and because, as that doctrine is understood, it requires for its application the existence or assertion of political influence over

certain territory, or a treaty in which it is concretely formulated, none of which circumstances apply to the case which is the cause of this controversy;

LXVI. Considering that the second of the questions to be examined in this award, *i.e.*, whether the southern boundary of the territory of Walfish Bay should be traced from a point distant 15 nautical miles, or, on the contrary, from one distant 15 statute miles from Pelican Point, is a question which raises as a preliminary another one as to which the necessary powers of settlement have been given to the arbitrator in the Arbitration Agreement;

LXVII. Considering that it is a constant doctrine of public international law that the arbitrator has powers to settle questions as to his own competence by interpreting the range of the agreement, submitting to his decision the questions in dispute;

LXVIII. Considering that the decision whether the eastern frontier of the territory of Walfish Bay should be measured in nautical or statute miles affects the starting-point of the southern frontier, whose demarcation is submitted to the decision of the arbitrator in general terms and without restriction of any kind, in accordance with the Convention of the 1st July, 1890, and the Declaration of the 30th January, 1909;

LXIX. Considering that if, in spite of the fact that both instruments speak simply of submitting to arbitration the settlement of the " southern frontier of the territory of Walfish Bay ", it is understood to be necessary to interpret the former in accordance with its antecedents, and accordingly that the Agreement of 1890 referred only to the part of the southern frontier in dispute at that date, *i.e.*, to the line from the vicinity of the church of Scheppmansdorf to Ururas, this same reasoning would conduce to recognizing that the declaration of 1909 refers to all that was then at issue, and therefore to the starting-point of the southern frontier disputed since 1904;

LXX. Considering that, in virtue of what has been said, the arbitrator is competent to settle this second question which has been brought forward in the German memorandum;

LXXI. Considering that, although nautical miles are not ordinarily used to measure land in British territory, there is no reason to suppose that a naval officer like Commander Dyer did not use them, as he states, to determine an extent of coast (which is what is meant by the western frontier), above all, when he had as his guide an Admiralty chart and had to refer to the distances on it;

LXXII. Considering that, from the selection of Nuberoff as the boundary of the territory on the Swakop River, it does not follow that, in contradistinction to what was done in the case of the western frontier, the northern frontier was measured in statute miles, because it is clear from Mr. Wrey's report, dated the 14th January, 1886, that the distance between Nuberoff and the mouth of the Swakop was not estimated to be 10 exact miles, and therefore that that point was marked as the boundary, not in accordance with the result of a scrupulous survey of the ground, but as being a natural feature near the place where the north-eastern corner of the territory ought to lie, and which it was necessary to accept, even if the extent of the territory was thereby reduced, as a permanent and visible mark of the frontier established;

LXXIII. Considering that, as exception has not been taken to the continued possession on the part of Great Britain of the territory extending to the point on the coast where the southern frontier, as drawn by Mr. Wrey, commences, it is necessary to accept the fact of possession, cited by the British Government, and to see in it not only a proof of the sense in which the Proclamation of

Annexation was always interpreted with reference to the matter under discussion, but also the evidence of a wish to acquire, and of an effective occupation, by which in any case British sovereignty could have been established over the zone in dispute, before the adjacent territory was placed under the protection of Germany;

LXXIV. Considering that the demarcation of the southern boundary of the territory of Walfish Bay by Mr. Wrey in 1885 has only been disputed as regards the points which have now been investigated;

LXXV. Considering that, although the accuracy with which the demarcation was carried out is proved by all the preceding arguments, it does not follow from this that it had binding force of any kind on Germany, who, as the Power conterminous with the territory of Walfish Bay at the time of the demarcation, could only be bound thereby so far as either she took part in it or gave her assent to it, since there is no juridical principle which applies the effect of a demarcation to States which, being directly interested in it, have not co-operated in any way in its execution or consented to accept its consequences.

For the reasons explained the arbitrator declares:

Firstly, that the demarcation of the southern boundary of the territory of Walfish Bay carried out by Surveyor Wrey in 1885 is not binding on Germany on the ground that that Power did not take part in it and did not give her assent to it subsequently;

Secondly, that since the said demarcation fixes the southern boundary referred to accurately, it must be accepted in future, by virtue of this arbitral award, as the exact definition of the frontier under discussion, which therefore must have the starting-point and termination indicated by Mr. Wrey, passing through the two other points where he erected the present intermediate beacons.

Joaquin F. Prida

Madrid, May 23, 1911.