

OPINION OF THE CHAIRMAN

By agreement of the Parties, the question to be resolved by the Tribunal is the alignment of the boundary between the two Termini, which are indicated on the Award Map (Map C) by "WT" for the Western Terminus, and by "ET" for the Eastern Terminus. It is the case of both Parties that the Tribunal is not bound to adhere to either claim line if it concludes on the evidence on record that the boundary lies elsewhere, between the extremes of those lines.

Two preliminary points need to be disposed of before the main aspects of the case are examined. Pakistan submits that the Diplomatic Note of the Indian Ministry of External Affairs to the High Commissioner for Pakistan in India, dated 28 July 1955, amounted to an admission by India that at the relevant time the border between India and Pakistan lay near Karim Shahi (see Chapter IX). The statement cannot in the context of the related correspondence, which finally led to the present dispute, be understood as an admission of the alignment of the boundary. The significance of the passage in the Note is not, in view of the letter as a whole and of the protracted diplomatic correspondence, greater than any other piece of evidence showing the extent of patrolling at any particular moment between the date of Independence and 30 June 1965. The Note by itself therefore is not of such a character as to conclusively affect the case of India.

Similarly, no decisive importance can be attached to the statement made in the Pakistan Note presented during the Indo-Pakistan Minister Level Conference on the Western Border Issues, held in January 1960, that before 1762 the whole of the Rann up to its northern extremity, and even beyond, including Rahim ki Bazar and Virawah, fell within Kutch jurisdiction (see Chapter III). In the context where it appeared, this pronouncement was merely an argument referring to certain historical accounts and cannot be construed as an admission binding upon Pakistan and producing the Tribunal from reaching an independent conclusion on the matter.

The greater part of the disputed territory falls in the Great Rann. The nature of this tract has been discussed in Chapter II with reference to the submission and arguments of the Parties on that topic. The question whether the Rann on the whole is most closely akin to land, or to what Pakistan has termed a "marine feature", has no decisive bearing on the determination of the issues in the case. For the purpose of this opinion, it needs only to be observed that the Rann is a unique geographical phenomenon.

Pursuant to the Agreement of 30 June 1965, the Tribunal is called upon to determine the border between India and Pakistan in the light of their respective claims and of the evidence produced before it. The Agreement does not include a rule analogous to the principle known as *uti possidetis*, under which the administrative or other boundaries existing on a postulated historical date are to be ascertained and given effect by the Tribunal, nor have the Parties later

agreed on such a date. It is true that one important element of a notion of this kind is common ground and therefore binds the Tribunal, viz., the agreement between the Parties that the boundary between India and Pakistan is a conterminous boundary, and that the disputed territory must therefore belong to one or other of them and cannot belong to any third party. It does not necessarily follow from this proposition, however, that the territory cannot at any relevant time have had an undefined status.

In view of what has now been said, the territorial dispute which the Tribunal is called upon to decide does not differ in essence from other like disputes in which opposing claims have been made in reliance upon conflicting testimony, and where a judgment has to be rendered on the relative strength of the cases made out by two parties.

While the Parties have not expressly joined in accepting a precise critical date, their pleadings and arguments embody a wide measure of agreement on certain dates or years as having particular relevance.

One such date is 13 October 1819, when the East India Company concluded the last of the three Treaties with the Rulers of Kutch. Both Parties submit that the boundary of Kutch has remained unchanged since the Treaty of 1819. In tracing the historical evolution, 13 October 1819 has therefore for both Parties been an important date. India, however, also maintains that the boundary after 1819 may have become crystallised and consolidated.

Both Parties have developed their cases with primary reference to and in reliance on evidence relating to the long period of British rule on the sub-continent. The attitude and actions of the British Government, both as Suzerain Power and as territorial sovereign at various times during this epoch have on each issue deemed by both Parties to be of crucial significance. For that reason, the time of Independence is of decisive importance.

With regard to the period after 1947, the main difference between the Parties' cases is that Pakistan relies upon certain acts of jurisdiction as constituting additional, independent sources of title to the disputed territory, while India denies that they are of such character.

Pakistan, at a late stage in the proceedings, introduced the argument that the rights claimed by Pakistan are those of the people of the Muslim unit which was conquered by the British in 1843 and then, as it were, restored to the Muslim State of Pakistan in 1947. According to this submission, Sind would have been held in trust by the British Government in a capacity of territorial sovereign incapable of acting as such, while Sind itself would have been a fettered sovereign possessing latent territorial rights; the dispositions of Great Britain during the century of its administration of Sind would in such an eventuality be without effect in this case. However, this submission was not pressed by Pakistan in argument, and it is not compatible with its case as a whole. While the principle of which it is an illustration is of interest, application of such a principle would be difficult and would introduce an element of instability in the relationship between nations which for a long time have been under foreign domination.

However, one cannot escape noting the somewhat strange consequence of history that in this case Sind will be constrained to suffer from possible indifference and neglect on the part of the British to safeguard and maintain Sind's proper territorial interests.

In the context of the constitutional system of India during British times, the very concept of sovereignty, and the distribution and exercise of sovereign functions, was complex.

The constituent elements of sovereignty, as evolved in practice on the sub-continent during the relevant time, must be understood in order to permit a proper appreciation of the import of the evidence.

It appears from Tupper's treatise, which was a compilation of the decisions of the Government of India in political cases, that the Government was faced with decisions requiring analysis and application of the concept of sovereignty primarily in cases calling for delimitation of various elements of the sovereign authority of rulers of Indian States. For the system which had evolved in India was one of

"...local autonomy of a number of small States under a central power charged with the duties of settling interstatal disputes and maintaining the general peace of the country — a position common enough in India, both in the past and in the present, and one which implies that certain rights of sovereignty are exercised by the central and certain other rights of sovereignty by the local authorities". (Tupper, *Indian Political Practice*, Vol. I, 1895, p. 217.)

At one time, the issue arose whether the province of Kathiawar was subject to British laws. In that instance, principal aspects of the distribution of sovereignty came into clear focus and were discussed by Sir Henry Maine, to whom it fell to consider the case in 1864. The central issue was the actual and proper extent of distribution of sovereign powers between the British Government and the numerous local chiefs in Kathiawar. In a Minute of 22 March 1864, Sir Henry initially established that sovereign rights are divisible and that "...there is not, nor has there ever been, anything in international law to prevent some of these rights being lodged with one possessor, and some with another". (*Op. cit.*, p. 44.) In India, Sir Henry continued: "...there may be found every shade and variety of sovereignty but there is only one independent sovereign — the British Government". (*Op. cit.*, p. 45.) On the mode of actual distribution of sovereign rights in India, Sir Henry pronounced:

"The mode or degree in which sovereignty is distributed between the British Government and any given Native State is always a question of fact, which has to be separately decided in each case, and to which no general rules apply." (*Ibid.*)

It may be noted that Tupper added that "there are certain circumstances which would in every case, justify the interposition of the Paramount Power". (*Op. cit.*, p. 44.)

In the context of discussing the question of how to distinguish State territory from territory which was part of British India, Tupper initially observed:

"Though part of the British Empire, State Territory is treated as foreign territory for the purposes of British laws. It is that to which British laws do not extend of their own force, and over which a chief exercises hereditary authority of the nature of limited sovereignty, those rights of sovereignty which he does not exercise being vested in the British Government." (*Op. cit.*, p. 251.)

Tupper then enumerated various tests which ought to be applied in determining whether a territory was State territory or a part of British India. In this context, he no doubt had in mind cases where a whole territorial unit was in issue, as distinguished from the actual extent of territorial units. The principles enunciated by him nevertheless provide an important clue to the practice of the British Government in determining issues turning upon notions of territorial sovereignty. It is for this reason worth observing that, according to Tupper, the overall general principle to be applied was usage:

"The question of sovereignty or no sovereignty must be decided in each particular case on the whole evidence available which bears on the relations of the Chief with the British Government and on the treatment extended by that Government to him and to his territory. We must look to the documents, if any, which set forth those relations, and to any declarations of policy on the part of the British Government which may throw light on them. Above all things, we must look to usage, to the relations in fact and practice established between the parties; for usage must be the guide where documents are silent, and if there is a conflict between the documents and the usage, the usage must prevail." (*Ibid*)

The political system in India during British times in eminent measure evolved as a matter of practical experience in response to the exigencies of each period. The rich spectrum of innumerable shades and degrees of sovereignty designed to be exercised variously and in entangled combinations by local chiefs and sovereigns, and by the ever present Paramount Power, strikingly illustrates the flexibility and pragmatism inherent in the British administration of India.

Tupper's conclusions on the tests to be applied in determining whether a territory was State territory or a part of British India read as follows:

"The really essential questions are what have we said and what have we done?... What have been our declarations of policy? Have we expressly or by implication announced an intention of leaving the Chief to conduct the government subject to some specified, or customary but unspecified, degree of control? Have we habitually allowed the Chief, in virtue of his hereditary position and without investing him with powers under our law, to exercise functions of government, — for instance, to administer justice, collect revenue and impose taxes, to maintain troops or police, or other public establishments? Have we abstained from applying our laws to the territory and from bringing it under the jurisdiction of the ordinary courts? Is the territory called a State in official documents? Is it included in Foreign or State territory in our statistical returns? Do we assume it to be foreign territory for the purpose of our laws, — of the Prisons Act, for example, of the Foreign Jurisdiction and Extradition Act, of the Civil Procedure Code? ... Did we omit the territory from the list of Scheduled Districts framed in 1874? ... Not one of these tests would be conclusive if applied by itself, even the habitual exercise of the functions of government might leave the question doubtful if the functions exercised were very petty ... But if several of these tests pointed to the same conclusions, we could hardly err ...". (*Ibid.*, pp. 251–2.)

It is established in the present case that the Maharao of Kutch enjoyed exclusive territorial and jurisdictional sovereignty over all his dominions, subject only to those restrictions of general applicability in the British Indian Empire which were inherent in the status of Kutch as a vassal in relation to the Paramount Power. There is for this reason no question of a conventional division of the various remaining sovereign functions between the State of Kutch and the Paramount Power. There was, however, such division, e.g., in respect of the Estate of Suigam, whose rulers were "non-jurisdictional Thakores", i.e.,

territorial sovereigns deprived of the power of exercising criminal jurisdiction in their proper territory.

Reducing the case to its basic elements, three main issues are to be resolved by the Tribunal.

The first is whether the boundary in dispute is a historically recognised and well-established boundary. Both Parties submit that the boundary as claimed by each of them is of such a character.

The second main issue is whether Great Britain, acting either as territorial sovereign, or as Paramount Power, must be held by its conduct to have recognised, accepted or acquiesced in the claim of Kutch that the Rann was Kutch territory, thereby precluding or estopping Pakistan, as successor of Sind and thus of the territorial sovereign rights of Great Britain in the region, from successfully claiming any part of the disputed territory. One question which arises in considering this issue is the true meaning of "the Rann" in the context of related documents.

The third main issue is whether the British Administration in Sind and superior British authorities, acting not as Paramount Power but as territorial sovereigns, performed acts, directly or indirectly, in assertion of rights of territorial sovereignty over the disputed tract which were of such a character as to be sufficient in law to confer title to the territory, or parts thereof, upon Sind, and thereby upon its successor, Pakistan; or, conversely, whether such exercise of sovereignty on the part of Kutch and the other States abutting upon the Great Rann, to whose rights India is successor, would instead operate to confer title on India to the territory, or to parts thereof.

Did there exist in the disputed region a recognised and well-established boundary at the time of the emergence of India and Pakistan as independent nations, and, if so, what was the alignment? In analysing the evidence relating to this question, the first point requiring consideration is whether the so-called vertical line between the Western Terminus and the Western Trijunction had been and is settled in a definitive fashion.

As described in Chapter VIII, this line was demarcated with pillars in 1924 jointly by the Administration in Sind and the Maharao of Kutch, the expense being shared equally between Sind (with the sanction of the Government of Bombay) and Kutch. The vertical line was demarcated together with the horizontal blue dotted line that was undisputedly laid down as a boundary between Sind and Kutch by the Resolution of the Government of Bombay of 24 February 1914. It has not been suggested that any difference was made in the demarcation proceedings between the horizontal line and the vertical line, or that the whole work, which to judge from all contemporary documents was both arduous and costly, was not viewed as one indivisible undertaking. If any further proof is required of the fact, *prima facie* evident though it is in the circumstances, that the British authorities clearly understood the pillars to represent a delimitation of British and Kutch territory, it may be found in the references to "the Sind-Kutch boundary" in the relevant correspondence. Moreover, the Superintendent of Land Records in Sind, who was in charge of the demarcation on the Sind side, in a letter of 12 July 1923 to the Collector of Karachi (Ind.

Doc. TA-16) expressly referred to the Western Trijunction as being one between Jati and Badin Talukas and "the Cutch State". In a report of 10 January 1924 (Ind. Doc. TA-17), he also referred to the "trijunction of Badin and Jati Talukas and the Cutch territory in the north". The vertical line as a boundary between Sind and Kutch was never questioned thereafter either by the British or by Kutch.

It is true that the erection of the pillars was prompted originally by representations of the Rao and that the vertical line, in distinction to the horizontal line, was not expressly and unequivocally encompassed by the wording of the Resolution of the Government of Bombay, embodying the compromise settlement which had previously been sanctioned by the Government of India. Whatever may have been the motive of the Rao in proposing an extension of the demarcation so as to include the vertical line, the acceptance of this proposal by the Commissioner in Sind, and the subsequent conduct of the Administration in Sind and of the Government of Bombay, coupled with the absence of any censure or other action then or later on the part of higher British authorities, are necessarily such as to preclude Pakistan from claiming that this demarcated boundary be put in issue. It is not open to the Tribunal to disturb a boundary settled in this manner by the British Administration and accepted and acted upon by it, as well as by the State of Kutch, for nearly a quarter of a century.

In my opinion, therefore, the portion of the boundary between the Western Terminus and the Western Trijunction lies along the vertical line as demarcated on the ground, and the pillars standing there mark the boundary between India and Pakistan.

In India's submission, the Resolution of 24 February 1914 presupposed and was based on the existence of an established boundary running roughly along the northern edge of the Great Rann. It is not possible to interpret the Resolution so extensively as to imply a determination of rights in the whole of the Great Rann. The matter disposed of in the Resolution was confined to the territory claimed by the Rao, which was delimited by a green line on the relevant map (Ind. Map B-44); the easternmost point of this line was the aforesaid trijunction. There are no inquiries in the file concerning the Great Rann as a whole. Nor is it possible to draw such far-reaching conclusions by mere inference from the appearance on Indian Map B-44 of a purple line with a dash-dot symbol along the northern edge of the Rann, particularly since the same riband and the same symbols are used to mark internal administrative boundaries within Sind. Hence, the Resolution and the map are recognised as a binding determination only of the portion of the boundary up to the Western Trijunction.

No evidence and no convincing arguments have been adduced by either Party for showing, even as a matter of probability, that the Great Rann as a whole fell under the exclusive sovereignty of either Kutch or Sind in the eighteenth century or indeed in more remote historical times. In the last decades of the eighteenth century, armies repeatedly crossed the Rann from either side. These military expeditions, though at times culminating in ferocious battles, resulted at most in the establishment of short-lived outposts in alien, hostile territory. If, at the time of the appearance of the East India Company in the area, the sovereigns of either Sind or Kutch had permanently held territories on both sides of the

Great Rann in firm control, a strong implication would arise that the intervening tract, barren and uninhabitable though it was and is, would have been under the same dominion; however, such was not the case.

The pleadings and arguments of the Parties, and the historical documents brought in evidence by them, unfold, as the fragmentary pieces are assembled, the contours of the political situation in the region at the time when the East India Company gained a foothold there. Kutch was torn by internal rivalries among the Bhayad, which had left the Rao in only a nominal control of parts of his realm. The Amirs ruled over a Sind split into three almost autonomous provinces, Thar Parkar not even being regarded as part of "Sind proper".

Separating these feudal kingdoms was the Great Rann. It could not but constitute a formidable physical barrier cutting the territories surrounding it apart from one another.

It is not unreasonable to assume that in the fluid political situation thus prevailing in the region at the beginning of the nineteenth century, given the limited means of communication then existing, the Rann proper was in fact viewed as itself forming the boundary between the adjacent lands. This theory, alluded to as a suggestion in Pakistan's first oral argument, was made the principal basis of Pakistan's case in its second oral argument. In fact, boundaries having the character of broad belts of territory are a well-known historical phenomenon.

The Sayra lands, at least up to and including Sindri, which were submerged in the earthquake of 16 June 1819, admittedly were Kutch territory. Pakistan has argued that Kutch sovereignty over Sayra lapsed when it was destroyed. Had Sayra been an island in the high seas, this argument might have been cogent. The transformation of a territory from cultivable land to a lake, or to a swamp, marsh or desert, cannot, however, by itself affect established sovereign rights over it.

Apart from Sayra, no evidence on record is such as to permit the conclusion to be drawn that in 1819 the dominion of either the Amirs or the Rao extended over the Great Rann. The Treaty of 13 October 1819 did not expressly define the territory of Kutch, nor had the previous Treaties of 1809 and 1816 done so. The undertaking by the Rulers of Kutch in the latter Treaties that their troops would not cross to the country on the opposite side of the Gulf and the Little Rann was, as pointed out in Chapter III, understood by a later Rao as equivalent to laying down the Gulf and the Rann as the boundaries of Kutch; MacMurdo, who negotiated the Treaty of 1816, employed the same terminology in alluding to the clause in question. While these statements related only to the Little Rann, nothing indicates that they would not be equally valid for the Great Rann.

In my opinion, it is thus established beyond doubt that Sayra belonged to Kutch and that the portion of the Rann which replaced it after the earthquake remained Kutch territory, but no proof has been given of the status of the remaining parts of the disputed territory in 1819 which is a sufficient basis for holding that it was then either Sind or Kutch.

Hence, it is my conclusion that the boundaries in the Rann had not then been determined even though there must have existed some limits in space to the

sovereign rights of the neighbouring countries. My notion as to the true state of such limits during this speech is akin to Pakistan's conception of the Rann as forming a broad belt of boundary. This accords with the pronouncement made on 21 November 1884 by Erskine, later Commissioner in Sind, that the actual boundary was the Rann itself (see Chapter V), echoing the statement to the same effect made by the Collector of Hyderabad in his letter to the Commissioner of 7 August 1884 (see Chapter VIII).

It appears likely that, in and after 1819, the potential control over the disputed territory, in terms of military and police power, lay with the British, and India so submits. Had the occasion arisen for the British to protect Kutch against an invasion from Sind, they would no doubt have defended Kutch territory in their capacity of allies of the Rao. However, this never happened, and the activities in fact undertaken were of a different nature, most closely similar to police surveillance; illustrations thereof are the instances of intermittent exercise of power against roving "banditti". The British obviously then were and acted both as an ally of Kutch and as an independent sovereign power in the region, let alone a power in emergence. While the British connection with the Rann at the time, loose and indistinct as it appears to have been, cannot in law be equated with genuine display of State authority, it would be fallacious to assume that the British could not act as independent sovereigns until they acquired the territory of Sind in 1843, which was then immediately brought under exclusive British Government administration.

It is argued by Pakistan that if the sovereignty of Kutch did not in 1819 extend over the disputed territory, it follows by a series of logical steps that Sind then began where Kutch ended and that the boundary between Sind and Kutch on 18 July 1947 was what it was in 1819. India in its main argument shares the view of Pakistan that Kutch did not increase after 1819, but argues conversely that the whole Rann at that time formed part of Kutch. However, issues of territorial sovereignty do not turn upon logical deductions from abstract precepts or postulates, valid though they may be *per se*.

With respect to the period between 1819 and the publication of the maps in Macdonald's Survey (1817), I must declare that I attach little weight to the statements of various authors who have described the Rann as an entity separating Sind and Kutch, or bounding Kutch or Sind, respectively. Most of these passages describe geographical or topographical features of the region and cannot be interpreted in a political sense. Even were they to be read as such, they would not be of material value in assessing sovereign rights because of their indefiniteness and the preponderance of other and more recent evidence of greater inherent significance.

One publication in the relevant period appears to be of more substantial importance than the others, viz., the *East India Gazetteer* by Walter Hamilton. The 1820 and, particularly, the 1828 editions of this work support India's case since they describe Kutch as consisting of two portions, one being the Rann. However, the map attached to the 1820 edition (Pak. Map 140) is not in keeping with the text as it seems to depict the Rann as a separating entity. The treatise by Hamilton, even if it constituted a remarkable scholarly achievement, is, moreover, a secondary source of authority, and several crucial texts relied upon by

the author in support of his thesis are not on record. Being the sole seemingly unequivocal statement dating from this time for the proposition that the Rann was recognised as forming part of Kutch, it cannot be deemed conclusive when examined in the context of the political situation then prevailing in the region.

Most of the pre-survey maps described in Chapter V were produced in the same period. Because of demonstrable inaccuracy, vagueness and inconsistencies, they are generally such as not to be accorded great weight. The only feature which recurs sufficiently often to establish a pattern or trend in these maps is the depiction of the Rann as a "marine feature" and as a "separating entity"; they sometimes also show certain bays as possibly falling under the dominion of sovereign entities abutting upon the Rann. Even India states that "in the course of history it is highly probable that the nearer State will occupy [an] island". The depiction of the Rann as an entity of its own in these maps is in consonance with the conclusion reached by Jacob in his report on the Keswala Bet dispute that no one could be said to have been the "proprietor" of this bet "during the year of guarantee" (which must have meant in 1819 and onwards). The notion of the Rann as constituting no man's land persisted for a long period of time, up to 1938, as is evidenced by the statements quoted in Chapter VII.

The first of the maps which indisputably showed the main portion of the Rann as belonging to Kutch was produced in 1878 (Ind. Doc. B.46). However, no other map with such a clear depiction appeared for a long time thereafter.

The main body of evidence relied upon by the Parties which has a major bearing on relevant issues in the case relates to a period beginning about 1870, and ending at the partition of the sub-continent. At the inception of this period, political conditions in the region had crystallised and were to remain essentially unchanged until Independence. On the northern side of the Great Rann was the Province of Sind, which had become a part of British India and hence was under direct and exclusive British sovereignty. On all the other sides were Indian States under British suzerainty. Great Britain ruled as Paramount Power, but the Indian States were permitted a varying measure of internal autonomy, including exclusive territorial, if not always jurisdictional sovereignty. There was thus a clear distinction between British territory and the territory of Indian States, and there must have existed the possibility of territory having an undetermined status, for the system was not conceptually closed.

The evidence falls into several broad categories, mainly dealt with separately in the various Chapters of this Award: maps, non-cartographical evidence, such as official pronouncements and statements in the form of administration reports, etc., incidents when boundaries in the region were put in issue, and exercise of acts of authority in disputed territory. This material will now be examined seriatim; its total impact on the alignment of the boundary will thereafter be discussed in a concluding section.

I will first examine the maps produced in the various surveys and the other maps described in Chapter V.

The Parties agree that Macdonald's Survey was a combined revenue and topographical survey. India contends that the maps produced in this survey showed a southern boundary of Sind running roughly along the northern edge of the

Rann and that this was a conterminous boundary between Sind and Kutch, authoritative for Sind, but not, in the absence of an agreement on its part, for Kutch. Pakistan maintains that the boundaries were village boundaries, as the primary object of the undertaking was to make a rough survey for revenue purposes. The kind of inquiries undertaken by the surveyors, the essential elements of which are undisputed between the Parties, support Pakistan's view. No evidence on record establishes that the surveyors in drawing the maps even attempted to inquire into the actual or historical extent of civil and criminal jurisdiction exercised by Sind authorities, or to ascertain where Government functions were otherwise exercised by the British or by adjacent Indian States.

On the consolidated map (Ind. Map. B-3), which may be viewed as the final result of the survey, the name "Kutch" significantly is indicated merely on its mainland, and the Rann is called "Rann of Kachh". On the Indian Map B-2 series also, the Rann proper is so marked. Significantly Erskine, later Commissioner in Sind, stated in his aforementioned letter that Macdonald's maps "did not show the limits towards the Runn of Cutch of the Province of Sind but merely the limits of defined dehs or village lands...". Moreover, Sheet 92 of Indian Map B-2, on which the Macdonald line runs north of Rahim ki Bazar, thus leaving the only important settlement on the northern side of the Great Rann (undisputedly a Sind village) in what according to India's interpretation of the line would have been Kutch territory, reinforces the conclusion that the boundary appearing on Macdonald's maps was something else than a Province or State boundary. The Indian interpretation of Macdonald's line would also mean, that great portions of what is marked as Mahomed Khan's Tanda at that time belonged to the State of Kutch — which is unlikely.

The line on the maps produced in Macdonald's Survey for these reasons cannot in my opinion have represented a conterminous boundary between Sind and Kutch.

Pullan's Survey was a survey of Kutch undertaken in co-operation with the State of Kutch. He reported to the Government of Bombay, and naturally also to his superiors in the Survey of India. There are indications that Pullan's initial conception was that the Great Rann was Kutch territory and that his task was to survey it as such. It would therefore seem not unreasonable to assume that, as India submits, Pullan in fact during the relevant period did survey the Rann as forming part of Kutch.

The question of what may have been in Pullan's mind or, for that matter, what he in fact did between 1880 and 1885 is, however, irrelevant in view of the correspondence of 1885, set out in Chapter VIII, during which the Resolutions of the Government of Bombay of 3 July and 7 August 1885 were passed. In the course of this correspondence, the Commissioner in Sind forcefully stated that the northern half of the Rann pertained to Sind and that "if any more defined boundary than now exists is required it should merely consist of boundary pillars as near the centre of the Runn as possible"; he advised, however, against "any hard and fast delimitation". Pullan, in response to the Resolution of 3 July 1885, stated that he had carefully abstained from laying down or even suggesting any boundary between Kutch and Sind. This statement may have to

be taken *cum grano salis*, as Pullan would naturally be inclined to defend himself against the inference that he had acted under a misapprehension. The essential point to note is, however, the attitude of the Political Department of the Government of Bombay, set out in said Resolution, that it did "not desire that any question of boundaries in the Rann between the Province of Sind and the Cutch State should be raised". It is impossible to maintain that this decision of the Government meant that the boundary was settled and defined in such a manner that the question of its alignment was not open for discussion.

It has not even been contended that the Government of Bombay in passing the two Resolutions of 1885 exceeded its competence and that the decisions for that or any other reason were not final and authoritative. No boundary between Sind and Kutch in the Rann shown on maps from that period could therefore possibly constitute an established and settled boundary between Sind and Kutch recognised as such by the British Government. The conclusion thus is inescapable that such an interpretation cannot be placed on any of the maps produced by Pullan himself. Moreover, by the same token, the Resolutions definitely confirm that the line on Macdonald's maps did not represent an established conterminous boundary between Sind and Kutch recognised as such by the British Government.

The maps produced in Erskine's Survey of 1904-05 cover a minor portion in the western sector of the disputed territory, extending eastwards up to the vicinity of Rahim ki Bazar. The alignment of the boundary shown on these maps south of the Western Trijunction has no direct relevance here in view of my conclusion set out above relating to the vertical line. East of said Trijunction, the maps show what the sheets define as a Province or State, or only State boundary, lying roughly as claimed by India. Indian Map B-11 also indicates that this boundary was intended by the map maker to be a conterminous boundary between Sind and Kutch, since the Rann south of Sinatri Dhand is marked "Cutch". Erskine's sources of information are not fully known, but it seems as if the advice of the Superintendent, Trigonometrical Survey, was decisive. It was given while a reference to the Government of Bombay was still pending.

However, the material on record concerning Erskine's Survey also contains the correspondence between the Commissioner in Sind, the Political Agent in Kutch and the Government of Bombay, which is summarised in Chapter V. It will be examined in another context. At this point, I observe only that although the boundary symbols shown on Erskine's maps according to the maps themselves do constitute a depiction of a Province or State boundary, which on Indian Map B-11 is, moreover, conterminous between Sind and Kutch, the Governor-in-Council of the Government of Bombay, as stated in the letter of 23 November 1905, upon inquiry declared that he did not wish to consider the question of the alignment of the boundary but desired to leave the question open. It cannot against the background of this decision be said that such a boundary, whatever its alignment, was one recognised on the part of the British Government as an established boundary. The Dewan of Kutch stated in his formal representation of 21 March 1911 to the Political Agent in Kutch that the boundaries on Erskine's maps could not be binding on the State of Kutch. Consequently, neither of the parties concerned at the time when Erskine's maps

were made and published regarded the symbols appearing on them as authoritative.

The fourth and last survey of sections of the disputed territory was Osmaston's Survey, which covered, *i.e.*, the eastern parts of Thar Parkar District. It is undisputed that his maps show a conterminous boundary between Sind and the States of Western India having an alignment largely corresponding to India's claim line.

Prior permission of the State of Kutch to carry out this survey "in Cutch State" was sought and obtained by the Office of the States of Western India; the index maps to which this correspondence related indicate only areas situated above the 24th parallel and reaching up to the northern edge of the Rann.

From the documentary evidence relating to Osmaston's Survey, a few points emerge as being of particular significance.

The final maps produced by Osmaston state in a foot-note that the boundary had been taken from "the old maps". The immediate reason for the inclusion of this foot-note was the letter of the Collector of Thar Parkar of 2 October 1939. This letter, which is the latest indication of the attitude on the part of the highest official dealing with this survey on the Sind side, proposed, in order to overcome Mr. Strong's proposal, of 23 August 1939, to omit the boundary from the modern survey maps, that "the boundary may be shown as in the old maps, by means of a special symbol and a foot-note be made indicating that it is in accordance with the old records, but is in dispute". However, Osmaston did not go so far as to adopt the suggestion to mark the boundary as disputed.

The "old maps" from which the boundary was taken were Survey of India maps and taluka maps based on them. The only previous scientific surveys of the relevant areas which had been undertaken were those of Macdonald and Pullan. In respect of the maps produced in those surveys, I have already held that the boundary lines appearing thereon do not represent the alignment of an established conterminous boundary between Sind and Kutch recognised as such by the British Government.

The question nevertheless arises whether Osmaston's decision on marking a boundary, investing it with the status of a conterminous boundary between Sind and the States of Western India, by itself amounted to a conclusive new determination of the matter.

It will first be recalled that it is agreed between the Parties that Osmaston was not competent to decide a genuine boundary dispute, had one existed. Was there such a dispute concerning the boundary drawn by Osmaston between Sind on one side and Kutch and Wav on the other side?

The correspondence exchanged in the course of Osmaston's Survey prompts an initial observation, *viz.*, that the documentary material on the basis of which various opinions were expressed by officials on different levels was demonstrably incomplete. The boundary at issue is today for the first time subject to an exhaustive judicial inquiry admitting in evidence all documents on both sides. The Tribunal has at its disposal a more reliable and complete collection of documents than any official dealing with the Great Rann during British time ever had the benefit of reviewing.

At the meeting on 22 January 1938, the Mukhtiarkar of Nagar Parkar, acting on instructions of the Deputy Collector of Thar Parkar, stated that half the Rann was British territory, while the Survey Superintendent of Kutch claimed that the whole Rann belonged to Kutch State. The position taken by the Mukhtiarkar "on behalf of the British Government" was endorsed by the Deputy Collector in a communication to the Collector.

During the next stage of the matter, i.e., in the investigations of immediately traceable files made on both sides in response to Osmaston's letters of 19 May 1938, the following positions were taken.

The Resident for the States of Western India, when asked to indicate the correct alignment of the external boundaries between, *i.a.*, Sind and Kutch in the Rann, responded, in a letter written by the Secretary, that he could not comply with the request since the boundaries were "apparently in dispute". This letter was sent after the letter of the Dewan of Kutch of 5 March 1938, asserting rights over the whole Rann, must have been received, and after issue of the letters requesting permission of Kutch to carry out Osmaston's Survey on "Cutch territory". It may also be noted that the Agent to the Governor-General in the States of Western India in 1934 had taken part in the preparation of Indian Map B-52, which depicts the northern boundary of Kutch by and large in conformity with India's claim line (see Chapter V).

On the Sind side, the Deputy Collector, by his letter of 8 August 1938, similarly maintained that the boundary was not settled but "that ever since the issue of the said orders [the Collector's Order of 20/31 December 1927] we have been considering half of the Rann as falling within the territorial jurisdiction of Thar Parkar District". He added that "in older times and up to 1875, as it appears from the report of the then Mukhtiarkar of Diplo...dated 22nd June 1875...right till today half of the Rann on all sides between our District and the States has been regarded as belonging to British". However, the Deputy Collector also expressed the personal opinion that "in the absence of any documentary evidence in support of our contentions, our case is rather weak". The Superintendent of Survey and Land Records restricted himself to comparing the current taluka maps with the Survey of India maps from which their boundaries had originally been reproduced. He, as well as the Collector, remarked that said boundaries "stand unaltered as originally taken from the Survey of India maps". It is impossible to attribute any other meaning to these letters than that they simply confirmed that no change had been made in the taluka maps on record. Neither of the two officials concerned could, in the light of the documents before them, have intended to verify the material accuracy of the boundaries appearing on the maps, and Osmaston did not so interpret their letters as he replied that "under the circumstances the question remains undecided".

What Osmaston did thereafter was to compare the alignment of the taluka and district maps sent to him by the Superintendent with the Survey of India maps from which the boundaries on the former had been taken. Finding them to agree, he decided that the boundary was "correct and undisputed". The relevant Survey of India maps were those based on Macdonald's Survey. According to the records, no new elements were taken into account by Osmaston in deciding upon the alignment of the boundary in his maps; it is notable that he did not

expressly refer to the degree sheets and the 32-mile map of India. It also follows, in appraising his actions on their merits, seen in isolation from such considerations of a broader nature as may have a bearing on the overall evidentiary value of maps issued by the Survey of India, that Osmaston's boundaries cannot have any constitutive effect or significance of their own.

In short, a review of the whole record pertaining to Osmaston's Survey shows that no document indicates that any official, save the Kutch authorities, was of the view that the whole Rann was Kutch territory, or indeed that the boundary was settled and established and recognised as such by the British Government.

It may well be that Osmaston, in reaching his ultimate decision, had before him some of those Survey of India maps which for about two decades had depicted a conterminous boundary in the region, notably the degree sheets published in 1921 and subsequently as well as the fifth edition of the 32-mile map. This circumstance might reinforce the weight of his decision but must at the same time diminish the evidentiary value of those maps since, if they were deemed to be authoritative, the elaborate inquiry and correspondence in which Osmaston engaged himself would have been superfluous.

My conclusion therefore is that the boundary appearing on the maps produced in Osmaston's Survey does not represent the alignment of an established conterminous boundary between Sind and Kutch, or other States forming part of the States of Western India, explicitly determined as such by the British Government. The importance of this boundary in the context of the case as a whole will be dealt with below.

Accordingly, in my opinion none of the original survey maps made of the disputed territory depict such a boundary therein.

The arguments and evidence set out in Chapter V under the heading of "The Authority of the Survey of India", largely relate to the meaning of the concept "authority to draw boundaries". It is obvious that it was the duty and function of the Survey of India to draw boundaries on maps, to ascertain their alignment, and to make required changes therein by reference to such material as may from time to time have been relevant for purposes of survey and map-making. No legislative or administrative regulations have, however, been produced to show that the Survey of India had final authority to draw boundaries intended to be binding in a political sense. It is inherently improbable that it had such authority, and in fact the very opposite is proved by those instances on record where express approval or sanction of specific maps was given by the highest agencies of the British Government in India (such as of the 32-mile map of India, and the Index Map of 1935), upon which India lays considerable stress. The files relating to the several incidents in which the boundary in dispute came under consideration before Independence (summarised in Chapter VIII) furthermore confirm that, as a matter of British constitutional and administrative practice and policy, the maps produced by the Survey of India were not regarded as authoritative in the sense of being data of decisive weight for the purpose of ascertaining or determining sovereign rights. In the written proceedings resulting in the Resolution of 1914, which in their initial stages were conducted as a judicial inquiry objectively assessing territorial rights, evidently the depiction of boun-

daries on previously existing maps was deemed by both sides to be of minor significance. Similarly, in the documents on record in the instances concerning bets in the Rann, summarised in Chapter VI, reference to and reliance either by the British Government or by the Indian States concerned on maps as evidence of title to disputed territory is absent.

In the context of the political system which existed in pre-partition times, it is therefore clear that maps issued by the Survey of India were not as such regarded as instruments by which either the British Government or Indian States were bound, or which could *per se* be viewed as constituting authoritative acts determining sovereign rights. If the depiction of a boundary upon inquiry was found to be erroneous, not only could the Survey Department itself modify it without reference to higher authorities; the political departments of both the Government of Bombay and the Government of India or judicial authorities could and did decide issues concerning such boundaries without attaching conclusive significance to Survey of India maps of any kind.

None of the so-called compiled maps or the Sind taluka maps, which by and large incorporate the boundary depiction adopted in the so-called "basic" original survey maps, can against this background have independent significance except on either of two grounds. First, it may be argued that extraneous circumstances, such as express approval or other forms of official sanction by authorities outside and above the Survey Department, invested the maps with a greater degree of authority than would be conferred upon them by the mere fact of their issue. Second, the cumulative effect of the publication of official maps in conjunction with other acts or omissions by the British authorities, and the interpretation placed on the maps by these concerned at the time, might be such that the maps must be given decisive weight in determining the issues confronting the Tribunal. The second proposition will be examined later; a few observations will be made here on the first thesis.

India places special reliance on two maps, viz., Indian Maps B-44 and B-45. My conclusions on the former have already been given in the context of dealing with the Resolution of 1914. The Index Map (Ind. Map B-45) will be considered below in the context of the related documents. Here will be examined the various editions of the 32-mile map of India, and particularly the fourth and fifth editions, Indian Maps B-51 and B-16.

The feature of this map, apart from its wide circulation, which is said to confer upon it a greater degree of authority than is possessed by other maps, is the fact that it was scrutinised in detail and expressly approved by the Foreign and Political Department of the Government of India; the (second and) third editions received the prior approval also of the Secretary of State. No evidence on record indicates, however, that the boundary at issue was at any time subject to especial scrutiny in the process of the production of the 32-mile map. The documents brought in evidence establish only that it was at one time debated whether "dry Rann" should be coloured as a marsh or as a lake, and eventually the former solution was adopted.

The boundary determination in 1914 was reflected in the fifth edition, upon instructions of the Foreign Department. It is argued by India that the silence on

the part of the Foreign Department on this occasion concerning the rest of the boundary must imply that the boundary alignment along the northern edge of the Rann was thereby expressly approved and sanctioned by the Government of India. The entire boundary had, however, been depicted with a pink riband and dot-dot symbols already in the third edition of 1898, a method of depiction that was repeated in the reprint of 1901, and again in the fourth edition of 1908, in which a yellow riband was added in two sectors. This circumstance did not prevent the British Administration from entertaining on its merits the claim of the Rao, which resulted in the Resolution of 1914, thereby admitting by unequivocal governmental action that a boundary thus depicted in maps approved by the Secretary of State could be disputed. The fact that the dispute between Kutch and Sind was ultimately resolved as a matter of compromise rather than of right does not invalidate the effect of this action, as the file clearly shows that a friendly settlement was chosen in preference to arbitration for reasons of expediency and because of doubt as to the likely outcome of a judicial or quasi-judicial inquiry and determination. None of the officials concerned (including the Government of Bombay and the Government of India) even referred to the the 32-mile map as having any bearing on the matter; much less was the depiction of a boundary along the Khori Creek in then existing editions of the said map considered to bar an examination of the merits of the Darbar's claim.

Another circumstance which tends to diminish the inherent weight of the 32-mile map, upon which Pakistan has placed considerable emphasis in oral argument, is the change in the alignment of the loops, made in the fifth edition in comparison with previous editions. The absence of any instructions of other departments of the Government of India to effect such a change indicates that it was made within the Survey of India. It would be an inconsistency to ascribe determining weight to the approval by the Secretary of State of the third edition of the 32-mile map, while recognising without question such a change in the alignment of the boundary in the fifth edition which did not receive similar approval.

The 32-mile map therefore cannot in my opinion be ranged in a category essentially from the survey maps. The same applies, *a fortiori*, to other compiled maps, such as the degree sheets.

The evidentiary value of all maps together will be examined below in another context.

The foregoing exposition has presented an appraisal of various aspects of the question whether the boundary at issue was an established boundary, the main alignment of which was recognised by all parties concerned before 1947. I will now consider, in chronological order, the evidence relating to the several occasions in the pre-partition period on which the boundary between Sind and Kutch, or Sind and other Indian States abutting upon the Rann, was in issue.

The incidence of 1875-76 (discussed in Chapter VIII) reveals that neither the Commissioner in Sind, nor the Government of Bombay, nor the Political Agent in Kutch had any available information concerning the alignment of the boundary between Thar Parkar District and Kutch. It is significant to note, incidentally, that it did not occur to any of these officials that the maps of

Macdonald, which had been published a few years earlier, constituted an authoritative source of information in this respect.

The Political Superintendent, Thar Parkar, assumed that the boundary was "in the Rann" and officially transmitted the statements made by the Mukhtiarkar of Diplo concerning the limits of the territories purportedly accepted locally by those acquainted with the region. The reports of this official seem to indicate that the boundary between Diplo and Kutch lay at Gainsa Bet. In any event, the correspondence shows that in 1876 the alignment of the boundary between Thar Parkar District and Kutch was far from certain, and that it would not be correct to say that an established boundary along the northern edge of the Rann in that district existed and was recognised as such by the British Administration or the States concerned.

The correspondence of 1884 (summarised in Chapter VIII) is remarkable for the vagueness and uncertainty as to the definition of the boundary between Hyderabad District and Kutch that was then attempted. It contains also the significant statement of the Collector interpreting the tracings examined by him to mean that "the Rann itself is the boundary", and the acknowledgement by the Commissioner in Sind that no demarcated boundary had been laid down between the Tando Sub-Division and Kutch, both which strongly suggest that, in so far as British authorities were concerned, there did not exist an established, even roughly defined boundary between Sind and Kutch in the region at that time.

My conclusions on the correspondence of 1885, resulting in the two Resolutions of the Government of Bombay of 3 July and 7 August 1885, have already been given. There is considerable force in the proposition that these decisions "wipe out everything right up to 1886". If so, undoubtedly the Resolutions must also, as Pakistan maintains, have an effect for a period subsequent to 1885.

The material relating to the correspondence of 1905 is mentioned in Chapter V. The matter then considered was the demarcation of the boundary between Jati Taluka and Kutch, and as noted above the inquiry was made in connection with Erskine's Survey.

In his letter of 3 October 1905 to Commissioner Morison, Lieut.-Col. Abud first predicted the claim of the Rao that was later in fact made and ultimately resulted in the boundary determination in 1914. He thereafter made it clear that the Rao in addition claimed the whole of the Great Rann. In this context, Abud made the interesting observation that "they [the Kutch Darbar] say they are prepared to prove it and it is certain that this assertion has been made on paper in administration reports and other documents without contradiction or query". Since in Abud's opinion the proposal of Morison to demarcate the boundary would "raise the whole question of the boundaries of Sind and Kutch, not only there [north and west of Khori Creek] but also elsewhere, and possibly might give rise to prolonged discussion and inquiry", he would not even allow the papers to go into his office and would prefer not to broach the matter with the Kutch Darbar or "open the question" at all.

In forwarding a copy of this letter to the Government of Bombay, Morison expressed a different view in stating that "the boundary between Sind and Cutch and the question of rights in the Rann of Cutch will have to be settled one day or other, and my opinion is that the sooner the matter is taken up the better".

It was on the basis of these papers that the Governor-in-Council of the Government of Bombay declared that "the question might well be left alone till we are forced to take it up". It has already been remarked that it is impossible to say in the light of this ruling of the Governor-in-Council that at that time there existed a boundary between Sind and Kutch in the disputed region which was recognised on the part of the British Government as an established boundary.

The correspondence now considered foreshadows the distinction between the territorial claim which was eventually resolved by the Resolution of 1914 and the question of the rights in the Great Rann as a whole. As previously explained, no support can be found in the file concerning the boundary determination in 1914 for an intimation that the broader issue of the limits between Sind and Kutch east of the Western Trijunction was at all considered. Nor did the British at Rajkot so regard it, as appears, *inter alia*, from paragraph 7 of the note of the Secretary to the Agent to the Governor-General in the States of Western India of 2 June 1934 (Pak. Doc. B.325).

Lieut.-Col. Abud's letter also demonstrates, however, that the Rao of Kutch may have conceived of the demarcation of the boundary along the vertical line up to the Western Trijunction as creating a circumstance potentially operating in his favour with respect to the alignment of the boundary east of said Trijunction. It will be recalled that, after the settlement in 1914 had been arrived at, it was the Rao who proposed that the portion of the boundary between the Western Terminus and the Western Trijunction should also be demarcated, even though said portion was not directly encompassed by the terms of the Resolution. The Tribunal is not called upon to pass on the issue whether the acceptance on the part of the British authorities of that proposal was or was not justified as a matter of legal rights as they then stood; this government act was one which in these proceedings must be recognised as having conclusive validity and effect. It is, however, to be noted that the Rao himself may, rightly or wrongly, as a matter of conviction, or as a matter of argument, have interpreted the acceptance to demarcate the vertical line as meaning that his claim to the whole of the Great Rann had thereby been confirmed and recognised by implication. Nevertheless, it was only by a letter dated 24/26 May 1947 that the Dewan of Kutch proposed to the Chief Secretary to the Government of Sind that "pillars on the boundary line already determined beginning from the Trijunction up to the end of the Sind-Kutch boundary in the east should be erected during the next cold season" (Pak. Doc. A.5).

In my opinion, it must be concluded that the correspondence of 1905, as well as the material pertaining to the 1914 Resolution, including the erection of pillars in 1924, show that east of the Western Trijunction the boundary was still not determined at the relevant time but remained in a state of uncertainty. Perhaps no more revealing proof of this fact can be found than the letter and office notes contained in Pakistan Documents B.324 and B.325, relating to the establishment of a Customs Preventive Line, which demonstrate that, as late as

1934, even after careful investigation, none of the British officials concerned could give a clear answer on what the division of rights was in the Great Rann between the British Government and the State of Kutch.

The incident of 1926-27 will be discussed in another context. It may be remarked, however, that a few days before the petition of the Sind villages, which was the origin of this incident, was sent to the Commissioner in Sind in 1926, the Kutch official responsible for establishing "vahivat" on Dhara Banni and Chhad Bet (the Thanedar of Khavda) reported to the Kutch Revenue Commissioner that "there are no means whatsoever here in the Office for knowing to what extent is the boundary of this Rann". He added that "a sketch map of this boundary prepared at a glance is attached herewith. It is requested that it may be seen and instructions are sought up to what extent we should regard (our) limits to be" (Pak. Doc. B.131/Ind., Pak. Doc. B.289). The Thanedar of Khavda, 18 years later, wrote to the Revenue Commissioner that "[t]here is a map prepared for this boundary. But it has not been received till now. It is very much needed on such occasions". (Pak. Doc. B.145/Ind.)

The next incident which calls for consideration here is that of 1935, i.e., the occasion of the constitution of Sind as a Governor's Province. The Government of India (Constitution of Sind) Order, 1936, defined Sind in the following terms:

"In the Act and in this Order 'Sind' means the territory known at the date of this Order as the Division of Sind, and the boundaries of that Division shall be the boundaries of Sind."

None of the papers produced in the process of drafting this legislative instrument, which was enacted in implementation of the Government of India Act, 1935, can be interpreted in a manner that gives the description another meaning than that which follows plainly from the words used in it, viz., that the boundaries of the Province of Sind should remain what they were before the Order. Authoritative though the definition undoubtedly is, it merely confirms the existing *status quo*, which in my opinion was that the boundary in the disputed region was not recognised and established at the time, and it can have no substantive significance, unless some fact intervened from which it follows that an explicit determination of the boundary was made prior to its adoption.

The draft of a Schedule setting out the boundaries of the Province of Sind with reference to an attached Index Map, both of which had been prepared by the Surveyor-General of India, were sent by the Additional Joint Secretary to the Government of India for comments to the Chief Secretary to the Government of Bombay by letter of 31 October 1935.

The Schedule no doubt described the boundary as lying along the northern edge of the Great Rann, for even Pakistan admits that if the words of the draft Schedule are read with reference to the map, as they were intended to be read, they can have but one meaning. India submits that the Schedule was prepared by the Government of India, and on this assumption argues that the draft implies a sanction on the part of that Government of the alignment of the boundary. It is, however, clear from the letter of 31 October 1935 that both enclosures had been prepared by the Surveyor-General and that they were.

merely forwarded to the Government of Bombay for its comments. At that stage at least, therefore, it cannot be said that the Government of India took any position in the matter, and no special significance can be attached to the action on the part of the Surveyor-General which would give to the map in question a greater degree of authority than to other maps issued by his Department.

Upon receipt in Bombay, the papers and the map were forwarded to the Commissioner in Sind who, without taking any position in the matter, solicited the views of the Superintendent of Survey and Land Records in Sind. The examination by the latter, therefore, was the first substantive inquiry into the question. The Superintendent's reply, contained in his letter to the Commissioner of 28 November 1935, with which a revised draft of the Schedule was enclosed, indicates clearly the nature of the review undertaken by the Superintendent: he had compared the description of the boundaries of the new Province of Sind with the maps contained in the Head Record Office and had found them to agree, except in certain particulars which are irrelevant in this case. This review, consequently, in fact means only what is apparent from the evidence on record, viz., that the Index Map and the Schedule attached to it showed a boundary of Sind that roughly conformed with the alignment of a boundary on previous maps.

The Report with enclosures of the Superintendent of Land Records in Sind was forwarded by the Commissioner in Sind to the Chief Secretary to the Government of Bombay with some comments which mainly referred to those of the Superintendent. This endorsement, it has been argued, constituted an official recognition by the highest authority in Sind of the alignment of a boundary conforming to that now claimed by India. However, there is nothing to indicate that the scope of the examination on the part of the Commissioner was greater than was called for in the circumstances or, in particular, that it did in any aspect go beyond the review, strictly limited in nature, that had been undertaken by the Superintendent of Land Records.

The restricted purport of the inquiry made by the Superintendent of Land Records, which was thus endorsed by the Commissioner in Sind, was clearly understood by the Government of Bombay, for in its Report to the Government of India dated 9 December 1935, with which it forwarded copies of the aforesaid letters and their enclosures, the Chief Secretary to the Government of Bombay pointed out that "the description of the boundaries of the new Province of Sind has been found to agree with the maps maintained in the Head Record Office, Sind...". This letter, therefore, simply reproduced the terms used by the Superintendent of Land Records.

By the time that the letter of the Government of Bombay was received by the Reforms Office of the Government of India, and in fact even before the Superintendent of Land Records had prepared his letter above referred to, the Secretary of State in London had proposed in a telegram of 12 November 1935 that a Schedule to the Order defining the boundaries of Sind was not necessary. In response to this suggestion, the telegram of 3 December 1935 was sent from the Viceroy (Reforms Office) to the Secretary of State, in which it was suggested that the words "and the boundaries of the said division shall be the

boundaries of the Province of Sind" be added to paragraph 3 of the draft Order in Council which was under consideration.

A review of the evidence summarised in Chapter VIII therefore shows that the Secretary of State in London proposed that no Schedule and map should be used and adopted and that the previous boundaries, whatever they may have been, should remain. The other high British authorities who were consulted, viz., the Commissioner in Sind and the Government of Bombay, both by way of endorsement, did not undertake an examination which went beyond formally comparing the Schedule and the Index Map with previously existing Survey of India maps. Nor were the views of Indian States concerned solicited, which would have been required if in the event a determination of Province or State boundaries had been contemplated.

Against this background, no further conclusion can in my opinion be derived from the correspondence preceding the issue of the Sind Order in Council than that which follows from a literal reading of the text itself, viz., that the position in respect of the boundaries of Sind was to remain unchanged.

Already on previous occasions the British had shown that they did not attach overriding importance to certainty and finality with regard to the sovereign in the Rann.

The last occasion on which the boundary at issue became the focus of inquiry before Independence was in the course of Osmaston's Survey. The relevant aspects of this incident and the related correspondence have already been reviewed. It may be added here, however, that none of the parties which at that time submitted conflicting claims to parts of the disputed territory seems at any time to have made reference to the files and documents produced in connection with the issue of the Sind Order in Council a few years previously as having relevance for the question of the alignment of the boundary; nor do the officials concerned on the Sind side, the surveyors of the Survey of India, or that Department itself appear to have done so. It is impossible to escape the conclusion that the construction now sought to be placed upon these documents was at no time recognised or propounded by the British Government or even by the States of Kutch and Wav, which lodged claims to the disputed territory.

The foregoing analysis has been made with a view to resolving the first main issue arising in the case, viz., whether the boundary in dispute is a recognised and well-established boundary. The evidence relating to the two most important processes in which such a boundary, if settled and confirmed, would doubtless have been so recognised, does not support such a conclusion. These processes are the four scientific surveys of the region, and the instances in which the boundaries in this region were specifically scrutinised and discussed. All the evidence pertaining to those processes points to the conclusion that there did not exist at any time relevant in these proceedings a historically recognised and well-established boundary in the disputed region. Other documents lend additional support to this view, and a brief reference to some of them shall now be made.

In 1885, when the Government of Bombay passed an explicit Resolution in the matter, under the heading "Boundary Disputes: Claim of the Cutch Durbar

to the Sind side of the Runn" (Pak. Doc. B.10), the same Government also stated in another Resolution concerning a salt matter that the British Government "control[led] the Runn, which is waste" (Pak. Doc. B.310). The latter Resolution, dated 21 December 1885, was drafted by Mr J. B. Peile who, in another matter which arose in 1886, stated that "the Runn is no man's land" (Pak. Doc. B.310).

In 1897, it appears that the Collector of Salt Revenue on behalf of the Revenue Department of the Government of Bombay maintained that "there was no authoritative statement on record which defined either sovereignty or jurisdiction in the Rann and it was suggested that this very difficult question should be left alone ..." (quoted from the summary given in 1934, in Pak. Doc. B.325, of a document not on record). The Acting Commissioner in Sind took note of this attitude of the Bombay Salt Department in the course of the correspondence concerning the Nara and Parpatana Bets which arose in the same year (see on this incident Chapter VI). Advocating that the bets were British territory, he stated in a letter of 17 June 1897 that "the Deputy Commissioner seems to be of the opinion that there is no definite boundary settled yet". He added that he believed that "the Salt Department have collected a good deal of evidence adverse to the supposition that the Runn can be claimed by Suigam or any other riparian owner ..." (Pak. Doc. B.313). The Government of Bombay by its Resolution of 1897 stated that the bets had never formed part of Thar Parkar District and that the proprietary rights therein vested in the Suigam Thakores.

Referring to this Resolution, the District Magistrate of Thar Parkar observed in the following year, 1898, that while it "disposes of the question regarding the Beyts it does not specify the boundary of this dist: along the Rann of Kutch". He added that "I have been unable to ascertain that the exact boundary has ever been laid down ..." (Pak. Doc. B.315). He asserted, further, that "the Rann itself (apart from the 'Beyts' in which there were more or less valuable rights to be contested) has been looked on as a 'no man's land' in which on our side at least we have maintained order" (*ibid.*). It was in response to this letter that the Acting Commissioner in Sind wrote that "the old arrangement must be adhered to, and the Rann, for Police duties, be considered British territory until the question [i.e., the boundary of British territory along the Rann] is settled ..." (Pak. Doc. B.47).

Next, in 1903, the Commissioner in Sind declared, in a matter concerning fishing, that "*prima facie* the rights of the Sind authorities extend up to at least the centre line of the Rann" (Pak. Doc. B.381).

The correspondence ending with the 1914 Resolution has already been dealt with, and the file of 1934 concerning the establishment of a Customs Preventive Line has also been mentioned; both of these confirm that at the relevant times a historically recognised and well-established boundary cannot be said to have existed. Between those dates, several official reports made in the course of the 1926 incident indicate that the Sind officials then concerned did not regard the boundary as definitely fixed.

Even later in the time are the documents emanating from both Kutch and Sind in the years 1944-46 and relating to an extradition case (see Chapter IX,

Section 15.11). They show that a dispute about the boundary still existed on the eve of Independence.

I will now proceed to an examination of the second main issue to be resolved in the case. This is whether Great Britain, acting either as territorial sovereign, or as Paramount Power, by its conduct must be held to have recognised, accepted or acquiesced in the claim of Kutch that the Rann was Kutch territory, thereby precluding Pakistan, as successor of Sind and thus of the territorial sovereign rights of Great Britain in the region, from successfully claiming any part of the disputed territory.

While the Rao of Kutch several times laid claim to the entire area of the Little Rann, he formulated an explicit representation addressed to the British authorities in respect of the whole area of the Great Rann only once, it being my opinion that his claim which eventually resulted in the Resolution of 1914 neither explicitly nor implicitly had such wide import. The sole representation was the letter of the Dewan of Kutch to the Resident for the States of Western India, dated 5 March 1938, which is quoted in Chapter V; the terms of that letter, however, were such as to imply that Kutch sovereignty over the Rann was taken for granted.

The claim for this reason is analogous to the unilateral declarations or assertions to the same effect made in Kutch Administration Reports (see Chapter VII). These Reports will now be discussed.

Leaving aside the first Reports on record, which were prepared by the Political Agent in Kutch, and which are therefore at most to be viewed as statements of opinion, as the Political Agent had no authority to represent the State or to make claims on its behalf, the descriptions of the territory of Kutch contained in 24 Reports prepared by the Dewan and issued as from and subsequent to that for 1876–77 explicitly stated that the Rann belonged to the Rao or formed part of Kutch, while 23 further Reports gave the area of Kutch as “independent of the Rann”, “exclusive of the Rann”, or “besides the Rann” without such additional qualification. It can only be a matter for conjecture to say whether the proposal made in 1875 to demarcate the boundary between Thar Parkar and Kutch caused the description in the Report for 1874–75, which was prepared by the Political Agent, and which gave the area of Kutch as a whole as “area including the Rann and islands in it, of about 9,000 square miles”, to be reformulated in the Report for 1876–77. The latter, which was the first Report prepared by the Dewan, defined the area as “6,500 square miles, exclusive of the Rann, which is, 9,000 square miles, belonging to His Highness”.

Whatever significance or effect ought to be attributed to these declarations made in the name of the Rao, their *prima facie* meaning is clear in one sense since, of the various interpretations argued by Pakistan to be possible, only one is reasonable in the circumstances: “exclusive of the Rann” and similar expressions must be read as a contention that the Rann was Kutch territory. In another sense, the statements are, however, notably vague. The “Rann” is not defined, and if both the Great Rann and the Little Rann were intended, the statements were unfounded, or at least incomplete, as admittedly the whole of the Little Rann did not belong to Kutch; indeed, India states that even small portions in

the eastern part of the Great Rann were or could have been the territory of other States. Again, if Dhara Banni and Chhad Bet and other areas which now in India's submission form part of the Great Rann are and were in fact at each relevant time rather to be viewed as extensions of the mainland of Sind, the assertion that "the Rann" belonged to the Rao could have no bearing in relation to such fringe areas. This would be the case even in the event that the concept of "the Rann" were interpreted in favour of Kutch so as automatically to include all the bets therein situated. The latter position, however, demonstrably did not obtain in either the Great or the Little Rann in the period to which the Kutch Administration Reports relate.

No evidence indicates that the competent British authorities took issue with the assertions made in the Kutch Administration Reports, or classified them as being incorrect. In fact, in so far as the documents on record show, the British never commented at all upon the statements regarding the area of Kutch. Significantly, in 1885, when the assertions had been made by the Rao for about a decade, the Commissioner in Sind remarked that he had "heard nothing of the claim alleged to have been put forward on behalf of the Cutch Darbar and [could] hardly believe that such a preposterous pretension [was] ever likely to be seriously pressed" (Pak. Doc. B.10).

India submits that constitutive effects must be deemed to follow from the fact that the assertions made by the Kutch Darbar were not contradicted by the Political Agent, who by reason of his presence in Kutch had intimate knowledge of the affairs of Kutch, nor by the Government of Bombay, to whose political superintendence the Kutch State was entrusted, nor by the Government of India and the India Office, who were fully aware of these assertions. India also submits that the Government of Bombay, as well as the Government of India, recognised in their own records that the territory of the Rao of Kutch included the whole of the Rann. If the latter contention were proved, [it naturally] would outweigh the former, as greater importance must be attached to an explicit acceptance and recognition than to one which is merely tacit and implied.

Until 1924, the Political Agent in Kutch, who was the representative of the British Government and who exercised an important influence over the administration of Kutch, functioned under the direction, control and supervision of the Government of Bombay. With the creation of the Western India States Agency in 1924, the office of the Political Agent was abolished, and the Government of India assumed the political superintendence previously exercised by the Government of Bombay.

The Bombay Administration Reports were issued annually during the existence of the Bombay Presidency, and a number of them dating from 1871-72 until 1923-24, are submitted in evidence. Four of the six Standard Chapters in the Reports on record stated that Kutch extended no further northwards than up to the 24th degree of north latitude. The Standard Chapters for the years 1911-12 and 1921-22 gave the area of Kutch as 7,616 square miles "exclusive of a portion of the Rann", while two previous Standard Chapters (for 1872-73 and 1901-02) included no reference to the area of Kutch, another (for 1882-83) stated it to be 6,500 square miles, while yet another (for 1892-93) gave it as "6,500 square miles exclusive of the Rann". Although the Current

Chapters in 20 Reports contained no reservation for the Rann in the area statements of Kutch, the Current Chapters in 20 Reports, from 1872-73 to 1923-24, gave its area as "exclusive of", "independent of", or "besides" the Rann, and three of them (those for 1903-04, 1904-05 and 1905-06) stated in addition that the Rann belonged to the Rao.

The observations made in the context of the Kutch Administration Reports on the correct interpretation of a phrase such as "exclusive of the Rann" apply in equal measure to the same words as used in the Bombay Administration Reports. While the simultaneous statements in the Standard Chapters that Kutch extended only up to the 24th degree of north latitude are noteworthy, they do not substantially detract from the persuasive force of India's submission that the words must be construed as an acceptance on the part of the Bombay Government of Kutch sovereignty over the Great Rann as a whole.

The Statistical Abstracts from the period 1866-81, submitted by India in evidence, invariably state the area of Kutch with the reservation in a foot-note "exclusive of the Rann". The correspondence between the Government of India and the Secretary of State in 1875-77 illustrates the care with which the statistical returns were compiled and examined and thus confers particular weight upon the relevant foot-note. Tupper, as will have been seen from a passage quoted earlier, also considered the inclusion or exclusion of a territory in statistical returns as a test for determining whether it was British or State territory. The foot-note in the Statistical Abstracts must, for these reasons, be construed as an act of recognition on the part of the highest British authorities that the Rann was Kutch territory, "the Rann", however, having the same somewhat imprecise meaning as in other similar statements previously discussed.

Further statements of like import, which are significant as constituting official acknowledgements by the competent British authorities that the Rann was Kutch territory, are those contained in the Gazetteers of the Bombay Presidency for 1880, 1905 and 1914. While the 1880 edition also described Kutch as extending up to the 24th degree of north latitude only, the two later editions stated, with a degree of precision which admits of but one construction, that the total area of 9,000 square miles of the Rann belonged to Kutch.

In this context should finally be mentioned certain other important official, or semi-official, publications which contain analogous statements concerning the extent of Kutch territory.

Among the Imperial Gazetteers, these for 1881, 1885, 1908 and 1909 contained a reservation for the Rann in giving the area of Kutch, but the edition for 1885 simultaneously stated the northern limits of Kutch (including the Rann) to extend only up to the 24th degree of north latitude. Some other editions of the Imperial Gazetteer stated that the limits of Kutch "exclusive of a portion of the Rann" extended northwards to said latitude.

Another authoritative source of reference is Aitchison's *Treaties*. Three of the four editions of this book on record contained a reservation for the Rann in giving the area of Kutch.

In regard to the evidence bearing on the second main issue which has so far been set out, special significance must be attached to those statements made

by the competent British authorities in official Government publications which acknowledged that the Rann constituted Kutch territory. While the Bombay Administration Reports did not invariably contain a reservation for the Rann in stating the area of Kutch, the Statistical Abstracts on record did so without exception.

An inconsistency is noticeable in official documents and communications of the Government of Bombay in the year 1905. Pakistan stated that around the years 1903–06, “a kind of short interval of intensified confusion” occurred. Besides the Bombay Gazetteer of that year, the Unofficial Note of 1905 (which is not on record, but which is referred to in a file of 1934 from the Western India States Agency) stated that the Government of Bombay considered that the Rann was included in and formed part of Kutch (see Chapter V). In direct contradiction with these two statements was the decision of the Governor in Council of Bombay of 23 November 1905, referred to above, which explicitly directed, on the basis of papers clearly presenting the issues, that “the question [i.e., of a settlement of the boundary between Sind and Kutch and of the rights in the Rann] might well be left alone till we are forced to take it up”. Hence it would appear that, in the year 1905, the various departments of the Government of Bombay did not conceive of or apply a co-ordinated and uniform policy as regards the Rann of Kutch.

Official statements by the Government of Bombay and higher British authorities recognising that the Rann was Kutch territory continued, however, to be made, and with increasing uniformity and frequency, in the period after 1905. Thus, the 1914 edition of the Gazetteer of the Bombay Presidency repeated the statement made in the 1905 edition. Even more significantly, the maps published under the direction of the Surveyor-General of India soon after 1905 began to show a boundary along the northern edge of the Rann as conterminous between Sind and Kutch. Thus, Erskine’s Indian Map B-11, published in 1907, significantly marked the area south of Sinatri Dhand as “Cutch”. A number of various editions of different maps on varying scales thereafter and until the partition of the sub-continent clearly indicated a conterminous boundary between Sind and Kutch, or Sind and the States of Western India, having an alignment by and large conforming to India’s claim line.

It is, in my opinion, established that after the publication of Indian Map B-11, the following maps beyond doubt did depict a conterminous boundary of the said character, referring in whole or in part to the boundary at issue in those proceedings; the fifth edition of the 32-mile map of India, published in 1915 under the direction of the Surveyor-General of India (Ind. Map TB-22), and reprints thereof made in 1922 (Ind. Map TB-23) and 1928 (Ind. Map B-16); the quarter inch or degree sheets, published under the direction of the Surveyor-General of India, in 1921 (Ind. Maps B-17 to B-20), 1925 (Ind. Map B-21), 1927 (Ind. Map B-22), 1936 (Ind. Map B-30), 1942–43 (Ind. Maps B-36, B-37 and TB-1 to 5) and 1946 (Ind. Map B-40, being a mosaic made in that year in preparation for a degree sheet); the maps included in the 1928 and 1935 editions of Aitchison’s *Treaties* (Ind. Maps TB-13 and B-52); the map illustrating the position of ports owned by Indian States, included in the Report of the Indian States Inquiry Committee (Financial) of 1932, presented by the Secretary of

State for India to the British Parliament (Ind. Map B-28); the Index Map of 1935, as read with either of the two successive accompanying draft Schedules of Boundaries (Ind. Map B-45 and Ind. Doc. A-35), the maps produced in Osmaston's Survey, published in 1939 under the direction of the officiating Surveyor-General of India (Ind. Maps B-33, B-34 and B-35), supplemented with Osmaston's plane-table section of 1938 (Ind. Map TB-28); the Southern Asia Series of 1944 (Ind. Map B-38), published under the direction of the Surveyor-General of India; the 1928 and 1945 editions of the Map of India and Adjacent Countries (Ind. Maps B-25 and B-53), published under the direction of the Surveyor-General of India; the sixth edition of the Road Map of India of 1945, printed at the Survey of India Offices (Ind. Map B-39); and the reprint in 1947 of Sind Survey Maps (Ind. Map B-26).

Among the maps enumerated above, particular weight must be attached to the degree sheets published in 1921 and subsequently, and to the fifth edition of the 32-mile map.

In conclusion, the maps listed above do depict with striking uniformity a continuous boundary lying above the northern edge of the Rann and a few of them were seen approved by the highest British authorities.

I have stated earlier that, in my opinion, there did not exist at any time relevant in these proceedings, a historically recognised and well-established boundary in the disputed region. This notwithstanding, the statements and the maps now referred to constitute acts of competent British authorities which — if viewed as being in response to claims by Kutch or other Indian States that the Rann was Indian States territory — may be interpreted as acquiescence in, or acceptance of, such claims, and which — if viewed as unilateral, administrative acts not prompted by such representations — may amount to a voluntary relinquishment, whether conscious or inadvertent, of British territorial rights in the Rann.

The absence of a demonstrable connection between representations of the Rao of Kutch or rulers of other neighbouring Indian States and the British administrative acts in question leads me to conclude that the acts constitute a relinquishment of potential rights rather than an explicit acceptance of claimed rights. Hence, it may be argued that, being in the nature of unilateral acts conferring benefits upon a third party, as it were, of grace, or by policy and not as of right, the actions should be restrictively interpreted in favour of the conceding party and its successor in title. An important guiding factor in a determination of the precise legal effects of the relevant administrative acts would then be whether and to what extent the third party beneficiary acted in reliance upon them, or remained passive.

A final answer to these questions will be deferred until the third main issue arising for determination in this case has been examined. This issue, which will now be discussed, is — subject to Pakistan being precluded from claiming the disputed territory on account of the British acts of relinquishment referred to above — whether the British Administration in Sind and superior British authorities, acting not as Paramount Power but as territorial sovereigns, performed acts in assertion of rights of territorial sovereignty, directly or indirectly, over the disputed tract which were of such a character as to be

sufficient evidence in law to have conferred title to the territory, or parts thereof, upon Sind, and thereby upon its successor Pakistan; or conversely, whether the evidence of such exercise of sovereignty on the part of Kutch and the other States abutting upon the Great Rann, to whose rights India is successor, would instead operate to confer title on India to the territory, or to parts thereof.

Territorial sovereignty implies, as observed by Judge Huber in the *Island of Palmas* case, certain exclusive rights which have as their corollary certain duties. In adjudging conflicting claims by rival sovereigns to a territory, all available evidence relating to the exercise of such rights, and to the discharge of such duties, must be carefully evaluated with a view to establishing in whom the conglomerate of sovereign functions has exclusively or predominantly vested.

The rights and duties which by law and custom are inherent in, and characteristic of, sovereignty present considerable variations in different circumstances according to time and place, and in the context of various political systems. The sovereign entities relevant in this case prior to Independence were, on both sides of the Rann, agricultural societies. The activities and functions of Government — leaving aside the military organisation — were in their essence identical in Sind and Kutch, being limited mainly to the imposition of customs duties and taxes on land, livestock and agricultural produce in the fiscal sphere, and to the maintenance of peace and order by police and civil and criminal courts and other law enforcement agencies in the general public sphere.

In these societies, at the times relevant in these proceedings, the borders between territories under different sovereignty still marked a strict division of economic rights as well as of Government functions. Significantly, ownership by an Indian ruler of agricultural property could imply and carry with it such a measure of sovereignty over it as to include taxing authority, and civil criminal jurisdiction. This explains why the "Rao's dominions" was synonymous with "Kutch territory". The Rao of Kutch, as remarked earlier, enjoyed a wide measure of sovereign prerogatives, while other territorial sovereigns in the region retained so few elements of sovereignty that their states were more closely similar to that of more private landholders.

Because of the close dependence of the taxation system on the land and the agricultural production even in Sind, State and private interests coincided and were necessarily so closely assimilated with each other that it would be improper to draw as sharp a distinction between them as is called for in the context of a modern industrial economy. The sole important revenue, apart from customs duties, derived from the land, and was earmarked for the State and the landholder in fixed proportions.

It is in the light of these facts and circumstances that the evidence relating to acts of "jurisdiction" in the northern half of the Rann has to be analysed. The object of such an appraisal is to define and delimit with the greatest possible accuracy which of the two contending sovereigns, being before Independence mainly the Rao of Kutch and the British Government in Sind, respectively, and after Independence India and Pakistan, in actual fact enjoyed the rights of sovereignty over the disputed territory, and which of them carried out the

burden of discharging the duties inherent in sovereignty in that territory at each relevant period of time.

The evidence dating from the period before the last decade of the nineteenth century, besides that related to the Sayra lands and to grazing, does not afford a firm basis for concluding that either Sind (whether under the rule of the Amirs or of the British) or Kutch predominantly performed acts of sovereignty over the disputed territory.

This is so in regard to the documentary evidence concerning the utilisation of the salt resources in the Rann proper which is referred to in Chapter IX, Section 6. Moreover, the British control over salt resources on the sub-continent was viewed as the outflow of an imperial prerogative, and not as an exercise of sovereign territorial rights, and the "control" over the Rann referred to in the Salt Resolution of the Government of Bombay 1885 was likely intended to signify control merely over the salt resources in the Rann. Furthermore, the letter of the Collector of Salt Revenue in Sind of 30 June 1897 implies that the extraction of salt in Sind was confined to the rich natural deposits of salt in what he referred to as British tracts adjacent to the Rann "which [were] guarded by a Salt Preventive Establishment". (Pak. Doc. B.313.)

The statement by the Mukhtiarkar of Diplo Paluka in 1875 that, before 1843, a conterminous limit of jurisdiction between Sind and Kutch lay at Gainda Bet was hearsay in character and cannot be deemed conclusive proof of the point. The assertions made by the Bhuj Vahivatdar in 1876 to the effect that a large portion of the Rann and numerous specified bets were Kutch territory, similarly are not corroborated by direct evidence, and in the circumstances no conclusive weight can be attached to them.

Nor can much guidance be found in the correspondence in the 1850s concerning the erection of road marks and the construction of a well and a rest house on Gainda Bet. In particular, the Memorandum of the Rao of 27 December 1854 cannot now, in the context of the broad issues in this case, be given the effect of a binding admission by him that the boundary between Kutch and Sind lay at Gainda Bet, even if certain words in the Memorandum might, *prima facie*, admit of the interpretation to such effect urged by Pakistan.

Similarly, the instances referred to in Chapter IX, Section 3.03, even if they indicate that all public works (roads, road marks and dharamsalas) required and possible to execute in the area of the Rann were carried out by Sind in the relevant decades of the nineteenth century, are too scanty and imprecise to be considered truly indicative of exercise of sovereignty at various times over the vast tract at issue. I am moreover inclined to accept the Indian argument that the construction and maintenance by Sind authorities of rest houses, etc., did not, in the circumstances, presuppose that the sites were situated in British territory and that they were in any event for the benefit of travellers generally.

I have declared in a previous context that the Sayra lands, at least up to and including Sindri, were Kutch territory and did not cease to be so by being assimilated with the Rann in and after the earthquake of 1819. The record indicates that the territory denoted by Pakistan as the "jutting triangle" similarly, at some

time, was converted from a fertile district, including settlements at Kanjarkot and Vighokot, into Rann. However, neither in respect of that district as a whole, whatever its actual extent, nor in regard to Kanjarkot and Vighokot, is there any evidence on record showing whether and when, historically, they fall under the sovereignty of the rulers of either Sind or Kutch. The references made to the ruins existing at those places in a few documents relied upon by Pakistan lend no support to the suggestion that they were viewed by the British authorities concerned as being situated in Sind at the relevant time.

Evidence has been introduced to show that, in the general area of the "jutting triangle", settlements of Sind existed outside the boundary claimed by India. On consideration of all the documents and arguments on record, I do not deem it proved that the entries indicating cultivation on the Diplo portion of "Dayra-i-Dharo" in 1867-69 related to territory situated outside said boundary, nor that "Shakurji Kandi" was so situated. A place called "Shakur" is, however, indicated on Indian Map B-11 just outside the boundary marks, on the eastern side of the Dhoro Puran River. This, no doubt is or was a Sind settlement.

The documentary evidence pertaining to "Ding", "Ding Mian" and "Dhing Naka" establishes no more, in my opinion, than that a British customs outpost, referred to again below, was situated not far outside the boundary claimed by India. The location of the outpost may be assumed to have been that indicated as "Dhing Naka" on the related official map (Pak. Map 92).

Certain other documents pertaining to the general area of the "jutting triangle" indicate that fishing ponds or lakes may have been situated outside the boundary claimed by India. Of particular significance would have been evidence supporting the assertion that leases for fishing were granted by the Government of Sind in respect of a lake situated six miles south of the Rahim ki Bazar. This contention is not, however, proved. Nor is there any evidence on record which constitutes proof of the cultivation at a place seemingly situated in the vicinity of said lake, which is referred to in Chapter IX, Section 2.04. The ponds referred to in Chapter IX, Section 4.02 cannot be identified.

In the "jutting triangle" lies Pirol Valo Kun. The sole map on which this area appears is the "Sketch Showing Relevant Places" submitted by India as Indian Map B-1. This depiction must be deemed binding upon India, and I will consider the area to be situated south-coast of Kanjarkot, its southern edge lying midway between Kanjarkot and Vighokot. The evidence shows that Kutch did not make any appearance in this area until 1946, and then only abortive attempts were made by the sons of the lessee, Node Sadi Rau, to go there in order to collect panchari. They reported that they did not even dare to stay overnight in the place. While no specific evidence has been submitted which proves any activities undertaken by Sind subjects in Pirol Valo Kun, the reports of the Kutch lessees establish that Sind inhabitants engaged in grazing there.

In this context, lastly, I may note that the statement in an appendix to the Indian Diplomatic Note of 9/11 May 1955, which is referred to in Chapter IX, Section 1.03.2, must be understood and treated, not as an admission having binding effects upon India, but as a submission equivalent to an argument presented in the course of the proceedings before this Tribunal.

In regard to the territory between the "jutting triangle" and the Western Trijunction, there is no evidence on record which, in my opinion, clearly establishes any activities by either Party. (A possible instance may be the incident in 1903, referred to in Chapter IX, Section 4.01.1, where the Commissioner in Sind considered that Kutch did not have jurisdiction over some fishing ponds situated at an unidentifiable point in the Rann five miles outside the limits of Badin Taluka). Here, however, are to be noted the report and map of Mr. Howes which indicate that he, who was Secretary to the Government of Sind in the Public Works Departments and its Chief Engineer, as late as a few years prior to Independence adopted the position that point 75 on Indian Map B-55, situated at the southern tip of the western loop, lay at the border between Sind and Kutch. This premise was stated in the process of planning important public works, and the fact that the project envisaged was not eventually realised does not diminish the force of the assumption as to existing territorial limits on which that project was planned to be executed.

The view of Mr. Howes is to a certain extent corroborated by a statement made in a committee report included in the book *Post-War Development Schemes*, published in 1945 by the Government of Sind. This statement, which is referred to in Chapter VII, described a strip on which the plantation of forests was recommended as a "strip along the Sind-Kutch border from Rahim ki Bazar via Adhegam at Berano" (Ind. Doc. TC-48).

The principal evidence of acts of sovereignty performed in the disputed territory falls into four categories, viz., customs, police surveillance and police jurisdiction, criminal jurisdiction, and the material relating to Dhara Banni and Chhad Bet (some of which overlaps with the evidence included in the other categories).

With regard to customs (see Chapter IX, Section 14), it is established that Kutch retained autonomy in the field of foreign trade and that the right to levy customs fell within the sphere of its exclusive determination. As it maintained lower tariffs than British India, goods were smuggled through Kutch over the Rann and into Sind and elsewhere. To prevent this illicit traffic, customs outposts were set up in 1934 along the "Northern and Sind-Cutch Frontiers Preventive Lines". Three of the outposts admittedly were situated south of the boundary claimed by India at Dhing Naka, Karali and Jattra.

It is established that officers of the Central British Customs Organisation patrolled in the Rann, that a number of offences against salt regulations were detected in the Rann and that offenders were prosecuted and fined. It is not necessary to render a conclusion on the submission by Pakistan that the jurisdiction of the British Customs was by law confined to British territory and that the customs officials had no competence to act outside British India, as it is in any event clear that the British Customs had no right to perform functions on Kutch territory if not expressly permitted to do so. For this reason, it must be assumed that the customs outposts established at the aforementioned places, and notably at Dhing Naka and Karali, would have been conceived of by the competent British authorities as located in territory falling under British jurisdiction and thus as British territory. The evidence relating to the actual patrolling is, however, not sufficient, consistent or precise enough to show with

any degree of exactitude what areas were within the beat of the British customs staff.

The evidence relating to post-Independence activities of the Pakistan Customs, which predominantly had the reverse object of preventing the export of goods from Pakistan to India, indicates only in a general way patrolling and enforcement in territory adjacent to outposts such as Ding, Jattra and Vingi. Furthermore, some instances of patrolling or interception may represent "hot pursuit", both before and after Independence.

The evidence on customs activities shows, in all, that both before and after Independence such Government functions were exercised by British and Pakistan Customs staff south of the boundary claimed by India in an area bordered in the west by the eastern loop and in the east by the Dhara Banni sector. It is, however, not established that customs staff patrolling regularly and consistently took place in a broad sector of the disputed territory within those limits, and it must therefore be assumed that the main activities were confined to areas in the relative vicinity of the customs outposts.

With regard to police surveillance and police jurisdiction, the submission that the police of Kutch exercised jurisdiction over the whole of the Rann (see Chapter IX, Section 10.01) is not corroborated by evidence and is in fact disproved by the evidence on record.

It is common ground between the Parties that the establishment of police on the British side was exclusively a provincial concern. Hence, evidence of British police activities must, in the absence of special arrangements, be deemed to illustrate exercise of territorial sovereign functions, in distinction to imperial functions. The order of the Acting Commissioner in Sind in 1898 affirmatively shows that both in the last decades of the nineteenth century, and for some period thereafter, the Rann was considered British territory for police purposes. The order cannot, however, *per se* be deemed to have had such an extension in time as submitted by Pakistan but must in default of specific documentation to the contrary be seen as operative only over a period reasonably close to the year in which it was issued.

Among the specific instances of investigation by Sind police of offences committed in disputed territory, the two cases of 1939 and 1945 referred to in Chapter IX, Section 11.02 both relate to the Ding customs outposts or its vicinity. Ding, then, clearly was understood as falling under Sind police jurisdiction.

The instance of 1945 summarised in Chapter IX, Section 11.03, is not clear-cut. The murdered person was a British customs officer, assassinated 15 miles south of Ding in the course of exercising his duties. In that case, the Kutch Police Commissioner stated in a communication to the Sind police that the territory of Kutch commenced immediately after leaving the Ding outpost, evidently also implying that the territorial and jurisdictional limits coincided.

The jurisdiction of the police forces is further illustrated by the instances of exercise of jurisdiction by criminal courts, as some accused persons brought to trial were arrested or seized in disputed territory, or as the offences for which they were indicted took place in such territory.

No evidence on record shows that the courts of Kutch or other Indian States exercised jurisdiction over the disputed territory (outside the area of Dhara Banni and Chhad Bet).

On the Sind side is to be noted the important statement made by the Deputy Collector of Thar Parkar on 20/21 May 1938 (see Chapter V) that "our Magistrates in charge of Nagar Parkar, Diplo and Mithi Talukas have been exercising their jurisdiction as Criminal Courts as far as half the Rann in question". However, in the absence of a satisfactory measure of corroborative evidence, this general statement cannot be regarded as conclusive proof of the assertion made by the Deputy Collector. The evidentiary value of the assertion also is somewhat diminished by the statement of the District Superintendent of Police Thar Parkar, who in the dacoity matter transpiring in 1923, while complaining of slowness and inaction on the part of Kutch police, stated that:

"...the Rann belongs to Cutch State and if the Cutch Police had followed up the tracks they would not only have been able to locate the gang but would also possibly have been able to cripple it with the assistance of the Nagar Parkar Police." (Ind. Doc. A-68.)

The documentary evidence set out in Chapter IX, Section 12.02 establishes that Sind police and criminal jurisdiction extended in 1940-45 to the vicinity of Vighokot in a case of dacoity.

No definite conclusions can be drawn from the instance of 1945 referred to in Chapter IX, Section 12.03, and relating to the outpost Khadai, because of the imprecise geographical indications. Furthermore, the instance may have been in the nature of "hot pursuit".

The case of an assault in 1945 on Biar Bet, set out in Chapter IX, Section 12.04, has been argued also to be analogous to "hot pursuit" for the reason that the police constable, when assaulted, was engaged in pursuit of people illegally smuggling goods from Sind to Kuteh. However, it is significant that, in this instance, it was specifically stated in the Diplo Police Station case diary that the area of Biar Bet was "situated in the jurisdiction of Thanedar Police Khadai of taluka Diplo of Government". Moreover, the accused — who was eventually acquitted for lack of evidence — was arrested and surrendered by the Kutch police to the Sind authorities. Biar Bet, therefore, evidently was treated by the authorities concerned in both Kutch and Sind, as late as 1945, as falling under Sind police and criminal jurisdiction.

In summary, on the evidence on record it may be taken as positively established that, in this century, prior to Independence, outside Dhara Banni and Chhad Bet (which will be treated presently), the police and criminal jurisdiction of Sind authorities over disputed territory extended, in the sector between the eastern loop and Dhara Banni, to Ding, Vighokot and Biar Bet. There is, however, no evidence which affirmatively proves in a conclusive fashion that the jurisdiction of Sind police and Sind courts encompassed areas west of the eastern loop, or east of Chhad Bet. Conversely, no proof is offered that Kutch either assumed or exercised such jurisdiction over any part of the disputed territory (leaving aside Dhara Banni and Chhad Bet).

The instances cited in Chapter IX, Section 12.05 and 13 do not materially assist in clarifying where the limits of police and criminal jurisdiction of India and Pakistan lay at each relevant time after Independence.

I will now proceed to an examination of the documentary evidence relating to Dhara Banni and Chhad Bet.

It is established that these areas have not at any time been cultivated and have not been the site of any permanent habitation, that they contain extensive grazing grounds, and that, at least since 1843 and until 1956, inhabitants of nearby villages in Thar Parkar District grazed large herds of cattle on Chhad Bet. It is also established that residents in Sind alone used the grazing grounds on Dhara Banni and Chhad Bet at all relevant times. Further, Kutch did not exercise any active jurisdiction over Dhara Banni and Chhad Bet before 1926.

The grazing fees which Kutch decided to collect in 1926 were conceived of by the Dewan of Kutch as a nominal tax, and the levy was treated by him as an act of exercise of Government authority. It was also so understood by the Sind people who filed a petition for relief with the Commissioner in Sind; in their view, the imposition of panchari squarely raised the issue of where the boundary lay between Thar Parkar and Kutch. In their petition of 1 July 1926, they described the boundary of Thar Parkar as "being up to" Kerdahi, Biria and Bamarala and the boundary of Kutch as situated about 12 miles away from their villages. The Mukhtiarkar of Diplo, upon hearing the petitioners, reported that they had "no self knowledge of the boundary limits" but they indicated to him the boundary on a sketch map. It is not established that this map is identical with a hand-drawn sketch submitted in evidence. Similarly, the Collector of Thar Parkar, to whom authority to dispose of the matter had been given by the Commissioner in Sind, dealt with the question as being one of ascertaining the true alignment of the boundary between Thar Parkar and Kutch.

The file of the Collector's office in the matter shows that contradictory opinions were expressed on the two questions of whether a settled boundary in fact existed, and, if so, what its alignment was. The maps relied upon by the Superintendent of Land Records as a basis for his opinion were evidently interpreted differently by him and by the official in the Collector's office who scrutinised the statement. The latter remarked that the maps practically showed no boundary of the British territory and Kutch in the Rann. It is not known precisely with reference to what material the Collector eventually reached his final decision on the petition. However, the purport of his order of 20/31 December 1927 clearly was that the areas of Dhara Banni and Chhad Bet were British territory and that the petitioners were to be informed that no tax was leviable by Kutch.

It would appear from the documents on record that the collection of panchari by Kutch was discontinued not long after the Collector's order was issued at the end of 1927. A period of some 12 years thereafter elapsed before Kutch revenue officials again started to collect panchari on Dhara Banni and Chhad Bet.

In 1944, in the course of engaging in such activities, a Kutch patrol tied and left on the ground in Chhad Bet a resident of the Sind village of Bandho who

was grazing cattle and maintained that he had the right to do so since the territory was British; the companions of the villager were arrested and taken to Khavda. The territorial issue became the focus and sole object of the inquiries subsequently made and official actions subsequently taken in this case both in Sind and Kutch.

The Thanedar of Khavda, who was the immediately responsible officer in Kutch, noted that "the main dispute is about the boundary" and reported to his superior that Chhad Bet was Kutch territory, while the Sind police, and subsequently the First Class Magistrate of Diplo and the District Magistrate of Thar Parkar, concluded that a *prima facie* case had been made out against the Kutch officials, for wrongful confinement and beating. There could be no other basis for the demands by the said Magistrates that extradition be requested of the Kutch officials than that the territory of Chhad Bet was considered to be British territory. The request for extradition, which was eventually issued by the Secretary to the Resident for the States of Western India, stated that "...if the Kutch Darbar have no objection, arrangements may kindly be made for the surrender...". There is no reason to assume that this expression signified an intimation that the basic premise of the request may have been lacking, i.e., that *prima facie* an offence had been committed on what was considered British territory.

The opinion that Chhad Bet was Kutch territory was clearly expressed in the internal reports of the Revenue and Police Commissioners of Kutch. It is, however, an open question whether this view was ever officially communicated by the Dewan of Kutch to the appropriate British authorities. On a lower level, the Kutch Sub-Inspector of Police had, however, made a statement to such effect to the Diplo Police in the first stages of the case.

Hence, in this instance, which transpired in a period shortly before Independence, the British local authorities advised the villagers concerned that Chhad Bet was Sind territory. Moreover, the courts of Sind acted on the basis that the territory belonged to Sind, and the Office of the Resident for the States of Western India officially requested extradition of Kutch officials for having committed a *prima facie* offence of wrongful confinement and beating in British territory. It is not established that the request for extradition was in fact opposed by Kutch *vis-à-vis* the British, or that the stand taken by the British authorities concerned was reversed. On the evidence on record it must therefore be concluded that in 1945 and 1946, thus shortly before Independence, these British authorities considered Chhad Bet to be Sind territory and took official action *vis-à-vis* Kutch on such basis. It is, however, not established that this position was accepted by the Kutch authorities; on the contrary, the documents indicate that the Kutch Darbar deemed Chhad Bet to be Kutch territory.

The activities of Node Sadi Rau, who was engaged as a Kutch lessee by a contract of 18 July 1945, have been described in Chapter IX, Section 15.12. Pursuant to the terms of the contract, he was to be provided with a metal badge indicating State authority. The lease significantly included a clause pursuant to which he was to be indemnified in the event of becoming indicted in criminal actions in the course of collecting grazing fees "from persons outside Kutch territory". The lessee did collect such fees to some extent, and on many

occasions impounded cattle from people who refused to pay, which resulted in the filing of 72 applications for release of such cattle. It is, however, clear that he was met with considerable resistance by those on whom he endeavoured to levy the tax within the territory covered by the lease, viz., Dhara Banni, Chhad Bet and Pirol Valo Kun. In November 1944, the Thanedar of Khavda had reported that the refusal by the Sind villagers to pay panchari was endorsed by the British authorities. Lessee's report of October 1945 also indicates that the resistance displayed in Dhara Banni and Chhad Bet on the two occasions described therein was made in the presence and with the support of British police officers.

With reference to Dhara Banni and Chhad Bet, I deem it established that, for well over 100 years, the sole benefits which could be derived from these areas were enjoyed by inhabitants of Sind. It is not suggested that the grazing as such was subject to British taxation. Such limited evidence as there is on record seems, however, to justify the assumption that the task of maintaining law and order was discharged by the Sind authorities; it is not even suggested that the authorities of Kutch at any time viewed such a task as forming part of their duties. The Kutch Tajviidar of Chhad Bet stated in a revealing letter of 26 March 1940 that "it is seen that the people of foreign territory have assumed a form of administration on this bet and have for a long time established their foothold" (see Chapter IX, Section 15.10.3). Whatever other Government functions were required with respect to these outlying grazing grounds, on which herds of cattle were from time to time shepherded, were apparently undertaken by Sind. Thus, the births, deaths and epidemics occurring there were recorded by the taluka office in Diplo. It is not shown that Kutch at any time established a thana on Chhad Bet.

The collection by Kutch of grazing fees must be viewed as an exercise of Government functions in the period before 1945, despite the fact that the actual presence of Kutch police is not proved and that the tax collectors do not appear to have been themselves invested with general police authority; their jurisdiction was strictly fiscal. It is established that these measures were instituted in 1926 and were discontinued about two years later, were reassumed for a brief period of time in 1942, were seemingly discontinued in connection with the extradition case, and were thereafter again instituted in a different form under the lease executed in the summer of 1945. At no time were these tax levies fully effective, as is evidenced by the small amounts recovered, which fell far short of the expenditure incurred in the collection. More significantly, during each of the three phases, the imposition of the levy was opposed, not only by the local villagers, but by the British Government authorities concerned. The first phase resulted in the order of the Collector, acting on the authority of the Commissioner in Sind, that payment of fees should be refused. The second phase led to the indictment and demand for extradition of Kutch officials for having arrested Sind villagers who contended that the territory was British; then also the Khavda Thanedar noted that British authorities "impressed upon the minds of the people of the villages . . . that the limits of Chhad bet do not belong to this sacred State . . .". (Pak. Doc. B.145/Ind.) During the third phase, lastly, the lessee — who worked under a Kutch contractual indemnity clause protecting him against

criminal indictment — encountered the opposition of a party furnished with British Government weapons and accompanied by Sind police. The third phase began shortly before Independence. Taken in all, these activities by Kutch cannot be deemed to have constituted continuous and effective exercise of jurisdiction. By contrast, the presence of Sind in Dhara Banni and Chhad Bet comes as close to effective peaceful possession and display of Sind authority as may reasonably be expected in the circumstances. Both the inhabitants of Sind who used the grazing grounds, and the Sind authorities, must have acted on the assumption that Dhara Banni and Chhad Bet were British territory.

India submits that it attributes little value to the instances of display of authority after Independence, I share this view.

The three main issues which fall to be considered in this case have been defined above. The evidence relevant in determining those issues has been discussed with a view to delimiting and evaluating its purport and weight. The vertical line between the Western Terminus and the Western Trijunction has been established as being the boundary between those points; this portion of the boundary therefore does not require further discussion.

As stated at the outset in this Opinion, the territorial dispute which the Tribunal is called upon to decide is one in which opposing claims have been made with reliance upon conflicting testimony, and where a judgment has to be given on the relative strength of the cases made out by the Parties. The dispute is one of great complexity. It is also one in which the claims and the evidence adduced in support of them are in respect of certain parts of the territory at issue almost evenly balanced. The ultimate determination therefore is both difficult and in exceptional measure dictated by considerations which do not heavily outweigh those considerations that would have motivated a different solution.

An analysis of the first issue arising in the case has yielded the conclusion that a recognised and well-established boundary did not exist in the disputed region east of the Western Trijunction on the eve of Independence. The absence of such a boundary does not in the context of this case imply that the disputed territory was *terra nullius*. According to the joint submissions of the Parties, the Rann of Kutch in modern times could only have formed part of the territory of a sovereign whose territory abutted upon it. Since the Rann until recently has been deemed incapable of permanent occupation, the requirement of possession cannot play the same important role in determining sovereign rights therein as it would have done otherwise. Therefore, special significance must be accorded to display of other State activities and to attitudes expressed or implied by one or several of the sovereign entities abutting upon the Rann in regard to the actual extension of their respective dominions.

It will have been seen from statements of authorities quoted earlier in this Opinion that the overall general principle that would apply during the British epoch in determining issues turning upon notions of territorial sovereignty was usage.

Pakistan has argued that the determination of sovereign rights over the Rann and the bets therein is governed by a regional custom which evolved and became

recognised in the nineteenth century. The instances which are cited in support of this proposition are set out in Chapter VI. From them, it is said, the principle can be deduced that the bays in the Rann and the territory of the Rann itself were recognised and acknowledged to appertain to the territorial units abutting upon the Rann to the shores of which such bays and such territory of the Rann were nearest. Even though a rule to this effect may have been applied in the determination of specific cases, notably in the Kennedy Valuation Judgment which was rendered half a century before Independence, the evidence does not in my opinion establish the existence of a constant and uniform usage or even of a general rule applied as binding in the area of the Great Rann in distinguishing British territory from that of Indian States. A principle of nearness of shores therefore is not proved to be applicable in this case.

The case of India rests in essence upon three grounds. The first is the fact that the assertions made by the Rao of Kutch that the Rann was his territory were not contradicted by the British authorities for a period of about 75 years prior to Independence. The second ground is that for a long period of time, extending over three-quarters of a century, Great Britain as Paramount Power in the sub-continent took official action by which it acknowledged that the Rann of Kutch was Kutch territory. Third, in more recent times, as from about the beginning of this century and until the eve of Independence, such action on the part of the British Government in India gradually assumed the more precise form of the depiction on maps of a conterminous boundary between Sind and Kutch, or between Sind and the States of Western India, along the northern edge of the Great Rann, roughly in accordance with India's claim line. This evidence will now be appraised.

There is no doubt some force in the argument that, if the British authorities concerned, and in particular the Government of Bombay, had considered the Rao's statements in the Kutch Administration Reports unfounded, they would have had to make this view express, lest a territorial claim on the part of the British be in some measure prejudiced. However, the Rao's statements, made in the briefest fashion possible in the statistical section of routine annual reports on the affairs of Kutch, were not and cannot have been understood as a claim in the true sense of the word. They were mere assertions or pretensions of an abstract nature and did not serve as a basis for any Government action taken by the State of Kutch. It is true that the greater part of the disputed territory is a barren tract incapable of habitation and of any but intermittent use for limited purposes, and that the requirement of occupation, as remarked earlier, is less essential in relation to such a territory. Nevertheless, it is significant that the State of Kutch did not establish even a token presence in the northern half of the Great Rann between 1819 and the demarcation of the vertical line in 1924; the two isolated reports of the Bhuj Vahivatdar made in 1876 do not constitute proof of such a presence of Kutch either then or in earlier times. Hence, while the Rao of Kutch stated that the territory was his, and while the British showed indifference and did not protest against this, the Rao did not act in reliance upon his assertions. Consequently, at least up to the year 1926, when the first agents of the Government of Kutch rode into Dhara Banni and Chhad Bet, the claimed title of Kutch to the territory rested solely on a negative ground and did

not have a foundation in concrete Government action. No benefits of the assumed extension of territorial dominion were enjoyed by the State; nor were any sovereign duties discharged by Kutch. The first ground upon which India's claim to title rests is for these reasons fragile.

The statements made on the British side that the Rann was Kutch territory carry greater weight. They may amount to a voluntary relinquishment of potential British territorial rights, and statements to the effect that one does not possess a right are no doubt more significant than statements to the opposite effect. The form in which these acknowledgements were made, however, was largely the same as that in which the Rao's assertions were expressed. The Bombay Administration Reports and the Gazetteers of the Bombay Presidency contained a mass of information on various topics relevant to the administration in the years to which they related, as well as on topics of general interest. They were not administrative acts, but encyclopaedic reference books. The passages relied upon in these proceedings occurred in lists of area statements included in those books. In the more relevant Statistical Abstracts, the reservation that the Rann was Kutch territory appeared in the form of foot-notes referring to the area of Kutch in a list of the areas of a great number of States. It is difficult to envisage a more insignificant form of Government action than such a foot-note.

Nevertheless, the statements that the area of Kutch was given "exclusive of the Rann", etc., were made and were repeated, though in some cases in more explicit terms than in others. As remarked earlier, the attitude was most clearly expressed in the Bombay Gazetteers for the years 1905 and 1914 in which it was stated that the total area of 9,000 square miles of the Rann belonged to Kutch.

Many passages of this nature which were published both on the Kutch and the British side characteristically referred to "the Rann" without specifying what this term meant. It is by no means obvious that "the Rann" necessarily included the bays situated therein, for much of the evidence on record which relates to the nineteenth century establishes that a distinction was made in practice between rights to the bays and rights in and to the Rann proper, and it is not a foregone conclusion to assume that an area like Dhara Banni—Chhad Bay, either subjectively or objectively, can at the time of each statement have been deemed to constitute a bay in the Rann. Furthermore, it appears quite possible that, upon inquiry, that area as well as the "jutting triangle" and other marginal areas would have been recognised and treated as forming an extension of the mainland of Sind, and as not being encompassed by the expression "the Rann" used in the publications in question. Any uncertainty in this respect ought properly to be resolved in favour of Pakistan. The reason therefore is that the claim made by Kutch must, because of the form in which it was made, and because it was unsupported by other action, be interpreted restrictively, to the disadvantage of the claiming party and the statements issued by the British authorities must be understood in like fashion and cannot in the circumstance be extensively interpreted.

The second ground on which India's claim to title rests is stronger than the first, but likewise limited in effect.

The uncertainty and vagueness as to details inherent in the assertions of the Rao and in the acknowledgements by the British that the Rann was Kutch territory are removed in the maps which indisputably depict a conterminous boundary between Sind and Kutch, or Sind and the States of Western India, having an alignment which conforms by and large to India's claim line. They form the third and most convincing ground of India's case. Those maps were published by the Survey of India from 1907 and onwards with increasing frequency. In the course of time, such a conterminous boundary appears to have become a constant feature on all maps produced by that Department for the variety of purposes that maps are intended to serve. They were also widely distributed, and to the highest British authorities. Because of the nature of the depiction, there could hardly be any doubt in the minds of those examining the maps that they implied and expressly acknowledged that British territory ended on the northern side of the Great Rann, and that the Great Rann formed part of Kutch or of other Indian States abutting on the Rann.

However, they were maps, and in the context of the political system in India during British times, the evidence on record leaves no room for doubt that none of the maps produced in this case was a conclusive and authoritative source of title to territory, except Indian Map B-44, on which the boundary determination made in the Resolution of 1914 was authoritatively depicted. However, as held earlier, this depiction with a blue dotted line covered only a portion of the boundary at issue. An overall assessment of the evidence on record concerning the methods applied in making ground surveys and in preparing basic maps, and the processes by which such maps, and particularly the subsequent compiled maps, were produced, examined, approved and continuously modified gives a clear picture of the true status of the relevant maps. This may be said to have been that the boundary in dispute as depicted cannot have been intended to offer more than a rather tentative indication of the actual extension of sovereign territorial rights. As such, the alignment of this boundary did not represent material accuracy but merely gave a clue to existing positions valid in the absence of other guides. When, however, the true extension of sovereignty over a territory became the subject of investigation and inquiry, and especially of an exhaustive judicial inquiry, the evidentiary value of the maps was lessened as far as the relevant boundaries were concerned, and they were made to yield to evidence of superior weight, particularly evidence of exercise of jurisdiction. This conclusion inescapably follows from an examination not only of the inquiries which are treated in Chapter VI, but particularly of the cases where parts of the boundary now at issue became the object of investigation and discussion: the boundary demarcation correspondence in 1875-76, the correspondence concerning the boundary between Hyderabad District and Kutch in 1884, the incident of 1885 culminating in the two Resolutions of the Government of Bombay in that year, the correspondence in 1905 on the boundary between Jati Taluka and Kutch, the claim resulting in the boundary determination by the Resolution of 1914, the incident of 1926-27 leading to the Collector's order, the inquiries made in the course of Osmaston's Survey, and the actions taken in Sind which led to the demand for extradition of Kutch officials in 1945. On none of these occasions were maps deemed by the responsible British Government officials

as determinative of those sovereign rights which were subject to discussion and inquiry.

Some of the maps which do depict a conterminous boundary as aforesaid are inconsistent in so far as they show minor portions of the boundary variously. It is known that these variations were made by the Survey of India without consulting or obtaining sanction from the authorities solely competent to decide political matters.

Persuasive evidence though the maps showing a conterminous boundary may be at first glance for the proposition that they constituted a relinquishment by the British of such territorial rights in the Rann as — absent the maps and the statements previously referred to — the British might have asserted on legal grounds in the disputed territory, they are therefore in the circumstances of the present case not conclusive support for a positive claim to sovereign title on the part of Kutch and the other Indian States abutting upon the Rann.

The three grounds on which India's claim is based have the feature in common of being acts of relinquishment by the British of such territorial rights as Sind might have asserted in the Rann. These acts on the part of the British leave, as it were, the disputed territory, or the greater part thereof, in the hands of the sovereign or sovereigns who by reason of geographical proximity were there to receive it.

What are the bases of the title claimed by Pakistan?

I have already concluded that no principle of law in the nature of a regional custom operates to confer title upon Pakistan to the Rann of Kutch on the grounds of nearness of shores or equidistance.

Evidence relied upon by Pakistan shows that, over the same period of time as the statements and the maps on which the title claimed by India is based were issued, the Sind authorities explicitly gave expression to the view that half of the Great Rann, or roughly the territory now in dispute, was British territory. Such a position was taken, significantly, in instances where the matter at issue was subject to especial scrutiny. These instances were the following.

In the course of the inquiries made at the request of the Commissioner in Sind in 1875, the Mukhtiarkar of Diplo stated that the rest house on Gainda Bet was fixed as the boundary of the Thar Parkar District and Kutch. The Political Superintendent of Thar Parkar accordingly reported to the Commissioner in Sind that there were "here and there certain spots in the Runn which are by custom generally accepted as showing the line of boundary between this district and Cutch". (Pak. Doc. B.168/Ind.)

In 1884, the Assistant Collector of Mahomed Khan's Tanda reported to the Collector of Hyderabad that all he could find out about the boundary line between that division and Kutch territory was that "it is somewhere in the Rann". The Collector then reported to the Commissioner in Sind as his opinion that "the Rann itself is the boundary". Reference has already been made to the fact that Erskine, later Commissioner in Sind, adopted this view in identical terms in his letter to Pullan of 21 November 1884, in which it was also stated that "no portion of Cutch territory is found on the Northern side of the Runn". (Pak. Doc. B.376.)

In the next year, 1885, Watson, Deputy Collector of Parkar, reported to the Commissioner in Sind that although apparently Kutch contended that the whole of the Rann was part of its territory, "the natural boundary between Sind and Kutch is without doubt the centre of the Runn and this has always been considered to be the border by the people of Thar and Parkar...". (Pak. Doc. B.9.)

In forwarding this report to the Government of Bombay, Commissioner Erskine characterised the Kutch claim to the whole of the Rann as preposterous and expressed doubts that it was "ever likely to be seriously pressed". The Commissioner added that:

"It is perfectly well understood by the people on both sides of the Runn that the northern half of the Runn pertains to Sind and the southern portion adjoining Cutch territory to Cutch and part to Gujerat and the grazing and other privileges involved in such division are fully appreciated by the people. If any more defined boundary than now exists is required it should merely consist of boundary pillars as near the centre of the Runn as possible." (Pak. Doc. B.378.)

The letter of the Acting Commissioner in Sind of 1898, which has previously been quoted in this Opinion, stated by way of a formal order that the Rann should be considered British territory for police duties; this was in response to an inquiry of the District Magistrate of Thar Parkar in which the latter had affirmed that law and order had been maintained by Sind authorities "on our side [of the Rann] at least".

In 1903, the Commissioner in Sind pronounced that "*prima facie* the rights of the Sind Authorities extend to at least the centre line of the Rann". (Pak. Doc. B.381.)

In the course of the 1926 incident, the Collector of Thar Parkar decided that "in default of any information we will continue to regard half the Runn as belonging to British and half to Kutch". (Pak. Doc. B.223.)

Referring to this statement the Mukhtiarkar of Nagar Parkar said in his written statement delivered at the meeting held in Nagar Parkar on 22 January 1938 in the course of Osmaston's Survey that "half of Kutch-jo-Runn belongs to British Territory and the remaining half of it adjacent to various states to those State authorities". (Pak. Doc. B.24.)

The statements now referred to which were made subsequent to 1903 emanated from rather subordinate officials. They were, however, officials who had direct and intimate knowledge of actual conditions and of locally recognised boundary conceptions. At the same juncture of history, the acknowledgements in various forms by higher British authorities to the effect that the Rann of Kutch was Kutch territory began to appear. Taken as statements, if unaccompanied by any action, the pronouncements to the effect that the boundary lay in the middle of the Rann — or the previously described statements that the boundary was in dispute or not settled — cannot outweigh the evidence to the opposite effect upon which India's claim rests. Clear and unequivocal though the statements relied upon by Pakistan are, they weaken but cannot invalidate India's claim.

The last question which remains to be considered is whether the evidence relied upon by Pakistan showing the display of State activity is of such a character as to rebut the presumption created by the evidence adduced by India.

My first conclusion on this evidence is that it has not been established that Sind exercised continuous and effective jurisdiction and authority over the whole of the disputed territory. However, I have already stated that Kutch did not do so either, if indeed at all.

The only sectors of the disputed territory in relation to which the evidence of Pakistan bears the conclusion that active State authority was exercised by Sind, lie in the area from the eastern loop up to and including Chhad Bet. Within this area, the southern-most places in which jurisdiction is proved to have been exercised are Vighokot and Biar Bet. Each of those two places is, however, referred to solely in one single instance, and one instance of exercise of jurisdiction cannot be taken as a basis for delimiting the true extension of territorial sovereign rights. The position is different in respect of a portion of what Pakistan has referred to as the "jutting triangle", within which a number of instances establish a continuous presence in recent times at and in the vicinity of Ding and Kanjarkot. There also the area of Pirol Valo Kun is situated. In a sector bounded to the south by the southern limit of Pirol Valo Kun, not only is there a total absence of effective Kutch activity, but there is a consistent exercise of sovereign rights and duties by Sind authorities, and activities of residents of Sind, in one instance taking the form of a permanent settlement at Shakur.

The remaining sector within the area described above in which authority, in this instance exclusively for the protection of activities of private individuals, is shown to have been displayed by Sind authorities in a manner which is not sporadic but consistent and effective, is Dhara Banni and Chhad Bet.

As stated earlier, the activities undertaken by Kutch in these areas cannot be characterised as continuous and effective exercise jurisdiction. By contrast, the presence of Sind in Dhara Banni and Chhad Bet partakes of characteristics which, having regard to the topography of the territory and the desolate character of the adjacent inhabited region, come as close to effective peaceful occupation and display of Government authority as may reasonably be expected in the circumstances. Both the inhabitants of Sind who openly used the grazing grounds for over 100 years and the Sind authorities must have acted on the basis that Dhara Banni and Chhad Bet were Sind territory.

Against the background of other evidence produced by Pakistan, decisive importance must be given to the Sind activities displayed in the sector of Rahim ki Bazar and in Dhara Banni and Chhad Bet.

Reviewing and appraising the combined strength of the evidence relied upon by each side as proof or indication of the extent of its respective sovereignty in the region, and comparing the relative weight of such evidence, I conclude as follows. In respect of those sectors of the Rann in relation to which no specific evidence in the way of display of Sind authority, or merely trivial or isolated evidence of such a character, supports Pakistan's claim, I pronounce in favour of India. These sectors comprise about 90 per cent of the disputed territory. However, in respect of sectors where a continuous and for the region intensive Sind activity, meeting with no effective opposition from the Kutch side, is established, I am of the opinion that Pakistan has made out a better and superior title.

This refers to a marginal area south of Rahim ki Bazar, including Pirol Valo Kun, as well as to Dhara Banni and Chhad Bet, which on most maps appear as an extension of the mainland of Sind.

These findings concern the true extent of sovereignty on the eve of Independence. I do not find that the evidence presented by the Parties in relation to the post-Independence period is of such a character as to have changed the position existing on the eve of Independence.

For the reasons now given, and with due regard to what is fair and reasonable as to details, I conclude on the great issue before me that the boundary between India and Pakistan lies as follows. Reference is made here to the Award Map (Map C). Because of the imprecise topographical features in the region and the impossibility of exactly delimiting many acts of State authority, the boundary must sometimes be represented by approximate straight lines.

The portion of the boundary between the Western Terminus (marked as "WT") and the Western Trijunction (marked as Point "A") shall lie along the vertical line as demarcated on the ground. In the sector between the Western Trijunction and Point "B" on Map C, the boundary will be that which was laid down in the most recent survey of that region, being Erskine's Survey; in that sector the maps of Erskine form part of the composite Map C. From Point "B", which is the eastern-most point of the eastern loop as appearing on Indian Map B-11, the boundary shall go in a straight line to Point "C", which is indicated as "Sadariaja Got" on Map C, and from there straight east-northeast until at Point "D", in the vicinity of the reported Karali outpost, it shall reach the boundary symbols appearing on a recent map of that sector, Indian Map B-26, which also forms part of Map C. From Point "D" it shall follow the boundary symbols until Point "E", which is defined in the next paragraph.

The boundary around Dhara Banni and Chhad Bet will be straight lines drawn from or through certain basic points. These shall be the southern-most (G) and eastern-most (H) points of Chhad Bet, as appearing on Indian Map B-33, and two traverse stations marked on Indian Map B-48 as small circles, one lying at a distance of approximately 5.8 miles south of Baliari next to the mark "5 r", and the other lying at a distance of approximately 1.7 miles south of the letters "D" and "H" in "Dhara Bani". The boundary shall go in a straight line through the middle of the first-mentioned circle and touch the second circle as depicted on Map C. Point "E" lies where that line reaches the boundary symbols on the northern edge of the Rann. From Point "G", the boundary shall go straight west until at Point "F" it reaches the straight line originating at Point "E". From Point "G" it shall proceed to Point "H", touching the outer points of the two tongues of land as depicted on Map C. From Point "H", the boundary shall go in a straight line north-northeast until it reaches the boundary symbols appearing on the most recent survey map of that sector, Indian Map B-33. That point is called Point "K".

As from Point "K", and until the Eastern Terminus, the boundary shall follow the boundary symbols appearing on the other maps and the plane-table section which form part of Map C, being Indian Maps B-33, B-34, B-35, Pakistan Map 103 and Indian Map TB-28, with the following deviations (Indian Map TB-28 of 1938 being chosen in preference to Pakistan Map 137 of 1881, which

choice in my opinion finds support in the "Minutes of the Meeting held at Lahore and Amritsar from 25th to 28th March 1959 in connection with the demarcation of Rajasthan (India)—West Pakistan Boundary"):

(a) The two deep inlets on either side of Nagar Parkar will constitute the territory of Pakistan. Already in 1885, the Deputy Commissioner of Thar Parkar pointed out that if those inlets were to be considered Kutch territory.

"[a] glance at the map will show that Parkar would be a peninsula almost entirely surrounded by Kutch territory. The Kutch State could erect fortifications and establish Custom houses at places situated many miles within the district for instance close to Veerawah, or on some of the roads which, crossing inlets of the Runn, lead from one part of this district to another". (Pak. Doc. B.9.)

In my opinion it would be inequitable to recognise these inlets as foreign territory. It would be conducive to friction and conflict. The paramount consideration of promoting peace and stability in this region compels the recognition and confirmation that this territory, which is wholly surrounded by Pakistan territory, also be regarded as such. The points where the boundary will thus cut off the two inlets are these:

At the western inlet, the boundary will leave the boundary symbols indicated on Indian Map B 34 at the point marked thereon as "26", more precisely where the cart track is indicated as departing from the edge of the Rann in a south-easterly direction. This point is indicated as Point "L" on Map C. On the other side of the inlet, the point will be that where the camel track is indicated on Indian Map B-34 to reach the edge of the Rann; that point is indicated as Point "M" on Map C. Between Points "L" and "M", the boundary shall be a straight line.

The boundary will cross the eastern inlet at its narrowest point in a straight line between Points "N" and "O" marked on Map C.

(b) The boundary marked by symbols along the outer edges of the peninsula of Nagar Parkar and up to the Eastern Terminus is a jagged one. As such it is unsuitable and impracticable as an international boundary. The boundary shall accordingly lie in conformity with the depiction on Map C between the outer points on jutting-out tongues of land from Point "M" and until the Eastern Terminus, marked as "ET" on Map C.

At no point between the two Termini shall the alignment of the boundary as above described be such as to include in India territory not claimed by India, as defined by the depiction of India's claim line on Map A.

It might be added that the boundary proposed by me for the greater part of its length roughly coincides with the boundary proposed by my learned colleague, Mr. Behler.

(Signed) (Gunnar Lagergren)

OPINION OF MR. ENTEZAM

In an early stage I considered that Pakistan had made out a clear title to the northern half of the area shown in the Survey Maps as the Rann. I have now had the advantage of reading the Opinion of the learned Chairman, and in the light of it I concur in and endorse the judgement of the learned Chairman.

(Signed) (Nasrollah Entezam)