LAKE LANOUX ARBITRATION (FRANCE v. SPAIN).

(1957) 12 R.I.A.A. 281; 24 I.L.R. 101

Arbitral Tribunal[1] *November 1*6, I957.
(Petrén, President; Bolla, De Luna, Reuter, De Visscher).

THE FACTS. —This arbitration concerned the use of the waters of Lake Lanoux, in the Pyrenees. Briefly, the French Government proposed to carry out certain works for the utilization of the waters of the lake and the Spanish Government feared that these works would adversely affect Spanish rights and interests, contrary to the Treaty of Bayonne of May 26, I866, between France and Spain and the Additional Act of the same date. In any event, it was claimed that, under the Treaty, such works could not be undertaken without the previous agreement of both parties.

Lake Lanoux lies on the southern slopes of the Pyrenees, on French territory.[2] It is fed by streams which have their source in French territory and which run entirely through French territory only. Its waters emerge only by the Font-Vive stream, which forms one of the headwaters of the River Carol. That river, after flowing approximately 25 kilometer's from Lake Lanoux through French territory, crosses the Spanish frontier at Puigcerda and continues to flow through Spain for about 6 kilometres before joining the river Segre, which ultimately flows into the Ebro. Before entering Spanish territory, the waters of the Carol feed the Canal of Puigcerda which is the private property of that town.

The Franco-Spanish frontier was fixed by three successive treaties signed at Bayonne on December I, I856, April I4, I862, and May 26, I866, respectively. The last of these treaties delimits the frontier from the Valley of Andorra to the Mediterranean Sea. The Treaty of Bayonne of I866 contains, *inter alia,* the following provisions:

" His Majesty the Emperor of the French, and Her Majesty the Queen of Spain, wishing to

---

[1] Set up under a *Compromis* dated November I 9, I956, pursuant to an Arbitration Treaty of July 10, 1929, between France and Spain.

[2] According to the French Memorial, Lake Lanoux, one of the largest Pyrenean lakes, lies at an altitude of approximately 2,174 metres, is about three kilometres in length and 500 metres in width, and has a surface of 86 hectares. Its depth is at some points as great as 53 metres. The volume of water it collects naturally is about I7 million cubic metres. The planned construction of barrage of the height of 45 metres would turn Lake Lanoux into a reservoir capable of storing approximately 70 million cubic metres of water. The water would be channeled through a tunnel toward the Atlantic watershed and directed to a power station where it would be run through a turbine after dropping straight from a height of 780 metres. This project would enable France to produce enough electricity, even during the peak hours, to serve a city of 326,ooo inhabitants throughout the year. To return to the Carol River the waters diverted from it, the French project contemplates the construction of a tunnel, 5 kilometres in length, which would take water from the Ariege to the Carol at a rate of approximately 5 cubic metres per second and at a point higher than where the headworks of a canal which serves Spanish users are located. The headworks would lie in French territory. The planned diversion amounts to 25% of the entire flow of the Carol, the waters of which are used in Spain by I8,ooo farmers. (Affaire du Lac Lanoux, Memoire du Gouvernement de la République Françsaise 3-I3 [Paris, I957].)

> fix in a definitive manner the Frontier common to both States, as well as the Rights, Usages, and Privileges belonging to the Populations bordering the two States between the Department of the Pyrénées-Orientales and the Province of Girone from the Val d'Andorre to the Mediterranean, in order to complete from one sea to the other the work so happily begun, and followed out in the Treaties of Bayonne of the 2nd December, I856, and I4th April, 1862, and at the same time and for ever to strengthen order and good relations between Frenchmen and Spaniards in that eastern part of the Pyrenees, in the same manner as on the remainder of the Frontier, from the Mouth of the Bidassoa to the Val d'Andorre, have considered it necessary to insert in a third and last Special Treaty, in continuation of the two above mentioned, the stipulations which they have considered it best to attain that object, and have appointed as their Plenipotentiaries to that effect . . ."[1]

The three Treaties of Bayonne were completed by an Additional Act of May 26, I866, in which, *inter alia,* the following provisions appear:

> " The Undersigned, Plenipotentiaries of France and Spain for the International Delimitation of the Pyrenees, duly authorised by their respective Sovereigns, to unite under one Act the Regulations applicable over the whole Frontier in either Country, and relative to the preservation of the Boundary Marks, to Cattle and Pasturage, to Properties divided by the Frontier, and the enjoyment of the Waters common to both, Regulations which, on account of their general character, claim a special place, which they could not find in the Treaties of Bayonne of the 2nd December, I856, and the I4th April, I862, nor in that of this day's date, have agreed upon the following articles: —. . . [2]

" Control and Enjoyment of Waters of Common User between the Two Countries"

"Article 8: All standing and flowing waters, whether they are in the private or public domain, are subject to the sovereignty of the State in which they are located, and therefore to that State's legis_2ation, except for the modifications agreed upon between the two Governments.

" Flowing waters change jurisdiction at the moment when they pass from one country to the other, and when the watercourses constitute a boundary, each State exercises its jurisdiction up to the middle of the flow.

"Article 9: For watercourses which flow from one Country to the other, or which constitute a boundary, each Government recognizes, subject to the exercise of a right of verification when appropriate, the legality of irrigations, of works and of enjoyment for domestic use currently existing in the other State, by virtue of concession, title or prescription, with the reservation that only that volume of water necessary to satisfy actual needs will be used, that abuses must be eliminated, and that this recognition will in no way injure the respective rights of the Governments to authorize works of public utility, on condition that proper compensation is paid.

"Article 10: If, after haring satisfied the actual needs of users recognized on each side respectively as regular, there remains at low tide water available where the frontier is crossed, such water will be shared in advance between the two countries, in proportion to the areas of the irrigable

---

[1] Translation as in Hertslet, *The Map of Europe by Treaty* (I875), vol. III, P. 1647.
[2] *Ibid., p.* I649.

lands belonging to the immediate respective riparian owners, *minus* land already irrigated.

"*Article* II: When in one of the two States it is proposed to construct works or to grant new concessions which might change the course or the volume of a watercourse of which the lower or opposite part is being used by the riparian owners of the other country, prior notice will be given to the highest administrative authority of the Department or of the Province to which such riparian owners are subject by the corresponding authority in the jurisdiction where such schemes are proposed, so that, if they might threaten the rights of the riparian owners of the adjoining Sovereignty, a claim may be lodged in due time with the competent authorities, and thus the interests that may be involved on both sides will be safeguarded. If the work and concessions are to take place in a *Commune* contiguous to the border, the engineers of the other Country will have the option, upon proper notice given to them reasonably in advance, of agreeing to inspect the site with those in charge of it.

"*Article* I2: The downstream lands are obliged to receive from the higher lands of the neighbouring country the waters which flow naturally therefrom together with what they carry without the hand of man having contributed thereto. There may be constructed neither a dam, nor any obstacle capable of harming the upper riparian owners, to whom it is likewise forbidden to do anything which might increase the burdens attached to the servitude of the downstream lands.

"*Article* I3: When watercourses form the frontier, any riparian owner may, on obtaining any authorization necessary under the law of his Country, make on his bank plantations and construct works of repair and of defence, provided that they do not produce any alteration of the flow of water which would harm his neighbors and that they do not encroach on the bed, that is, the land covered by water at ordinary levels.

"As regards the river Raour, which forms the frontier between the territories of Bourg-Madame and Puigcerda, and which, owing to special circumstances, has not any well-defined boundaries, the demarcation of a zone where it shall be forbidden to make plantations or construct works will be proceeded with, taking as a basis what was agreed between the two Governments in I750 and renewed in I820, but with the right to introduce modifications, if it can be done without injury to the river system or to adjoining lands, so that, on the execution of the present Additional Act, as little damage as possible is caused to the riparian owners when clearing the bed, which is to be delimited, of the obstacles which they have placed there.

" *Article* I4: If, by falls of earth from the banks, by objects carried down or deposited, or from other natural causes, some deterioration or blockage in the flow of water should result, to the detriment of the riparian owners of the other Country, the individuals affected may apply to the competent jurisdiction for [an order] that repairs and clearance be carried out by whoever may be concerned.

" *Article* 15: When, apart from disputes within the jurisdiction of the ordinary courts, there shall arise between riparian owners of different nationality difficulties or subjects of complaint regarding the use of water, the persons concerned shall each apply to their respective authorities, so that '-he latter] shall agree between themselves to resolve the dispute, if it is within their jurisdiction,

and in case of lack of jurisdiction or failure to agree, as also in a case where the persons concerned will not accept the decision given, then recourse shall be had to the higher administrative authority of the Department and the Province.

" *Article* I6: The highest administrative authorities of the bordering Departments and Provinces will act in concert in the exercise of their right to make regulations for the general interest and to interpret or modify their regulations whenever the respective interests are at stake, and in case they cannot reach agreement, the dispute shall be submitted to the two Governments.

" *Article* I7: The Prefects and the Civil Governors on both sides of the frontier may, if they deem it expedient, establish in concert, with the approval of their Governments, elected syndicates formed equally of French and Spanish riparian owners, to supervise the carrying out of the regulations and to bring offenders before the competent courts.

" *Article* I8: An international Commission of engineers shall ascertain, where it deems useful, on the frontier of the Department of Pyrenees-Orientales with the Province of Girona, and at all points on the frontier where there may be occasion, the present use of water in the respective frontier and, if necessary, other, communes, whether for irrigation, for factories or for domestic use, so as to allocate in each case only the necessary quantity of water, and to remove abuses; it will determine, for each watercourse, at low water and where it crosses the frontier, the volume of water available and the area of irrigable land belonging to the nearby respective riparian owners which have not yet been irrigated; it will proceed to the operations concerning the Raour indicated in Article I3; it will propose measures and precautions requisite for ensuring on either side the due execution – of the regulations and for avoiding, so far as possible, all strife among the respective riparian owners; finally, if mixed syndicates are established, it will examine what is to be the extent of their competence.

" *Article* I9: As soon as the present Act has been ratified, the Commission of Engineers mentioned in Article I8 may be nominated so that it may proceed immediately to its work, commencing with the Raour and the Vanera, where it is most urgent.

Three further additional Conventions were attached to the Treaties of Bayonne: the first was designed to ensure the execution of the Treaty of December I, I856, the second that of April I4, I862, and the third, entitled " Final Act of the Delimitation of the International Frontier of the Pyrenees ", was to ensure the execution of the Treaty of May 26, I866, and the Additional Act of the same date. In the Final Act w ere contained various regulations, drawn up under Article IS of the Additional Act, concerning the use of certain waters. None of these regulations, however, concerns the Carol; nor does it appear that at any subsequent time the waters of that riser were made the subject of any such regulations.

On the other hand, the question of the use of the waters of Lake Lanoux was, on several occasions after I9I7, the subject of exchanges of view between the French and Spanish Governments. Thus, when in I9I7 the French authorities had a scheme for disserting the waters of Lake Lanoux towards the Ariege and thence towards the Atlantic, the Spanish Government intimated to the French Government that such a scheme would affect Spanish interests and

requested that the scheme would not be carried out without previous notice to the Spanish Government and agreement between the two Governments. One effect of this action was that on January 3I, I9I8, the French Ministry of Foreign Affairs informed the Spanish Ambassador in Paris that the French Minister of Public Works would take no decision concerning the deviation of the waters of Lake Lanow; towards the Ariege without previously notifying the Spanish authorities. In reply, the Spanish Government intimated, on March I3, IgI8, that it regarded the scrupulous maintenance of the *status quo* as being guaranteed until such time as the French Government should think fit to adopt definitively a plan modifying the current state of affairs, when an amicable and equitable accord should be arrived at between the interested parties acting in conformity with the provisions concerted by the two States.

As schemes for diverting the waters of Lake Lanoux continued to be studied by the French authorities, the Spanish Government, in a communication dated January I5, I920, to the French Ministry of Foreign Affairs recalled their desire to be consulted and requested that steps be taken to appoint an international commission which, in accordance with the provisions of existing treaties, would examine question in the name of the two Governments and would reach accord on the works to be undertaken so as to safeguard both the French and the Spanish interests involved. As a result of this *démarche,* the French Ministry of Foreign Affairs on February 29, I920, communicated to the Spanish Ambassador in Paris the fact that the French Government were entirely in agreement with the Spanish Government in considering that the question of the diversion of the waters of Lanoux could be definitively resolved only with the agreement of the Spanish Government. At the same time the Ministry indicated that the studies then being pursued were not yet completed so that the French Government was not vet able to lay definite proposals before the Spanish Government.

The following years saw a series of exchanges of view regarding the constitution of the International Commission and the task to be confided to it; the French Government wishing to restrict the commission's mandate to taking note of representations made by Spanish users and ascertaining whether they were well-founded,[1] while, in the opinion of the Spanish Government, the

[1] In an official note of May I, I922, of the Prime Minister and Minister of Foreign Affairs, M. Poincaré, France objected to the enlarged jurisdiction of a Mixed Commission, saying that it was " incompatible with her sovereign rights. Every State has in practice the right to carry out, on its territory, independently, such works as it pleases. In case of alterations of the regime of waters whose counterpart is being used by riparians of another State, it must only subordinate the execution to the safeguarding of the interests of these riparians. These principles are those of natural law. Article II of the Treaty of May 26, I866 has added nothing. It has confined itself to indicating the procedure aimed at ensuring its enforcement in the relations between France and Spain." *(Affaire du Lac Lanoux,* Contre-Memoire du Gouvernement de la République Française, p. 6 (Paris, 1957).

The French Counter-Memorial, at p. 7, refers to this " natural law " and maintains that, since no alteration of the system or volume of the Carol River was planned, no violation would follow. In addition it indicates the French interpretation of the duties resting on France under Article II. The French Government stated that " II va de soi " a state must respect the rights and interests of a lower riparian in one of three possible ways, depending on the circumstances: (I) by indemnification in the form of payments or replacement of the waters appropriated; (2) by incorporating in its projects

Commission should have the power to deal with all other questions concerning the scheme which the respective delegations might deem it necessary to examine. In the meantime, the French Government intimated on January I7, I930, that new schemes for the utilization of the waters of Lake Lanoux had taken the place of those previously studied and that **these new** schemes not having been sufficiently examined by the technical services of the French administration, it was not possible to supply the Spanish Government with particulars concerning the new schemes as had been requested. The world situation subsequently stopped the negotiations concerning Lake Lanoux, which were not recommenced until I949.

The negotiations recommenced on the occasion of a meeting on February 3, I949, at Madrid, of the International Commission for the Pyrenees, which had been created by an Exchange of Notes, dated May 30 and July I9, I875, between the French and Spanish Governments. At that meeting, the French delegation raised anew the question of the utilization of the waters of Lake Lanoux and proposed the setting up of a mixed commission of engineers with instructions to study the question and make a report to the two Governments. That proposal was accepted by the Spanish delegation. It was also agreed, according to the *procès verbal* of the meeting, that the existing state of affairs should not be modified until the two Governments agreed to decide otherwise. The Commission of Engineers met on August 29 and 30 at Gerona, when the French delegation explained that the French Government had before it several schemes for the utilization of the waters of Lake Lanoux and had not yet come to any decision but that the procedure laid down by Article II of the Additional Act would be put into operation as soon as the Government had made its choice. The meeting at Gerona, therefore, had no result as regards Lake Lanoux.

On September 2I, I950, Electricité de France applied to the French Ministry for Industry for a concession, based on a scheme involving the diversion of the waters of Lake Lanoux towards the River Ariège. The waters so diverted u ere to be completely returned into the River Carol by means of a tunnel leading from the upper courses of the Ariège at a point on the Carol above the outlet to the Puigcerda Canal. The French Government, however, while accepting the principle that waters drawn off should be returned, regarded itself as bound only to return a quantity of water corresponding to the actual needs of the Spanish users. Consequently, and without any recourse to the Mixed Commission of Engineers, the Prefect of Pyrenees Orientales, by a letter dated May 26, I953, intimated to the Governor of the Province of Gerona that France was going to proceed to develop Lake Lanoux by diverting its waters towards the Ariege but that a certain limited flow of water corresponding to the actual needs of the Spanish frontagers would be assured at the level of the outlet to the Puigcerda Canal and that the Spanish Government was invited to formulate the compensation to which these public utility works would give a right under Article g of the Additional Act. The reply of the Spanish Government was to request, on June I8, I953, that the work on Lake Lanoux should not be undertaken until after a meeting of the Mixed Commission of Engineers. The French Government replied, by a Note dated June 27, I953, that even though the Additional Act did not provide that works likely to affect the system of the waters should be suspended at the request of the other party—it would willingly give an assurance that nothing had

---

appropriate technical and legal guarantees; (3) even by giving up its project if it cannot avoid a serious injury to the interests in question. *Ibid.,* at p. 29.

yet been undertaken or was about to be undertaken in connection with Lake Lanoux. Moreover, the French Government agreed to a meeting of the Mixed Commission of Engineers.

In the meantime, the French Government had begun to review its position regarding the quantity of water which was to be restored -to the Carol and decided to accept the proposal of " integral restitution " which Electricité de France had put forward when applying for the concession. Consequently, the Prefect of the Department of Pyrénées Orientales, by letter dated January 2I, I954, communicated to the Governor of Gerona the technical papers relating to this proposal. In that letter it was intimated that the scheme would involve no change in the waters system on the Spanish slope of the Pyrenees, seeing that the whole of the water diverted towards the Ariege would be restored to the Carol. Since, then, the present state of affairs would not have to be modified, the obligations undertaking at the meeting of the Commission of the Pyrenees at Madrid on February 3, I949, would be respected.

As a result of the communication thus made to the Governor of the Province of Gerona, the Spanish Government by a Note dated April 9, I954, drew attention to the serious prejudice which the work envisaged would cause, in his opinion, to the Spanish part of the Cerdagne Valley and requested a meeting of the Mixed Commission of Engineers. In its reply, dated July 18, I954, the French Government emphasized the difference between the schemes which were studied in I949 and I953 and which provided for a partial restitution only of the water, and the scheme most recently adopted, which provided that the water should be restored in its entirety to the Carol before entering Spanish territory. In the former case, the French authorities were, under Article II of the Additional Act, obliged to inform the Spanish authorities about the proposed work—this was in order to determine the compensation which would eventually have to be paid. It was in this spirit that the communication of May 26, I953, from the Prefect of Pyrénées Orientales to the Governor of Gerona and the French Government's Note of June 27, I953, had been written. Thus, the latter had been limited to giving an assurance that nothing had yet been, or was about to be, undertaken with regard to Lake Lanoux and it did not postpone the beginning of the works to the results of the work of the Mixed Commission of Engineers. On the contrary, as regards the later French scheme, the Spanish riparian owners ought not to suffer any prejudice, seeing that, on Spanish territory neither the flow nor the system nor the course of the Carol would be modified. Article II of the Additional Act was therefore not applicable and the French authorities were in no way bound to make the beginning of the works depend on the meeting of the Mixed Commission of Engineers. Nevertheless, the French Government, in the hope of mutual understanding and co-operation, raised no objection to the meeting of that Commission for the study in detail of the restitution of the water of the Carol, it being understood that the question of principle was not to be debated.

The meeting of the Mixed Commission of Engineers took place at Perpignan on August 4, I955, without achieving any result. The question of the development of Lake Lanoux was then raised again at the next meeting of the International Commission for the Pyrenees which was held at Paris from November 3 to I4, I955. On that occasion, the French scheme which had been communicated to the Governor of Gerona on January 21, I954, was the subject of an exchange of views in the course of which the French delegation formulated a certain number of proposals linking the execution of the projected works with guarantees for the interests of Spanish riparian owners. As it was not found possible to arrive at any agreement, the Commission decided, in

accepting a French proposition to this effect, that there should be set up a special mixed commission, entrusted with the task of drawing up a proposal for the utilization of the water of Lake Lanoux, which would be submitted to the two Governments. The French delegation made it clear however, that if the new Commission had not reached a conclusion by the end of three months from November I4, I955, the French authorities would resume freedom of action within the limits of their rights.

The Special Mixed Commission met at Madrid from December I2 to I7, I955. The French delegation produced details of a scheme which corresponded in substance to the scheme communicated to the Governor of Gerona on January 2I, I954, and to the French proposals put forward at the meeting of the International Commission for the Pyrenees in November I955. The French development scheme for Lake Lanoux comprised, in essence, the following features: Without modifying the springs and the system of streams then feeding the lake, the latter would be transformed, in particular by the formation of a dam, so as to enable it to accumulate a quantity of water which would increase its capacity from I7 to 70 million cubic metres. The waters of the lake, which run naturally by a tributary stream of the Carol and thence flow towards Spain, would normally cease to follow that course. They could be used to produce electric energy by a diversion which would lead them towards the Ariege, a tributary of the Garonne. Those waters would then go on to lose themselves in the Atlantic Ocean and not, as previously, in the Mediterranean. In order to compensate for this prior abstraction of the waters feeding the Carol, an underground replacement tunnel would lead a part of the waters of the Ariege to the Carol, to which those waters would be restored in French territory upstream from the intake of the Canal of Puigcerda.

This scheme, then, envisaged the construction of a large reservoir at the very favourable site of Lake Lanoux, to utilize the waters accumulated there after falling a considerable distance and to restore to the Carol, by drawing it from the Ariège, a quantity of water assail to that which is brought to Lake Lanoux by springs and the natural system of streams. The amount of water received by Lake Ianoux is determined by a simple method: the volume of water in -the lake is measured periodically—in principle every week—in order to determine its increase; to that volume is then added the quantity of water used in the fall and restored after passing through a turbine to the Ariège; and the volume of water artificially pumped back into the lake, in order to make use of the electric power at times when there is no more profitable employment for it, is deducted. Thus the amount brought into the lake from natural sources over a given period is obtained. It is simple to deduce from it the average hourly flow of restoration which ought to be effected by the canal which diverts a part of the waters of the Ariege towards the Carol. This method of calculation is capable of introducing into the water system of the Carol a certain modification which depends on the length of the period chosen. In effect, it introduces at the outset a displacement of time: the volume of the restitution is over a period a function of the quantity received from natural sources during the immediately preceding period. On the other hand, the restitution is effected according to the average of the quantity of water received which excludes errors in relation to that average during the same period. In any event, there is nothing to prevent the taking of very short periods of reference—one week, a few days, one day, or even less—in such a way that the systemic difference between the amount restored and the natural gains loses all practical significance as a function of the river system. In order to assure a restoration of water equivalent to that brought from natural sources, even in the event of technical difficulties preventing the restitution from the Ariege taking place by

the tunnel intended for that purpose, a double set of cocks would permit the restoration being assured out of the waters of Lake Lanoux itself, which would thus resume for a time their present course.

The French scheme included, besides these two guarantees of a technical nature, two other guarantees and one advantage. There would be a mixed Franco-Spanish Commission, with both sides equally represented, to ensure the control of the works as well as the regularity of the restoration of water; one member of the Spanish Consulate at Toulouse, enjoying the immunities and privileges laid down in the Franco-Spanish Convention of January 7, I862, would have access to any of the projected installations; and the volume of water restored, without ever being less than the actual amount received, would be fixed at an annual minimum of 20,000,000 cubic metres.

The Spanish delegation, however, maintained its basic opposition to any diversion of the waters of Lake Lanoux, and the meeting of the Special Mixed Commission in December 1955 was without result.

It was nevertheless agreed that a further meeting of the Commission should take place at Paris, and the Commission in fact met on March 2, I956. In the course of this meeting, the French delegation intimated that they could offer certain additional modalities and guarantees to further the interests of certain Spanish riparian answers beyond those already included in the French project. The Spanish delegation, on the other hand, presented a counter-project for the utilization of the waters of Lake Lanoux without diverting them from the course of the Canal. The points of view of the two delegations could not be reconciled, and the Commission, not having been able to reach agreement, decided, on March 6, I956, to terminate its work and report to the two Governments.

Subsequently to the declaration of the French delegation at the meeting of the International Commission for the Pyrenees in S7ovember I955, the French Government, by a Note dated March 2I,I956, informed the Spanish Government of its determination thenceforth to assume freedom of action within the limits of their rights. In consequence, the work of developing the waters of Lake Lanoux—which had been declared works of public utility by a Decree of October 20, I954, but had so far consisted in no more than the construction of a road and the installation of a *téléphérique*—was recommenced on April 3, I956. Since that date, the work had by the date of the present judgment been largely completed without, however, involving any diversion of the waters flowing out of Lake Lanoux.

The Spanish Government asked the Tribunal to declare that the French Government should not execute works for the utilization of the waters of Lake Lanoux in accordance with the modalities and guarantees provided in the Electricité de France project, for if no agreement were previously arrived at between the two Governments on the problem of dealing with the said waters, the French Government would be committing a breach of the relevant provisions of the Treaty of Bayonne of May 26, I866, and the Additional Act of the same date.

The French Government asked the Tribunal to declare that it was correct in maintaining that in carrying out, without an agreement previously arrived at between the two Governments, works for the utilization of the waters of Lake Lanoux on the conditions laid down in the French project

and proposals mentioned in the *Compromis* (Arbitration Agreement) of November I9, I956, it was not committing a breach of the Treaty of Bayonne of May 26, I866, and the Additional Act of the same date.

The French Memorial summarizes the principles to be derived from the authorities as follows: " As far as this litigation is concerned, the following topics may be particularly borne in mind: the sovereignty in its own territory of a State desirous of carrying out hydro-electric developments; the correlative duty not to injure the interests of a neighbouring State; the convenience of informing a neighbouring State of contemplated projects, of discussing them with it, If need be; the opportunity of seeking an agreement, including, if appropriate, guarantees of execution; but, if the interests of the latter State do not suffer serious prejudice, no duty to obtain its consent before undertaking the work."

The Spanish Memorial, at pp. 6I-78, states that the examination of treaties regulating the rights of co-riparians is a proper method of inquiry into the conception of general international river law held by States in general, since in many cases treaties contain applications of general principles to specific circumstances. A number of bilateral and multilateral treaties are then analyzed in the Memorial to show that co-riparians have often undertaken to refrain from making changes in the existing régime of international rivers without first securing the consent of interested co- riparians.

The decisions of the German, Swiss and American federal courts are reviewed in the Memorial to indicate that the principle that no substantial change can be brought about by one riparian without the consent of co-riparians is supported in the available opinions of courts having to decide questions analogous to those arising from the use of international rivers.

More than thirty publicists are listed in the Memorial as supporting the view that a prior agreement is mandatory before a riparian may effect a substantial change in the régime of the Maters of international rivers and lakes. It is recognized by the Spanish Government that different authors justify their views on the basis of different theories, but the conclusion is reached that they all agree on the basic proposition that international law, apart from treaty, sanctions not only the equality of rights of co-riparians, but also the necessity of prior agreement among co-riparians, whenever a substantial alteration of the system of the waters is contemplated.

The principal arguments put forward by the parties were as follows:

On behalf of Spain. " (I) The Electricité de France scheme affects the whole of the water system and the flow of the waters coming from Lake Lanoux and passing through the Carol, because both are clearly predetermined by any modification of the physical causes which determine the flow of those waters along the bed of that river.

" (2) The Electricité de France scheme is based on the diversion of the waters of the basin of the Carol, which flow via the Sègre and the Ebro into the Mediterranean, to carry them into the Ariège the waters of which join the Garonne and flow into the Atlantic. This abstraction of water would produce a modification of the physical features of the hydrographic basin of the Carol, because it would radically alter its structure from its source onwards by the effect of the total

removal of the volume of water which now flows along its natural course.

" (3) The restoration of the equivalent of the abstracted water, as. it 46+rojected in the Electricité de France scheme, implies that the water would no longer flow naturally in its own course, the physical cause of its present flowing being supplanted and replaced by the will of one country only, as much in the abstraction of the waters of Lake Lanoux as in the restoration of an eventual equivalent previously taken from the Ariège. This unilateral modification of the physical cause of the present flow of the Carol and the substitution for its hydraulic substance of another, of differing provenance, would transform the waters of the river basin which are common by nature into waters for the predominant use of one country, thus establishing a physical predominance which does not today exist, as is shown by the fact that the water flows today according to physical [natural] laws, whereas after the scheme has been completed its eventual equivalent will be restored solely by the work of the human will which abstracted it.

" (4) The technical possibility of restoring the equivalent of the waters abstracted, according to the Electricité de France scheme, will not lessen in any way the profound transformation which the basin of the River Carol will undergo in its physical structure as a result of human interference with the flow of waters which hitherto have run naturally. The restoration of the equivalent mentioned will do no more than lessen the consequences of that transformation, but it would not reduce the effectiveness of the physical superiority acquired by one of the parties, once the scheme has been carried out; and that superiority will not be diminished by a juridical system based on a unilateral conception, contrary to the system of community which is sanctioned by the Act.

" (5) The guarantees and the alleged advantages comprised in the Electricité de France scheme (the creation of a Spanish-French Commission to control the construction of the restoration arrangements; the nomination of a Spanish engineer, enjoying consular status, who would then inspect their operation; increased availability of water at the irrigation season; and the creation in Lake Lanoux of a reserve for use in Spain) are not in themselves sufficient to permit the juridical establishment of the system of community destroyed by the unilateral realization of the said scheme.

" (6) The nature of the Electricité de France scheme, and the effects which must result from its execution, prove that the appropriate works are of a kind which require the agreement of the two Governments prior to their execution, as appears from the provisions Of Article II read with Articles I2,I5 and I6 of the Act of May 26, I866—a point of view which the French Government itself took in regard to the hydraulic scheme known as the ' Ojo de Toro ' in the Val d'Aran.

" (7) Consequently, the execution, without the prior agreement Of the two Governments, of the Electriciteé de France scheme will involve, on the part of the French Government, a breach of Articles 11, 12, 15 and 16 of the Act of I866, in destroying the system of community established by that international instrument and the Demarcation Treaties to which it is complementary—a system which is respected by the Spanish scheme in its appraisal of the interests of France and Spain."

On behalf of France. " (I) The Treaty of Bayonne of May 26, I866, and the Additional Act of the same date did not have as their object the ' freezing ' in perpetuity of the natural conditions existing at the time; they confined themselves, in this matter, to laying down rules according to

which, should occasion arise, those conditions should be modified.

" (2) The sovereignty of each of the two States on its own territory remains untouched, subject only to the restrictions contained in international instruments in force between them.

(3) In particular, their right to undertake works of public utility is expressly confirmed.

" (4) The ability of one State to proceed with such works is not made subject to the prior consent of the other State by answer of the provisions of the Acts above cited, and especially not by Article II or Article I6 of the Additional Act. The Spanish Government itself so adjudged when, not only without seeking assent but also without consulting the French Government, it authorized the works at Val d'Aran.

" (5) The French Government has observed the rules of procedure designed to preserve, in such matters, all the rights and interests in question.

" (6) The French scheme, with the guarantees and modalities with which it is furnished, will safeguard completely the rights and interests of Spain, whose independence it will not compromise in any way.

" (7) French rights and interests would, on the other hand, be seriously harmed if this scheme were not carried out or even if it were replaced by the Spanish scheme, the economic value of which would be substantially less.

" (8) The French scheme, as it has been conceived, presented and guaranteed, therefore complies fully with the conditions required for its valid execution by the provisions of the Conventions in force between the two States, even in the absence of the consent—which it was not obligatory to obtain ~f the Spanish Government."

In reply on behalf of Spain, it was contended:

" (I) The Treaty of Bayonne of May 26, I866, and the Additional Act of the same date did not intend to crystallize in perpetuity the conditions existing at the time [of their signature]; they were limited to laying down rules in the matter, rules according to which those conditions can he modified. But those rules were conceived and drawn up in a spirit of friendship, of reciprocal confidence, and with a idea of necessary mutual accord, which inform the whole system of ' community of pasture ' which is latent in the Treaty and underlies the Additional Act.

" (2) The sovereignty of the contracting States over the waters of successive[1] rivers which flow on their territories is not absolute, but is made subject to modifications arrived at between the two parties.

" (3) The rule of priority in recognizing existing legitimate utilization and the rule as to the distribution of the excess volume of water in the summer season, are clear limitations on territorial sovereignty, seeing that they were established for the common, peaceful enjoyment of the waters of rivers flowing on the territory of the two States. And the right of each country to execute works of *public utility* cannot supersede the right of *common utility* which flows from those rules, because the concept of municipal law is subordinated to the latter principle of international law.

" (4) The right which each State has to proceed with works of public utility is necessarily subject to agreement with the other State if such works affect the course and the flow of rivers. That follows clearly from Article II of the Act, seeing that it contains no mention of possible compensation for resulting damage; but it creates the obligation of giving notice to ' the competent

[1] I.e. those which flow from one State to another; *cf. infra, p. 121*].

authorities ' *[a qui de droit]* (a significantly imprecise expression . . .) so that interests which might be involved should not be harmed. And that necessarily requires the reconciliation, by virtue of the agreement of the Parties, of opposing interests. Article II, read with Articles I5 and I7 which provide for administrative or governmental collaboration between the two States, confirms the necessity for that agreement, as appears from a proper construction of those provisions. Such agreement is much more desirable when the public utility works affect, not secondary causes like the course and the flow of rivers, but a prime cause, like the physical reason for their flow, or their hydraulic substance, as is the case in the Electricité de France scheme, a matter in which the Spanish Government and the French Government have successively agreed to regard such an agreement as inevitable. For just as the Spanish Government is now defending this point of view in connection with the scheme mentioned, so the French Government itself was fully of the same opinion with regard to the scheme of the Produetora de Fuerzas Motriees, which was based on the diversion of waters in the upper part of the Val d'Aran (see the ' Ojo de Toro ' case previously cited).

" (5) The rules of procedure, which the French Government has observed, are not sufficient to preserve all the rights and interests in question seeing that the opinion which it was able to give concerning the works is not sufficient in itself, but constitutes merely a notification which allows the other Party to adopt the most appropriate - gratitude to safeguard those rights and interests. That attitude could be silence, acceptance or opposition, and the last named for the purpose of initiating conversations leading to the reconciliation of interests and eventually to agreement. That is why the mere observance of the rules of procedure by the French Government does not mean that it has fulfilled all its obligations under the Act, since to hold that it had done so would be equivalent to accepting as valid the claim that that international instrument only lays down rules of procedure applicable to the modalities of the exercise of sovereignty by the Parties but without properly limiting that sovereignty, whereas, in fact, the limitations comprised in the Act have an essential import, as has been several times demonstrated.

" (6) The guarantees and modalities of the French scheme do not safeguard the Spanish rights and interests, although naturally they do not compromise the material independence of the State: the consequences of developing the waters of Lake Lanoux cannot go so far as that. But that scheme does affect its right to independence and gravely compromises very important interests, which touch the most sensitive point of the agronomy of the country, namely, shortage of water for irrigation, and serious damage would result from that if the whole of the use of the waters of the lake while following their natural basin could not be regularized. In any event, the guarantees of the French scheme are insufficient, because they were conceived unilaterally, starting from the erroneous concept that these waters can be freely disposed of in French territory, for which reason the scheme accords with a unilateral criterion which excludes a rational dealing with the waters of the basin to the advantage of both Parties and a juridical bilateral regularization of that dealing as an effective guarantee for the two Parties.

" (7) It is a gratuitous assertion that French rights and interests will be harmed if the French scheme were not carried out and if it were replaced by the Spanish scheme the economic value of which is said to be considerably less. And the assertion is gratuitous because the last observation envisages only the total of the energy produced and omits to say that, according to technical calculations, the two schemes differ by only ten per cent. But the assertion does not take into account that the Spanish scheme is conceived on the basis of dealing with the waters according to

their natural basin which permits a more perfect regularization of the waters for irrigation and ensures that the interests of both Parties will benefit from it equally, instead of favouring the interest of one only, as does the French scheme, the basis of which establishes a preponderance which is repugnant to the spirit of equality which inspires the Additional Act. And that is the other aspect to which the Electricité de France scheme does not give full value, because it has an affect on the political equilibrium between the two sovereignties, confirmed by the Treaties of Delimitation, which the Spanish scheme respects. In consequence, the damage which the French scheme would cause to Spanish interests would be serious, permanent, and contrary to the system of community established by the Treaty of Bayonne and its Additional Act, while the alleged damage which French interests would sustain if the French scheme were not carried out is reduced to obtaining only a relatively smaller hydro-electric production, which is however a minimal inconvenience which could well be put up with for the sake of good neighbourly relations between the two countries and in conforms with the spirit which inspires the Treaties of Delimitation and their Additional Act

" (8) The Electricité de France scheme does not satisfy the requirements of the treaty provisions in force because it was conceived unilaterally on the principle that France can dispose freely of waters which flow on her territory. That is why its technical conception as well as its juridical regulation are contrary to the system of community sanctioned by the Act, of which both the letter and the spirit would be ignored if the scheme were carried out without first arriving at an agreement with the Spanish Government, given that the necessity for that agreement arises from the correct application of the provisions of that Act."

In reply on behalf of France, it was contended:

"(I) It is necessary to state once more, to indicate the exact material scope of the Electricité de France scheme, that the latter would not affect the whole of the waters in the basin of the Carol. It would extend only to the diversion of the waters coming from Lake Lanoux, and these represent only a quarter of those which feed the Carol. So far as regards [the other] three quarters, the waters of that basin will retain their natural destination. The modifications resulting from the execution of the scheme will bear solely on a short section of the course of the Carol, situated in France. The complete restoration of the volume of water diverted will take place well above the head of the Puigcerda Canal and, *a fortiori,* above the Spanish frontier. On Spanish territory, neither the course nor the flow of the Carol will suffer the slightest change.

"(2) The diversion, not of the waters of the basin of the Carol, as the Spanish pleadings assert, but only of the water brought from Lake Lanoux to that river, will no doubt involve, to that very small extent, and only on French territory, a physical modification of the basin. But such a modification, in the conditions laid down, is not forbidden either by the Treaty of May 26, I~ ~6, or by the Additional Act of the same date.

" (3)-It cannot be said that the Carol would cease to follow its natural course. Save on one very small part of French territory, no change would be effected in that course.... Only a very limited quality of its waters will be used in a ' preponderant ' manner by France. There is nothing to forbid such a use if it is compensated by the restoration of an equivalent quantity of water, as will be the case.

" (4) The restoration of the diverted waters will be not partial but total. That is the very basis of the Electricité de France scheme. That complete restoration has been the object of formal and unconditional obligations undertaken by the French Government. In those circumstances, to say that the restoration would depend on the ' good will ' of France is to bring against the latter a charge of a kind which is quite unjustified and to manifest a spirit of suspicion of a kind which would make international relations impossible.

" (5) The functioning of the system would bring about, thanks to the complete restoration of the volume of water diverted, the maintenance of the system of utilization of waters of common use as it was laid down by the Additional Act. The analysis above set forth of the guarantees offered by the French Government is sufficient to show the indisputable efficacy of the scheme, both on the juridical and on the practical plane. The working of these guarantees would assure, as between the Parties, respect for equality which would break, to the disadvantage of France, a Spanish veto of a kind which would seriously prejudice the interests of France, while the realization of the scheme would cause no detriment to Spanish interests.

" (6) On that point, which is fundamental to the dispute, the divergence of opinion between the two Governments is complete and it is now for the Tribunal to make its decision, there being no need to set out afresh the contentions of the French Government in its pleadings herein.

" (7) The divergence of opinion on the preceding point inevitably entails the same disagreement on this one. The French Government maintains that, for the various reasons it has shown, the execution of its scheme will not modify the system set up by the Additional Act, which nowhere lays down the necessity, in such a case as this, for the previous consent of the other State. It is also pointed out that the Spanish Government in its contentions refers only to the Act and no longer to the Treaty of Bayonne itself."

In addition, the French Government added the following arguments:

" I. The Spanish Memorial excludes, in its juridical discussion, the final provision of Article 9 of the Additional Act which reserves the respective rights of each of the Governments to authorize works of public utility.

" 2. It ignores the fact that the French scheme provides for the complete restoration of the volume of water diverted and not, as it several times asserts, a partial restoration.

3. It is silent on the formal undertakings accepted with regard to this total restoration by the French Government.

" 4. It analyses in a manner which is quite insufficient the guarantees offered by the latter.

" 5. It does not make it sufficiently clear that the French scheme does not affect the whole of the waters of the basin of the Carol, but only approximately one-quarter of them.

" 6. It gives no precise indication of the damage which **the** execution of the French scheme

would cause to Spanish interests."

Further arguments advanced during the oral hearings are dealt with, so far as necessary, in the findings of the Tribunal.

Held: that France must succeed. " In carrying out, without previous agreement between the two Governments, works for the utilization of the waters of Lake Lanoux under the conditions set forth in the [Electricité de France] scheme . . . the French Government would not be committing a breach of the provisions of the Treaty of Bayonne of May 26, I&66, and the Additional Act of the same date." Nor did the French action contravene any rule of international law. These two instruments comprised inroads on the principle of territorial sovereignty, which must yield to such and other limitations of international law. The conflicting interests aroused by the industrial use of international rivers must be reconciled by mutual concessions embodied in comprehensive agreements. States have a duty to seek to enter into such agreements. The " interests " safeguarded in the Treaties between France and Spain included interests beyond specific legal rights. A State wishing to do that which will affect an international watercourse cannot decide whether another State's interests will be affected; the other State is the sole judge of that and has the right to information on the proposals. Consultations and negotiations between the two States must be genuine, must comply with the rules of good faith and must not be mere formalities. The rules of reason and good faith are applicable to procedural rights and duties relative to the sharing of the use of international rivers; and the subjecting by one State of such rivers to a form of development which causes the withdrawal of some supplies from its basin, are not irreconcilable with the interests of another State.

The Tribunal said: " I. The public works envisaged in the French scheme are wholly situate in France; the most important part if not the whole of the effects of such works will be felt in French territory; they would concern waters which Article 8 of the Additional Act submits to French territorial sovereignty:

> *"Article 8.* All standing and flowing waters, whether they are in the private or public domain, are subject to the sovereignty of the State in which they are located, and therefore to that State's legislation, except for the modifications agreed upon between the two Governments.
>
> " Flowing waters change jurisdiction at the moment when they as from one country to the other, and when the watercourses constitute a boundary, each State exercises its jurisdiction up to the middle of the flow."

“This text itself imposes a reservation on the principle of territorial sovereignty (' except for the modifications agreed upon between the two Governments'); some provisions of the Treaty and of the Additional Act of I866 contain the most important of these modifications; there may be others. It has been contended before the Tribunal that these modifications should be strictly construed because they are in derogation of sovereignty. The Tribunal could not recognize such an absolute rule of construction. Territorial sovereignty plays the part of a presumption. It must bend before all international obligations, whatever their origin, but only before such obligations.

"The question is therefore to determine the obligations of the French Government in this case. The Spanish Government has endeavoured to define them; the problem should be examined by beginning with the Spanish contention.

" 2. The argument of the Spanish Government is of a general character and calls for some preliminary remarks. The Spanish Government bases its contention first of all on the text of the Treaty and of the Additional Act of I866. Its contention thus falls exactly within the jurisdiction of the Tribunal as it has been defined by the *Compromis* (Article I). But in addition, the Spanish Government bases its contention on both the general and the traditional features of the regime of the Pyrenean boundaries and on certain rules of international common law in order to proceed to the interpretation of the Treaty and the Additional Act of I866.

" In another connection, the French Memorial (p. 58) examines the question put to the Tribunal in the light of the ' law of nations '. The French Counter-Memorial (p. 48) does the same thing, but with the following reservation: ' although the question submitted to the Tribunal is clearly confined by the *Compromis* to the interpretation, in the present case, of the Treaty of Bayonne of 26 May I866 and of the Additional Act of the same date . . .' In the oral pleadings the representative of the French Government said: ' The *Compromis* does not request the Tribunal to find out whether there are general principles of international law applicable in this context' (third session, p. 7), and: 'A treaty is interpreted in the context of positive international law from the time when it may be applied' (seventh session, P. 6).

" In an analogous case, the Permanent Court of International Justice *(Diversion of Water from the Meuse*[1] declared:

In the course of the proceedings, both written and oral, occasional reference has been made to the application of the general rules of international law as regards rivers. In the opinion of the Court, the points submitted to it by the Parties in the present case do not entitle it to go outside the field covered by the Treaty of I863.'

" Since the question presented by the *Compromis* relates solely to the Treaty and to the Additional Act of 866, the Tribunal will apply the following rules for each particular point:

" The clear provisions of law contained in a treaty do not require any interpretation; the text provides an objective rule which covers entirely the subject matter to which it applies; when the provisions call for interpretation this should be done according to international law; international law does not sanction any absolute and rigid method of interpretation; we may therefore take into account the spirit that guided the framing of the Pyrenean Treaties as well as the rules of international common law.

" The Tribunal may deviate from the rules of the Treaty and of the Additional Act of I866 only if they referred expressly to other rules or had been modified with the clear intention of the Parties.

" 3. The present dispute can be reduced to two fundamental questions:

---

[1] *P.C.I.J.,* Series **A/B, No.** 70, p. I 6; *cf. Annual Digest,* I935-1937, Case No. 211, at p. 450.

" (A) Do the works for utilizing the waters of Lake Lanoux in the conditions laid down in the French scheme and proposals mentioned in the Preamble of the *Compromis* constitute an infringement of the rights of Spain recognized by the principal provisions of the Treaty of Bayonne of May 26, I866, and the Additional Act of the same date?

" (B) If the reply to the preceding question be negative, does the execution of the said works constitute an infringement of the provisions of the Treaty of Bayonne of May 26, I866, and of the Additional Act of the same date, because those provisions would in any event make such execution subject to a prior agreement between the two Governments or because other rules of Article II of the Additional Act concerning dealings between the two Governments have not been observed?

"As to question (A):

" 4. The Additional Act of May 26, I866, includes a section headed ' Control and enjoyment of waters of common user between the two countries '. Besides Article 8 already cited, it contains three articles which are fundamental for the present case (9, IO and II) and one article (I8) which deals with the **ensuring of its practical** application. Articles g and IO both apply to watercourses ' which flow from one country to the other' (successive watercourses) or which ' constitute a boundary ' (contiguous watercourses). By Article 9, each State recognizes the legality of irrigations, of works and of enjoyment for domestic use, by virtue of concessions, of title or by prescription, existing in the other State at the moment when the Additional Act entered into force. Under Article I&, an national Commission of Engineers was charged with the technical operations necessary for the application of Article g and other articles of the Additional Act.

" The recognition of the legality of such use is subject to the following conditions:

" (a) Each State may, when appropriate, require the concession, the title or the prescription invoked by the other State to be verified by examination. The recognition of such legality by the State which requires the verification shall cease for any enjoyment which has not passed this latter test.

" (b) The legality of each enjoyment is recognized only to the extent that the water used is necessary to satisfy actual needs.

" (c) The recognition of the legality of an enjoyment is to cease in case of abuses, including abuses other than employment of water in excess of what is necessary to satisfy actual needs.

" 5. Article 10 provides that after having satisfied the actual needs of recognized enjoyments, the quantity of water available at low water at the point where it crosses the frontier is calculated and is then shared out in advance according to a predetermined principle of distribution.

" These two Articles, 9 and I0, ought clearly both to be interpreted together without opposing one to the other, because Article I0 deals with ' available water' after the application of Article 9 concerning recognized enjoyment: the two Articles taken together exhaust the object of the regulation.

" This remark is of interest if one approaches the point which raised most controversy between the parties, that is, the reservation of ' the respective rights of the Governments to authorize works of public utility, on condition that proper compensation is paid '.

" According to the Tribunal, the reservation of the right of each contracting State to execute works of public utility has a general application.

" In any event, if Article 9 gives the upstream State the right, subject to compensation, to deprive in a definitive way users in the downstream State of the enjoyment of waters to which they have a recognized right, it may be asked whether, for the execution of works of public utility, it is equally sufficient for the upstream State to pay, under Article IO, compensation for cutting off, in a definitive manner, the enjoyment by the downstream State of the available part of the water.

" It is certain that, if the right of the upstream State had no legal limit in this sphere, apart from the payment of compensation, the French scheme would satisfy the basic conditions laid down by Article I0.

" The Spanish Government maintains that the French Government did not have the right to deprive the Spanish State definitively of the enjoyment of that part of the water which devolves to it under Article I0. If that were the case, the French scheme would still comply with the terms of Article II if it were established that the part of the waters of the Carol directed into the Ariege is less than the volume of water allocated to the riparian owners of the Carol on this side of the frontier as well as to the French State under Article I0. The Tribunal has not sufficient factual evidence to permit it to decide the latter point.

" The solution of the problem which has just been examined on the subject of the scope of Article 10 is nevertheless not indispensable for resolving the question put by the *Compromis.*

" 6. In effect, thanks to the restitution effected by the devices described above, none of the guaranteed users w ill suffer in his enjoyment of the waters (this is not the subject of any claim founded on Article 9); at the lowest water level, the volume of the surplus waters of the Carol, at the boundary, w ill at no time suffer a diminution; it may e~-en, by virtue of the minimum guarantee given by France, benefit by an increase in volume assured by the waters of the Ariege flowing naturally to the Atlantic.

" One might have attacked this conclusion in several different ways.

" It could have been argued that the works would bring about an ultimate pollution of the waters of the Carol or that the returned waters would have a chemical composition or a temperature or some other characteristic which could injure Spanish interests. Spain could then have claimed that her rights had been impaired in violation of the Additional Act. Neither in the *dossier* nor in the pleadings in this case is there any trace of such an allegation.

" It could also have been claimed that, by their technical character, the works envisaged by

the French project could not in effect ensure the restitution of a volume of water corresponding to the natural contribution of the Lanoux to the Carol, either because of defects in measuring instruments or in mechanical devices to be used in making the restitution. The question was lightly touched upon in the Spanish Counter Memorial (p. 86), which underlined the extraordinary complexity ' of procedures for control, their ' very onerous ' character, and the ' risk of damage or of negligence in the handling of the watergates, and of obstruction in the tunnel'. But it has never been alleged that the works envisaged present any other character or would entail any other risks than other works of the same kind which today are found all over the world. It has not been clearly affirmed that the proposed works would entail an abnormal risk in neighbourly relations or in the utilization of the waters. As we have seen above, the technical guarantees for the restitution of the waters are as satisfactory as possible. If, despite the precautions that have-been taken, the restitution of the waters were to suffer from an accident, such an accident would be only occasional and, according to the two Parties, would not constitute a violation of Article 9.

" 7. The Spanish Government takes its stand on a different ground. In the arbitration *Compromis* it had already alleged that the French scheme ' modifies the natural conditions of the hydrographic basin of Lake Lanoux by diverting its waters into the Ariège and thus making the restoration of the waters of the Carol physically dependent on human will, which would involve the *de facto* preponderance of one Party in place of the equality of the two Parties as provided by the Treaty of Bayonne of May 26, I866, and by the Additional Act of the same date.

" The position of the Spanish Government seems to become clearer in the course of the written and of the oral proceedings. In the Memorial (at p. 52) that Government invokes Article I2 of the Additional Act:

> *" 'Article* I2. The downstream lands are obliged to receive from the higher lands of the neighbouring country the waters which flow naturally therefrom together with what they carry, without the hand of man having contributed thereto. There may be constructed neither a dam, nor any obstacle capable of harming the upper riparian owners, to whom it is likewise forbidden to do anything which might increase the burdens attached to the servitude of the downstream lands.'

" According to the Spanish Government, that provision appears to establish the conception that neither of the Parties may, without the consent of the other, modify the natural flow of the waters. The Spanish Counter Memorial (at p. 77) recognizes nevertheless that: { From the moment when human will intervenes to bring about some hydraulic development, it is an extra-physical element which acts upon the current and changes what Nature has established.' Similarly, the Spanish Government does not give a fixed meaning to ' the order of Nature'; according to the Counter Memorial (at p. 96): { A State has the right to utilize unilaterally that part of a river which runs through it so far as such utilization is of a nature which will effect on the territory of another State only a limited amount of damage, a minimum of inconvenience, such as falls within what is implied by good neighbourliness.'

" Actually, it seems that the Spanish argument is twofold and relates, on the one hand, to the prohibition, in the absence of the consent of the other Party, of compensation between two basins, despite the equivalence of what is diverted and what is restored, and, on the other hand, the prohibition, without the consent of the other Party, of all acts which may create by a *de* ***facto***

inequality the physical possibility of a violation of rights.

" These two points must now be examined successively.

" 8. The prohibition of compensation between the two basins, in spite of equivalence between the water diverted and the water restored, unless the withdrawal of water is agreed to by the other Party would lead to the prevention in a general way of a withdrawal from a watercourse belonging to River Basin A for the benefit of River Basin B. even if this withdrawal is compensated for by a strictly equivalent restitution effected from a watercourse of River Basin B for the benefit of River Basin A. The Tribunal does not overlook the reality, from the point of view of physical geography, of each river basin, which constitutes, as the Spanish Memorial (at p. 53) maintains, ' a unit '. But this observation does not authorize the absolute consequences that the Spanish argument would draw from it. The unity of a basin is sanctioned at the juridical level only to the extent that it corresponds to human realities. The water which by nature constitutes a fungible item may be the object of a restitution which does not change its qualities in regard to human needs. A diversion with restitution, such as that envisaged by the French project, does not change a state of affairs organized for the working of the requirements of social life.

" The state of modern technology leads to more and more frequent justifications of the fact that waters used for the production of electric energy should not be returned to their natural course. Water is taken higher and higher up and it is carried ever farther, and in so doing it is sometimes diverted to another river basin, in the same State or in another country within the same federation, or even in a third State. Within federations, the judicial decisions have recognized the validity of this last practice *(Wyoming v. Colorado* . . . [259 U.S. 4I9]) and the instances cited by Dr. J. E. Berber, *Die Rechtsqgellen des internationalen Wassernutzungrechts, p.* I80, and by M. Sauser-Hall, ' L'Utilisation industrielle des fleuves internationaux', [in] *Recueil des Cours de l'Académie de Droit international de la Haye,* I953, vol. 83, p. 544; for Switzerland, [see] *Recueil des Arrêts du Tribunal Fédéral,* vol. 78, Part I, pp. I4 *et seq.).*

The Tribunal therefore is of opinion that the diversion with restitution as envisaged in the French scheme and proposals is not contrary to the Treaty and to the Additional Act of I866.

" 9. Elsewhere, the Spanish Government has contested the legitimacy of the works carried out on the territory of one of the signatory States of the Treaty and of the Additional Act, if the works are of such a nature as to permit that State, albeit in violation of its international pledges, to bring pressure to bear on the other signatory. This rule would derive from the fact that the Treaties concerned confirm the principle of equality between States. Concretely, Spain considers that France has not the right to bring about, by works of public utility, the physical possibility of cutting off the flow of the waters of the Lanoux or the restitution of an equivalent quantity of water. It is not the task of this Tribunal to pronounce judgment on the motives or the experiences which may have led the Spanish Government to voice certain misgivings. But it is not alleged that the works in question have as their object, apart from satisfying French interests, the creation of a means of injuring, at least contingently, Spanish interests; that would be all the more improbable since France could only partially dry up the resources that constitute the flow of the Carol, since she would affect also all the French lands that are irrigated by the Carol and since she would expose herself along the entire

boundary to formidable reprisals.

" On the other hand, the proposals of the French Government which form an integral part of its project carry ' the assurance that in no case will it impair the régime thus established ' (Annex I2 of the French Memorial). The Tribunal must therefore reply on the basis of this assurance to the question posed by the *CoHlpro7wlis.* It cannot be alleged that, despite this pledge, Spain would not hare a sufficient guarantee, for there is a general and M ell-established principle of law according to which bad faith is not presumed. Furthermore, it has not been contended that at any time one of the two States has knowingly violated, at the expense of the other, a rule relating to the control of the water. At any rate, while inspired by a just spirit of reciprocity, the Treaties of Bayonne has only established a legal equality and not an equality in fact. If it were otherwise, they would has had to forbid on both sides of the boundary all installations and works of a military nature which might have given one of the States a *de facto* preponderance which it might use to violate its international pledges. But we must go still further; the growing ascendancy of man over the forces and the secrets of nature has put into his hands instruments which he can use to violate his pledges just as much as for the common good of all; the risk of an evil use has so far not led to subjecting the possession of these means of action to the authorization of the States which may possibly be threatened. Even if we took our stand solely on the ground of neighbourly relations, the political risk alleged by the Spanish Government would not present a more abnormal character than the technical risk which was discussed above. In any case, we do not find either in the Treaty and the Additional Act of May 26, I866, or in international common law, any rule that forbids one State, acting to safeguard its legitimate interests, to put itself in a situation which would in fact permit it, in violation of its international pledges, seriously to injure a neighbouring State.

" It remains to enquire whether the French scheme conflicts with the basic rules laid down by Article II. That question will be examined below within the general framework of that Article (see para. 24).

" Subject to this last-mentioned question, the Tribunal replies in the negative to the first question, at para. 3 (A) supra.[1]

"As to question (B.):

'AQF In the *Compromis,* the Spanish Government had already declared that, in its opinion, the French scheme required for its execution ' the previous agreement of both Governments, in the absence of which the country making the proposal is not at liberty to undertake the works '.

" In the written as well as the oral proceedings, that Government developed this point of view, completing it by the recital of the principles which ought to govern dealings leading to such prior agreement. Two obligations, therefore, would seem to rest upon the State which desires to undertake the works envisaged, the more important being to reach a prior agreement with the other interested State; the other, which is merely accessory thereto, being to respect the other rules laid down by Article II of the Additional Act.

---

[1] See *supra*, p. 121.

" The argument put forward by the Spanish Government is stated on two planes—the Spanish Government takes its stand, on the one hand, on the Treaty and the Additional Act, on the other hand on the system of *faceries* or *compascuités*[1] which exists on the Pyrenean frontier, as well as on the rules of international common law. The two latter sources would permit, first of all, the interpretation of the Treaty and the Additional Act of 1866, and then, in a larger perspective, the demonstration of the existence of an unwritten general rule of international law. The latter (it is contended) has precedents which would permit its establishment in the traditions of the system of *faceries,* in the provisions of the Pyrenean Treaties and in the international practice of States in the matter of the industrial use of international watercourses.

" II. Before proceeding to an examination of the Spanish argument, the Tribunal believes it will be useful to make some very general observations on the nature of the obligations invoked against the French Government. To admit that jurisdiction in a certain field can no longer be exercised except on the condition of, or by way of, an agreement between two States, is to place an essential restriction on the sovereignty of a State, and such restriction could only be admitted if there were clear and convincing evidence. Without doubt, international practice does reveal some special cases in which this hypothesis has become reality; thus, sometimes two States exercise conjointly jurisdiction over certain territories (joint ownership, *co-imperixm,* or *condominium);* likewise, in certain international arrangements, the representatives of States exercise conjointly a certain jurisdiction in the name of those States or in the name of organizations. But these cases are exceptional, and international judicial decisions are slow to recognize their existence, especially when they impair the territorial sovereignty of a State, as would be the case in the present matter.

" In effect, in order to appreciate in its essence the necessity for prior agreement, one must envisage the hypothesis in which the interested States cannot reach agreement. In such case, it must be admitted that the State which is normally competent has lost its right to act alone as a result of the unconditional and arbitrary opposition of another State. This amounts to admitting a ' right of assent ', a ' right of veto ', which at the discretion of one State paralyses the exercise of the territorial jurisdiction of another.

" That is why international practice prefers to resort to less extreme solutions by confining itself to obliging the States to seek, by preliminary negotiations, terms for an agreement, without subordinating the exercise of their competences to the conclusion of such an agreement. Thus, one speaks, although often inaccurately, of the obligation of negotiating an agreement '. In reality, the engagements thus undertaken by States take very diverse forms and have a scope which varies according to the manner in which the) are defined and according to the procedures intended for their execution; but the reality of the obligations thus undertaken is incontestable and sanctions can be applied in the event, for example, of an unjustified breaking off of the discussions, abnormal delay, disregard of the agreed procedures, systematic refusals to take into consideration adverse proposals or interests, and, more generally-, in cases of violation of the rules of good faith (*Tacna-Arica*

---

[1] "Droit de passage communa plusieurs communautés, villages, etc." —*Nouveau Larousse Universel.]*

Arbitration: Reports of International Arbitral Awards, vol. II, pp. 92I et seq.;[1] Case of Railway Traffic between Lithuania and Poland: P.C.I.J., Series AIB, No. 42, pp. I08 et seq.[2]).

" In the light of these general observations, and in relation to the present case, we will now examine in turn whether a prior agreement is necessary and whether the other rules laid down by Article II of the Additional Act have been observed.

"A. The necessity for a prior agreement.

" I2. First, to enquire whether the argument that the execution of the French scheme is subject to the prior agreement of the Spanish Government is justified in relation to the system of *compascuités* or *aceries* or in relation to international common law; the collected evidence would permit, if necessary, the interpretation of the Treaty and the Additional Act of I866, or rather, according to the wider formula given in the Spanish argument, to affirm the existence of a general principle of law, or of a custom, the recognition of which, *inter alia, is* embodied in the Treaty and the Additional Act of I866 (Spanish Memorial, p. 8I).

The Spanish Government has endeavoured to demonstrate that the demarcation line at the Pyrenean boundary constitutes a zone organized in conformity with a special law, customary in nature, incorporated in international law by the Boundary Treaties which have recognized it, rather than being a limitation on the sovereign rights of bordering States' (Spanish Memorial, p. 55). The most characteristic manifestation of this customary law would be the existence of *compascuités or faceries (Oral* Pleadings, fourth session, p. I69 which are themselves the remnant of a more extensive communal system which, in the Pyrenean valleys, was founded on the rule that matters of common interest must be regulated by agreements that have been freely debated.

“In effect, the French project does not impair at all the rights of pasturage on French territory guaranteed by the treaties for the benefit of certain Spanish communes. It appears in particular, according to the replies of the Parties to a question put by the Tribunal, that the pasturage rights that the Spanish Commune of Llivia possesses on French territory in no way touch the waters of Lake Lanoux or of the Carol. The Spanish Government invokes also the system of *compascuités* or rather that of the Pyrenean communal rights which have now disappeared, and of which the *compascuités* are the last trace, to retain essentially the spirit of this system, based on understanding, on respect for common interests and on a search for compromise by agreements freely negotiated and concluded. In this sense, it is indeed correct that the characteristics peculiar to the Pyrenean border induce the bordering States to be guided, more than for any other boundary, by a spirit of co-operation and of understanding indispensable to the solution of the difficulties which may be born of boundary relations, particularly in mountainous countries.

“But one cannot take the matter any further; it is impossible to extend the system of *compascuités* beyond the limits assigned to them by the treaties, or to deduce therefrom a notion of generalized ' communal rights ' [communauté] which would have a legal content of some sort. As

---

[1] See also *Annual Digest*, 1925-1926, Case No. 269.
[2] *Ibid*., 1931-1932, Case No. 215.

for recourse to the notion of the ' boundary zone ', it cannot, by the use of a doctrinal vocabulary, add an obligation to those sanctioned by positive law.

" I3. The Spanish Government endeavoured to establish similarly the content of current positive international law. Certain principles which it demonstrates are, assuming the demonstration to be accepted, of no interest for the problem now under examination Thus, if it is admitted that there is a principle which prohibits the upstream State from altering the waters of a river in such a fashion as seriously to prejudice the downstream State, such a principle would have no application to the present case, because it has been admitted by the Tribunal, in connection with the first question examined above, that the French scheme will not alter the waters of the Carol. In fact, ,States are today perfectly conscious of the importance of the conflicting interests brought into play by the industrial use of international rivers, and of the necessity to reconcile them by mutual concessions. The only way to arrive at such compromises of interests is to conclude agreements on an increasingly comprehensive basis. International practice reflects the conviction that States ought to strive to conclude such agreements: there would thus appear to be an obligation to accept in good faith all communications and contracts which could, by a broad comparison of interests and by reciprocal good will, provide States with the best conditions for concluding agreements. This point will be referred to again later on, when enquiring what obligations rest on France and Spain in connection with the contracts and the communications preceding the putting in hand of a scheme such as that relating to Lake Lanoux.

" But international practice does not so far permit more than the following conclusion: the rule that States may utilize the hydraulic power of international watercourses only on condition of a *prior* agreement between the interested States cannot be established as a custom, even less as a general principle of law. The history of the formulation of the multilateral Convention signed at Geneva on December 9, **I923,** relative to the Development of Hydraulic Power Affecting More than One State,[1] is very characteristic in this connection. The initial project was based on the obligatory and paramount character of agreements whose purpose was to harness the hydraulic forces of international watercourses. But this formulation was rejected, and the Convention, in its final form, provides (Article I) that

> ' [The present Convention] in no way alters the freedom of each State, within the framework of international law, to carry out on its territory all operations for the development of hydraulic power which it desires '; there is provided only an obligation upon the interested signatory States to join in a common study of a development programme; the execution of this programme is obligatory only for those States which have formally subscribed to it.

" Customary international law, like the traditional Law of the Pyrenees, does not supply evidence of a kind to orient the interpretation of the Treaty and of the Additional Act of **I866** in the direction of favouring the necessity for prior agreement; even less does it permit us to conclude that there exists a general principle of law or a custom to this effect.

" I4. As between Spain and France, the existence of a rule requiring prior agreement for the development of the water resources of an international watercourse can therefore result only from a

---

[1] *L.N.T.S.*, vol. 36, p. 75.]

Treaty. From this point of view, first the Treaty and the Additional Act of **I866** and then the Agreement of I949 will be examined. The latter was the subject of copious argument; it can be included among the number of those ' modifications agreed upon between the two Governments' mentioned in Article 8 of the Additional Agreement of May 26, I866; and for that reason the Tribunal is competent to examine it.

" (a) *The Treaty and the Additional Act of* 1866.—I5. The basic argument of the Spanish Government, put forward from the time of *the-Compromis* onward, is that the execution of the French scheme is subject to the necessity of a prior agreement because it touches the common general interests of the two countries.

"According to one argument, the waters are subject to a regime of *indivision* [joint ownership] or, rather, *communauté*. In its strict meaning, this argument clearly contradicts the provisions of Article 8 of the Additional Act; it was not maintained by the Spanish Government. But the latter distinguished between community of property and community of use and made reference to a community of use based on the sub-heading covering Articles 8 to 2I in the Additional Act: ' Control and enjoyment of waters of common usage between the two countries' *(cf.* Spanish Counter Memorial, p. 42; Oral Pleadings, 4th session, p. 28).

" In regard to running waters, it is difficult to make a very great distinction between a communal right of property and a communal right of usage, both of which are in perpetuity. But above all, expressions used in a heading cannot in themselves embrace consequences contrary to the principles formally established by the articles grouped under that heading. Now, the water system which results from the Additional Act is not in general favourable to *indivision* or communal rights, even of usage; it sets out precise rules for a division of waters; few international watercourses are subjected to such detailed rules as are those of the Pyrenees; the object of these provisions is to divide and separate the rights so as to avoid the difficulties of the systems of *indivision,* difficulties to which the Pyrenean Treaties openly call attention in their preamble (Treaty of April I4, I862), and even in their text (Article I3 of the Treaty of December 2, I856).

“I6. A second argument to establish the necessity for a prior agreement could be drawn from the text of Article II of the Additional-Act *(cf.* Spanish Memorial, p. 48). If Article II explicitly sets forth only an obligation to furnish information, ' the necessity for prior agreement . . . results implicitly from this obligation to give information which was considered above; this obligation cannot disappear by itself since its object is the protection of the interests of the other Party.' In the opinion of the Tribunal, this reasoning lacks a logical basis. If the contracting Parties had wished to establish the necessity for a prior agreement, they would not have confined themselves to mentioning in Article II only the obligation to give notice. The necessity for prior notice from State A to State B is implicit if A is unable to undertake the work envisaged without the agreement of B; it would, then, not have been necessary to mention the obligation of notice to B. if the necessity for a prior agreement with B had been established. In any case, the obligation to give r4et~ce does not include the obligation, which is much more extensive, to obtain the agreement of the State that has been notified; the purpose of the notice may be completely different from that of agreeing to allow B to exercise the right of veto; it may be quite simply (and Article II of the Additional Act states this) to allow B to safeguard, on the one hand, at the proper time, the rights of its riparian owners to

compensation, and on the other hand, so far as is possible, its general interests. This is so true that, incidentally, and without abandoning on that account its main thesis, the Spanish Counter Memorial (at p. 52) admits that according to Article II ' these works or new concessions may not alter the system or flow of a watercourse except to the extent to which the reconciliation of the interests compromised would be impossible.'

" The method of reasoning apparent in the development of the Spanish thesis calls for a more general observation. The necessity for a prior agreement would derive from all the circumstances in which the two Governments are led to reach agreement; this would be the case in matters concerning the compensation provided for by Article g of the Additional Act, and in the matter of the French proposals which, on account of the interplay of the guarantees which they provide, would presuppose an agreement with the Spanish Government. This reasoning is in contradiction with the most general principles of international law. It is for each State to evaluate in a reasonable manner and in good faith the situations and the rules which will involve it in controversies; its evaluation may be in contradiction with that of another State; in that case, should a dispute arise the Parties normally seek to resolve it by negotiation or, alternatively, by submitting to the authority of a third party; but one of them is never obliged to suspend the exercise of its jurisdiction because of the dispute except when it assumes an obligation to do so; by exercising its jurisdiction it takes the risk of seeing its international responsibility called into question, if it is established that it did not act within the limits of its rights. The commencement of arbitral proceedings in the present case illustrates perfectly these rules in the functioning of the obligations subscribed to by Spain and France in the Arbitration Treaty of July I0, I929.

“Pushed to the extreme, the Spanish thesis would imply either the general paralysis of the exercise of State jurisdiction whenever there is a dispute, or the submission of all disputes, of whatever nature, to the authority of a third party; international practice does not support either the one or the other of these consequences.

" I7. The last textual argument relied upon by the Spanish Government relates to Articles I5 and I6 of the Additional Act, which (it is said) establishes the obligation to reach a prior agreement. Their exact scope raised considerable controversy: the French text of Article I6 relates to a "'*droit de réglementation des intéréts généraux et interpretation ou modification de leurs réglements';* the Spanish text, which is wider, refers to matters of common accord (‘*asuntos de conveniencia general').*

“In the opinion of the Tribunal, even giving that provision its widest connotation and combining, as in the Spanish argument, Article I5 and Article I6, no more can be drawn from it than the following conclusion: it lays down a procedure of consultation which defines the extent to which the local authorities are called upon to resolve certain disputes or to harmonise the exercise of their powers. In case of difficulty, the superior administrative level must take over, and finally, in the terms of Article I6, ' the dispute shall be submitted to the two Governments '. It results from what has been said above that it is impossible to deduce from that formula the need for prior agreement. If the Spanish argument were correct, it would have to be admitted that, in a zone which would vary from case to case according to the general interests involved, the exercise of the powers of the two States would be suspended by the necessity for a prior agreement. Practice shows no trace of such

an obligation.

" The examination of Articles I5 and I6 of the Additional Act leads therefore to a negative conclusion as regards the obligation to enter into a prior agreement. Positively, one can but admit that there does exist a duty of consultation and of bringing into harmony the respective actions of the two States when general interests are involved in matters concerning waters. On this point, the fairly extensive principles of Article I6 are worthy of being borne in mind when the obligations of the two Parties resulting from Article II of the Additional Act are examined later.

" I8. The Parties have attempted to determine the meaning of the Treaty and of the Additional Act of I866 by reference to their respective attitudes, notably on the occasion of various projects for developing hydraulic power in the Pyrenees. In support of the necessity for an agreement the Spanish Government invoked a Note of February 29, I920, from the French Ministry of Foreign Affairs to the Spanish Ambassador in Paris (Annex I3 to the Spanish Memorial)-as well as a *note verbale* dated February 10, I932, from the French Ambassador at Madrid relating to the diversion of the waters known as Trou de Toro. It is not possible to draw a direct conclusion from this diplomatic correspondence, because it concerns works which comprise for a large part diversion without restoration.

" In a more general way, when a question gives rise to long controversies and to diplomatic negotiations which have been several times begun, suspended and resumed, it is appropriate, in order to interpret the meaning of diplomatic documents, to take into account the following principles.

" As has been recognized by international judicial decisions, both by the Permanent Court of Arbitration (in the case of the *North Atlantic Fisheries* (I9I0)) and by the International Court of Justice (in the *[Anglo-Norwegian] Fisheries Case* (I95I)[1] and in the *Case Concerning [Rights of] United States Nationals in Morocco* (I952)[2]), one must not seize upon isolated expressions or ambiguous attitudes which do not alter the legal positions taken by States. All negotiations tend to take on a global character; they bear at once upon rights—some recognized and some contested—and upon interests; it is normal that when considering adverse interests, a Party does not show intransigence with respect to all of its rights. Only thus can it have some of its own interests taken into consideration.

" Further, in order for negotiations to proceed in a favourable climate, the Parties must consent to suspend the full exercise of their rights during the negotiations. It is normal that they should enter into engagements to this effect. If these engagements were to bind them unconditionally until the conclusion of an agreement, they would, by signing them, lose the very right to negotiate; this cannot be presumed.

" It is important to keep these considerations in mind when drawing legal conclusions from

---

[1] *I.C.J. Reports*, 1951, P. 116; *International Law Reports,* 1951, Case No. 36.
[2] *I.C.J. Reports*, 1952, P. 116; *International Law Reports,* 1952, Case No. 51.

diplomatic correspondence.

" In this case, it is certain that Spain and France have always maintained their essential theses concerning the necessity for prior agreement. As the Spanish Memorial recognizes (p. 35), neither of the two Governments has ever modified the position that it has taken from the beginning. The French Government has in particular restated its own position on several occasions, as shown in the dispatch of May I, I922 (Annex 25 of the Spanish Memorial), and in the conversations set forth in a report of the meeting of August 5, I955, of the Mixed Commission of Engineers (Annex 39 of the Spanish Memorial). The Tribunal . . . has not found in the diplomatic correspondence any elements which involve recognition by France of the Spanish Government's thesis that the execution of works such as those envisaged in the present case is dependent upon a prior agreement between the two Governments.

" (b) *The Agreement of* I949.□I9. But a special place must be given to an Agreement concluded in I949, to which the Spanish case attaches considerable importance.

" At the time of the meeting of the session of January 3IFebruary 3, I949, of the International Commission of the Pyrenees, the question of Lake Lanoux was brought up under the item ' other business' on the agenda, by the French delegation, who proposed the constitution of a mixed Commission of Engineers. The Spanish delegation accepted the constitution of the Commission ' which shall undertake to study the matter and report to the respective Governments, it being understood that the present state of affairs is not to be modified until the Governments shall have decided otherwise by common accord ' (Annex 3I (I) of the Spanish Memorial). On March 13, I950, the Spanish Government, in a *note verbale* addressed to the French Government, suggested that the installation at Lake Lanoux of water-measuring apparatus constituted a breach of the Agreement. Then France drew up another scheme which would ensure a partial restoration of the water, which was notified in accordance with Article II of the Additional Act of May 26, I866. In response to a *demarche* by the Spanish Embassy at Paris, the French Government by a Note dated June 27, I953, agreed to the meeting of the Mixed Commission of Engineers envisaged at the meeting of the International Commission for the Pyrenees in I949. Furthermore, the Note stated:

' Although the Additional Act of Bayonne of May 26, I866, which governs the matter, in particular by Article II thereof, does not provide that works which might affect the water system shall be suspended on the request of the other Party, the Minister for Foreign Affairs most willingly gives the Spanish Embassy the assurance that nothing has been or is about to be undertaken in regard to Lake Lanoux.' (Annex 37 of the Spanish Memorial.)

" In I954, the Prefect of the Department of Pyrénées Orientales, acting on the instructions of his Government, brought to the notice of the Governor of Gerona that an essential modification had been effected to the French scheme, which now provided for the restoration of the diverted water, and he added that therefore ' as the present state of affairs is not being modified, the obligations undertaken at the time of the meeting of the International Commission for the Pyrenees at Madrid in February I949 are being observed.' (Annex 8 of the French Memorial). To a Spanish Note of April 9, I954, the French Ministry of Foreign Affairs replied by a *note verbale* of July I8,I954 (Annex g of the French Memorial). It stated that ' contrary to what the Spanish Embassy asserts in the

penultimate paragraph of its Note of April 9, I954, the Ministry of Foreign Affairs did not, in its Note of June 27, I953, give an assurance " that such works would not be commenced before the meeting of the Mixed Commission of Engineers " but, more precisely, that nothing had been or was about to be undertaken in regard to Lake Lanoux, without making the commencement of the works subject to the results of the labours of the Commission.' Moreover, the Note adds that the Spanish riparian owners of the Carol were not to suffer any damage: ' Article II of the Additional Act cannot be invoked by either party and the French authorities are in no way bound to make the commencement of the work wait upon the meeting of the Mixed Commission arranged at the International Commission for the Pyrenees in I949.' The Mixed Commission of Engineers met at Perpignan on August 5, I955, and reached no result. In reply to a Spanish *note verbale* of August I9, I955 (Annex 40 of the Spanish Memorial), which on the basis of previous obligations denied that the French Government had the right to execute the projected works, the latter Government on October 3, I955, renewed its assurance to the Spanish authorities ' that no work has been or will be undertaken which might modify the water system on the Spanish slopes ~4 of the Pyrenees before the Commission for the Pyrenees meets at Paris on November 3 next. Certain ancillary works which had been begun have been suspended.' (Annex 4I of the Spanish Memorial.) With the meeting of the International Commission for the Pyrenees the negotiations were to take another course; the two delegations recorded their disagreement on important points of law, but it was decided that a new Commission, the Special Mixed Commission, was to meet at Madrid on December I2,I955, in order ' to draw up a scheme for the utilization of the waters of Lake Lanoux ' (Annex I2 of the French Memorial). At the same time, the French delegation made it clear that ' if, within three months from today, the Commission whose meeting is provided for in the *procès-verbal* has not reached a conclusion, the French authorities will resume their freedom of action within the limits of their rights '. The Special Mixed Commission held its first meeting at Madrid on December I2, I955, and a second meeting at Paris on March 2, I956, without arriving at any result and without any new obligations being undertaken.

" Examination of the diplomatic correspondence shows then that three distinct obligations (before the arbitration proceedings) were undertaken by the French Government. The two last, that of October 3, I955, and that of November I4, I955, were for a limited duration; that of I949 did not mention any period of duration—that is why it has a special importance in the Spanish argument.

" 20. One point alone is not contested: the obligation had a valid existence; but the Parties are in accord neither as to its duration nor as to its scope.

It is not to be doubted that each of the Parties understands that obligation in the light of its own interpretation of the Treaty and of the Additional Act of I866. France was able to form the view that, as Spain did not have the right to approve or disapprove, and seeing that she could regard the proposed works as conforming with the basic rules of the Treaties, she was not bound to suspend the execution of the works; from that point of view, the agreement of I949 was a measure which w as preparatory to negotiations and which had no meaning except in its concrete framework. This position had been taken up in I922 by France, who in a Note dated January 5, I922 (Annex 2I of the Spanish Memorial), asserted that the constitution of a survey commission could not in any event prejudice the Treaty of May 26, I866. Spain, on the other hand, was able to form the view that, in any circumstances, France was bound not to carry out any work without her consent and that, in

consequence, the agreement of I949, far from giving rise to a new obligation, did no more than confirm a pre-existing general obligation. This difference of viewpoint also explains why the Parties differed as to the extent of their respective liabilities. It appears that the French Government. considered sometimes that it was only bound to ensure for the Carol a course and a flow equivalent to its natural course and flow, sometimes that it was only bound not to divert the waters. Spa-in, on the contrary, all along took the view that France must not undertake any work which, whether closely or remotely, had a direct or indirect connection with the development project.

" The good faith of both Parties being absolutely unchallenged, it falls to the Tribunal to make an objective search for the full significance of the obligation; it is not necessary in fact that it should determine the scope thereof; it will suffice to establish its duration.

In view Of the circumstances surrounding its conclusion, it is normal to place this agreement within the framework of diplomatic negotiations. It was brought about by an act of the International Commission of the Pyrenees, which possesses no power of its own to decide questions which are submitted to it, and whose competence is limited to making studies and giving information. The agreement contained not only the pledge to maintain the present state of affairs, but above all and essentially it established a Mixed Commission of Engineers whose rather vague mandate was to study the question of Lake Lanoux and to submit the result of its labours to the Governments. The pledge to maintain the *status quo* therefore appears to be an accessory consequence of the task entrusted to this Commission. The maintenance of the *status quo is* therefore, in some manner, a provisional measure which could last only on condition that the Mixed Commission of Engineers showed some real activity. But this Commission, after its first meeting held at Gerona on August 29 and 30, I949, became dormant after having done no useful work at all. The engagement entered into by the French Government came to a normal end at the moment when, faced with this default, it had recourse to a procedure, provided for by treaty, for submitting to Spain a new scheme which comprised, unlike all the preceding ones, the restitution, at first partial and then total, of the diverted waters. Nevertheless, some doubts may persist, as both the French Note of June 27, I953, and that of July I8,I954, allude to a mixed Commission of engineers; and this body met at Perpignan on August 5, I955, to put on record that it was definitely unable to accomplish anything. After this setback, it may be regarded as certain that the Commission disappears as an instrument for study and negotiation and that the obligations connected with its existence disappear with it. The International Commission of the Pyrenees met in November I955 and set up fresh negotiating machinery, a Special Mixed Commission of new composition of which one of the Governments had fixed the authority at a period of three months. No engagement similar to that of I949 was entered into. The agreement of I949, therefore, could not prolong its effect beyond the existence of the Mixed Commission of Engineers, unless it was to be of indefinite duration. But in this last hypothesis it would lose its provisional character; it would subordinate the very right to execute the works to the necessity for an agreement, whereas such an agreement was simply to mark the moment when their execution might be begun.

" B. Other obligations owing from Article II *of the Additional Act.*

" 2I. Article II of the Additional Act imposes on the States in which it is proposed to erect works or to grant new concessions likely to change the course or the volume of a successive

watercourse a double obligation. One is to give prior notice to the competent authorities of the frontier district; the other is to set up machinery for dealing with compensation claims and safeguards for all interests involved on either side.

" The first obligation does not call for much comment, since its sole object is to permit the carrying out of the second. In any event, the possibility of prejudicing the course or the volume of the water mentioned in Article II cannot in any case be left exclusively to the discretion of the State which proposes to execute those works or to grant new concessions; the assertion of the French Government that the projected works can cause no prejudice to the Spanish riparian owners is, despite what has been said in argument (French Memorial, p. 36) not sufficient to relieve that Government from any of the obligations contained in Article II (see the *note verbale* of July I8, I954, from the French Ministry of Foreign Affairs to the Spanish Embassy: Annex g of the French Memorial, p. I00). A State which is liable to suffer repercussions from work undertaken by a neighbouring State is the sole judge of its interests; and if the neighbouring State has not taken the initiative, the other State cannot be denied the right to insist on notification of works or concessions which are the object of a scheme.

" It has not been disputed that France has, in regard to the development of Lake Lanoux, complied with the obligation to give notice.

" 22. The content of the second obligation is more difficult to determine. The ' claims ' mentioned in Article II are related to the various rights protected by the Additional Act, but the essential problem is to ascertain how ' all the interests that may be involved on both sides' ought to be safeguarded.

" It must first be determined what are the ' interests' which have to be safeguarded. A strict interpretation of Article II would permit the reading that the only interests are those which correspond with a riparian right. However, various considerations which have already been explained by the Tribunal lead to a more liberal interpretation. Account must be taken of all interests, of whatsoever nature, which are liable to be affected by the works undertaken, even if they do not correspond to a right. Only such a solution complies with the terms of Article I6, with the spirit of the Pyrenees Treaties, and with the tendencies which are manifested in instances of hydro-electric development in current international practice.

" The second question is to determine the method by which these interests can be safeguarded. If that method necessarily involves communications, it cannot be confined to purely formal requirements, such as taking note of complaints, protests or representations made by the downstream State. The Tribunal is of the opinion that, according to the rules of good faith, the upstream State is under the obligation to take into consideration the various interests involved, to seek to give them every satisfaction compatible with the pursuit of its own interests, and to show that in this regard it is genuinely concerned to reconcile the interests of the other riparian State with its own.

" It is a delicate matter to establish whether such an obligation has been complied with. But, without substituting itself for the Parties, the Tribunal is in a position to proceed to that decision on

the basis of elements furnished by the negotiations.

" 23. In the present case, the Spanish Government reproaches the French Government for not having based the development scheme for the waters of Lake Lanoux on a foundation of absolute equality: this is a double reproach. It attacks simultaneously form and substance. As to form, it is said that the French Government has imposed its scheme unilaterally without associating the Spanish Government with it in a common search for an acceptable solution. Substantively, it is alleged that the French scheme does not maintain a just balance between French interests and Spanish interests. The French scheme, in the Spanish view, would serve perfectly French interests, especially those related to the production of electric energy, but would not take into sufficient consideration Spanish interests in connection with irrigation. According to the Spanish Government, the French Government refused to take into consideration schemes which, in the opinion of the Spanish Government, would have involved a very small sacrifice of French interests and great advantages for the Spanish rural economy. Spain bases its arguments on the following facts in particular. In the course of the work of the Special Mixed Commission at Madrid (September I2-I7, I955), the French delegation compared three schemes for the development of Lake Lanoux and remarked on the considerable advantages which the first scheme (which was similar to the final scheme) presented, in its view, over the other two. The Spanish delegation having no special objection in regard to the latter schemes, declared itself ready to accept either of the two. The French delegation did not feel itself able to depart from the execution of scheme No. I, which was more favourable to French interests and was founded, according to the delegation, on French rights (French Memorial, pp. II7 *et seq*., I27)

On a theoretical basis the Spanish argument is unacceptable to the Tribunal, for Spain tends to put rights and simple interests on the same plane. Article II of the Additional Act makes this distinction and the two Parties have reproduced it in the basic statement of their contention at the beginning of the *Compromis:*

> " ' Considering that in the opinion of the French Government the carrying out of its scheme . . . will not harm any of the rights or interests referred to in the Treaty of Bayonne of May 26, 6 , and in the Additional Act of the same date,
>
> considering that, in the opinion of the Spanish Government, the carrying out of that scheme will harm Spanish rights and interests'

" France is entitled to exercise her rights; she cannot ignore Spanish interests.

" Spain is entitled to demand that her rights be respected and that her interests be taken into consideration.

"As a matter of form, the upstream State has, procedurally, a right of initiative; it is not obliged to associate the downstream State in the elaboration of its schemes. If, in the course of discussions, the downstream State submits schemes to it, the upstream State must examine them, but it has the right to give preference to the solution contained in its own scheme provided that it takes into consideration in a reasonable manner the interests of the State.

" 24. In the case of Lake Lanoux, France has maintained to the end the solution which consists in diverting the waters of the **Carol** to the Ariege with full restitution. By making this choice France is only making use of a right; the development works of Lake Lanoux are on French territory, the financing of and responsibility for the enterprise fall upon France, and France alone is the judge of works of public utility which are to be executed on her own territory, save for the provisions of Articles 9 and I0 of the Additional Act, which, however, the French scheme does not infringe.

" On her side, Spain cannot invoke a right to insist on a development of Lake Lanoux based on the needs of Spanish agriculture. In effect, if France were to renounce all of the works envisaged on her territory, Spain could not demand that other works in conformity with her wishes should be carried out. Therefore, she can only urge her interests in order to obtain, within the framework of the scheme decided upon by France, terms which reasonably safeguard them.

" It remains to be established whether this requirement had been fulfilled.

" In whatever fashion one regards the course of dealings covering the period I9I7-I954, it is beyond doubt that the French position became very flexible and even transformed. From a promise of compensation but without restoration of diverted water, it passed to a partial restoration; then, in j 9 4, to complete restoration. In I955, in the proposals which are an integral part of the scheme itself, France added to complete restoration the guarantee of a minimum restoration of 20 million cubic metres; that offer was possible only without the framework of the diversion of water from the Atlantic into the Mediterranean, since, moreover, France was going to ensure the complete restoration of the waters of the Carol. In I956, at the time of the second meeting of experts, in March, France made two new proposals to Spain. The restoring of the water by the French, instead of following the rhythm of the natural feeding of Lake Lanoux, would be modified according to the needs of Spanish agriculture; during the irrigation period, all the water would be diverted into the Carol while during the winter period, on the other hand, France would reduce the flow so as to ensure over the year an equality of water diverted and restored (a system known as ' running account of water'). On the other hand, an inter-annual reserve would permit Spain to draw from a supplementary source in an exceptionally dry year (Annex II of the French Memorial, p. I47). On March 5, I956, the president of the Spanish delegation replied, according to the *procès-verbal,* as follows:

> "The new proposals formulated by the French delegation cannot be taken into consideration because any solution which pre-supposes the diversion of the waters of Lake Lanoux out of their natural course is unacceptable to Spain. He adds that the attitude of the Spanish delegation does not result from a desire to obtain compensation either by an increase in the volume of water guaranteeing Spanish irrigation or by more electric energy, so that it is quite useless to discuss the volume of water proposed by way of compensation, seeing that there is no agreement on the basic question.' (French Memorial, p. I56.)

" When one examines the question of whether France, either in the course of the dealings or in her proposals, has taken Spanish interests into sufficient consideration, it must be stressed how closely linked together are the obligation to take into consideration, in the course of negotiations, adverse interests and the obligation to give a reasonable place to these interests in the solution finally adopted. A State which has conducted negotiations with understanding and good faith in

accordance with Article II of the Additional Act is not relieved from giving a reasonable place to adverse interests in the solution it adopts simply because the conversations have been interrupted} even though owing to the intransigence of its partner. Conversely, in determining the manner in which a scheme has taken into consideration the interests involved, the way in which negotiations have developed, the total number of the interests which have been presented, the price which each Party was ready to pay to have those interests safeguarded, are all essential factors in establishing, with regard to the obligations set out in Article II of the Additional Act, the merits of that scheme.

" Having regard to all the circumstances of the case, set out above, the Tribunal is of opinion that the French scheme complies with the obligations of Article II of the Additional Act.

" For these reasons:

" The Tribunal decides to reply affirmatively to the question set out in the first Article of the *Compromis.* In carrying out, without prior agreement between the two Governments, works for the utilization of the waters of Lake Lanoux in the conditions mentioned in the Scheme for the Utilization of the Waters of Lake Lanoux notified to the Governor of the Province of Gerona on January 2I, I954, and brought to the notice of the representatives of Spain on the Commission for the Pyrenees at its session held from November 3 to I4, I955, and according to the proposals submitted by the French delegation to the Special Mixed Commission on December I3, I955, the French Government was not committing a breach of the provisions of the Treaty of Bayonne of May 26, I866, and the Additional Act of the same date."

[Report: *Sentence dg Tribunal arbitral (Affaire du Lac Lanoux),* November I6, I957 (in French).[1]]

[1] See also *A.J.*, 53 (1959), pp. 37-49, 62-66 and 156-171.