CHAMIZAL ARBITRATION. THE COUNTERCASE OF THE UNITED STATES OF AMERICA BEFORE THE INTERNATIONAL BOUNDARY COMMISSION, UNITED STATES-MEXICO, HON. EUGENE LAFLEUR PRESIDING UNDER THE PROVISIONS OF THE CONVENTION BETWEEN THE USA AND THE UNITES STATES OF MEXICO

Published @ 2017 Trieste Publishing Pty Ltd

ISBN 9780649415717

Chamizal Arbitration. The Countercase of the United States of America Before the International Boundary Commission, United States-Mexico, Hon. Eugene Lafleur Presiding Under the Provisions of the Convention Between the USA and the Unites States of Mexico by Various

Edited by Trieste Publishing Pty Ltd.
Cover @ 2017

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VARIOUS

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U. S.

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HON. EUGENE LAFLEUR, PRESIDING

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THE UNITED STATES OF AMERICA AND
THE UNITED STATES OF MEXICO
CONCLUDED JUNE 24, 1910

With Appendix and Portfolio of Maps

WASHINGTON
GOVERNMENT PRINTING OFFICE
1911

COUNTERCASE OF THE UNITED STATES OF AMERICA BEFORE THE INTERNATIONAL BOUNDARY COMMISSION, THE HONORABLE EUGENE LAFLEUR PRESIDING.

THE SCOPE OF THE COUNTERCASE.

The Case of the United States set forth at some length the understanding of this Government as to the function of the "case" under the provisions governing the present arbitration.[a] This discussion need not be here repeated except to say that the conclusion was reached that the "case" called for by the convention was analogous to a declaration or complaint in municipal law, accompanied by the evidence upon which it was based and that accordingly the case of the United States would be narrative in form, generally chronological in arrangement, and would make no effort either to argue the law or marshal the facts.

In accordance with this general view the Countercase, like the Case, is in the nature of a pleading, setting up whatever additional facts may be thought necessary to answer the Case and evidence of the other party and is accompanied in turn by the documents upon which it is based.

In the contemplation of the United States, moreover, the countercase should also, as far as practicable, notice any points of agreement between the two Governments, indicate the contentions of the other party which are not believed to be material; set up any additional positions which it is desired to take in view of the case presented by the other Government, and in general define as clearly as may be the issues of law and fact which are to be argued before the court. The discussion of these latter questions is, in the absence of what seems to be sufficient reason for departing from this general scheme in particular matters, reserved for the printed and oral arguments which would seem to offer ample opportunity for the citation of authorities and the discussion of principles as well as for marshaling the facts and making deductions therefrom. Such at least is the view respectfully submitted by the United States.

An examination of the Case of the United States of Mexico, however, shows that in addition to the exposition of facts from the Mexican viewpoint therein contained, the greater portion of the Mexican Case consists in argument of the various questions of law and fact deemed by the learned Agent of Mexico to be

[a] See U. S. Case. Procedure under convention "The Case," pp. 4–7.

involved in the case to be decided. Notwithstanding the temptation thus held out by the Mexican Case to embark upon the argument at this stage of the proceedings, the United States believes that both the provisions of the treaty of June 24th, 1910, and the necessities of an orderly presentation of the case require that the United States follow the line which it has marked out for itself.[a]

RECIPROCAL INSPECTION OF DOCUMENTS, ETC.

With a view to facilitate the proceedings of the tribunal and to avoid as far as possible the necessity of producing certified copies of a large number of documents with regard to the most of which no question of the accuracy of the documents as reproduced in the respective cases and countercases would be likely to arise, and at the same time to provide for an easy and convenient way of correcting the inadvertent inaccuracies necessarily attendant upon the reproduction and translation of so many documents from manuscript originals in the limited space of time necessary to meet the requirements of the terms of submission, the Agent of the United States proposed to the Agent of Mexico an arrangement for the reciprocal inspection in advance of the meeting of the tribunal of the documents printed and relied on in the respective cases and countercases.[b] This proposition has been accepted by Señor Casasus with the understanding that the agreement should go into effect upon the 15th of April, the date for the filing of the countercases.[c] Not having as yet had the advantage of this inspection for the correction of inadvertent errors and discrepancies, the United States deems it advisable specifically to reserve the right to bring to the attention of the tribunal at some appropriate opportunity later on in the proceedings any material errors or discrepancies which may be discovered either in the documents and translations presented by the United States or presented by Mexico. Particularly the United States deems it advisable to point out that there are numerous discrepancies, generally immaterial, but sometimes going to matters of substance, between the English version of the journals of the Boundary Commission sitting under the treaties of 1848 and 1853, printed in the appendix to the Mexican Case, and the signed originals in the possession of the United States. Nevertheless, it has not been deemed necessary to encumber the record by printing the original journals in the archives of the Department of State signed by the United States

[a] See Case of the United States, pp. 4–7.

[b] Mr. Dennis to Señor Casasus, March 18, 1911, U. S. Countercase Appendix, p. 3.

[c] Señor Casasus to Mr. Dennis, April 5, 1911, U. S. Countercase Appendix, p. 6.

Commissioners, inasmuch as it is thought that the discrepancies between the two versions can be detected upon the reciprocal inspection, and matters of substantial difference can be brought to the attention of the Court as deemed necessary, if in the course of the trial passages in which such substantial discrepancies occur appear to be deemed of importance.

The United States has, however, printed in the appendix to the countercase the instructions to the American Commissioners and three journals of Commissioners Emory and Salazar[a] under the Treaty of 1853, namely, the journals of June 24, 1856, September 21, 1857,[b] and September 30, 1857,[c] which were omitted from the journals printed in the Mexican Case.

Article 9 of the arrangement concluded between the two Agents reads as follows:

"9. That it is agreed by both Agents that subject to any order which the International Boundary Commission, acting upon its own initiative may make in the premises, both Agents waive the production at the trial of the following,"[d] etc.:

It will be observed that this article is careful to avoid any suggestion of attempting in any wise to limit the scope of the authority of the International Boundary Commission upon its own motion to direct the production of the originals or certified copies of the documents printed or relied on by either party. Moreover it will be noted that the reciprocal arrangement for the inspection of documents made by the two agents relates only to the documents printed or relied on in the respective cases and countercases. However, the authority conferred upon this honorable tribunal, by Article 7 of the Convention of 1889 constituting the International Boundary Commission, is much broader than this. That article provides that "The International Boundary Commission shall have power to call for papers and information, and it shall be the duty of the authorities of each of the two countries to send it any papers that it may call for relating to any boundary question in which it may have jurisdiction in pursuance of this convention." The United States submits itself wholly to the Commission as regards the subject-matter of this article, as of all other provisions of the conventions governing the arbitration, and invites the tribunal to make the fullest and freest use thereof, so far as papers and information within the custody or control of the United States are concerned.

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[a] See U. S. Countercase Appendix, p. 59.

[b] Ibid., p. 62.

[c] Ibid., p. 63.

[d] Mr. Dennis to Señor Casasus, March 18, 1911, U. S. Countercase, p. 3.

HAS MEXICO ENTIRELY ABANDONED THE ISSUE OF "AVULSION OR EROSION?"

The Mexican case appears to have abandoned the contention upon which Mexico rested her claim in the Chamizal case before the International Boundary Commission in 1894–1896, namely, that the Chamizal tract was thrown upon the American side of the Rio Grande through an avulsive change in the current of the river. It is true that in various places in the Mexican case, language is used which, taken by itself, might seem to indicate that Mexico still holds to the avulsive theory. These passages in the Mexican case, so far as noted, are as follows:

The first paragraph of the Mexican case speaks of the Chamizal tract as "segregated" on the right bank of the Rio Grande and "situated today on the opposite bank, due to the effects of various and sudden changes which for some years the current of the said river suffered."[a]

Subsequently, in making the statement that the Chamizal tract was "passed over to the left bank of the river," the Mexican case speaks of the "violent and sudden changes of the Rio Grande or Bravo del Norte, principally in the years 1864, 1868 and 1873."[b]

Again, the Mexican case uses the following language: "The action of the waters of the said river (the Rio Grande) sudden and violent at the time of certain swells, such as those of 1864, 1868 and 1873, caused a portion of it (the Garcia estate) to be segregated from the right side and to finally remain on the left side of the river."[c]

Further on, the Mexican case says: "The result is as appears from the declarations of witnesses taken before the District Court of El Paso del Norte in 1894, and before the Joint Boundary Commission, that the destruction of the right side almost wholly took place during the great swells in the years 1864, 1868 and 1873."[d]

The Mexican agent thereupon enters upon a somewhat detailed examination of the testimony given in the District Court of Ciudad Juarez in 1894 and before the International Boundary Commission at the first trial of the Chamizal case. He sums up his contention as to the result of this testimony in the following language: I. "That the tract known by the name of "El Chamizal" and which was situated on the Mexican bank of the Rio Grande or Bravo del Norte, by reason of the segregation of the right bank, finally resulted joined to and incorporated with the

[a] Mexican case, p. 1.
[b] Ibid., p. 4.
[c] Ibid., p. 5.
[d] Ibid., p. 6.

Concession Ponce de Leon, which is situated on the left side of the river."

II. "That the changes which produced the above results were not effected successively and annually from the years 1852 to 1873, but at fixed times, when great swells came on as those which took place principally in 1864, 1868 and 1873."[a]

In the next sentence the Mexican case refers to "each time that sudden changes in the course of the Rio Grande or Bravo del Norte took place."[a]

But, in summing up this portion of the Mexican case, the Mexican agent uses language which seems to indicate that the purpose of these various statements, with respect to "sudden changes" and "great swells" was not to set up an avulsive change in the course of the river, in a technical sense, nor was this language used merely for the purpose of maintaining an apparent consistency with the Mexican position in 1894–1896. The principal purpose as stated appears to be to fix the time at which the change took place, so as to show that it took place before the signature of the Treaty of 1884. Says the Mexican case: "The whole of this study of the Washington Convention of the 12th of November, 1884, which, we have undertaken, denotes that as the changes which the Rio Grande or Bravo del Norte suffered at the point which separates the two towns, El Paso, Texas, and Ciudad Juarez, have their origin and were claimed by the Mexican Government before the date of its celebration, its precepts are not and cannot be applicable."[b]

Again, in his conclusions, the Mexican agent says: "In order to prove the first point, that is, that the case called 'El Chamizal,' sprung up before the Convention of the 12th, of November, 1884, it has been maintained:

"I. That the changes which the Rio Grande or Bravo del Norte has suffered and which have brought on as a consequence, the destruction of the Mexican bank of that river, were effected principally in the years 1864, 1868 and 1873."[c]

And finally the Mexican agent appears to leave no doubt that any substantive claim to the Chamizal tract upon the basis of an alleged avulsive change in the river is abandoned when, in the concluding paragraph of the Mexican case, he rests his case absolutely and unreservedly upon the fixed boundary theory, making no reference whatever to the theory of avulsion. The

[a] Mexican case, p. 11. [b] Ibid., p. 30. [c] Ibid., p. 50.

concluding paragraph of the Mexican case reads as follows: "In conclusion we respectfully submit: That, the dividing line between Mexico and the United States being fixed in an invariable manner, by Articles V of the Treaty of February the 2nd, 1848, and I of the Treaty of December the 30th, 1853, to Mexico corresponds the eminent dominion over the tract called 'El Chamizal,' because it is situated South of the dividing line which, in accordance with Map No. 29 of the Boundary Commission, was marked out in 1852 by Messrs. José Salazar Ilarregui and General W. H. Emory." [a]

Upon this state of the record it could be safely assumed, were this case to be tried in accordance with the rules of pleading obtaining in Anglo-American courts, that Mexico would be held to be precluded from setting up a claim based upon the theory of avulsion. But in view of the lack of any well-developed rules of pleading recognized as governing international arbitration, and in view of the liberal practice which has hitherto been ordinarily followed by international tribunals in such matters, it does not seem by any means certain that Mexico would not still be entitled to revert to the avulsive theory, if so advised. In view of these considerations and of the fact that the Mexican agent has deemed it advisable to reproduce the opinion submitted by Senor Corella, the Consulting Engineer of the Mexican Section of the International Boundary Commission, on the occasion of the first trial of the Chamizal case, it has been deemed proper to request Mr. Follett, the Consulting Engineer of the American Section, to submit an opinion covering the scientific aspects of the case, which is printed in the Appendix of the countercase.[b]

Having thus placed Mr. Follett's opinion in the record for the information of the Tribunal in case the question of erosion or avulsion is again to be mooted, the United States, as stated in the case,[c] rests as to the issue of avulsion or erosion upon the opinion of the United States Commissioner delivered at the former trial of the case, "unless and until, further evidence or argument on the question of avulsion or erosion, is adduced by Mexico," and the United States respectfully calls upon Mexico in case it has not clearly defined its position on this point in the counter case to do so in the printed argument, which, in accordance with the terms of the Convention, is to be handed to the court at its first session on May 15th by informing both this honorable tribunal

[a] Mexican case, p. 53. [b] U. S. Countercase, p. 218. [c] U. S. Case, p. 19.