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THE DISPUTE OVER THE SHATT AL-ARAB

BUREAU OF INTELLIGENCE AND RESEARCH

January 22, 1960

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Abstract

The dispute over the Shatt al-Arab between Iran and Iraq, which recently has again become acute, has its roots in the contest for Mesopotamia between Persia and the Ottoman Empire. The frontier between these two powers in the Shatt al-Arab region was first defined in the Treaty of Erzerum of 1847. To Persia this Treaty assigned Muhammarah (present day Khorramshahr) and several islands, but apparently left the river itself under Ottoman sovereignty. In spite of British and Russian endeavors to achieve a delimitation of the boundary, so as to stabilize the frontier between the Ottoman Empire and Persia, no progress was made until 1911, when the two countries agreed on the establishment of a commission to delimit the boundary on the basis of the Treaty of Erzerum of 1847. On November 4, 1913 this commission signed the so-called Constantinople Protocol, which defined the boundary in considerable detail. In 1914 the boundary was delimited on the ground by a commission consisting of Persian, Turkish, British, and Russian members. The boundary as then established traced the frontier at the low-water mark on the left (Persian) bank of the Shatt al-Arab with the exception of the Muhammarah region, where the boundary followed the thalweg from the confluence of the Karun river and the Shatt al-Arab to the point where the boundary leaves the Shatt. Muhammarah and a number of islands in the river were confirmed as being under Persian sovereignty.

After World War I, in 1919, the British occupation authorities in Iraq established a Basra Port Authority with jurisdiction over all of the Shatt al-Arab between Basra and the sea, including pilotage. Only within harbor limits was pilotage assigned to the harbor masters. In the inter-war period increasing friction arose between Iraq and Iran over the boundary question and shipping in the Shatt al-Arab; this culminated in a complaint to the League of Nations by Iraq in 1934. In the debate before the League Council Iran challenged the validity of the Treaty of Erzerum and of the Constantinople Protocol. Negotiations between the parties ensued, and in 1937 they concluded a treaty which reaffirmed the boundary in the Shatt al-Arab region as established by the Constantinople Protocol and the Minutes of the boundary commission of 1914 with the exception of the area off Abadan, where the boundary was shifted from the low-water mark to the thalweg. This met one of the main Iranian grievances, namely, that the jetties at Abadan were in Iraqi waters. The treaty declared that there should be free navigation for merchant vessels of all countries and stipulated that a convention should be concluded between the parties dealing with pilotage, collection of dues, and other questions concerning the administration of the Shatt al-Arab. Until the conclusion of this convention Iraq was to continue to be responsible for the administration of the river, including pilotage. This convention has not been concluded so far and Iraq thus has retained the right to administer the river.

Negotiations between the two countries for a convention were attempted at various times after 1937, but they had not led to a conclusion at the time of the revolution in Iraq in 1958. Although the new Iraqi regime did not change the regime of the Shatt al-Arab, the ouster of British personnel from the Basra Port administration and their partial replacement with Soviet technicians contributed to Iranian apprehensions about the control of the river by a potentially hostile regime. The present conflict has centered around the problem of pilotage and flying of the Iranian flag by vessels bound for Iranian ports as well as the question of the use by Iran of its port at Khosrowabad. While shipping actually does not appear to have suffered appreciably, the dispute was exacerbated on both sides by the raising of fundamental issues. However, neither side has seriously questioned the validity of the 1937 Treaty although Iran contended that Iraq had, by its activities, abrogated that Treaty. An abrogation of the Treaty would hardly benefit either side, since it would put in doubt not only the location of the boundary, but also the administration of the river by Iraq and continued freedom of navigation. Iran has renewed its demands that the boundary be shifted to the thalweg along the whole course of the Shatt al-Arab. While the tracing of the boundary along one shore of a river is not as unique as Iran contends, the thalweg as boundary would be more in accord with modern international law principles. However, the shift of the boundary to the thalweg would entail the conclusion of a new Treaty and might be even more difficult to achieve under present circumstances than an implementation of the Treaty of 1937 relative to the convention on administration of the Shatt al-Arab.

THE DISPUTE OVER THE SHATT AL-ARAB

I. INTRODUCTION

In recent months the latent dispute between Iraq and Iran over the administration of the Shatt al-Arab has again become acute. The reasons for the latest flare-up lie basically in the reorientation of Iraqi policy following the revolution of July 14, 1958. Iran never liked the idea that the administration of the river, which is the only access to its main ports, should be solely in Iraqi hands and during the Nuri as-Said regime in Iraq various attempts at settlement of this question were made. Progress was very slow and no solution had yet been reached when Nuri's regime was overthrown although negotiations were then under way. The new Iraqi regime did not change the established administration of the Shatt al-Arab. However, the ouster of British personnel from the Basra port administration and their partial replacement with Soviet technicians, coupled with the general anti-Western and pro-Soviet attitude of the Iraqi government, heightened Iranian apprehension over the control of navigation in the Shatt al-Arab by a power which was potentially hostile. The most recent disputes have centered, as have earlier ones, on the issue of pilotage and use of flag. New elements have been added, however, through the use of Khosrowabad on the Iranian shore by ships of the Pan American International Oil Company, Iranian attempts to force Iraqi certification of Khosrowabad as a port, and Iraqi territorial claims.

II. TREATIES AND AGREEMENTS RELATING TO THE SHATT AL-ARAB

A. Treaties and Agreements Between Persia and the Ottoman Empire.

1. The Treaty of Erzerum of 1847. Since the beginning of the 16th century the border between Persia and the Ottoman Empire had been the cause of constant disputes and frequent wars. Various attempts were made in peace treaties which punctuated the disputes to arrive at a definition of the frontier. The specific problem of control over the Shatt al-Arab came into prominence in 1837, when the Turks attacked and demolished Muhammarah (the present Khorramshahr) apparently because they feared that it was becoming a thriving commercial port and would threaten the importance of Basra. Iran claimed an indemnity of £1,000,000; the Turks, on their part, asserted that both Muhammarah and Abadan were Turkish territory. The British and Russian governments, who by then constituted the predominant foreign influence in the region, intervened in the dispute to prevent the outbreak of war, and in the treaty concluded at Erzerum in 1847 the frontier between the Ottoman Empire and Iran along the Shatt al-Arab was defined in geographical terms.

The pertinent portions of Article 2 of that treaty read:[1]

> The Ottoman Government formally recognizes the unrestricted sovereignty of the Persian Government over the city and port of Muhammara, [present day Khorramshahr] the island of Khizr, the anchorage, and the land on the eastern bank -- that is to say, the left bank -- of the Shatt al-Arab, which are in the possession of tribes recognized as belonging to Persia. Further, Persian vessels shall have the right to navigate freely without let or hindrance on the Shatt al-Arab from the mouth of the same to the point of contact of the frontiers of the two Parties.

The provisions of this treaty relating to the Shatt al-Arab, however, cannot be read without the context. On April 26, 1847, more than a month before the signature of the treaty (May 31, 1847), the British and Russian Ambassadors at Constantinople, representing the mediating powers, addressed a note to the Sublime Porte. In this note they answered certain questions raised by the Porte relating to the interpretation of specific treaty provisions. With regard to the provisions of Article 2 which are pertinent to this discussions, the note stated:

> The anchorage of Muhammara is the port situate opposite the city of Muhammara in the Haffar Canal, and this definition is not susceptible of any other interpretation.

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1. The text here used is that of the English translation of the treaty given by Iraq in its submission to the League of Nations in 1935. The text contained in the Iranian submission is identical. See League of Nations, Official Journal, February 1935, pp. 197 and 226. In his Legislation Ottomane (Constantinople 1874) Aristarchi Bey provides a French translation of this treaty from the Turkish which does not contain the words "without let and hindrance." In other regards, too, this translation differs from the text given above. Khizr is apparently another name for Abadan island.

> The undersigned Representatives are further in agreement with the Ottoman Minister in the view that, in ceding to Persia in the region in question the city, port and anchorage of Muhammara and the island of Khizr, the Sublime Porte is not ceding any other territory or any other ports there may be in this region.
>
> The undersigned Representatives further declare that Persia will not be entitled on any pretext whatsoever to put forward claims in regard to the regions situate on the right bank of the Shatt al-Arab, or to the territory on the left bank belonging to Turkey, even where Persian tribes or parts of such tribes are established on the said bank or in the said territory.

The Porte formally accepted this note and stated that

> His Majesty the Sultan, having complete confidence in the two Mediating Courts and in their Representatives, has ordered in the exercise of His Sovereign Will that instructions should be issued to His Excellency Enver Effendi, Plenipotentiary of the Sublime Porte at Erzerum, to sign the draft Treaty submitted by the Commissioners of the two Mediating Courts without amendment, on the understanding that the Court of Persia will accept the assurances which have been given by the Representatives of the two Mediating Courts to the effect that it will raise no claim going counter to those assurances, and on the further understanding that, in the event of any such claim being raised, the Treaty will be deemed to be null and void.

In a note of January 19, 1848, the Persian representative declared that he "concurred entirely with the explanations given to the Porte by the Representatives of the two Mediating Powers." The value of this acceptance has been put in question by Iran. During the discussion of the Shatt al-Arab dispute before the Council of the League of Nations in 1935 the Iranian Government contended that the Persian representative

had been authorized by his government merely to ratify the treaty consisting of nine articles. Iran claimed that the Persian Government of the day had not been informed of the exchange of notes between the Mediating Powers and the Sublime Porte and that the Persian envoy had accepted the explanatory note upon the urgent request of the Porte without authorization and had thereby exceeded "his instructions and his powers." The Iranian Government argued in 1935 that the Treaty of Erzerum thus was "ratified without having been accepted." The Iranian Government further stated that since the Porte had made acceptance of the explanatory note an essential condition for its acceptance of the treaty and since Persia had not accepted the note, the treaty should be regarded as "null and void."[1]

This Iranian argumentation is in line with frequent endeavors on the part of Iran to try to prove that a treaty provision is null and void or had been agreed to under duress whenever it is felt as onerous or as counter to the Iranian interests of the moment. It is, of course, impossible today to establish, without the use of the Iranian archives, what authorization the Iranian envoy actually had in 1848 and whether the contention of the Iranian Government is correct that it had no knowledge of the explanatory note. Even if the Iranian contention is correct, the further question might arise as to whether the other party had any reason to suspect that the envoy was not empowered to accept the note. However, there is a patent flaw in the Iranian argument made in 1935. The Iranian representative himself stated before the League of Nations that the Erzerum Treaty with the explanatory note was accepted by the Iranian Government in 1912. He pleaded, however, that this was done "under the pressure of Russian influence."[2] The question of the validity of the Treaty of Erzerum is not merely academic, since that treaty constitutes the basic instrument on which later agreements have been based.

2. The Tehran Protocol of 1911 and the Protocol of Constantinople of 1913. During the years following the conclusion of the Treaty of Erzerum disputes concerning the interpretation of that treaty continued and in spite of endeavors by the two mediating powers the boundary was not demarcated. Finally, in 1911 Russia and Great Britain prevailed upon the Ottoman Empire and Persia to establish bases for negotiations and for the procedure to be followed in the delimitation of the frontier. This was done in the Tehran Protocol of December 21, 1911 which stipulated that a commission consisting of an equal number of delegates of either

1. League of Nations, Official Journal, February 1935, p. 217, see also p. 121.

2. Ibid., p. 118, see also pp. 218-19.

party should meet as soon as possible in Constantinople. The work of the commission was to "be based on the clauses of the treaty known as the Treaty of Erzerum, concluded in 1263 (1847 A.D.)." The commission was established and on November 4, 1913 signed the so-called Protocol of Constantinople. This protocol defined the boundary between the Ottoman Empire and Iran in great detail. In the Shatt al-Arab area the boundary was defined as follows:

> /from a point between the Nahr-Diaiji and the Nahr-Abu'l-Arabid the boundary/ shall follow the medium filum aquae of the Khaiyin canal as far as the point where the latter joins the Shatt al-Arab, at the mouth of the Nahr-Nazaileh. From this point the frontier shall follow the course of the Shatt al-Arab as far as the sea, leaving under Ottoman sovereignty the river and the islands therein, subject to the following conditions and exceptions:
>
> (a) The following shall belong to Persia: (1) the island of Muhalla and the two islands situate between the latter and the left bank of the Shatt al-Arab (Persian bank of Abadan); (2) the four islands between Shetait and Maawiyeh and the two islands opposite Mankuhi which are both dependencies of the island of Abadan; (3) any small islands now existing or that may be formed which are connected at low water with the island of Abadan or with Persian terra firma below Nahr-Nazaileh.
>
> (b) The modern port and anchorage of Muhammara, above and below the junction of the river Karun with the Shatt al-Arab, shall remain within Persian jurisdiction in conformity with the Treaty of Erzerum; the Ottoman right of usage of this part of the river shall not, however, be affected thereby, nor shall Persian jurisdiction extend to the parts of the river outside the anchorage.
>
> (c) No change shall be made in the existing rights, usages and customs as regards fishing on the Persian bank of the Shatt al-Arab, the word "bank" including also the lands connected with the coast at low water.

(d) Ottoman jurisdiction shall not extend over the parts of the Persian coast that may be temporarily covered by water at high tide or by other accidental causes. Persian jurisdiction, on its side, shall not be exercised over lands that may be temporarily or accidentally uncovered when the water is below the normal low-water level.

(e) The Sheikh of Muhammara shall continue to enjoy in conformity with Ottoman laws his rights of ownership in Ottoman territory.[1]

In its presentation before the League of Nations in 1935 the Iranian Government argued that the 1913 protocol, too, should be regarded as invalid. Not only was it based upon an invalid treaty, the Iranian Government claimed, but it embodied changes in the boundaries of Persia which under the Persian constitution required the consent of the parliament which was not in session from 1911 to 1914. The Iranian argument was that the Treaty of Erzerum did not actually state, as did the Protocol of 1913, that the whole river should be under Ottoman sovereignty. The Iranians interpreted the clause relating to navigation without let and hindrance as indicating that the "riparian states will have an equal right of sovereignty as far as the middle of the river." This is a doubtful construction, because had sovereignty been divided or shared, there would have been no need to single out Iranian vessels in a stipulation relating to free passage. In that case, one would expect that the ships of both nations would have been mentioned, since both Iran and the Ottoman Empire would have been in a position to interfere with free navigation on the river. If it is assumed that the river remained under Ottoman sovereignty, the grant of free navigation to Iranian vessels was a necessary prerequisite to unhindered Iranian utilization of its ports on the Shatt al-Arab.[2] If it is assumed that the Treaty of Erzerum was validly concluded and if the Protocol of Constantinople is based, as it purports to be, upon the stipulations of the Treaty of Erzerum, the requirement of ratification is doubtful since the Protocol would constitute a delimitation of the boundary line on the basis of earlier treaties rather than the establishment of a new boundary line changing the territory of Persia. It should be added that the Protocol of Constantinople did not stipulate any requirement of ratification.

1. The Sheikh of Muhammarah was the ruling sheikh of a section of an Arab Shiah tribe inhabiting this area. In practice administrative powers were delegated to this sheikh until 1924, when Reza Shah brought the region under the control of the central government in Tehran.

2. For the possible usage of the thalweg as boundary before 1913 see below pp. 22 and 29.

3. The Minutes of the Turco-Persian Frontier Delimitation Commission 1913-1914. In accordance with the Constantinople Protocol, a quadripartite Commission was formed consisting of British, Russian, Persian and Turkish Commissioners and their staffs. According to G.E. Hubbard, the Secretary of the Commission, the British and Russian Commissioners were "arbitrating" rather than "mediating" members of the Commission.[1] The first session of the Commission took place at Muhammarah on January 21, 1914. The Commission started the delimitation of the frontier from the mouth of the Shatt al-Arab. According to the Minutes, the frontier coming from the sea touches

> the left bank of the Shatt al-Arab at a point situated a distance of two miles below the fort belonging at this time to Sheikh Khazaal[2]....From this point it follows the low water mark on the left bank (bank of Abadan) until it reaches the two islands opposite Manyouhi (Mankuhi)[3] the outline of which it follows in such a way as to leave them to Persia. It immediately rejoins the low water mark which it follows up to four islands situated between Monaouie (Maouiye) and Choutait (Chetait). Having followed the outlines of these islands in such a manner as to leave them to Persia, it follows again the low water mark which it follows up to the island of Mahalla (Mouhalla) which forms part of the Persian territory with the two islands situated between it and the Persian shore. After having followed the outline of Mahalla following always the same low water mark, it reaches the point where the port and anchorage of Mohammerah begins. This point, actually known under the name of Touweidjat is situated at a distance of 4,650 English feet from the outermost point of the left bank of the Karun near its juncture with the Shatt al-Arab.[4]

1. G.E. Hubbard, From the Gulf to Ararat (Edinburgh and London, 1916), p. 16.

2. This fort is apparently situated on the Persian shore across from and slightly to the south of Fao.

3. This place could not be located on available maps.

4. Second Session of the Commission, 25 January 1914, Recueil des Procès-verbaux de la Commission de Délimitation de la Frontière turco-persane, 1913-1914, p. 11. Text is translated from the French of the official Minutes. The spelling of names is that of the Minutes.

> From Touweidjat on the frontier line is transferred to the medium filum aquae of the Shatt, which it follows passing between the Persian shore and the island having the name of Oumm er-Rassas in its eastern portion and of Oumm el-Khassasif in its western portion. Having arrived at the eastern entrance of the Nahr el-Khaiin which can be identified by means of two brick markers (bearing both the number one) erected at the outermost point of its two shores, the frontier line enters the canal and follows it along the medium filum aquae up to a point situated an approximate distance of 400 feet (122 meters) to the west of the junction of the Nahr-Aboul-Arabid with the Nahr-el-Khaiin.
>
> Marker no. 2 has been placed at this point. From there the frontier line runs along the crest of an ancient accumulation of earth on which the markers no. 3 and 4 have been erected, at a distance of 846 feet (260 meters) and 1,365 feet (420 meters) from the markers 2 and 3 respectively. The direction of this line is 23 degrees of the azimuth from east to north.[1]

In the "Description of the Frontier" attached to the Minutes, the boundary along the Shatt is described in terms nearly identical with those used in the Minutes. On one point the Description is more explicit than the Minutes. It states that at Tuweidjat the frontier line is transferred in a "direct line to the medium filum aquae of the Shatt." The Description also states that from marker no. 4 the line runs true north up to marker no. 12. In the Description the position of the markers is given in terms of terrain, as in the Minutes, and also in terms of longitude and latitude. According to recent maps, the longitude and latitude figures appear to be inaccurate since they

1. Third Session of the Commission, 29 January 1914, ibid. p. 13. The island Oumm er-Rassaf - Oumm el-Khassasif is located in the Shatt, its eastern extremity is near the mouth of the Hafar Channel and it stretches up river from that point. The Nahr-Aboul-Arabid could not be located on the available maps.

would place the markers inland, away from the points on the river banks where they are supposed to be situated. This variance is probably due to a lack of accuracy in the maps used by the Commission at the time.[1]

As compared with the Constantinople Protocol, the one major clarification which the Minutes of the Commission provide in the Shatt al-Arab is that of the exact course of the frontier at Khorramshahr. The Minutes establish beyond doubt that the boundary there does not run along the low water mark. Some difficulty is created by the use in the Minutes of the term medium filum aquae. This term refers to the median line of a river rather than to the thalweg, that is the navigable channel, and in modern usage is generally employed in the case of rivers which are not navigable. The shipping channel above Khorramshahr lies between the island of Um al-Khasasif (Um al-Rasas) and the Iranian shore. Thus, in modern usage, the thalweg rather than the median line would form the boundary. It is possible that in 1913 and 1914 when the Protocol and the Minutes were drawn up, no clear distinction was made between median line and thalweg. The boundary line in the Khorramshahr area does not appear to be in dispute and, in practice, the line may actually run along the thalweg or there may not be a great deal of difference in this rather narrow channel between thalweg and median line.

1. Hubbard, op.cit., p. 11 relates that the British and the Russians in 1869 produced a carte identique of the frontier area (reconciling British and Russian versions of this map) on a scale of one inch to a mile. This carte identique was used by the Commission in their delimitation of the frontier in this area, see Minutes, p. 10 and p. 150.

4. The general Iranian attitude toward treaties. The endeavors of the Iranian Government to prove, often through devious reasoning, that the various instruments establishing the boundary along the Shatt al-Arab should be regarded as void are another expression of a general Iranian attitude toward treaty obligations. This attitude has its basis in a doctrine of the Shiah branch of Islam which is dominant in Iran, that of taqiyah or dissimulation. This doctrine permits the believer to hide his true convictions and, if he is confronted by major force or the risk of serious detriment to himself, to comply, with mental reservations, with any request made. Although originally devised as a defense against religious persecution, this doctrine, owing to the lack of separation between law and religion in Islam, has been extended to fields not regarded as religious in the West, and has become an inherent feature of the Iranian personality. By applying this doctrine to the field of international relations it is thus quite logical for an Iranian to claim that a treaty or agreement concluded with or under the influence of a stronger power was entered into "forcibly" and that, consequently, mental reservations could be made. This attitude was, no doubt, reinforced by Iranian feeling that foreign powers in the past exerted an undue influence in Iranian affairs.

However, the doctrine of taqiyah is not applied openly: in many instances it is doubtful that the Iranians actually thought out their position in terms of taqiyah; they very likely merely followed what has become an ingrained, traditional attitude. In their argumentation in international intercourse, Iranian governments have instead endeavored to translate this attitude, based on a purely Islamic institution, into terms of western international law. Since there is no equivalent to the doctrine of taqiyah in modern international law, the arguments adduced by Iran to prove on various occasions that a treaty or agreement is void and need not be honored frequently appear tortuous, weak, and even illogical. This Iranian tendency to rely upon a tradition which is not part of generally accepted international law and custom, complicates international relations. In the modern setting such a doctrine, no matter how ingrained in the national character, can hardly be allowed to prevail since it would put all of Iran's international obligations under a cloud. It can probably be argued that if Iran is ready to participate in international organizations governed by generally accepted rules of international law and claim rights under these rules, it must also be expected to comply with these rules where its own international obligations are concerned. In Sunni Islam, which is the branch of Islam the Iraqi Government would follow, taqiyah is less developed, but similar doctrines, though less ingrained than is taqiyah in Shiah Islam, can lead to similar results.

B. The Treaty of 1937 Between Iran and Iraq.

1. Events leading up to the conclusion of the Treaty of 1937. After World War I Iraq, as the successor state of the Ottoman Empire in this region, fell heir to the Ottoman position in the Shatt al-Arab as defined in the instruments discussed above. Following World War I, Iraq was under British mandate and the nominally Iranian shore of the Shatt al-Arab was de facto controlled by the Sheikh of Muhammarah, whose subordination under the Iranian Government was only nominal. A proclamation of the British General commanding the army of occupation in Iraq of October 8, 1919, set forth regulations for the Port of Basrah. The limits of that port were defined in detail in a notification issued under the Port of Basrah Proclamation. According to this notification, the Port of Basrah included "the Shatt al-Arab from the up-River limit, as defined by a stone post, at the Port of Nahr Umar to the sea." The Port of Basrah authority thus extended, and still extends, for about 90 miles upstream from the mouth of the Shatt al-Arab, including the Abadan as well as the Khorramshahr area. This state of affairs did not give rise to any difficulties immediately following World War I, since the Sheikh of Muhammarah, in whose domain Abadan island with its refinery was situated, also was virtually under British protection.

The situation was altered in 1924 when Reza Shah, following an act of defiance on the part of the Sheikh of Muhammarah, ousted the Sheikh and brought the latter's domain under direct Iranian control. Subsequently, incidents in the Shatt al-Arab occurred quite frequently. The situation was actually difficult, particularly as Abadan assumed increasing importance. Abadan was undisputed Iranian territory, in theory, before the Sheikh of Muhammarah's elimination and, in fact, since that event. However, the jetties of Abadan projected into Iraqi waters and ships could take on oil at Abadan from these jetties without the permission of the Iranian Government. Iranian-Iraqi relations were marred during this period also by incidents along other parts of the frontier, but the Shatt al-Arab remained a constant source of dispute as Iran sought to assert broader rights to the river and Iraq endeavored to maintain the status quo, which gave it distinct advantages in the control of the river. Finally, in 1934 the Government of Iraq appealed to the League of Nations under Article 11, paragraph 2 of the Covenant. The League Council heard the Iraqi and Iranian case on January 14 and 15, 1935 and appointed the Italian representative, Baron Aloisi, as rapporteur. His endeavors at conciliation did not have any immediate effect, but the two parties were induced to settle their differences because of Mussolini's expansionist policies, which in the Middle East area, eventually led to the conclusion of the Saadabad Pact.

2. The stipulations of the 1937 Treaty. The treaty between Iraq and Iran was concluded on July 4, 1937. Article 1 recognized the validity of the Irano-Turkish protocol of 1913 and of the Minutes of the Delimitation Commission of 1914 and stated that the boundary between the two countries should be as delimited and demarcated by the Commission except as otherwise provided by this Treaty. One of the new provisions concerned the Shatt al-Arab region. Article 2 of the Treaty provided:[1]

> When the frontier line arrives at the outermost point of Shutait island (approximately 30° 17' 25" North latitude, 48° 19' 28" East longitude) it joins in a perpendicular line from the limit of low water the thalweg of the Shatt al-Arab which it follows as far as a point situated across from the present jetty no. 1 of Abadan (approximately 30° 20' 8.4" North latitude, 48° 16' 13" East longitude). From that point the frontier line runs again along the low water mark and follows the line of the frontier as described in the minutes of 1914.

Article 3 of the Treaty provided for the establishment of a commission to set up boundary markers. Navigation on the Shatt was dealt with in Articles 4 and 5:

> Article 4. The provisions which follow shall be applicable to the Shatt al-Arab from the point where the land boundary between the two countries enters the said river up to the high seas:
>
> a. The Shatt al-Arab shall remain open in equal fashion to merchant vessels of all countries. All dues collected shall be in the nature of payments for services rendered and shall be devoted exclusively to the coverage in an equitable manner of the costs of upkeep,

1. The treaty was written in French, Persian and Arabic. In case of dispute the French text governs. All tests can be found in League of Nations, Treaty Series vol. 190 (1938) pp. 242-55. The above translation is based on the French text. An English translation contained Ibid. pp. 256-58 was utilized.

maintenance of navigability or the improvement of the navigable channel of access to the Shatt al-Arab from the sea, or to defray expenses incurred in the interest of navigation. The said dues shall be calculated on the basis of the official tonnage of the vessels or of their displacement or both.

b. The Shatt al-Arab shall remain open for the passage of warships and other non-commercial vessels of the High Contracting Parties.

c. The fact that in the Shatt al-Arab the frontier line sometimes follows the low water mark, and sometimes the thalweg or medium filum aquae, shall not prejudice in any way the right of the High Contracting Parties to utilize the entire course of the river.

Article 5. The two High Contracting Parties having a common interest in the navigation in the Shatt al-Arab as defined in Article 4 of the present Treaty, undertake to conclude a convention concerning the upkeep and improvement of the navigable channel, dredging, pilotage, dues to be collected, health measures, measures to be taken to prevent smuggling, as well as all other questions concerning the navigation in the Shatt al-Arab as defined in Article 4 of the present Treaty.

A protocol which was appended to the Treaty provided for establishment of a commission of experts to establish definitively the coordinates mentioned in Article 2. The protocol further obligated the two countries to conclude the convention mentioned in Article 5 within a year from the date on which the treaty entered into force. The term could be extended by the parties. The Iranian Government agreed that during the one year period and any extension thereof, the Government of Iraq should regulate, on the then - existing basis, the questions which were to be regulated by the convention. The Government

of Iraq undertook to inform the Iranian Government every half year of works undertaken in the Shatt, of dues collected, expenses paid, and of all other measures taken. Article 3 of the protocol provided that either government could give permission to foreign warships and other non-commercial vessels to enter its ports situated on the Shatt al-Arab. This permission was to be regarded as having been given by both parties and entitled the vessel to navigate in the waters of either country. The government giving permission has the duty to inform the other government.

The Treaty between Iraq and Iran thus maintained the frontier on the Shatt al-Arab as it had been established by the Treaty of Erzerum and by the Constantinople Protocol, deviating only in the Abadan region. There the boundary line was shifted to the thalweg[1] obviously to meet Iranian complaints concerning the location of jetties in Iraqi waters. Another important feature of the 1937 Treaty is the stipulation of free navigation. This was extended beyond the terms of the Erzerum Treaty. Under the 1937 Treaty the Shatt al-Arab thus was treated as a navigable international river with navigation free to the merchant vessels of all nations. The navigation of warships and other non-commercial vessels is free to such ships belonging to the two parties; with regard to the warships of third powers it is dependent only on the permission of one of the two parties. The other party has a right to be informed, but has no right to veto such permission. In general, these provisions and those relating to dues are in accord with the stipulations contained in the multilateral Convention and Statute on the Regime of Navigable Waterways of International Concern signed at Barcelona on April 20, 1921, to which, however, neither Iran nor Iraq is a party.

It might be mentioned that during the negotiations for the 1937 Treaty, a coup d'etat took place in Iraq in 1936 which brought to power General Bakr Sidqi. However, the new government continued negotiations and carried them to a final conclusion.

1. The protocol annexed to the 1937 Treaty appears to equate the terms thalweg and medium filum aquae (median line).

III. DEVELOPMENTS FROM THE CONCLUSION OF THE 1937 TREATY TO THE IRAQI REVOLUTION OF 1958

A. The Question of the Thalweg and of the Additional Convention.

The Treaty of 1937 attempted to settle permanently the dispute over the boundary line along the Shatt al-Arab. However, the compromise which had been reached had actually satisfied Iranian demands only with regard to a very small section of the river. The Iranians continued to feel that it was iniquitous that so much of the boundary should be on the Iranian bank of the river and not along the thalweg. Thus, in 1954 the Iranian Foreign Minister stated to the American Ambassador that the Iranian Government had agreed temporarily in the 1930's under British pressure that the eastern bank of the Shatt al-Arab should be the boundary, but that such a solution could not be permanent. This point of view was, of course, not admitted by the Iraqis, to whom control of the river meant insurance of access to their main port, Basra, which lies upstream from Abadan and Khorramshahr. Talks between the Iranians and the Iraqis concerning the boundary and navigation on the Shatt al-Arab were held on various occasions and the two governments even progressed so far as to agree on the appointment of a neutral expert. However, no final determination of the problem had been reached when the Iraqi revolution of July 14, 1958 intervened.

The problem of navigation on the Shatt al-Arab was at least as difficult to settle for the two governments as the problem of the boundary line. The 1937 Treaty had not even attempted a final determination of the problem, but had left the settlement to a subsidiary convention to be concluded within a year. This convention was never entered into and the administration of the river remained exclusively in Iraqi hands.

B. The Problem of Pilotage and of River Administration.

Under the Port of Basra Proclamation of 1919 and the Port of Basra Rules and By-laws the jurisdiction of the Basra Port Authority extends from above Basra to the sea, thus including the areas of the Shatt al-Arab where the Iranian ports are situated. Pilotage by pilots of the port authority is compulsory within the limits of the port of Basra. Exempted from pilotage are only native sailing craft, ships belonging to the government of Iraq, ships of Her Britannic Majesty in commission, ships of war of any state which is a member of

the UN (which would, of course, include Iran) or which enjoys the same rights as a member of the UN, shipping exclusively engaged in military traffic in connection with armed forces maintained in Iraq by the Iraqi Government or the British Government, and any other ships or classes of ships as may from time to time be exempted by international usage, or by any treaty, convention or agreement to which the Iraqi Government is a party.[1] Iranian commercial vessels, thus, do not appear to be exempt from pilotage requirements unless any of them falls in the general category of ships exempt from compulsory pilotage by treaty or international usage. In practice, at least small Iranian craft appear to have been exempted from pilotage requirements. In spite of the change of government in Iraq, official British vessels appear still to be exempted from pilotage.

This state of affairs has been galling to the Iranians, of course, and their endeavors to achieve a change of the boundary line to the thalweg has probably always been motivated to a considerable degree by the desire to obtain an equal voice with Iraq in the administration of the river, including pilotage and collection of dues. The 1937 Treaty did not do that. Most of the Shatt al-Arab was left in the status of Iraqi internal waters. Thus, even if the convention envisaged by that Treaty were concluded, it would still not provide the Iranian Government with that equality of legal status which it apparently has been seeking.

1. This enumeration is based upon Port of Basra, Marine Schedule of Dues and Charges, 11th edition (brought up to date to April 1, 1952).

IV. DEVELOPMENTS SINCE THE IRAQI REVOLUTION OF 1958

A. The Origin of the Dispute.

The long-standing uneasiness of the Iranian Government over the situation regarding the Shatt al-Arab was increased considerably with the overthrow of the monarchy in Iraq in 1958. While Iraq had a conservative regime and was a member of the then Baghdad Pact, there was some chance that an amicable settlement would, in time, be reached, which would improve the position of Iran with regard to the Shatt al-Arab. The emergence of a neutralist republican regime, which withdrew from the Baghdad Pact, allowed Communist influence to grow, sheltered Tudeh leaders and accepted extensive Soviet economic and arms aid, put the whole Shatt al-Arab problem into an entirely new light from the Iranian point of view. The Basra Port Authority was no longer under British management, and the chances that the Authority would use Bloc technicians and possibly Bloc pilots were very considerable. In general, the idea that the river providing access to the important Iranian ports of Abadan and Khorramshahr was wholly within the territory of a potentially hostile state was disturbing to the Iranian Government.

Various happenings soon confirmed and increased Iranian apprehensions. British and pre-revolution Iraqi pilots were dismissed and replaced by pilots loyal to the new Iraqi regime. Some Soviet technicians were employed by the Basra Port Authority. Also, there were instances when incoming foreign vessels were searched for arms by Iraqi soldiers. However, the situation did not reach an acute stage until May 1959, when the Pan American International Oil Company, a subsidiary of Standard Oil Company (Indiana), leased the former Anglo-Iranian Oil Company terminal at Khosrowabad, twelve miles below Abadan on the Shatt al-Arab, as a base for operations in the Iranian offshore area where Pan American International Oil Company holds a concession. Khosrowabad had, at one time, been listed as an official Shatt port, but this was no longer the case in May 1959.[1] When requested to redesignate Khosrowabad as a port the Basra Port Authority raised a number of technical objections which were not, however, sustained by maritime experts on the spot. Iraqi pilots refused to take Pan American vessels to Khosrowabad, and as the conflict developed, Iran complained about Iraqi interference with Iranian river craft.

1. See below p. 24 note 1

B. Dispute over Flag and Pilotage Rules

In July 1959, the Iranian Government addressed a note to Iraq suggesting that a joint commission be named to deal with the use of the Shatt al-Arab, and that permission be granted for reasonable use of the Khosrowabad port facilities. In August, Tehran requested all shipping bound for Iranian ports in the Shatt al-Arab to fly the Iranian flag from 12 miles out to sea, since Iranian territorial waters extended twelve miles. This directive was in direct conflict with Iraqi instructions that vessels fly the Iraqi flag while passing through Shatt waters. Iranian policy concerning the flying of the Iranian flag was laid down in detail in a meeting of Iranian Government officials on September 8, 1959. The Ministry of Customs and Monopolies was directed to notify all navigation agencies and firms that in the future all vessels entering the Shatt al-Arab bound for Iranian ports or outbound from Iranian ports were to fly the Iranian flag. In case of obstruction or molestation by Iraqi officials, the masters were to inform the Iranian port authorities and guard units in the Shatt al-Arab in order to call for protection by the Iranian Navy. If Iraqi pilots refused to take ships to Iranian ports, Iranian pilots and naval escort would be provided. No vessels violating the Iranian instructions were to be allowed to enter Iranian ports to load or unload cargo.

In the past, no hard-and-fast rules had been established by either side concerning the flying of flags in the Shatt al-Arab. According to information received from Iranian authorities, foreign shipping bound for Iranian ports generally flew the Iraqi flag at fore while the Iraqi pilot was on board. When the ship passed under the control of the Harbor Master of Khorramshahr or Abadan, the Iranian flag was hoisted.[1] Ships outbound from the Iranian ports lowered the Iranian flag and hoisted the Iraqi flag as soon as the ship was under way. Some inbound ships flew the Iranian flag at the outer bar, while awaiting the arrival of the pilot, to indicate the port of destination. Occasionally, ships bound for Iranian ports flew the Iranian flag all the way up river, but they were exceptions to the general rule. Until Iran issued its directive, the flag problem apparently had not been prominent, although Iraqi pilots from time to time ordered the Iranian flag lowered and the Iraqi flag hoisted. After the Iranian directive,

1. According to the Port of Basra rules, pilotage inside harbor limits is conducted by the Harbor Masters, not by Port Authority Pilots. Harbor limits, to be distinguished from the Port of Basra limits, are also defined in the rules.

difficulties did arise and some ships were actually blacklisted by Iran. Some ships elected to fly both flags, a procedure which seems to have been acceptable to both parties.

There are no general rules in international law governing the use of the flag of the local state by foreign vessels in internal waters. As a recent British study has pointed out, the practice varies with regard to individual international rivers. For example, on the Scheldt, which provides the only access to the Belgian port of Antwerp through Dutch waters, no flag is flown until the vessel is within the precincts of the port of Antwerp. On the Rhine, vessels bound for German river ports fly the Dutch flag while in Dutch territory and change to the German flag at the German customs point. Since most of the Shatt al-Arab is Iraqi internal waters, Iraq probably has a better case than Iran with regard to a demand that vessels in the Shatt al-Arab fly its flag. There is nothing in the 1937 Treaty regarding the flying of either the Iranian or the Iraqi flag, nor does there appear to be any provision relating to this question in the port rules. If acceptable to both countries, the practice of flying both flags might be one way of neutralizing this issue which, while of little practical importance, can assume a considerable prestige value during times of tension and dispute.[1]

In spite of these moves, tension appeared to ease in the early fall of 1959. The Iranian instructions concerning the flying of the flag and pilotage were not rigidly enforced. The Iranian Government also apparently informed the Iraqi Government that it would not object to the use of both flags and that it would like to commence negotiations with the object of establishing an equal Iranian voice in matters concerning the Shatt al-Arab; confirming the right to use Khosrowabad; establishing the right of vessels to fly the Iranian flag on the Shatt al-Arab; and settling the problem of the right of Iranian small craft to ply back and forth on the Shatt al-Arab without Iraqi interference. However, because of the disorganization of the Iraqi Government, no negotiations resulted.

C. The Contentions of the Two Parties in November - December 1959

Although no serious incidents occurred in the river, the dispute became more bitter late in 1959, as shown in statements made by the Shah of Iran, by Prime Minister Qasim, and by other official spokesmen of the two countries. In a press conference on November 28, the Shah stressed his country's desire for friendly relations with Iraq, but accused the Iraqi Government of not observing agreements made between the two governments with regard to the Shatt and added:

1. This would, of course only apply to ships bound for Iranian ports on the Shatt.

> ...Where a river is a common frontier between two countries, it cannot be unilaterally utilized, or come under unilateral sovereignty. How can Iran give up a right recognized by all the nations of the world? We cannot entertain Iraq's colonial policy in this connection.

On December 2, Prime Minister Qasim in a press conference likewise expressed his hope that the dispute with Iran could be solved peacefully. However, for the first time he injected a territorial claim into the quarrel. He stated:

> In the past, in 1937 or 1936, when the then government of the late Bakr Sidqi and brethren in the revolution was in power, at that time strong pressure was exerted against the Iraqi Government, which needed funds, and neighbor Iran was granted about five kilometers (of our) Shatt al-Arab; this was a grant and not an agreed right.
>
> These five kilometers, in the area of Abadan, were exploited by the oil companies, the same companies which at that time refused to pay royalties to Iraq. Since Iraq was under pressure at that time it granted this area to the Iranian Government which had no rights over it. The grant was given to Iran under pressure with the hope that the border problem between us and Iran might be solved. The problems of good neighborhood and other border problems. (sic) These borders and these problems have so far not been solved. If they are not solved in the future, we shall be absolved from this grant and shall restore it to the motherland.

In these remarks Qasim was obviously referring to the Treaty of 1937 and to the area which was assigned to Iran by moving the frontier to the thalweg in the Abadan region. It is interesting that Qasim, as the Iranians had done on other occasions, also uses the argument of foreign pressure to claim that a treaty provision considered onerous by him was invalid. It is, of course, true that the UK in 1937 was interested in a settlement of the Shatt al-Arab controversy. The Anglo-Iranian Oil Company (present-day British Petroleum Company), in which the British Government holds a majority interest, had a direct stake in

the settlement of the boundary line in the Abadan region, because it involved unimpeded access to the jetties at Abadan. Furthermore, the expansionist policy of Italy in Africa alarmed the small nations of the Middle East, and in order to allow them to come to a multilateral agreement (which was consummated in the Saadabad Pact), points of friction between individual countries had to be removed. While the UK thus no doubt desired the peaceful settlement of a dispute between two countries in which it had important interests, there does not appear to be any indication of undue British pressure. Besides, a claim that a treaty should be regarded as void because of "duress" on the part of a third power is always difficult to establish. It is likely that Qasim in this instance, as the Iranians on similar occasions, actually did not think in terms of Western international law, but made his claims on the basis of Islamic doctrines and the general feeling that everything that happened in the past and that was regarded by his regime as unfavorable to Iraq must have been done under foreign pressure.

The argument that the cession of the strip in the Abadan region was "a grant" and not an "agreed right" is difficult to understand. From the text of the treaty it certainly appears that the boundary along the thalweg at Abadan was as much agreed upon between the two parties as was the boundary line elsewhere. It was no doubt a concession on the part of Iraq, but, as far as can be gathered, Iraqi agreement to the shifting of the boundary to the thalweg off Abadan was the result of a compromise under which Iran in turn agreed to have the boundary remain at the low water mark in other parts of the Shatt al-Arab. Qasim's threat that Iraq would regard itself as "absolved from this grant and will restore it to the motherland" unless the boundary problems are solved, might actually be bad tactics on the part of Iraq. If the Treaty of 1937 were declared void, Iraq could claim that matters should return to the status of 1913, that is that the boundary should be traced along the low water mark also at Abadan. However, such a move would make it much easier for Iran to reopen the whole case and again advance the arguments, used in 1935, that the 1913 protocol and the instruments which preceded it should also be regarded as void. Also, Iran would be in a much better position to challenge continued Iraqi administration of the Shatt al-Arab.

The Iranian Foreign Minister replied to Qasim's statement in the Iranian Majlis on December 10, 1959. The Foreign Minister went all the way back to the Treaty of Zuhab of May 17, 1639 which was the first treaty to deal with Iran's western frontier without, however, defining it in detail. This treaty was reaffirmed by later treaties, but as mentioned before, it was not until the Treaty of Erzerum of 1847 that the boundary between Persia and the Ottoman Empire along the Shatt al-Arab was defined.

The Foreign Minister claimed that the Ottoman Government "recognized the common sovereignty of Iran on the Shatt al-Arab" and that "this policy continued until the end of World War I." In support of this claim, Foreign Minister Aram quoted a passage from a book "Iran" by Sir Arnold Wilson "the British representative" on the 1913 Demarcation Commission. Aram may here be referring to Sir Arnold Wilson's book S. W. Persia, (London, 1942). Sir Arnold Wilson was a member of the boundary commission of 1913-1914 as British Deputy Commissionary. In this book, Wilson asserts that:

> For over fifty years the frontier (in the Shatt al-Arab) had been held to run down the middle of the main channel, the medium filum aquae or thalweg; this interpretation was not entirely consistent with the wording of the Treaty of Erzerum but was a modus vivendi of long standing. The sovereignty of some islands was disputed, for the main stream had changed its course since 1869. The right of the Persian Government to control navigation was denied, probably upon good legal grounds, but modern steamships could not lie as of old in the mouth of the Karun opposite Mohammerah. They had to anchor in the main stream and thus de jure in Turkish waters.

Sir Arnold Wilson goes on to say that the growth of Abadan and the size of the ocean-going vessels of the time, which required dredging of the bar of the Shatt al-Arab, made it necessary to settle the various questions relating to control of the Shatt. He relates that the final settlement arranged by him and Sir Percy Cox left the river itself to the low water mark in Ottoman hands, except for the anchorages at Abadan and Muhammarah.[1] There is some other evidence to indicate that locally the thalweg was generally regarded as the dividing line between the two countries, even though this may not have been in full accord with the legal situation.[2] However, all available evidence shows that in

1. Pp. 271-72.

2. See Gooch and Temperley, British Documents on the Origin of the War 1898-1914, vol. 10, part 2, p. 86. See also below p. 29.

the 1913 protocol the low water mark was established as the official boundary.[1] Aram thus appears to be in error if he claims that the boundary remained the thalweg until the end of World War I.

Foreign Minister Aram also discussed at some length the Treaty of 1937 stressing that Iran signed the Treaty even though it did not protect all its legitimate rights and interests, out of a spirit of conciliation. He rejected Qasim's claim concerning the "grant" of the territory off Abadan and stated that the Treaty recognized "equal rights for Iran and Iraq in connection with shipping and management of the Shatt al-Arab." Aram stressed that although 22 years had elapsed since the conclusion of the Treaty, the ancillary convention had not been concluded and he complained that Iraq alone collected the fees on the river, in spite of the fact that 75% of the shipping was destined for Iranian ports and that less than half of the fees collected were spent by Iraq on the maintenance of the river. In closing, Aram maintained that "nowhere else in the world does a similar situation exist in which a navigable river as great as the Shatt al-Arab runs along a border where one country alone has the right to manage the river and enjoy its revenues." He emphasized that "Iran will not accept any border of the Shatt al-Arab as compatible with the principles of international law except the thalweg." This seems to indicate that Iran would not be satisfied with a regulation of navigation, pilotage, and other issues in a convention as foreseen by the 1937 Treaty, but would wish to reopen the question of the position of the boundary, which of course, would amount to a revision rather than an implementation of the Treaty of 1937.

The speech by Foreign Minister Aram was answered by a long statement by an Iraqi Foreign Office spokesman on December 16, 1959 in which the spokesman again traced the history of the Shatt al-Arab dispute and tried to refute Iran's contentions. With regard to Khosrowabad and the river boundary, the spokesman declared:

1. G.E. Hubbard, From the Gulf to Ararat (Edinburgh and London, 1916), describes the actual delimitation of the frontier on the ground in which he participated as secretary to the commission. He states (p.46): "the frontier follows the left bank of the Shatt, so that all that had to be done was to fix the point where it first strikes the shore from seaward and settle the case of a few small islands near the Persian bank." No difficulties thus appear to have arisen in fixing the boundary on the left bank. See also the Minutes of the Delimitation Commission, above pp. 7-9.

> From the legal point of view, the Iraqi Government explained, the Iraqi boundaries in the Shatt al-Arab extend to the lowest water level on the Iranian shore in accordance with the boundary protocols, with the limited exceptions in the port of Khorramshahr and the port of Abadan, where the Iraqi Government had granted the Iranian Government the right to use the Shatt al-Arab as far as the middle of its channels. Iraq's boundaries in the Khosrowabad area include all the Shatt al-Arab waters as far as the lowest water level on the Iranian shore. Thus without the consent of Iraq no Iranian port could be established in this area, because its waters are Iraqi territorial waters (sic: it should be "internal waters") falling within Iraqi sovereignty.

While it is true that the boundary at Khosrowabad is at low water mark, Khosrowabad has been used as a harbor until four or five years ago[1] and its reuse would not constitute the establishment of a new port. Except for the need of redesignation by the Basra Port Authority, no Iraqi agreement would appear to be needed to formally bring the harbor back into use. The jetties at Khosrowabad do extend into Iraqi waters. In this respect, the situation is parallel to that at Abadan before the 1937 Treaty.

The Iraqi spokesman also declared that the Ottoman Government in 1913 "conceded to Iran the port of Muhammarah, which is part of Iraq, because of its desire to end the dispute." This is not in accordance with facts as the "city and port of Muhammara" (Khorramshahr) were recognized by the Ottoman Empire as being under the "unrestricted sovereignty" of Persia in the Treaty of Erzerum of 1847. There is some indication that the area of Muhammarah was a dependency of Basra in the seventeenth century, but it is unlikely that a claim going back beyond the Treaty of Erzerum of 1847 could be seriously entertained. In a

1. In the Port of Basra, Port Rules and By-Laws 1942, pp. 1, 31-36, (this is the latest edition) Kabda (or Khosrowabad) is listed as a harbor. It is also listed as an "oil terminal connected with Abadan by pipeline" which is used "to avoid congestion" at Abadan in US Navy Hydrographic Office, Sailing Directions for the Persian Gulf, Fourth edition, 1952, as amended 1956, 8-45.

speech on December 23, Prime Minister Qasim stressed Iraq's desire to settle the dispute peacefully, possibly through resort to the UN. At the same time, he accused the Iranian Government of aggression and appealed directly to the "Iranian people." Statements by Qasim and Iraqi Foreign Minister Jawad on December 29, also were rather conciliatory in tone. Jawad stressed particularly Iraq's desire to settle disputes by peaceful means and to abide by and respect treaties and agreements. No further mention was made of any Iraqi claim that the boundary should be rectified.

On January 3, 1960 the Iranian Foreign Ministry issued a lengthy statement dealing in detail with endeavors claimed to have been made by the Iranian Government to negotiate with Iraq the convention envisaged by the 1937 Treaty. It is interesting to note that the validity of the 1937 is not questioned in any way. The statement is, of course, written from the Iranian point of view trying to put all the blame for the non-conclusion of the convention on Iraq and detailing the "aggressions" committed by the Iraqi regime against Iran during the present dispute. With regard to the thalweg as boundary it is stated that:

> It is an open secret that the principles of international law and international justice and equity required that provision should have been made in the 1937 Treaty for the thalweg to become the basis for determining the border of the two countries throughout the Shatt al-Arab, and not only before Abadan.

The statement ends with the assertion that:

> the Iranian Government does not regard any criterion or standard except the thalweg as conforming to international principles and law, and international justice and equity, for the determination of its boundary line in the Shatt al-Arab.

Thus, the Iranian Government appears to continue to insist that the boundary line should be shifted to the thalweg, at the same time it acknowledges, however, at least implicitly, that the boundary is not now the thalweg. While rather uncompromising, this latest Iranian statement was not menacing in tone and taken together with the conciliatory Iraqi statements might indicate the beginning of some relaxation of tension and a willingness of both sides to have the dispute settled by peaceful means.

V. EVALUATION OF THE BASIC ISSUES INVOLVED

A. The Boundary Line in the Shatt al-Arab and its Implications

1. The low water mark as boundary generally. The Iranian Government has from time to time contended, most recently in Foreign Minister Aram's speech of December 10 and in the Foreign Ministry statement of January 3, that fixing the boundary on the left bank of the Shatt al-Arab was an anomaly. It is true that, as a rule, in navigable rivers which form the boundary between two countries the line is traced along the middle of the so-called thalweg. The thalweg is usually defined as the navigable channel of a river. However, the tracing of a frontier line along one bank of a river, even a navigable one, is not unknown. For example, in the Treaty of Friendship, Cession of the Floridas, and Boundaries between the United States and Spain of February 22, 1819, Article 3 states:

> The boundary line between the two countries shall begin on the Gulph (sic) of Mexico, at the mouth of the river Sabine, in the sea, continuing north, along the Western bank of that river....thence following the course of the southern bank of the Arkansas... All the islands in the Sabine, and the said Red and Arkansas Rivers, throughout the course thus described, to belong to the United States, but the use of the waters and the navigation of the Sabine to the sea, and of the said rivers Roxo (Red River) and Arkansas, throughout the extent of the said boundary, on their respective banks, shall be common to the respective inhabitants of both nations.

In 1933 the special boundary tribunal arbitrating a boundary conflict between Honduras and Guatemala fixed part of the boundary on the basis of "priority of settlement" along the mean high water mark on the right bank of the Tinto River and from the point of cofluence of that river with the Motagua River on the right bank of that river to its mouth.[1] Of some interest in the present discussion, is also a case decided by the US Supreme Court in 1820.[2] Involved in this case was the boundary

1. United Nations, Reports of International Arbitral Awards, vol. 2, pp. 1362, see also American Journal of International Law, vol. 27 (1933), pp. 403-427.

2. "Wandley's Lessee v. Anthony," Wheaton, United States Supreme Court Reports, vol. 5, p. 374.

between Kentucky and Indiana in an area along the Ohio River which had been ceded to the United States by Virginia. In delivering the opinion of the Court Chief Justice Marshall stated:

> When a great river is the boundary between two nations or states, if the original property is in neither, and there be no convention respecting it, each holds to the middle of the stream. But when, as in this case, one state is the original proprietor, and when it grants the territory on one side only, it retains the river within its own domain, and the newly created state extends to the river only. The river, however, is its boundary.

A somewhat similar reasoning might be applied to the Shatt al-Arab situation at the time of the Treaty of Erzerum. The Ottoman Empire apparently had some claim to the area on the left bank of the Shatt al-Arab and it could be argued that in recognizing the Persian sovereignty over Muhammarah and neighboring territory, the Ottoman Empire wished to restrict the cession of territory to as narrow limits as possible.[1]

Among European examples, roughly contemporaneous to the Treaty of Erzerum, where the boundary followed one bank of a river rather than the median line or the thalweg two may be cited. One is the Treaty of Warsaw between Prussia and Poland of September 18, 1773 whose Article 2 traced part of the frontier between the two countries along the Netze River, leaving all of the river to Prussia.[2] Another, the Treaty of Peace of Adrianople between Russia and the Ottoman Empire of September 14, 1829, provides in Article 3 that along the Danube the boundary between the two parties shall be on the right or Ottoman bank.[3] This case appears particularly interesting since it involves the Ottoman Empire and also deals with one of the large navigable rivers of the world.

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1. See below p. 28

2. Martens, Recueil de Traités, 2nd edition, pp. 149-159.

3. British and Foreign State Papers, vol. 16, pp. 647-54.

Placing the boundary between two countries on one bank of a river rather than along the median line or the thalweg is thus not very common, but a number of examples can be cited and the Shatt al-Arab situation is by no means unique. Under modern conditions and in the specific circumstances of the Shatt al-Arab, it might perhaps be considered desirable to have the boundary line shifted eventually to the thalweg. This would avoid difficulties of the kind which arose concerning Abadan before the 1937 Treaty was concluded and which might now involve Khosrowabad. However, this would involve changing existing treaty provisions.

2. The low water mark as boundary in the Shatt al-Arab. There is considerable evidence that at least in the more recent past, Iran has regarded the low water mark as the boundary line in the Shatt al-Arab as iniquitous. During the recent dispute, the Iranian Government has been vociferous in claiming that the only proper and equitable boundary line in the Shatt al-Arab would be the thalweg. On the basis of the evidence here available, it is impossible to determine the historical reasons why the low water line was established as the boundary between the two countries. According to a recent official British study, Sir Henry Rawlinson pointed out in a memorandum in 1844 that great uncertainty attached to the extent of the territory which was dependent on Basra at the time of the Treaty of 1639. However, Rawlinson felt that there could be no doubt that the immediate banks of the Shatt al-Arab were under the rule of Basra and that some towns on the left bank near present day Khorramshahr were dependencies of Basra. If areas on the left bank were claimed for Basra, the Ottoman Empire in acknowledging Persian sovereignty over the left bank in the Treaty of 1847, may have followed the principle, as suggested above, of ceding only the land area, but retaining full control of the river. While it is true that the Treaty of 1847 does not specifically state that the whole river is under Turkish control, the statement that Persian ships should be allowed to use the Shatt without let and hindrance, would indicate Ottoman control of the river.

However, the history of the boundary line in the river between 1847 and the Constantinople Protocol of 1913 is far from clear. As mentioned above, Sir Arnold Wilson asserts that "for over fifty years" prior to 1913, the thalweg was, in practice, considered as the frontier and a British memorandum to the Ottoman Government of July 18, 1912 points out that there was no express stipulation in the Treaty of 1847

as to the ownership of the river and states that the boundary locally recognized was the thalweg.[1] This seeming confusion may in the last analysis, be traceable to the general lack of understanding among peoples of the Near and Middle East of the importance and meaning of line boundaries. As Lord Curzon expressed it in 1907:

> In Asia there has always been a strong instinctive aversion to the acceptance of fixed boundaries, arising partly from the nomadic habits of the people, partly from the dislike of precise arrangements that is typical of the Oriental mind, but more still from the idea that in the vicissitudes of fortune more is to be expected from an unsettled than from a settled frontier.[2]

However, whatever confusion might have existed with regard to the boundary in the river prior to 1913 was removed by the Constantinople Protocol and by the boundary commission set up under the Protocol. Thus, at least since 1913, the low water mark on the Persian shore has been established as the boundary between the Ottoman Empire (and now Iraq as one of its successor states) and Persia, except where, as off Khorram-Shahr and Abadan, the boundary line has been established along the thalweg by agreement between the two riparian countries. From the most recent Iranian statements, it appears that Iran does not intend to claim that the boundary line actually runs along the thalweg today. The claim rather appears to be that tracing of the boundary line along the low water mark on the Iranian shore is contrary to general rules of international law and to considerations of equity, and that the presently existing boundary consequently should be changed.

B. The Shatt al-Arab as an International Waterway.

1. The problem of free navigation. At present, the Shatt al-Arab,

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1. Gooch and Temperley, op.cit., p. 86. The British Government pledged itself, however, in the same communication to support the Ottoman Government's claim to the whole of the river, in return for certain concessions to Persia with regard to islands in the Shatt and arrangements with Great Britain on navigation in the river. This communication was part of the negotiations concerning the Baghdad Railway.

2. Quoted in G.E. Hubbard, op.cit., p. 12.

with the exception of the small areas where the thalweg is the boundary, is Iraqi internal waters and Iraq's sovereignty extends to the whole course of the river. The right of innocent passage which applies to territorial waters does not apply to the internal waters of a state.[1] However, even before World War I, the convention concerning the establishment of a commission for the improvement of conditions on the Shatt al-Arab signed by the Ottoman and British Governments on July 29, 1913 provided in Article 1 that navigation on the Shatt al-Arab should remain open to ships of all nations.[2] Freedom of navigation for merchant vessels of all countries was expressly stipulated in the Treaty of 1937. There does not appear to have been any contention in the recent controversy that the principle of free navigation of merchant vessels was seriously infringed upon. The search of foreign vessels bound for Iranian ports on the Shatt al-Arab by Iraqi soldiers, which occurred in some instances, could possibly be construed as interference with the freedom of navigation in the Shatt al-Arab, but Iraq could always claim that the searches were made in exercise of Iraq's sovereign rights for security reasons to prevent possible smuggling of arms to potential dissidents in Iraq. At times, Iranian spokesmen have cited the provisions of the 1937 Treaty on freedom of navigation to argue that Iraq had no right to insist upon Iraqi pilots. However, this constitutes a confusion of the question of freedom of navigation with the issue of pilotage. The requirement by a port authority that pilots be used in a port area, a canal or a river, cannot by itself be regarded as interference with the freedom of navigation.

2. The issue of pilotage and of dues. The protocol attached to the Treaty of 1937 vests in Iraq the right to continue on the basis then

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1. Internal or interior waters are the waters landward from territorial waters including harbors, ports and roadsteads, as well as rivers, lakes, and similar bodies of water. Rivers forming the boundary between two countries or flowing through two or more countries is termed, at least if navigable, international rivers. These rivers continue to be part of the national territory, but navigation on many of them is free by virtue of various treaties and conventions. See C.C. Hyde, International Law (Boston 1945) pp. 524-565; A.P. Higgins and C.J. Colombos, The International Law of the Sea (London 1945) pp. 58-59, 142-163.

2. Gooch and Temperley, op.cit., p. 184. Because of the construction of a refinery on Abadan Island which went into operation in 1913 and because of the Baghdad Railway project, the problem of free navigation on the Shatt al-Arab had become of much greater interest than before to the UK and other European powers.

existing the services to be provided for in the ancillary convention until the conclusion of such a convention. Since no convention has been concluded, Iraq has provided pilotage service and has also collected dues paid by the ships using the Shatt al-Arab. The Basra Port Rules and By-laws make pilotage by Port Authority pilots compulsory outside harbor limits for all inbound and outbound ships with certain specified exceptions. Basically, therefore, as long as no convention has been concluded and the present treaty provisions remain in force, the Port Authority can insist that its pilots be used. In the light of the 1937 provisions, it does not appear that Iran could set up its own pilotage service at least as long as Iraq continues to provide adequate service. Iraqi refusal to take ships to Iranian ports probably could be adduced by Iran as a reason for providing its own service only if such refusal could be proven to be discriminatory against Iran.[1] In practice, establishing satisfactory proof of such a contention would, in all likelihood, not be easy. In many cases, the Basra Port Authority would probably claim some technical reasons, as in the case of Khosrowabad, for refusing pilotage. The flag issue as reason for denial of pilotage might be more tenuous. However, as long as the whole of the river can be regarded as being under Iraqi sovereignty, it might be difficult to deny Iraq the right to enforce a claim that its flag should be flown in its internal waters.

Again as provided by the Treaty of 1937, all navigation dues have been collected by Iraq. Recently, Iran has charged that Iraq has not used the dues exclusively for the upkeep of the river and Iraq, in turn, has claimed that Iran has not paid dues to Iraq since 1953. Sufficient facts are not available here for the proper evaluation of either claim. Diversion of navigation dues to other purposes would constitute an infringement of the provisions of Article 4 of the Treaty of 1937.

In the last analysis, the pilotage and dues problem is, in the present controversy, less of a legal than a political issue. The dismissal from the Port Authority of its British personnel and of Iraqi pilots appointed by the old regime, as well as the replacement of some British technicians by Soviet ones, has very much increased

1. See for a discussion of the principle of equality of use of an international river by the riparian states, Permanent Court of International Justice, Judgment no. 16, September 10, 1929, Territorial Jurisdiction of the International Commission of the River Order, p. 27.

Iranian uneasiness over an arrangement in the Shatt al-Arab under which Iran has no part and no voice in the administration of river traffic and the unkeep of the navigation channel.

3. The importance of the ports on the Shatt al-Arab. One of the important practical problems of the Shatt al-Arab which has greatly influenced the attitude of both parties with regard to the boundary issue and with regard to the question of navigation, is that of the ports on the Shatt al-Arab. For Iraq, the Shatt al-Arab is the only outlet to the sea, and Basra, located beyond Abadan and Khorramshahr on the river, is its most important port. The Iraqis have, therefore, often claimed that they should have control of the river which is their only "window to the world." However, while Iran has other ports, a large oil refinery is located at Abadan and unimpeded access to Abadan is regarded by the Iranians as essential. Recently, the Iranian Foreign Minister claimed that 75% of the ships on the Shatt al-Arab were bound for Iranian ports. This figure may be exaggerated. The following table shows the total import and export figures for the Iranian and Iraqi ports on the Shatt al-Arab and for the Iranian ports located on the Persian Gulf:

		In 000 metric tons		
Name of Port	Year	Imports	Exports	Total
1. Shatt al-Arab ports				
a. Iraqi ports				
Basra	1957	668	356	1,024
	1958	651	473	1,124
Fao	1956/57		7,968	7,968[1]
	1957/58		9,487	9,487[1]
b. Iranian ports				
Khorramshahr	1956/57	374	339	713
	1957/58	435	216	651
Abadan	1956/57	251	10,133[2]	10,384
	1957/58	175	11,310	11,485

1. Crude oil only. All figures except those for Basra relate to the fiscal year starting April 1.

2. Refined petroleum products

Name of Port	Year	In 000 metric tons Imports	Exports	Total
2. Iranian Persian Gulf ports				
Bandar Shapur	1956/57	454	6	460
	1957/58	493	.8	493.8
Bandar Mashur	1956/57	.4	15,292	15,292.4
	1957/58	.1	20,380	20,380.1
Bushir	1956/57	21	25	46
	1957/58	18	26	44
Bandar Abbas	1956/57	10	45	55
	1957/58	12.5	28	40.5

According to this table, Basra is largest in terms of imports, whereas in exports the oil ports of Fao in Iraq and Abadan and Bandar Mashur in Iran far outstrip all other ports. In the Shatt al-Arab the Iraqi and Iranian oil ports probably are about equal in export tonnage handled. However, the heaviest oil export traffic goes through the Iranian port of Bandar Mashur on the Persian Gulf east of the mouth of the Shatt al-Arab. Both riparian states can thus claim that they have important port facilities which are only accessible via the Shatt al-Arab. In the Iranian case, there is at least one important port outside the Shatt al-Arab and Iran is thus not wholly dependent on the river as is Iraq. However, this argument might be challenged from the Iranian point of view with the argument that the important Abadan refinery site can only be reached via the Shatt.

C. The Problem of the Validity of the Treaties Governing the Shatt al-Arab.

The various treaties and agreements governing the boundary in the Shatt al-Arab have, at times, been attacked by one side or the other as not being valid. As stated above, these claims are tenuous, and with regard to the Treaty of 1937, which is the instrument now governing the boundary, no very serious claim actually appears to have been made by either side that the Treaty should be regarded as invalid. As far as the Protocol of Constantinople of 1913 is concerned, Iran did in the

1. Crude petroleum

discussions before the League of Nations in 1935, claim that the Protocol should be regarded as invalid. However, regardless of the merit of that claim, the parties agreed in the 1937 Treaty to recognize the Protocol and the Minutes of the boundary commission as valid, which would appear to estop either party from claiming now that the 1913 Protocol is invalid, unless such party intends also to attack the validity of the 1937 Treaty.

Both parties acknowledge that the ancillary convention envisaged in the 1937 Treaty has not been concluded so far and each party has tried to blame the other for causing the delay. However, there has not been any serious suggestion from either side that failure to conclude the convention affected the validity of the Treaty and it also appears to have been conceded by the Iranians that the time period in which the convention is to be concluded can be regarded as having been extended tacitly to the present. Should negotiations on a convention be reopened and end in failure, it is conceivable that Iran might claim that Iraqi intransigence had frustrated the conclusion of a convention and that the interim arrangement giving Iraq responsibility for administration of the Shatt should be regarded as no longer valid. Such a course, however, would obviously contain political risks and might throw navigation on the river into confusion.

Some tendency has been apparent recently on the part of the Iranians to claim that Iraq through its recent actions had abrogated the Treaty of 1937 and that Iran, therefore, should state that it regards the Treaty as abrogated. Even if this argumentation were accepted, and its legal validity appears doubtful, the results of such a move would probably be detrimental to both parties. The Treaty of 1937 is obviously the basis of the present boundary line and the present system of administration in the Shatt al-Arab. An abrogation of the Treaty would put not only the boundary line, but also navigation in the Shatt al-Arab on a much more uncertain basis and would, in the last analysis, probably not benefit either side. The Iranians would probably feel free, should the Treaty be abrogated, to claim the thalweg as the boundary line. However, it could probably be argued that an abrogation of the 1937 Treaty would not imply the inapplicability of earlier instruments such as the Protocol of 1913. Whether the Iranians would be successful in attacking the validity of that Protocol and the earlier instruments is uncertain. The Iranians could, however, use the tactic of claiming that in view of the abrogation of the 1937 Treaty, a wholly new arrangement should be made for the Shatt al-Arab and that in such a new arrangement, the boundary line should be placed along the thalweg for the whole length of the river.

The Iraqis could probably claim, at least for tactical reasons, that with the abrogation of the 1937 Treaty, the boundary reverted to the line established by the Constantinople Protocol, that is that it would follow the low water mark also at Abadan. However, abandonment of the 1937 Treaty would deprive Iraq of the basis for its position, not only with regard to the boundary, but also with regard to the administration of the Shatt al-Arab. If the 1937 Treaty were abrogated, Iran would, in all likelihood, try to place Iraq's right to continued sole administration of the Shatt al-Arab in serious doubt. This administration would then actually rest on internal Iraqi enactments, such as the Basra Port Proclamation, and upon usage rather than upon the provisions of an international treaty. From the point of view of third countries, an abrogation of the 1937 Treaty would eliminate the clear undertaking contained therein relating to the right of free navigation. An abrogation of the 1937 Treaty would, under present circumstances, thus create a very uncertain situation in the Shatt al-Arab and would, in all likelihood, increase tension rather than promote a negotiated resolution of the problem of administration of the river and of the latent boundary dispute.

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