

I

---

DECISIONS OF INTERNATIONAL  
TRIBUNALS

## Helmand River Cases (Afghanistan/Persia)

---

### Arbitral Tribunal, Tehran

19 August 1872 (Goldsmid, *Arbitrator*)

### Arbitral Tribunal, Camp Kohak

10 April 1905 (McMahon, *Arbitrator*)

---

*Waters – international river – Helmand River – boundary delimitation – apportionment of waters – prohibition of works interfering with requisite supply of water for irrigation – determination of requisite supply of water for irrigation*

*Sources of international law – general principles – international river – subject to natural changes in course – precautionary approach to be taken regarding envisaged works*

*Powers and procedures of tribunals – apportionment of waters of international river – arbitral award providing for establishment of monitoring and dispute settlement mechanism*

**SUMMARY** *The facts*<sup>1</sup> The Helmand River and its principal tributaries originated in the mountains of central Afghanistan. The river flowed south-west through Afghanistan to Band-i-Kamal Khan at which point it turned northwards and flowed through a lakeside region known as Sistan. Approximately forty miles downstream

<sup>1</sup> The facts are based on information given in C. U. Aitchinson, *A Collection of Treaties, Engagements and Sanads Relating to India and Neighbouring Countries* (Government of India Central Publication Branch, Calcutta, 1933) vol. XIII, pp. 32–5, 209–10, J. G. Lammers, *Pollution of International Watercourses* (Martinus Nijhoff Publishers, The Hague, 1984) pp. 302–4, and in the Awards themselves. According to F. J. Goldsmid (ed.), *Eastern Persia: an Account of the Journeys of the Persian Boundary Commission 1870–71–72* (MacMillan & Co., London, 1876) pp. 281ff, 'bands' were dam-like structures usually constructed from the branches of tamarisk shrubs.

from Band-i-Kamal Khan lay Kohak, where the Kohak Dam, or Band-i-Kohak, was to be found.<sup>2</sup>

The rival claims of Persia and Afghanistan to sovereignty over Sistan caused disputes for many years. Pursuant to the Treaty of Peace of 4 March 1857 between Britain and Persia, the British Government offered to arbitrate on the question of the sovereignty and boundaries of the whole of Sistan on both sides of the Helmand River on the basis of ancient right and present possession.<sup>3</sup> As a result British, Afghan and Persian Commissioners met in Sistan. The Afghan and Persian Commissioners stated and substantiated their claims and local enquiry was made. The Commissioners then proceeded to Tehran to discuss the matter fully. The British Commissioner was required to state his opinion as arbitrator, and it was agreed that should either the Persian or Afghan Government not agree to the opinion of the British arbitrator, reference should be made to the British Government whose decision would be final and binding on both Governments. The Award of Major General Goldsmid, the British Commissioner, was delivered on 19 August 1872.

*Held by Arbitrator Goldsmid* (1) The part of Sistan enclosed on three sides by lakes and on the fourth by the Helmand River, should be included by a special boundary line within the limits of Persia (p. 9).

(2) Persia should not possess the land on the right of the Helmand (p. 9).

(3) The banks of the Helmand to the north of Kohak should be given up to Afghanistan (p. 10).

(4) The main bed of the Helmand below Kohak should be the eastern boundary of Persian Sistan (p. 10).

(5) No works were to be carried out calculated to interfere with the requisite supply of water for irrigation on both banks of the Helmand (p. 10).

*Subsequent facts* Arbitrator Goldsmid's Award was confirmed by the British Secretary of State for Foreign Affairs, and was accepted by

<sup>2</sup> See map in Appendix 3, p. 580.

<sup>3</sup> GB–Persia, Treaty of Peace, Paris, 4 March 1857. Article VI provided: 'In case of differences arising between the Government of Persia and the countries of Herat and Afghanistan, the Persian Government engages to refer them for adjustment to the friendly offices of the British Government, and not to take up arms unless those friendly offices fail of effect.'

the Persian and Afghan Governments in 1873. As final confirming authority of the Award, the British Secretary of State for Foreign Affairs further laid down in 1873, after consulting Arbitrator Goldsmid, that the clause in the Award providing that '[i]t is to be clearly understood that no works are to be carried out on either side calculated to interfere with the requisite supply of irrigation on both sides of the Helmand' was not to be understood to apply either to existing canals or to old or disused canals that it may be desired to put in proper repair, nor to interfere with the excavation of new canals, provided that the requisite supply on both banks was not diminished.

After 1873 changes occurred in the course of the Helmand River and its tributaries causing further disputes, and over time relations between Persia and Afghanistan in this regard once again became strained. An abnormal deficiency of water in the Helmand in 1902 brought matters to a crisis and led to a request for arbitration again by the British Government, on condition that the award rendered would be in accordance with the terms of Arbitrator Goldsmid's Award. The Award of Colonel McMahon, as Arbitrator, was delivered on 10 April 1905.

*Held by Arbitrator McMahon*

*Preliminary remarks* (1) The present Award was restricted by the condition that it had to be in accordance with Arbitrator Goldsmid's Award (p. 11).

(2) That Award was so definite that it was unnecessary to make any attempt to define it further except on one particular point. It provided that Persia had a right to a requisite supply of water for irrigation. In order to prevent future misunderstandings, it only remained to define what amount of water fairly represented a requisite supply (p. 11).

(3) Since the question of the sufficiency of water was serious only during spring crop cultivation when the river was at its lowest, any settlement based on the requirements of that season would also meet the case of the remainder of the year (p. 12).

(4) Calculation of the normal volume of the Helmand River during the spring cultivation season showed that one third of the water of the Helmand River entering Sistan at Band-i-Kamal Khan would amply suffice for the irrigation of all existing cultivation in the Persian part of Sistan, would allow for a large future extension

of that cultivation and would leave a requisite supply for all Afghan requirements (p. 12).

*Award* (1) No irrigation works were to be carried out on either side that were calculated to interfere with the requisite supply of water for irrigation on both banks of the river. Both sides, however, had the right within their own territories to maintain existing canals, to open out old or disused canals, and to make new canals from the Helmand River, provided that the supply of water requisite for irrigation on both sides was not diminished (p. 12).

(2) The amount of water required for irrigation of Persian lands, irrigable from and below Kohak, was one third of the whole volume of the Helmand River which entered Sistan (p. 12).

(3) Persia was therefore entitled to one third of the whole Helmand River calculated at the point where water was first taken off to irrigate lands on either bank situated in Sistan (p. 12).

(4) Any irrigation works constructed by Afghanistan to divert water had to allow for at least one third of the volume of the whole river being available for Persian use at Kohak (p. 12).

(5) To monitor compliance with the Award, and to avoid the necessity of fresh references to the British Government, a British officer with irrigation experience was to be attached permanently to the British Consulate in Sistan. The officer was to be empowered to give an opinion, when required by either party, on any case of doubt or dispute over water questions that might arise. The officer was also to be able to call the attention of either party to any significant indications of danger to their water supply arising from natural causes or their own irrigation works. To enable the officer to fulfil these functions, the officer was to be given free access, by either side, to the Helmand River, its branches and the heads of canals leading therefrom (pp. 12–13).

(6) The maintenance of the dam at Kohak was of great importance to the welfare of Persian Sistan. Should the deepening of the river bed necessitate moving the dam a short distance further up the river, Afghanistan should permit such a move and grant Persia the right to excavate the short canal through Afghan territory required for such an adjustment. Similarly should it become necessary for Afghanistan to move the Shahgul Dam lower down the Pariun River Persia should, as it had done before, allow Afghanistan the requisite right of way through Persian territory (p. 13).

(7) The rights to the Helmand River which Afghanistan's geographical position naturally gave it as owner of the Upper Helmand had been restricted to the extent stated above in favour of Persia in accordance with Arbitrator Goldsmid's Award. It followed that Persia had no right to alienate to any other power the water rights thus acquired without the consent of Afghanistan (p. 13).

(8) The Helmand River in Sistan had always been subject to sudden, significant changes in its course. Great care should be exercised by both countries in the opening out of new canals or the enlargement of old canals leading from the Helmand. Unless that was done with proper precaution it could cause the river to divert itself entirely at such points and cause great loss to both countries (p. 13).

*There follows*

Award of Arbitrator Goldsmid, 19 August 1872	7
Award of Arbitrator McMahan, 10 April 1905	10
<i>Note concerning non-acceptance of Arbitrator McMahan's Award</i>	14

### Award of Arbitrator Goldsmid, 19 August 1872

#### [410] PREAMBLE

The Arbitral opinion which I am required to deliver has been formed after perusal of the several histories of Sistán of more general note; after examination of much oral and written evidence; and after a stay of forty-one days within the localities under dispute. Naturally the more immediate argument with which I have to deal is contained in the statement authoritatively given in by the Persian Government (through the Foreign Office, or Mirza Melkam Khán), and Afghán Commissioners. These have been carefully considered together with the documentary evidence with which they are supported.

I now proceed to summarise my views on the whole Sistán question, and to carry out the instructions with which I have been honoured.

#### SUMMARY

I. Sistán was undoubtedly in ancient times part of Persia, and it appears to have been so especially under the Safavian Kings: but under Ahmad Shah it formed part of the Duráni Empire. Further it had not been recovered to Persia until at a very recent date; and *that* only partially, and under circumstances the nature of which materially affect the present enquiry.

II. Ancient associations, together with the religion, language, and perhaps habits of the people of Sistán Proper, render the annexation of that tract to Persia by no means a strange or unnatural measure. But Persia has no valid claim to possess it on abstract right, [411] whether the country be taken from Afghánistán, or whether it be simply deprived of independence. The period referred to for former connection is too remote. A century of disconnection cannot fail to be a bar to validity.

III. The possession of the Afgháns for the second half-century may have been more nominal than real, and more spasmodic than sustained. It may have been asserted by raids and invasions, or mere temporary tenure: but it has nevertheless a certain number of facts in support; and these are most material in an enquiry of this nature. General principles and theories are always important, but they cannot produce facts: whereas facts have a more practical tendency – for they support and establish general principles and theories. Neither ancient associations nor national sympathy are strong enough to nullify the force of circumstances, and circumstances show that Persia has exercised no interference in the internal administration of Sistán from the days of Nadir Shah until a very recent date.

IV. Geographically, Sistán is clearly part of Afghánistán, and the intrusion of Káin into that province is prejudicial to the delineation of a good natural frontier.

It has been commonly considered part of Herát and Lásh Juwain; though its dependence on the Helmand for irrigation may cause it to be included by some in the general valley of that river. The Neh Bandan Hills manifestly separate Sistán from Persia. I cannot but believe such would have been found to be the *status* had an illustrative map accompanied the sixth article of the Paris treaty.

V. But while, in my opinion, Afghánistán has the advantage in claims on the score of an intermediate tenure, superseding that of Nadir Shah or the Safavian Kings, it cannot be denied that from year to year she has been relaxing her hold over Sistán; and this has been evinced in a marked manner since the death of the Wazír Yar Muhammad. It would be absurd to contend that the second half-century of Afghán connection with the province has been a period of continuous possession. That Sistán has now fallen into the hands of the Amir of Káin can only be attributed to the helplessness of its independence and the personal action of its ruler. It was for a time at least out of the hands of Afghánistán. I do not admit that the manner in which Sistán was occupied by Persian troops corresponds with an appeal to arms such as contemplated by Lord Russell's letter quoted – There was no fair fighting at all. Nor can it be admitted [412] that allegiance was obtained by the single means of military movements or open procedure of any kind. On the other hand, I cannot see that the Afgháns took any measures to counteract the proceedings of Persia when treating with Ali Khán, Taj Muhammad, or other Sistán chiefs.

VI. As the Sistán of the present day is not the separate principality of the past, and it is essential to a due appreciation of claims, that the parts in possession of either side should be intelligibly defined, I revert to a territorial division which has

appeared to me convenient and approximate. By this arrangement the rich tract of country, which, the Hámún on three of its sides and the Helmand on the fourth, cause to resemble an island, is designated, 'Sistán Proper,' whereas the district of Chakhansúr and lands of the Helmand above the Bank, and Sistán desert, are known as 'Outer Sistán.'

The first may be considered in absolute possession of Persia, and has a comparatively large and mixed population.

The second is either without population or inhabited chiefly by Balúchis, some of whom acknowledge Persian, some Afghán sovereignty. The professions of Kamal Khán and Imam Khán do not to my mind prove a possession to Persia, similar to that of Sistán Proper. Chakhansúr on the right bank of the Helmand is under the Afgháns. But the fort of Nad Ali on the same bank has been lately taken by the Persians.

VII. I have to consider ancient right and present possession, and report briefly my opinion on both these heads: 1st. That Sistán was incorporated in the Persia of ancient days: but the Afghánistán of Ahmad Shah, which also comprised Sistán, had not then come into existence; and it is impossible to set aside the fact that this kingdom *did* exist, any more than that Ahmad Shah was an independent monarch. 2nd. That the possession of Sistán obtained in recent days by Persia cannot affect the question of right as regards Afghánistán. If admitted at all under the circumstances, it can only be so subject to certain restrictions, and with reference to the particular people brought under control.

#### ARBITRAL OPINION

Weighing therefore the merits of the case on either side as gathered from evidence of many kinds, and with especial regard to [413] the great advantages of a clearly defined frontier, I submit an opinion that the tract which I have called 'Sistán Proper' should be hereafter included by a special boundary line within the limits of Persia, to be restored to independence under Persian protection, or governed by duly appointed governors. This opinion is accompanied by an expression of the sincere and earnest hope that the Persian rule will prove beneficial to a people whose nominal state has been from time immemorial one of terror, suspense, and suffering.

But I am thoroughly convinced that, by all rules of justice and equity, if Persia be allowed to hold possession of a country which has fallen to her control under such circumstances as these detailed, her possession should be circumscribed to the limits of her actual possession in Sistán Proper, as far as consistent with geographical and political requirements. She should not possess land on the right bank of the Helmand.

If in a question of ancient right and present possession, a military occupation of six or seven years and the previous action of a local chief be suffered to outweigh rights and associations extending more or less over a whole country, and



Arbitration award the most coveted, populous, and richer part of the Sistán province, it is manifestly fair that some compensating benefit should accrue to the losing side.

It appears therefore beyond doubt indispensable that Nád Ali should be evacuated by Persian garrisons, and both banks of the Helmand above the Kohak Band be given up to Afghánistán. And this arrangement becomes doubly just and proper when the character of the inhabitants along the banks of the river is compared with that of the Sistánis of Sekuha, Deshtak, and Sistán Proper.

The main bed of the Helmand therefore below Kohak should be the eastern boundary of Persian Sistán, and the line of frontier from Kohak to the hills south of the Sistán desert should be so drawn as to include within the Afghán limits all cultivation on the banks of the river from the Band upwards.

The Malik Siáh Koh on the chain of hills separating the Sistán from the Karmán desert, appears a fitting point.

North of Sistán the southern limit of the Naizár should be the frontier towards Lásh Juwain. Persia should not cross the Hámún in that direction. A line drawn from the Naizár to the 'Kuh Siáh' (black hill) near Bandan, would clearly define her possessions.

It is moreover to be well understood that no works are to be [414] carried out on either side calculated to interfere with the requisite supply of water for irrigation on the banks of the Helmand.

F. J. GOLDSMID, *Major General, On Special Mission*

[Report: F. J. Goldsmid (ed.), *Eastern Persia: An Account of the Journeys of the Persian Boundary Commission 1870–71–72* (London, MacMillan & Co., 1876), p. 410]

### Award of Arbitrator McMahon, 10 April 1905

#### [283] PRELIMINARY REMARKS

Paragraph 1. – General Sir Frederick Goldsmid, as Arbitrator between Persia and Afghanistan, was called upon to settle the question of rights to land and water of Persia and Afghanistan in Seistan. He delivered an arbitral award on both points in 1872,<sup>4</sup> which was confirmed by Her Majesty's Secretary of State for Foreign Affairs, and accepted by the Persian and Afghan Governments in 1873.

2. At the time of the above award, the Helmand river had one main distributary channel in Seistan, *i.e.*, the Rud-i-Seistan, at the mouth of which, in order to divert sufficient water into this Rud, was a tamarisk band known as the Band-i-Kohak or Band-i-Seistan. The Helmand river from thence onwards flowed in one channel past Nad Ali and along what is now known as the Sikhsar into the Naizar and

<sup>4</sup> See above, p. 7.

Hamun. In 1896 a large flood caused the river to burst out for itself a new main channel, which left the old one near Shahgul and is now known as the Rud-i-Pariun.

3. Various disputes regarding water between Persian and Afghan Seistan, which were caused by changes in the course of canals and in the course of the main [284] river, have arisen since 1872. My enquiries show that these have, until recently, always been mutually and amicably settled by the responsible officials concerned on both sides, *i.e.*, the Governors of Seistan and Chakhansur. These officials, who thoroughly understood each other's water requirements, have always shown great tact and skill in settling water disputes to the mutual satisfaction of both countries.

4. Unfortunately of recent years, whatever may have been the cause, and whether this was due to the changes in the course of the main stream, or to more strained relations, the amicable settlement of water difficulties has been found to be no longer possible. A series of small, and in themselves unimportant, water questions arose between 1900 and 1902, which, by reason of estranged relations, caused mutual misunderstanding and increased ill-feeling, until matters were brought to a crisis by further disputes arising from abnormal deficiency of water in the Helmand in 1902. This led to the present reference to the arbitration of the British Government.

5. The condition under which the present arbitration has been agreed to by the Governments of Persia and Afghanistan is that the award should be in accordance with the terms of Sir Frederick Goldsmid's award.

6. In framing my award I am, therefore, restricted by the above condition.

7. Sir Frederick Goldsmid's award on the water question was as follows: – 'It is to be clearly understood that no works are to be carried out on either side calculated to interfere with the requisite supply of irrigation on both banks of the Helmand.' Her Majesty's Secretary of State for Foreign Affairs, in his capacity as the final confirming authority of that award further laid down in 1873, after consulting General Goldsmid, that the above clause should not be understood to apply either to existing canals or to old or disused canals that it may be desired to put in proper repair, nor would it interfere with the excavation of new canals, provided that the requisite supply on both banks is not diminished.

8. The above award is so definite that it is unnecessary to make any attempt to define it further, except on one particular point. This award provides that Persia has a right to a requisite supply of water for irrigation. In order to prevent future misunderstandings, it only remains to define what amount of water fairly represents a requisite supply for Persian requirements.

9. From the careful and exhaustive measurements, observations, and enquiries made by this Mission in Seistan, the following facts have been clearly established: –

(a) Seistan suffers more from excess than deficiency of water. Far more loss is caused by damage done to land and crops year after year by floods, than is caused by want of water for irrigation.