

HONDURAS

REPLY OF THE UNITED STATES TO THE HONDURAN CLAIM OF SOVEREIGNTY OVER THE SWAN ISLANDS¹

811.0141 SW 2/172

The Acting Secretary of State to the Honduran Minister (Cáceres)

WASHINGTON, August 12, 1940.

SIR: I have the honor to refer to your note no. 85 of October 4, 1938,² which was acknowledged by this Department in its communication of October 25, 1938,³ and to previous communications regarding the Honduran claim to the Swan Islands.

Since the receipt of your note of October 4, 1938 under reference, the appropriate officers of this Government have made a careful study of the arguments advanced therein in support of the Honduran claim to sovereignty over the Swan Islands, due consideration having been given at the same time to the statements contained in previous communications on the same subject from the Government of Honduras, namely, note of November 15, 1923, from the Honduran Foreign Office to the American Legation in Tegucigalpa⁴ and note of December 12, 1935, from the Legation of Honduras in Washington to the Department of State.⁵ The views of the Government of Honduras have been given the most careful consideration, and my Government feels it desirable to set forth below the conclusions reached after a careful review of the pertinent facts and circumstances.

There was enclosed with the note of the Honduran Government of November 15, 1923, to the American Minister in Tegucigalpa, the text of a Report on the Swan Islands, dated June 11, 1923,⁶ made by a Commission which was appointed for that purpose under the provisions of the Legislative Decree No. 57, of February 23, 1922. In as much as the subsequent communications of the Honduran Government on the subject, namely, notes of December 12, 1925 [1935] and October 4, 1938 from the Honduran Legation in Washington to the Department of State, are based in large measure on the arguments

¹ For previous correspondence, see *Foreign Relations*, 1939, vol. v, pp. 650 ff.

² *Ibid.*, 1938, vol. v, p. 650.

³ Not printed.

⁴ Not printed; for a brief summary of this note, see Green H. Hackworth, *Digest of International Law*, vol. I, p. 519.

⁵ *Foreign Relations*, 1935, vol. iv, p. 750.

⁶ *Las Islas del Cisne* (Tipo-Litografía y Fotograbado Nacionales, Tegucigalpa, 1926).

and data contained in that Report, an effort has been made to examine those data with a view to determining their pertinence to the point at issue, and to consider the arguments in the light of generally accepted doctrines of international law.

The Legation's note of October 4, 1938 states that titles of dominion and possession of Honduras over Swan Islands, as part of the territory comprising it (Honduras), descended from the time immemorial when Spain discovered and "took possession" of the said islands. The Honduran Report of June 11, 1923 states:

"It has been impossible to find exact documentary proof of the date of discovery of these islands or the name of their discoverer. But it can be safely stated that they were discovered in the same period as the Lesser Antilles, that is, before 1520."

From the fact that the early cartographers and navigators refer to certain islands called San Millán or Santanilla located in the approximate position of what are now known as the Swan Islands, it is only reasonable to assume that they were in fact seen by early explorers. No evidence, however, has been submitted that Spain ever took possession of the islands, as stated in the note of October 4, or that they were ever occupied or administered by that country.

Reference is made in various passages of the Honduran Report under discussion, to the fact that early cartographers included the islands of San Millán or Santanilla in their maps. No particular political significance may be attached to this fact and it has little or no bearing on the actual question of sovereignty. In this connection, your attention is called to the following statement with respect to the value of maps which was made by Secretary of State Fish in a communication to Stephen Preston, Minister of the United States to Haiti,⁷ of December 31, 1872:⁸

"It is difficult to understand why the specification in or omission of Navassa from any maps ancient or modern, or a mere statement of the position of that island by geographers could give to any nation a right to sovereignty over it."

Additional evidence of the negative value of the mere fact of the inclusion of an island in maps, without any indication of its political status, is found in the award of the Arbitrator, Max Huber, a Swiss citizen, in the Palmas Island arbitration between the United States and the Netherlands,⁹ who states:

⁷ Actually Stephen Preston was the Haitian Minister in the United States.

⁸ Not printed; see John Bassett Moore, *A Digest of International Law*, vol. 1, p. 266.

⁹ For text, see Permanent Court of Arbitration, *Arbitral Award Rendered in Conformity with the Special Agreement concluded on January 23rd, 1925 between the United States of America and the Netherlands Relating to the Arbitration of Differences Respecting Sovereignty over the Island of Palmas (or Miangas), April 4th, 1928* (International Bureau of the Permanent Court of Arbitration).

"Any how, a map affords only an indication—and that a very indirect one—and, except when annexed to a legal instrument, has not the value of such an instrument, involving recognition or abandonment of rights."

At various places in the Honduran Report of June 11, 1923, as well as the communications of the Honduran Government dated November 15, 1923 and October 4, 1938, it is stated that the Swan Islands are within territorial waters of Honduras. In both of the Honduran notes just referred to the statement is made that the map "The West Indies with the Gulf of Mexico and Caribbean Sea", published in June 1892 by the United States Hydrographic Office placed the Swan Islands in the territorial waters of Honduras. In the Report and the 1938 note reference is also made to the *Central American and Mexican Pilot* (East Coast) published in 1920 by the United States Hydrographic Office and it is stated that the book declares the islands to be located in Honduran territorial waters. I am obliged to call to your attention that neither of these documents places Swan Islands in the territorial waters of Honduras, as stated.

The 1892 map without containing any indication whatever of sovereignty merely places the islands in their true geographical position in the Caribbean Sea outside of the Gulf of Honduras. This position, it will be noted, is nearly 100 miles off the closest part of the Honduran coastline. The only statement made on the map with respect to the islands is the parenthetical remark "flat and woody".

Similarly the *West Indies Pilot* contains no statement regarding sovereignty over the islands. This publication is of course entirely non-political in character and is issued solely as an aid to mariners. It does not state that the islands are in the territorial waters of Honduras but merely states that the "islands are situated 98 miles northward of Patuca point, the nearest part of the coast". It refers to the Swan Island Light maintained by the United Fruit Co. (an American company) and to the radio station also maintained by that company on Great Swan Island. It also refers to a settlement on the western island and to a flagstaff there and states that the inhabitants are engaged chiefly in the cultivation of coconuts. While it is not so stated in this publication the coconuts were cultivated by an American concern and the flagstaff was used to fly the American flag.

The Swan Islands are 98 statute miles from the nearest point on the coast of Honduras and over 128 statute miles from the nearest Bay Island, and this Government is aware of no principle of international law which would warrant the claim that they are within the limits of Honduran territorial waters. On the contrary, Swan Islands are situated in the Caribbean Sea outside the territorial waters of Honduras.

The Honduran Government has also advanced arguments asserting a claim to sovereignty over the Swan Islands on the grounds of contiguity, or adjacency to the mainland of Honduras, or to its island possessions. In all three of the Honduran communications under consideration, extensive discussion is devoted to this proposition.

It is pointed out that the constitutions of December 11, 1825 and February 4, 1848, in describing the boundaries of the State include the "islands adjacent to its coasts in both seas." From this, the assumption is drawn, which in the opinion of this Government is entirely unwarranted, that jurisdictional acts performed by officials of the Spanish Government, and subsequently by officials of the Honduran Government with reference to the North Coast of Honduras and what are known as the Bay Islands, constituted an exercise of sovereignty over the Swan Islands. The Swan Islands, it will be recalled, are even more remote from the Bay Islands than from the Honduran mainland. Nowhere is it shown that the various decrees and administrative acts cited included any specific reference to the Swan Islands. The apparent assumption of the Honduran Government that such acts and decrees were applicable to the Swan Islands is therefore difficult to understand.

With regard to the question of the extension of sovereignty to off-shore islands on grounds of contiguity, it is desired to invite the attention of the Government of Honduras to certain opinions of authorities on international law on the subject. The arbitrator in the Palmas Island arbitration between the United States and the Netherlands states on page 39 of his decision :

"... Although States have in certain circumstances maintained that islands relatively close to their shores belonged to them in virtue of their geographical situation, it is impossible to show the existence of a rule of positive international law to the effect that islands situated outside territorial waters should belong to a State from the mere fact that its territory forms the terra firma (nearest continent or island of considerable size). Not only would it seem that there are no precedents sufficiently frequent and sufficiently precise in their bearing to establish such a rule of international law, but the alleged principle itself is by its very nature so uncertain and contested that even Governments of the same State have on different occasions maintained contradictory opinions as to its soundness. The principle of contiguity, in regard to islands, may not be out of place when it is a question of allotting them to one State rather than another, either by agreement between the Parties, or by a decision not necessarily based on law; but as a rule establishing *ipso jure* the presumption of sovereignty in favour of a particular State, this principle would be in conflict with what has been said as to territorial sovereignty and as to the necessary relation between the right to exclude other States from a region and the duty to display therein the activities of a State. Nor is this principle of contiguity admissible as a legal method of

deciding questions of territorial sovereignty; for it is wholly lacking in precision and would in its application lead to arbitrary results."

On this subject, Westlake¹⁰ states, page 166 [116]:

"If an island lies entirely outside the range of territorial water measured from the mainland or from any other island, the original acquisition of title to it or to any part of it must depend on the same principle as the original acquisition of title to a part of a continent."

It is believed that reference may also appropriately be made to the statement in Moore's *International Law Digest*, Vol. I, page 265, on contiguity:

"The question of a claim of title on the ground of contiguity 'may be regarded as generally defined by the celebrated correspondence of Mr. Webster with the Peruvian Government, in 1852,¹¹ in the Lobos Islands controversy, in which Mr. Webster laid down the proposition that inasmuch as according to 'the well-settled rule of modern public law, the right of jurisdiction of any nation whose territories may border on the sea, extends to the distance of a cannon-shot, or three marine miles from the shore, this being the supposed limit to which a defence of the coast from the land can be extended,' the whole discussion must turn upon this, viz: 'The Lobos Islands lying in the open ocean, so far from any continental possessions of Peru as not to belong to that country by the law of proximity or adjacent position, has the Government of that country exercised such unequivocal acts of absolute sovereignty and ownership over them as to give her a right to their exclusive possession, as against the United States and their citizens, by the law of undisputed possession?' . . ."

In the introduction to the Honduran Report of 1923, as well as in various passages of the body of the Report, and in the notes of 1923 and 1938 previously referred to, the statement is made that the Swan Islands form part of the archipelago of the Bay Islands. In these same documents references are made to administrative acts carried out by the Government of Honduras with respect to the Bay Islands as indicative of the exercise of sovereignty over the Swan Islands. Also, considerable weight is attributed to the Wyke-Cruz Treaty of November 28, 1859,¹² by which the Government of Great Britain undertook to withdraw from the Bay Islands, which it had previously occupied.

With regard to the geographical aspect of the question whether the Swan Islands can properly be included in the Bay Islands, it should be sufficient to point out once more that the Swan Islands are approxi-

¹⁰ John Westlake, *International Law: Peace* (Cambridge, 1904), pt. I, p. 116.

¹¹ For full text of Webster's note of August 21, 1852, see William R. Manning, *Diplomatic Correspondence of the United States: Inter-American Affairs, 1831-1860*, vol. x, p. 241.

¹² *British and Foreign State Papers*, vol. XLIX, p. 13.

mately 128 statute miles from the nearest of the Bay Islands. In so far as the Wyke-Cruz Treaty is concerned, Article I thereof states:

“ . . . Her Britannic Majesty agrees to recognize the islands of Roatán, Guanata, Elena and Barbareta and Morat, known as the ‘Bay Islands’ and located in the Bay of Honduras.”

The fact that the islands comprising the group known as the Bay Islands are specifically mentioned by name, and that no reference is made to the Swan Islands, is significant. *Expressio unius est exclusio alterius*. If Swan Islands had been considered as belonging to or forming part of the Bay Islands, they would have been specifically named. It cannot be admitted that they form a part of the Bay Island group. Consequently, it is not considered that references to acts or decrees applicable to the Bay Islands are of any value in the present discussion.

Similarly, references are made in the Honduran documents cited, to the provisions of Article I of the Clayton-Bulwer Treaty of April 19, 1850,¹³ presumably in an effort to establish that the United States recognized by this instrument that the Swan Islands formed a part of the territory of Honduras. The only provisions of a geographical nature in this treaty are found in Article I, where reference is made to “Nicaragua, Costa Rica, the Mosquito coast, or any part of Central America”. Nothing is contained in the said treaty with respect to the boundaries or claims of any of the Central American countries, thus excluding any pertinence to the question at issue.

In the Honduran Report of 1923, after quoting the text of the Arbitral Award of the King of Spain of December 23, 1906,¹⁴ in the boundary dispute between Honduras and Nicaragua, it is stated that: “This Award, which was accepted by both parties, therefore leaves the Swan Islands within the jurisdiction of Honduras . . .”. Again, in the 1938 note, it is stated in paragraph (h): “I should not fail to mention that the acts of sovereignty and jurisdiction of Honduras over the said Swan Islands are reaffirmed by administrative provisions passed on the recording of land titles by the Government of Honduras in 1907, in execution of the Award of His Majesty the King of Spain of December 23, 1906 . . . the Swan Islands thus remaining in Honduras, as is understood”.

A reference to the Award of the King of Spain is also made in the 1923 note. A perusal of the Award reveals that it refers solely to the land boundaries between Honduras and Nicaragua. It provides that:

¹³ Hunter Miller (ed.), *Treaties and Other International Acts of the United States of America*, vol. 5, p. 671.

¹⁴ *British and Foreign State Papers*, vol. c, p. 1096.

"The extreme boundary point on the coast of the Atlantic shall be the mouth of the river Coco, Segovia or Wanks in the sea near Cape Gracias á Dios, considering as the mouth of the river that of its principal channel between Hara and the island of San Pío where is found the said Cape, Honduras retaining the islets or keys existing within the said principal channel before reaching the bar, and Nicaragua keeping the south shore of the said principal mouth with the above mentioned island of San Pío and also the Bay and town of Gracias á Dios and the channel or inlet called Gracias which goes to the Bay of Gracias á Dios between the continent and the above mentioned island of San Pío.

"From the mouth of the Segovia or Coco the border line will follow the midstream or thalweg of this river upstream without interruption as far as the point of its confluence with the Poteca or Bodega and from that point the said border line will leave the Segovia River continuing along the midstream of this said tributary Poteca or Bodega and continuing upstream until its junction with the Guineo or Nomasli River.

"From this junction the border line will take the direction corresponding to the demarcation of the place of Teotecacinte in accordance with the delimitation made in 1720, ending in the Pass of Teotecacinte, in such manner that the said place remains wholly within the jurisdiction of Nicaragua."

The precise terms of the Award limit its effect to "the extreme boundary point on the coast of the Atlantic". It does not appear that the Award has any bearing on the question of the sovereignty over the Swan Islands.

The 1923 Honduran Note states:

"Even in 1912 the Government of Honduras was deeply interested in the administration of the Swan Islands but could do nothing in that respect at that time, nevertheless those islands were not outside the realm of law as the Civil Code, the Customs Code, the Police Regulations and the regulations governing control over ports contain provisions relative to permission to disembark only in ports opened for such purpose, and disembarking at other points of the coasts incur penalties for those responsible, except in special cases. In this sense disembarking on the aforementioned islands is prohibited."

Neither the texts of the laws and regulations referred to in the above quotation, nor of the administrative provisions passed on the recording of land titles by the Government of Honduras in 1907 in execution of the award of the King of Spain, have been furnished, and it is not shown that they specifically mentioned Swan Islands. It is probable that here, as elsewhere, it is merely assumed that they covered these islands. However, even if these various measures had in terms been made applicable to Swan Islands, such action would have had no validity since at the time the islands were under the sovereignty of the United States.

The 1923 note mentions and the Honduran report contains the text of a letter dated March 8, 1861 addressed by the Commandant at Trujillo to the firm of W. Guild and Company of Belize, in which the Commandant stated that he had information that guano existed in considerable quantities in "Santanillas" Islands; that to verify this he was sending a commission to examine them and that if the information turned out to be correct there would be another product to offer to the company. It does not appear that the matter was further developed with the company. While this letter would indicate that the Commandant thought that Santanilla (Swan) Islands were within the jurisdiction of Honduras, it would not, of course, have the effect of placing the islands under Honduran jurisdiction if, at the time, such jurisdiction did not in fact exist.

It is stated in paragraph (f) of the 1938 note that "It would be proper to note, among other acts of jurisdiction, that in March 1861, military authorities from Trujillo sent a commission to reconnoiter the Santanilla Islands, then so called, now Swan Islands . . .". Details of the expedition are not given. It cannot be conceded that a "reconnoitering" expedition would have any particular bearing on the question of sovereignty. Furthermore, at that time the islands were occupied by American citizens and had been for several years.

Elsewhere in the Honduran case references are made to concessions stated to have been granted to certain individuals for the exploitation of the Swan Islands, but there is no evidence that any of the alleged concessionaires actually occupied, or exploited, or even landed on the islands. In the 1923 note it is set forth that:

"According to the data of Major Edward A. Burke, who was in the employ of the Government of Honduras in 1903 and 1904, making investigations in the national archives, there existed in the years 1835 to 1837 a concession for the right to exploit mineral phosphates and guano for a certain number of years in the Swan Islands granted to an American company."

The 1923 Report states that the information concerning this concession was contained in a letter of August 15, 1921, from Major Burke to the Honduran Minister for Foreign Affairs. The authors of the report state that they were unable to find the documents to which Major Burke refers. The other concessions referred to, namely, one granted on September 1, 1854 to Augustin Follin for the purchase of unappropriated lands of the state, including those on islands, and another granted May 28, 1888, to Jacobo Baiz for the exploitation of guano on islands belonging to the state, do not name Swan Islands specifically, and the assumption that the concessions included the Swan Islands is not warranted.

The origin of the claim of Honduras over Swan Islands is based upon the assertion that they were discovered by early Spanish

explorers or navigators. As has already been noted, the Legation's note of October 4, 1938 states that "titles of dominion and possession of Honduras over the Swan Islands, as part of the territory composing it, descend from the time immemorial when Spain discovered and took possession of the said islands". The Honduran Government admits that the date of the discovery and the name of the discoverer are not known.

It is probable that the islands were first seen by Spanish subjects. However, no evidence has been submitted establishing that possession was ever taken of the islands. In fact it has nowhere been established in the Honduran presentation of the case that either Spain, Honduras, or any intervening government ever took possession, occupied, or exercised dominion over Swan Islands prior to the acquisition of sovereignty thereover by the United States. The Government of the United States cannot admit that sovereignty is acquired by discovery alone.

Not only do the modern authorities on international law recognize that discovery alone is not sufficient to confer sovereignty, but this was also recognized by earlier authorities.

Grotius in *Mare Liberum*, written in 1608, states that "to discover a thing is not only to seize it (*usurpare*) with the eyes but to take real possession of it. The grammarians accordingly use discover (*invenire*) and occupy (*occupare*) as having the same meaning. Natural reason, the precise words of the law, and the interpretation of scholars all show clearly that discovery suffices to give a title of lordship only when it is accompanied by possession".

Vattel states that "Thus, navigators going on voyages of discovery, furnished with a commission from their sovereign, and meeting with islands or other lands in a desert state, have taken possession of them in the name of their nation, and this title has been usually respected, provided it was soon after followed by a real possession."¹⁵ (Underlining supplied.)

It is believed that it will be of particular interest also to consider the following statement made by King Charles I of Spain in a letter written in 1523 to D. Juan de Zuniga, "pues estaba manifesto que hallar requeria aprension, y no se decia ser hallado lo que no fue tomado ni aprendido, aunque fuese visto ó descubierto" (*Colección de los viages y descubrimientos que hicieron por mar los españoles coordinada é ilustrada por D. Martín Fernandez de Navarrete*; Madrid, Imprenta Nacional, 1837, Tome IV (*Expediciones al Maluco*, P. 316)). ("it was thus manifest that to find required seizure, and that which was not taken or seized, was not said to be found, even though it were seen and discovered") (*Collection of voyages and discoveries made by sea by the Spaniards*, collected and illustrated by D. Martín Fernandez

¹⁵ Emmerich de Vattel, *The Law of Nations* (Seventh American Edition, Philadelphia, 1849), p. 99.

de Navarrete; Madrid, National Press, 1837, Vol. IV (*Expedition to Maluco*, P. 316)). It is believed that great weight can properly be attributed to this declaration made by the Spanish Monarch at the very time when the Spanish explorations and discoveries were being carried out in the region where the Swan Islands are situated and during the epoch when it is contended by the Honduran Government that the islands were first discovered.

Attention is called to the arbitral decisions in the Clipperton Island case and the Palmas (or Miangas) Island case, respectively. Each of these cases involved issues substantially similar to those surrounding the case now under discussion with Honduras and in each instance discovery was alleged to have been made by early Spanish explorers. In each case the position was taken by the arbiter that discovery alone was not sufficient to establish sovereignty.

The first case involved a dispute between the Governments of France and Mexico to sovereignty over Clipperton Island. The arbitral award was rendered in Rome, January 28, 1931, by the King of Italy. The English text of this decision is printed in the *American Journal of International Law*, Volume 26 (1932), commencing on page 390. The arbiter decided that "the sovereignty over Clipperton Island belongs to France, dating from November 17, 1858". The decision contained the following statement:

"In law, it is opportune to examine, in the first instance, the principal thesis maintained by Mexico that Clipperton Island already belonged to her before France had proclaimed her sovereignty over the said island. If this claim should be recognized as founded, it would be necessary to conclude that the occupation of the said island by France was unlawful.

"According to Mexico, Clipperton Island, which had been given the name of the famous English adventurer who, at the beginning of the 18th century, used it as a place of refuge, was none other than Passion Island, called also Medano or Medanos Island, that this island had been discovered by the Spanish Navy and, by virtue of the law then in force, fixed by the Bull of Alexander VII, had belonged to Spain, and afterwards, from 1836, to Mexico as the successor state of the Spanish state.

"But according to the actual state of our knowledge, it has not been proven that this island, by whatever name one may call it, had been actually discovered by the Spanish navigators. That they might have known it before the log-books on board the French vessels *La Princesse* and *La Découverte*, dated in 1711, had identified and described it, is a conjecture more or less probable, but from which one cannot draw any decisive argument. However, even admitting that the discovery had been made by Spanish subjects, it would be necessary, to establish the contention of Mexico, to prove that Spain not only had the right, as a state, to incorporate the island in her possessions, but also had effectively exercised the right. But that has not been demonstrated at all. Mexico produces to support her thesis a geographical map printed from the Archives of the Mexican Society of Geography and

Statistics, where the island figures as comprised within the 'Political and Military Governments of Spain in North America.' But the official character of this map cannot be affirmed, because it is not certain that it was drawn by order and under the care of the state, or because the manuscript memorandum which one reads there, namely, that it was used at the Royal Tribunal of the Consulate of Mexico, does not confer official character upon it.

"Moreover, the proof of an historic right of Mexico's is not supported by any manifestation of her sovereignty over the island, a sovereignty never exercised until the expedition of 1897; and the mere conviction that this was territory belonging to Mexico, although general and of long standing, cannot be retained.

"Consequently, there is ground to admit that, when in November, 1858, France proclaimed her sovereignty over Clipperton, that island was in the legal situation of *territorium nullius*, and, therefore, susceptible of occupation."

The other case which was submitted to the Permanent Court of Arbitration involved a dispute between the Governments of the United States and the Netherlands to sovereignty over the Island of Palmas (or Miangas). The arbiter, Mr. Max Huber, rendered his opinion on April 4, 1928 awarding the island to the Netherlands. The arbiter in his decision in part stated that "the title of discovery . . . would, under the most favorable and extensive interpretation, exist only as an inchoate title, as a claim to establish sovereignty by effective occupation. An inchoate title, however, cannot prevail over a definite title founded on continuous and peaceful display of sovereignty". The English text of the opinion in this case is printed in the *American Journal of International Law*, Volume 22 (1928), commencing on page 867, and also in *The Hague Court Reports* (second series) of the Carnegie Endowment for International Peace, commencing on page 81 [83].

The Honduran Report of 1923, contains the following statement:

"Although the note of the American Legation of August 11, 1921,¹⁶ says that American citizens discovered the Swan Islands and have remained in full possession since, the same note implicitly admits that the said islands do not belong to the United States since it is stated that 'in the opinion of this Government it would be very easy to arrive at a satisfactory settlement of the dispute between the two Governments if Honduras refrained from any attempt to take possession of the islands, thus maintaining for the present the *status quo*'. If the United States tried to defend the Swan Islands as being its own territory, it would not have offered the settlement that is found in the note."

Obviously, the proposal of this Government was made solely for the purpose of avoiding the development of a situation which might

¹⁶ Honduras, *Memoria de la Secretaría de Estado en el Despacho de Relaciones Exteriores* . . . 1920-1921 (Tipografía Nacional, Tegucigalpa, 1922), p. 200.

affect adversely the harmonious relations of the two Governments, and it cannot be admitted that it implied an abandonment of the claim of this Government to sovereignty over the islands.

Paragraph (*j*) of the Legation's note of October 4, 1938 states:

"(*j*) Finally, referring to the view made public that the United States bases its sovereignty over the said Swan Islands on an opinion of the Department of Justice issued in 1925, I would take the liberty to indicate, without desiring to abuse Your Excellency's recognized kindness, that the Secretary of the Navy expressed the opinion on February 8, 1918 (Op. 216) that the United States had not acquired sovereignty of any nature over the said Swan Islands and that the law of August 19 (18), 1856, known as the Guano Island Act, which is invoked by the Opinion of 1925, only refers to discoveries of deposits of guano on islands, rocks, promontories, or keyes which 'are not within lawful jurisdiction of any other Government, and are not occupied by the citizens of any other Government', wherefore, and in view of the facts noted above, the sovereignty of the United States could not be extended over the said Swan Islands."

The opinion of February 8, 1918, referred to in this paragraph of the note of October 4, 1938 was not as stated an opinion of the Secretary of the Navy but was one given by the Attorney General of the United States at the request of the Secretary of the Navy. It is printed in Volume 31, Opinions of the Attorney General, commencing on page 216. In giving this opinion, the Attorney General relied on the statement of facts, subsequently found to have been incomplete, as submitted to him and it was rendered without knowledge of the certificate of February 11, 1863 issued on behalf of the President of the United States by Secretary of State Seward pursuant to the provisions of the Guano Act of 1856. (The facts with regard to the issuance of this certificate are given elsewhere in this communication.) Speaking then, without knowledge of the issuance of the certificate, the Attorney General says:

"It nowhere appears, however, that any executive action was taken by the President or on his behalf, through the Secretary of State, at any time, which could be construed as an exercise of the discretion conferred upon the President by the Act of August 18, 1856, such as to amount to a declaration that the Swan Islands were considered as appertaining to the United States."

However, the Attorney General also said, after reviewing the history of the occupation of the islands by American citizens:

"These facts and circumstances are sufficient in my opinion to warrant the statement that no other country has any proper claim to these islands, and that the United States Government may at any time assert its sovereignty over them by appropriate action."

The matter was re-submitted to a later Attorney General whose attention was called to the certificate of Secretary of State Seward

of February 11, 1863. In an opinion dated June 24, 1925 (34, Opinions Attorney General, 507),¹⁷ the Attorney General after reciting the history of the occupation of Swan Islands by American citizens and the pertinent actions of the Government of the United States with respect to the island held that "the dominion of the United States Government was extended over the Swan Islands by the President, as evidenced by the certificate of Secretary Seward, dated February 11, 1863, and that the sovereignty of the United States attached to said islands as of that date."

A copy of the opinion of the Attorney General of June 24, 1925 is attached as Annex A.¹⁸

The Act of Congress of the United States of August 18, 1856 (Chapter 164, 11 U. S. Statutes at Large, page 119), known as the Guano Act, which is also contained in sections 5570 to 5578 of the Revised Statutes of the United States and, as amended, is also printed in Title 48 of the U. S. Code, sections 1411-1419, provided the method by which jurisdiction may be acquired and the dominion of the United States extended over unoccupied and unclaimed islands containing guano deposits. It provides certain conditions which must be complied with by the discoverer of guano, or those claiming through him, and when such conditions have been complied with the President may in his discretion consider the same as appertaining to the United States.

For the information of the Honduran Government, the text of the Guano Act of 1856 is attached as Annex B. Section one of the act provides:

"Whenever any citizen of the United States discovers a deposit of guano on any island, rock, or key, not within the lawful jurisdiction of any other government, and not occupied by the citizens of any other government, and takes peaceable possession thereof, and occupies the same, such island, rock, or key may, at the discretion of the President, be considered as appertaining to the United States."

Following the passage of the Guano Act, a claim to Swan Islands was presented to the Department of State in a letter from Joseph W. Fabens, dated May 19, 1857, in which he stated that he had discovered deposits of guano thereon; that he and his associates were desirous of organizing a company to bring away the guano deposits on the islands referred to and inquired concerning the steps to be taken in order that he and his associates might be entitled to occupy the islands in question. The Secretary of State, under date of May 25, 1857, requested the opinion of the Attorney General as to the proper con-

¹⁷ Also printed in *Foreign Relations*, 1927, vol. II, p. 532.

¹⁸ Annexes not printed here.

struction to be placed upon the Act of August 18, 1856, particularly as to the time when and the extent to which alleged discoverers of guano may fairly request intervention of the President. The Attorney General in an opinion dated June 2, 1857 (9, Opinions Attorney General, page 30) enumerated the facts upon the establishment of which the President might consider an island as appertaining to the United States and protect the rights of the discoverer thereof. The opinion of the Attorney General was brought to the attention of Fabens, and on the 18th of June, 1857, Joseph W. Fabens and Charles Stearns wrote to the Department of State transmitting affidavits of George V. White and Samuel E. Stearns, together with an assignment of their rights in the islands to Fabens and Charles Stearns, and an associate, General Duff Greene. The affidavit of White, dated June 16, 1857, set forth that on the third day of April 1857 he had landed on Swan Island, where he had found "certain deposits of guano and accordingly took possession of the same in the name of the United States according to the provisions of the Act of Congress relative to guano discoveries." The affidavit of Samuel E. Stearns, dated June 17, 1857 corroborated the evidence submitted by George V. White. Subsequently Joseph W. Fabens, Charles Stearns and Duff Greene created a corporation under the laws of the State of New York by the name of the "Atlantic and Pacific Guano Company", in which company was merged all their rights, title, and interest in and to the Swan Islands and the guano deposits thereon. There are several reports in the Department's files showing that the company was engaged in shipping guano from the Swan Islands during the year 1858.

The Atlantic and Pacific Guano Company by deed of October 4, 1862, conveyed its interests in the islands to George I. Crooker, who, by deed dated October 6, 1862, conveyed the title thereto to the New York Guano Company, a corporation organized under the laws of the State of New York. Fabens and his wife quitclaimed their interest on November 24, 1862, to the New York Guano Company. The latter company in December 1862 presented its bond to the Department and asked for recognition under the Act of August 18, 1856. On January 31, 1863 the Department received from the New York Guano Company additional affidavits, maps, and papers in support of the company's claim. There was included an affidavit executed December 31, 1862 by Thomas P. Morgan, stating that in August 1858 he assisted Lieutenant George T. Sinclair, United States Navy, who was stated to have been detailed for the purpose by the Navy Department, and Thomas Walter, chemist, in making a survey of the Swan Islands and that Lieutenant Sinclair estimated the quantity of guano to be in excess of three million tons, yielding from forty to sixty-nine per cent of phosphate of lime. Included in the documents submitted were transcripts from the log of the schooner *Harry Maybee*, which had

been sent to the Swan Islands, in which there is contained a detailed account of the activities of the representatives of the Atlantic and Pacific Guano Company in extracting guano covering the period January 28, 1857, to March 18, 1858. Honorable William H. Seward, Secretary of State, under date of February 18, 1863, in response to a communication of February 10, 1863 from V. A. Baldwin, regarding the recognition of the claim of the New York Guano Company, stated as follows:

"I have to acknowledge the receipt of your letter of yesterday relative to the recognition of the claim of the New York Guano Company to the guano on Swan Islands and in reply to transmit herewith a certificate under the seal of the Department on the subject."

The certificate referred to, a copy of which is in the possession of the Department, reads as follows:

"To all to whom these presents shall come, Greeting:

"I certify that the New York Guano Company have filed in this Department satisfactory proof of their claim to the guano on great and little Swan Islands in the Caribbean Sea as the assignees of the original discoverers; have filed the bond, and taken the steps required by the Act of Congress of the 18th of August 1856 entitled 'An Act to authorize protection to be given to citizens of the United States who may discover deposits of guano.'

"In testimony whereof I have hereunto set my hand and caused the seal of the Department of State to be affixed at Washington, this 11th day of February in the year of our Lord eighteen hundred sixty-three."

The Supreme Court of the United States has held (*Jones v. United States*, 137 U. S. 202, 217, 222) that the act of the Secretary of State in issuing a proclamation (or certificate) of this nature is in legal contemplation of the act of the President, under the first section of the Guano Act of 1856, and that the proclamation (or certificate) is considered as equivalent to a declaration that the President considered the island or islands covered thereby as appertaining to the United States.

Subsequently, the rights of the New York Guano Company were transferred to John M. S. Williams by deed of October 13, 1870; by Mr. Williams and wife to the Pacific Guano Company by deed of December 18, 1882, and by William E. Stowe and Charles E. Morrison, assignees and trustees for the benefit of the creditors of the Pacific Guano Company (under an assignment made by the Corporation to John C. Ropes on February 7, 1889) to Warren K. Blodgett, of Cambridge, Massachusetts, by quitclaim deed of December 4, 1895. Mr. Blodgett in turn conveyed his interests to the Albion Chemical Exporting Company of Boston by deed of July 1, 1902.

On March 14, 1904 there was filed with the Secretary of State the sworn statement of Alonzo Adams with regard to the abandonment of the Swan Islands on February 5, 1904 by the Albion Chemical

Export Company by whom he had been employed as manager on the islands and the repossession and occupation of the islands by him on the following day. On November 27, 1908 Adams conveyed his rights to the Swan Islands Commercial Company of Boston, Massachusetts, a corporation organized under the laws of the State of Maine. On May 1, 1922 the Department of State received from the firm of Dunbar, Nutter and McClennen of Boston, Massachusetts, a copy of a deed of conveyance by which the Swan Island Commercial Company assigned its interest in the island to the Swan Island Trustees.

In addition to the utilization of Swan Islands for the extraction of guano, the raising of coconuts and other purposes by the various owners referred to above, the records of the Department of State indicate that the Tropical Wireless Company, a subsidiary of the United Fruit Company, erected a wireless telegraph station on the islands early in 1908, which operated until 1927, when the wireless station was abandoned. It is understood, however, that the United Fruit Company has since that time regularly employed a caretaker to protect its property remaining on the islands.

Additional information with regard to occupation of the islands by American citizens is found in a letter of August 19, 1922, from Captain Martin Anderson of Brooklyn, New York, who stated that "In the year of 1887, month of July, I shipped as sailor in Mobile, Alabama, on the schooner *Moskito*, owned by a Boston company. We went to Swan Island with general cargo and provisions for the working men who worked on the island—300 men. The Island and schooner was owned by the Company and the American Flag was flowing on the island at that time Captain Adams of the *Moskito* was the superintendent in charge"; and in a letter dated August 31, 1922 from Mrs. Grace Rowley Parker, Bradentown, Florida, who stated "In February 1901, my husband, H. A. Parker (see *Who's Who in America*, 1910) and daughter landed at Swan Island—the western one. Captain Adams was there with eight colored men and the U. S. flag was flying. It was flying every day we were there, and it was Captain Adams' constantly expressed pride that he would hold the island for the United States."

In addition to the foregoing evidence of effective occupation of the Swan Islands by American citizens, there have been a series of acts and statements by the Government of the United States since the issuance of the certificate of February 11, 1863 which conclusively establish the animus of this Government to retain its sovereignty over the Swan Islands.

The Secretary of the Treasury issued, on February 12, 1869, Customs Circular No. 1, relative to the guano islands appertaining to the United States, which contained a list of such islands bonded under the Act of August 18, 1856, including the Swan Islands. The Customs Cir-

cular contained the statement that "as the laws of the United States forbid foreign vessels in engaging in the coasting trade and as commercial intercourse with these islands thus form a part of said trade, you are hereby requested to use all due diligence to prevent the infraction of any law or regulation upon that subject."

In a letter from the Treasury Department to the Collector of Customs at Key West, dated September 14, 1893 it was stated that the Treasury Department had considered the question of the liability to duty of tobacco imported from the Swan Islands and that the Solicitor of the Treasury Department had expressed the opinion that "as the said islands had been taken possession of under the provisions of Section 5570 Revised Statutes and the conditions of law complied with, they appertain or belong to the United States and are under its exclusive jurisdiction . . ." The Collector of Customs was authorized to admit tobacco grown on the islands free of duty.

It will also be of interest to the Government of Honduras to know that the Committee of Commerce of the United States Senate in considering a bill for the establishment of a lighthouse on the Swan Island submitted a report dated April 2, 1896,¹⁹ in which it was stated in part:

"As to the political phase of the question: The Swan Islands are guano islands, and as such were the first islands taken possession of by citizens of the United States after the passage and under the provisions of the act of Congress in relation to such islands, enacted in 1856. The United States, through Mr. Seward, the then Secretary of State, proclaimed in February, 1863, that those islands were under the protection of the United States. In the technical phrase of the act they are 'islands appertaining to the United States;' and they have for forty years been owned and continuously inhabited and operated by citizens of the United States. They are now owned by Mr. Warren K. Blodgett, of Boston, Mass."

Vessels of the United States Navy have on a number of occasions carried out surveys of Swan Islands. The official records of this Government indicate that in May 1911 the U. S. S. *Paducah* surveyed the Swan Islands to determine their true geographic position, at which time a report was submitted with regard to the operation of a light which was located on one of the masts of the wireless station and on the location of a flagpole on the island. It was also reported by the commanding officer of this vessel that an American company had a resident manager residing on the island at that time. In addition, the U. S. S. *Hannibal* carried out survey operations in 1913 on behalf of the Hydrographic Office of the United States Navy. The island was again visited in 1920 by the U. S. S. *Ballard* which reported at that time that the island was occupied by eight radio operators, ten

¹⁹ Senate Report No. 606, April 2, 1896, 54th Cong., 1st sess.

laborers and a caretaker and his family, and that vessels of the United Fruit Company called at the islands every three weeks with stores and provisions for the personnel stationed there. In 1922 the U. S. S. *Hannibal* reported that a meteorological station was being operated by the radio personnel stationed on the island, furnishing daily weather reports. It was also reported that "the United States Weather Bureau has established the following benchmarks: (a) a cross chiseled on the top of the west corner of foundation of S. W. radio tower which is called the reference plan and is 27.52' above mean sea level; (b) flange of concrete forming N. W. corner of radio operating room nearly on a level with the ground—0.68' above (a)."

Another instance of the exercise of sovereignty by this Government over Swan Islands arose from a report received in September [April] 1911 from the then British Ambassador in Washington, Lord Bryce, that certain British subjects residing on Swan Islands had complained of ill treatment. At that time it was proposed by the British Government to send a warship to the islands for the purpose of conducting an investigation of the complaint. Following the discussion of the subject between the Department of State and the British Embassy, the British Government canceled its plan to send a vessel to Swan Islands and the Navy Department of the United States Government despatched the United States steamship *Wheeling* to the islands in October of the same year. The report of the commanding officer of the United States steamship *Wheeling* stated that the Swan Island Commercial Company was then occupying the islands and that Messrs. W. A. Brooks and W. Cole Adams resided on the islands from time to time, together with their families. The company was represented at the time of the visit of the U. S. S. *Wheeling* by a foreman who had under his charge a number of laborers. The American flag was found by the United States steamship *Wheeling* to be hoisted on the flagstaff on the islands. The report further stated that the company was planting the Western Island in coconut groves and coconuts were being exported on vessels of the United Fruit Company. In addition the company was exporting satin-wood. It was also found that the United Fruit Company maintained two American employees on the islands for the operation of its wireless station.

Following the establishment of the wireless station on the Swan Islands by the Tropical Wireless Company, the Weather Bureau of the United States Department of Agriculture established in June 1914 a meteorological observation station which was maintained until August 31, 1927 when its abandonment became necessary because of the closing down of the wireless station. The meteorological station was reestablished by the Weather Bureau in August 1928 through an arrangement with the United Fruit Company and was maintained until 1932 when it was again discontinued for administrative reasons.

As the Government of Honduras is aware, the station was again established in August of 1938 for the carrying out of meteorological observations during the hurricane season.

It is believed that the foregoing discussion has served to correct certain assumptions contained in the Honduran notes under reference, which appear to have been made with insufficient basis or justification. The geographic location of the islands is in itself a refutation of any Honduran claims based on the extension of territorial jurisdiction on the grounds of contiguity. The various administrative measures, treaties, decrees and concessions referred to in the Honduran notes contain no reference to Swan Island and therefore have no bearing on the question. No evidence has been submitted establishing that, prior to the extension of the sovereignty of the United States over Swan Islands, Spain, Honduras, or any intervening government ever took possession or exercised any act of dominion over the islands, or that the nationals of such governments ever occupied or used the islands. No basis is found in the case as presented for the claim of Honduras to sovereignty over Swan Islands.

The islands have been in effective use and occupation by American nationals since 1857 and have been under the dominion and sovereignty of the Government of the United States since February 11, 1863.

In the light of the attending facts in the case, the Government of the United States is impelled to reaffirm its title to sovereignty over Swan Islands and to deny that Honduras has a valid claim to sovereignty over the islands. With the complete knowledge of the facts, it is very earnestly hoped that the Government of Honduras will concur in the conclusions reached.

Accept [etc.]

For the Secretary of State:
SUMNER WELLES