CASE CONCERNING A BOUNDARY DISPUTE BETWEEN ARGENTINA AND CHILE CONERNING THE DELIMITATION OF THE FRONTIER LINE BETWEEN BOUNDARY POST 62 AND MOUNT FITZROY, 21 OCTOBER 1994

AFFAIRE CONCERNANT UN LITIGE FRONTALIER ENTRE LA REPUBLIQUE ARGENTINE ET LA REPUBLIQUE DU CHILE PORTANT SUR LA DELIMITATION DE LA FRONTIERE ENTRE LE POSTE FRONTIERE 62 ET LE MONT FITZROY, 21 OCTOBRE 1994

Mr. Rafael Nieto Navia, *President*;

Mr. Reynaldo Galindo Pohl, Mr. Santiago Benadava, Mr. Julio A. Barberis and Mr. Pedro Nikken, *Judges*;

Mr. Rubem Amaral Jr., *Secretary*;

Mr. Rafael Mata Olmo, *geographical expert.*

In the dispute concerning the line of the frontier between boundary post 62 and Mount Fitzroy, *between*

The Argentine Republic, represented by

Her Excellency Susana Ruiz Cerutti, Ambassador to the Swiss Confederation and the Principality of Liechtenstein.

His Excellency Ambassador Federico Mirré, delegate to the Comisión técnica mixta del Frente marítimo del Río de la Plata.

His Excellency Ambassador Horacio A. Basabe, Director of the Arbitration Office.

As Agents:

Mr. José María Ruda, former President of the International Court of Justice, member of the International Law Institute.

Mr. Daniel Bardonnet, professor at the University of Law, Economics and Social Sciences, Paris, member of the International Law Institute.

Mr. Santiago Torres Bernárdez, former Secretary of the International Court of Justice, member of the International Law Institute.

As Counsel:

General Luis María Miró, President of the National Commission on International Boundaries.

Engineer Bruno Ferrari Bono, member of the National Academy of Geography of the Argentine Republic.

Mr. Eric Brown, Emeritus Professor of Geography, University College, London.

As experts:

Captain Federico Río, Deputy Director of the Arbitration Office.

Counsellor Bibiana Lucila Jones, Arbitration Office.

Counsellor Eduardo Mallea, Arbitration Office.

Counsellor Gustavo C. Bobrik, Arbitration Office.

Counsellor Alan C. Béraud, Arbitration Office.

Embassy Secretary Pablo A. Chelía, Arbitration Office.

Mr. Alejandro Suárez Hurtado, Vice-Consul in Rio de Janeiro.

Embassy Secretary Holger F. Martinsen, Arbitration Office.

Mrs. Luisa Lemos, Argentine Embassy in Berne.

Mrs. Liliana Pérez Malagarriga de Bounoure, Argentine Embassy in Berne.

Mrs. Ursula María Zitnik Yaniselli, Arbitration Office.

Mr. Gustavo R. Coppa, Arbitration Office.

Mrs. Nora G. Veira, Arbitration Office.

Mrs. Andrea S. Fatone, Arbitration Office.

Mrs. María Elena Urriste, Arbitration Office.

As Advisers and Assistants:

and

The Republic of Chile, represented by

His Excellency Ambassador Javier Illanes Fernández, National Director of State Frontiers and Boundaries, Ministry of Foreign Affairs,

His Excellency Ambassador Eduardo Vío Grossi, Director of Legal Affairs, Ministry of Foreign Affairs, member of the Inter-American Juridical Committee,

As Agents:

Mr. Elihu Lauterpacht, CBE, Director of the Research Centre for International Law, University of Cambridge, member of the International Law Institute.

Mr. Prosper Weil, Emeritus Professor at the University of Law, Economics and Social Sciences, Paris, member of the International Law Institute.

His Excellency Ambassador Ignacio González Serrano, head of the Arbitration Agency office in Rio de Janeiro,

As Counsel:

Mrs. María Isabel volochinsky Weinstein, lawyer, Ministry of Foreign Affairs.

Mr. César Gatica Muñoz, geographer, head of the Department of Boundary Studies, Ministry of Foreign Affairs.

Mr. Eduardo Martínez de Pisón, Doctor of Geography, Professor of Physical Geography, Autonomous University of Madrid.

Mr. Eugenio Montero C., lawyer, Arbitration Agency.

Mr. Sergio Gimpel F., Master of Geographical Sciences, Professor of Physical Geography, University of Chile.

Mr. Miguel González Polanco, topographer, Ministry of Foreign Affairs.

Mrs. Marcela Javalquinto Lagos, geographer, Ministry of Foreign Affairs.

Miss Marta Mateluna R., cartographer, Arbitration Agency.

Miss Cecilia Zamorano V., cartographer, Arbitration Agency.

Mr. Anthony Oakley, lawyer, Professor of Civil Law, University of Cambridge.

Mrs. María Teresa Escobar, interpreter, Arbitration Agency.

Mr. Raúl Boero, interpreter, Arbitration Agency.

Mrs. Ana Morales R., secretary, Ministry of Foreign Affairs.

Miss Viviana Morales A., secretary, Arbitration Agency.

Miss Marcela Leal G., secretary, Arbitration Agency.

As Advisers and Assistants:

the Court, composed as above, pronounces the following Award:[1]

I

1. On 31 October 1991 Argentina and Chile signed in Santiago the Arbitral *Compromis* set out below:

> The Government of the Argentine Republic and the Government of the Republic of Chile,
>
> Whereas by the Presidential Declaration on Boundaries signed in Buenos Aires on 2 August 1991 the two Governments took the decision to submit and agreed on the bases for submitting to arbitration the line of the frontier between the Argentine Republic and the Republic of Chile in the sector between boundary post 62 and Mount Fitzroy,
>
> Have agreed as follows:

[1] This Award quotes from some French sources. In order to help the reader, translations have been provided in footnotes. These footnotes are not part of the Award. Quotations from Spanish sources are translated directly in the body of the text.

Article I

The two Parties request the Court of Arbitration (hereinafter "the Court") to determine the line of the frontier in the sector between boundary post 62 and Mount Fitzroy in the Third Region, defined in section 18 of the report of the 1902 Arbitral Tribunal and described in detail in the last paragraph of section 22 of the report.

Article II

1. The Court shall reach its decision by interpreting and applying the 1902 Award in accordance with international law.

2. For this purpose, the specific principles, guidelines, criteria or rules used in the solutions adopted pursuant to the Presidential Declaration of 2 August 1991 concerning other sections of the frontier line shall not constitute precedents.

Article III

1. The Court shall be composed of the following members: Mr. Reynaldo Galindo Pohl, Mr. Rafael Nieto Navia and Mr. Pedro Nikken, appointed by the Parties by common accord; Mr. Julio Barberis, appointed by the Government of the Argentine Republic, and Mr. Santiago Benadava, appointed by the Government of the Republic of Chile.

2. The President of the Court shall be elected by its members from among their own number.

3. The Secretary of the Court shall be appointed by the Court in consultation with the Parties.

Article IV

The Court shall be constituted in Rio de Janeiro on 16 December 1991.

Article V

Any vacancy arising in the Court shall be filled in the manner specified in chapter II, article 26, of annex No. 1 of the Treaty of Peace and Friendship of 29 November 1984. When the vacancy has been filled, the arbitral proceedings shall continue from the point at which the vacancy occurred.

Article VI

The Court shall sit at the headquarters of the Inter-American Juridical Committee in Rio de Janeiro, but some meetings or hearings may be held at other places in that city.

Article VII

1. The working language shall be Spanish.

2. If any of the oral submissions are made in some other language, the Secretary of the Court shall make the necessary arrangements for their simultaneous interpretation into Spanish.

3. Documents submitted by the Parties as annexes to the memorials and counter-memorials in English or French shall not require translation into Spanish.

Article VIII

1. The written proceedings shall consist of the submission of memorials and counter-memorials.

Each Party shall submit a memorial before 1 September 1992.

Each Party shall submit a counter-memorial before 1 June 1993.

The memorials and counter-memorials shall be transmitted by the Secretary of the Court simultaneously to each Party.

Failure to submit any of the documents within the indicated time limits shall not impede or delay the arbitral proceedings.

There shall be no other written submissions by the Parties, unless the Court decides otherwise for the purposes of its deliberations.

2. The oral presentations shall begin on 1 October 1993.

3. Either Party may submit additional documents up to four weeks before the beginning of the oral presentations. After that date new documents may be submitted only with the consent of the other Party.

4. The Court may, having heard the opinion of the other Party, extend the time limits referred to in this article if either Party so requests at least 15 days before the expiry of the time limit in question.

5. The Parties may, by common accord, request the Court to reduce the time limits referred to in this article.

6. The Court shall endeavour to pronounce its Award before 1 March 1994.

Article IX

Each Party shall grant the members of the Court, its staff and the authorized representatives of the other Party free access to its territory, including the sector between boundary post 62 and Mount Fitzroy, but such authorization shall not be construed as enhancing or impairing the rights of either Party to the dispute.

Nor shall such authorization signify any change in the *status quo* prevailing at the time of the signature of this *Compromis*.

Article X

Each Party shall appoint one or more agents for the purposes of the arbitration, who may act individually or jointly.

The agents may be assisted by legal counsel, advisers and any other personnel, as each Party sees fit.

Each Party shall communicate to the other Party and to the Court the names and addresses in Rio de Janeiro of its respective agents.

Article XI

The Court shall be empowered to interpret the *Compromis*, decide on its own competence and establish rules of procedure which have not been agreed between the Parties.

Article XII

1. The Court's decisions shall be governed by the provisions of chapter II, article 34, of annex No. 1 of the Treaty of Peace and Friendship of 29 November 1984. However, they shall be adopted by the affirmative votes of at least three of the judges.

2. The Court may take any decisions necessary for settling points of procedure and conducting the arbitration until the pronouncement and execution of the Award.

3. The Court shall state the reasons for its Award. It shall state the names of the judges who participated in its adoption, the way in which they voted, and the date on which the Award was pronounced. Each judge shall have the right to append to the Award a separate or dissenting opinion.

4. The Award and other decisions of the Court shall be notified to each Party by delivery to their respective agents or to the consulates of the Parties in Rio de Janeiro. Once the Award has been notified, each Party shall be free to publish it.

Article XIII

The hearings shall be held in private, except the meeting constituting the Court or any other meetings agreed upon by both Parties.

The documents of the arbitration proceedings and the records of the oral hearings shall not be published until the proceedings have concluded.

During the arbitration both the Court and the Parties shall furnish public information only about the current stage of the proceedings.

Article XIV

The Court may employ experts, following prior consultation of the Parties.

Article XV

The Award shall specify the persons responsible for its execution, and the manner and time-frame of its execution, including any demarcation work which it may order, and the Court shall remain constituted until it has approved such demarcation work and notified the Parties that in its opinion the Award has been executed.

Article XVI

The Parties shall bear equally the costs of the functioning of the Court.

Article XVII

The Award shall be binding on the Parties, final and unappealable, and its implementation shall be entrusted to the honour of the two Nations.

Without prejudice to the provisions of chapter II, article 39, of annex No. 1 of the 1984 Treaty of Peace and Friendship, the Award shall be executed without delay and in the manner and within the time limits specified by the Court.

Article XVIII

Any matters not covered by this *Compromis* shall be governed by the provisions of chapter II of annex No. 1 of the Treaty of Peace and Friendship of 29 November 1984.

Article XIX

Once the Award has been executed, the documents and records of the arbitration shall be kept by the Secretary-General of the Organization of American States.

Article XX

This *Compromis* shall be registered by the Parties with the Secretary-General of the United Nations in accordance with article 102 of the Charter of the United Nations.

Article XXI

This *Compromis* shall enter into force on the date of its signature.

Signed in Santiago on 31 October 199.

2. The *Compromis* set out above (hereinafter "the *Compromis*") was preceded by a Declaration of 2 August 1991, in which the Presidents of Chile and Argentina decided to submit this dispute to arbitration. On 30 October 1991 the two Parties also signed a headquarters agreement with Brazil for the Court to sit in Rio de Janeiro. At the invitation of the Secretary-General of the Organization of American States, the Court sat at the offices of the Inter-American Juridical Committee.

3. Argentina appointed as its agents Her Excellency Susana Ruiz Cerutti, Ambassador to the Swiss Confederation and the Principality of Liechtenstein, and His Excellency Ambassador Federico Mirré, delegate to the Comisión tecnica mixta del Frente marítimo del Río de la Plata. His Excellency Ambassador Horacio A. Basabe was appointed alternate agent.

Chile appointed as its agents His Excellency Ambassador Javier Illanes Fernández, National Director of State Frontiers and Boundaries, and His Excellency Ambassador Eduardo Vío Grossi, Director of Legal Affairs, Ministry of Foreign Affairs.

4. In accordance with article IV of the *Compromis*, the Court was constituted on 16 December 1991 in a ceremony at the Palacio de Itamaraty in Rio de Janeiro. At a meeting held on that date the Court elected Mr. Rafael Nieto Navia as its President. In consultation with the Parties the Court appointed Minister Rubem Amaral Jr., Executive Coordinator of the Legal Advisory Service of Brazil's Ministry of Foreign Affairs, as its Secretary.

5. On the date of the constitution of the Court the agents of the Parties agreed on a "Memorandum of Understanding", which reads:

> The agents of the Argentine Republic and the Republic of Chile have agreed on the followkng principles to be applied during the arbitration referred to in the Arbitral *Compromis* concluded in Santiago on 31 October 1991:
>
> 1. In presenting their cases the Parties shall not use the services of lawyers or experts who are nationals of States bordering on the Argentine Republic or the Republic of Chile or who have the same nationality as any of the judges appointed by common accord.
>
> 2. The memorials, counter-memorials and any other documents which may be submitted shall not be printed but type-written.
>
> 3. The maps and diagrams submitted to the Court may be originals or colour or black-and-white photocopies or photographic copies. All such documents shall bear an indication of the location of the originals of the copies submitted to the Court.
>
> 4. Both Parties shall provide the Secretary of the Court with 25 (twenty-five) copies of each document submitted to the Court of Arbitration.
>
> 5. Any visits by the Court or by appointed experts to the area of the dispute shall enter the area through the territory of one of the Parties and leave it through the territory of the other Party.

In witness whereof they have signed this memorandum in Rio de Janeiro on 16 December 1991.

6. In accordance with article XI of the *Compromis*, on 14 May 1992 the Court adopted its "rules of procedure".

7. The memorials were submitted to the Court on 31 August 1992. The *Compromis* stipulated that the counter-memorials should be submitted before 1 June 1993. However, on 30 March 1993 Chile and Argentina requested an extension of the established time limits and suggested new time limits for the proceedings. The Court accepted the suggestion of the Parties and, accordingly, decided that the counter-memorials should be submitted on 16 August 1993 and that the hearings would begin on 11 April 1994.

8. The counter-memorials were submitted to the Court on 16 August 1993. On that same date a resolution of the President was communicated to the Parties, setting 15 January 1994 as the time limit by which they must communicate the elements referred to in rule 16.1 of the rules of procedure.

9. The Court decided to visit the area subject to the arbitration, and this visit, at the suggestion of the Parties and for reasons of the weather, took place in early February 1994. At the session of the Court held between 4 and 8 October 1993 lots were drawn to decide through which country's territory the visit to the area should begin and the order in which the arguments would be submitted at the hearings. The lots were drawn in the presence of Mrs. Susana Grané and Mr. Ignacio González, Consuls-General of Argentina and Chile, respectively, in Rio de Janeiro. The outcome was that the visit would begin through the Republic of Chile and that Chile would also begin the oral presentations.

10. At that same session the Court requested its President to make the necessary arrangements for the appointment of a geographical expert, after consulting the Parties. On 11 January 1994 Dr. Rafael Mata Olmo, Professor of Geography at the Autonomows University of Madrid was appointed as geographical expert, and he submitted in writing the undertaking referred to in rule 18 of the rules of procedure.

11. The visit to the area was preceded by a session of the Court in Rio de Janeiro on 3 and 4 February 1994. On 5 February the judges travelled to Chile, accompanied by the Secretary of the Court and the expert. They were received by the President of the Republic, Mr. Patricio Aylwin, and the Minister for Foreign Affairs, Mr. Enrique Silva Cimma. From 8 to 11 February the Court toured the sector of the frontier lying between boundary post 62 and Mount Fitzroy and inspected on the ground the boundary line claimed by each Party. For the first two days the Court was accompanied by the agents and other personnel of Chile and an Argentine observer, while for the last two days the visit was conducted in the company of the agents and other personnel of Argentina and a Chilean observer. On 12 February the President of Argentina, Mr. Carlos Menem, and its Foreign Minister, Mr. Guido Di Tella, visited the Court at El Calafate. On that same date the Court travelled to Buenos Aires, where it concluded its visit on 14 February.

12. In accordance with rule 14.1 of the rules of procedure, on 18 March 1994 the Parties submitted additional documents to the Court.

13. The hearings were held from 11 April 1994 in the conference room of the library of the Palacio de Itamaraty, Rio de Janeiro, made available for the Court's use by the Government of Brazil. The Chilean case was presented by its agents, Mr. Javier Illanes Fernández and Mr. Eduardo Vío Grossi, its coun-

sel, Mr. Elihu Lauterpracht, Mr. Prosper Weil and His Excellency Ignacio González Serrano, and its advisers, Mr. César Gatica Muñoz and Mr. Eduardo Martínez de Pisón. The Argentine case was presented by its agents, Her Excellency Susana Ruiz Cerutti, His Excellency Federico Mirré and His Excellency Horacio A. Basabe, its counsel, Mr. José María Ruda, Mr. Daniel Bardonnet and Mr. Santiago Torres Bernárdez, and its adviser, General Luis María Miró. The hearings concluded on 18 May 1994.

14. In its memorial Argentina argued for the following conclusions:

> In the light of the facts and arguments set out in this memorial, the Government of the Argentine Republic requests the Court of Arbitration to decide that, on the basis of the correct interpretation and application of the 1902 Arbitral Award in accordance with international law, the line of the frontier between the Argentine Republic and the Republic of Chile in the sector between boundary post 62 and Mount Fivzroy is constituted by the line described in the preceding chapter and depicted on maps III *a*, *b*, *c*, *d* and *e* contained in the annex to the atlas in this memorial.

This line is described in paragraph 39 of chapter 12 of the Argentine memorial in the following terms:

> The ling begins at boundary post 62 on the south shore of Lake San Martín at 324 metres above sea level (X = 4584177; Y = 1449178), proceeds to Cerro Martínez de Rozas at altitude 1,521 metres (X = 4583170; Y = 1446330), then follows a generally west-south-west direction for 3.5 kilometres. In this part of its course the line separates the waters of the River Martínez de Rozas from the waters of several unnamed watercourses which also discharge into Lake San Martín. The line continues along the Cordón Martínez de Rozas in a south-south-west direction as far as Cerro Tobi at altitude 1,736 metres (X = 4578900; Y = 1442180) for 5.1 kilometres and continues in the same direction for 3.8 kilometres as far as an unnamed peak at altitude 1,767 metres (X = 4575870; Y = 1442080). In this part of its course the line separates the basin of the River Martínez de Rozas from the basin of the River Obstáculo. At altitude 1,767 metres the local water-parting changes direction, forming an elbow towards the north-east and descending to the Portezuelo de la Divisoria, at an altitude of about 690 metres (X = 4576900; Y = 1440380). This *portezuelo* (pass) separates the waters which run northwards towards Lake Redonda and through it and along the River Obstáculo to Lake San Martín from the waters which run southwards through Lake Larga, Lake del Desierto and the River de las Vueltas towards Lake Viedma.
>
> From the peak at altitude 1,767 metres and as far as the Cordón Marconi the local water-parting is also the continental water-parting.
>
> From the Portezuelo de la Divisoria the line continues for 1.5 kilometres in a generally west-south-west direction before turning north-west for 3.2 kilometres as far as Cerro Sin Nombre at altitude 1,629 metres (X = 4578330; Y = 1437020). From this point the water-parting continues along the summit-line between Cerro Sin Nombre and Cerro Trueno in a generally westerly direction as far as Cerro Trueno at altitude 2,003 metres (X = 4579230; Y = 1433270). Between the peak at altitude 1,767 metres and Cerro Trueno the line covers a distance of 11.1 kilometres. In this part of its course it separates the waters of the basin of the River Obstáculo, which discharges into Lake San Martín, from the waters of Lake Larga and the basin of the River Diablo, which discharge into Lake del Desierto.
>
> The line continues from Cerro Trueno in the same direction and after 900 metres turns south-south-west until it reaches Cerro Demetrio at altitude 1,717 metres (X = 4574512; Y = 1430054) after 6.5 kilometres. It then turns west-south-west for 2 kilometres, descending to the Portezuelo El Tambo (X = 4573389; Y = 1427928) at an altitude of about 807 metres. From this pass the water-parting continues southwards for 4 kilometres as far as Cerro Milanesio at altitude 2,053 metres (X = 4569210; Y = 1428510). In this part of its course the line, which follows the Cordón Cordillerano Oriental, divides the waters which run down to Lake Chico, a tributary of the southern arm of Lake San Martín-O'Higgins, from the basin of the River Diablo which, as stated, discharges into Lake del Desierto.

From Cerro Milanesio the line runs westwards for 2 kilometres, then southwards for 4.5 kilometres and westwards for 1.5 kilometres before turning south-south-west for 7.5 kilometres. In this part of its course, still along the Cordón Cordillerano Oriental, it separates the streams and glaciers which descend to the Ventisquero Chico from the basins of the Rivers Cañadón de los Toros, Milodón, El Puesto and Cóndor or del Diablo, which flow into the River de las Vueltas and are fed by the Milodón Norte, Milodón Sur and Cagliero Este and Sur glaciers.

The line then turns in a generally westward direction for 3 kilometres, passing across Cerro Gorra Blanca at an altitude of 2,907 metres (X=4557500; Y=1421250). It then takes a generally south-south-westerly direction for 4.2 kilometres. It next runs westwards for a further 500 metres before taking a south-south-west direction for 1 kilometre to descend to Marconi Pass (at an altitude of about 1,560 metres). From this pass the line takes a generally southerly direction, climbing to Cerro Marconi Norte at altitude 2,210 metres (X = 4550210; Y = 1417110), and continues in the same direction for 10 kilometres, still along the Cordón Cordillerano Oriental, as far as Cerro Rincón at altitude 2,465 metres (X = 4542650; Y = 1417800). In this section the line separates the Ventisquero Chico, which runs towards Lake San Martín-O'Higgins, and the other glaciers situated to the west from the Gorra Blanca Sur and Marconi glaciers, which feed the River Eléctrico, which itself flows eastwards, i.e., towards the River de las Vueltas.

From Cerro Rincón and in the direction of Mount Fitzroy the local water-parting, still running along the Cordón Cordillerano Oriental, maintains its easterly direction and passes across Cerro Domo Blanco at altitude 2,507 metres (X = 4542660; Y = 1419590), Cerro Pier Giorgio at 2,719 metres (X = 4543350; Y = 1420200) and Cerro Pollone at 2,579 metres (X = 4544230; Y = 1420990) before reaching Mount Fitzroy at 3,406 metres (X = 4542219; Y = 1424383). In this eight-kilometre stretch the water-parting separates the basin of the River Eléctrico, which is fed by the Pollone and Fitzroy Norte glaciers, from the basin of the River Fitzroy, which is fed by the Torre glacier.

15. In its counter-memorial Argentina stated:

In the light of the facts and arguments set out in the Argentine memorial and in this counter-memorial and bearing in mind the relevant evidence submitted and in accordance with the 1991 *Compromis*, the Argentine Republic respectfully requests the Court of Arbitration:

1. To reject the line of the frontier in the sector between boundary post 62 and Mount Fitzroy proposed in the Chilean memorial;

2. To decide and declare, on the basis of the correct interpretation and application of the 1902 Arbitral Award in accordance with international law, that the line of the frontier in the sector between boundary post 62 and Mount Fitzroy is constituted by the line described in chapter 12, paragraph 39, of the Argentine memorial and depicted on maps III*a*, *b*, *c*, *d* and *e* contained in the envelope attached to the atlas in the said memorial.

16. In accordance with rule 28 of the rules of procedure, on the termination of the hearings Argentina submitted the following conclusions:

In the light of the facts and arguments set out in the Argentine memorial, in the Argentine counter-memorial, and during these oral hearings and bearing in mind the relevant evidence submitted and in conformity with the 1991 *Compromis*, the Argentine Republic respectfully requests the Court of Arbitration:

1. To reject the line of the frontier in the sector between boundary post 62 and Mount Fitzroy proposed by Chile in its final conclusions submitted on 17 May last;

2. To decide and declare, on the basis of the correct interpretation and application of the 1902 Arbitral Award in accordance with international law, that the line of the frontier in the sector between boundary post 62 and Mount Fitzroy is the local water-parting described in chapter 12, paragraph 39, of the Argentine memorial and depicted on maps III*a*, *b*, *c*, *d* and *e* contained in the envelope attached to the atlas in the said memorial.

17. In its memorial Chile argued for the following conclusions:

16.1 Chile respectfully requests the Court to decide and declare that the line of the frontier in the sector between boundary post 62 and Mount Fitzroy is the following:

16.2 From boundary post 62, at coordinates X = 4584177, Y = 1449178 and at altitude 324 metres, the frontier ascends to the Cordón Oriental and continues southwards, following the local water-parting until it reaches a summit at 1,767 metres, approximately at coordinates X = 4575870, Y = 1442080. The two countries agree on this first section of the frontier.

16.3 The frontier continues southwards, following the series of water-partings which are formed on the Cordón Oriental, until it reaches Mount Fitzroy at a summit of 1,810 metres, approximately at coordinates X = 4551920, Y = 1434500.

16.4 It descends to the valley of Lake del Desierto, following the water-parting, which leads it to a point on the bank of the River Gatica or de las Vueltas, approximately at coordinates X = 4549640, Y = 1432400. It crosses the river in a straight line 360 metres long to reach a point approximately at coordinates X = 4549310, Y = 1432260.

16.5 From that point it crosses the valley in a south-west direction, following the local water-parting shown on the Mixed Commission's map, to a point on the bank of the River Eléctrico, approximately at coordinates X = 4546290, Y = 1430010.

16.6 It crosses this river in a straight line 250 metres long to reach a point approximately at coordinates X = 4546200, Y = 1429780.

16.7 Finally, it ascends to the north-east spur of Mount Fitzroy and then follows the local water-parting, which leads it as far as the summit at 3,406 metres, at coordinates X = 4542219, Y = 1424383.

16.8 This line corresponds to the one described by Chile at the meeting on 22 June 1991 of a subcommission of members of the Mixed Boundary Commission and shown on the transparent sheet which is superimposed on the 1:50,000 map produced by the Commission.

16.9 This line has been depicted on a reduction of the said map, which is included in atlas No. 31.

18. In its counter-memorial Chile stated:

Chile formally confirms the requests set out in paragraphs 16.1 to 16.9 of its memorial and respectfully requests the Court to reject the pleas contained in the Argentine memorial, except in so far as the line claimed therein coincides with the line claimed by Chile.

19. In accordance with rule 28 of the rules of procedure, on the termination of the hearings Chile submitted the following conclusions to the Court:

Chile respectfully requests the Argentina-Chile Court of Arbitration, on the basis of the arguments put forward in its memorial, counter-memorial and oral submissions, to accept its formal requests set out in paragraphs 16.1 to 16.9 of its memorial of 31 August 1992, which it confirms in full in this document.

Chile further respectfully requests the Argentina-Chile Court of Arbitration, in consequence, to reject the requests made by Argentina in this dispute.

II

20. Since the time when they became independent States, Chile and Argentina sought to determine the boundaries of their respective territories in accordance with the 1810 rule of *uti possidetis*. For example, article 39 of the Treaty of Friendship, Trade and Navigation concluded between the Argentine Confederation and Chile on 30 August 1855 provides that both "Contracting Parties recognize as the boundaries of their respective territories the bound-

aries which they held to be such at the time of their separation from Spanish rule in 1810 and agree to defer issues which have arisen or may arise in this connection, with a view to discussing them at a later stage in a peaceful and friendly manner . . .". This Treaty entered into force in April 1856.

21. In accordance with the aforementioned article 39, the two countries signed the Boundary Treaty of 23 July 1881, article 1 of which provides that:

> The boundary between the Argentine Republic and Chile from North to South as far as the parallel of latitude of 52°S. is the Cordillera of the Andes. The frontier line shall run in that extent along the most elevated crests of said cordilleras that may divide the waters and shall pass between the slopes which descend one side and the other. . .

22. On 20 August 1888 a new agreement for the physical demarcation of the boundaries established in the 1881 Treaty was signed. articles I and II provided that, within two months from the date of the exchange of the instruments of ratification, which took place on 11 January 1890, each State would appoint an expert and five assistants to help him. The function of the experts would be to "fix on the ground the demarcation of the lines indicated in articles 1, 2 and 3 of the Boundary Treaty" (art. III). Chile appointed Mr. Diego Barros Arana as its expert, and Argentina Mr. Octavio Pico. The two experts met for the first time in Concepción on 24 April 1890.

23. From 1881 Argentina and Chile sent missions to the southern region of the continent in order to improve the existing geographical knowledge of the region. As a result of these missions it was established that in the Patagonian region the continental water-parting frequently diverges from the Andes range and has to be sought to the east thereof, and that in some places the range is submerged in the Pacific Ocean. These studies gave rise in both countries to interpretations which differed from the Boundary Treaty and meant that Argentina could have ports on the Pacific and Chile's territory could extend as far as the Patagonian plains.

24. In September 1891 Mr. Barros Arana, who had been removed from his post in December 1890, was re-appointed as expert by the Chilean Government. The experts met in Santiago on 12 January 1892 in order *inter alia* to draft the instructions for the demarcation commissions. On that occasion the Chilean expert suggested that the instructions should include a general interpretation of the 1881 Treaty. To this end he put forward the argument that the Treaty had specified the continental *divortium aquarum* as the boundary between the two countries. The Argentine expert disagreed with the Chilean proposal and sent a report to his Foreign Ministry. The two experts met again on 24 February and signed the instructions for the commissions of engineers which were to begin the demarcation work.

25. The questions of the continental *divortium aquarum* and of possible Argentine ports on the Pacific were the main differences concerning the 1881 Treaty but not the only ones. The differences paralysed the demarcation work, which was resumed only after the entry into force of the Additional and Explanatory Protocol of 1 May 1893 following the exchange of its instruments of ratification on 21 December 1893.

26. The text of the first and second articles of the Protocol reads:

> FIRST—whereas article 1 of the treaty of 23 July 1881 provides that "the boundary between Chile and the Argentine Republic from north to south as far as parallel of latitude 52°S. is the Cordillera of the Andes" and that "the frontier line shall run along the most elevated crests of said Cordillera that may divide the waters, and shall pass between the slopes which descend one side and the other", the experts and the subcommissions shall observe this principle as an invariable rule of their proceedings. Consequently all lands and all waters, to wit: lakes, lagoons, rivers and parts of rivers, streams, slopes situated to the east of the line of the most elevated crests of the Cordillera of the Andes that may divide the waters, shall be held in perpetuity to be the property and under the absolute dominion of the Argentine Republic; and all lands and all waters, to wit: lakes, lagoons, rivers and parts of rivers, streams, slopes situated to the west of the line of the most elevated crests of the Cordillera of the Andes to be the property and under the absolute dominion of Chile.
>
> SECOND—The undersigned declare that, in the opinion of their respective governments, and according to the spirit of the boundary treaty, the Argentine Republic retains its dominion and sovereignty over all the territory that extends from the east of the *principal chain of the Andes* to the coast of the Atlantic, just as the Republic of Chile over the western territory to the coasts of the Pacific; it being understood that by the provisions of said treaty, the sovereignty of each State over the respective coast line is absolute, in such a manner that Chile cannot lay claim to any point toward the Atlantic, just as the Argentine Republic can lay no claim to any toward the Pacific. If in the peninsular part of the south, on nearing parallel 52°S., the Cordillera should be found penetrating into the channels of the Pacific there existing, the experts shall undertake the study of the ground in order to fix a boundary line leaving to Chile the coasts of said channels; in consideration of which study, both governments shall determine said line amicably.

27. The experts met again at the end of December 1893. On 1 January 1894 they signed the instructions for the demarcation work in the Cordillera of the Andes and in Tierra del Fuego. On that occasion Mr. Barros Arana, referring to the 1893 Protocol, stated that the term

> "*principle chain of the Andes*" meant the unbroken line of summits which divide the waters and constitute the separation of the basins or hydrographic regions flowing to the Atlantic in the east and to the Pacific in the west, thus establishing the boundary between the two countries according to the principles of geography, the Boundary Treaty and the opinion of the most distinguished geographers of the two countries.

The Argentine expert stated that

> . . . he regretted his colleague's insistence on establishing the definition of what was meant by *principle chain of the Andes*, since that was not within the terms of reference of the experts, who were merely demarcators of the frontier line between the two countries. ..

28. In view of the differences between the experts over the interpretation of the 1881 Treaty and the delays which this had caused in the demarcation work, Argentina's Minister Plenipotentiary in Santiago, who had moreover been appointed as expert, concluded an agreement with Chile's Foreign Minister on 6 September 1895, article 3 of which provided that, if the subcommissions could not agree on the location of a boundary mark, the matter should be submitted to the experts for resolution. But that provision did not authorize the subcommissions to suspend their work, which should continue with the following boundary marks until the whole of the dividing line had been demarcated. Another article stated that, if the experts could not reach agreement, the whole matter should be referred to their Governments with a view to settlement of the differences in accordance with the treaties in force.

29. On 17 April 1896 an agreement was reached for submission of the differences between the experts to a ruling by the Government of Her Britannic Majesty. Articles I and II of this agreement state:

> II.—Should disagreements occur between the experts in fixing in the Cordillera of the Andes the dividing boundary-marks to the south of the 26°52'45", and should they be unable to settle the points in dispute by agreement between the two Governments they will be submitted for the adjudication of Her Britannic Majesty's Government, whom the Contracting Parties now appoint as Arbitrator to apply strictly in such cases the dispositions of the above Treaty and Protocol, after previous examination of the locality by a Commission to be named by the Arbitrator.
>
> III.—The experts shall proceed to study the district in the region adjoining the 52nd degree of latitude south, referred to in the last part of article II of the Protocol of 1893, and they shall propose the frontier-line to be adopted there in the event of the case foreseen in the above-mentioned stipulation. Should there occur divergence of views in fixing the frontier-line it shall be also settled by the Arbitrator designated in the Agreements.

30. In September 1896 Mr. Francisco P. Moreno was appointed as the Argentine expert and he met with his Chilean colleague Mr. Diego Barros Arana in May 1897 in Santiago, Chile; they adopted a number of measures to accelerate the demarcation work.

31. With a view to deciding on "the general line of the frontier", the experts met in Santiago, Chile, from 29 August 1898. At the meeting held on that date the Chilean expert presented his version of the line, accompanied by a map in which each of the most relevant points through which the line passed was marked with a number. He said that in establishing his line he had followed

> solely and exclusively the demarcation principle established in the first article of the 1881 Treaty, a principle which should also be the invariable rule in the experts' proceedings, according to the 1893 Protocol.

He also stated that:

> the proposed frontier line runs along all the most elevated crests of the Andes, which divide the waters and constantly separate the flows of the rivers belonging to each country.

32. At the meeting on 3 September 1898 the Argentine expert, Francisco P. Moreno, put forward his proposal for the general line of the frontier; and he submitted a text and a map, on which each of the relevant points through which the proposed line passed were marked with numbers (see para. 44).

33. Once each expert had proposed a general line of the frontier, the issue was submitted to the two Governments for consideration. On 15 September 1898 the Chilean Foreign Minister and the Argentine Minister in Santiago met to study the experts' materials. The Foreign Minister stated at that time: "The Government of Chile defends and maintains in its entirety the general line of the frontier indicated by its expert"; while the Argentine Minister stated: "The Argentine Government also defends and maintains in its entirety the general line of the frontier indicated by its expert". On 22 September the two experts met again in order to determine the points at which the proposed lines coincided and those at which they diverged. With regard to the divergences, they both stated that:

> since it has not proved possible to reach any direct agreement, the Minister for Foreign Affairs of Chile and the Envoy Extraordinary and Minister Plenipotentiary of the Argentine

Republic have agreed on behalf of their respective Governments to submit to Her Britannic Majesty copies of this document, the materials of the experts and the international treaties and agreements in force, in order that, in accordance with the second clause of the *Compromis* of 17 April 1896, she may resolve the differences referred to above.

34. The experts met again in Santiago on 1 October 1898. With regard to the points and sections at which the general line of the frontier proposed by each of them coincided, they resolved "to accept them as forming part of the dividing line in the Cordillera de los Andes between the Argentine Republic and the Republic of Chile".

35. On 23 November 1898 the Parties requested the Government of Her Britannic Majesty to act as arbitrator, and the request was accepted on 28 November. The British Government then appointed the Arbitral Tribunal, which consisted of: Lord Macnaghten, Lord of Appeal in Ordinary and member of the Privy Council; General Sir John Ardagh, member of the Royal Geographical Society; and Colonel Sir Thomas Hungerford Holdich of the Royal Engineers, Vice-President of the Royal Geographical Society. The Tribunal was constituted and held its first meeting on 27 March 1899.

36. In May 1899 the Parties began their presentations to the Tribunal. Between January and May 1902 a commission headed by Colonel Holdich toured the disputed area and prepared its reports, which it submitted to the Tribunal; the reports contained the frontier line proposed as the basis for a solution and, at the Tribunal's request, it was depicted on a map. Between September and October 1902 the Parties delivered their final arguments before the Tribunal. At its session on 19 November 1902 the Tribunal approved and signed its report to His Britannic Majesty [Edward VII], with the corresponding maps. Paragraph 10 of this report offers a summary of the arguments put forward by the Parties:

> The Argentine Government contended that the boundary contemplated was to be essentially an orographical frontier determined by the highest summits of the Cordillera of the Andes: while the Chilean Government maintained that the definition found in the Treaty and Protocols could only be satisfied by a hydrographical line forming the water-parting between the Atlantic and Pacific Oceans, leaving the basins of all rivers discharging into the former within the coast-line of Argentina to Argentina; and the basins of all rivers discharging into the Pacific within the Chilean coast-line to Chile.
>
> The following paragraphs from this document are also of interest for the purpose of appreciating the general tenor of the report of the 1902 Court of Arbitration:
>
> 15. In short, the orographical and hydrographical lines are frequently irreconcilable: neither fully conforms to the spirit of the Agreements which we are called upon to interpret. It has been clear by the investigation carried out by our Technical Commission that the terms of the Treaty and Protocols are inapplicable to the geographical conditions of the country to which they refer. We are unanimous in considering the wording of the Agreements as ambiguous, and susceptible of the diverse and antagonistic interpretations placed upon them by the Representatives of the two Republics.
>
> 16. Confronted by these divergent contentions we have, after the most careful consideration, concluded that the question submitted to us is not simply that of deciding which of the two alternative lines is right or wrong, but rather to determine—within the limits defined by the extreme claims on both sides—the precise boundary line which, in our opinion, would best interpret the intention of the diplomatic instruments submitted to our consideration.

> 17. We have abstained, therefore, from pronouncing judgement upon the respective contentions which have been laid before us with so much skill and earnestness, and we confine ourselves to the pronouncement of our opinions and recommendations on the delimitation of the boundary, adding that in our view the actual demarcation should be carried out in the presence of officers deputed for that purpose by the Arbitrating Power, in the ensuing summer season in South America.

On the next day King Edward VII signed the Arbitral Award. It describes the boundary line which had been decided upon and adds:

> A more detailed definition of the line of frontier will be found in the Report submitted to Us by Our Tribunal, and upon the maps furnished by the experts of the Republics of Argentina and Chile, upon which the boundary which we have decided upon has been delineated by the members of Our Tribunal, and approved by Us.

37. Even before the Arbitral Award had been pronounced, Chile and Argentina agreed in an instrument dated 28 May 1902 "to request the Arbitrator to appoint a commission to fix on the ground the boundaries described in his Award". The Arbitrator appointed as commissioner for the demarcation Colonel Sir Thomas H. Holdich, assisted by the following British officers: Captain B. Dickson, Captain W.M. Thompson, Captain C.L. Robertson, Captain H.L Crosthwait and Lieutenant H.A. Holdich.

38. The experts of the two countries, Mr. Alejandro Bertrand and Mr. Francisco P. Moreno, agreed with the British Commissioner some of the general arrangements for the demarcation work. They agreed that no demarcation would be needed in the places where the boundary was clear and defined beyond doubt by the topography of the land. Boundary posts would be erected only to mark the points at which the boundary line crossed rivers or lakes and the high points of passes, and in open areas where the topographical features were such that it was difficult to determine the frontier.

39. The area was divided into four sections and it was decided that each of them would be the responsibility of a commission headed by a British officer and including one or more representatives of each Party. The demarcation work was done during the summer months of 1903. Once each commission had completed its work, the British officer in charge submitted a report which was attached to the final demarcation report prepared by Colonel Holdich, dated London, 30 June 1903. The Chilean and Argentine representatives submitted separate reports to their Governments.

40. On 16 April 1941 the Governments of Chile and Argentina concluded a protocol in order to "determine the means of replacing boundary posts which had disappeared, erecting new posts on the sections of the Chilean-Argentine frontier where they were needed, and determining the exact coordinates of all such posts". In order to carry out this work the Parties created a Mixed Commission staffed by technical experts from both countries. The Commission divided the frontier into 16 sections and, since its creation up to the present time, has been working steadily at the tasks assigned to it.

41. A dispute between the Parties concerning the line of the frontier established by the 1902 Award between boundary posts 16 and 17 erected by the British Demarcation Commission was submitted for decision to Queen Elizabeth II, who pronounced her award on 9 December 1966 (hereinafter "1966 Award") (*Reports of International Arbitral Awards*, hereinafter "*R.I.A.A.*", vol. XVI, p. 111 *et seq.*).

42. From the beginning of the century Argentina and Chile have had at their disposal binding means of dispute settlement. This includes the Treaty of Peace and Friendship signed by the Parties in Vatican City on 29 November 1984, which establishes a system for the peaceful settlement of disputes. The present arbitral proceedings have been instituted by the Parties pursuant to this Treaty.

III

43. With regard to the section of the boundary which is the subject of the present dispute, the differences had already arisen at the meetings of the experts in 1898. At the meeting on 29 August 1898 (see para. 31) the Chilean expert proposed the following boundary line for the area between Lakes San Martín and Viedma:

> Number 326, an unnamed range, separates the waters of the sources of the Chilean rivers, which probably discharge into the Pacific through the Baker Channel, from the sources of the Argentine River Corpe or Chico which flows to the Atlantic.
>
> Points 327 to 329 separate the waters of the streams flowing into Lake Tar and Lake San Martín, which discharge into the Pacific inlets, from the streams flowing into the Argentine Lake Obstáculo.
>
> Point 330 is a section of the range which separates the waters which form the Argentine stream Chalia from the sources which feed Lake San Martín, which discharges into the Pacific inlets.
>
> Point 331, Cordillera del Chaltén, which divides the hydrographic basin of Lake Viedma or Quicharre, which flows to the Atlantic via the River Santa Cruz, from the Chilean streams which discharge into the Pacific inlets.

The expert provided a map depicting the boundary line, with identification numbers.

44. In turn, at the meeting on 3 September 1898 (see para. 32) the Argentine expert proposed the following boundary line:

> From the summit of Cerro San Clemente, following the general summit-line of the chain, the frontier line will continue as far as Cerro San Valentín and thereafter along the summit-line (301) of the slopes of the chain, cutting across the River Las Heras, as far as the pass indicated with the number 1.070 (302) on the Argentine map. From that point the line will continue south-south-east to the crest of the same snow-covered chain (303), which dominates Lake San Martín on the western side, cutting across the outlet from the lake and running along this crest over Mount Fitzroy (304) . . .

The Argentine expert also provided a map depicting the proposed boundary line, with identification numbers.

45. As already stated (see para. 33), Chile's Minister for Foreign Affairs and Argentina's Minister Plenipotentiary in Santiago met in that city on 22 September 1898 in order to study the experts' materials. On that occasion they established that No. 331 on the line proposed by the Chilean expert coincided with No. 304 on the line proposed by the Argentine expert, and that the lines differed with respect to the section marked by Mr. Barros Arana with the numbers 271 to 330 and by Mr. Moreno with the numbers 282 to 303. This difference, like the other differences between the experts as to the general line of the frontier, was submitted to Her Britannic Majesty for decision.

46. The Arbitral Award of 20 November 1902 established the boundary in this area as follows:

> The further continuation of the boundary is determined by lines which we have fixed across Lake Buenos Aires, Lake Pueyrredón (or Cochrane) and Lake San Martín, the effect of which is to assign the western portions of the basins of these lakes to Chile and the eastern portions to Argentina, the dividing ranges carrying the lofty peaks known as Mounts San Lorenzo and Fitzroy.

The Court's report gives the following description:

> From this point it [the boundary] shall follow the median line of the Lake [San Martín] southwards as far as a point opposite the spur which terminates on the southern shore of the Lake in longitude 72°47'W, whence the boundary shall be drawn to the foot of this spur and ascend the local water-parting to Mount Fitzroy. . .[2]

The Award includes the corresponding maps (see para. 36).

47. During the demarcation work in this region Captain H.L. Crosthwait erected a boundary post on the southern shore of Lake San Martín. This work was made extremely difficult by the very bad weather, so that he was unable to erect an iron post but only a cairn of stones, the geographical coordinates of which, according to the report of the British Commissioner, are longitude 72°46'0"W and latitude 48°53'10"S (*Boundary Commission Reports,* p.44). An iron post was erected at this point on 23 March 1903.

48. Captain Crosthwait did not explore the region lying between Lake San Martín and Mount Fitzroy and he did not erect any boundary markers on Mount Fitzroy. He only surveyed Fitzroy from a distance of about 100 kilometres, from the eastern shore of Lake Viedma. He stated that it stood out splendidly and that its shape was characteristic and unmistakeable (*Boundary Commission Reports,* p. 20).

49. The report of the British Demarcation Commission states that it is accompanied by illustrative maps and photographs. The official published version of this report does not contain maps or photographs. However, these maps were transmitted to the Foreign Ministries of both Parties. The map submitted by Captain Crosthwait is on a scale of 1:200,000 and bears his signature; it indicates the place where the boundary post was erected and contains a delineation of the boundary in this area which differs from the map of the Arbitral Award.

50. On 10 March 1966 the Mixed Boundary Commission replaced, on the same spot, the boundary post originally erected in 1903 which bears the number 62. During its visit to the area in February of this year (see para. 11) the Court inspected boundary post 62 and Mount Fitzroy. The agents of both States agreed *in situ* on the identification of these two points.

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[2] *NOTE BY THE SECRETARIAT:*

The term "spur" has been translated differently by the two Parties, who have based arguments on their translations. For example, for Chile "spur" can mean "*estribación*" (see, for example, memorial, pp. 13 and 67) or "*cordón*" (see, for example, oral submissions, record of 19 April 1994, pp. 47 and 61). In Argentina's view, "spur" should be translated as "*espolón*" (see, for example, counter-memorial, p. 150) or "*contrafuerte*" (see, for example, counter-memorial, p. 153).

51. Although there is agreement between the Parties on the two extreme points of the boundary in this sector, the Mixed Commission could never arrive at a definition of its course between those points. On 29 August 1990 the Presidents of Chile and Argentina signed a joint declaration in which they decided to instruct their respective delegates to the Mixed Commission to prepare within 60 days "a complete report on the latest situation with respect to the outstanding issues of the demarcation of the international boundary". The Commission met in Buenos Aires on 10 September 1990 and included in its report on the still outstanding demarcation issues the "sector between boundary post 62 as far as the limit of the Third Region, defined in section 18 of the report of the 1902 Arbitral Tribunal and analyzed in detail in the last paragraph of section 22 of that report" (record No. 132, annex I).

52. On 21 August 1991 the Presidents of the two countries decided to submit this issue to arbitration, in accordance with the 1984 Treaty of Peace and Friendship. The *Compromis* was signed by the Foreign Ministers of the two countries on 31 October 1991 (see para. 1).

IV

53. The geographical space lying between boundary post 62 and Mount Fitzroy is roughly rectangular in shape, running north-north-east/south-south-west; it extends from the southern shore of Lake San Martín-O'Higgins (48°51'S) as far as the Fitzroy range and the confluence of the Rivers Eléctrico and de las Vueltas (49°16'S). As the crow flies, the two extreme points are 48 kilometres apart. The average width of the area is 12 kilometres, with a maximum of almost 18 kilometres between Marconi Pass and the Cordón del Bosque. The area lying between the lines claimed by the Parties is approximately 481 square kilometres. The altitude is very variable, ranging between 250 metres at Lake San Martín-O'Higgins and 3,406 metres on Mount Fitzroy.

54. The most outstanding feature of the landscape of the region is its relief, which has all the characteristics of the Patagonian Andes with regard to lithology, tectonics and glacial morphology. The mountains are arranged in three big groups or main linear formations, running north-north-east/south-south-west, following the main line of the longitudinal fractures of the range.

55. The first of these linear formations, situated immediately to the east of Campo de Hielo Sur, consists in its first section of a chain of peaks separated by passes and gaps of glacial origin, between which are located the peaks known as Dos Aguas, Colorado, Trueno, Demetrio and Milanesio, with altitudes ranging from 1,600 to 2,000 metres. Beyond Cerro Milanesio the formation becomes more marked, less broken and higher. Its name then changes to Cordón Gorra Blanca, the high point of which is Cerro Gorra Blanca (2,907 metres). From Gorra Blanca towards the south the formation connects, across a broad glacial pass known as Marconi Pass, with the Cordón Marconi which terminates at Cerro Rincón (2,465 metres). From this point originates a sharp and twisting spur, running west-east, which terminates at the summit of Fitzroy, a mountain of considerable size with a peculiar conical shape and batholitic granite structure.

56. Towards the east the region's second orographic linear formation, also running north-north-east/south-south-west, is a low-lying area extending from the southern shore of lake San Martín-O'Higgins to the southern limits of the area. In its northern part this depression forms a threshold or pass at an altitude of about 700 metres—a difference of altitude of 450 metres with respect to Lake San Martín-O'Higgins and 200 metres with respect to Lake del Desierto, i.e., an average gradient in both directions of 4 in 100. This pass is the source of the River Obstáculo, which flows into Lake O'Higgins-San Martín on the Pacific slope; it is also the source of a watercourse which flows southwards and feeds Lake Larga, which in turn drains into Lake del Desierto. The waters of this latter lake flow out through the River de las Vueltas or Gatica towards Lake Viedma on the Atlantic slope. Lake del Desierto is narrow, elongated and rectilinear, enclosed between steep sides and about ten kilometres long by one wide. In the north-east it receives the waters of the River Diablo and in the north, as stated, the waters of Lake Larga. In the east it is fed by short streams draining the rain- and melt-water from the mountain chain in the immediate vicinity. The southern outlet of the lake gives birth to the River de las Vueltas or Gatica which, a short distance downstream, flows into a gradually widening valley. Its volume increases considerably from that point, with the contributions of the glacial-and snow-melt rivers and streams which rise on the Gorra Blanca and Marconi spurs and the Fitzroy chain.

57. The third orographic feature is a linear formation situated in the east of the region, which is less broken than the first formation described above, although it is also much wider and lower. This is the reason for the current absence of active glaciation. The height of its peaks ranges between the 1,521 metres of Martínez de Rozas and the 2,101 metres of an unnamed peak situated at the beginning of the Cordón del Bosque; there are many passes and indents, some of them barely higher that 1,000 metres, which introduce a degree of discontinuity in the summit-line. In its northern part this linear formation is called the Cordón Martínez de Rozas, and in its southern part the Cordón del Bosque, with a section unnamed in the toponymy used by Argentina in this arbitration lying between the two. In the toponymy used by Chile in this arbitration this formation, as a whole, has been designated the Cordón Oriental. In any event, its southern sector faces Mount Fitzroy to the south-west, being separated from it by the depression described above, through which run the River de las Vueltas or Gatica and one of its tributaries, the River Eléctrico.

58. The action of the ice, which is still a major feature of the high ground to the west and south-west and which must have covered a large part of the region in the Pleistocene glacial maximum, is a fundamental factor in an understanding of the relief described above, the result of glacial erosion and sedimentation.

59. The climate is damp and cold, in keeping with the region's latitude and altitude and its proximity to the South Pacific, with sharp internal variations depending on the relief. Precipitation is abundant, in excess of 1,000 mm a year, although it can be much greater in the high peaks in the west. The average annual temperature is about 7°, with a short mild summer and a long season of frosts.

60. The vegetation cover depends closely on the orographic features and the climate described above. There are still large areas of Patagonian Andean forests of *lengas* and Antarctic beech in an almost virgin state.

V

61. Article I of the *Compromis* assigns to the Court the following specific mandate:

> The two Parties request the Court of Arbitration (hereinafter "the Court") to determine the line of the frontier in the sector between boundary post 62 and Mount Fitzroy, in the Third Region, defined in section 18 of the report of the 1902 Arbitral Tribunal and described in detail in the last paragraph of section 22 of the report.

Article II.1 of the *Compromis* states:

> The Court shall reach its decision by interpreting and applying the 1902 Award in accordance with international law.

Article XI adds:

> The Court shall be empowered to interpret the *Compromis*, decide on its own competence and establish rules of procedure which have not been agreed between the Parties.

62. Before ruling on the points which are the subject of this dispute, the Court wishes to state some thoughts on the nature of the dispute, the applicable law and the scope of its functions, topics on which different opinions have been offered during the proceedings.

63. The Court is an independent jurisdictional organ established by the *Compromis* of 31 October 1991 pursuant to the 1984 Treaty of Peace and Friendship. This Court is not a successor to the Tribunal of King Edward VII; it is not subordinate to any other arbitration body and is entirely independent. Its function is stated clearly in the *Compromis* and consists of determining the line of the frontier between boundary post 62 and Mount Fitzroy established in the 1902 Award, which has been recognized by the Parties as *res judicata* and is not subject to any procedure of review, appeal or annulment.

64. In order to determine whether a body created by two or more States for the purpose of resolving a dispute is jurisdictional, administrative or political in nature, the international practice relies on the characteristic elements of the proceedings conducted by those States before the said body (see article 3, paragraph 2, of the Treaty of Lausanne—Frontier between Turkey and Iraq, P.C.I.J., *Collection of Judgments*, Series B, No. 12, pp. 26 and 27; Award in the matter of an arbitration concerning the border between the Emirates of Dubai and Sharjah, 1981, p. 58). In this sense, the proceedings conducted by the Parties before this Court are proper to a jurisdictional organ. This conclusion is based on the *Compromis* and the relevant provisions of the 1984 Treaty. Among the characteristic elements of the proceedings, attention must be drawn to the power of the Court to rule on its own competence (art. 29 of annex I of the 1984 Treaty; art. XI of the *Compromis*), which is typical of jurisdictional organs.

65. The Court is called upon to determine the boundary line in a sector of the frontier. This determination must be made on the basis of the 1902 Award, which the Court must interpret and apply in accordance with international law. Accordingly, the Court is not limited by the text of the Award but may apply any rule of international law binding on the Parties.

66. According to the *Compromis*, the Court has to interpret and apply the 1902 Award. A difference has emerged between the Parties concerning which documents constitute that Award. Argentina maintains that the Award itself,

the Tribunal's report and the Arbitrator's map constitute the Award. Chile added to those documents, at some point in the proceedings, a fourth element—the demarcation.

Article V of the 1902 Award states on this point:

> A more detailed definition of the line of frontier will be found in the Report submitted to Us by Our Tribunal, and upon the maps furnished by the experts of the Republics of Argentina and Chile, upon which the boundary which we have decided upon has been delineated by the members of Our Tribunal, and approved by Us.

The 1966 Court, however, took the view that the 1902 Award consisted of the decision itself, the Tribunal's report and the Arbitrator's map (*R.I.A.A.*, vol. XVI, p. 174). In the present case this Court sees no reason to depart from that precedent.

67. A decision on a boundary issue and the demarcation of the boundary are two distinct acts, each of which has its own legal force. In the original dispute the Parties assigned to the British Crown, in the *Compromis* of 17 April 1896, competence to pronounce the Award (see para. 29), while they assigned it competence to demarcate the line in the agreement of 28 May 1902 (see para. 37). If it had been understood that the demarcation formed part of the act of pronouncing the Award, this latter agreement would not have been necessary. This is consistent with the international practice according to which, whenever the parties to a boundary dispute wish the arbitrator to carry out the demarcation, they request him to do so and request him expressly, since the demarcation work is not included in the pronouncement of the Award.

68. A decision with the force of *res judicata* is legally binding on the parties to the dispute. This is a fundamental principle of the law of nations repeatedly invoked in the legal precedents, which regard the authority of *res judicata* as a universal and absolute principle of international law (Mixed Franco-Bulgarian Court of Arbitration, Award of 20 February 1923, *Recueil des décisions des tribunaux arbitraux mixtes institués par les traités de paix*, vol. II, p. 936; Trail Smelter case, Arbitral Award of 11 March 1941, *R.I.A.A.*, vol. III, p. 1950).

69. In the present case the Parties have not contested the authority of *res judicata* of the 1902 Award and have accordingly acknowledged that they are legally bound by its provisions.

70. The force of *res judicata* of an international award applies, primarily, to its operative part, i.e., the part in which the Court rules on the dispute and states the rights and obligations of the parties. The legal precedents have also established that the provisions of the preambular part, which are the logically necessary antecedents of the operative provisions, are equally binding (see Interpretation of Judgements Nos. 7 and 8—Chorzów Factory (P.C.I.J., *Collection of Judgments*, Series A, No. 13, pp. 20 and 21; Case concerning the delimitation of the continental shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic, Decision of 10 March 1978, *R.I.A.A.*, vol. XVIII, p. 296). As argued (para. 122), the meaning of the concepts used in an arbitral award are also covered by the *res judicata* and none of the parties may alter it.

71. In the law of nations the question of interpretation has been linked for more than two centuries with the teachings of Christian Wolff, the inspiration of jurists of following generations. He defined interpretation as the conclusion which is reached in a specific manner concerning what someone meant to indicate by his words or other signs (*Ius naturae methodo scientifico pertractatum*, VI, ch. III, para. 459), i.e.,, in our case, to "determine the intention of the Arbitrator", in the words of the 1966 Award (*R.I.A.A.*, vol. XVI, p. 174).

72. International law has rules which are used for the interpretation of any legal instrument, be it a treaty, a unilateral instrument, an arbitral award, or a resolution of an international organization. For example, the rule of the natural and ordinary meaning of the terms, the rule of reference to the context and the rule of the practical effect are all general rules of interpretation.

73. There are also norms which establish standards of interpretation for specific categories of rules. For example, with regard to the interpretation of awards, the 1966 Arbitrator stated:

> The Court is of the view that it is proper to apply stricter rules to the interpretation of an Award determined by an Arbitrator than to a treaty which results from negotiation between two or more Parties, where the process of interpretation may involve endeavouring to ascertain the common will of those Parties. In such cases it may be helpful to seek evidence of that common will either in preparatory documents or even in subsequent actions of the Parties. But with regard to the 1902 Award, the Court is satisfied that, in order to determine the intention of the Arbitrator, it is not necessary to look outside the three documents of which the Award consists. (*R.I.A.A.*, vol. XVI, p. 174)

74. The interpretation of an award has, moreover, a singular feature, already established in international case law, which has stated:

> The interpretation of a decision involves not only determination of the meaning of the text of the operative points of the decision but also determination of its scope, meaning and purpose in accordance with its reasoning. (Inter-American Court of Human Rights, Velásquez Rodríguez case, interpretation of the Award of Compensatory Damages, Award of 17 August 1990 (art. 67 of the Inter-American Convention on Human Rights), Series C, No. 9. para. 26).

75. Interpretation is a legal operation designed to determine the precise meaning of a rule, but it cannot change its meaning. With regard to the interpretation of awards, the Arbitral Award of 14 March 1978 concerning the delimitation of the continental shelf between Great Britain and France (see para. 70) puts forward some considerations which merit quotation:

> . . . account has to be taken of the nature and limits of the right to request from a Court an interpretation of its decision. "Interpretation" is a process that is merely auxiliary, and may serve to explain but may not change what the Court has already settled with binding force as *res judicata*. It poses the question, what was it that the Court decided with binding force in its decision, not the question what ought the Court now to decide in the light of fresh facts or fresh arguments. A request for interpretation must, therefore, genuinely relate to the determination of the meaning and scope of the decision, and cannot be used as a means for its "revision" or "annulment". . . (*R.I.A.A.*, vol. XVIII, p. 295).

The International Court of Justice has supported the same argument with regard to the interpretation of treaties (I.C.J., *Reports 1950*, p. 229; *Reports 1952*, p. 196; *Reports 1966*, p. 48).

76. It is a principle of hermeneutics that a text must be interpreted so as to produce effects consistent with international law and not in conflict with it (Case concerning right of passage over Indian territory, preliminary objections, I.C.J.,

Reports 1957, p. 142). In other words, a text may not be interpreted in such a way that its effects are in conflict with international law. In the specific case of international awards, whose legal validity is not in dispute and which have the force of *res judicata*, they must be interpreted in such a way that they do not produce the result that the judge or arbitrator has handed down his decision in violation of rules of the law of nations. Accordingly, in the discharge of its jurisdictional function a court called upon to interpret a legal rule must ensure not only that its decision is based on and consistent with international law but also that the decision does not produce results contrary to international law.

77. The competence of international judges is limited by the functions assigned to them by the parties in the case. Their powers are also limited by the extreme claims which the parties put forward in the hearings. To exceed these functions or powers means deciding *ultra vires* and rendering the decision null by reason of *excès de pouvoir*. The same rule is applicable to the interpretation of awards. The International Court of Justice has ruled that:

> Interpretation can in no way go beyond the limits of the Judgment, fixed in advance by the Parties themselves in their submissions. (Request for interpretation of the Judgment of November 20th, 1950, in the Asylum Case. Judgment of 27 November, 1950, I.C.J., *Reports 1950*, p. 403)

One manifestation of the application of this rule is the assertion made in paragraph 16 of the report of the 1902 Tribunal, according to which the decision is "within the limits defined by the extreme claims on both sides".

VI

78. In the present case Argentina has argued that Chile's request amounts to reclaiming territory lying farther to the east than Chile's extreme claim in the 1898-1902 arbitration. According to Argentina, Chile seeks to achieve this purpose by interpretation of the 1902 Award. Chile's extreme claim at that time had been the continental *divortium aquarum*, which meant that the Atlantic basins would remain under Argentine jurisdiction and the Pacific basins under Chilean jurisdiction. Now, in contrast, Chile (see paras. 17, 18 and 19) is requesting jurisdiction over part of the basin of the River de las Vueltas or Gatica, which is on the Atlantic slope.

79. Argentina argues that, if this Court allowed that claim, it would be deciding that the 1902 Award granted to Chile territory which it had not claimed at that time and, therefore, the decision of King Edward VII would be vitiated by *excès de pouvoir*.

80. This argument is set out in the Argentine memorial in the following terms:

> Chile always argued before the 1902 Arbitrator . . . that the continental *divortium aquarum* was the boundary between the two countries and that meant indisputable, clear and definitive recognition of the fact that the basins of the rivers and lakes which flow to the Atlantic belong to the Argentine Republic.

Chile could not now present an argument by means of which it sought, 90 years later, to claim territory which it had recognized as Argentine in the 1902 arbitration (pp. 336-337).

The Court . . . cannot establish a boundary *de novo*. Its function is to identify accurately a boundary already established in accordance with the spirit of the treaty within the extreme claims of the Parties.

The 1902 Arbitrator would have acted in excess of his powers if the boundary which he adopted had exceeded the lines claimed by the Parties (p. 357).

81. The Argentine counter-memorial reiterates the same argument. It states that Chile's extreme claim in the 1898-1902 arbitration was that the 1881 Treaty and the 1893 Protocol should be interpreted to mean that the international boundary was constituted by the natural and effective continental water-parting. It mentions in support of its argument several passages from the documents and in particular a map submitted by Chile to H. B. Majesty. It goes on to state that, as a consequence of Chile's extreme claim, the basin of the River Gatica or de las Vueltas was not included in Chile's request and that, therefore, the Arbitrator could not have awarded it to that country.

The counter-memorial states:

The Arbitrator determined the boundary, and could not have done so in any other way, within the extreme claims of the Parties. If he had not done so and if the boundary had passed beyond those claims, the Award would undoubtedly have been affected by one of the clearest and most indisputable grounds of annulment (p. 396).

It then cites the passage from paragraph 16 of the Tribunal's report which states that the boundary decided upon lies within the extreme claims of both sides and adds:

This was a very serious legal limitation which the Tribunal had the wisdom to mention expressly in its report. What it decided was *within the extreme claims of the Parties* and not beyond them. If it had acted otherwise it would have acted *ultra petita* beyond the competence assigned to it by the Parties (p. 399, emphasis in the original).

In the oral submissions Argentina developed the same argument at length. We may cite here, by way of example, the following passage of the reasoning repeated several times before this Court.

Like this extreme claim and plea to the Arbitrator, Chile's natural and effective continental water-parting in 1898-1902 also has very important legal consequences for the interpretation of the 1902 Award by this Court.

The question inevitably arises, since Chile is now requesting, in this arbitration, a frontier line, allegedly established by the 1902 Award, which goes beyond the content of its extreme claim and request in 1898-1902.

This, Mr. President, clashes with a fundamental legal principle of international law and also of internal legal rules. We are referring of course to the principle of *non ultra petita partium*.

By virtue of this principle the British Arbitrator could not award to Chile in 1902 more than Chile requested from him in the arbitral proceedings conducted before him (record of 26 April 1994, pp. 30-31).

82. Chile acknowledged the legal relevance of the rule *non ultra petita partium*. During the oral submissions the Chilean delegation stated:

Investi par le *Compromis* de la mission de définir le "recorrido de la traza del limite" par l'interprétation et l'application du Laudo de 1902, votre Tribunal ne peut dépasser les "limits

defined by the extreme claims on both sides" de 1902. Contrairement à ce que l'on a parfois laissé entendre dans cette enceinte, ce n'est pas là, pour votre Tribunal, je le note en passant, un problème de *petita* ou de compétence territoriale. C'est une exigence de fond. Ne pas dépasser les limites extrêmes des deux cotés de 1902, c'est une exigence de fond qui repose tout simplement sur l'obligation imposée à votre Tribunal par le *Compromis* de prendre sa décision par la voie de l'interprétation et l'application du Laudo (record of 10 May 1994).[3]

83. Chile, however, denies that its present claim goes beyond what it requested from the British Arbitrator in 1898-1902. Chile argues in its counter-memorial that the extreme claims of the Parties in the 1898-1902 arbitration were indicated by lines on maps and that the Arbitrator also fixed the boundary by drawing a line on a map. If these lines are compared, Chile argues, its present claim does not exceed the extreme claim put forward in the 1898-1902 arbitration.

Chile's counter-memorial states:

In this region the line claimed at that time by Chile was drawn further to the south of the true continental water-parting, which was not identified until the end of the 1940s. Accordingly, the boundary line and the area now claimed by Chile are essentially within the perimeter claimed at that time (p. 11).

. . .with respect to the expression of Chile's interpretation of the determination of the boundary, what is really important is the line drawn on the map (p. 46).

For the moment it is sufficient to stress that the claims of the Parties were both submitted to the Tribunal in the form of lines drawn on maps and that, without adhering to those lines, the Tribunal also represented its decision by means of a line drawn on a map (p. 46).

As Chile has stated and will feel obliged to explain later, the extreme limits of its claim in the 1902 arbitration were determined not by its general commitment to the theory of the continental water-parting but by the lines actually identified by Chile in 1898, drawn on maps submitted to the Tribunal by Chile and Argentina, and regarded by the Tribunal as the expression of the limits of the Chilean claim (p. 62).

84. In the oral submissions Chile reiterated its argument that in the 1898-1902 arbitration its claim consisted of a boundary delineated on a map and it developed at length arguments relating to the geographical knowledge of the time. According to Chile, it is impossible to interpret its 1898-1902 claim on the basis of current geographical knowledge but rather of such knowledge at the time, when there had still been unexplored areas and other areas about which little was known. This concept was repeatedly stated in the oral submissions, of which the following passage is an example:

Je voudrais tout d'abord dénoncer, pour ne plus avoir à y revenir, l'inacceptable manipulation temporelle qui sous-tend l'argumentation argentine que j'espère avoir résumée sans l'avoir trahie. Le Chile n'a pas revendiqué en 1902, nous dit-on, et le Laudo ne lui a pas attribué en 1902, nous dit-on, la moindre parcelle du bassin atlantique du Lago Viedma et du Río de Las Vueltas; par conséquent, conclut-on, le Chile ne peut pas revendiquer aujourd'hui, et votre Tribunal ne peut pas lui accorder aujourd'hui, la moindre parcelle de ce bassin. Ce raisonnement est proprement effarant car il ne s'agit pas du même bassin dans

[3] Entrusted by the Compromis with the task of determining "the line of the frontier" by interpreting and applying the 1902 Award, your Court cannot exceed the "limits defined by the extreme claims on both sides" in 1902. Contrary to what has sometimes been intimated in this room, this is not for your Court, I note in passing, a problem of *petita* or of territorial competence. It is a fundamental requirement. Not to exceed the extreme claims on both sides in 1902 is a fundamental requirement based simply on the obligation imposed on your Court by the Compromis to reach its decision by means of interpretation and application of that Award).

la prémisse et dans la conclusion. Dans la première partie du raisonnement, il s'agit de ce que l'on croyait *à cette époque* constituer le bassin atlantique du Lago Viedma et du Río de Las Vueltas: dans la seconde partie du raisonnement, il s'agit de ce que l'on sait *aujourd'hui* constituer le bassin atlantique du Lago Viedma et du Río de Las Vueltas. On sait *aujourd'hui* que le *divortium aquarum* continental court autrement qu'on ne l'imaginait il y a un siècle. On sait *aujourd'hui* que le bassin du Rio Gatica ou de Las Vueltas s'étend beaucoup plus vers le nord qu'on ne le pensait en 1902 et qu'il n'a pas du tout la configuration qu'on lui supposait alors. Et l'on connaît *aujourd'hui* une Laguna del Desierto dont on ne soupçonnait même pas l'existence il y a un siècle. Lorsque nos adversaires s'appuient, comme ils le font avec tant d'insistence, des dizaines de fois, sur la séquence du "bassin Viedma, dont fait partie le bassin Vueltas, auquel appartient la Laguna del Desierto", c'est à une donnée totalement inconnue en 1902 qu'ils se réfèrent—puisqu'à *cette époque* la région où on sait aujourd'hui que se trouve la Laguna del Desierto était considerée comme située sur le versant pacifique et que l'existence même de la Laguna était inconnue (record of 13 April 1994, pp. 28-29, italics in the original).[4]

85. As can be seen from these paragraphs, there are divergences between the Parties as to what Chile's extreme claim was in the 1898-1902 arbitration. In order to determine what that claim was it is necessary to refer to what Chile actually stated at the time and not to what Argentina or Chile today assert the claim to have been. In fact, the extreme claims of the Parties in the 1898-1902 arbitration were set out in accordance with criteria which both defined their aspirations and justified them or invested the documents submitted to the Arbitrator with meaning. It would be impossible to interpret what was decided at that time in accordance with criteria presented to the 1991 Court but which were not validated in the original decision, for that would be to take up matters which were not covered by the 1902 Award and which, in consequence, cannot serve as a basis for interpreting it. This Court believes, therefore, that Chile's extreme claim in 1898-1902 must be sought in that country's presentations before that Arbitrator.

86. At the meeting on 29 August 1898 (see para. 31) the Chilean expert stated that the boundary between the two countries was formed by the "natural and effective water-parting of the South American continent, between parallels 26°52'45" and 52°."

[4] I should like first of all to reject, so that I do not have to return to it, the unacceptable manipulation of time which underlies Argentina's argument, which I hope I have summarized accurately. Chile did not claim in 1902, we are told, and the Award did not assign to it in 1902, we are told, the least part of the Atlantic basin of Lake Viedma and the River de las Vueltas; accordingly, it is concluded, Chile cannot today claim, and your Court cannot assign to it today, the least part of that basin. This argument is truly outrageous, because the premise and the conclusion are not talking about the same basin. The first part of the argument refers to what was believed *at that time* to constitute the Atlantic basin of Lake Viedma and the River de las Vueltas: the second part refers to what is known *today* to constitute the Atlantic basin of Lake Viedma and the River de las Vueltas. It is known *today* that the continental *divortium aquarum* follows a different line from what was thought a century ago. It is known *today* that the basin of the River Gatica or de las Vueltas extends much further towards the north than was thought in 1902 and that it does not have at all the configuration attributed to it at that time. And it is known *today* that there is a Lake del Desierto whose existence was not even suspected a century ago. When our adversaries base their argument, as they do so insistently, dozens of times, on the sequence of "Viedma basin, part of which consists of the Vueltas basin, to which Lake del Desierto belongs", they are referring to a piece of information entirely unknown in 1902—since *at that time* the zone in which Lake del Desierto is known to be situated today was believed to lie wholly on the Pacific slope, and the Lake's very existence was unknown.

87. Chile maintained throughout the 1898-1902 arbitration that, according to the 1881 Treaty and the 1893 Protocol, the boundary was provided by the continental water-parting, which it also called *divortia aquarum*. For example, in its first submission before the Arbitral Tribunal in May 1899 Chile stated:

> After the lengthy exposition of facts given in the preceding pages, it is impossible to argue reasonably that the boundary agreements between Chile and the Argentine Republic have established any other demarcation rule than the *divortia aquarum* (Appendix to the submission on behalf of Chile in reply to the Argentine Report submitted to the Tribunal constituted by H.B. Majesty's Government acting as Arbitrator, hereinafter "*appendix*", Paris, 1902, vol. V, p. 91).

Other similar references may be found in the *appendix* on pages 95, 113 and 115. In the same submission Chile asserts that the continental water-parting is "a natural, entirely known and visible line . . . which the existing Treaties have declared to be the 'geographical condition of the demarcation' and the 'invariable rule' with which the persons carrying out the demarcation must comply" (*appendix*, vol. V, p. 123). In the conclusions of its first submission Chile requested the Arbitrator to use the continental water-parting as the criterion for delineating the frontier in accordance with the treaties in force.

88. Chile put forward the same argument in its reply to the Argentine memorial. Reference may be made, for example, to chapters XXI and XXIII of this submission (Statement presented on behalf of Chile in reply to the Argentine report submitted to the Tribunal constituted by H.B. Majesty's Government acting as Arbitrator, hereinafter "*Chilean Statement*", London, 1901, vol. II, pp. 644 *et seq.* and 700 *et seq.*). Several passages illustrating this assertion are cited in paragraph 93 of this Award.

89. On 27 October 1902 Chile, commenting on Argentina's final statement, reiterated the idea that the 1881 Treaty and the 1893 Protocol established as the boundary the principle of the continental water-parting. The following passages are clear in this respect:

> The Tribunal will have seen that due consideration has been given in chapters XX to XXV of our Statement to every sentence of this and the other clauses of the Treaties and Protocols that have any bearing on the boundary demarcation. The existence of "a sole and absolute rule" of demarcation—that is to say of an "invariable rule"—in the Treaty is officially declared by the two Nations in the Protocol of 1893; and it has been exhaustively proved (*Chilean Statement*, pp. 702 to 705) that *there is no other possible invariable rule* contained in the Treaty, but that of water-parting (Some remarks on the final statement presented to the Arbitration Tribunal by the Argentine representative, hereinafter "*Some Remarks*"; italics in the original).
>
> The *Continental divide* as the basis of the Boundary Treaty is not a "Chilean Doctrine", but has been laid down as the guiding rule in the Covenant as the outcome of prolonged negotiations and has been upheld by the Argentine Representatives in particular (*Chilean Statement*, ch. IX, X and XI); (*Some Remarks*, italics in the original).
>
> . . . according to the Chilean interpretation officially laid down by the Expert Señor Barros Arana, the "main chain" alluded to in the Protocol of 1893 cannot be other than that which conforms with the "geographical condition" of the demarcation established by the Boundary Treaty and Protocol, that is to say the one which divides the waters, constantly separating the streams which flow to either country. . .(*Some Remarks*).

90. In view of the passages cited above, this Court concludes that Chile claimed before the Arbitrator as the boundary established by the 1881 Treaty and the 1893 Protocol the line of the continental *divortium aquarum*.

91. The Court must now determine how the Chilean claim has to be interpreted in those cases in which the maps submitted by Chile represented the line of the *divortium aquarum* with some divergences from the reality on the ground or in those other cases in which the line was unknown because the areas were unexplored. This matter is of special importance in view of Chile's assertion that this claim was better represented on a map than by means of its underlying concept (see paras. 83 and 84).

*93. In 1898 the Chilean expert stated:

> . . . although in its most extensive and important parts the ground across which the dividing line runs is sufficiently well-known, and even extensively surveyed, and although the hydrographic origins of the rivers and streams which flow away to both sides is generally well-established, it must nevertheless be pointed out that the topographical location of the proposed line is entirely independent of the accuracy of the maps and that, for this reason, this line is none other than the natural and effective water-parting of the South American continent, between parallels 26°52'45" and 52°, and can be demarcated on the ground without carrying out any more topographical operations than are necessary for determining what the course of the waters would be in places where they do not physically run (statement of the Chilean expert, record of 29 August 1898).

In its arguments before the Arbitrator, Chile stated:

> The water-parting is one of those topographical features which are most easy to identify and mark on the ground. It is based on the natural geography and obeys perfectly clear physical laws. Neither maps nor complicated topographical studies are needed for its identification. A simple ocular inspection is all that is required to perceive where a river or stream rises and the natural direction which its waters take (*appendix*, vol. V, p. 92).
>
> It is interesting to note that this same opinion was stated in almost the same words and more or less at the same time by the Chilean expert when he told the Argentine expert, in his note of 18 January 1892: "The reason why the 1881 negotiators took the line of the water-parting as the demarcation line in the Cordilleras is the same reason as is recommended by sound principles of geography and international law. It is, in fact, a single line, easy to define, locate on the ground and demarcate, and it is designated by nature itself and not open to any ambiguities or errors" (*appendix*, vol. V, pp. 92-93).
>
> When the article says that "the boundary line shall run along the highest summits of the said Cordilleras *which divide the waters*, we understand that *the* waters are the *whole* of the waters flowing over the conterminous territories; waters which, being compelled by natural laws to choose between two opposite directions of outflow, must involve the existence of a natural divide, the easy identification and necessary continuity of which leads to its being recognized as wholly adequate to serve as the international boundary (*Chilean Statement*, vol. I, p. 313; italics in the original).
>
> It is in fact perfectly conceivable that two bordering States should adopt for the delimitation of their frontiers a principle of demarcation which, when applied to unexplored regions, should result in one of them profiting by a larger portion of territory. This is conceivable because, on such a hypothesis, both parties negotiate on conditions of perfect equality, both being aware of the risks they are running and accepting them deliberately. What is not conceivable, within the limits of the spirit of loyalty which should prevail in the adjustment of international Treaties, is that any validity should be supposed to attach to the acquisition of an enormous advantage by one of the parties, who is conscious of obtaining it, at the expense of the other, who is unaware of its loss (*Chilean Statement*, vol. II, pp. 467-468).

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* Note by the Secretariat: skipping of paragraph number from 91 to 93 is in the original text.

Given any boundary line—such as would exist after effecting the demarcation referred to in the first paragraph of article 1 of the Protocol—it is as impossible to imagine that a "lake" or "lagoon" lying to the east of the line should not belong to the Argentine Republic, as to imagine that any "parts" of a river should not belong to the country in which the whole of it lies (*Chilean Statement*, vol. II, p. 489).

. . . Señor Barros Arana invariably maintained that no previous scientific survey of the ground was needed in order to discover *which* was the line ordered by the Treaties, although an ocular inspection was sometimes necessary to ascertain *where* the line lay, and although a simultaneous or subsequent survey was also necessary for delineating the line on a map, so that the extent of the respective territories near the frontier might be known (*Chilean Statement*, vol. II, p. 560; italics in the original).

Moreover, it must not be forgotten that, on the one hand, any deficiency of geographical information on the part of the Chilean Expert could involve no worse consequence than the subsequent discovery—when the demarcation was being carried out—that the course of the dividing line differed from what might at first have been anticipated; but this could never entail any difficulty in the identification of the line itself, since the rule of following the water-parting could give rise to no ambiguity in practice (*Chilean Statement*, vol. II, p. 640; italics in the original).

In order to prevent any misunderstanding on this score, it was usual . . . to close the sentence by an enumeration of the principal watercourses on each side, or the mention of their ultimate drainage. Sometimes this was omitted, either because it was not thought necessary, or because part of the region and its watercourses were unexplored. In any case it cannot be doubted that if such formulae as the above-quoted represent a single principle of demarcation, this principle can be no other than the principle of water-parting (*Chilean Statement*, vol. II, p. 660).

. . . the only fact then positively known about the southern regions of both countries, north of the 52nd parallel, was that there was a Pacific drainage and an Atlantic drainage, and that a line of separation between them *must* exist somewhere. (*Chilean Statement*, vol. II, p. 662; italics in the original).

Given the state of knowledge of Patagonia south of 38° in 1881, there is no question that the *existence* of an arcifinious frontier in that region, such as would fulfil the various conditions required by the Argentine Representative, was by no means an assured fact; on the contrary, exaggerated notions had been repeatedly circulated as to the very easy access to one side from the other. On the other hand, the *existence* of waters flowing to the Pacific and of waters flowing to the Atlantic all along the respective coasts and proceeding from the region of the boundary, was an undoubted fact, and that these opposite water flows *must have a line of separation somewhere* was an inevitable consequence of it (*Chilean Statement*, vol. II, p. 672; italics in the original).

. . . it is indisputable that the only line which can be identified on the ground without any discussion or ambiguity in all places save those where the water-parting is doubtful, is the water-parting line itself; the water-parting as understood by the Chilean Expert—the only water-parting line that can be correctly called by that name from one extremity to the other—because if subordinate and partial water-partings be taken into consideration, the expression would cease to be definite and the stipulation founded on it would cease to be valid (*Chilean Statement*, vol. II, p. 673).

The manifest assumption in article 1 of the Boundary Treaty—that the frontier line indicated therein to the North of the 52nd parallel had a necessary and unequivocal existence on the ground, save where the water-divide should not be clear, and consequently could be no other than the water-divide itself—was confirmed by the terms of the Convention, with the one qualification that in 1881 it was not thought necessary to place landmarks on the ground except where the boundary line might not be clear, while in 1888 the expediency of carrying out the demarcation along the whole line was recognized (*Chilean Statement*, vol. II, pp. 697-698).

The principle of the water-parting has always been regarded as a mathematical principle in boundary demarcation, and is usually applied both in the case of countries having separate river systems originating in unexplored mountains or low divides, and in the case of those whose features have been mapped out beforehand.

The advantages of the method in the former case are obvious: two opposite flows of water *must* have a line of separation somewhere, and thus at least the *real existence* of a continuous line is secured (*Chilean Statement*, vol.II, p. 738; italics in the original).

. . . it is likewise assumed that the line shall be marked out first *on the ground*, and that the data shall then be collected for the sole purpose of *drawing the line on the maps* (*Chilean Statement*, vol. II, p. 748; italics in the original).

The primary water-parting being identified at points separating the basins of well known—though possibly unsurveyed—Chilean and Argentine watercourses, the said divide could easily be demarcated, point by point, and the nearest points on either side conducive to the identification of the line would be the origins of opposite headstreams; for this reason the Protocol enjoins that the latter shall be included in the survey, so as to enable their delineation on the map (*Chilean Statement*, vol. II, p. 751).

The "natural water-parting" consequently is that which is actually effected at the places where Nature has determined that it should be (*Chilean Statement*, vol. II, p. 802).

The Tribunal knows that the opinion of the Chilean Expert as to which was the principle of demarcation established by the Treaty did not depend on maps, and that he never proposed to subordinate the demarcation to maps, since no maps were needed to know that a real and unique line of water-parting existed between Chilean and Argentine territories, or to find and identify such line on the ground (*Chilean Statement*, vol. III, p. 889).

The Chilean line is a single one, easy of determination on the spot and on any map, independent of technical errors and of incorrect names in the maps (*Chilean Statement*, vol. IV, p. 1250).

First of all, it must be observed once more that the course given by the Expert of Chile to his boundary line is entirely independent of those maps, since it obeys a definite principle whose application to the ground is not affected by the more or less accurate details of the cartographical picture shown in the map (*Chilean Statement*, vol. IV, p. 1322).

In 1881 and 1893, the water-divide, which was established as the geographical condition of the demarcation between the two countries, was, therefore, supposed to take place in the labyrinth of ranges and mountain masses west of Lake San Martín, which was assumed to belong to the Atlantic basin. When, shortly before the official tracing of the boundary line by the Experts, it was ascertained beyond doubt that the lake discharged its waters into the Pacific, the Expert of Chile had no cause for deviating from the principle laid down by the Treaty and sanctioned by its practical application in the regions where the frontier line had already been accepted, and consequently included the whole basin of Lake San Martín within the territory of Chile, just as he had acted in the case of Lake Buenos Aires and Lake Resumidero (*Chilean Statement*, vol. IV, pp. 1505-1506).

As we have explicitly demonstrated in different parts of our Statement (pp. 563-564, 884-886, 1483-1485) any deficiency of geographical information in the Chilean maps is of no importance to the question of the boundary demarcation, since the line submitted by the Chilean Expert, based on a fixed principle and not subject to any individual appreciation of certain features of the ground, can be recognized everywhere in practice, even if the details be not always correctly traced in the maps (*Some Remarks*).

94. This Court concludes that Chile, in its presentations to the 1898-1902 Arbitrator, established an order of priority among the manifestations of its wishes (the written texts and the maps) and asserted that the natural and effective continental water-parting prevailed, i.e., the water-parting present in nature, over its representations on maps and regardless of the accuracy thereof. The same criterion applies to the unexplored regions and to the ones which have been insufficiently explored.

95. The conclusions reached by the Court are entirely in accordance with the principles of good faith and contemporaneity.

96. In fact, these conclusions are not based on isolated passages or passages susceptible of different interpretations but on precise texts which manifest Chile's intention in that arbitration clearly and conclusively. Nor is it a question of isolated assertions but of reiterated ones.

97. The conclusions are also based on the geographical knowledge available to the Parties in 1902. At that time there were still unexplored areas of the frontier and other areas which were insufficiently known, something which is not the case today. Chile argued that neither the inaccuracy of the maps nor the lack of knowledge of a region could serve as an excuse for not applying the invariable criterion of demarcation which, in its opinion, was the continental water-divide. It asserted that the same principles should also be applied to the unexplored regions, even when the outcome was uncertain, and that it was ready to accept the consequences. Thus, the conclusion of this Court to the effect that Chile claimed in any event the natural and effective continental water-parting has been established on the basis of the geographical knowledge of 1902, i.e., in strict confirmity with the principle of contemporaneity.

98. It is now necessary to determine what Chile's extreme claim was in the 1898-1902 arbitration with respect to the boundary sector subject to the decision of this Court. This claim is presented in the *Chilean Statement* and on one of the maps submitted to the British Arbitrator and identified as "plate X". Concerning the water-parting between Lakes San Martín and Viedma, Chile states:

> The Chilean Expert's line, always traced along the continental water-divide, runs in the stretch corresponding to No. 330 of the official proposal, on the "section of Cordillera which separates the waters which form the Argentine stream Chalia from the tributary sources of Lake San Martín which drains in the inlets of the Pacific". (record of August 29, 1898); (*Chilean Statement*, vol. IV, p. 1515).

Chile then gives the following description:

> . . . the plateau situated to the south of Lake San Martín, which separates the sources of streams flowing into that lake from those flowing to the River Chalia and Lake Viedma, gradually rises and breaks as it stretches from east to west, until it forms snowy ridges and ranges. In view of such an imperceptible transition, the Chilean Expert had no reason for considering as excluded from the "Cordillera" a plateau which, from the point of view of orographical dependency, undoubtedly forms a ramification of the Andean system. The heights measured by the first Chilean sub-Commission along the line of the *divortium aquarum*, 727,558,952,1059,1988 1789 and 2095 metres, show the gradual elevation of the ground from east to west, until it forms a group of snowy hills, whence flow towards the Pacific a series of southern affluents of Lake San Martín, and towards the Atlantic side, the head-streams or sources of the River Chalia and the River Hurtado, a tributary of Lake Viedma.
>
> On the summit of 2095 metres the *divortium aquarum* turns to the N.N.W. to enter a region still very little known, bordering on the north the basin of the River Gatica (Río de la Vuelta of the Argentine maps), which in the lower part of its course attains 80 metres in breadth, and the sources of which, judging by the great volume of their waters, are probably situated far above the point to which it has been explored. At its bend to the south the dividing line, the details of which have not yet been determined in this region, reaches point 331 of the Chilean enumeration situated, in conformity with the Record, on the "Cordillera del Chaltén which divides the hydrographical basin of Lake Viedma (or Quicharre) that drains into the Atlantic through the River Santa Cruz, from the Chilean sources which drain into the inlets of the Pacific" (*Chilean Statement*, vol. IV, pp. 1515-1516; italics in the original).

99. According to the text transcribed above, at the time of the arbitration the upper basin of the River Gatica or de las Vueltas, also called "de la Vuelta", had not even been explored and, therefore, its origins were unknown. During the present Court's visit to the area (see para. 11) and bearing in mind the cartography of the time, particularly the map of Riso Patrón, a distinguished Chilean geographer of that era, the members were able to verify which part had then been unexplored.

100. According to the *Chilean Statement*, Chile claimed as the boundary a line bordering in the north the basin of the River Gatica or de las Vueltas. In other words, it claimed Lake San Martín and its whole basin, which drains to the Pacific, and left on the other side of the frontier the basin of the River Gatica or de la Vuelta, which drains into Lake Viedma, which flows to the Atlantic.

101. It is now necessary to settle the question of whether the boundary claimed by Chile leaves on the Argentine side the natural and effective basin of the River Gatica or de la Vuelta or only the then known part of that basin.

102. The passages transcribed from the *Chilean Statement* must be interpreted in the light of the general criterion of that statement, which has been analyzed in paragraph 87 *et seq.*. According to that criterion, it must be concluded that Chile's extreme claim in 1898-1902 consisted of the natural and effective continental *divortium aquarum*, which separated the basin of the Gatica or de la Vuelta from the Pacific slope.

103. Plate IX submitted by Chile in that arbitration allows the same conclusion. On that map the course of the continental *divortium aquarum*, which had been surveyed at that time, appears as a solid red line, and its assumed course in the area still unsurveyed appears as a broken or pecked line. This map depicts the River Gatica or de la Vuelta with an unbroken blue line, but the upper part of the basin, still not surveyed at the time, appears as a broken blue line. The limits of the sources of the River Gatica or de las Vueltas, which corresponded to the limits of the continental water-divide, were shown with a pecked line, in contrast to the solid line which depicts the continental water-divide throughout the basin of Lake San Martín, whose contours were known.

104. The location of these two pecked lines, i.e., of the continental *divortium aquarum* and of the origins of the River Gatica or de la Vuelta, clearly shows what the meaning of Chile's extreme claim was. It was that the claimed boundary passed to the north of the natural and effective sources of the Gatica or de la Vuelta basin, which was left in its entirety on the other side of the frontier, regardless of its extension.

105. The Court concludes that, in the light of the terms in which Chile expressed itself at the time, both from the conceptual and from the cartographic standpoint, the essential thing was not the actual points which were to constitute the frontier line on the maps but that this line should effectively perform the function of separating the basins of Lake San Martín and the River Gatica or de las Vueltas.

106. The interpretation of the 1902 Award should thus keep in mind that Chile's extreme claim in that arbitration was the line of the natural and effective *divortium aquarum*. Therefore, according to international law the terms used by the British Arbitrator to define the frontier between the point on the southern shore of Lake San Martín where boundary post 62 stands today and Mount Fitzroy could not be assigned an effect which would award to Chile territory which, by extending beyond the said line, is located beyond that extreme claim. Such a result would be equivalent to concluding that the 1902 Award violated the law of nations by breaking the rule *non ultra petita partium*.

107. These conclusions require some clarification with respect to the point on the frontier corresponding to Mount Fitzroy. In fact, when the experts of the two Parties met in 1898, each of them proposed what, in his opinion, was the general line of the frontier according to the 1881 Treaty and the 1893 Protocol (see paras. 31 and 32). With regard to the sector of the frontier which is the subject of this arbitration, the Chilean expert proposed as point 331 on his map that the line should pass along the "Cordillera del Chaltén which divides the hydrographical basin of Lake Viedma (or Quicharre) that drains into the Atlantic through the River Santa Cruz from the Chilean sources which drain into the inlets of the Pacific". The Argentine expert proposed as point 304 on his map that the frontier should pass across Mount Fitzroy. In September 1898 the Minister for Foreign Affairs of Chile and the Argentine Minister Plenipotentiary in Santiago confirmed that point 331 in the Chilean proposal coincided with point 304 in the Argentine proposal (see paras. 43-45). At the time it was believed that Mount Fitzroy, which formed part of what Chile called the Cordillera del Chaltén, was located on the continental water-divide in that Cordillera.

108. During the arbitral proceedings of 1898-1902, and as a result of the technical work done by the Parties, it was verified that Mount Fitzroy was located to the east of the continental water-divide. This was confirmed in the *Chilean Statement* (vol. IV, p. 1517) and in Captain Crosthwait's report. In addition, the British demarcation commissioner, Sir Thomas Holdich, refers in his final report to Mount Fitzroy and states the "probability that that mountain is not on the main water-parting—a matter which, of course, requires further proof and does not invalidate the Award".

109. In the present arbitration the Argentine memorial states that there was agreement between the two Governments that Mount Fitzroy was a point on the boundary (p. 92). Chile stated in its counter-memorial that it "shares Argentina's opinion that there was agreement between the two Governments that Mount Fitzroy was a point on the boundary" (p. 46). According to the Parties, as a result of this agreement the 1902 Award had the boundary pass across Mount Fitzroy, which was situated on the Atlantic side. The interpretation must therefore be that Chile's extreme claim, described in paragraph 94, was altered, according to Argentina, so that the boundary line, within the so-called Cordillera del Chaltén, should make the necessary inflection to touch Mount Fitzroy. To sum up, then, Chile's extreme claim in 1898-1902 concerning the frontier sector submitted to the decision of this Court was the natural and effective continental *divortium aquarum*, except in the case of Mount Fitzroy.

110. In the course of the proceedings Chile argued that its extreme claim in 1898-1902 was not accepted by the Arbitrator and that, therefore, it lacks any legal force today. This Court, however, points out that the application of the rule *non ultra petita partium* in this case is based only on a comparison of the extreme claim of one Party to an international dispute with the claim of that same Party with respect to which the Court is called upon to interpret the Award which settled the dispute. The admission or rejection of that extreme claim by the Arbitrator is irrelevant to the application of the rule.

111. Nor should one forget paragraph 16 of the report, where it was expressly stated that "the question submitted to us is not simply that of deciding which of the two alternative lines is right or wrong, but rather to determine—within the limits defined by the extreme claims on both sides—the precise boundary line which, in our opinion, would best interpret the intention of the diplomatic instruments submitted to our consideration". The Award, consequently, without accepting or rejecting definitively the claims of the Parties, sought to delineate a frontier which, situated between the two claims or coinciding sometimes with one and sometimes with the other, would offer a balanced solution to the dispute. What the Award did not accept was the Chilean position that the continental *divortium aquarum* had to be the sole criterion of delimitation, but there are several sections of the frontier which run along the continental water-parting because the Award so decided. It cannot therefore be argued that the Award definitively rejected the Chilean claim or that the interpretation that a segment of the frontier coincided with the continental water-divide conflicts with the Award.

112. In addition to the rule *non ultra petita partium*, Argentina has also based its claim on the argument that the territories included in the sector to which this dispute refers were outside the competence of the British Arbitrator, and on the doctrine of estoppel (*venire contra factum proprium non valet*). Both arguments are based on the recognition which, in Argentina's opinion, Chile had accorded to Argentina's sovereignty over those territories. These issues have been extensively debated in this arbitration. However, an analysis of these arguments does not alter the earlier conclusions and, therefore, the Court does not think it necessary to rule on them.

VII

113. Now that the limits to the Court's work of interpretation have been established, it must determine the meaning of the provisions of the 1902 Award and apply them.

The Award itself states:

> The further continuation of the boundary is determined by lines which we have fixed across Lake Buenos Aires, Lake Pueyrredón (or Cochrane) and Lake San Martín, the effect of which is to assign the western portions of the basins of these lakes to Chile and the eastern portions to Argentina, the dividing ranges carrying the lofty peaks known as Mounts San Lorenzo and Fitzroy.

114. The report adds, with regard to the sector which is the subject of the present dispute:

> From this point it [the boundary] shall follow the median line of the Lake [San Martín] southward as far as a point opposite the spur. . . on the southern shore of the Lake in longitude 72°47'W., whence the boundary shall be drawn to the foot of this spur and ascend the local water-parting to Mount Fitzroy. . .

115. The Parties are in agreement on the two extreme points of the frontier sector in dispute, boundary post 62 and Mount Fitzroy, as the Court has indicated in paragraph 50 of this Award. Therefore, the dispute turns on the determination of the boundary line between those two points.

116. Argentina states that the Award does not contain a definition of "water-parting" and that, therefore, this concept should be interpreted according to its current meaning at the time (memorial, pp. 447-449) by applying the interpretation rules of practical effect and the object and purpose of the juridical act. It also points out that it would be appropriate to take into account the arguments put forward in the *Chilean Statement* because it was Chile which introduced the notion of *divortium aquarum* into the 1898-1902 arbitration.

117. According to the Argentine memorial, a water-parting has four essential characteristics: (i) it is a line which, at each of its points, separates river basins; (ii) it is a line which cannot cross rivers or lakes; (iii) it is an unbroken line; and (iv) it is a single line between two predetermined points (p. 525).

118. Argentina has stressed that the essential thing is the concept of "water-parting", while it regards the adjectives "local" and "continental" as of subsidiary importance (memorial, p. 530). With regard to the meaning of these adjectives, it assigns to "continental water-parting" the meaning of a line which divides the waters which drain towards the Pacific in the west from the waters which drain towards the Atlantic in the east; in contrast, it considers that the term "local water-parting", in the meaning which it has in the Award, refers to the line dividing the waters in a specific sector between two predetermined points, as in the case of boundary post 62 and Mount Fitzroy.

119. According to the Argentine counter-memorial, the terms have to be understood in their meanings and context current at the time. When the Arbitrator called the dividing line between boundary post 62 and Mount Fitzroy a "local water-parting", he would have used that term in the current meaning of "local", i.e., relating to a space situated between two previously determined points. Any water-parting between two points on a topographical surface could be described as "local", regardless of whether it coincided in part of its course with a section of the continental water-parting (p. 124).

120. In its memorial Chile states that the continental water-parting "represents, on the American continent, the separation of the waters which discharge into the Atlantic and those which discharge into the Pacific" (p. 17). In contrast, "local water-partings separate waters which flow to a single ocean" (p. 18). The Chilean memorial concludes from these definitions that "logically, a water-parting cannot be, simultaneously, both "continental" and "local", because the waters which it separates cannot flow simultaneously to both

oceans but only to one of them" (p. 18). On this conclusion Chile founded one of its criticisms of the line proposed by Argentina in the present arbitration, which runs for part of its course along the continental water-divide. The memorial states, consequently, that "there is no continuous "local water-parting" which carries the line from boundary post 62 to Mount Fitzroy" (p. 20), i.e., that the description of the boundary in the 1902 report does not conform with the geographical reality.

121. During the oral submissions, however, the line proposed by Chile was defined as a genuine local water-parting, although it cuts across surface water and also coincides in one segment with a continental divide. Having concluded these arguments, in its "Summary of the main points of Chile's position" (point III.1) Chile asserted that there was a local water-parting between the two extreme points of the sector submitted to arbitration:

> The Chilean line is the only one determined by the requirement that the local water-parting, in the correct interpretation of this term, should ascend from boundary post 62 to Mount Fitzroy (record of 11 May 1994, p. 82).

Chile accepted in the same document that the proposed line, conceived by Chile as a local water-parting which would run along the so-called "Cordón Oriental" coincided in part of its course with the continental divide (III.6). The notions of continental water-parting and local water-parting would not, therefore, be mutually exclusive, as the Chilean memorial asserted.

122. The Court has already referred to the force of *res judicata* of the 1902 Award and has stated that, according to the case law, it applies both to the operative part of the decision and to the preambular part, which is a necessary antecedent of the operative part (see paras. 68-70). It must now be added that in the international legal system *res judicata* also applies to the meaning of the terms used in the propositions which make up an arbitral award and that this meaning cannot be altered by any use subsequent to the decision or by the evolution of the language, or by the acts or decisions of one of the parties to the dispute.

123. Accordingly, some consideration must be given to the concept of "water-parting". This concept appears in the 1881 Treaty ("the frontier line shall run. . .along the most elevated summits of these Cordilleras which divide the waters. . .") and it took on particular relevance in the 1898-1902 arbitration because Chile argued at the time that, according to that Treaty and the 1893 Protocol, its boundary with Argentina was constituted by the continental *divortium aquarum*. Chile submitted to the Arbitrator fuller and more accurate studies concerning the notion of water-parting. The following passages from Chile's written submissions to the British Arbitrator show how it presented its conception of water-parting at that time:

> How a river can cross a cordon which serves as a division of waters is a thing impossible to understand, since the condition of dividing the waters and of being traversed by a watercourse are incompatible and contradictory (*Chilean Statement*, vol. I, p. 272).

> . . . the Chilean Government have never applied the expression *"Water-parting line"* to a line that is crossed by watercourses large or small (*Chilean Statement*, vol. I, p. 386; italics in the original).

Thus specified stretches of *water-parting* lines only are to be followed, and from the place where one ends to the place where another begins, if the boundary follows a *watercourse*, it also is specified and is called a *river* and not a water-parting (*Chilean Statement*, vol. I, p. 389; italics in the original).

To sum up, the Chilean Republic not only has given no "categorical recognition" to the terms *"divortium aquarum"* or water-parting line ever being applied to a line cut by watercourses—a recognition which would amount to a misuse of technical terms—but she has made no such misuse in the case quoted by the Argentine Representative, nor in any other case whatever (*Chilean Statement*, vol. I, p. 389; italics in the original).

. . . when it is said that a line between two points divides *the* waters, a line is meant which does not allow of *any water* coming across it from one point to the other (*Chilean Statement*, vol. II, p. 656; italics in the original).

Whether termed "continental" or not, the "line of *the* water-parting" or the *"divortium aquarum"*, applied—as they are in articles 1 and 2 of the Treaty—to the whole boundary line as far as the 52nd parallel, mean a line "through which no water flows", to use Gilbert's expression; and on that part of the South American continent with which we are dealing—at least from 27°40' to 50°42'S.—no line, save the continental divide, can be drawn which is not crossed by watercourses (*Chilean Statement*, vol. II, pp. 664-665; italics in the original).

. . . by the strictest rules of interpretation, as laid down by Hall, the terms "which divide the waters", "line of the water-parting", *"divortium aquarum"* must be taken in the "customary meaning" they have in Treaties, which is that of a mathematical line that no superficial drainage line can cross within the extent to which any of the aforesaid expressions are intended to apply (*Chilean Statement*, vol. II, p. 690; italics in the original).

The same terminology has always been used in South America, that is to say, when "water-parting line" has been or is mentioned with reference to a certain extent of territory, it has always been, and always is, understood to mean a line which is not crossed by any watercourse within the extent of territory referred to (*Chilean Statement*, vol. II, p. 796).

. . .within the extent in which the boundary is said to follow the main chain, it is understood that it will follow *"la ligne de partage des eaux"*, the water divide: in other words, that *no water* shall cross it *in that extent* (*Chilean Statement*, vol. II, p. 816; italics in the original).

. . . when the rule of water-parting is given in a Treaty *for a certain extent* or for *separate extents* of a boundary line, it is always understood that *no watercourse shall be crossed* by the said boundary line *within the extent* or *within each of the extents*, to which the said rule is to be applied (*Chilean Statement*, vol. II, p. 818; italics in the original).

. . . not a single case can be quoted in which a boundary line subject to "pass between 'vertientes' starting, descending or flowing in opposite directions", or any similar formula, has been made by the demarcators *to cut a stream within the section to which such a formula applies* (*Chilean Statement*, vol. IV, p. 1618; italics in the original).

124. The paragraphs transcribed above show that Chile maintained that the *divortium aquarum* consisted of a line which separates the waters belonging to basins which have different outlets. Thus, it is impossible for this line to cut across a watercourse at any point in its trajectory because, if it did so, it would cease to be a water-parting.

125. The Argentine presentations to the British Arbitrator also contain a concept of water-parting. The following passages from one such presentation expound this concept:

In a vast extension of the frontier, the culminating edge of the Cordillera de los Andes—the dividing line of the waters belonging to it—coincides with the Continental divide. In that extension the chain does not give passage to the streams which rise outside of it. The Experts, therefore, had no substantial difference in those places, nor in those in which the

Cordillera has its bifurcation foreseen in the Treaties (Report presented to the Tribunal appointed by Her Britannic Majesty's Government, hereinafter "*Argentine Report*", London 1900, vol. I, p. ix).

Both Experts have referred to the water-parting line, but in different forms: for the Chilean Expert, the water-parting line to be accounted is that of the South American Continent, without taking into consideration whether the phenomenon takes place within the Cordillera de los Andes or not; for the Expert of the Argentine Republic, the water-parting line is nothing more than the detail which serves him as a secondary rule to designate in the main chain of the Cordillera de los Andes the topographical boundary between the two countries.

This difference in their respective points of view explains the divergences which have arisen between the Experts when arranging the landmarks, the right or wrong placing of which is to be a matter for the decision of Her Britannic Majesty's Government (*Argentine Report*, vol. I, pp. ix-x).

In the main chain . . . the line should run along its watershed, i.e., along the edge of the intersection of its slopes (*Argentine Report*, vol. I, p. x).

It is not a case of discussing the different kinds of watershed that exist in nature. The only thing that must be borne in mind is that the Treaties only determine the watershed of the high crests, the *divortium aquarum* of the Andes, the watershed of the main chain, and the continental divide is never mentioned in them (*Argentine Report*, vol. I, p. 210; italics in the original).

The Argentine-Chilean frontier is, therefore, situated within the Andes, in its main and dominant chain, and runs along the most elevated crests—along its watershed.

In presence of the terms employed in the International Convention, the line must be subject to two distinct conditions, *viz*:

1. To be within the Cordillera de los Andes.

2. To run along the most elevated crests of the Cordillera that may divide the waters of the same (*Argentine Report*, vol. I, p. 211).

When he [the Argentine negotiator] specified the *divortium aquarum* of the Andes, he was aware that the watershed referred to was no other than that which belonged to "the most elevated crests"; as it was in that form, and so understanding those terms, that the convention had been drawn up. He knew that a watershed is the line of intersection of two slopes or inclined surfaces, and hence that the watershed of the Cordillera de los Andes is the culminating line formed by the intersection of its eastern and western declivities (*Argentine Report*, vol. I, p. 215; italics in the original).

In regard to this argument, we may again note the erroneous tendency shown in the Statement read by the Chilean Representative to convert the watersheds into continental divides. It is therein explicitly recognized, in accordance with the already quoted opinion of Señor Bertrand, that there are an indefinite number of *divortia aquarum*; but if in a Treaty or in a book, the word "waters" is met with, the Chilean Statement takes for granted at once, without further investigation, that it refers to the separation of the hydrographic basins of the rivers that are tributaries of the Atlantic and Pacific Oceans, although there may be no reference to basins, rivers or oceans. The watershed referred to in the Protocol of 1893 is that of the Cordillera, it is that of its most elevated crests, as the boundary cannot be removed from the most elevated crests still less from the Cordillera itself. What reason, therefore, is there for saying that article 3 has laid down the rule for the continental divide? Would it not be more logical to say that if care has been taken to omit all reference to continent, to oceans or to hydrographic basins, it is because after the discussions that had taken place, it was desirable to abandon once and for all the theory which is based on such features? (*Argentine Report*, vol. I, pp. 269-270; italics in the original).

Therefore, whatever be the standpoint from which we examine article 3 [of the Protocol of 1893], the conclusion is always identical. It lacks anything bearing on determining the general rule for the boundary, and in the actual case on which it legislates it repudiates the interoceanic water-divide and makes it unmistakeable that the boundary should pass over the Cordillera even though it should bifurcate: that it should pass over its most elevated crests, and that when the bifurcation exists the Experts, by studying the geographical conditions, shall proceed to settle the differences that may arise (*Argentine Report*, vol. I, p. 271).

> According to the Chilean Representative, the Chilean Expert, when deciding upon the definitely traced portion of the frontier, stated that the division of the waters was borne in mind; that this was the manner in which the stipulations of the boundary Treaty were carried out; and that such was the interpretation which in the practical application had been given to the words, *"main chain of the Cordillera"*. The Argentine Expert does not object to these conclusions if they are correctly interpreted, because it is true that in the high ridge of the central chain of the Andes, as considered by Señor Barros Arana, i.e., the main chain along *the whole extent in which the frontier line has been agreed upon* with the exception of the part comprised between Mount Copahue and the Santa María Pass—*occurs the division of the waters of the continent, as well as the division of the waters of the Andean Cordillera*, properly so called, in its main chain; but it is likewise a fact that the Argentine Expert *has not taken any account of the continental water-parting*, as that is not stipulated in the Treaties, *but taken into account the watershed of the main chain of the Andean Cordillera, because it is this that was stipulated*, in order to define the high frontier ridge in this chain (*Argentine Report*, vol. II, p. 404; italics in the original).
>
> To draw a line satisfying these conditions within the letter and the spirit of the Treaties, has been the purpose of the Argentine Expert.
>
> The line planned by the Chilean Expert in this part of the boundary was drawn through the same points, and so has been accepted *because it is situated in the main chain of the Cordillera de los Andes*.
>
> At all the points wherein the line dividing the waters has coincided with the Cordillera, properly so called, in its general line of lofty summits, even though some few still loftier rear themselves to the right and left, it is these points that have been chosen by the Argentine Expert for tracing the political line of separation. But where the *divortium aquarum* does not coincide with the said Cordillera, as the boundary between the two countries is the *Cordillera de los Andes, and not the water-divide*, the line must be marked out along the mountain range (*Argentine Report*, vol. II, p. 414; italics in the original).
>
> The Chilean Representative was doubtless influenced by the phrase "main chain of the Andes which divide the waters", and by the mention made of some streams which the Paso de las Damas separates. As to the former, it may be remembered that the Chilean Representative admitted before the Tribunal something which is demonstrated by the most trivial observation, viz. that in each chain there is a dividing line of its own waters. It is not at all strange, therefore, that the Record should specify the fact of the local divide effected on the crests, and especially seeing that the boundary line cannot pass over any part whatever of the chain—over its sides for instance—but over the topmost ridge, from whence the waters descend by the two slopes of the chain (*Argentine Report*, vol. II, p. 446).

126. The transcribed passages show that the concept of "water-parting" used by Argentina is the same as the one used by Chile. An important proof of this point is provided by the fact that in the cases of coincidence between the *divortium aquarum* and the line of the most elevated crests of the main chain of the Andes the experts of both countries were in agreement as to the line of the frontier.

127. In none of the written documents which constitute the 1902 Award, i.e., the decision itself and the Court's report, is there any indication that the Arbitrator's intention was to deviate from the concept of "water-parting" which had been submitted to him by the Parties, which moreover coincided with the normal meaning assigned to that term at the time. On the contrary, the statement in paragraph 15 of the report that ". . . the orographical and hydrographical lines are frequently irreconcilable" is inseparable from the notion of a claim based on the hydrography contained in paragraph 10 of the same report, which refers to "a hydrographical line forming the water-parting between the Atlantic and Pacific Oceans, leaving the basins of all rivers discharging into the former within the coast-line of Argentina; and the basins of all rivers discharg-

ing into the Pacific within the Chilean coast-line, to Chile". Paragraph 14 of the report uses an identical concept: "The line of continental water-parting occasionally follows the high mountains, but frequently lies to the eastward of the highest summits of the Andes, and is often found at comparatively low elevations in the direction of the Argentine pampas".

128. In order to determine what the meaning of this expression was at the time it is useful to refer to the work by A. Philippson entitled *Studien über Wasserscheiden* (Leipzig, 1886) which, according to the *Chilean Statement* (vol. II, p. 792), was "the best-known monograph on water-divides". This work defines a water-divide in the following manner:

> A water-divide is the line which divides from each other two separate directions of surface flow of the waters or, in other words, the line at which two slopes of the land surface intersect vertically (pp. 15-16).

This concept coincides with what is stated, in the present dispute, in appendix A of Chile's counter-memorial, according to which

> . . . a water-parting is the line which marks the limit between two opposed directions of water flow on a land surface. That is to say, it corresponds to the line which separates the surface flows of waters which have different destinations (p. A/235).

129. In addition, topography teaches that, between two points on a land surface located on the same continent or island there is always one and only one water-divide. This principle was applied in the Arbitral Award of 14 July 1945 by Mr. Braz Dias de Aguiar in the frontier dispute between Ecuador and Peru (the Award is unpublished but a copy of the original is kept in the archives of this Court).

130. The concept of "water-parting" fulfils an essential function in the 1902 Award, and any alteration of its meaning would also alter the import of the rulings. The Court considers that the concept of "water-parting" in the 1902 Award is protected by the *res judicata* and is not susceptible of any subsequent change through usage, evolution of the language, or acts or decisions of one of the Parties to the dispute.

VIII

131. The water-parting between boundary post 62 and Mount Fitzroy is described in the 1902 Award as "local". The Court must now consider the context within which this term is used in the 1902 Award, as well as the common characteristics attached to it, and determine whether there exists in this connection a general practice of the Award which reveals the meaning of the terms used by the 1902 Arbitrator in his description of the frontier in the sector.

132. The 1902 report refers repeatedly to water-partings. In some instances it adds the qualification "local" or "continental", but at other times it uses different qualifiers, such as the basins which the water-parting separates or the appearance of the places through which it passes. The cases in which the report uses the term "local water-parting" have some common characteristics. It can be verified that all the instances of "local water-parting" refer to lines drawn between two specific points. Similarly, all these references save one

(between Cerro Rojo and the summit of Cerro Ap Ywan) are to sectors in which the frontier crosses a river or lake or ascends from surface water, so that its point of departure does not coincide with a "continental water-parting".

133. With regard to the graphic representation of the local water-parting on the Award map, the boundary in the sector which is the subject of this dispute is depicted, for most of its extent, by a pecked line. This was a schematic and tentative representation, and not a conclusive one, of the result of applying the relevant part of the Award. By defining the frontier as a "local water-parting", the Arbitrator opted for a natural feature whose exact location was not known. This assertion is borne out by the fact that the two maps signed by the 1902 Arbitral Tribunal and the three demarcation maps signed by Captain Crosthwait, copies of which were submitted by the Parties to this Court, show fairly significant differences in the course of the pecked line.

134. The 1966 Award stated with reference to the 1902 Award map:

> A pecked line is the normal indication for a feature which is known to exist, but whose position has not been accurately located (*R.I.A.A.*, vol. XVI, pp.150-151).

There is no reason to abandon this concept in the present case, in which the pecked line also represents tentatively a geographical feature, the "local water-parting" between boundary post 62 and Mount Fitzroy, whose existence was known but whose course had not been accurately located.

135. In the 1898-1902 arbitration the term "local water-parting" was used in its ordinary meaning. Both in English and in Spanish the adjective "local" designates something specific to a place or limited to an area, in contrast to something of a general nature. So it appears in the presentations of the Parties:

> Naturally within each block of highlands the two long slopes are separated by a *water-parting line*, and each of these local divides may be referred to as "the water-parting line of the Cordillera de la Costa" within the particular block to which the expression is applied. Such local water-partings are frequently adopted as departmental or district boundaries in Chile, but we fail to see how this fact could be interpreted in support of the conclusion that Chile has recognized that a water-parting line may be "traversed by other waters" (*Chilean Statement*, vol. II, pp. 386-387; italics in the original).

> The Argentine Republic does not reject the watershed if it is located in the principal chain of the Cordillera de los Andes. The line of the Argentine Expert follows in the main range the special watershed that is produced therein, and when doing so he naturally disregards the many other watersheds to be found in lateral mountains or in plains (*Argentine Report*, vol. II, p. 458).

> Plate LXX, fig. 2, represents the landscape to the east of the foothills of the Cordillera, the valley of Cholila, the last eastern spurs of the Cordillera, the eastern ridge outside the range, and the low plains where the abnormal continental divide is produced, and which can only be considered as a *secondary local watershed* (*Argentine Report*, vol. III, p. 797; italics in the original).

The terminology of the 1902 Award considers a local water-parting to be one which runs between two points, at least one of which is not located on the continental divide. When the Award uses the term "local water-parting" it also specifies the point from which the water-parting begins and the point to which it extends. The same terminology, with identical meaning, was used in the 1966 Award (see para. 146).

136. In the present arbitration Chile has put forward various arguments to demonstrate, on the one hand that no local water-parting runs between boundary post 62 and Mount Fitzroy, and on the other hand that the concept of "local water-parting", in the sense in which it was used in the 1902 Award, has specific characteristics which differentiate it from the common concept of water-parting. The Court will now proceed to analyze these two lines of reasoning.

Chile defined the local water-parting in its memorial as the line which separates waters which flow to a single ocean (see para. 120). If this definition is applied to the 1902 Award in respect of the determination of the frontier between boundary post 62 and Mount Fitzroy, the conclusion will be that there could not have been any local water-parting between those extreme points and that, accordingly, the Award could not be applied on the ground. In fact, boundary post 62 is situated in the Pacific basin, while Mount Fitzroy is on the Atlantic slope, so that the water-parting between them would separate, at least in one of its parts, waters which flow to different oceans.

137. The rule of practical effect, embodied in uninterrupted and constant legal practice, states that a provision must always be interpreted in such a way as to have a certain effect. If this rule is applied to the proposition in question here, the result is that the term "local water-parting" used by the 1902 Arbitrator in this sector, must be interpreted so as to have an applicable meaning and outcome. Accordingly, the definition of local water-parting as the line which separates waters which flow to a single ocean, which appears in the Chilean memorial as an *a priori* premise, cannot be accepted by the Court. In any event, in the oral submissions Chile asserted that the boundary line which it is claiming is a local water-parting between boundary post 62 and Mount Fitzroy, so that Chile admits the existence of such a divide between those points.

138. Chile has also stated that, although technically a water-parting cannot transect surface watercourses, when the 1902 Award refers to "local" water-partings, such transections would be possible. For example, in the oral submissions Chile asserted that, although a water-parting cannot cross rivers "as a matter of pure theory", ". . .the report itself shows that the Tribunal was using that term in a different way relating to a particular sector of the boundary in question" (hearing of 10 May 1994, p. 79). In support of this assertion Chile cites the cases of the Rivers Mayer and Mosco, in which, it argues, this circumstance is found in the Award.

139. In the case of the River Mayer we must bear in mind what the 1902 report has to say about the frontier in that sector:

> . . . it [the boundary] shall follow the water-parting between the basin of the Upper Mayer on the east, above the point where that river changes its course from north-west to south-west, in latitude 48°12'S., and the basins of the Coligué or Bravo River and the Lower Mayer, below the point already specified on the west . . .

According to this text, the frontier should follow a water-parting between the upper and lower basins of the River Mayer, which cannot actually occur unless the line cuts across the river at some point. Now, the point at which the basins should divide was specifically established: "where that river changes its course from north-west to south-west, in latitude 48°12'S." At this point the frontier,

descending along a water-parting, should cut across the river in order to ascend once again along another water-parting between the same upper and lower basins of the River Mayer, assigning the former to Argentina and the latter to Chile.

140. Furthermore, the work of the Mixed Boundary Commission confirms that the Parties did not assign the segment of the frontier which crosses the River Mayer the status of "local water-parting". Annex No. 10 of record No. 133 of 24 November 1990 states:

> In these two sections the boundary is defined by the local water-parting between the point of entry and boundary post IV-6 "bend of the River Mayer south bank" and between boundary post IV-7 "bend of the River Mayer north bank" and the point of exit from the basin; both sections of the water-parting separate tributaries of the River Mayer.

141. The interpretation agreed by the Parties in the Mixed Boundary Commission confirms, then, that there are two sections of water-parting in the sector and that the extreme points are situated on opposite banks of the Mayer. In contrast, the segment which joins those extreme points by crossing the river does not have the status of water-parting. It is the frontier itself which crosses this river bed, not a water-parting. The paragraph of the report referred to in paragraph 139 does not therefore help to demonstrate that the 1902 Award had used the term "water-parting" as a line which could cut across surface watercourses or that it had done so without indicating the point at which such a crossing should occur.

142. The circumstances are different in the case of the River Mosco. This river is not mentioned in the 1902 report. It is depicted with a thin line and unnamed on the Award map, where the frontier is shown as touching it and would in fact seem to cut across its upper part. However, the report assigned to Chile the lower Mayer basin, of which the Mosco is a part, so that the whole of this latter river must have been Chilean and could not be cut by the frontier. This was confirmed by the work of the Mixed Boundary Commission, whose map showing the frontier in this sector (Argentina-Chile Mixed Boundary Commission, Cocovi-Villa O'Higgins (IV-16), scale 1: 50,000) shows that the whole of the River Mosco is located in Chilean jurisdiction and that the frontier does not cut across this tributary.

143. Chile has repeatedly cited a passage in the 1966 Award in support of its argument that a water-parting may cut across rivers or streams. According to this passage,

> The general practice of the 1902 Award was for the boundary line to follow either the Continental Divide or local surface water-partings, crossing over river tributaries as necessary (*R.I.A.A.*, vol. XVI, p. 180).

144. The Court recognizes the value for the interpretation of an award of reference to its general technique or working method, which are described as the "general practice" in the 1966 Award. When an award systematically treats similar matters in a similar way, or when a common meaning can be identified as assigned to repeatedly used terms or expressions, this establishes a useful framework for their interpretation.

145. However, this citation from the 1966 Award, when it talks about a line which may cross rivers "as necessary", is referring to the "boundary line" and not to water-partings. There are no grounds for interpreting this to mean

that there existed in the 1902 Award a general practice which would allow a local water-parting to cross rivers. Therefore, the passage cited by Chile does not support the proposition of a water-parting which crosses rivers.

146. Furthermore, the immediate continuation of the passage cited above confirms the meaning of the terminology of the 1902 Award, which refers to a local water-parting and mentions the point from which it begins and the point to which it extends. This terminology was used, with exactly the same meaning, in the 1966 Award:

> Applying this practice to the boundary between Point B and Cerro de la Virgen, the boundary ascends from Point B by way of a small lake to the local water-parting to Point C. From this point the boundary line follows the local water-parting through points D, E, and F to point G on top of a hill just east to the River Engaño. From this point it crosses the River Engaño by a straight line to Point H. It continues by a straight line to point I, on the water-parting north of Cerro de la Virgen. It then follows the local water-parting to point J at Cerro de la Virgen (*R.I.A.A.*, vol. XVI, p. 180).

147. Moreover, to argue that a local water-parting can cross rivers conflicts with the general concept of water-parting accepted in the 1902 Award in its usual meaning, which has the force of *res judicata*.

148. Chile has also argued that, in the terminology of the 1902 Award, the hydrographic element depends on the orographic, so that when a water-parting is mentioned it is in reference to a dividing spur, which is always the main factor of the frontier. From this standpoint the hydrographic element would be determined by the orographic. For example, Chile stated in the oral submissions:

> Chile has from the beginning (as is shown in its Memorial) presented as its first line of argument the proposition that when the Tribunal directed that the boundary should follow a water-parting, it was directing that the boundary should follow the orographic feature identified by that water-parting—the ridge, the chain, the cordón—which carried that water-parting (record of 10 May 1994, pp. 69-70).

Chile added:

> As the Tribunal will appreciate, in Chile's basic approach, the distinction between a local water-parting and a continental water-parting is not important. It is enough that the ridge has been identified by the named local water-parting (record of 10 May 1994, p. 70).

In the "Summary of the main points of Chile's position" submitted at the end of the hearings, Chile stated:

> It was the Tribunal's practice to identify an orographic feature (a spur) by reference to a hydrographic feature (a water-parting). The example of what occurred on the Ibáñez-Pallavicini peninsula confirms this practice yet again (record of 11 May 1994, p. 83).

149. The Court has already shown that, according to the submissions in the 1898-1902 arbitration and the text of the Award, throughout those proceedings the two Parties were as one in using the notion of water-parting in its customary sense and that the Arbitrator did likewise. It cannot therefore be concluded that the intention of the Arbitrator or of the Tribunal which supported him, which was of acknowledged professional skill and scientific rigour in matters of geography, was to assign to precise terms a different meaning from their correct technical one. Anyone who argues that a term used in a legal text has an exceptional or unusual meaning, different from its ordinary meaning, must prove it. In this case the only consideration invoked to support this assertion (the Ibáñez-Pallavicini peninsula) does not refer to the Award but to

the practice of the Mixed Boundary Commission which, as pointed out below, may be useful for analysis of the legal situation of the sectors where it carried out its work but proves nothing about the intention or the meaning of the terminology used by the 1902 Arbitrator (see para. 170). This Court does not find that the necessary proof has been furnished in the present arbitration.

150. Chile has also argued that, by their very nature, "local" and "continental" water-partings are mutually exclusive. Accordingly, a water-parting between two points which coincides in part of its course with a continental water-parting could not be described as local. But in a section of Chile's line the two water-partings do coincide. Regardless of the length of the section in which this occurs, the proposed line would not, therefore, be local and would not be consistent with what, according to Chile's interpretation, the Arbitrator had decided, quite apart from the fact that this circumstance weakens Chile's criticism of the Argentine line, which has the same characteristic.

151. The Court commissioned its geographical expert to identify the water-parting between boundary post 62 and Mount Fitzroy. The local water-parting between these two extreme points, according to the identification made by the expert, is as follows:

From boundary post 62 (X = 4584177; Y = 1449178), situated at an altitude of 324 metres on the south shore of Lake San Martín-O'Higgins, it ascends in a west south-west direction to Cerro Martínez de Rozas (1,521 m). In this section it separates the waters which flow to the River Martínez de Rozas from several unnamed streams which discharge directly into Lake San Martín-O'Higgins. From Cerro Martínez de Rozas the water-parting continues south-south-west along the summit-line of the Cordón Martínez de Rozas, which divides the basins of the Rivers Obstáculo and Martínez de Rozas, to reach an unnamed peak at altitude 1,767 metres.

From this peak the water-parting turns north-west, descends to the pass situated between Lakes Redonda and Larga and then ascends, first in a west-south-west direction and then north-west, to an unnamed peak (1,629 m), before continuing in a west-north-west direction to Cerro Trueno (2,003 m). In this section the water-parting runs between the basins of the River Obstáculo to the north and the River Diablo and other small streams which flow into Lake del Desierto to the south.

After Cerro Trueno the water-parting runs south-south-west, passes across Cerro Demetrio (1,717 m) and the Portezuelo del Tambo and reaches the summit of Cerro Ventisquero or Milanesio (2,053 m). In this section the water-parting separates the basin of the River Diablo, a tributary of Lake del Desierto, from the basins of the streams and rivulets which flow into Lake Chico.

From Cerro Ventisquero or Milanesio the water-parting follows a mainly south-south-west direction, reaching the Cordón Gorra Blanca and continuing along it as far as the summit of Cerro Gorra Blanca (2,907 m). This section separates the basins of various tributaries of the Rio Gatica or de las Vueltas, including its glacial headsprings (River Cañadón de los Toros, River Milodón, Puesto stream, River Cóndor, River Eléctrico) from the streams and glaciers which flow into the Ventisquero Chico.

From Cerro Gorra Blanca the water-parting continues southwards along a snow-covered ridge, descends westwards from the southern end of this ridge to the Gorra Blanca (Sur) glacier along a spur and continues on the surface of the glacier to Marconi Pass, following a south-south-west course determined by the contour lines of the 1:50,000 map of the Argentina-Chile Mixed Boundary Commission.

From Marconi Pass the water-parting ascends to Cerro Marconi Norte (2,210 m) and continues southwards to Cerro Rincón (2,465 m) on the summit-line of the Cordón Marconi, which separates first the Ventisquero Chico and the Marconi glacier and then the Viedma and Marconi glaciers.

From Cerro Rincón it turns eastwards, separating the basin of the River Eléctrico to the north from the basin of the River Fitzroy and the Viedma glacier to the south, passes across Cerros Domo Blanco (2,507 m), Pier Giorgio (2,719 m) and Pollone (2,579 m) and terminates at the summit of Mount Fitzroy (3,406 m).

152. Chile has repeatedly argued during the present arbitration that a line such as the one described above does not conform to the intention of the 1902 Award because it coincides for much of its extent with a proposal of Captain Robertson which, according to the preparatory work for this Award, was submitted to the Arbitral Tribunal by Sir Thomas Holdich—a member of the Tribunal—but was rejected by it.

153. The Chilean memorial cites the part of Captain Robertson's proposal to draw a line close to the Cordón Occidental, in which Robertson, referring to the proposed line, says that:

> *It is a line which has the disadvantage that,* even when it divides more or less equally the zone disputed by the two countries, *in fact assigns to Argentina all the territory which has any potential value, while it assigns to Chile an almost impenetrable mass of rugged and inhospitable peaks* (emphasis in the Chilean memorial, p. 48).

Chile adds that "it is very clear that the Tribunal rejected the proposal of following the Cordón Occidental and, instead, preferred a line which ran more to the east, using a spur which can only be the Cordón Oriental" (p. 139).

154. Argentina's counter-memorial also refers to Robertson's proposal but only to demonstrate the knowledge which the Arbitrator had of the geography and to emphasize that the proposal left the basin of the River Gatica or de las Vueltas in Argentine territory (p. 95).

155. In fact, Captain Robertson produced two proposals which were submitted by Sir Thomas Holdich to the Tribunal and formed part of the preparatory work of the Award. They start at a point to the south of Cerro Rasgado and proceed thence, one on the west and the other on the east, separated by up to 32 kilometres. The Arbitrator drew his line basically along an intermediate course between the two, but in an area to the north he drew it still further to the east than the easternmost line in the proposal, thereby favouring Chile.

156. Nevertheless, what appears in the preparatory work are merely proposals which the Arbitrator might or might not accept. The interpretation of the 1902 Award contains no ambiguities which would justify application of the rule allowing recourse to the preparatory work. But the Arbitrator also drew a pecked line which ran towards Gorra Blanca, at which point it coincided with the

Robertson proposal referred to in the Chilean memorial. That is to say, in this sector the Arbitrator did not reject the proposal in its entirety and it cannot be concluded that the Tribunal disowned any alleged agreement with the proposal.

157. Nor can the Court accept Chile's argument that the application of the 1902 Award in the light of geographical knowledge acquired subsequently would be tantamount to its revision by means of the retroactive assessment of new facts (see para. 84). The 1902 Award defined, in the sector with which this arbitration is concerned, a frontier which follows a natural feature which, as such, depends not on an accurate knowledge of the terrain but on its actual configuration. The land remains unchanged. Thus, the local water-parting between boundary post 62 and Mount Fitzroy existing in 1902 is the same as the one which can be traced at the time of the present arbitration. Thus, this Award does not revise but instead faithfully applies the provisions of the 1902 Award.

158. Furthermore, in this arbitration there should be no suggestion of the retroactive application of subsequent grounds or knowledge. In fact, although the disagreement between the Parties concerning the boundary line manifests itself also in a differing allocation of areas of land, that does not affect the nature of the Court's task as interpreter of the 1902 Award. Its decision is declaratory of the content and meaning of the 1902 Award, which in turn was declaratory with respect to the 1881 Treaty and the 1893 Protocol. As a consequence, the Award of this Court, by its very nature, has *ex tunc* effects, and the boundary line decided upon is the one which has always existed between the two States Parties to this arbitration.

159. At one stage in this arbitration Chile argued that a water-parting could not run across areas of ice (counter-memorial, pp. 185 and 189). Leaving aside the technical problems implicit in such an argument, it does not carry decisive weight in this case, since Chile recognized in the hearings that, in the practice of the Mixed Boundary Commission, there are several precedents in which a water-parting is depicted as crossing areas of ice (record of 19 April 1994, pp. 37-44).

160. The line described in paragraph 151 is consistent with the provisions of the three instruments which make up the 1902 Award. In fact, this line coincides with the actual decision of Edward VII for the area of which the sector subject to the present arbitration is a part ("the dividing ranges carrying the lofty peaks known as Mounts San Lorenzo and Fitzroy") and also satisfies the requirement stated in the Tribunal's report (". . .the boundary shall be drawn to the foot of this spur and ascend the local water-parting to Mount Fitzroy"). Furthermore, this line is consistent with the Award map. On this map the boundary line is depicted in the northern part of the sector by a solid line and in the remaining part by a pecked line. The solid line marks the limit of the explored area at the time of the arbitration and the pecked line does likewise in the area unexplored at that time (see *R.I.A.A.*, vol. XVI, p. 152). In this latter part the line indicates only the direction in which the boundary line heads (in this case towards Mount Fitzroy), and it cannot be claimed that it follows the twists and turns of the water-parting, precisely because the water-parting was located in an unexplored area and its course was therefore unknown.

161. The line decided upon by this Court does not exceed Chile's extreme claim in the 1898-1902 arbitration. Therefore, according to international law it does not attribute to the 1902 Award the effect of having violated the rule *non ultra petita partium* (see para. 106). Nor does it exceed the extreme claims of Argentina in that and in the present arbitration.

IX

162. The Parties have based many arguments on their conduct subsequent to the 1902 Award. Such subsequent conduct, as the 1966 Award pointed out, does not throw any light on the intention of the 1902 Arbitrator.

> . . . As for the subsequent conduct of the Parties, including also the conduct of private individuals and local authorities, the Court fails to see how that can throw any light on the Arbitrator's intention (*R.I.A.A.*, vol. XVI, p. 174).

163. Such conduct is not directly related to the Court's mandate, since it involves facts subsequent to the Award which the Court is required to interpret. The Court has been requested to decide on the frontier line between boundary post 62 and Mount Fitzroy established by the 1902 Award and not to investigate whether the subsequent conduct of the Parties has altered the frontier determined by that Award. However, the two Parties have agreed to bring such conduct before the Court, assigning it different degrees of relevance. The Court must take care that in its analysis of the facts thus presented it does not deviate from the strict performance of its function, but it cannot avoid making some reference to the matter.

164. Both Parties have submitted to the Court documents subsequent to the Award in three areas: cartography, the effective exercise of jurisdiction in the territory lying within the sector which is the subject of this dispute, and the demarcation work carried out by the Mixed Boundary Commission.

165. Chile has argued that, although its official cartography in the decades following the Award depicted the Arbitrator's line, which passed across Cerro Gorra Blanca, Argentina's official cartography, consistently up to a few years ago, followed the Demarcator's line, which is very similar to the Chilean claim in the present arbitration.

166. In analysing this fact, regardless of whether it is fully authenticated, it must be borne in mind that those official maps not only established the line of the frontier but also indicated geographical features, in particular hydrographic basins.

167. The frontier has been delineated differently on the official maps of the Parties. However, no matter what the significance or direction of this line, an examination of the maps shows a definite tendency to locate the basin of the River Gatica or de las Vueltas in Argentine territory, a fact of particular relevance since the "local water-parting" is a frontier which follows a natural feature separating hydrographic basins. The official maps of Chile published

up to 1958, as well as all the official maps of Argentina published up to the present, show the boundary in the sector which is the subject of this dispute as bordering, in the north, the basin of the River Gatica or de las Vueltas. Decisive weight should not therefore be attached to the maps in support of Chile's contention in this arbitration that a part of the basin of that river might belong to Chile.

168. The arguments concerning the subsequent conduct of the Parties also included the effective exercise of jurisdiction in the sector. Such arguments were put forward mainly by Chile, whose central authorities made a number of land grants in those areas, both to Chilean settlers and to foreigners, and its local authorities had also exercised public functions there.

169. The evidence submitted to the Court shows that these acts of jurisdiction have not been exercised with the necessary consistency, lack of ambiguity and, in some cases, effectiveness for them to be assigned legal consequences relevant to the present case. Furthermore, none of these acts included the publication of maps or plans indicating that they affected the basin of the River Gatica or de las Vueltas. In view of these characteristics of the acts which Chile says that it had carried out in the sector, it is not reasonable to draw decisive consequences from the failure of the Argentine Government to protest, especially in the light of Argentina's confidence in the Chilean cartography of the time, which located the basin in Argentina. In a similar context the decision of the International Court of Justice in the case concerning the Temple of Preah Vihear is relevant here:

> . . . the Court finds it difficult to regard such local acts as overriding and negativing the consistent and undeviating attitude of the Central Siamese authorities to the frontier line as mapped. (Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgement of 15 June 1962. I.C.J., *Reports 1962*, p. 30).

170. The Parties have also argued that the practice of the Mixed Boundary Commission contains precedents which support their respective claims: in the case of Argentina, because the Commission abandoned the distribution of territory shown on the map of the 1902 Award and faithfully followed the water-parting as actually determined on the ground; in the case of Chile, to point out that in one instance the Commission abandoned the water-parting decided on in the Award and opted for a dividing range as a more visible and reliable boundary. In any event, the Court notes that the work of the Mixed Boundary Commission could have some relevance, where interpretation of the 1902 Award is concerned, to its analysis of the legal situation of the sectors in which the work was carried out, and its value as a precedent would be considerable on that assumption. But this work, obviously, could not have influenced the intentions of the 1902 Arbitrator or his Award concerning the sector between boundary post 62 and Mount Fitzroy. It does not therefore alter the conclusions which this Court has already reached in this respect.

X

171. For the reasons stated above,

THE COURT

by three votes to two decides that:

I. The line of the frontier between the Republics of Argentina and Chile between boundary post 62 and Mount Fitzroy in the Third Region, referred to in the Award of H.M. Edward VII, and defined in section 18 of the report of the 1902 Arbitral Tribunal and described in the last paragraph of section 22 of the said report, is the local water-parting identified in paragraph 151 of the present Award.

II. The course of the line decided upon here shall be demarcated and this Award executed before 15 February 1995 by the Court's geographical expert with the support of the Mixed Boundary Commission.

The geographical expert shall indicate the places where the boundary posts are to be erected and make the necessary arrangements for the demarcation.

Once the demarcation is completed, the geographical expert shall submit to the Court a report on his work and a map showing the course of the boundary line decided upon in this Award.

For: Mr. Nieto Navia, Mr. Barberis and Mr. Nikken; *against*: Mr. Galindo Pohl and Mr. Benadava.

Done and signed in Rio de Janeiro today, 21 October 1994, in Spanish in three identical originals, one of which shall be kept in the archives of the Court and the others delivered on this date to the Parties.

Rafael Nieto NAVIA
President

RUBEM AMARAL JR.
Secretary

Mr. Galindo Pohl and Mr. Benadava append their dissenting opinions.

DISSENTING OPINION OF MR. REYNALDO GALINDO POHL

I. CIRCUMSTANCES OF AND REASONS FOR THE DISSENTING OPINION

1. *The origin of the dissenting opinion*

1. I had wished to concur with the unanimous or at least majority position of the members of this Court of Arbitration. That did not happen owing to differences on the most important points on which the Court had to pronounce.

2. The Parties submitted abundant documentation on the origins and development of the frontier dispute concerning the sector between boundary post 62 and Mount Fitzroy; and their written and oral submissions brimmed with erudite arguments of excellent technical quality, which were moreover presented with intelligence and skill. Faced with such a large volume of information and such interesting arrays of arguments I could not help wavering during the proceedings between the conflicting petitions, especially when the inevitable moment came to take a position on the facts, arguments and legal principles invoked.

3. My dissent stems, in particular, from the conflicting positions in the Court of Arbitration on two points: (1) Chile's territorial claims in 1898-1902 and in the present dispute; and (2) the meaning of continental water-parting and local water-parting. The Court chose the question of the territorial claims as the first item in the list of topics for study and debate owing to its significance for the final decision.

4. Discord is far from being an ideal situation in collegial courts, although they have often in practice divided into majorities and minorities. This circumstance constitutes one of the realities of the existence and functioning of collegial courts, both national and international.

5. It is not the purpose of this dissenting opinion to quibble with the decision taken but to expound a line of reasoning and a particular view of the facts and the law pertaining to the 1898-1902 arbitration. Hence the absence of judgements on details and of references to the majority position. My purpose is to present a conceptual approach based on study of the documents received and on the opinions of the Parties.

6. This dissenting opinion is designed solely to expound a line of thinking and assess what happened in 1892-1902 and subsequent years with respect to this dispute. Accordingly, it takes an entirely positive line. As the dispute relates to the assessment of the facts and the interpretation and application of the law, a dissenting opinion may help to clarify the problems studied. This is the positive meaning of dissent.

7. I cannot avoid saying something which invests this dissenting opinion with a radical quality: I agree with the decision taken with respect to the sections concerning the history of what happened in the years of that arbitration and the history of the present arbitration. On the other sections I have reservations, because although I can accept some of the arguments in isolation, when they are combined in an opposing line of thought, their general meaning and their purposes do not fit with this dissenting opinion.

8. Although in the Court's consideration of the fundamental points two paths emerged which led to opposing courses of action and conclusions, in the situation in which I find myself there is only one path—to state the grounds and purposes of my dissent. With every respect for the Award and the Judges who make up the majority, I will now state my views on this case.

2. *General outline of problems arising in this arbitration*

1. The 1991 *Compromis* specifies the objectives of the arbitration and the competence of the Court. It is a question of determining "the line of the frontier in the sector between boundary post 62 and Mount Fitzroy"; and this determination must be made by "interpreting and applying the 1902 Award in accordance with international law" (articles I and II of the *Compromis* of 31 October 1991). Additional rules are to be found in the Treaty of Peace and Friendship of 29 November 1964 (annex I, ch. II, arts. 28 and 29).

2. The two rules cited from the *Compromis* constitute a semantic unity, and although each of them can be analyzed separately in methodological terms, each delivers its meaning as a function of the other. The first rule states the issue to be determined—the line of the frontier between boundary post 62 and Mount Fitzroy; and the second stipulates how this issue is to be addressed—by interpreting and applying the 1902 Award in accordance with international law.

3. International law governs the interpretation and application of the 1902 Award; and the Award and international law rest on the decision guided and supported by the interpretation and application of the 1902 Award under the auspices of of international law. The Parties conferred on the Court a limited authority. As a result, its decision on the line of the frontier must be based not on arbitrary attitudes, personal opinion, prerogative or discretion but on law, i.e., the law constituted by the combined application of the particular rules of the Award and the general rules of international law.

4. The Parties are not questioning the Award, for they acknowledge that it is a firm decision. What is more, they reiterate with manifest emphasis that the Award is valid and, moreover, constitutes the indissoluble cement of the present arbitration. The problem is to determine the circumstances of fact and of law which gave birth to the arbitration and the true meaning of the arbitral decisions.

5. It follows from the intention of the Parties that the Court's interpretation of the 1902 Award should leave the *res judicata* untouched. Given the circumstances of the present case, it does not seem wise to follow in the tracks of recent case law in the matter of interpretation of international awards, because this case law deals with matters whose characteristics differ considerably from the ones which shape the present dispute and invest it with its singularity. Furthermore, some of these interpretations deal with awards concerning areas of ocean; and the essential features of the interpreted awards, determined mainly by considerations of equity, might have been the reason, although without any express acknowledgement to this effect, for the fairly lax treatment, at times bordering on revision, of the questions subject to interpretation.

6. Out of concern for the legal safety vital to the protection of the *res judicata*, it seems to me more appropriate, with respect to the interpretation and application of earlier decisions, to pursue in principle the conceptual ap-

proach which has shaped the extensive and consistent traditional case law, because in this approach care has been taken to avoid entering that uncertain and slippery domain where one may be led, unawares, in the direction of revision of the award which is being interpreted.

7. Given the way the dispute has arisen, two problems are most relevant: Chile's territorial claim in 1898-1902 in relation to its present claim, and the concepts of local water-parting and continental water-parting. The solution of these two problems definitively and irrevocably determines the final decision.

8. The Court is required to interpret and apply the 1902 Award in accordance with international law. There are a number of prominent principles of international law which have a significant impact on this case: the principles of contemporaneity, stability of frontiers, integral interpretation of the relevant instruments, and preservation of the *res judicata*. These principles bear on the treatment of matters of fact and of law, both positively in terms of what can and should be done and negatively in terms of what cannot and should not be used.

9. The principles of contemporaneity and stability of frontiers are particularly relevant to the determination of the line of the frontier between boundary post 62 and Mount Fitzroy. The principle of contemporaneity is not limited and cannot be limited to the interpretation of the terms in the meaning which they had at the time when they were used. It is not merely a principle relating to terms but a general principle of law. For example, the Arbitrator of 1898-1902 cannot be held to have had geographical knowledge which he did not have and could not have had for the simple reason that nobody had it, nor can subsequent knowledge be used to interpret the meaning of past facts. Everything in its time and in its place.

10. It is moreover an essential requirement to analyze the case by placing oneself in the situation of the time and trying to reproduce the situation which shaped the vision and opinions of the Arbitrator and the opinions and purposes of the Parties. The proposed end dictates the means; and since the end is to determine the meaning of the 1902 Award the case and its consequences must be examined in the light of the considerations of fact and of law available to the Arbitrator for the purposes of his decision.

11. Accordingly, one must go back to the time of the decision and try to understand and, of course, respect the situation in which the Arbitrator worked, as a *sine qua non* of understanding the meaning of his decisions. When considered outside of their temporal context, as if the Award was being pronounced today, the decisions of the past lose their original meaning. Particularly in frontier disputes awards must be interpreted on the basis of the geographical knowledge, information and arguments submitted to the judge at the time and in the context of the time. Otherwise, there is a risk of disrupting the *res judicata* and the stability of the frontiers.

12. The often attractive effects of subsequent facts and knowledge, for example new and more accurate geographical surveys using very sophisticated techniques, have to be disregarded in the interpretation of events and

statements of a distant time, in this case 92 years ago. By means of interpretation one penetrates into the past, and application in the light of what is known today returns one to the present.

13. This case does not contain any circumstances justifying the application of evolving concepts or the inclusion of unresolved matters to which knowledge subsequent to the Arbitral Award is applied. The motives and purpose of territorial disputes are concerned with stability. There is no place here for the interpretative processes which have been used in branches of law undergoing development and reorganisation, as has happened in some areas of the law of the sea. Without rejecting the reasons for this kind of adaptation which modifies the past by means of the present, it is wrong to take this updating approach with regard to matters governed by the desire for stability, such as matters of State frontiers.

14. Stability is so firmly established where State frontiers are concerned that even a fundamental change of circumstances cannot be asserted as a reason for terminating a treaty or withdrawing consent to it in such matters (Vienna Convention on the Law of Treaties, art. 62, para. 2 (*a*)).

15. The most respected and respectable legal precedents support the view that judicial and arbitral decisions must be interpreted solely on the basis of the facts examined in the case in question, to the exclusion of facts subsequent to such decisions. (P.C.I.J., *Collection of Judgements*, Series A, No. 13, p. 21; United Nations, *R.I.A.A.*, vol. XVIII, p. 336). And interpretation has definite limits in the decision of the court concerned, a decision which in turn is determined by the claims of the parties (I.C.J. *Reports 1950*, p. 403).

16. The Parties agreed that the Arbitrator should make his Award on the basis of the geographical knowledge of the time and even in the awareness that there were unexplored areas. In this latter connection the sector between boundary post 62 and Mount Fitzroy was no exception. There are 16 blank zones on the Arbitrator's map, i.e., 16 unexplored zones. By accepting this geographical circumstance and even urging the Arbitrator to pronounce his Award quickly, under pressure of a complex political situation, the Parties implicitly agreed in advance to accept the risks and consequences.

17. Examination of the language of the documents available has played a role, at times a decisive one, in the formulation of this dissenting opinion. I mean analysis of the terms and the structures in which they are used, in particular the language of the arbitration documents. Of equal importance is the study of the organisation of the propositions and the context in which they are presented.

18. For example, a distinction must be made between what is exercise of the *ars litigandi*, by means of which the parties try to win over the judge, and what constitutes a real claim or recognition of the rights of others. With regard to the recognition of the rights of others, it is necessary to consider whether the language is categorical, even if conditionality occasionally seeps in by means of conditional or future tenses of verbs. The art of litigation is an aspect of the art of reasoning, and both are rich in propositions loaded with probability and therefore separate or separable from proof governed by the principle of identity-contradiction.

19. The 1991 *Compromis* says that the Court has to determine the line of the frontier between boundary post 62 and Mount Fitzroy. The Court must therefore determine the course of a frontier line, the one most consistent with the terms of the 1902 Award. Thus, the dispute is more about lines than about areas, zones or space. These spatial matters have already been adjudicated in the 1902 Award. Of course, two different lines competing for recognition create space without losing the character of lines; and lines of interpretation entail spaces when they establish the external limits of a claim or award.

20. In principle, this Court could adopt one of the following lines: (1) the Argentine line; (2) the Chilean line; (3) the Demarcator's line; (4) the line on the Arbitrator's map; or (5) a line of its own, different from the others, which conforms with the terms of the Award. A solution of mere equity is dismissed by the intention of the Parties; and a solution of equity within the norm appears *prima facie* unnecessary.

21. Argentina maintains that Chile cannot claim today more than it claimed in 1898-1902 and that, moreover, Chile recognized as Argentine territory what Chile is claiming today. The Argentine argument has to be answered with a yes or no, without any intermediate positions, qualifications or dilution. An affirmative answer leads necessarily to certain consequences, and a negative one to different consequences. The Court had to rule on this question: the affirmative answer shaped its decision, and the negative answer was the starting point of this dissenting opinion.

22. Clarification of the content and extent of Chile's territorial claim in the 1898-1902 arbitration is a key point in determining one's position on four fundamental issues: (1) the competence of the 1898-1902 Arbitrator and of course of the present Court, for the Court cannot exceed the competence of the Arbitrator; (2) the practical effects of the *res judicata*; (3) the decision-making capacity of this Court in accordance with the principle that it cannot award more than what has been requested; and (4) application of the principle of estoppel.

23. These four points have a common origin in Chile's territorial claim in the arbitration of 1898-1902. If accepted, the Argentine argument would entail certain practical effects, such as: (1) the entire basin of the River de las Vueltas, as it is known today, would have been excluded from the competence of the Arbitrator in 1898-1902; (2) the entire basin of the River de las Vueltas would be excluded from the competence of this Court, as a direct effect of the former exclusion; (3) any interpretation of the 1902 Award based on a line which entered the upper part of the las Vueltas basin, for example the area marked on the Arbitrator's map with a pecked line, would constitute a decision vitiated by *ultra vires*; (4) the whole line in Chile's interpretation of the 1902 Award would be rejected *ipso facto*; and (5) the whole line in the present Argentine interpretation of the 1902 Award, by the fact of coinciding with Chile's extreme territorial claim at that time, would be legitimated and validated.

24. The Arbitrator made his Award within the space of his territorial competence; and within this space lay the line of the Arbitrator's map, Robertson's two lines, Holdich's line, the Demarcator's line, and the lines which the Parties drew between boundary post 62 and Mount Fitzroy on the many maps which they published over some 50 years.

25. The other main point of divergence concerned the concepts of local water-parting and continental water-parting. Set against the doctrine that the two concepts form a unity when they perform the same function—the function of separating waters which flow in different directions—and that the qualifiers "local" and "continental" do not express any specificity or differentiation, the argument that this is not the case augmented the volume of dissent.

26. Now that the two main topics have been clarified, it is necessary to consider the lines submitted by the Parties, both affected by the problem that, while the arbitral report stipulates following the local water-parting, the lines combine local and continental water-partings. It will then be necessary to consider the Demarcator's line, to which Chile assigns sufficient merit for it to represent the interpretation of the intention of the Arbitrator in 1898-1902.

27. This process of successive exclusion—exclusion because these lines entail difficulties which, to a greater or lesser extent, render them in themselves incapable of satisfying the arbitral texts of 1892-1902—leaves as a final option a line consistent with the three instruments making up the 1902 Award: the decision itself, the Arbitrator's report, and his map. These documents, the primary source material for adjudicating the case, form a single semantic unit and complement and clarify each other.

28. The principle purpose of this exercise is and will remain the search for consistency among the many and complex factors affecting the problems under discussion. What is needed is, on the one hand, successive elimination of possible solutions and, on the other, coordination and connection of all the factors present, even the apparently most disparate ones, within a unity of meaning.

29. The chosen method presupposes a model governed by the principle of consistency and shaped by the purpose which steers the exercise, in the knowledge of course that this model cannot materialize owing to insuperable obstacles of various kinds but nevertheless constitutes a source of inspiration and a guideline which acts as a goal and a point of reference for proof, amendment and adjustment, as well as a guideline for elaboration of the final conclusion.

30. Within this structural consistency each and every one of the elements of fact and of law has its meaning and its value and, taken together, they achieve harmony and justification by means of generally recognized principles and, moreover, they support the final conclusion. This dissenting opinion closes with some thoughts about a solution which might be consistent with the 1902 Award.

II. The territorial claims of Chile in 1898-1902 and in 1992-1994

II.1 The territorial claim of Chile in 1898-1902

1. *Framing of the question*

The determination of Chile's two claims, one in 1898-1902 and the other in 1992-1994, is fundamental to the question of whether Chile is today claiming territory which it did not claim in 1898-1902 and to a decision, if the answer is affirmative, that its present claim is inadmissible in its entirety and that, as a counterpart, the present Argentine claim is admissible in its entirety.

These consequences will also find support in Chile's acknowledgement that all the Atlantic basins belong to Argentina. In this case the claim and the acknowledgement have the same consequences; and they are moreover joined at the root, because Chile would have accorded recognition to land which it did not claim. A determination of what Chile's claim was at that time will also determine, implicitly, which areas Chile recognized as being under Argentine sovereignty.

It is further necessary to determine Chile's present territorial claim, compare it with the claim of 1898-1902 and decide whether it subtracts anything from what was recognized as belonging to Argentina at the time of the arbitration, and therefore whether Chile is today asking for more than it sought at that time, with the consequent collapse of its entire present claim.

In concrete terms, would the upper las Vueltas basin, situated to the north and west of what at the time of the arbitration was regarded as the continental water-divide and today is known for certain, as a result of surveys carried out since then, to belong to the Atlantic slope, have fallen outside the competence of the Arbitrator in 1898-1902 because it was not in dispute? If the answer is in the affirmative, the upper las Vueltas basin would lie outside the competence of the present Court as well.

There is nothing better than the language of the Parties for siting this question within the context of the causes and the circumstances of the present dispute. First, the problem will be stated by means of quotations culled from the many written and oral submissions of the Parties. Then an attempt will be made to render things clearer and more precise by reference to primary and secondary sources and the relevant developments at the time and to assess their influence on the interpretation and application of the 1902 Award.

2. *Argentina's position on the Chilean claim of 1898-1902*

A large part of the problem of this dispute turns on what Chile claimed or did not claim in 1898-1902. Argentina maintains that Chile "cannot claim today, in an exercise of interpretation and application of the 1902 Award, territory which it did not claim at the time of that arbitration and which it repeatedly, persistently and systematically recognized as belonging to the Argentine Republic. In short, Chile cannot now claim territory which it acknowledged to

be Argentine in 1898 and in its submissions to the 1902 Arbitrator" (*Argentine memorial*, pp. 332-333, para. 1, p. 336, para. 6, p. 337, para. 7, and pp. 338-339). (This memorial will be referred to hereinafter by the abbreviation MA and the page or pages by the abbreviations p. or pp., and the paragraph numbers will follow the page numbers.)

> It was not a question of tacit recognition, which may always give rise to difficult problems of interpretation concerning the conduct of a State. Using the language frequently cited in the legal literature, it is a question of "the adoption of a positive acknowledgement on the part of the State". . . . in 1902 Chile's attitude was not one of silence or mere acquiescence but a positive one, for it recognized that the Atlantic hydrographic basins belonged to Argentina (MA, p. 337, 8).

Furthermore, "subsequent developments, from 1902 up to the present dispute, show that Chile's conduct has been invariable in this respect; it has never claimed basins of rivers or lakes which discharge into the Atlantic, throughout the lengthy process of demarcation which has taken place since that time". "If in its interpretation of the 1881 Treaty submitted to the British Arbitrator Chile recognized the Atlantic basins as belonging to Argentina, it may not now discuss such sovereignty." (MA, p. 341, 12, and p. 343, 14)

Argentina reiterated the same argument in its counter-memorial. The following is one example of many relevant passages: "The line which Chile is requesting in these arbitration proceedings, based on a supposed "interpretation" of the 1902 Award", disregards Chile's extreme claim for the sector in 1898-1902. By this sole fact, not to mention others, this line cannot correspond to the boundary decided upon by the 1902 Award. At no point did Chile seek from the British Arbitrator a line which would award to Chile basins or parts of basins on the Atlantic slope, and it did not do so, therefore, with regard to the basin of the River de las Vueltas. What Chile requested was all of the basins which discharge into the Pacific Ocean and only those basins." (Argentine counter-memorial, p. 27, para. 22). (Hereinafter this counter-memorial will be referred to by the abbreviation CA and the paragraph numbers will follow the page numbers.)

The importance of Chile's extreme claim in 1898-1902 for the purposes of an interpretation of the 1902 Award lies in the fact that the las Vueltas basin was not claimed by Chile (CA, p. 27, 21).

In the oral submissions Argentina presented this point as the most important of its arguments to prove that the entire las Vueltas basin, as it is known today, was excluded from the competence of the Arbitrator in 1898-1902. It stated two grounds: Chile did not claim the basin and recognized that it belonged entirely to Argentina.

> If a State recognizes that a territory belongs to another State, such recognition precludes the first State from subsequently claiming what it had previously recognized as belonging to the other State (record No. 12 of 28 April 1994, p. 55). . . . the said continental *divortium aquarum* was also to the south of Lake San Martín, as in the other areas, and was the "true" one on the ground, i.e., the *natural and effective* water-parting of the South American continent (record No. 10 of 26 April 1994, p. 33).
>
> Accordingly, despite Chile's claims in the present arbitration the 1902 Award could not have assigned to Chile, in the sector between boundary post 62 and Mount Fitzroy, either Lake del Desierto or the valley of the River Diablo or any other part of the Atlantic basin of

the River de las Vueltas, which is, in turn, part of the lacustrine basin of Lake Viedma. Both Atlantic basins had been excluded from the territorial competence assigned by the Parties to the British Arbitrator (record No. 10 of 26 April 1994, p. 24).

In 1958 Chile, in contradiction with its earlier acts contemporaneous with and subsequent to the 1898-1902 arbitration, began to claim a part of the Atlantic basin of Lake Viedma, which included *inter alia* the valley of the River Diablo and Lake del Desierto (record No. 19 of 16 May 1994, pp. 39-40).

Many more such passages can be cited:

In Argentina's opinion, Chile contradicts its earlier position because in 1992-1994 it is claiming territory which it recognized as Argentine before and during the 1898-1902 arbitration. Chile recognized as Argentine the territory to the east of the natural and effective continental water-divide (record No. 12 of 28 April 1994, pp. 48 and 54).

Chile's argument must be dismissed in the light of its own position and the competence *ratione loci* of the Tribunal in the 1898-1902 arbitration . . . Chile's claim is located beyond and outside its extreme claim during the 1902 arbitration (record No. 14 of 2 May 1994, p. 9).

The effects of Chile's territorial claim and the recognition that went with it have four consequences for the present dispute: (1) application of the principle of estoppel; (2) determination of the territorial competence of the 1902 Arbitrator so as to exclude from the competence of the present Court the entire de las Vueltas basin as it is known today; (3) application of the principle that it is impossible to award more than what has been requested in the case; and (4) the *res judicata* (record No. 19 of 16 May 1994, pp. 86-87).

3. *Chile's position on its 1898-1902 claim*

Chile confirms that the expert Barros Arana stated in the arbitral proceedings that "the topographical location of a proposed line is entirely independent of the maps and that, accordingly, this line is no other than the actual and effective water-parting of the South American continent". It then adds that this statement "may not be used in support of the argument that whatever proved to be the continental water-parting at a later stage should become the definitive expression of Chile's claim in 1902. Thus, it is impossible to interpret Barras Arana's statement as an assertion that the continental water-parting, whose true course was not known at the time of the Award, could be incorporated in the Award many years later and despite having been rejected by the Arbitrator as an appropriate criterion for determining the boundary. Moreover, with regard to the expression of Chile's interpretation of the determination of the boundary, what really matters is the line drawn on the map" (Chilean counter-memorial, pp. 45-46, paras. 4.2 and 4.3). (Hereinafter this counter-memorial will be referred to by the abbreviation CCH, and the paragraph numbers will follow the page numbers.)

Chile has also stated on this question: "For the moment it is sufficient to stress that the claims of the Parties were both submitted to the Tribunal in the form of lines drawn on maps and that, without adhering to those lines, the Tribunal made its decision, also shown as a line drawn on a map" (CCH, p. 46, 4.4).

Chile is obliged to reject the conclusion drawn by Argentina that "both Governments . . . recognized that the whole hydrographic basin of Lake Viedma belonged to Argentina". The

arbitration proceedings in relation to this area were conducted on the basis of lines drawn on maps. Any speculation about the position which Chile might have taken if the true geographical facts had been known cannot affect the scope of the claim actually made by Chile or the interpretation of the words actually used or the identification of the claimed result by the Tribunal on the basis of the terms used (CCH, pp. 47-48, 4.5 (iii)).

Chile transcribes the following passage from the Argentine memorial: "Consistent with its position, Argentina requested the Arbitrator in its petition to accept as the boundary the points proposed by its expert and indicated by the numbers 1, 2, 267-274, 282-302 and 306, and to reject the points proposed by the Chilean expert and indicated by the numbers 1-9, 257-262, 271-330 and 333-348".

Chile comments: "From Chile's standpoint the form in which the Argentine memorial records Argentina's position offers the most effective support of Chile's assertion that, ultimately, what mattered in the 1902 arbitration was not the general and doctrinal principles stated by the two Parties as their respective interpretations of the 1881 Boundary Treaty but the graphic expression of these interpretations, represented as lines which actually passed through definite points specifically identified and numbered by the Parties" (CCH, p. 51, 4.11 and 4.12).

Nor does Chile deny having said that the application of the principle of the continental divide would not require at that time maps providing an accurate picture of the area, for the subsequent application of this principle would be sufficient to identify the boundary. But this does not mean that Chile had accepted, as a consequence, that the identification of the boundary on the ground could be postponed for an indefinite period after the Award or that, whatever proved to be the boundary which the Parties had regarded as such in the meantime, this boundary could be altered by the subsequent discovery of the true geographical facts (CCH, p. 52, 4.14).

Chile drew on a map the line which it claimed. The Tribunal, like Argentina, regarded that line as representing the Chilean claim, and the Award was made on the basis of its depiction on the Arbitrator's map (CCH, p. 54, 4.17).

Chile mentions map X submitted to the Arbitrator by Argentina, which contains the legend "showing. . .the frontier line proposed by Chile for the whole length of the continental water-parting". On the same map we read: "The continental water-parting, where the Chilean expert places his line, as shown on maps ii, iv, v, vii, x and xi, is not mentioned in the Treaties or in the documents on the boundaries question up to 1898. . ." Chile comments: "This map and its accompanying legend make it clear that Argentina accepted that the line claimed by Chile was depicted on the map and was not a line to which a verbal or geographical definition could not be attached". "This applies equally to the following map, No. XII in the Argentine memorial" (Chilean memorial (hereinafter MCH), p. 55, 4.18 (1) and (2), and footnote 29; MA, *maps*, p. 11).

Similar comments may be made about the two other maps in the Argentine collection, i.e., maps XIII and XIX. The main map described by Argentina in this section is map XVIII. This map confirms everything stated above about the acceptance and reproduction by Argentina of the two lines claimed by the Parties, which are shown on the map as representing the extent of their claims (CCH, p. 56, 4.19 (4), and p. 58, 4.23).

4. *The origins of the territorial dispute of 1898-1902*

Argentina and Chile decided to compare the reports of their respective experts to determine the points of convergence and divergence for the whole length of their common frontier. An extensive section of this frontier allowed the application of the agreed principle for determining the frontier, i.e., the high peaks of the Andes which divide the waters between the Atlantic and Pacific Oceans.

Between latitudes 41°S and 51°S the geography changed: the high peaks, running north-south, were now cut by valleys and rivers running east-west, and the continental water-divide lay a considerable distance away and sometimes deep within the Pampas on extremely low ground. The high mountain peaks no longer separated the waters, so that they no longer obeyed the general rule on boundaries, and the approach taken in the northern and central parts of the common frontier was no longer possible. The principle of the high peaks *which* separate the waters could no longer be applied.

Four regions of disagreement were identified: the First Region, known as San Francisco Pass, which began at the point where a boundary mark had been erected by agreement between the Parties; the Second, called Lake Lacar; the Third, known as Pérez Rosales Pass-Lake Viedma; and the Fourth, identified as Ensenada de la Ultima Esperanza [Last Hope Inlet]. The present dispute concerns territory in the southern part of the Third Region.

The geography which separated the high peaks and the continental water-parting was the cause of the difficulty of applying the delimitation principle which associated peaks with water-parting. In these four regions, where the high peaks and the continental divide were separated by large distances, it was impossible to apply the delimitation principle on the agreed terms. The original principle was thus undermined by the geography.

The principle which associated high peaks with continental divide produced two further principles, that of the high Andean peaks advocated by Argentina and that of the continental water-parting advocated by Chile, head-to-head and in determined competition to secure the assent of the other Party throughout the work of the commissions established for implementation of the boundary treaties and, later, to obtain the backing of the Arbitrator. Each Party, on the basis of the treaties whose application had been thrown awry by the unforeseen geography of the Andes, chose the principle which best fitted with its territorial claims.

Thus, Argentina made the high Andean peaks the centre of its claim, and Chile opted for the continental water-parting. The British Arbitrator, called upon to apply the treaties, could not satisfy these competing principles, given his agreed terms of reference, and he devised and implemented a compromise solution, which was previously accepted by the Parties; he thus decided upon an intermediate line, in the tracing of which he took into consideration, in addition to the geography, the value of the land, including its development potential, and its population and the strategic interests (MA, *Annex of Documents*, vol. I, document No. 35, Holdich, "Considerations Other than Geographical Which Must Affect the Decision of the Tribunal", pp. 385-392).

5. *Concerning whether the Chilean claim was a principle or a line drawn on maps*

Argentina maintains that Chile sought recognition of a concept or principle, the natural and effective water-parting of the South American continent, and that the maps were of secondary importance, while Argentina itself claimed the line of the highest Andean peaks shown on the maps. According to this interpretation, the natural and effective continental water-parting was the principle and constituted the position which Chile wished to see triumph in the 1898-1902 arbitration as an interpretation of the 1881 Treaty and more particularly of the 1893 Protocol.

Argentina says that Chile began with a position of principle, which it advocated with tenacity and did not alter throughout the arbitration, and that to assert the contrary is to deny the obvious. It then adds that all the quotations show very clearly that Chile maintained that a natural and effective continental water-parting was the general boundary criterion which should be followed for the whole length of its frontier with Argentina, in accordance with the provisions of the boundary treaties of 1881 and 1893. Finally, Chile recognized as Argentine the territory to the east of the natural and effective water-parting. Completing its presentation, Argentina argues that Chile's statement of its claim was not, however, structured in terms of lines on a map (MA, pp. 75-76, 21 and 22, pp. 99-104, 39, and pp. 119-121, 50; CA, pp. 26-27, 20, pp. 29-30, 28, and pp. 31-33, 28-30).

Argentina states that "a simple comparison of these three maps shows clearly that the depiction of Chile's position in 1898-1902 was not a line fixed on a map, as Chile claims today, but rather a dynamic representation which was adapted as geographical knowledge evolved (record No. 9 of 25 April 1994, p. 7). "In short, Chile claimed that the Arbitrator had ruled on the applicable principle of delimitation and that he had accepted that this principle was the continental water-parting" (MA, p. 115, 47).

Other quotations from the oral submissions support the Argentine thesis. "The eastern limit of the area falling within the competence of the British Arbitrator was. . .a natural limit, the natural and effective water-parting of the South American continent, and not the cartographic representations of this natural limit on any map or plan, whatever its origin" (record No. 20 of 17 May 1994, p. 7). "It is important to bear in mind that the Tribunal realised that the "extreme claims" of the two Parties were not the lines as drawn on the maps" (record No. 12 of 28 April 1994, p. 74).

Chile's claim "was not a line fixed on a map, as Chile asserts today, but rather a dynamic representation which was adapted as geographic knowledge evolved, for it represented the course on the ground of the natural and effective continental water-parting" (record No. 9 of 25 April 1994, p. 7).

> The succession of geographical descriptions and cartographical representations of the continental divide submitted during the British arbitration had for Chile no more than a merely tentative and illustrative value, always subject to revision depending on the true line of the natural continental water-parting on the ground. During the British arbitration the geographical descriptions and cartographical representations of the "continental divide" in the area to the south of Lake San Martín were evolving in step with improvements in the knowl-

edge of the geography and topography. However, at no point did Chile adopt any of these successive cartographical representations as the "specific" line of its extreme claim, which remained throughout the arbitral proceedings the "natural and effective water-parting" wherever it was located on the ground (CA, pp. 29-30, 25).

Against the background of this interpretation, Argentina comments that it is not for nothing that paragraph 10 of the report of the Arbitral Tribunal "does not mention the claims as being depicted on maps", and Argentina goes on to say that "for the Tribunal Chile's line was the natural and effective continental water-parting, regardless of the maps, and could not be anything else when Chile itself kept telling the Tribunal that any deficiency of geographical information on the Chilean maps was of no importance" (record No. 12 of 28 April 1994, pp. 75-76).

Chile, in contrast, argues that "the claims of the Parties were established as specific lines described with some precision and represented visually on maps", and that "for each Party the demarcation of its claim in the form of a line on its map running from one numbered point to another brought the dispute between the Parties to a head in 1898" (CCH, p. 134, 8.4). Accordingly, in opposition to the Argentine thesis that Chile claimed solely a concept or principle, Chile argues that it claimed a concrete line marked on maps.

In order to determine one's position on this issue it is necessary to examine directly the documents which constituted the 1898 Arbitral *Compromis*, i.e., the records of the experts and the agreement of the representatives of Argentina and Chile to submit the points of dissent to the British Arbitrator.

6. *The claims of the Parties in the records of the experts*

The points of agreement and disagreement were indicated in the records of their deliberations produced by the experts. These records were submitted to the Arbitrator in order to make clear to him the areas concerning which the Parties were seeking a decision.

These are records of the meetings which the experts held on 29 August and 1 and 2 September 1898 and of the meeting in Santiago between Chile's Minister for Foreign Affairs and Argentina's Minister Plenipotentiary on 22 September of that year with the experts in attendance. At these meetings the points of agreement and disagreement were established, and the two countries, having exhausted the possibilities of reaching a direct understanding, finally decided to submit the points of disagreement to the British Arbitrator for adjudication.

6.1 *The maps in the records of 29 August and 1 September 1898*

The record of 29 August 1898 (MA, *Annex of Documents*, vol. I, document No. 14, pp. 109-136) says that the two experts made the following statements: "The Chilean expert, that he has established a general line of the Andean frontier between Chile and Argentina specified in the 1881 Treaty, which he presents to his colleague on a map and as a numerical list of points included below" (para. 2).

"The Argentine expert, that it would be four days before he could submit a general map, similar to the one submitted by the Chilean expert, of the part of the Cordillera de los Andes lying between parallels 38° and 52° . . . but that he would be happy to make available to his colleague, at the office of the Argentine Commission, the partial sheets of a 1:200,000 map, in the expectation that he would in turn be able to examine, at the Chilean office, the partial sheets which had been used in the preparation of the full map". (para. 82)

At the same meeting the Argentine expert stated:

" 8. He regards it as essential and so proposes to the Chilean expert that the experts should exchange photographic reproductions, or reproductions of any other kind, of the partial maps used in determining the general line proposed by each of them, and that these reproductions should contain indications of the points and sections of such lines" (para. 88).

" 9. They should also exchange reproductions of the same maps showing clearly the points or sections of the general frontier line" (para. 89).

The same record contains other references to maps. The Argentine expert added:

" 10. Having made the comparison referred to in proposal 4, they should enter on reproductions of the same maps the changes made in the course of the general line by the two experts on their respective maps" (para. 91).

" 11. Once proposal 5 has been carried out, they should enter [in the record] reproductions of the same maps" (para. 92).

" 12. . . . including the proposed lines, the lines rejected and accepted for the whole or part of the extent [of the frontier], accompanied by reproductions of the same maps containing specific depictions of the various lines" (para. 93).

There are further references to maps in the record of 29 August. The Argentine expert again:

" 13. They should at the same time exchange reproductions of the maps on which they had drawn the dividing lines proposed for adoption, in the event of the case provided for in the said protocol and agreement" (para. 94).

" 14. . . . and of the various reproductions of the maps which they have taken into account in the formulation of decisions . . ." (para. 95).

" 16. The reproductions of all the maps referred to in this general record shall show the area of the demarcation, on a scale of not less than 1:400,000, and they shall be signed by the two experts" (para. 96).

" 17. When all this has been done, the two Parties will have completed the representation of the general frontier line between the Argentine Republic and the Republic of Chile" (para. 97).

" 18. . . . the experts shall deliver to their assistants copies of the maps on which the approved points or sections of the dividing line have been entered" (para. 98).

It seems that at the meeting of the experts on 1 September 1898 (MA, *Annex of Documents*, vol. I, Document No. 15, pp. 137-138) the Chilean expert "proposed that the part concerning the exchange of copies of maps should

be amended as follows: both experts shall in future deliver to his colleague at his office all the individual maps or sets of maps available from the ones which have been used in formulating the proposal of his general line, so that each expert may consult, copy or reproduce them as he sees fit. They shall also undertake to certify with their signatures all duly verified copies or reproductions" (para. 3). The Argentine expert replied that "he would have no difficulty in accepting the amendment proposed by the Chilean expert concerning the exchange of maps" (para. 5).

These quotations demonstrate the importance of the maps in the determination of the points of agreement and disagreement on the frontier line between Argentina and Chile. The experts made their partial maps available to each other and resolved to certify the reproductions with their signatures and exchange maps without restriction; and they mentioned the exchange of partial maps representing clearly the points or sections of the general frontier line.

In addition, the experts agreed to enter on the maps any changes in the course of the general line and to depict the differing dividing lines which they sought to have adopted. Lastly, there is the reference to "the maps which have been taken into account in the formulation of decisions". These abundant references to maps, evidence of their widespread use, mean that the Parties used maps to determine their points of agreement and disagreement concerning the common frontier.

It is worth mentioning the statement of the Chilean expert on 29 August 1898 that "he has established a general line of the Andean frontier between Chile and Argentina", which "he submits to his colleague on a map and as a numerical list of points included below" (para. 2). "The description of the dividing line proposed by the Chilean expert" (para. 18) does in fact appear later in the same record. It is followed by a description of the proposed line by means of toponyms and numbered points (paras. 19-75). Here it is stated that Chile presented "the general line of the Argentina-Chile frontier . . . on a map and as a numerical list of points and sections".

6.2 *The frontier lines in the records of 29 August and 22 September 1898*

These records contain abundant references to the lines of the Parties. The purpose of the meeting on 29 August was "to decide on the general line of the frontier" (record of 29 August, para. 1). There now follows a sample of quotations concerning the frontier lines:

Here are the words of the Chilean expert:

(1) "that he has established a general line of the frontier . . ." (para. 2);

(2) "the delineation of this line has been based solely and exclusively on the demarcation principle established in the first clause of the 1881 Treaty . . ." (para. 3);

(3) "that accordingly the frontier line which he proposes passes . . ." (para. 4);

(4) "that the same line leaves . . ." (para. 5);

(5) ". . . to conclude . . . the deliberations of the experts concerning the general line" (para. 7);

(6) "the description of the dividing line proposed by the Chilean expert which, at his request, is to be inserted in the record is as follows: . . ." (para. 18);

(7) ". . . would have no problem in stating that the course of the general line which he has proposed is in conformity with the provisions of the articles of the Treaties and Agreements cited by the Argentine expert" (para. 80).

The record repeats, then, that the Chilean line was depicted on maps. A depiction is a drawing or other portrayal of a person or thing. What is depicted by a line can be, for example, "the course or direction of a road, canal, railway line, highway, etc.". In the language of the records what is depicted as a line is the course of the frontier.

Elsewhere the Chilean expert says "that although in its most extensive and important parts the ground across which the dividing line runs is sufficiently well-known and even extensively surveyed, . . . it must nevertheless be pointed out that the topographical location of the proposed line is entirely independent of the accuracy of the maps and that, for this reason, he states that this line is none other than the natural and effective water-parting of the South American continent" (para. 6).

The Chilean expert adds "that the Argentine expert has submitted his general line with a numerical list of points and sections accompanied by fairly concrete and precise indications for identifying them on the ground by any natural feature" (para. 8).

The record of 22 December (MA, *Annex of Documents*, vol. I, document No. 17) contains the following statements: "the said officials have entered the line which each of them believes should separate the Argentine Republic from the Republic of Chile"; "the line of the Chilean expert begins . . ."; "the lines of the two experts coincide . . ."; "the line of the Chilean expert diverges from the line of the Argentine expert at the points and sections . . ." (paras. 1, 2, 3 and 4).

The record of 22 September repeats that the proposed lines are the ones which the experts consider to separate Argentine and Chilean territory; and it is stated that the lines coincide or diverge at this or that point. The points of coincidence and divergence were established by reference to lines; and the records tell us that the lines were described by means of toponyms and points and sections numbered and depicted on maps.

These quotations show that in formulating their proposals both Parties translated the underlying principles into concrete points and that these points were marked on maps. The references to lines are continual—unlike the references to principles, except Chile's statement that its line is in conformity with the principle established in the 1881 Treaty and the reiteration of Chile's interpretation of that Treaty to the effect that it accorded preference to the continental water-parting. From this material we can infer the interrelationship between the chosen principle and its descriptive and graphic representations.

7. *Determination of points of agreement and disagreement in the records of 29 August and 22 September 1898*

When the discussions had been completed, the Chilean expert proposed to his Argentine colleague a procedure for deciding on the general frontier line. To this end he suggested that in the course of two or three meetings the experts should resolve matters relating to the general line and that at one of these meetings they should submit to each other in writing "a list of the points and sections on which each is in agreement with the other and a list of the points or sections concerning which this is not the case".

The Chilean expert then added: "4. Once the two lists have been compared, each of the experts will have an opportunity to offer any clarifications or comments or any amendments which he wishes to make to his original proposal in the light of the geographical data contained on the maps submitted by his colleague, which shall be entered in the record" (record of 29 August, paras. 86-88).

Thus, the points of agreement and disagreement were determined by comparing the experts' lists. List means an enumeration of items. In this case the relevant items were the toponyms and points and sections in the experts' proposals. A comparison of the lists of toponyms and points and sections produced the concrete versions of the respective territorial claims.

The experts also envisaged the possibility of making changes in their respective lines in the light of the maps submitted to each other: "in the light of the geographical data contained in the maps submitted by his colleague".

According to the record of 22 September 1898, on that date Chile's Minister for Foreign Affairs and Argentina's Minister Plenipotentiary agreed to submit to the British Arbitrator the points of disagreement identified in the experts' records. Accordingly, they sent to the British Arbitrator a copy of the record of 22 September and "[copies] of the records of the experts and of the international treaties and agreements in force in order that, in accordance with the second clause of the *Compromis* of 17 April 1896, he may resolve the differences noted above" (para. 7). (MA, *Annex of Documents*, vol. I, document No. 17, pp. 149-152)

The fact that the record of 22 September did not mention any plans or maps among the documents sent to the Arbitrator has been interpreted as confirming that the concrete expression of the claims of the Parties did not take the form of plans or maps.

This fact does not vitiate or devalue the use of maps at the meetings of the experts or their use to identify the points of agreement and disagreement. Argentina submitted its first map on 17 January 1899, and Chile its in February of that year. From that date the filing of maps and their description in written submissions was a keynote of the arbitral proceedings.

8. *Points and sections in the experts' records*

The record of 22 September states: "2. That the lines of the two experts coincide . . . at the points and sections designated by the numbers 10-256 in the Chilean expert's list, and 3-266 in the Argentine expert's list; and at the points

and sections designated by the numbers 263-270 of the Chilean expert, and 275-281 of the Argentine expert; and finally at those numbered 331 and 332 by the Chilean expert, and 304 and 305 by the Argentine expert" (para. 3).

The points and sections of disagreement were specified as follows: "That the line of the Chilean expert diverges from the line of the Argentine expert at the points and sections designated . . . by the numbers. . .271-330 by the Chilean expert and 282-303 by the Argentine expert . . ." The current dispute concerns points of divergence 330 (Chile) and 303 (Argentina), to the north, and points of coincidence 331 (Chile) and 304 (Argentina), to the south. Points of coincidence 331 (Chile) and 304 (Argentina) mark Mount Fitzroy.

The points coincided with respect to Mount Fitzroy because, owing to their lack of geographical knowledge, the Parties believed during the deliberations of the experts in 1898 that Mount Fitzroy was a high Andean peak situated on the continental water-divide. This meant that it satisfied the requirements of the 1881 Treaty and the 1893 Protocol for designation as a point of the frontier. Later, in the course of the arbitration, although it was known that this mountain was not situated on the continental water-divide, the Parties left their agreement untouched.

The record of 1 October 1898 (MA, *Annex of Documents*, vol. I, document No. 18, pp. 153-155) clearly repeated the points of agreement with a view to entrusting their demarcation to four mixed commissions. This record reads as follows: "1. That, as a result of the comparison of the general frontier lines submitted by the Argentine expert as contained in the record of 3 September last and by the Chilean expert as contained in the record of 29 August, the points and sections of the Argentine expert numbered 3-266, 275-281 and 304-305 coincide with the points and sections of the Chilean expert numbered 10-256, 263-270 and 331-332, they resolve to accept them as forming part of the dividing line in the Cordillera de los Andes between the Argentine Republic and the Republic of Chile" (para. 2).

This record refers to "points and sections", so that, the description beginning from the north, the numbers refer first to the points and then to the sections, i.e., to the lines running southwards. The numbers correspond both to the points and to the sections. This is stated in the records: "The points and sections designated by the numbers. . ." (record of 22 September, para. 3)

The sequence is established between points and sections, not between sections and points. When the number of a point is given, the section identified by the same number is the line running southwards as far as the next point; and each section is identified by the same number as the point at which it begins.

When there is a discrepancy between points on the two lines it is understood that this discrepancy also exists with respect to the sections running southwards. Accordingly, the discrepancy between points 303 (Argentina) and 330 (Chile) continues southwards until the line reaches the next point, which in this case is Mount Fitzroy, numbered 304 (Argentina) and 331 (Chile).

It will be noted that with respect to the points and sections relevant to the present dispute the coincidence of point 331/304 continues throughout the section running southwards as far as the next point, 332/305. The discrepancy

between points 330 and 303 continues with respect to the section running southwards and coinciding on Mount Fitzroy (point 331/304). The points coincided from Mount Fitzroy onwards. The Arbitrator had no doubt that the points and sections of disagreement numbered 303 and 330 fell within his competence. The preparatory work and the outcome of the Award confirm this.

8.1 *Concerning whether the section between Chilean points 330 and 331 was not in dispute.*

In the oral submissions Argentina submitted some comments demonstrating or at least suggesting that Chilean section 331 had been agreed between the Parties. Although that assertion is unobjectionable, the identification of section 331 can be questioned. In fact, section 331 is not located between points 330 and 331 but between points 331 (Mount Fitzroy) and 332. On the other hand, section 330, located between points 330 and 331, was the subject of dispute.

An examination of these materials can be boiled down to the determination of the number corresponding to the section between points 330 and 331, because if it turns out that this is not section 331 but 330, the stated consequences can be disregarded, because once the cause has been eliminated, the effect disappears.

The record of 22 September lists the points and sections of agreement. It states that the lines of the two experts coincide "at the points and sections designated by the numbers. . .; and finally at those numbered 331 and 332 by the Chilean expert and 304 and 305 by the Argentine expert" (para. 3).

The records make specific mention of the points and sections of agreement and disagreement. They indicate the number and whether there is agreement or disagreement and they refer both to the point and to the section running southwards from it. Agreement was not reached on Chilean point 330 but there was agreement on Chilean point 331. The failure to agree on point 330 extended to the section also bearing the number 330 and running southwards as far as the point and section numbered 331.

Since the lines ran parallel to each other, there was agreement and disagreement as to whether some of the points and sections of both Parties corresponded in the descriptions and depictions of the lines on maps. Even if the sections ran from south to north, which was not the case according to the description of the general frontier line contained in the records of the experts, the same attitude would have to be taken to section 331 as to section 304. Section 330 could not have been disputed, even if it was assigned number 331, without the dispute also covering section 303, to which had been assigned number 304; and if there had been agreement on section 330 there would also have been agreement on section 303. The sections between Lake San Martín and Mount Fitzroy were within the competence of the 1898-1902 Arbitrator, regardless of their numbers, and the Arbitrator ruled on them. Here the *ex post facto* argument seems solid.

9. *Reasons for questioning the evidentiary value of plans and maps*

9.1 *Water-parting principle versus concrete line*

First of all it is adduced that the dispute arose between a concept or principle (the continental water-divide) and a concrete line, the principle advocated by Chile and the line by Argentina. In this connection Argentina refers to the Chilean statements contained in the record of 29 August 1898: (*a*) "the delineation of this line has been based solely and exclusively on the demarcation principle established in the first clause of the 1881 Treaty, a principle which should also be the invariable rule of the proceedings of the experts, according to the 1893 Protocol" (para. 3); and (*b*) "this line is none other than the natural and effective water-parting of the South American continent between parallels 26°52'45" and 52° and can be demarcated on the ground without carrying out any more topographical operations than are necessary for determining what the course of the waters would be in places where they do not physically run" (para. 6). It has been understood, on the basis of these and other similar statements, that the Chilean claim consisted of a concept or a principle, the natural and effective continental water-divide, wherever it might be located, and not of a line specified on a map.

The statement of the Chilean expert that his line followed solely and exclusively the continental water-parting of the South American continent is preceded by another statement: the Chilean expert "has established a general line of the Andean frontier between Chile and Argentina specified in the 1881 Treaty, which he submits to his colleague on a map and as a numerical list of points included below". This general statement precedes and provides the context for the series of subsequent statements and indicates that this is a line based on the 1881 Treaty and represented on a map and by a numerical list of points.

A key element of the proposal appears at this point: the numerical list of points transposed onto a map. Further on in the same record of 29 August are found details of the points and sections and a description of the line with its toponyms. The importance of the maps is thus confirmed, not as secondary materials but as materials essential to the claims of the Parties.

It must be pointed out that the claims of the Parties would have been unintelligible if they had not been expressed as lines drawn on maps. If even the most learned person were given the records of the experts without the maps, he would be hard put to understand the point of the dispute. And if he sought guidance from the toponyms, he would have to use maps to see where each river or peak was located. And it must be noted that the descriptions did not include the identification of geographical features in terms of degrees, minutes and seconds.

In a submission to the Arbitrator Chile associated its line with its map, which it called official: "That the information in the Chilean proposal about a frontier line contained in the records, in 1898, is sufficient for the identification and demarcation of the line throughout its total extent and that the depic-

tion of this line on Chile's official map submitted with the records agrees with the description and is substantially correct" (*Chilean Statement*, ch. XXVIII; MA, *ibid.*, document No. 6, p. 273).

Still on the use of maps, the Chilean statement added: "The examination of the ground covered by the Treaties will be undertaken with the aid of the maps annexed to the present statement of evidence" (*ibid.*, p. 274).

An examination of the lines and maps mentioned in the records of the experts shows that the Parties were arguing about two principles, in the sense that each of them endeavoured to secure victory for the principle which suited it best: Argentina the high Andean peaks, and Chile the continental water-parting.

Each of these principles was manifested in terms of toponyms and numbered points and sections. The common source of the two positions was the 1881 Treaty and the 1893 Protocol. The respective principles were the guideline, foundation and legal justification of the toponyms, points, sections and lines of the competing claims.

The experts compared materials of the same kind to determine the general line of the frontier and identify the points and sections of agreement and disagreement. Reduced to a confrontation between a principle and a concrete line, the dispute would have introduced an internal imbalance both in the petitions and in the proceedings. Furthermore, the results could not be permanent for one of the Parties and variable and dependent on subsequent geographical discoveries for the other.

9.2 *The pecked section of the continental water-parting*

In order to promote the thesis of a principle, particular importance is attached to the fact that the boundary proposed by Chile was marked as a pecked line in a sector of the continental water-parting. This pecked line should have meant that the course of the divide was tentative and subject to correction in the light of advances in geographical knowledge.

During the arbitration Chile moved the pecked line shown on plate IX further to the north from the position which it had occupied on its 1899 map. The parties to an international dispute can alter their claims during the judicial or arbitral proceedings, and the final submission determines the plea in question. The Argentine line was also altered between points 302 and 303: from its south-south-east direction in the records of the experts, on the basis of which the Parties agreed to submit the dispute to the British Arbitrator, it was shifted through a right-angle to a south-west direction in the statement and maps submitted to the Arbitrator (MA, *Annex of Documents*, document No. 27, "Chilean Statement", ch. XL, p. 284).

Although Chile's pecked line now occupied a different position on plate IX, this last depiction constituted its final location. The Arbitrator ruled on the basis of this final representation of the continental water-parting. Following his decision the situation was consolidated by the *res judicata* and consequently the variability referred to above ceased.

9.3 *The Chilean claim independent of maps*

The record of 29 August contains the following statement by the Chilean expert: "That although in its most extensive and important parts the ground across which the dividing line runs is sufficiently well-known, and even extensively surveyed, and although the hydrographic origins of the rivers and streams which flow away to both sides is generally well-established, it must nevertheless be pointed out that the topographical location of the proposed line is entirely independent of the accuracy of the maps and that, for this reason, this line is none other than the natural and effective water-parting of the South American continent between parallels 26°52'45" and 52°" (para. 6).

Both at the meetings of the experts and in its submissions to the Arbitrator Chile reiterated the advantage of the adoption of the continental water-parting—that it could generally be identified by surveying the ground. According to this argument, if anyone is told to trace a line by following this water-parting, all he has to do is to go to the spot and observe the flow of the waters.

Chile's second submission to the Arbitrator clarifies the role of the maps with respect to the continental water-parting. Chile said that "it had never proposed subordinating the demarcation to the maps since they were not necessary, either for establishing that there existed a true and single line separating the waters between Chilean and Argentine territory or for finding and identifying that line on the ground". One can agree with the statement that maps are not necessary for establishing that a continental divide exists on the South American continent or for identifying that divide on the ground, for it can be found by means of exploration.

Part of the grey area enveloping this problem can be clarified by distinguishing between the guiding principles—the high Andean peaks and the continental water-parting—and the lines which represent them. This distinction is implicit throughout the arbitral proceedings. The claims could not be reduced to principles nor could they lack parallelism and balance, because they necessarily had to be claims of the same kind, i.e., claims represented as lines on maps.

Thus, the principles came on the scene as the basis, foundation and legal justification of concrete lines which were manifested in terms of points and sections designated by numbers and described by toponyms, as can be seen from the records of the experts.

The Parties were not in dispute merely about principles, nor was one arguing about a principle and the other about a concrete line. Both were arguing about lines based on principles. And there can be no other possibility in the light of the records of the experts and the circumstances of the proceedings themselves. The Parties argued in reference to a continental water-parting in full knowledge of the uncertainty attaching to some of its sectors.

In this context, the point is not that the maps were unofficial but that their accuracy was not an essential condition without which the Arbitrator could not have adopted a line based on the continental divide. Generally speaking, the maps of the time were by no means renowned for their accuracy and technical quality, according to Holdich (MA, *Annex of Documents*, vol. I, document No. 32, "Narrative Report of the Chile-Argentine Boundary Commission", pp. 300-334).

The Chilean expert's statements were not enough to convince the Arbitrator, who opted for an intermediate line between the extreme claims of the Parties, i.e., between the high Andean peaks and the continental water-parting as known at the time. The documents of the preparatory work of the Award contain abundant references to a compromise line and they specify how and when the Parties gave their consent thereto.

Inaccuracy is not the same thing as non-existence. Inaccuracy means a lack of precision and finish and, accordingly, the possibility of subsequent changes and additions. Something regarded as inaccurate does exist but it exists subject to possible correction. Chile changed the line of the continental water-parting during the arbitration, including the line in this sector, by means of two documents which have a unity of meaning: the *Chilean Statement*, the relevant chapter of which is No. XL, and the map known as plate IX.

The possibility of changing the line was closed by the final Chilean presentation and then sealed by the Award, which crystallised the claims of the Parties in their final expression and determined definitively the territorial competence of the Arbitrator. That moment marked the end of the possibility of changing, for better or for worse, the lines claimed by the two Parties, for that was now precluded by the *res judicata*.

9.4 *Significance and importance of the maps*

In order to elucidate the nature and extent of Chile's territorial claim in 1898-1902, which has been one of the most complicated topics of the present arbitral proceedings, it is necessary to take account of the significance of the maps, i.e., the legal purpose of maps in territorial disputes. Maps constitute a graphic language and as such they must be read and interpreted in conjunction with the written and oral language of the submissions of the Parties.

Maps are not isolated documents but integral parts of submissions, either of claims or of arguments. For example, plate IX cannot be considered in isolation from the corresponding *Chilean Statement*; on the contrary, the two documents are bound together by a unity of exposition and meaning. All the maps submitted to the Arbitrator by the Parties contained a graphic representation of the Argentine and Chilean claims, and the Argentine maps made a graphic distinction between explored and unexplored zones. One cannot really see the reason for discounting the message contained in the plans and maps.

10. *The maps in the 1898-1902 arbitration*

Beginning with references to Argentine sources, attention may be drawn to the following statements:

(1) The representatives of the two countries which decided to submit the territorial dispute to adjudication by the British Arbitrator (record of 22 September 1898) mentioned the submission to the British Arbitrator of the records and international treaties and agreements in force, but there was no mention of the maps.

(2) Argentina states that paragraph 2 of the arbitration report indicates that an examination was made of copies of the treaties, agreements, protocols and documents provided by the Parties, but it makes no mention in this context of maps or of lines drawn on maps.

(3) The Tribunal was aware that the "extreme claims" of the two Parties were not the lines drawn on the maps; and in paragraph 10 of the arbitration report there is no mention at all of the claims as depicted the maps.

Some comments may be offered on these points. The record of 22 September did not mention the submission of maps. The reason for this silence was not explained, but, since the abnormal has to be explained, it would have been strange if the maps had been deliberately removed without any statement of the reason. If the Parties had thought the maps of little value, they would have said so, for such an attitude would have been unusual in a territorial dispute. In principle there is no need to explain a normal action because it goes without saying that it is part of a regular procedure.

A review of the circumstances of the request submitted to the British Arbitrator prompts the conclusion that the maps did not accompany the notes requesting intervention in the dispute which the Parties sent to the Foreign Office on 23 November 1898. Argentina stated in its note that it was not forwarding the minutes of the meetings of the experts because the Government had not finished preparing them. The Chilean note referred to the annex consisting of the minutes concerning the points of disagreement. Neither of the notes referred to maps (MA, *ibid.*, documents Nos. 19 and 20, pp. 157-162).

Both Argentina and Chile submitted their maps to the Foreign Office. Argentina appended a map to its note of 17 January 1899, and Chile delivered a map in February of that year (MA, *maps*, maps Nos. 1 and 2; MCH, *Atlas*, maps Nos. 1 and 2). Both these maps showed the continental water-parting as a line corresponding to the numbered points and sections and to the toponyms mentioned in the records of the experts. The Argentine map depicted the continental water-parting as known at the time with no difference indicated between explored and unexplored zones. The Chilean map depicted the continental divide as a pecked line in the unexplored sector.

The arbitration report mentioned documents but not maps. A restrictive interpretation of the term "documents" is not consistent with other passages of the same arbitration report or with the preparatory work of the 1902 Award. Later in the arbitration report paragraph 4 states that the Tribunal "invited the representatives of the two Governments to provide it with the fullest possible information about their respective positions, accompanied by maps and topographical details of the disputed territory, and it acknowledged that the Parties had provided it with lengthy and exhaustive statements and arguments in several printed volumes illustrated with maps and drawings and with a large number of photographs which provided a graphic and topographic picture of the characteristics of the terrain". The Tribunal states clearly that it requested maps from the Parties and that the maps illustrated the corresponding statements and arguments.

With regard to the preparatory work, the report of Sir Thomas Holdich (*ibid.*, document No. 32, T.H. Holdich, "Narrative Report of the Chile-Argentine Boundary Commission", p. 332) noted that the inspection of the area should be carried out sufficiently quickly to ensure that it was concluded before the harsh Patagonian winter, and it added that this was only rendered possible because the Technical Commission had maps of the country and that, provided

that these maps were complete and accurate and that the rival experts on either side were satisfied of their accuracy and could raise no argument on this point subsequently, the field would at once be open for the Tribunal *to discuss or decide on the map basis*. If they proved insufficient or inaccurate, the investigation would certainly be prolonged.

In the same report Holdich went on to say that he was confident "that we may take the Argentina maps as they stand and depend on them (so far as they are officially complete) *as the basis of any decision the Tribunal may advance*" (*ibid.*, p. 333).

Holdich's report shows that the Technical Commission could quickly explore the region and would not require a second visit in the following southern summer because it had maps provided by the Parties; that unless the experts of the two countries disagreed, the Tribunal could begin discussing or deciding *on the map basis*; and that the Argentine maps were reliable enough to constitute the basis for such a discussion and subsequent decision. The Argentine maps showed, without exception, the lines of the territorial claims both of Argentina and of Chile. And there was no mention of any disagreement concerning the maps, for in that case the Technical Commission would have undertaken other exploration work, and the Arbitrator would have delayed his final decision.

Furthermore, the Arbitrator's map is one of the three instruments constituting the 1902 Award and its immediate antecedent is Argentina's map No. XVIII. Attention must be drawn to the role which the Award itself accorded to the maps: a more detailed definition of the frontier line was to be found in the arbitration report and on the maps received from the Republics of Argentina and Chile, on the basis of which the Arbitrator approved the frontier proposed to him by the Arbitral Tribunal (art. V, para. 1).

11. *Chile's submissions to the Arbitrator*

Several of Chile's submissions to the Arbitrator have been quoted in order to demonstrate that the upper part of the basin of the River de las Vueltas lay outside the Arbitrator's competence because Chile had not included it in its claim and that, as an Atlantic basin, it was covered by Chile's acknowledgement that all the Atlantic basins belonged to Argentina.

Here are some passages on this point: (1) "Accordingly, all the land irrigated in that region by waters which flow to the Atlantic were Argentine, and land irrigated by waters flowing to the Pacific were Chilean" (first Chilean submission); (2) "All the orographic, topographic and hydrographic features which may occur on either side of the line belong in perpetuity and *will remain* under the absolute rule of the respective country" (second Chilean submission).

It immediately strikes one that the Spanish verb tenses in the quoted passages are not categorical. Those in the first passage are in the imperfect indicative and imperfect subjunctive; the ones in the second passage are in the future indicative.

Reading the submissions as a whole, these seem to be arguments in favour of the adoption of the continental water-parting, for the term is not used in association with the line of the high Andean peaks, as stated in the boundary treaties, but in an exclusive manner. Chile stated that "in short, Chile's positions on the Andean frontiers can be condensed into two introductory paragraphs: 1. That the sole principle of demarcation which the Treaties order to be followed is the water-parting; and 2. That the Chilean expert has followed this principle in drawing his line" (MA, *Annex of Documents*, document No. 26, "Chilean Statement", ch. XVIII, pp. 279-280).

There is no need to refer to the submissions to the Arbitrator to verify that Chile recognized that the territory located in Atlantic basins was Argentine. The matter had been settled by the 1881 Treaty and more particularly so by the 1893 Protocol: "the frontier line shall run along the most lofty peaks of the said Cordillera that may divide the waters"; and "consequently all lands and all waters . . . situated to the east of the line of the most elevated crests of the Cordillera of the Andes that may divide the waters, shall be held in perpetuity to be the property and under the absolute dominion of the Argentine Republic; . . . and all land and all waters . . . situated to the west of the line of the most elevated crests of the Cordillera of the Andes to be the property and under the absolute dominion of Chile" (MA, *Annex of Documents*, document No. 6, "Additional and Explanatory Protocol to the Boundary Treaty of 1881, signed on 10 May 1893", para. 2).

The real issue relates not to Chile's acknowledgement that the Atlantic basins belonged to Argentina but rather to the territory which first the Parties and then the Arbitrator understood and recognized, in the case of the River de las Vueltas, as constituting and confining the Atlantic basins at the time. It is a question of knowing whether the geographical knowledge of the time is to be upheld or disregarded and what effect was given to such knowledge in the 1898-1902 arbitration.

11.1 *Chile's statement on the basin of the River de las Vueltas*

The frequently cited chapter XL, entitled "The proposed frontier lines between Lake San Martín and Mount Stokes" was the object of particular attention and debate during the present arbitral proceedings. Describing the course of the continental water-parting in the southern part of the section currently in dispute, Chile said that its First Subcommission measured altitudes of 727, 558, 1,029, 1,850 and 2,095 metres along the *divortium aquarum*, indicating a gradual elevation of the ground from east to west as far as a series of snowy peaks from which several tributaries of Lake San Martín flow towards the Pacific and the streams or sources of the Rivers Chalia and Hurtado, tributaries of Lake Viedma, flow towards the Atlantic.

The description of the continental water-parting continued as follows: "On the summit of 2,095 metres the *divortium aquarum* turns to the N.N.W. to enter a region still very little-known, bordering on the north the basin of the River Gatica (Río de la Vuelta of the Argentine maps), which in the lower part

of its course attains 80 metres in breadth, and the sources of which, judging by the great volume of their waters, are probably situated far above the point to which it has been explored" (*Annex of Documents*, document No. 27, "Chilean Statement", p. 292).

This description corresponds to what at the time was known as the continental water-parting which, running north-south at a considerable distance from the high Andean peaks, turned westwards and followed an east-west course for the whole length of the peaks whose altitudes are given above, and then from the peak at altitude 2,095 metres turned north-north-west and ran along the edge of the basin of the River de las Vueltas before turning south-south-west to reach point 331 (Mount Fitzroy). This description corresponds fully with the map labelled plate IX, the pecked line on which has been the subject of much controversy.

The description follows explored land for the whole extent of the measured elevations, which run east-west not north-south, and then, now in little-known or unknown terrain, it passes along the edge of the las Vueltas basin, following a curve which ascends northwards, i.e., borders what at the time was known as the las Vueltas basin. The references are to the periphery of the las Vueltas basin as it was thought to be at the time, i.e., the maximum extent attributed to it.

An important point in this scenario is the significance of the pecked line on plate IX. From the peak at altitude 2,095 metres and all along the periphery of the las Vueltas basin as it was known at the time the line is not solid but pecked to indicate unexplored terrain. This pecked line has blank spaces to take account of the possible prolongation of the las Vueltas basin that might be established by exploration work during the arbitration proceedings.

Exploration work in the 1920s, which led to the discovery of Lake del Desierto, proved that the basin extended much further to the north than had been assumed at the time of the arbitration. No use has been made of this pecked line, which is tantamount to declaring it non-existent for practical purposes, with the consequence that the true course of the line would have depended on geographical discoveries, regardless of when they occurred.

The pecked section of the continental water-parting indicates little-known or unknown terrain but was based on two known facts: the continental divide which ran east-west to the peak at altitude 2,095 metres, of which the geographers of the time were certain; and the mapped part of the las Vueltas basin, which showed that the basin began further to the north of the mainly horizontal line which carried the continental divide east-west to the peak at 2,095 metres. The pecked line had been drawn, then, not as a mere hypothesis but as an inference from known facts: the explored part of the continental divide and the mapped part of the las Vueltas basin. It can thus be seen why at the time there was no other line to compete with the pecked section of the continental divide.

The final graphic representation of the continental divide described above appeared on plate IX. The two documents, *Chilean Statement* (ch. XL) and the map, correspond in all respects. Neither the description of the periphery of the las Vueltas basin nor plate IX showed the whole extent of the Rivers Cañadón

de los Toros, Milodón, Diablo and Eléctrico, Lake del Desierto and Lake Larga, i.e., they did not include the upper las Vueltas basin as it is known today, because it was situated to the north and west of the continental divide, i.e., in a disputed area which was regarded as a Pacific basin and fell within the competence of the 1898-1902 Arbitrator.

The River de las Vueltas, in view of the volume of its waters in its lower part—it is 80 metres wide—was shown extended on plate IX with a dotted line, and the continental water-parting was moved a little to the north, beyond a blank space indicating an unexplored area between the mapped zone and the continental water-parting.

Furthermore, plate IX and its pecked line cannot and should not be considered in isolation but in conjunction with the statement describing the periphery of the las Vueltas basin, i.e., the area which at the time was regarded as the entire basin of this river. The description and the map refer to the las Vueltas basin in similar terms; and since they have the same purpose and complement each other they cannot be interpreted separately. On the contrary, they form a unity of exposition and meaning.

The essence of the problem is to clarify what the Chilean statement was referring to—whether to the las Vueltas basin and the continental water-parting as they were known at the time or whether, in view of the pecked section of the continental water-parting, the space was left open to later correction, including correction subsequent to the 1902 decision.

The final written and graphic expression of the continental water-parting as it was known at the time was crystallized in the claim submitted to the Arbitrator and in the consensus of the Parties, indicated both by their silence and failure to protest and by their reproduction of this final line, without any reservations, on Argentina's map No. XVIII, sheet 8, which the Arbitrator used when he drew his own line. The continental water-parting shown on this sheet 8 was more advantageous to Chile than the plate-IX map. But the Arbitrator's line respected the plate-IX continental water-parting in its entirety. With these acts the arbitration proceedings were brought to a close, the territorial competence of the Arbitrator was established, and the 1902 Award was pronounced.

It is necessary to decide whether the variability of the Chilean claim could be prolonged in time or would be rendered fixed by the effect of the final form of the claim and then by the effect of the Award. It can be argued that the *res judicata* consolidated the territorial claims in their final expression and fixed the space concerning which the Arbitrator made his Award. From that moment the claimed line could move no more.

12. *The maps produced prior to the Award*

Argentina depicted the line of the continental water-parting on all the maps which it submitted to the Arbitrator, without entering any reservations as to the significance of this line in unexplored areas. On the Argentine maps the continental water-parting occupied the same position as on the two Chilean maps, a

fact which supports the interpretation that the two countries were in agreement on the continental water-parting at the time and that therefore it could determine the Arbitrator's territorial competence.

On 19 January 1899 Argentina delivered to the Foreign Office a three-sheet map prepared by the expert Francisco P. Moreno, on which its claim was marked with a solid line and Chile's with a pecked line throughout their extent. Both lines are continuous and do not distinguish between unexplored and explored areas.

Coming from east to west, the continental parting ascended northwards to run along the periphery of what was known as the las Vueltas basin. This basin was situated to the south of the area formed by the continental water-parting. The River de las Vueltas was shown as extending northwards by a pecked line, with two sources at its headwaters separated from the continental water-parting by a blank space. This map was submitted a few days before the Chilean map.

On 16 January 1901 Argentina delivered map X to the Arbitral Tribunal. This map showed the numbered points and sections which the experts had described in the records and delineated on their maps. It has the following title, a very interesting one to be sure: "map of the Region between 47° 0' & 49°30' Lat. Showing the Proposed Argentine Boundary Lines (Landmarks Nos. 301-305) and the Proposed Chilean Boundary Lines (Landmarks Nos. 322-331). Argentine Evidence—map X. Scale 1:500,000" (MA, *maps*, p. 11).

The copy of map X furnished to the present Court, a reduced and partial reproduction of the one submitted to the British Arbitrator, covers the entire area of the present dispute. The Chilean line contains the points numbered 329, 330 and 331 (Mount Fitzroy). The las Vueltas basin is shown, as was customary at the time, by a pecked line in its still unexplored sector, with its sources shown as two rivers which do not touch the continental water-parting. The prolongation as a pecked line is the same as on the earlier map, and the las Vueltas basin lies to the south and within the continental water-parting of the time, as on the Chilean map of 1899.

Map X depicts the line of Argentina's claim with crosses and dashes throughout its length and the line of Chile's claim with dots and dashes throughout its length. Both lines are continuous and do not distinguish between unexplored and explored areas.

In April 1901 Argentina delivered to the Tribunal maps XII, XIII and XIV, which include the area between the south shore of Lake San Martín and Mount Fitzroy. map XII marks the Argentine line with crosses and dashes and the Chilean line with dots and dashes, both continuous and with no distinction between unexplored and explored areas. Maps XIII and XIV reproduce the graphic representations described above (MA, *maps*, pp. 12, 13 and 14).

On 22 September 1902 Argentina submitted to the Tribunal its "Short Reply to the Chilean Statement", to which were appended several maps, including No. XVIII, sheet 8 of which describes the area between Lake San Martín and Mount Fitzroy. As already stated, this map was used by the Arbitrator when he drew his boundary line between the two countries. Sheet 8 showed the las Vueltas basin as it was known at the time and included Cerro Gorra Blanca, in

accordance with Von Platen's map. As had become customary, the Argentine line was marked with crosses and dashes and the Chilean line with dots and dashes, both continuous and without distinction between unexplored and explored areas.

13. *The maps of the 1898-1902 Arbitration*

13.1 *The maps in the preparatory work*

The preparatory work of the 1902 Award took account of the continental water-parting of the time, as described and depicted in the statements and maps of the Parties. This conclusion is based on the works of Robertson and Holdich.

In his report on the southern section of the frontier of Chile and Argentina Captain Robertson wrote: "Section B—from Mount Fitzroy, the northernmost agreed point on the frontier in the vicinity of Lakes Argentino and Viedma (if this point were not in the las Vueltas basin) the line will run direct to the nearest point in this basin. It will then follow an easterly direction round the watershed till it reaches a point in the neighbourhood of longitude 73°00'WG" (Chilean Skeleton map, scale 1:200,000, Season 1900, map 3).

With regard to this proposal, known as the alternative proposal, Robertson commented: "This line has the advantage over the line described earlier which, while assigning the larger part of the fertile land to Argentina, divides the disputed zone in this part of the territory in such a way that the larger portion remains Chilean. However, it has the disadvantage that it does not constitute a good barrier between the two countries, unlike the earlier proposal. I have been unable to visit the southern part of this line, from Mount Fitzroy to the point mentioned on meridian 72°33'WG, but I have seen from a distance that it consists at this time of the year (mid-April) of valleys and high snow-covered and mud-streaked hills" (MCH, *Annexes*, vol. I, annex No. 14).

This description and the accompanying map, the 1900 map of Riso Patrón, on which Robertson drew the alternative line, demonstrate that the alternative proposal ran along the continental water-divide of the time, as it appeared on the maps furnished to the Arbitrator.

Robertson states expressly that this line should pass direct to the nearest point of the watershed of that river, the River de las Vueltas, and then continue round the watershed, or periphery of the las Vueltas basin, to the neighbourhood of longitude 73°00', or more accurately to longitude 72°32'.

This "watershed" of the River de las Vueltas was the continental water-parting of the time. From Mount Fitzroy the continental watershed runs east, not north or north-east. It is sufficient to identify the place which longitude 73° runs through to realise that this was the continental water-parting as depicted on the maps. If the alternative proposal had been accepted by the Arbitrator, it would have assigned to Chile the entire area which is the subject of the present dispute and therefore the upper part of the las Vueltas basin.

Confirming his description of his two proposals, Robertson added the course of his two lines on Riso Patrón's map. Nobody objected to Robertson's second proposal for allegedly entering an area which had been excluded from the territorial competence of the 1898-1902 Arbitrator.

The language used by Holdich to refer to his own boundary proposal confirms that the Tribunal believed that the continental watershed came from the north, far to the east of the las Vueltas basin: "The real continental water-divide followed a line of comparatively low level to the east of the main or more elevated peaks of the Andes".

Holdich was referring, then, to the watershed as a fairly low-level chain in comparison with the lofty peaks of the main chain of the Andes. Its location some distance to the east made it an unsuitable candidate for the compromise boundary which he was seeking. The reference to its following a line of comparatively low level corresponds to the continental divide as described and depicted on maps of the time.

Holdich was categorical in stating that the maps were key elements in the preparatory work of the 1902 Award. For example, the following passages from his "Narrative Report" (MA, *Annex of Documents*, document No. 32, pp. 330, 331 and 333):

1. "In the first place I considered it essential that the examination should be conducted with sufficient rapidity to ensure its completion before the rigorous Patagonian winter put an end to further work in the field."

2. "The field would at once be open for the Tribunal to discuss or decide upon a boundary of compromise on the map basis."

3. "It is necessary to say a few words as to the nature of the respective maps and surveys"; and Holdich went into details about the methods of preparing the Argentine and Chilean maps and their relationship with the topography and triangulation."

4. "There was a most satisfactory general agreement between the values of most of the important points fixed when the two sets of maps were critically examined."

5. "We may take the Argentine maps as they stand. . .as the basis for any decision the Tribunal may advance."

Holdich referred to two series of maps, of Argentina and of Chile, and saw fit to use the Argentine maps as they stood as the basis for the Tribunal's decision. He also explained that the Tribunal would "decide. . .*on the map basis*".

Argentina showed on its maps the continental water-parting of the time, and the Arbitrator carried out his preparatory work and pronounced his decision on the basis of the continental water-parting of the time, i.e., the northern part bordered by the pecked line on the Chilean maps. The Arbitrator's map, regardless of the merit or demerit attached to his pecked line, is decisive for the reconstruction of the Arbitrator's territorial competence because he drew his pecked line in the area which later became known to be the upper part of the las Vueltas basin. The Arbitrator's map, considered in the light of current geographical knowledge, shows that the Arbitrator made his Award with respect to the upper part of the las Vueltas basin as it is known today on the understanding that it was a Pacific basin.

14. *The maps in the 1902 Award*

The Award stated: "A more detailed definition of the line of frontier would be found in the report of the Tribunal and on the maps furnished by the experts of the Republics of Argentina and Chile, on which the boundary which the members of the Tribunal had decided upon had been delineated and approved by them" (MA, *ibid.*, "Award Pronounced by His Majesty King Edward VII", document No. 40-A, art. V, first paragraph, p. 447).

This statement by the Arbitrator makes the Award map an essential element for determining the details of the frontier. This map depicts an unbroken line from the southern shore of Lake San Martín to the termination of the Cordón Martínez de Rozas, continuing with a pecked line as far as Mount Fitzroy, touching Cerro Gorra Blanca on the way.

The Arbitrator's map superimposes this line on Argentine map No. XVIII, sheet 8 of which covers the area of the present dispute. This map was better than the Chilean maps, in Holdich's view. However, sheet 8 was not as good as Chile's plate IX, but the Arbitrator could not insert plate IX on the Argentine map because that would have destroyed the topographical unity of the presentation. He was thus compelled to use map XVIII in its entirety.

It is not a question, at this time, of considering this line as a possible frontier decided upon by the Arbitrator but of assessing it in relation to the space which determined the territorial competence of the 1898-1902 Arbitrator.

To this end it must be pointed out that the Arbitrator took care not to place his line to the south of the continental water-parting shown on plate IX, except at one point at which, by agreement of the Parties, the line had to reach Mount Fitzroy. Accordingly, the Arbitrator's line respected the continental water-parting marked on plate IX although he worked on Argentine sheet 8. The continental divide shown on sheet 8 runs further to the south than the water-parting on plate IX, but the Arbitrator traced his line *as if he had worked* on the basis of the continental water-parting on this latter map.

Thus, the line on the Arbitrator's map lies within the space which, according to the geographical knowledge of the time, lay between Lake San Martín to the north and the continental water-parting to the south, i.e., in the upper part of the las Vueltas basin as it is known today.

The pecked section of the line on the Arbitrator's map, even if it is regarded as tentative for the purposes of determining the frontier, shows that the Arbitrator believed that, tentative or definitive, his line was drawn within the area of his territorial competence. An arbitrator cannot and should not trace a line, even a tentative one, in an area outside his competence. And he may not do so, because what is tentative has the capacity of becoming definitive. Thus, the Arbitrator knew that his line on his map was within his competence, or otherwise he would not have marked it where he did, not even with a pecked line. The Parties did not enter any objection or reservation during the next several decades.

15. *The Demarcator's map*

It is not our purpose, at this time, to discuss the possible value of this map or to decide whether the Demarcator was authorized to establish his own line or whether this map really had the status of "final map", as Holdich stated in a letter to the Ministry of Foreign Affairs and Worship of Argentina. Our purpose is to consider the significance of this map for an understanding of the territorial competence of the 1898-1902 Arbitrator.

The Demarcator of this region, Captain Crosthwait, depicted his frontier line on map XVIII, sheet 8, the same one as was used by the Arbitrator. In the British archives there are two maps signed by Crosthwait, on 7 and 8 June 1903. Both these maps show an almost straight line between boundary post 62 and the vicinity of Mount Fitzroy. The lines on these maps do not touch Mount Fitzroy nor do they make an inflection to Cerro Gorra Blanca.

The line of the map signed on 7 June is superimposed on the continental water-parting of the time from the point at which the water-parting turns south. The line on the map of 8 June lies much closer to and parallel to the full length of the continental divide in this same sector and it touches the divide at only one point. Both lines are pecked in the unexplored part. Both maps show the continental divide of the time as a continuous line (MA, pp. 188-190, plates XXIII and XXIV).

The two lines on Crosthwait's maps lie entirely within the zone which, according to the geographical knowledge of the time, lay to the north and west of the continental divide and was regarded as a Pacific basin, i.e., outside the basin of the River de las Vueltas as it was known in those years.

Neither of the Parties expressed any disagreement, objection or doubt about Crosthwait's work. Many years later there was some discussion as to whether he had been authorized to establish his own line, but it was never argued that he had located his line outside the area of competence of the 1898-1902 Arbitrator. Chile on its first two maps and Argentina on many maps depicted frontier lines which, more or less, followed the Demarcator's line or lay close to it.

16. *The maps produced after the 1902 Award*

Following the pronouncement of the Award the Parties produced maps whose lines, although they did not coincide with each other, included sections running through the area known today to be the upper part of the las Vueltas basin and considered at the time to be a Pacific basin. There has been much discussion as to whether this or that map reproduced the Arbitrator's line or the Demarcator's line. For the purposes of clarifying the territorial competence of the 1898-1902 Arbitrator this topic is irrelevant, because both lines and *all the lines* depicted on *all the maps* published by the Parties, *without exception*, ran through the area which today is said to have been outside the competence of the Arbitrator in 1898-1902.

The common characteristics of the maps published by the Parties over more than 50 years is that they delineated the frontier without stating any reservation about matters of territorial competence, i.e., they sited their lines to

the north and west of what was regarded as the continental water-divide at the time of the arbitration. In order to confirm the Arbitrator's territorial competence there is no need to engage in a detailed examination of the maps, whose common characteristics have been pointed out above. The consistent behaviour of the Parties endorses the position that the dispute arose and was settled on the basis of the geographical knowledge of the time.

For the purposes of determining the understanding which the Parties had of the Arbitrator's competence it does not matter that at some times they adopted the Arbitrator's line and at others the Demarcator's line, that they made one or two mistakes, or that the map reproductions, for lack of reliable technical equipment, varied slightly from one case to another. The Demarcator's line, similar to the line on the Argentine maps, sometimes touched and sometimes did not touch Mount Fitzroy. Now, for our present purposes, it does not matter that the line on the two Argentine maps, as was actually the case, sometimes touched and sometimes did not touch Mount Fitzroy.

The common characteristic of all the maps, Argentine and Chilean, is that they depicted boundary lines within the area now in dispute and that they therefore considered this area to be within the competence of the 1898-1902 Arbitrator.

17. *The 1902 Argentine map*

Immediately after the pronouncement of the Award on 20 November 1902 Argentina produced a map, a reduced and partial reproduction of which was included in a volume annexed to the Argentine memorial (MA, *maps*, map No. 19). This map showed the line on the Arbitrator's map and the lines claimed by Argentina and Chile. The sheet containing map No. 19 reproduces on its right-hand side the map of the 1902 Arbitrator, on which are added the lines claimed by the Parties, and on its left-hand side a copy of the corresponding explanatory legend.

This legend begins with the title of the map: "General map of the Southern Region of the Argentine Republic and Chile showing the Argentine and Chilean Projects [i.e., proposals] and the Boundary Line settled by the Arbitrator".

The contents of the map are then given: (1) "The Boundary Line Settled by the Arbitrator", marked with continuous red crosses; (2) "International Boundary Line Agreed upon—Record of October 1st 1898", depicted with black crosses—the frontier agreed without recourse to arbitration; (3) "Proposed Argentine Line Along the Cordillera de los Andes—Records of 1st and 3rd September 1898", marked with continuous dots and dashes; and (4) "Proposed Chilean Line Along the Continental Divide—Record of 29th August 1898", marked with continuous dashes.

A box contains the statement: "Partial reproduction of legend on the same scale as the original deposited with the Ministry Foreign Relations and Worship of the Argentine Republic".

The explanatory note "Proposed Chilean Line Along the Continental Divide—Record of 29th August 1898" helps to elucidate this matter. According to this text, the Chilean proposal consisted of a line which followed the continental water-parting in accordance with the record of 29 August 1898. The Chilean line marked on this map does not distinguish between explored and unexplored areas. What is more, there is no indication at all that this factor, so important at the time, had been taken into account in the drafting of the explanatory notes.

This map was filed with the present Court without any reservation or additional explanation and it shows that, according to the understanding of events at the time, the line proposed by Chile (its claim) had been marked along the whole length of the continental water-parting and in accordance with the record of 29 August 1898. If this water-parting is compared with the one shown on the maps submitted during the arbitration proceedings, the full concordance of the two are immediately obvious. The area circumscribed by the two lines of the claims, each based on the country's respective principles and expressed concretely on maps, as the 1902 Argentine map confirms, determined the territorial competence of the 1898-1902 Arbitrator.

18. *Mount Fitzroy and the continental water-parting*

The Parties agreed that Mount Fitzroy was an obligatory point on the frontier. This was because at the time of the arbitration it was considered that Mount Fitzroy satisfied the requirements of the two competing principles, i.e., that it was a high Andean peak and was situated on the continental water-parting.

The Argentine expert stated that Mount Fitzroy bore the number 304 on his general frontier line: "It will pass along this crest (the snow-covered chain which overlooks Lake San Martín from the west and cuts across this lake's outlet), passing across Mount Fitzroy (304) and the lofty snowy peaks of the Cordillera . . ." (MA, *Annex of Documents*, vol. I, record of 3 September 1898, p. 147).

The Chilean expert indicated the Cordillera del Chaltén as point 331 on his general frontier line: "No. 331, Cordillera del Chaltén, which divides the hydrographic basin of Lake Viedma or Quicharre, which flows to the Atlantic via the River Santa Cruz, from the Chilean sources which discharge in the Pacific inlets" (*ibid.*, record of 29 August 1898, p. 124).

The Chilean description says that point 331, Cordillera del Chaltén, of which Mount Fitzroy is one of the highest peaks, separates the waters flowing to the Atlantic from the waters flowing to the Pacific. The two experts identified Mount Fitzroy as the point of conjunction of the Argentine and Chilean lines and stated this in the record of 22 September, which recognized that Argentine point 304 and Chilean point 331 were the same: "2. That the lines of the two experts coincide . . . at the points numbered 331 and 332 by the Chilean expert and 304 and 305 by the Argentine expert" (*ibid.*, pp. 149-150).

Through its expert Barros Arana Chile had reiterated that the points which it was proposing were all on the continental water-parting. Now, by accepting that Mount Fitzroy was an agreed point on the boundary the Parties also accepted implicitly that it was an Andean peak situated on the continental water-parting.

The record of 22 September stated that, since Argentine point 304 and Chilean point 331 coincided, they were considered to be situated on the common frontier. This agreement could not have been reached unless Mount Fitzroy had been considered to be located on the continental divide, because if it had been known to be a peak in an Atlantic basin it would have been in Argentine territory according to the provisions of the 1881 Treaty and the 1893 Protocol. Accordingly, the Parties reached agreement on Mount Fitzroy as a point on the common frontier on the basis of the continental water-parting of the time, the very water-parting which was carried as far as Mount Fitzroy (No. 331) on the Chilean map by a pecked line.

Later, when it was discovered during the arbitration proceedings that Mount Fitzroy was not situated on the continental divide but to the east thereof and in fact entirely within an Atlantic basin, the agreement between the Parties was left untouched. The continental water-divide discovered in 1945 passes by Mount Fitzroy at a distance of no less than 17 kilometres. The continental water-divide of the time was used for determining that Mount Fitzroy was a point on the frontier and then as a point of reference for deciding that this mountain was located a little further to the east than had originally been supposed. The accord on Mount Fitzroy was made possible by a lack of geographical knowledge, and years later it was maintained even in the light of improved geographical knowledge.

19. *The subsequent conduct of the Parties*

The subsequent conduct of the Parties indicates how they interpreted the Award and it is therefore a useful element in confirming the interpretation of the Award based on the study of its components. To a greater or lesser extent both Argentina and Chile have recognized the role played by their subsequent conduct in the interpretation of the meaning of the arbitral rules.

Argentina pointed out the differing weight attached to the subsequent conduct of the parties depending on whether such conduct relates to the interpretation of a treaty, in which case it has enormous force, or of an award and, more concretely, when it relates to the conduct of local authorities or individual nationals or foreigners (record No. 9 of 25 April 1994, p. 31).

Chile has repeatedly stressed the importance of the subsequent conduct of the Parties in this case and has assigned multiple effects to it; Argentina has attached less relevance to it and, although it has referred at times to subsequent conduct in some of its statements, it has done so with frequent reservations.

Chile has argued that "the conduct of the Parties is a very important factor for demonstrating the way in which they interpreted the content and intention of the text" (MCH, p. 154, 14.14). In one of its submissions Argentina frames the problem thus: "Such subsequent conduct shows how the Parties have interpreted the 1902 Award in practice" (CA, p. 215, 9).

It is in fact a question of determining how the Parties interpreted the Award in practice, i.e., in implementing it. This exercise is of particular importance for the question of the 1898-1902 Arbitrator's territorial competence, for it

helps to determine how the Parties understood that competence and provides evidence supporting conclusions reached by other means and on the basis of other sources.

The Parties have furnished the present Court with ample documentation and painstaking analysis on this point. The relevant materials can be divided into four categories: maps, activities of settlers, administrative acts in general, including the prosecution of criminals, and administrative acts relating to land grants. The subsequent conduct of the Parties manifests itself in a pertinent manner in their production of maps, but since this topic has been extensively studied, it is better to concentrate on other aspects.

The activities of settlers are not conclusive because contradictory accounts are provided by the authorities of each country. They reflect instead the common attitude of settlers in frontier regions, especially in regions remote from the centres of political power, i.e., the propensity of settlers to move about according to their immediate needs.

Chile performed acts of administration in the area which illustrate its interpretation of what the Arbitrator accorded to each country in his Award. Such administrative acts include the report and map prepared by Engineer Fernández Correa, who visited the area of the present dispute in 1933 and marked out the plots of Percival Knight, Ismael Sepúlveda and Evangelista Gómez in Chilean territory. Chile granted titles of ownership in the area to Ismael Sepúlveda (1937) and Evangelista Gómez (1934).

Something more precise emerges from the land grants made by Chile and Argentina after the arbitration. In 1904 Chile made the so-called Freudenburg Concession. Although this concession failed, since it did not become established in the area, the grant and the accompanying plan illustrate the fact that one of the Parties believed that the land in question had been covered by the arbitral decision. This grant, the eastern boundary of which extended up to the line on the Arbitrator's map, received widespread publicity.

The titles of ownership which Chile granted in 1935 to Evangelista Gómez and Ismael Sepúlveda related to the area today in dispute. For the present purposes there is no need to verify the exact boundaries of the plots. Furthermore, there was overlapping between Chilean and Argentine grants, but this does not vitiate the conclusion that the area had been covered by the 1902 Award.

Argentina's land grants generally stopped first at the Demarcator's line and later at the Arbitrator's line, without that preventing them from overlapping in some cases with Chilean grants or the same recipient from seeking to obtain titles or protection from both countries.

The abundant documentation submitted to this Court shows that the Parties tried to respect the arbitral decision in the area, despite difficulties stemming partly from its remoteness, ruggedness and harsh climate but mainly from the lack of boundary posts on a line on which two undisputed fixed points might be located about 50 kilometres apart.

In the years following the arbitration several Argentine maps offered land in the area today in dispute, but none of these offers infringed on the Demarcator's line. The series of maps showing land offered on leases began in

1911 and continued in 1916 and 1919 with maps produced by private individuals which marked the boundary line within the area today in dispute. There is a map of the Land Department of the Ministry of Agriculture which offers land bounded in the west by the Demarcator's line, depicted by a series of crosses. Another 1918 map produced by the same Department depicts the frontier line in the same way.

The plans and maps, which were given widespread publicity with a view to the award of land grants or leases, indicate the areas which the Parties considered to be within the Arbitrator's competence and concerning which he had made his Award. The land grants and offers of leases illustrate the projects for the development of available areas and the territory in which each country believed that it could exercise this kind of act of sovereignty with the knowledge and acquiescence of the other Party.

20. *The status quo unaffected for many years by new geographical discoveries*

The discovery in about 1923 of Lake del Desierto, the main source of the River de las Vueltas, did not prompt any claim. A map produced in 1923 by the cartographer of the Office of the Governor of the Territory of Santa Cruz, Mr. Roberto Daublebsky von Sterneck, and annexed to a book in the following year, showed Lake del Desierto for the first time on the maps of the Parties (MCH, pp. 107-108, 9.42).

Everything continued just as before, despite the discovery of the main source of the River de las Vueltas and of the fact that its basin extended beyond the continental water-divide as known at the time of the arbitration. In the case of Chile this silence continued until 1953 when it adopted, indicating that it was "a preliminary map" and "a boundary under study", the continental water-parting discovered by means of the aero-photogrammetric surveys carried out by United States technical personnel in 1945. On a 1969 map Argentina reproduced the continental water-parting discovered in 1945, labelling the map "provisional".

The acquiescent silence on the two sides following the simultaneous publication of maps based on the 1898-1902 arbitration lasted for some 31 and 45 years from the discovery that the las Vueltas basin extended beyond the continental divide known at the time of the arbitration, and for some eight and 21 years after the discovery, in 1945, of the true continental water-parting.

Thus, for a very long time consensus prevailed concerning the continental water-parting of the time of the arbitration and indeed concerning the fact that the work and the decision of the British Arbitrator had applied to an area within his competence. For some time, indeed, even after the consensus on this continental water-parting had been disrupted by the discovery of the main source of the River de las Vueltas in Lake del Desierto and the subsequent discovery of the natural and effective continental water-parting on the ground, the Arbitrator's decision, as depicted on his map, was preserved out of respect for the *res judicata*.

21. *The lack of geographical knowledge at the time of the arbitration*

This attempt to identify the origins of some of the problems underlying the present dispute brings one to the question of the lack of geographical knowledge. The positions of the Parties in 1898-1902 were necessarily conceived and formulated on the basis of what was known of the region at the time. The Arbitrator reached his decision on the same basis.

It was in this context that the Arbitrator's competence was established, the Arbitrator pronounced his Award, and the Parties demonstrated by their acts their interpretation of the Award. The preparatory work of the Award (Robertson and Holdich), the Award with its three components, and the subsequent demarcation work (Crosthwait) applied to an area which was regarded as a Pacific basin situated to the north of the continental divide known and acknowledged at the time. Years later, as a result of new exploration work, it became known that this area was in fact an Atlantic basin.

The fact that the continental divide lay further to the north than had been realised at the time of the arbitration became known for certain with the discovery of Lake del Desierto in about 1923. Even this did not make it possible to identify the true continental divide. The continental divide was hidden from human eyes, following a line which starts from the Cordón Martínez de Rozas, from the summit at altitude 1,767 metres, runs north-west and continues northwards, then westwards and finally southwards, without touching Mount Fitzroy. This complicated course—unexpectedly complicated—diverges considerably from the assumed or known course of the continental divide at the time of the arbitration.

The key point, which Argentina has called Portezuelo de la Divisoria, was discovered by means of aero-photogrammetric surveys in 1945. In 1966 the Mixed Boundary Commission identified it on the ground and for ease of reference constructed a mound 10 metres in diameter and three metres thick (MA, pp. 257-258, 53; CCH, pp. 39-40, 3.24, 3.25 and 3.26; MCH, *volume of Annexes*, annex No. 7).

This mound stands in a marsh where the direction taken by the water or, more accurately, whether the water flows in any direction, cannot be established by examination of the ground, where one's feet sink in the mud and standing water, or by climbing the neighbouring heights. If it had not been for the technical work and the mound, it would not be known or even suspected that the continental water-parting is situated here.

The geographical features of the place explain the delay in identifying this section of the continental water-parting. Here the idea that this water-parting can be determined by visual examination of the ground was once again overturned. This place is one of the series of instances, and it even outdoes the others, which Holdich noted on his tour of inspection, in which it is very difficult to locate the continental water-parting.

The members of the present Court were able to verify with their own eyes during their tour of the area in February 1994 the physical impossibility of identifying the continental divide without the help of sophisticated techniques.

22. *Summary of the analysis of the Chilean position in 1898-1902*

Following the 1902 Award and the 1903 demarcation the Parties expressed themselves in the graphic language of maps. They did not submit new lines but repeated the line of the Arbitrator's map or the Demarcator's line. Chile in 1953 and Argentina in 1969 depicted on maps the new possibilities which had apparently been opened up, with respect to the frontier line, by the discovery of the continental divide in 1945. Thus, the Parties continued to use maps, just as they had done during the arbitral proceedings.

The interpretation developed here with respect to the significance of the facts, documents and arguments is supported by the records of the experts, the vital role of maps during the arbitral proceedings, the preparatory work of the Award, the Award with its three components, and the subsequent conduct of the Parties, including their presentation of their positions by means of maps. All these facts form a unity of meaning, the consistency of which is confirmed by analysis of Chile's territorial claim of 1898-1902.

The facts of action, inaction, silence and acquiescence show that for a long time a consensus about the territorial competence of the Arbitrator prevailed, that this consensus survived the discovery of the main source of the River de las Vueltas, and that it began to waver following the discovery of the true continental divide in 1945. The only significant incident in the area of the current dispute occurred in 1965, 62 years after the pronouncement of the Award. The time factor is not to be underestimated in cases in which an initial situation continues undisturbed.

The strands of the interpretation of the available factual and legal materials merge at the point where these materials are united by the principle of consistency: Chile's territorial claim of 1898-1902 had its basis, foundation and legal justification in the principle of the continental water-parting and was manifested in a line consisting of numbered points and sections and of toponyms which are interwoven with the graphic language of the plans and maps. This line was the continental water-parting as known and acknowledged, without reservation, dissent or counter-proposal at the time of the arbitration, fixed by the final presentations to the Arbitrator and protected by the Award as *res judicata*.

Once the competence of the 1898-1902 Arbitrator has been determined and verified in this way, it cannot be asserted that the zone lying to the north and west of the continental divide of the time, along which the line on the Arbitrator's map ran throughout its extent, fell outside the Arbitrator's competence and therefore outside the competence of the present Court. Nor can it be asserted that a decision concerning this area would mean that the 1898-1902 Arbitrator had exceeded his authority or that such a decision would itself suffer the defect of *ultra vires*. The principle *non ultra petita partium* is not subject to any reservations in its application, nor is the principle of estoppel. The Arbitrator himself marked out his area of competence on his map, and this was corroborated by the preparatory work, the demarcation and the maps produced by the Parties themselves over several decades. Argentina indeed stated: "The official maps are of special relevance to an assessment of the conduct of the Parties subsequent to the 1902 Award, for they show how the delineation rule of the Award has been interpreted and applied by the Parties" (CA, p. 133, 1).

II.2 The Chilean claim in 1992-1994

1. *Nature and possible effects of the present Chilean claim*

The Chilean claim in the 1898-1902 arbitration has implications for the present Chilean claim. "Chile cannot claim today more than it claimed in 1902." The assertion that Chile cannot claim today more than it claimed in 1898-1902 is absolutely correct. It is based on the principle which circumscribes the competence of international courts charged with interpreting earlier decisions by reference to the competence of the first court and on another principle which penalizes, provided that certain conditions are satisfied, some kinds of contradiction by precluding any claim, in the same case, of more than what was claimed earlier.

The issue turns on what Chile claimed or did not claim in the 1898-1902 arbitration and on what it is claiming and not claiming today. The first issue has already been clarified. It is now necessary to consider the current Chilean petition. A comparison of the two claims helps to clarify and close the circle on some of the topics which have been examined. It can be argued that, within the conceptual approach which has been taken, the earlier Chilean claim could vitiate partially, if not wholly, its current claim.

This current claim has to be examined in relation to the nature of the dispute submitted to this Court. According to the 1991 *Compromis*, this Court has to decide on the course of the frontier line between boundary post 62 and Mount Fitzroy by interpreting and applying the 1902 Award in accordance with international law. Thus, the Award is left untouched, and its content cannot be reopened. The language of the *Compromis* framed the dispute as a dispute about a line—the course of the frontier line. In the end, the claims of the Parties, given the acknowledged validity of the 1902 Award, can only have the significance of interpretations thereof.

Chile has stated that this is a dispute about a zone or area, whereas Argentina has emphasized that it is about a line and not an area and that "the delimitation of the sector was decided by the Award and confirmed by the 1991 *Compromis*, which govern these arbitral proceedings". Argentina maintains that "Chile's current claim is a new territorial claim" (CA, p. 171,1, p. 3, 7, and p. 113; MA, pp. 358-359, 23, and p. 336, 7), and it adds: "There is no more territory to be adjudicated to the south of Lake San Martín" and that there is no "area in dispute" in this region.

Going back to the time and bearing in mind the events and geographical knowledge of that time, it can be asserted that Chile's interpretation of the line, by the fact that it enters spaces which were clearly outside the competence of the Arbitrator and the Chilean claim of 1898-1902, is defective in its southern part. This problem is not eliminated by the fact that, in some way and at some point, the line had to cut across the continental water-parting of the time in order to arrive at Mount Fitzroy, the point in the Atlantic basin declared obligatory by the Parties. This mandatory point would have to be reached

by cutting across the smallest possible area of Atlantic basin, as the Arbitrator did on his map, in contrast with the sizeable cut entailed by the Chilean line. The need to cut across the old continental divide ought not to lead to a deep incursion into land which was not disputed.

It is not a question here of applying the principle of estoppel, which presupposes contradiction, qualified by several conditions, between claims of the same specific nature and relating to the same object, but of the essential characteristics which defined the dispute at that time, in particular with regard to the territorial competence of the 1898-1902 Arbitrator.

It could be argued that, since the dispute is not over an area but over a line, Chile's current petition could not be understood to relate to a zone or area. There would then not be a zone comparable to the zone claimed in 1898-1902, and it would be said that it would be impossible to compare the current Chilean claim, concerning its interpretation of the line, with the 1898-1902 claim unless the latter claim had related to a line and not a zone.

As a counter-argument reference may be made to the fact that, in this case, there is no clear separation of line and zone, because two competing lines create space and even a single line representing a claim includes a space which it circumscribes and limits, so that it implicitly entails a claim to the space marked by the line. The delimitation was of course settled in 1902, and now the problem is to identify the course of the boundary line on the basis of that delimitation.

In any event, the decisive factors are the continental water-parting of which the Arbitrator took account in pronouncing his Award and the area which the Parties disputed in 1898-1902. From these bases it can be concluded that only the southern part of Chile's current interpretation of the line is affected by its 1898-1902 claim.

2. *Effects of a possible contradiction between the Chilean claims*

Chile's claim of 1898-1902 was the main topic of the debate between Argentina and Chile during the oral submissions and the principle point of disagreement in the present Court. The main thrust of Argentina's arguments is that Chile is today claiming space which it had not claimed in 1898-1902 and that therefore its entire present claim had to be rejected.

The big question has been and remains the determination of the actual area covered by the Chilean claim in 1898-1902. Depending on the framing and resolution of this question, the arbitration will follow different paths and lines of reasoning and will reach opposite conclusions. Given such a radical disagreement no type of conciliation seems possible.

Acceptance of the Argentine thesis would produce the following consequences:

1. In accordance with the principle of estoppel Chile cannot claim today what it did not claim in 1898-1902;

2. The entire basin of the River de las Vueltas as known today would lie outside the competence of the present Court because it had been outside the competence of the 1898-1902 Arbitrator;

3. The present Court would be precluded from according to Chile, pursuant to the interpretation which it might adopt, the least part of the las Vueltas basin as known today, for that would be to decide *ultra vires*, except of course with respect to the part of the Atlantic basin bordering Mount Fitzroy;

4. Chile's version of the line would be rejected *ipso facto* by application of the principle of estoppel, by Chile's admission that the whole of the las Vueltas basin as known today is Argentine, and by the territorial competence of the 1898-1902 Arbitrator, which had placed this entire basin outside the dispute;

5. Argentina's version of the line, consisting partly of continental and partly of local water-parting, would automatically be validated, for it would follow the whole length of the line of Chile's extreme territorial claim at the time of the arbitration, which in turn was the limit of the territorial competence of the 1898-1902 Tribunal and indeed of the present Court.

As a direct effect of the Chilean claims of 1898-1902 Argentina has argued that the territorial competence of that Tribunal, and therefore of this Court, was circumscribed in its eastern part by the continental water-parting as known today, dissociating the entire las Vueltas basin from any dispute about or interpretation of the course of the frontier line. The only line which would be consistent with the competence of the present Court would be the one situated on the periphery of the Viedma-Vueltas basin as known today, i.e., Argentina's line. If the decision of this Court were to affect any other part of this basin, it would inevitably incur the defects of *ultra petita* and *ultra vires*.

Given such results there would be no need to examine the Argentine and Chilean lines on their merits and demerits, for the Chilean line would be dismissed and the Argentine line validated. A detailed study of these lines would not be essential but merely confirmatory, offering some subsidiary grounds for adoption of one line and rejection of the other. Given these results the discussion of the decision of the present Court would follow a necessary path leading to equally necessary conclusions.

But an examination of the documents produced by the Parties in that arbitration in the form of pleadings, commentaries and maps and of the three components of the Award—the Award itself, the report of the Arbitral Tribunal and the Arbitrator's map—shows that the 1898-1902 dispute was resolved not on the basis of the entire basin of the River de las Vueltas as it is known today but as it was known at the time of that arbitration.

3. *Invocation of the principle of estoppel*

"Chile cannot claim today, in an exercise of interpretation and application of the 1902 Award, territory which it did not claim at the time of that arbitration and which it repeatedly, persistently and systematically recognized as belonging to the Argentine Republic. In short, Chile cannot now claim territory which it acknowledged to be Argentine in 1898 and in its submissions to the 1902 Arbitrator" (MA, pp. 332-333, I, 1; CA, pp. 7-8, 13).

Argentina calls for the application of the principle of estoppel on the basis of the scope of the territorial competence of the 1898-1902 Arbitrator, Chile's extreme claim during that arbitration, and Chile's acknowledgement that the basin of the River de las Vueltas is Argentine in its entirety, with the exception of the small section bordering Mount Fitzroy, an obligatory point on the frontier (CA, p. 18, 13, p. 22, 11, and p. 39, 37). Application of this principle presupposes that Chile is claiming in the present arbitration more territory than it claimed in that arbitration and is contradicting or denying its earlier recognition that the entire las Vueltas basin belongs to Argentina.

Argentina repeatedly requested application of the principle of estoppel to the present dispute, both in its memorial and counter-memorial and in its oral submissions. During these submissions considerable importance has been attached to Chile's admission that the Atlantic basins belong to Argentina, so that they lay outside the competence of the 1898-1902 Arbitrator.

Both these arguments, of estoppel and territorial competence, have the same origin in Chile's territorial claim during that arbitration and they lead to the same conclusion, i.e., divorce of the entire las Vueltas basin from any decision which the present Court may take on the course of the frontier line.

Chile argued that the principle of estoppel was irrelevant to the present dispute and that "the Award makes law and must be interpreted as it is, on the basis of its own content". Chile also stated that its claim of 1898-1902 was not relevant now because neither Argentina nor the Arbitrator had accepted it, and therefore it had, legally speaking, disappeared (record No. 3 of 13 April 1994, p. 34).

"Estoppel or preclusion cannot apply when the conduct cited is immediate, forceful and completely rejected by the other Party." "Argentina did not rely on the Chilean argument in such a way as would cause Argentina to suffer harm or detriment as a result of relying on that argument" (record No. 3 of 13 April 1994, pp. 84-85). Argentina replied that the territorial claim in question was a unilateral act and therefore the exclusive responsibility of its author, requiring no counterpart participation (record No. 12 of 28 April 1994, p. 59).

"Argentina attaches fundamental importance to this question, that is to say, with respect to the Atlantic basins recognized by Chile as Argentine in the 1898-1902 arbitration. As Argentina has stated already in its memorial, this is a basic issue which the Court must necessarily resolve as a first and preliminary step" (CA, pp. 385-386, 1).

But Argentina did not raise this issue as a special plea in bar; instead it emerged as the first matter on the Court's agenda. The Court accepted this opinion in view of the internal logic of the procedure of deliberation and decision.

Argentina referred to the authority of Judge Ricardo J. Alfaro with respect to estoppel. According to his definition, this principle establishes that "a State which is a party to an international dispute is bound by its previous acts when these contradict its claims in the dispute". Dr. Alfaro explains that this principle, based on good faith, penalizes any contradiction between the current position of the State and its previous acts, opinions and conduct which may cause harm to another State. (*Cuaderno de la Facultad de Derecho y Ciencias Politicas*, No. 4, University of Panama, Panama, 1966).

Application of the principle of estoppel, also known as preclusion, still gives rise to much controversy and the principle is far from having achieved a consistent formulation and general acceptance. Dr. Alfaro's definition has been cited many times during the oral and written submissions. But it must be said, with all respect for the academic and legal authority of this eminent jurist, that his conception of this principle is very broad in scope, for it omits conditions and nuances well-established in Anglo-Saxon law, the principle's immediate source.

If these original conditions and nuances are eliminated, the principle becomes simple and easy to apply, but it will then address many different kinds of conduct, and if estoppel is applied to them it would limit the freedom of action of States. If the original conditions are eliminated, the scope of the principle is expanded, for it loses in decisive specificity and gains in scope as much as it loses in content (the fundamental conditions for its application in Anglo-Saxon law).

It is then so broad that it could be applied even to opinions. Since the law accords individuals freedom of opinion, which includes both the statement and the correction and amendment of opinions, international law cannot punish the exercise by States of their freedom of opinion.

Although the essence of estoppel is the contradiction of earlier positions to the detriment of the other State, care must be taken not to reduce it to mere contradiction, for mere contradiction could not be objected to and even less punished: the law must not act as a master in the classroom. Mere contradiction could be a matter of policy but not of law. The contradiction has to be accompanied by detriment and, moreover, the fact of having relied on the first position of the other State and having used it in support of the assertion of one's own right.

As we advance along this rock-strewn path we can see that when the Statute of the International Court of Justice (art. 38, 1.c) authorizes the application of the general principles of law recognized by civilised nations, it is referring to principles of law in general, including principles of internal law. It may be hoped that such principles of internal law are fully consistent with the principle of legal certainty and indeed adhere fully to its original terms.

If it eliminates the original conditions a court is creating a new rule. Generally speaking, courts apply pre-established rules and they create new rules, or partly new ones, only by way of exception to resolve a specific case by clarifying pre-existing rules, in the light of very particular and even totally new circumstances when the solution is to be based on equity alone.

In any event, in the present case the conditions for application of the principle of estoppel do not obtain, either in the restrictive sense just described or in the very broad sense of Dr. Alfaro. The 1898-1902 dispute was framed, developed and decided on the basis of the geography of the time. The present geography cannot prevail over the *res judicata*.

Nor do the conditions obtain which would allow the argument that the area located to the north and west of the continental divide of the time lay outside the competence of the Tribunal and therefore is not within the compe-

tence of the present Court. Accordingly, no decision which the Court may take on the area where the 1898-1902 Arbitrator drew his line would imply the assertion that he had acted *ultra vires*.

III. Argentina's version of the line

1. *Description of Argentina's line*

Argentina's 60-kilometre line follows the continental water-parting between boundary post 62 and Mount Fitzroy, combining continental and local water-partings. It passes through four points regarded as obligatory, the first two indicated in the Award (boundary post 62 and Mount Fitzroy), the third indicated on the Arbitrator's map (Cerro Gorra Blanca), and the fourth, called Portezuelo de la Divisoria, identified by the Mixed Boundary Commission, as stated in record No. 74 of 4 March 1966.

Starting from the south shore of Lake San Martín, at boundary post 62, the line runs along the Cordón Martínez de Rozas for about 12 kilometres of local water-parting to reach the summit at altitude 1,767 metres, at which point, now following the continental water-parting, it turns north-west and descends to Portezuelo de la Divisoria.

There is no disagreement between the Parties concerning the 12 kilometres of local water-parting, since both regard this sector as the undisputed boundary between the two countries. The disagreement begins at the 1,767-metre summit, with the Argentine line turning north-west along the continental divide and the Chilean line continuing southwards, also along the continental divide.

From Portezuelo de la Divisoria the Argentine line changes direction several times (west-south-west, north-west, west, south-south-west, west-south-west, and south) and passes across Cerro Sin Nombre, Cerro Trueno, Cerro Demetrio, Portezuelo El Tambo, Cerro Gorra Blanca, Marconi Pass, Cerro Marconi Norte and Cerro Rincón to reach Mount Fitzroy. The line abandons the continental divide when the divide turns westwards. From this point it follows the local water-parting which leads to Mount Fitzroy (MA, pp. 589-599).

From this summary description it is clear that the Argentine line combines local water-parting, continental water-parting and again local water-parting. The question arises as to whether the language of the arbitration report, according to which the frontier shall be delineated along the local water-parting from the point at longitude 72°45'30", is compatible with a line which combines continental and local water-partings.

The report states ". . . whence the boundary shall be drawn to the foot of this spur and ascend the local water-parting to (usually translated "*hasta*") Mount Fitzroy and thence to the continental water-parting to the northwest of Largo Viedma". "Here the boundary is already determined between the two Republics" (MA, *Annex of Documents*, vol I, document No. 40-B, p. 460, section 22, last paragraph).

Argentina made lengthy written and oral submissions to demonstrate that, since the continental and local water-partings function in the same way, in that they separate waters running in opposite directions, there is no difference between them. Therefore, the key point is to determine whether Argentina's line is in conformity with the report and for this purpose to assess the meaning of the terms continental water-parting and local water-parting as used in the instruments which constitute the 1902 Award.

2. *The Argentine thesis concerning water-partings*

"When he termed the local water-parting linking boundary post 62 with Mount Fitzroy "local parting" the Arbitrator was doing no more than using this term in the current meaning of such terms at the time of the Award: "local" in the sense of relating to space situated between two obligatory predetermined points which he had himself chosen. As the Argentine memorial argued, any water-parting between two points on a topographic surface can be described as "local" (MA, p. 525, 11) without precluding its possible coincidence in part of its course with a section of the continental water-parting as it passes through the place in question. "This meaning is consistent with the normal meaning accorded to "local" by any dictionary, either contemporary or of the time when the Award was pronounced" (CA, p. 124, 21).

"The important thing is not the epithet, for the nature of a "water-parting" and its *modus operandi in a delimitation* are the same. The important thing is *the extreme points which define the water-parting* in question. These extreme points will determine whether the "course" of a "water-parting" is local or continental and whether it coincides wholly or partly with a section of the "continental water-parting", but the characteristics and *modus operandi* of the "water-parting" do not change. They are always the same" (CA, pp. 124-125, 22).

". . . the qualifier which in exceptional cases is attached to the established delimitation criterion has no practical or legal consequences for the drawing of the boundary" (MA, p. 553, 37, and pp. 561-562, 44). "The essential thing is the condition of being a water-parting, and its qualification is incidental. The incidental cannot be compared with the essential. The incidental cannot alter the essential" (MA, p. 530, 17). "The important thing is the fact that in the Award all the "water-partings", regardless of how they are qualified, have the same inherent characteristics and the same effects" (CA, p. 124, 22).

". . . nothing in the 1902 Award precludes the possibility that a local water-parting between two specified points may also be a continental water-parting for part of its course . . ." ". . . for the drafters of the Award the qualifiers sometimes attached to the term "water-parting" are secondary and merely descriptive; for them the main thing is the affirmation of the criterion of water-parting and its actual use in a delimitation." "There is only one local water-parting between boundary post 62 and Mount Fitzroy, and this is the line advocated by Argentina in this arbitration" (CA, pp. 126-127, 28).

Argentina adduces several reasons in support of its argument that continental and local water-partings, since they function in the same way, are the same thing: (1) the meaning of the adjective "local"; (2) the discounting of the

adjectives "continental" and "local"; (3) the fact that all water-partings function in a similar way; (4) the failure of the Award to define a term to which special significance had been attached in the case of "local water-parting"; and (5) the language of the 1902 Award.

3. *A point supposed to be both continental and local*

It is argued that, since the Arbitrator knew that the continental water-parting bordered Mount Fitzroy in the north and west, he also knew that the local water-parting which the arbitration report ordered to be followed from the south shore of Lake San Martín had necessarily to cut across the continental water-parting, and that it did in fact cross it at the point at which the pecked line on the Arbitrator's map crossed the continental divide to reach Mount Fitzroy.

This argument maintains that such a crossing, at a specific point, made this point part of the continental divide and part of the local water-parting. It thus undermines the separation of the two water-partings. And if that happens at one point, it would not be surprising for it also to happen in the case of a line combining continental and local water-partings. If a point can be both local and continental, the line can also be local and continental.

On the assumption that the crossing point combines the local and continental water-partings, it must be pointed out that, although it is the same point, it is a point which performs two different functions, one as part of the local and the other as part of the continental water-parting. It is not a question of whether it is both continental and local in one given situation, but whether in each different situation it is continental or local.

Furthermore, what applies to a point may not necessarily apply to a line, just as what applies to a line may not necessarily apply to a point. Even if it is conceded that a point may be at the same time both continental and local, this would not be a sufficient reason for attributing equal versatility to the corresponding line.

In any event, this is moreover a phenomenon which does not and cannot occur on the ground but only in depictions on maps. A map may show the continental divide cut at some point by another line which may have the character of local water-parting, but this is a question of a continental divide being crossed not by a local water-parting but by a frontier line drawn at the behest of the parties or court. It is a situation similar to the one which occurs when the intention of the court or arbitration body links two local water-partings by drawing a line across a river, for in this case too the same intention results in a line drawn on a map without the crossing of the river actually being effected by the local water-parting as such and as defined.

A local water-parting may run close to the continental water-parting on a slope, but it cannot cross it. On the slope on the other a local water-parting (a different one) may begin very close to the continental divide. These two water-partings, even when they run in the same linear direction and extremely close together, cannot cross the continental divide. This is precluded by the very nature of the continental divide, the continuity of which cannot be interrupted by any other geographical feature.

4. *Reasons for questioning the equivalence of continental and local water-partings*

Such reasons may be found in the theory of meaning and in the preparatory work of the 1902 Award and its language, both in the relevant texts and in the context which supports and clarifies them. It is a question of establishing the meaning of three terms: *continental water-parting*, *local water-parting*, and *water-parting*.

4.1 *Reasons based on the theory of meaning*

According to the theory of meaning, at least in its most simple and customary form, words represent perceptible forms of ideas, and the ideas represent the immediate meaning of the words themselves. It would be odd if certain words, particularly in legal texts, lacked any meaning or message and were superfluous, or if nouns qualified by different adjectives were able to function interchangeably without restriction by discounting the adjectives. It is usual to define the meaning of all the terms used in a legal instrument. Thus, the first step in this exercise is to assign differentiating connotations to the adjectives continental and local.

Theoretically adjectives distinguish between objects of the same kind. They are never redundant either in ordinary or in technical language. Adjectives perform a function, indeed a very valuable function, in rendering communication intelligible and precise. To discount different adjectives qualifying the same noun, in this case the adjectives continental and local qualifying the noun water-parting, is tantamount to waiving in advance the precision which the adjectives bring to the communication of the ideas in question.

An adjective indicates an attribute of a person, an object, an idea or an action; and the attribute distinguishes person from person, object from object, idea from idea and action from action. Persons differentiated by attributes are still persons and ideas differentiated by attributes are still ideas, just as water-partings differentiated by the qualifiers continental and local are still water-partings.

The theory of meaning and communication cannot dispense with adjectives. They are normally used for a purpose and every effort must be made to discover the meaning of the communication in the light of this purpose. That a word is redundant, is used erroneously or constitutes a mere repetition would be a conclusion reached only in the light of exceptional and somewhat extraordinary circumstances.

When the same adjectives are repeated in a legal document the assumption, for the purposes of determining its meaning, is necessarily that they have a significance which must be identified. Therefore, in the circumstances of the present case the assumption is that the adjectives have a useful meaning. That they should have a meaning is normal and usual; that they should not have a meaning is abnormal and unusual.

One of the most delicate aspects of the formulation of legal rules is the separation and exploration of distinctions between ideas and between their corresponding expressions in language. Generally speaking, when there is a

possibility of confusion or at least a degree of obscurity or uncertainty, this legal technique recommends the use of different nouns or distinguishing qualifiers of the same nouns. In the present case the qualifiers continental and local bring clarity and precision to the text of the report.

Qualifiers usually make distinctions between ideas and they consequently help to regulate and fix the use of the ideas. Since this is the normal situation, one must start from the assumption that such qualifiers perform a useful function, i.e., have a purpose and a meaning which convey a message.

In exceptional cases, when they clearly cause confusion and lack a logical application or usefulness, adjectives can be discounted. Such cases would be atypical and therefore would have to be carefully justified. The atypical, since it is not part of the usual processes of formulation and interpretation of legal rules, cannot be the premise but only the result of a proof. Furthermore, the mere reiterated use of the terms in question, in the case of the 1902 Tribunal, excludes any possibility of a blunder, error or slip attributable to the copyist or author.

4.2 *The specific nature of continental water-partings and local water-partings*

The first conclusion to be drawn from the repeated use of these two adjectives in the instruments which make up the 1902 Award is that they render the nouns to which they are attached more specific without impairing their common characteristics. The two types of water-parting do in fact have common characteristics: they are the sole partings between specified points and divide waters flowing to different basins. Side by side with these common characteristics exist distinctions based on the specific nature of the concepts themselves.

Here a distinction must be made between the general function common to all water-partings and the specific functions proper to each member of the class. A continental water-parting, as its name suggests, divides waters of continents; a local water-parting is one which, not being a continental water-parting, can be identified by means of its function of dividing waters and which, owing to its special location, also performs a special function within the framework of the continental water-parting. It differs from a continental water-parting by virtue of its specific function and not of its general function and it can be designated in several ways, for example secondary or subsidiary, but in the 1902 arbitration report it is frequently referred to as local. A continental water-parting, also called real or principle, has a familiar and generally accepted function. A local water-parting, defined in relation to the continental, is any water-parting which does not function specifically as a continental one.

Use is also made of the term "water-parting", without qualification, to denote the concept of what all water-partings have in common, regardless of their specific functions and therefore of their qualifiers. As to the specific nature of the functions of continental and local water-partings, the continental serves as a point of reference and differentiation, since its function is unambiguous and in this case has been accepted by the Parties—separation of the waters of a continent.

It is a characteristic common to all water-partings that they separate waters flowing in different directions. The qualifiers refer to specific functions which are added to the general function. In some geographical situations water-partings separate the waters of the continental land mass and in others they separate waters which flow to different basins, without involving separation of the waters of the continent. When a text wishes to refer to both types of divide without distinguishing between their specific functions it simply says "water-parting", a term applicable without distinction both to continental and to local partings, as well to partings qualified in any other way.

The qualifier "local" is understood, in its usual meaning, to be something relating to an area, region or country. It is also used to indicate municipal or provincial as opposed to general or national. This second usage means that the local is distinct from the general. The problem here cannot be solved by reference to the usual use of one of the terms which form part of the problem. The question of the terminology of water-divides is not one of ordinary language but of technical language. The authors of the Award, well-versed in geography, must have used the terms of their speciality in their technical sense; and it is the technical sense of these terms which must be clarified. A continental water-parting is the big, principle or general divide, sometimes called real, which separates the waters of the continent. A local water-parting lacks this distinguishing characteristic and therefore relates to an area, region or country lying within the areas separated by the continental divide.

In other words, all water-partings have the common and equal function of dividing waters which run in different directions. This general function is expressed by the term water-parting. Then there are the specific functions, which qualify the general function, without of course destroying it, and which consist sometimes of the separation of the waters of continents and sometimes of the separation of waters which are not of continents taken as a whole but of smaller, partial and dependent or secondary areas.

The Arbitral Tribunal did not define the meaning of the term local water-parting. It did not need to do so, unless it wanted to attach to it a special meaning different from the one which might be attached to it in accordance with the text and context of the report. The definition of terms is not indispensable in a legal text, and the use of definitions to make ideas clearer is left to the discretion of whoever drafts the text.

The mere absence of definition does not imply any particular message. When the author of a legal text decides not to define the terms used in it—and the Award contains no definition of the terms used—their meaning must be determined in the light of their common or their technical interpretation and in conformity with the text and context of the relevant provisions, as well as with their practical effect, all of this within the linguistic structure which ensures the communication of the ideas.

To conclude, according to the theory of meaning, including its implications for legal instruments and in this case arbitral awards, "local water-parting" is different from "continental water-parting", and both terms are encompassed by "water-parting".

4.3 *Water-partings in the scientific literature of the time*

One author whom the Parties have cited as an authority in this matter is Dr. Alfred Phillipson, who had written a scientific study widely esteemed at the time of the arbitration entitled *Studien über Wasserscheiden* (1886). This study offers criteria which help to elucidate the problems which have arisen in the present arbitration with respect to water-partings.

"The innumerable water-partings in a specific region are not absolutely equivalent and they can be ranked in their significance, which is determined by the destination of the separated waters flowing together in the watercourses of the valleys on both sides of the water-parting." "In other words, the more independent and divergent the separated drainage flows or systems are, and the greater their extent, the more significant is the water-parting." "In every large land mass are found principal divides, as opposed to the water-partings between the drainage systems of the same regions, which have only a *local* significance."

The following conclusions may be drawn from the quoted passages and they may help to settle the problem under discussion: (1) the water-partings in a specific region are not absolutely equivalent; (2) water-partings can be ranked in their significance, and when so ranked they display differences; (3) the ranking of water-partings depends on the destination of the waters; and (4) in each big land mass are found principle water-partings "as opposed to" water-partings of only local significance.

4.4 *Water-partings in the preparatory work of the 1902 Award*

Terms for water-parting occur with great frequency in the reports of Holdich, head of the Technical Commission which visited the disputed area and prepared the compromise proposal which the Tribunal adopted with some modifications for the sector between boundary post 62 and Mount Fitzroy. For example, in the report of the Technical Commission Holdich mentioned "continental divide" (pp. 328, 341 and 344), "continental water-divide" (p. 332), and "divide" (pp. 338 and 341). Nor did he fail to use "local watershed" (p. 344). He also stated that he had formed a good picture of the nature of the frontier divide which Chile claimed (p. 344) (MA, *Annex of Documents*, document No. 32, pp. 328, 332, 338, 341 and 344).

In another preparatory work Holdich continued to reveal how he used terms relating to water-partings: "continental water-divide" (pp. 350, 366 and 381), "continental divide" (pp. 370, 372 and 376), "main water-divide" (p. 363), "a lofty sierra which carries the continental divide" (p. 365), "watershed" (p. 372), "mountain watershed" (p. 372), "very low divide" (p. 379), "a well defined East West sierra carries the continental divide" (p. 380), "division of the waters", "*divortium aquarum*" (p. 361), and "local divide" (p. 358) (MA, *ibid.*, document No. 33, "Geographical Conditions of Patagonia").

Holdich states: "From the point at which it touches the north shore of the lake [San Martín] the frontier line will continue along the local water-parting to its conjunction with the continental water-parting to the north-west of Lake Viedma. Here the frontier has already been determined between the two Republics" (MA, *ibid.*, document No. 37, p. 403).

He says here that the local and continental water-partings enter into conjunction to the north-west of Lake Viedma. Conjunction means the union or joining of things having separate identities. Here conjunction refers to two lines, one local and the other continental. A single line cannot conjoin with itself but only continue or be extended.

A memorandum by Holdich which the Tribunal received during the oral submissions contains a distinction between continental and local water-partings ("Hearing Book", document No. D-I). Here, referring to a specific situation, Holdich writes: "The water-divide in such a case would be "local" and not "continental", but it would all the same furnish the most effective natural boundary that could be found" (Sir T. Holdich, "Notes on the Boundary", April 1899). Here the same passage contains three terms relating to this geographical feature: water-parting, continental water-parting, and local water-parting.

In these notes Holdich asks why the qualifier "continental" or "between the Atlantic and Pacific", which is "so obviously necessary" had been omitted from the boundary treaties, for its inclusion would have defined beyond the reach of further argument the nature of the water-divide; and he adds that reference to the local water-parting has also been omitted. "The terms of the treaty are not therefore contradictory but defective; whilst the terms of the protocol leave no doubt on my mind that whether we accept the "divortium aquarum" as being continental (which is not stated) or as being local (which is not provided for) we are to look for the boundary within the Andine system, and not beyond it." (Sir. T. Holdich, *ibid.*, April 1899).

Holdich says that qualification of the water-parting was obviously necessary in the boundary treaties. And he adds that this would have defined the nature of the water-parting. This means that the qualifier denotes the specific nature of the water-parting. And the qualifier was "obviously necessary" in this case, because it would have indicated the specific nature of the water-parting and placed the water-parting so qualified beyond the reach of further argument. This result could have been obtained by using the qualifiers "continental" or "local", which were not used in the treaty in question. "As regards the Chile contention that by the terms of the treaty the boundary should follow the continental water-divide between the Atlantic and Pacific, it is difficult to understand, if this were really the intention and meaning of the Chile Government, why so obviously necessary a qualification as the word "continental" or "between the Atlantic and Pacific", or some similar qualification which would define beyond the reach of further argument the nature of the water-divide which the boundary should follow, has been omitted from the treaty." (*ibid.*)

Holdich also refers to the failure to qualify the water-parting in another of his preparatory works, saying that if the words "continuous" or "continental" had been used in the treaties Chile's position on the continental water-parting would have been unassailable (MCH, *Annexes*, vol. I, annex No. 22, "Holdich Introduction", para. 1).

4.5 *Repeated mention of continental water-parting and local water-parting in the arbitration report*

The Award itself refers to "principal water-parting of the South American continent" (art. III), which is obviously equivalent to continental water-parting. There are three mentions of the continental water-parting in the arbitration report and all of them indicate clearly that it is characterised by its specific function, which is to separate waters of the continental land mass. The first two references occur in the zone Pérez Rosales Pass-Lake Viedma, the second with reference to Mount Fitzroy, and the third in the region of Last Hope Inlet.

The arbitration report uses the term water-parting 17 times and local water-parting seven times. It also uses equivalent expressions. For example, it says that the frontier line follows a high mountain water-parting and local water-parting before reaching the continental water-parting. The passages in question make it clear that these are different things. The distinction is clear, and the continental water-parting emerges as an entity with its own essential character, distinct from other water-partings (MA, *ibid.*, document No. 40-B, pp. 458, 460 and 461).

The arbitration report frequently uses the term water-parting (without qualifiers) and adds a description of the basins which it separates, and in some cases it uses qualifiers which do not modify in any way the generic nature of this term, qualifiers such as snow-covered, high-mountain, elevated or lofty. Exceptionally, in three instances referring to two short sections separated by the crossing of the waters of Lake Pueyrredón there is no mention of the basins separated by the water-parting (MA, *ibid.*, pp. 455-459).

The term water-parting, unqualified, can refer both to continental and to local water-partings, as well as to terms equivalent to these two terms, such as principle water-divide and secondary or subsidiary divide. In the report the term is used to denote both types of parting; and then the subsequent determination of its principle or secondary function has to be made on the basis of the topography of the ground.

Without any inconsistency with the arguments set out above, when a water-parting (unqualified) is mentioned and its terminal points are indicated, reference can be made to a section of the continental divide which runs along a section of the local divide and vice-versa, linking the terminal points. This occurs in the passage of the arbitration report which establishes the frontier line as the water-parting between Pérez Rosales Pass and Mount Tronador, which on the ground begins as a continental divide and continues as a local divide (document No. 40-B, p. 456).

4.6 *Water-partings in the last paragraph of section 22 of the arbitration report*

This final paragraph of section 22 of the arbitration report contains the nub of the question of distinguishing between continental and local water-partings. This paragraph must be transcribed because of its vital importance for the elucidation of this problem: "From this point it [the boundary] shall

follow the median line of the Lake [San Martín] southwards as far as a point opposite the spur which terminates on the southern shore of the Lake at longitude 72°47'W., whence the boundary shall be drawn to the foot of this spur and ascend the local water-parting to Mount Fitzroy and thence to the continental water-parting to the north-west of Lago Viedma".

Examining this delimitation rule for the section between the southern shore of Lake San Martín (today boundary post 62) and Mount Fitzroy one is struck by the use of the terms local water-parting and continental water-parting in the same passage, separated by eight words of the same semantic unit. The boundary shall ascend the local water-parting to Mount Fitzroy, i.e., towards Mount Fitzroy, and thence to the continental water-parting. The two terms are quite clearly distinguished: between Lake San Martín and Fitzroy there is a local water-parting, and from Fitzroy the continental water-parting. It is impossible to see how these two terms could be interchangeable in this passage or how the qualifiers could be omitted.

If the Tribunal had wanted the frontier in this section to follow a water-parting without any qualification whatsoever, i.e., that it did not care whether it was a continental or local water-parting or a combination of the two, it could simply have said "water-parting". But that is not what it did, and the Arbitrator distinguished clearly, in the same prescriptive clause, between the use of local and continental water-parting.

The arbitration report consistently adheres to the standard usage with respect to water-partings. This text is of decisive importance to the solution of the problem of interpretation. It could even be asserted, if necessary, that this terminological distinction in the principal legal text could not be altered by the context, since the situation is so clearly established in the prescriptive clause of the arbitration report. Furthermore, the context, as we have seen, consistently takes the same approach.

Moreover, the Arbitrator could not have proceeded in any other way with regard to this sector, for he knew for certain, from the consensus of the Parties about the position of the continental divide of the time, that this divide lay much further to the east of the zone through which he wished to draw his compromise line, a line situated between the high peaks which Argentina advocated and the continental divide advocated by Chile. There was no continental divide available for a compromise solution. It may be noted that, given the geographical conditions as they were known during the arbitration, a single local water-parting could not run from Lake San Martín to Mount Fitzroy because the continental water-divide of the time stood in the way, as is made clear by the graphic language of the Arbitrator's map.

Given the many references to continental and local water-partings and bearing in mind the use of these two terms in the same prescriptive clause of the arbitration report concerning the zone between Lake San Martín and Mount Fitzroy, it cannot be assumed that these terms were used in such a way as to lack determinative effect. On the contrary, everything points to the fact that they served to identify particular geographic situations and helped to distinguish between different segments of the boundary line.

5. *The problems of Argentina's version of the line*

The biggest obstacle to acceptance of the Argentine line is that it combines continental divide with local divide, and this circumstance is not consistent with the language of the arbitration report, which directs that the local water-parting should be followed. In the light of the analysis given above, it is not consistent with the preparatory work or with the language of the arbitral instruments. In particular, attention must be drawn to the use of the terms local water-parting and continental water-parting in the provision of the arbitration report concerning the line of the frontier from Lake San Martín, which makes a distinction between these terms.

In addition, it may be noted that the Argentine line does not conform to the line of the Arbitrator's map. This latter line, even though in the disputed sector it is shown as pecked, cannot be disregarded in all its possible effects. The Arbitrator's map has the authority invested in it by the Award itself when it indicated this line as the source of details of the delimitation of the frontier (Award, art. V), and the direction of the line is of course an important point.

Leaving for later an examination of the significance of the pecked line on the Arbitrator's map, the minimum value which can and should be assigned to it is that it indicates the direction of the line which interprets the meaning of the arbitral decision correctly. The Argentine line deviates completely from the direction followed by the line on the Arbitrator's map. In fact, this Argentine line moves in directions inconsistent with the general direction indicated on the Arbitrator's map as the continuation of the frontier line, which generally runs north-south. Therefore, it is inconsistent with another requirement, that of interpreting the three arbitral instruments as a single semantic unit in accordance with the principle of integration.

IV. Chile's version of the line

1. *Description of the Chilean line*

From Boundary post 62 Chile's version of the line of the 1902 Award ascends the Cordón Martínez de Rozas and runs southwards to the summit at altitude 1,767 metres. Thence it continues by the summits of the Cordón Innominado and Cordón del Bosque. In other words, from boundary post 62 the line runs along three ranges which, as a whole, Chile calls the Cordón Oriental. Leaving the Cordón del Bosque from the terminal point—Mount Fitzroy—the line descends to the valley and crosses the River de las Vueltas in a straight line 360 metres long and the River Eléctrico in a straight line 250 metres long. It then ascends the north-east spur of Mount Fitzroy and follows the local water-parting to its summit at 3,406 metres (MCH, pp. 163-164, 16.1-16.7).

2. *The justification of the Chilean line*

The arbitration report says that the boundary line shall ascend to Mount Fitzroy along the local water-parting from Lake San Martín. Since there is no continuous local water-parting between boundary post 62 and Mount Fitzroy, Chile refers to the Award itself, as the 1966 Court did, and bases its position on one of its clauses, the one to the effect that Mounts San Lorenzo and Fitzroy are located in the dividing ranges. Then, identifying the range which effects the division, Chile uses the arbitration report to identify the spur near the south shore of Lake San Martín.

Chile emphasizes the dominant position of the three ranges which it designates as a whole the Cordón Oriental. In the case of the Cordón Oriental the water-parting has the additional function of making the definition of the line running along its crest more precise. "The identification of the dividing range is the main element in the determination of Chile's line. The addition of the local water-parting is both a reference to the hydrographic function of the range and another way of designating the range, as well as a means of determining the precise line for the whole extent of the summit-line of the range along which the boundary should run" (CCH, pp. 62-63, 4.30).

The backbone of Chile's argument is the text of the Award itself, which states: "The further continuation of the boundary is determined by lines which We have fixed across Lake Buenos Aires, Lake Pueyrredón (or Cochrane), and Lake San Martín, the effect of which is to assign the western portions of the basins of these lakes to Chile, and the eastern portions to Argentina, the dividing ranges carrying the lofty peaks known as Mounts San Lorenzo and Fitzroy". "From Mount Fitzroy to Mount Stokes the line of frontier has been already determined" (*Award*, art. III, 3rd and 4th paras.).

Chile states its understanding of this provision of the Award: "It describes the line which assigns the eastern part to Argentina as being "the dividing ranges" in which Mounts San Lorenzo and Fitzroy are located". Chile then acknowledges that this provision is insufficient in itself for determining the exact course of the boundary in the disputed region (MCH, p. 135, 12.11-12.12). Chile finds the beginning of the correct course of the line in the arbitration report in the reference to "spur".

From this provision of the Award itself Chile infers that it was not prescribed, at least for this section of the line, that the boundary should necessarily follow a local water-parting and that "the truth is that the Award speaks of dividing ranges and not of water-partings" (MCH, p. 136, 12.14). Chile considers that, by referring to the spur from which the boundary runs in the direction of Mount Fitzroy the arbitration report identified the range which the line should follow, interpreting spur to mean a very long feature and even the mountain range itself. Thus, the course of the line is based on the Award, supplemented by the report, for the whole length of the three successive ranges.

At the point at which the Cordón del Bosque moves away from Mount Fitzroy the Chilean line abandons this range and descends to the valley along a local water-parting, crosses the River de las Vueltas and the River Eléctrico and ascends to Mount Fitzroy along another local water-parting. On the Cordón

Oriental the Chilean line coincides first with the local water-parting for 12 kilometres from the initial spur, then runs for 27 kilometres along the continental water-parting, before moving to the local water-parting along the flanks of the Cordón del Bosque and crossing the Rivers de las Vueltas and Eléctrico.

With regard to the crossing of these two rivers, Chile relies on what the 1966 Court called "the general practice of the 1902 Award" which was "to follow the boundary, either along the continental divide or along local surface water-partings, crossing tributary rivers when necessary" (MCH, p. 147, 13.18, and pp. A/266-A/267).

A particular topic of debate in the arbitral proceedings was whether Chile maintained that a local water-parting, as such, can cross rivers. Argentina argued that the language used by Chile had that meaning; it constantly criticized this position and declared that it was a serious defect in the Chilean line that it crossed rivers as a prolongation of local water-partings.

That Chile took this position can be seen from some passages in its written submissions. "Argentina is therefore wrong when it asserts that the Arbitrator recognized a concept of "water-parting" consisting of "a continuous and single line which, between its extreme points and throughout its extent or course, separates two opposite directions of water-flow, which cannot be interrupted or crossed by any water-course . . .". Referring to the course of the line between Cerro Tres Hermanos and the north shore of Lake San Martín, Chile argued that "the Tribunal indicated that a water-parting should be used. This meant crossing two rivers" (CCH, p. 60, 4.27). Attention is drawn here to the sequence of the references to water-parting and the crossing of two rivers.

In its counter-memorial Chile made statements in which the crossing of rivers was not attributed to an intrinsic quality of local water-partings but to the intention of the Arbitrator, who wanted to link two local water-partings.

Whether its justification is derived from the nature of a water-parting as such, which in fact is impossible, or from the Arbitrator's decision to link two water-partings, the Chilean line crosses two rivers and connects the local water-parting descending from the summit of the Cordón del Bosque to the local water-parting ascending from the valley by the slopes of Mount Fitzroy.

3. *The problems of Chile's version of the line*

Five issues connected with the Chilean line merit attention: (1) the dividing ranges as the legal basis for determining the boundary; (2) the identification of the beginning of the line as the spur of Cerro Martínez de Rozas; (3) the combination of continental and local water-partings; (4) the crossing of the Rivers de las Vueltas and Eléctrico; and (5) the line's penetration into territory which was not disputed in 1898-1902.

3.1 *The provision of the Award concerning dividing ranges*

The relevant provision of the Award, which has two parts, must be read carefully. The first part states that the further continuation of the boundary is determined by lines fixed across Lakes Buenos Aires, Pueyrredón and San

Martín, the effect of which is to assign the western portions of the basins of these lakes to Chile and the eastern portions to Argentina. This statement is obviously prescriptive, i.e., it contains a rule concerning the determination of the boundary across these three lakes.

The second part continues "the dividing ranges carrying the lofty peaks known as Mounts San Lorenzo and Fitzroy". In this text the second part stands in apposition to the first, but it is more of an independent than a subordinate clause. Sir John Ardagh, a member of the Tribunal, added this clause after the first part had been written.

When the two parts are read together, the first is prescriptive and the second descriptive or explanatory. Being explanatory, the second part lacks any prescriptive or mandatory meaning and simply states that Mounts San Lorenzo and Fitzroy are located in the dividing ranges. It does not say that the dividing ranges extend between the two peaks or that the line should follow ranges between these peaks.

Neither the prescriptive clause, concerning the division of the three lakes between the Parties, nor the explanatory clause, stating that Mounts San Lorenzo and Fitzroy are located in the dividing ranges, says that the ranges function as the dividing line between the summits of San Lorenzo and Fitzroy. The prescriptive clause contains the Arbitrator's decision that the line divides the three lakes and assigns the western portions of their basins to Chile and the eastern to Argentina. The descriptive or explanatory clause simply states that Mounts San Lorenzo and Fitzroy are located in the dividing ranges.

The second clause determines the position of Mounts San Lorenzo and Fitzroy, stating that they are located in dividing ranges. It says nothing more about dividing ranges. The verb "located" is not prescriptive but merely indicative of situation. Nor is the verb "carry" prescriptive and the most appropriate Spanish translation in the present case is "*encontrarse*".

In the English text the subject of the sentence is "the dividing ranges", the verb is "carrying", which here, as is common usage in English to indicate a stable situation, is in the gerundive form; and the complement is "the lofty peaks known as Mounts San Lorenzo and Fitzroy".

The Award could have said more but it did not. The arbitration report established the rule for determining the line in this sector: the local water-parting which ascends to Mount Fitzroy. This is a prescription or a mandate and not an explanation.

The late addition of "the dividing ranges" to the arbitration text could not be more eloquent, for the line was being determined in the extensive zone lying between Mount San Lorenzo and Mount Fitzroy, some 190 kilometres long, in which the Arbitrator had decided to cross the River Mayer and Lake San Martín, delimiting large zones without reference to dividing ranges, either because they did not seem appropriate or because they did not exist, as in the area of the three lakes and the surrounding terrain.

3.2 *Start of dividing range in the boundary post 62–Mount Fitzroy sector*

Having cited the Award itself in support of its argument that the line runs along dividing ranges, Chile refers to the arbitration report to specify what these ranges are. "The report first identifies the "dividing range" referred to in the Award (the Cordón Oriental) when it mentions the spur whose foot is to be found at the specified point on the southern shore of Lake San Martín and to which the line is then to ascend in the direction of Mount Fitzroy." Further: "Cordón Oriental, also known as Cordón Martínez de Rozas and Cordón del Bosque in its southern part, is the spur referred to in the 1902 arbitration report . . ." (MCH, p. 136, 12.16, and p. 13, 3.12).

Chile considers that this provision of the report is consistent with the more general rule contained in article III of the Award, for the rule uses a dividing range to carry the boundary. The report adds a reference to the local water-parting as the tool which defines with greatest detail or precision the course of the boundary along the chosen dividing range. In several statements Chile argues that "spur" is equivalent to "dividing range", for example in the reference to "the foot of this spur" (record No. 1 of 11 April 1994, p. 44).

Here is another example of this identification of spur with range: "An examination of the 1902 arbitration report shows that its use of "spur" corresponds in all cases to "dividing range", i.e., to one of the ranges chosen by the Arbitrator as the geographical feature constituting the international boundary". "This is precisely the case of the Cordón Oriental, i.e., it constitutes one of the dividing ranges." Chile then explains that immediately after the arbitration Chile's official documents translated "spur" as "*contrafuerte*", but that today it prefers "*estribación*" as being a noun which, while meaning the same, is now in wider use (record No. 7 of 19 April 1994, pp. 47-53).

The meaning of "spur" provoked much debate during these arbitral proceedings. Argentina argued against the thesis that "spur" identifies the dividing range, the basis for Chile's position that spur and range are equivalent terms. This approach corresponds to the Chilean position according to the passages quoted above.

The dictionaries of the time cited by the Parties and today's dictionaries agree that "spur" is a salient issuing from a mountain mass, but it is not the mass itself; in other words, a spur issues from a range or mountain but it is not the range or mountain itself. The term does not include the range, peak or mountain from which the spur issues. Thus, the report indicates only the start of the line from the crossing of Lake San Martín and says nothing to the effect that it runs along dividing ranges. Having indicated its starting point, the reports states that the line is determined by the local water-parting. The Parties agree on the first 12 kilometres of the local water-parting on the Cordón Martínez de Rozas.

The report stipulates the local water-parting as mandatory. A local water-parting may run along ranges or along such a low relief that its identification of the ground is difficult. If the report had made the dividing ranges the delimitation rule, it would not have mattered whether the continental or local water-parting ran along them. But since this is not the case, the only applicable criterion, from the point identified as "spur", is the local water-parting.

3.3 *The combination of continental and local water-partings*

Chile argues that the boundary should follow the Cordón Oriental until this range moves a considerable distance away from Mount Fitzroy. The first section of the Chilean line runs along the local water-parting, this being a more precise indication of the position of the line along the ranges. According to Chile's thesis, the principal and decisive element is the dividing range, and the secondary or complementary element is the local water-parting. After the first 12 kilometres the line joins the continental water-parting and then moves on to a local one. This combination is not consistent with the Chilean argument that the two kinds of water-parting are distinct and that if one of them is continental it cannot also be local, and vice-versa. Chile states that "logically, a water-parting cannot be continental and local at the same time, because the waters which it separates cannot flow simultaneously to two oceans and to only one of them (MCH, p. 18, 2.42).

Chile would have fallen into contradiction with its thesis of the clear distinction between continental and local water-partings if it had relied of the arbitration report, which makes the local water parting mandatory, because the Chilean line combines local and continental partings. Since Chile relied on the dividing ranges, the continental or local character of the water-parting became a secondary consideration. However, as it has been determined that dividing ranges do not play the role assigned to them in this sector, local and continental water-partings remain set in contradiction with each other, and the combination of local and continental partings is not without relevance to the resolution of this contradiction.

Since Chile accords precedence to the dividing ranges, it would be possible to avoid the problem of this distinction if such precedence was a prescription of the Award, for the successive ranges could carry the line to the point from which it descends to the valley along which flow the Rivers de las Vueltas and Eléctrico. If the local water-parting played a subsidiary role, and moreover there was no continuous and single water-parting between the supposed terminal points, it would not matter whether the dividing ranges carried along their summit-line a continental or a local parting. These hypotheses, however, do not fit with the terms of the Award and the arbitration report.

Based as it is on the distinction between continental and local water-partings and on the fact that the applicable rule for determining the boundary in this section is the local water-parting alone, the Chilean interpretation of the boundary line, like the Argentine version, suffers the defect of combining continental and local water-partings. The report speaks of a local water-parting

not of a water-parting without qualification. If the report had referred to a water-parting without qualification, it would have been admissible to combine continental and local partings.

3.4 *The crossing of the River de las Vueltas and the River Eléctrico*

The Chilean line descends from the Cordón del Bosque along a low-lying local water-parting to the River de las Vueltas, crosses it and continues towards the River Eléctrico, which it also crosses before ascending along a local water-parting to Mount Fitzroy. Chile finds the justification for crossing these rivers in the practice of the 1902 Award, which the 1966 Court described as follows: "The general practice of the 1902 Award was for the boundary line to follow either the Continental Divide or local surface water-partings, crossing river tributaries as necessary". (*Award of the British Government and Report of the Court of Arbitration*, Santiago, MCMLXX, bilingual edition, p. 169).

The waters of a river flow in only one direction, while a water-parting separates waters which flow in different directions. Thus, a water-parting as such cannot cross a river, because in that section it would not part the waters. Accordingly, it is not a question of the local water-parting crossing rivers, which would contradict its definition, but of the intention of the Arbitrator to the effect that at the end of one local water-parting the line should cross a river to reach another water-parting or some other geographical feature.

The 1902 Award was able to accept the crossing of rivers as the Arbitrator's intention, not as a prolongation of the local water-parting. The language of the arbitration report indicates that the crossing of rivers is a result of the decision of the Tribunal and not of the prolongation of local water-partings.

The statement of the 1966 Court quoted above indicates that the general practice of the 1902 Award associates the crossing of tributary rivers with the line of the frontier but not with the local water-parting. This general practice to which the 1966 Court refers means that the frontier line, not the local water-parting, can cross rivers when necessary; and the frontier line represents the arbitral decision.

The crossing of rivers in the present case of interpretation and application of the 1902 Award could be effected by decision of the Court, if that was absolutely indispensable for giving effect to the intention of the 1898-1902 Arbitrator and in view of the incomplete geographical knowledge of the region at the time of the arbitration. But since objections have been raised against the earlier sections of Chile's version of the line, it would be wrong to consider the possibility of having it cross rivers at the behest of the Arbitrator.

3.5 *Penetration of the Chilean line into areas which were not disputed in 1898-1902*

After crossing the River Eléctrico the Chilean line ascends along a local water-parting to Mount Fitzroy. This sector of the line is located in a zone which at the time of the 1898-1902 arbitration was considered to belong to the Atlantic basin, which Chile recognized as Argentine, and to lie outside the competence of the Arbitrator.

This incursion into a zone which was not disputed is grounded on a reason similar to the one by which the Arbitrator justified entering the Atlantic basin of Lake Viedma, i.e., that Mount Fitzroy, an obligatory point of the boundary, was located in the geography of the time on the Atlantic slope and was bordered to the north and west by the continental divide. Any line coming from Lake San Martín had necessarily to cross the continental divide of the time in order to reach Mount Fitzroy, but the Arbitrator opted for the minimum incursion into this basin, as his map demonstrates, while the Chilean line makes a relatively large incursion into territory which was not disputed in 1898-1902.

The 1898-1902 Tribunal would not have been able to carry its intention of seeking an intermediate line between the extreme claims of the Parties as far as dividing land which was clearly not in dispute. The Tribunal could not direct that the boundary should penetrate far into land which was not disputed and therefore lay outside its competence. By sticking to their agreement on Mount Fitzroy as a point on the frontier the Parties accepted that the line should enter the Atlantic basin as known at the time, but the Arbitrator understood that, although the incursion into the Atlantic basin was meant to meet a need, it must be kept to a minimum, precisely because it was an exception. The Arbitrator's map proves this.

V. The 1903 demarcation line

1. *Background*

On 26 December 1901 Sir John Ardagh submitted the first proposal for a British commission to undertake the execution of the delimitation. He sent a cable to the Foreign Office on 30 April 1902 saying that a mixed commission would certainly be needed to erect the boundary marks, with British officers as arbitrators. The significance of assigning the role of arbitrators to British officers was clarified in a note which the Secretary of the Tribunal sent to the Foreign Office on 3 May 1902, stating that the Tribunal was thinking of proposing that the demarcation of the boundary should be undertaken by a mixed commission of the two Republics, with British officers as arbitrators, and that consequently the decision of these officers would be accepted by both Parties as absolutely final and binding (see MCH, *Annexes*, vol. I, annex 13, p. 1, and annex 15, pp. 1 and 2).

On 26 May 1902 the Governments of Argentina and Chile signed an agreement on demarcation of the boundary line between Chile and Argentina, in which they requested the British Government to appoint a commission to fix on the ground the boundaries which it had ordered in its Award (MCH, *Annexes*, vol. I, annex 17). On 29 December 1902 Sir Thomas Holdich informed Argentina's Minister for Foreign Affairs, Mr. Luis Drago, that he had reached an agreement with the experts of the two countries on the terms under which the mixed commission would operate, with British officers acting as arbitrators (MCH, *Annexes*, vol. I, annex 29).

The note mentioned above contains the terms of reference of the demarcation commissioners, to the effect that the British officer in charge will have absolute command of the group and will be the final judge in the event of disagreement. He was also responsible for the accuracy of the final records of the frontier, which should include: (1) the final map; (2) a summary or list of boundary marks indicating the coordinates of their location on this map in latitude and longitude correct to 10 seconds and their relation to adjacent boundary posts and surrounding points fixed by triangulation (CCH, *Annexes*, vol. I, annex 29). This is the most important part of the agreement reached by Holdich and the experts, because it refers to the powers conferred on the members of the Demarcation Commission, and of course on the British officers as arbitrators.

2. *The powers and work of the Demarcator Captain Crosthwait*

Argentina submitted two maps prepared by Captain Crosthwait, dated 7 and 8 June 1903, and it pointed out a number of differences between them. For our present purposes the differences between these maps are irrelevant. None of them showed a line extending to Mount Fitzroy. Chile stated that it had not received the map until 8 June.

Given the absolute authority conferred on the British officers to resolve definitively any problems connected with the boundary marks, it may be concluded that they were the real demarcators of the delimitation ordered by the Arbitrator. The determination of the powers invested in the Demarcator for the zone in question, Captain I.H. Crosthwait, is a matter of great importance for the assessment of the value of his map. The main point to be settled is the meaning of the words "final map".

Crosthwait made some changes in the line which he drew on his map: (1) he changed the direction of the line on the Arbitrator's map, depicting it as an almost straight line running north-south between boundary post 62 and the continental water-parting of the time in the neighbourhood of Mount Fitzroy, and deleting the westward inflection of the line on the Arbitrator's map; (2) his line did not touch Cerro Gorra Blanca, and this represented a substantial change from the Arbitrator's map; and (3) nor did it touch Mount Fitzroy, an obligatory point on the boundary, again diverging from the Arbitrator's map.

Captain Crosthwait did not explain these changes, so that it is impossible to indicate, except as hypotheses, his reasons for acting in this way. One possible reason for the omission of Cerro Gorra Blanca might be that, although the Arbitrator's map touched this peak with its boundary line, the arbitration report did not mention it. The fact that the line did not pass over Mount Fitzroy, when the Arbitrator's map touched it by crossing the continental divide of the time and then left it by crossing the same continental divide again, does not seem to point to a reason but rather to an act of will.

Captain Crosthwait erected boundary post 62 on a prominent rock about 50 metres above the level of the lake in line with the spur which descends from the peak described in the Award (marked "D" on the map), about 750 metres to

the west of a river which flows into the lake (MCH, *Annexes*, vol. I, annex No. 31, "Tabular Statement of Boundary Pillars Erected on the Chile-Argentina Boundary by the British Delimitation Commission", pp. 7-8).

3. *Controversy concerning the work of Captain Crosthwait*

Argentina considers that the Demarcator was only authorized to erect boundary marks. "The 1903 demarcation was not a second disguised arbitration. Its purpose was not to "adjust the line" of the frontier of the 1902 Award . . . what was done in 1903 was to fix points on the line of the frontier of the 1902 Award by erecting boundary marks at some of these pre-selected points. This was, then, a "demarcation" in the most elementary sense of the term, i.e., the actual implementation of the "delimitation decided upon in the Award" (CA, p. 187, 23).

Chile, in contrast, assigns to the Demarcator's map a dominant role in the determination of the line of the frontier in accordance with the 1902 Award. "This is the line, which, in its general characteristics and principally by reason of its almost direct path to Mount Fitzroy, represents in Chile's view the clearest indication of the intention of the 1902 Award and report." "Both for Chile and for Argentina the demarcation settles definitively any omissions or uncertainties in the frontier defined by the Award." (MCH, p. 139, 12.31)

"It was clear to the Tribunal that the acts and decisions of the Demarcator were to resolve any points remaining in doubt." Chile also refers to the practice of implementing the Demarcator's line by correcting the Arbitrator's map, which occurred on many occasions involving hundreds of kilometres of frontier (CCH, p. 23, 3.1, p. 139, 12.31, and p. 71, 7.47 and 7.48). These corrections were made possible by an agreement between the Parties.

Chile accords precedence to the acts of the Demarcator, for it says that "the 1903 demarcation must be regarded as an integral part of the 1902 Award and report, and it was accepted as such by the Palena Court". In this connection it believes that "the demarcation settles definitively any omissions or uncertainties in the frontier defined by the Award". "The authority and mandatory nature of the demarcation cannot now be called into question." (MCH, p. 139, 12.31)

It must be pointed out that the 1902 Award consists of three instruments: the Award itself, the arbitration report and the Award map. The binding authority of the Demarcator's map and report stems from the agreement concluded by the Parties on 28 May 1902. Here the question under discussion is not so much the binding nature of the demarcation as the authority of the Demarcator to produce a map different from the one produced by the Arbitrator.

3.1 *Delimitation and demarcation*

Where frontiers are concerned it is common practice to distinguish between delimitation and demarcation. The Tribunal distinguished between the two concepts, for it said that it undertook to give opinions and recommendations on the delimitation and that the actual demarcation should be carried out in the presence of British officers (*Arbitration Report*, para. 17).

It must be noted that the delimitation had already been concluded in 1903 and that Crosthwait was not appointed to amend the delimitation but to carry out the demarcation in accordance therewith. His powers, defined by their purpose, were limited to demarcation, and therefore he had no authority to diverge from the Arbitrator's delimitation.

The demarcation agreement signed by the two countries spelled out the terms of reference of the Mixed Commission as follows: "It shall fix on the ground the boundaries prescribed in [the Arbitrator's] Award". The distinction between demarcation and delimitation means that demarcation is a technical activity concerned only and exclusively with the implementation of the delimitation. To accept that the Demarcator could make changes to the Arbitrator's map would also mean accepting instability and uncertainty in the delimitation decision.

3.2 *The question of the final map entrusted to the Demarcator*

One question which has given rise to error is the Demarcator's responsibility for the production of the "final map". It has been inferred from this that the map had been superimposed on the Arbitrator's map with some adjustments for accuracy. This would mean that the Arbitrator's map would be the penultimate in the delimitation process. It is not easy to see how the Demarcator could make adjustments for accuracy on the Arbitrator's map by omitting Mount Fitzroy as a point on the frontier line, or how the deletion of the passage of the line across Cerro Gorra Blanca could properly be called adjustment for accuracy. But the main point concerns the Demarcator's powers.

The agreement between Holdich and the experts states the task entrusted to the Demarcator: to erect boundary marks in the appropriate places and to do so in accordance with specific instructions. In order to facilitate this task the Demarcator was authorized to use certain discretionary powers. Within this context the final map for which he was responsible was to consist of a graphic description of the places where the boundary marks were erected. In any event, the use of the words "final map" provoked debate during the present arbitration proceedings.

Sir Thomas used different language, this time unambiguous, in the instructions which he gave to his four demarcation officers. He directed them to supervise the alignment of the boundary posts or frontier markers in the places indicated by the Tribunal and to decide, in the event of any doubt, where they should be erected. He then stated the criteria for erection of the primary and secondary boundary marks and the information about each post which should be included in the mission report.

These instructions no longer refer to a "final map" but to a "fair map". "A short narrative report will be required of each Officer's work together with a fair map of the boundary in his section." The qualifier "final" was used in the report: "A final statement, or synopsis, of the boundary pillars will be drawn up . . ." (CCH, *Annexes*, vol. I, annex 30, "General Directions Given by Sir Thomas Holdich to Officers in Charge of Demarcation 1902", paras. 9 and 10).

4. *The subsequent use of the Demarcator's map*

On the question of how to assess the maps it is worth recalling the following comment by Argentina: "In an assessment of conduct subsequent to the 1902 Award the official maps are of special relevance, for they show how the delimitation rule of the Award has been interpreted and applied by the Parties" (CA, p. 333,1).

Even though the Demarcator's map, examined in the light of the powers conferred on its author, could not be interpreted as binding on the Parties, except with respect to the erection of boundary post 62, it was used by Argentina, beginning with the 1907 map published by the Office of International Boundaries. For several decades Argentina consistently, except on two maps which reproduced the line of the Arbitrator's map, depicted a line similar to the one on the Demarcator's map. On some of these maps the line touched Mount Fitzroy and on others it did not. The first Argentine map showing a line similar to its version of the line in the present arbitration appeared in 1962.

An examination of this long series of maps shows that the Argentine line on them was drawn in the same direction, in the same area and through the same points as the line of the Demarcator's map, no matter whether it did not touch Mount Fitzroy, following in this respect the Demarcator's map, or did touch it, thus adding to the Demarcator's map. This assertion is not based on deduction but on direct and objective visual examination.

Two maps produced by Chilean experts, Riso Patrón (1905) and Donoso Grillé (1906), also adopted the Demarcator's line. This was repeated on maps up to 1953. Chile's 1953 map, labelled "preliminary map" and "boundary under study", used the line advocated today by Argentina, i.e., the continental divide discovered in 1945. In 1955 Chile published a map showing its current version of the line of the 1902 Award.

Although the maps of Riso Patrón and Donoso Grillé were published on their authors' responsibility in their private capacity, Chile did not dissociate itself from these maps but referred to them as its own. It states in this connection: "(1) in 1905 and 1906 two Chilean maps used the line indicated on the Demarcator's 1903 map, i.e., the line running directly between boundary post 62 and Mount Fitzroy. Cerro Gorra Blanca was thus in Chilean territory" (MCH, p. 101, 9.3). On this basis it can be asserted that Chile first adopted the Demarcator's line and that from 1906 and for many years it preferred the line of the Arbitrator's map.

The maps produced by the Parties subsequent to the 1902 Award confirm that the area on which the lines of the Arbitrator's map and the Demarcator's map were shown fell within the competence of the 1898-1902 Arbitrator. The maps of the Parties up to 1953 reproduced those two lines, and reproduced them without any reservation concerning the area which later wound be known as the upper part of the basin of the River de las Vueltas. The lines on the maps of the Parties coincided, notwithstanding their differences in other respects, in the path which they took in the upper las Vueltas basin. The Parties were stating in graphic language that the two original lines had been drawn in an area concerning which the Arbitrator had been given authority to rule.

It emerges from the foregoing arguments that the Parties' assessments of the value of the Demarcator's map and line did not agree. Notwithstanding its original defect, if the Parties had agreed to invest the Demarcator's line with the status of dividing line throughout several decades, the question would have arisen of determining the implications of that agreement.

The official maps took different approaches to identification of the boundary line. Argentina inclined towards the Demarcator's line and Chile towards the Arbitrator's. In consequence there remained an intermediate space concerning which, for several decades, neither Party made any attribution or claim by means of the graphic language of their maps. Actual activities, private and official, were carried out in this intermediate area. But no agreement could be reached on the Demarcator's line, nor could its original defects be corrected by the subsequent conduct of the Parties.

In conclusion, the Demarcator's map could not take the place of the Arbitrator's map owing to the Demarcator's lack of authority, and the subsequent and divergent conduct of the Parties could not correct its original defects. The line on his map does not meet the necessary requirements for being considered as the authentic interpretation of the 1902 Award, even though it did confirm that the area through which this line ran between boundary post 62 and Mount Fitzroy had been within the competence of the 1898-1902 Arbitrator.

VI. Thoughts on a line which may represent the decision of the 1898-1902 arbitrator

1. *The common problem of Argentina's and Chile's versions of the line*

The most pertinent point in the debate between Argentina and Chile on the capacity of their respective lines to represent the authentic interpretation of the 1902 Award turns on their interpretation of continental water-parting and local water-parting: similar and interchangeable terms (Argentina) or different and non-interchangeable (Chile).

Argentina says that the two divides function in the same way and denominate the same geographical situation and that therefore the qualifiers do not alter their essential shared character. Chile maintains that the terms mean two different things and that a water-parting is either continental or local but not both at once.

In its interpretation of the arbitration report's rule which stipulates following the local water-parting, Argentina presents a divide combining continental and local features, interpreting local in accordance with the approach taken by the Award. Chile relies on the dividing ranges for part of the course of its line and then takes up the local water-parting. The elucidation of what is understood by continental and local water-parting becomes a decisive factor in the assessment of the two lines and establishing the correct interpretation of the 1902 Award.

Argentina argues that, in the boundary post 62–Mount Fitzroy sector, there is no incompatibility between the Award itself and the arbitration report, in contrast to what happened in the 1966 arbitration when the Court set aside the

report by reason of its faulty geography and applied the Award itself. Thus, Argentina considers that in the present case there is total consistency between Award and report and that they can be applied on the ground.

Argentina maintains that, when these two instruments are read in the context of the geographical situation as it is known today, the frontier line should be drawn on the ground for the whole length of the water-parting running without interruption between boundary post 62 and Mount Fitzroy, notwithstanding the fact that this water-parting is a continental one in part of its course. In Argentina's opinion, this is the water-parting which the 1898-1902 Tribunal called local water-parting.

Argentina considers that the local water-parting can be used between boundary post 62 and Mount Fitzroy on the understanding that there is no difference between continental and local divides since both function in the same way, i.e., they separate waters flowing in different directions.

The task of the present Court, Argentina concludes, is to identify the line corresponding to the local water-parting in accordance with the 1902 Award and report and to determine its course, for which purpose it does not matter that part of this course corresponds to a continental divide, since the adjectives local and continental add nothing to and subtract nothing from the nature of the divide.

This line of argument would confirm the conclusions drawn from application of the principle of estoppel and from the territorial competence of the 1898-1902 Arbitrator. Thus, estoppel, territorial competence of the Arbitrator and thesis of water-parting concur in validating the Argentine line.

Chile considers that there is a clear distinction between continental and local water-parting, since the one separates waters flowing to the Atlantic and Pacific Oceans and the other waters flowing to one same ocean. Chile says that a divide is either continental or local but not both at once; and it hopes to overcome the obstacle inherent in this distinction for its version of the line by recourse to dividing ranges and the interpretation that in the stretch where the dividing range prevails it is immaterial whether the water-parting is continental or local.

Chile maintains that there is a geographical error in the present case and that, just as in the 1966 arbitration it was determined that the River Encuentro does not have its sources on Cerro de la Virgen, the local water-parting does not run without interruption between boundary post 62 and Mount Fitzroy and that, therefore, the arbitration report's rule cannot be applied.

Chile refers to the authority of the 1966 Award in support of two points: (1) reliance on the Award itself with respect to the dividing ranges mentioned in its article III, since the report had made a geographical error; and (2) the possibility that the local water-parting may cross rivers, in accordance with what the 1966 Court called "the general practice of the 1902 Award".

On the assumption that the arbitration report's rule cannot be applied because there is no single water-parting which is actually local throughout its length between boundary post 62 and Mount Fitzroy, Chile relies, as did the 1966 Court, on the Award itself in order to draw a line which runs along the ranges Martínez de Rozas, Innominado and del Bosque, descends to the valley

along a local water-parting, crosses the River de las Vueltas and the River Eléctrico, and then ascends along a local water-parting to Mount Fitzroy. Along these ranges the Chilean line is in some parts a continental divide.

If a distinction is made between continental and local water-partings, on the basis of their respective qualifiers and moreover on the understanding that they are technical terms, it can be said that the Argentine line combines continental and local water-partings and that the Chilean line does likewise. The question, with respect to both lines, is to decide whether this combination is consistent with the rule of the arbitration report's instruction that the local water-parting should be followed in this sector.

Reasons have been adduced, some theoretical and others taken from the texts of the 1898-1902 arbitration and its preparatory work, to prove that continental water-parting and local water-parting were specific terms at the time and that they cannot be used interchangeably in the language of the Award. Reference to the preparatory work is necessary in this case because the texts in question prefigure the language of the Award and state clearly that the authors make a distinction between continental and local water-parting. Thus, the solution to this dispute must be sought elsewhere than in the understandings or claims of the Parties with respect to their lines.

2. *The 1994 Arbitral Award*

The 1994 Award and this dissenting opinion invoke the same legal principles but they differ in their application of these principles. I cannot find any significant points of agreement between the Award and my dissenting opinion.

My dissent from the Award begins in the chapter containing an examination of the competence of the present Court, moves on to the territorial competence of the 1898-1902 Arbitrator, including its consequences, citing the history and application of the principle *non ultra petita partium*, and concludes with the meaning of the terms for water-parting.

Thus, I do not endorse the grounds, conclusions or decision of this Award with respect to the interpretation and application of the 1902 Award. This dissenting opinion, taken as a whole and in each of its elements, explains the reasons why I voted against the Award.

Therefore, having thus exhausted the material used for the successive exclusion of possible answers to the question put in the 1991 *Compromis*, I will now offer some thoughts with which I bring to an end and close the circle on this dissenting line of reasoning.

3. *The sources for determination of the line in accordance with the 1902 Award*

The exposition given above has successively eliminated possible ways of interpreting the 1902 Award with regard to the sector covered by the present dispute, on the ground that for one reason or another they are not duly consistent with the terms of that Award. It makes reference to the Award, with its three elements consisting of the decision itself, the arbitration report and the Arbitrator's

map, i.e., the primary source from which are derived the interpretations to which objections have been raised and which, pursuant to the 1991 *Compromis*, is to be interpreted and applied in accordance with international law.

The three components of the 1902 Award must be considered as a whole, because in isolation none of them resolves the problem. The decision itself, the report and the map constitute a semantic unity and complement each other. It must be remembered that the 1902 Award contains language of two kinds, the written language of the decision itself and the arbitration report and the graphic language of the map. If the principle of integration is to be applied to its interpretation, this technique based on a legal principle and backed by logic must be applied to the whole interpretation and to all the problems which arise.

The Award itself contains two fundamental clauses concerning the sector currently in dispute. The first states: "The further continuation of the boundary is determined by lines which we have fixed across Lake Buenos Aires, Lake Pueyrredón (or Cochrane), and Lake San Martín, the effect of which is to assign the western portions of these lakes to Chile and the eastern portions to Argentina" (*Award*, art. III, para. 3).

The second fundamental clause states: "A more detailed definition of the line of frontier will be found in the Report submitted to Us by Our Tribunal, and upon the maps furnished by the experts of the Republics of Argentina and Chile, upon which the boundary which We have decided upon has been delineated by the members of Our Tribunal, and approved by Us" (Award, art. V, para. 1). Thus, the frontier approved by the Arbitrator is delineated on the maps.

The arbitration report contains the following prescription: ". . . [the frontier line] shall follow the median line of the Lake (San Martín) southwards as far as a point opposite the spur which terminates on the southern shore of the Lake in longitude 72_47'W., whence the boundary shall be drawn to the foot of this spur and ascend the local water-parting to Mount Fitzroy and thence to the continental water-parting to the northwest of Lake Viedma" (*Arbitration Report*, section 22, last paragraph).

The Arbitrator's map contains details of the arbitral decision, in accordance with the provision of the Award itself (art. V, para. 1). The Award does not allude to any order of priority between the report and the map but uses both of them to set out the details of its decision.

In other words, the Award itself formulates the general rule concerning the line, which, coming down from the north crosses Lake San Martín and then continues to Mount Fitzroy, the effect of which is to assign the eastern portions of the lacustrine basins to Argentina and the western portions to Chile, thus implementing the compromise solution which the Arbitrator regarded as appropriate in the light of positions which were incompatible with the provisions of the boundary treaties interpreted in their strict sense.

As this was a very general formulation, the Arbitrator supplemented it with the report and the map, adding the details which were lacking in the general rule. As a result, not only for reasons of interpretative logic but also at the express direction of the Arbitrator, the report and the map represent and clarify the

Arbitrator's intention. The structure of these instruments is such that neither of them, in itself and in isolation, can solve the problem of the identification of the course of the frontier line between boundary post 62 and Mount Fitzroy.

The arbitration report read in conjunction with the Arbitrator's map provides the details of the line prescribed in very general terms in the decision itself. The way in which this general rule is to be applied in the sector of the present dispute is specified in the arbitration report and on the Arbitrator's map. Thus, the key to a solution is to be found in the examination and interpretation of the report and the map considered as a single semantic unit consisting of written and graphic language.

And at the end of the day, if all the paths of interpretation encounter insuperable obstacles, there will remain, as a first hypothesis, an abominable silence, a symbol of the bewilderment of the logicians. But since silence is not a solution and is inadmissible in legal matters, even though legal history does record some cases, the Court would have the power to adopt its own decision, not one devised totally by the Court but one consistent with the factual and legal background and the context in which the Arbitrator conducted the proceedings and adopted his decision, as well as with the written and graphic language of the components of the Award, in particular the report and the map.

4. *Concerning whether the Parties confirmed an interpretation of the Award by their concordant conduct*

Before continuing with this consideration of solutions a few words must be said about the possibility that the Parties had confirmed a given interpretation of the Award by their concordant conduct. The conduct of the Parties following the Award manifested itself mainly in the form of maps. These maps do not seem to have consolidated a common interpretation which might have constituted a binding factor for the present dispute.

For the details of the content and significance of the maps which the Parties produced subsequent to the 1902 Award reference must be made to the sections of this exposition dealing with the question of the territorial competence of the 1898-1902 Arbitrator. Here I will limit myself to a summary of the reasons why it can be asserted that such concordance did not materialise.

The first Argentine map, produced in 1902 immediately after the pronouncement of the Award, was apparently an internal document which was not made public and was not discussed during the arbitral proceedings. This map depicted the line of the Arbitrator's map, recognizing that this was the boundary adopted by the Arbitrator. This map came to the attention of the present Court because a copy of it was included in the volume of annexes in the Argentine memorial.

The first two Chilean maps, produced by Riso Patrón and Donoso Grillé, depicted the Demarcator's line, and then for many years the official Chilean maps showed the line of the Arbitrator's map. Chile continued to use this line consistently until in 1953, eight years after the discovery of the true continental divide, it published a map showing a line similar to the one which would

subsequently become the current Argentine line. This map was labelled "boundary under study" and "preliminary map", so that it cannot be regarded as acknowledging Argentina's present version of the line, for acknowledgement must be categorical and unambiguous. In 1955 this map was replaced by one showing the current version of Chile's line.

Argentina's official maps tended to follow the Demarcator's line, with a few exceptions. Since Chile chose the line of the Arbitrator's map and Argentina the Demarcator's line, there was no concordance between the two countries on the interpretation of the Award.

What is more, for many years there remained between these two lines a space not encompassed by either of them. With the passage of time concrete activities were carried out in this space. These activities, although they show that the Parties never intentionally went beyond the line of the Arbitrator's map, allowed some uncertainty as to boundaries, and the present task is to identify and define a line which does not give rise to any uncertainty.

5. *The dispute about the value of the Arbitrator's map*

The two Parties agree that there are a number of difficulties connected with application of the Arbitrator's map, difficulties due mainly to the pecked line in the sector currently in dispute. Even so, they recognize that this map is a component of the Award. What is more, they have made statements recognising the legal force of the graphic language of the map. For example, Argentina has stated: "Thus when a "map" is part of the international instrument subject to interpretation, as in the present case, its value as evidence of the meaning and scope of the instrument in question is legally and logically obvious" (CA, p. 65, 21). It would be difficult or even impossible to disagree with this statement.

Argentina comments on the joint interpretation of the components of the Award, including the Arbitrator's map. For example: "And the Award maps constitute the graphic representation of the criteria established and defined in the other two documents. Consequently, the two documents referred to in article V are in fact complementary to and explanatory of the Award itself" (MA, pp. 441-444, 5).

On the basis of the validity which it accords to the Arbitrator's map, Argentina believes that there are three obligatory points on the line between boundary post 62 and Mount Fitzroy: the two extreme points—post 62 and Mount Fitzroy—indicated in the arbitration report, and a third intermediate point indicated on the Arbitrator's map. The arbitration report does not mention Cerro Gorra Blanca but the Arbitrator's map shows it as a point on the pecked line which sets out from the Cordón Martínez de Rozas and reaches Cerro Gorra Blanca by means of a westward inflection.

". . . Cerro Gorra Blanca is a point which must necessarily be taken into account by the present Court in determining the boundary . . ." "Even if the Award and the report do not mention it expressly, the Award map shows Cerro Gorra Blanca without any ambiguity, highlighting it and even mentioning its

altitude of 2,770 metres." "It must be added that the official Chilean maps from 1903 up to 1958 always showed the international boundary as passing across Cerro Gorra Blanca." (MA, pp. 589-591, 36, pp. 305-306, 19, and p. 308, 21).

Chile takes a different position. "The Arbitrator's map introduces, for the first time in the case, a reference to Cerro Gorra Blanca, which is not mentioned in the report or the Award. There is nothing in the topography depicted on the map itself to suggest that Cerro Gorra Blanca was situated on "the local water-parting" (to which the arbitration report alludes) between the place where boundary post 62 would be erected and Mount Fitzroy."

Chile comments on the fact that Captain Crosthwait did not have his line pass over Cerro Gorra Blanca: "He (Crosthwait) was also authorized to take the view that Cerro Gorra Blanca was not situated on the spur ascending to Mount Fitzroy from boundary post 62 and, therefore, he could eliminate this peak from the boundary line". "Cerro Gorra Blanca had not been named in the Award or in the report and was not, therefore, an obligatory point on the frontier" (MCH, p. 59, 6.11, and p. 69, 7.29).

Furthermore, Argentina acknowledges that the line on the Arbitrator's map is drawn within the space falling within his territorial competence. "The Award map provides a perfect illustration of how the Arbitrator understood that [the line] should reach the obligatory point of Mount Fitzroy in accordance with his terms of reference, i.e., without exceeding the limits of his territorial competence over the basins." ". . . by indicating on the Award map that the boundary line passed over Cerro Gorra Blanca the Arbitrator complied fully with the terms of reference given him by the Parties . . ." "Argentina refers further . . . to the text of the 1902 Award as a whole, and to the text of the rule contained therein applicable to the boundary post 62-Mount Fitzroy sector, and to the Award map both as a whole and in the part concerning this sector . . ." (record No. 10, pp. 27-28 and 39-39).

These statements acknowledge that the Arbitrator made his Award within his competence and, this being the case, he acted within his competence when he drew the pecked line in areas which subsequently were revealed to be in the Atlantic basin. Moreover, the map is acknowledged as a whole, without distinction or reservation of any kind, probably because, constituting a unity, it does not admit of partial acceptance.

6. *The significance of the pecked line*

The reply to this question appeared in the 1966 Award, which the Parties have mentioned and accepted without suggesting any reservation or contradiction. "A pecked line is the normal indication for a feature which is known to exist but whose position has not been accurately located." The map "shows the boundary decided upon in the Award with a solid red line where the country has been adequately surveyed and with a pecked red line across unsurveyed areas" (*Award of the British Government and Report of the 1996 Court of Arbitration*, pp. 101 and 103).

The Arbitrator used the pecked line 17 times and he used it whenever his line crossed blank areas, i.e., unsurveyed areas, or separated explored and unexplored areas. He used it so many times that it would have been essential for him to have stated, if such had been his intention, that the pecked line had a special value somewhat different from the value of the solid line.

As an example of the use made of the pecked line on the ground we may refer to the details of the complicated section between Cerro de la Virgen and Lake General Paz. When the Mixed Boundary Commission traced the pecked line of the Arbitrator's map on the ground, the demarcated frontier followed a much more twisting course than Arbitrator's line. By following the local water-parting on the ground the demarcation line deviated from the line on the map but did respect its direction. Respect for the direction of the line on the map, solid or pecked, is an important factor in a proper reconstruction of the Arbitrator's intention.

On the Arbitrator's map Cerro Gorra Blanca is touched by the pecked line; and before inferring from the depiction of this peak on the map that it is an obligatory point of the frontier line, it must be remembered the map cannot be used piecemeal, for it constitutes an indivisible whole. It is either accepted *in toto* or rejected *in toto*, but it cannot be accepted with regard to the obligatory status of Cerro Gorra Blanca, touched by the pecked line, when it is rejected with regard to the rest of the pecked section.

It may be agreed that Cerro Gorra Blanca is an obligatory point on the frontier, but at the same time it must be acknowledged that this is the case by virtue of the pecked line on the Arbitrator's map and that this line arrives at Gorra Blanca by following a specific direction. Since the unity of the documentary evidence cannot be disturbed, if Cerro Gorra Blanca is obligatory by virtue of the pecked line, so will be the other elements of this line, such as the direction and route which produce the sole appearance of this peak in the Award.

7. *The local water-parting according to the Arbitrator's map*

It must be pointed out that between two well-defined terminal points there can be only one local water-parting. It has generally been thought that the Award assumes a single local water-parting between the southern shore of Lake San Martín and Mount Fitzroy. As the report's prescription has been interpreted, there is no single local water-parting between these two points. This interpretation stems from the Spanish translation of the relevant part of the report, where "to" is rendered as "*hasta*".

It can be seen from an examination of the Arbitrator's map that the pecked line crosses the continental divide of the time, as depicted on the map. This crossing means that the local water-parting coming from Lake San Martín and the one which proceeds to Fitzroy after the crossing are not the same. The watershed in the first section flows to the Pacific Ocean, and the one in the second to the Atlantic Ocean. According to this map, Mount Fitzroy cannot be the other terminal point of a local water-parting running from Lake San Martín.

In fact, just as it is the case that a local water-parting cannot itself cross a watercourse, but that the frontier line running along the water-parting can cross rivers at the behest of the Arbitrator, so is it impossible for a local water-parting as such to cross the continental divide, and if it does so on the map it is because the Arbitrator has decided that the line should continue from the continental divide along another water-parting on the slope on the other side of the divide.

According to the Award map, Mount Fitzroy was not and could not be the other terminal point of the local water-parting running from the southern shore of Lake San Martín, but it could be the terminal point of another local water-parting originating from a summit on the continental divide of the time. This assertion is in conformity with the geography as it was then known, as can be seen from the Arbitrator's map. Thus, a distinction must be made between Mount Fitzroy as an obligatory point on the frontier line and Mount Fitzroy as the supposed terminal point of a single local water-parting running between two extreme points, boundary post 62 and Mount Fitzroy.

If the Arbitrator's map is interpreted in this way, it would be possible for at least two local water-partings to run between Lake San Martín and Mount Fitzroy.

8. *Examination of the arbitral report in conjunction with the Arbitrator's map*

Taken separately, neither the report nor the map settles this issue. The report speaks only of the local water-parting and it does not say where this parting is located. The only indication is that it heads towards Mount Fitzroy. The map states what is missing from the report, for it indicates the direction and path of the local water-partings which the Arbitrator adopted as the compromise line.

The direction and path of the line, solid or pecked, were determined by the compromise decision which the Arbitrator took after obtaining the consent of the Parties, and they must therefore be preserved. In fact, the compromise which determined the Arbitrator's line is one of the several grounds which concur in supporting the interpretation that the line marked on the Arbitrator's map must be followed in as close conformity as possible with the provisions of the instruments which make up the Award; in other words, unnecessary liberties or distortions of the Award's message must be avoided.

The geography of the time allows the assertion that people knew about the geographical feature which could be found in the zone and about the feature which was not sought and could not be found there. The pecked line indicates that there is here a geographical feature whose existence is known but whose details are not known, and the report says that this feature is the local water-parting.

The report states what must be looked for and identified in order to demarcate the line decided upon by the Arbitrator, thus transforming the pecked line into a precise line. Furthermore, the Arbitrator's map says that this search must not be carried out just anywhere but in the direction and along the path

marked by the pecked line. The significance of the pecked line must be that it represents, on the basis of the geographical knowledge of the time, the local water-parting, the only one mentioned in the report, and not the continental water-parting, which was situated some considerable distance away.

9. *Complementarity of the arbitration report and map*

The Award states that a detailed description of the line decided upon will be found in the arbitration report and in the lines drawn on the maps provided by the experts of Argentina and Chile. Thus, the Award refers at the same time and in the same provision to the arbitration report and map in connection with the details of the line which it prescribes in general terms (art. III).

The report and map have the same authority and neither takes precedence over the other. This consideration dispels any doubt which may have arisen with regard to the value of the Arbitrator's map. The line drawn on the map represents the Arbitrator's intention and, in conjunction with the report, it helps to identify the frontier line between boundary post 62 and Mount Fitzroy. Greater accuracy than was provided by these two instruments lay beyond the Arbitrator's grasp because he lacked adequate maps of the area. It is this additional accuracy which the present Court has to supply.

The arbitration report states that the frontier line, from the spur at longitude 72°47'W, shall "ascend the local water-parting to Mount Fitzroy". The Spanish translation of the phrase "shall ascend to Mount Fitzroy" is "*ascenderá hasta el Monte Fitz Roy*" [shall ascend as far as Mount Fitzroy], so that Mount Fitzroy is indicated as the terminus of the ascent and there is even a suggestion of the idea of continuous ascent as far as this terminus by means of the same single local water-parting.

This translation is not consistent with the geography known at the time and reproduced on the Arbitrator's map. In fact, this map showed Mount Fitzroy as located on the far side of the continental divide, so that it was physically impossible for a single local water-parting to run without interruption from the southern shore of Lake San Martín as far as Mount Fitzroy. A local water-parting with these characteristics cannot be found today, nor could it be found at the time, as the Arbitrator's map shows.

The English preposition "to" has several meanings in Spanish; for example: "*hasta*", as it was translated in this case, as well as "*hacia*", "*a*" and "*en dirección a*". Since Mount Fitzroy cannot be the terminus of a local water-parting which would be consistent with the translation of "to" by "*hasta*", the English preposition should be translated by "*hacia*", "*a*" or "*en dirección a*". If the Arbitrator had wished to indicate a local water-parting which ran from Lake San Martín all the way to Mount Fitzroy, he could have said "as far as", which is beyond doubt equivalent to "*hasta*", but that would not have been consistent with the known geography of this sector as it is shown on the Arbitrator's map. In order to render report and map compatible, "to" must be translated by "*en dirección a*" ["towards" or "in the direction of"]. It will immediately be noted that this translation is compatible with the possibility of several successive local water-partings all running in the direction of Mount Fitzroy.

If boundary post 62 and Mount Fitzroy are regarded as the terminal points of the local water-parting, then there is no local water-parting running between them as a single and unbroken line, i.e., in accordance with the definition of water-parting. There is certainly a water-parting consisting of continental and local stretches, but this circumstance is not consistent with the language of the arbitration report, which uses the term "local water-parting".

These stretches of continental water-parting did not become known until 1945. On the basis of the geography of the time the Arbitrator neither expected nor could expect that some section of the continental divide would be found in this zone, because this continental divide was depicted as situated far from that zone, and there cannot be, in a single area, two lines having the status of continental divide.

The pecked line indicates a geographical feature which is known to exist but has not yet been identified. The Arbitrator could not know that a continental divide existed here, because the geography of the time, represented on many maps produced and consistently accepted by the Parties, placed this divide to the east and south of the main block of the area subject to the present arbitration. The only features which the Arbitrator knew to exist in this area, a conclusion arrived at by a process of elimination, were local water-partings.

It does not seem appropriate to diverge from the language of the arbitration report to opt for a line which is not the local water-parting but to some extent local and to a great extent continental, both because that would amount to disregarding the clear language of the report and because one would be choosing a geographical feature which, although unknown in that location at the time of the report, was known to be found some distance away. If the line has to follow a single local water-parting running between two supposedly extreme points, boundary post 62 and Mount Fitzroy, the report's rule could not be applied on the ground, simply because such a line does not exist as such, nor, according to the Arbitrator's map, could it exist.

To conclude, the translation of "to" by "*hasta*", which suggests a single and unbroken local water-parting between the two extreme points, is not consistent with the language of the report supplemented and illustrated by the Arbitrator's map. In contrast, the translation of "to" by "*en dirección a*" is consistent with the message of these documents read in conjunction. Thus, such a reading points the interpretation in a different direction.

10. *A way of identifying the true course of the pecked line*

The arbitration report's rule, which directs that the local water-parting shall ascend to Mount Fitzroy, is the key to improving the accuracy of the Arbitrator's map, accuracy which it could not originally possess in sufficient degree owing to the incomplete geographical knowledge of the region in question.

The arbitral decision does not distinguish between the value of the pecked line and the value of the solid line. The Award itself refers only to the line drawn on the maps provided by the Argentine and Chilean experts. One of the criteria of interpretation states that when the author of a decision does not

offer an interpretation of a point, it should not be interpreted. Of course, this criterion cannot be absolute or apply invariably in all interpretation exercises, but the distinctions produced by the interpretation must be well-founded and carefully developed, for the interpretation is subject to the limiting factor of the mandatory content of the interpreted rule.

If a judge makes distinctions in a rule when its author has not done so, he is using a technical device to adapt the rule to the special features of the actual case and thus to comply with the true *intention* underlying the rule. The result is a specific rule better adapted to the object and purpose of the adjudication. But one should not be led astray by this device, because basically, although it is regarded as a use of implicit or discretional powers, it is a rule which the judge has created in order to dispense better and fuller justice.

This practice, by its nature, and especially in the case of interpretation of a decision which has the status of *res judicata*, as in the present case, must be based on a careful evaluation of the circumstances and implications in order to ensure that it is truly consistent with the interpreted text. In the present case there is no apparent need to make any fundamental distinction between the pecked and solid lines, mainly because that would distort the Arbitrator's intention. The report and the map, in conjunction, identify the pecked line accurately and preserve the Arbitrator's intention.

Nothing has been said, either by the cartographers or by the 1966 Court of Arbitration, about a possible discounting of the value of the pecked line. This line is a technical means of describing a particular situation—the total or partial lack of topographic surveys. The pecked line must therefore be followed but also adjusted in the light of improved geographical knowledge. The interpretation must be consistent with the known geography of the time at which the Award was pronounced, and the interpretation must be put into effect in conformity with the known geography of the time when it is made.

Such adjustments are necessary with respect both to the pecked line and to the solid line, as is confirmed by the experience of the Argentina–Chile Mixed Boundary Commission. This experience teaches that compliance with the direction of a line shown on a map, either pecked or solid, is an essential criterion in the adjustment of the line.

11. *The details shown on the Arbitrator's map*

There has been much talk of the details which, according to the Arbitral Award, are to be found on the Arbitrator's map. There are indeed several such details, in addition to the general direction in which the Arbitrator wished the compromise frontier line to be drawn. There are, for instance, these two details: deviating from the straight line which it should have been possible to draw in order to reach Mount Fitzroy, the line makes a westward inflection to touch Cerro Gorra Blanca; and it arrives at Fitzroy by way of the shortest possible stretch of the continental divide of the time.

Any adjustment of the map's pecked line must respect these details. Accordingly, it should touch Cerro Gorra Blanca and reach Mount Fitzroy by way of the minimum possible incursion into the area lying to the east and south of what was the line of the continental divide at the time.

12. *A course for the line which might satisfy the 1902 Award*

The question of local water-partings in the area has been discussed with the Court's expert, Dr. Rafael Mata Olmo. In his judgement, the criterion of following several local water-partings allows a large number of lines, even, in theory, an infinite number. In any event, there is no local water-parting issuing from the terminal point at the southern end of the Cordón Martínez de Rozas. "It is important to point out that, whatever the line, it would always include a small section of continental water-parting."

Thus, all the possibilities include a stretch of continental water-parting. This circumstance might prompt thoughts of an entirely arbitrary line which would divide the zone as if in implementation of a second *Compromis* or on the basis of a solution of equity. However, such an extreme recourse is unnecessary and unjustified, for the interpretation of the Award can in fact be applied on the ground.

The inclusion of a section of the continental divide would not be a result of the interpretation of the 1902 Award but a necessity of the application of the appropriate interpretation. There is no other way of acting on the combined instructions of the report and the Arbitrator's map. The interpretation is made in conformity with the geography of the time; it has to be applied in conformity with the geography of today. With regard to such application, as has been pointed out during the Arbitral proceedings, "the ground gives the orders".

But there is another reason, and a very important one, for including a certain section of the continental divide: the section which is required to ensure that these lines correspond exactly with the pecked line on the Arbitrator's map.

From the many possibilities available the expert has found that three lines are consistent with the features described in the decision. They start from the summit at altitude 1,767 metres, to the south of the Cordón Martínez de Rozas, and touch Cerro Vespigniani. The first line consists of seven small local water-partings and crosses Lake del Desierto, two small glacial lakes and five rivers.

The second line lies fairly close to the pecked line of the Arbitrator's map and therefore is more consistent than the first line with the combined instructions of the map and the report. It consists of two local water-partings and touches Cerro Milanesio before arriving at Cerro Gorra Blanca. The line of the Arbitrator's map headed towards Cerro Gorra Blanca not towards Cerro Milanesio, and therefore this second line is not fully consistent with the line which has to be identified.

The third line, which fits best and closest with the line on the Arbitrator's map, touches Cerro Vespigniani, crosses the Rivers Cañadón de los Toros and Milodón, passes across Cerro Cagliero to Cerro Gorra Blanca and terminates on Mount Fitzroy, having followed a water-parting which is partly local and partly continental. This line, which reaches Cerro Gorra Blanca by way of four successive local water-partings, complies fairly well with the combined instructions of the graphic language of the Arbitrator's map and the provision in the report concerning the local water-parting.

Since there is no single local water-parting in this area and since the Arbitrator could not have believed one to exist, as his map shows with its crossing of the continental divide of the time, the adoption of successive local water-

partings was a necessity from the outset. And even on this basis two or four successive water-partings can be chosen, even though the advantage lies with the one lying closest to the line on the Arbitrator's map because the purpose of the exercise is to identify that line. There are therefore grounds for giving preference to the line consisting of successive local water-partings which fits best and closest with the line of the Arbitrator's map.

It must be pointed out that the possibilities described here involve crossing Lake del Desierto, which was not taken into account in the arbitral proceedings because each Party maintained that it lay entirely within its territory. Now, when the experts draw the pecked line of the Arbitrator's map on a map of today, it emerges that the pecked line, once identified on the ground, crosses Lake del Desierto at an angle, leaving about a third of the volume of its water to the north and two-thirds to the south. Thus, Lake del Desierto would be crossed even when the line of the Arbitrator's map is followed exactly.

Since this exposition is not concerned with the drafting of an award, it can close without going into the details of the line which is most consistent with the combined requirements of the Arbitrator's map and the arbitration report. Furthermore, on the basis of the summary description given here the cartography experts would be able to identify it, in an idle moment, to satisfy their curiosity.

And thus I bring to an end this protracted discourse, whose length may be excused, I hope, by the subtle and delicate nature of this dissenting opinion.

Reynaldo Galindo POHL

DISSENTING OPINION OF MR. SANTIAGO BENADAVA

I regret that I do not support the decision taken by the majority of the members of this Court. I explain below the reasons for my dissent.

I will not refer to each and every one of the points on which the Award is based nor will I cite, except in a few instances, the texts of the Award. Instead, I will present the line of reasoning which has led me to dissociate myself from the majority view and vote against the Court's decision.

The Court's task

The task entrusted to this Court by the Parties is defined in article I of the *Compromis* of 31 October 1991: "to determine the line of the frontier in the sector between boundary post 62 and Mount Fitzroy . . ." The method by which this is to be achieved is specified in article II, paragraph 1: "The Court shall reach its decision by interpreting and applying the 1902 Award in accordance with international law".

Both Parties recognize that the 1902 Award is fully valid and that the present case is concerned only with interpreting and applying it, not with revising or amending it. The interpretation of the Award cannot lead to revision of what the 1902 Arbitrator decided with the force of *res judicata*.

The interpretation of the 1902 Award by this Court has not been requested by means of an application for interpretation submitted to the same Arbitrator who pronounced the Award. This Court is independent of the 1902 Tribunal and of any other body. Its competence to carry out the task entrusted to it derives from the agreement between the Parties expressed in the 1991 *Compromis*.

The 1902 Award consists of three instruments: the Award itself, signed by Edward VII, the report which the Arbitral Tribunal submitted to the King, and the maps on which the Tribunal drew the line decided upon, which was approved by the Arbitrator. The intention of the Arbitrator must be understood on the integrated basis of the instruments which convey it.

The Court's first duty in interpreting the Award is to try to discover the natural meaning which is to be attributed to its terms, in the context of these terms and taking into account the circumstances of the Award's pronouncement. If by applying this criterion the interpreter can assign a conclusive meaning to the texts, he will need to go no further; but, if this cannot be done, he will be allowed to use other auxiliary means such as, for example, the preparatory work of the Award which is being interpreted.

In any event, as it performs its function of interpretation the Court must take account of the geographical reality facing the 1902 Arbitrator when he pronounced his Award. In contrast, it must disregard any geographical circumstance which was unknown at the time of the first arbitration.

The Award which has prompted this dissenting opinion bases its decision on two fundamental points:

1. The whole area claimed by Chile in the present arbitration lay outside its extreme claim in the 1898-1902 arbitration and therefore outside the territorial competence of the 1902 Tribunal. As a result, the 1902 Award should not be interpreted in such a way as to assign to Chile an area which it did not claim in the 1898-1902 arbitration.

2. The line between boundary post 62 and Mount Fitzroy, described in paragraph 151 of the Award, corresponds, according to the Award, to the local water-parting indicated by the 1902 Award in this area. This line is basically the one proposed by Argentina.

I shall take these two points up one by one:

First question: Was the area currently in dispute outside the Chilean claim in the 1898-1902 arbitration?

This Award, citing statements made by the Chilean expert in 1898 taken from written submissions by Chile to the 1902 Tribunal, concludes that Chile adopted as the general criterion for defining its claim in the earlier arbitration the principle of "the natural and effective continental water-parting.. ., i.e., the water-parting present in nature . . .", regardless of its representation on the maps (para. 94). This was the principle which, according to Chile, faithfully interpreted the boundary agreed in the 1881 Treaty and the 1893 Protocol.

The Chilean claim had been limited, according to the Award, to the Pacific basins and Chile had thus abandoned any claim to Atlantic slopes, including the basin of the River Gatica or de las Vueltas, which "was left in its entirety on the other side of the frontier *regardless of its extension*" (para. 104).

The Award goes on to say that the Court must reject any interpretation implying that the British Arbitrator broke the rule which prohibited him from deciding *ultra petita partium* (awarding more than requested) by assigning to Chile territory situated to the east of its extreme claim (para. 106).

The position taken by the Court on this point is basically the same as the one constantly asserted by Argentina during the various stages of the present arbitral proceedings.

Chile's extreme claim in the 1898-1902 arbitration

I am not convinced that Chile's extreme claim between 1898 and 1902 amounted to no more than a theoretical principle divorced from the maps on which it was depicted.

The records of the experts demonstrate the importance attached to the maps which each of them produced. In fact, each expert submitted to the other a depiction of the course of the general frontier line which he advocated, in accordance with the delimitation principle which he supported, on a map and as a numerical list of points and sections. The points of agreement and disagreement were identified by comparing the lists of toponyms, points and sections.

This conclusion is confirmed by the Argentine map which appears in the annex to the Argentine memorial as No. 19. This map, published in 1902 shortly after the conclusion of the arbitration, depicts in detail the proposals made by the Argentine and Chilean experts at their meetings in 1898.

As Judge Galindo Pohl states in his dissenting opinion appended to this Award, "the principles came on the scene as the basis, foundation and legal justification of concrete lines which were represented by points and sections designated by numbers and described by toponyms, as can be seen from the records of the experts".

During the 1898-1902 arbitral proceedings both Chile and Argentina submitted to the Tribunal several maps showing the lines of their respective claims. These lines gave graphic expression to the principle which each Party maintained as its extreme claim. In the course of the arbitration a number of areas were explored and geographical knowledge was acquired which led to modification of the maps and a more accurate depiction of the line which each Party represented as the expression of its territorial claim. The map labelled "plate IX" was the last one submitted to the Arbitrator by Chile on which it presented its territorial claim.

The maps and the lines drawn on them crystallized the claims of the Parties and confirmed the Tribunal's view of the extent of the area subject to its decision.

Chile's extreme claim consisted of the continental water-parting, as known at the time of the arbitration, and was shown on the maps submitted to the British Tribunal and used by it.

The Court's perception of the extreme claims of the Parties in the 1898-1902 arbitration seems to me of fundamental importance.

In his "Narrative Report of the Chile-Argentine Boundary Commission" Holdich underlines the importance of the maps in the preparatory work of the Award. Among other terms and statements the "Narrative Report" contains the following very significant ones:

> 1. . . . the field would be at once open for the Tribunal to discuss or to decide upon a boundary of compromise *on the map basis* (our italics).
>
> 2. . . . there was a most satisfactory general agreement between the values of most of the important points fixed when the two sets of maps were critically examined.
>
> 3. I am confident that we may take the Argentine maps as they stand and depend on them . . . as the basis for any decision that the Tribunal may advance.

It is therefore perfectly clear that, according to Holdich, a boundary of compromise would be decided "on the map basis".

Furthermore, it seems obvious to me that the Arbitrator adopted his compromise solution on the basis of the lines proposed by the Parties.

And it could not have been otherwise. In order to adopt a compromise boundary between these claims the Arbitrator had to work within a specific spatial ambit. And this ambit had necessarily to be circumscribed by the lines which, on the maps which he used to pronounce his Award, represented the extreme claims of Chile and Argentina.

If the 1902 Arbitrator had decided to pronounce exclusively on the basis of one or other of the *principles* advocated by Chile and Argentina, he might perhaps have dispensed with the lines which illustrated these principles on the maps; but from the moment when, with the authorization of the Parties, he opted for a compromise boundary he had to draw this boundary within a spatial ambit which could only have consisted, at the time, of the lines which illustrated the principles advocated by each Party on the map which he used for his decision.

It would have been *a logical and practical impossibility* for the 1902 Arbitrator to have decided upon a compromise boundary between two abstract principles or concepts. The compromise boundary was a line which lay between the two competing lines, not between two conflicting principles. It is possible to divide and distribute an area whose perimeter is known but not one whose perimeter is unknown.

Thus, the 1902 Arbitrator could not have defined a boundary and drawn a line representing it across an area one of whose extreme points (the continental divide) was "moveable", i.e., which could be shifted as the geographical knowledge of the area improved. And it should even be asked what would have happened if he had defined a boundary in a given zone by means of a local water-parting which was perfectly identifiable on the ground and then,

many years later, it turned out that the natural and effective continental water-parting lay. . .to the *west* of the Arbitrator's line. Which would have prevailed: the Arbitrator's boundary or the "moveable" continental divide?

I think, therefore, that the 1902 Tribunal's perception of the extreme claims of the Parties consisted of the lines shown on the maps which they submitted to it (particularly Argentine map XVIII-8), which depicted these claims graphically.

A mere glance at the final maps made available to the 1902 Arbitrator (either Argentine map XVIII-8 or the Chilean map on plate IX) makes it obvious that the line representing Chile's extreme claim clearly lay within the area of the present dispute. This area was, therefore, covered by the Chilean claim in the 1902 arbitration. This was also the understanding of the Arbitrator since, believing that this area lay within his territorial competence, he drew within it the line of the frontier between Chile and Argentina.

The frontier line on the Arbitrator's map

Article V of the Award states:

> A more detailed definition of the line of frontier will be found in the Report submitted to Us by Our Tribunal, and upon the maps furnished by the experts of the Republics of Argentina and Chile, upon which the boundary which We have decided upon has been delineated by the members of Our Tribunal and approved by Us.

Thus, the Arbitrator's map is a component of the Award, and the frontier line was delineated on this map by the 1902 Court.

During these proceedings Argentina has recognized the importance and value of the Arbitrator's map:

> Thus when a "map" is part of the international instrument subject to interpretation, as in the present case, its value as evidence of the meaning and scope of the instrument in question is legally and logically obvious (Argentine counter-memorial, p. 65).
>
> And the Award maps constitute the graphic representation of the criteria established and defined in the other two documents. Consequently, the two documents referred to in article V are in reality complementary to and declaratory of the Award itself (Argentine memorial, pp. 441-442).

Argentina itself has also cited the Arbitrator's map in support of its argument that the boundary decided upon by the Award in the disputed area passes across Cerro Gorra Blanca, a geographical feature which is represented on the map but not mentioned either in the Award or in the arbitration report.

However, Argentina argues in this submission that the Arbitrator's map is merely indicative of the real boundary, which would be identified on the ground by the demarcation work in the relevant stretch of the frontier. This conception of the line, which renders it devoid of meaning, if not totally non-existent, seems to me unsustainable.

In my opinion, the line drawn on the Arbitrator's map has great legal force. It is not an arbitrary line. It represents the essential course of the frontier and indicates its general direction. In addition, this line shows the distribution of territory which the Arbitrator proposed to make in the area.

The pecked part of the line on the map should not be discounted. The Arbitrator did not treat the solid and pecked parts of the line differently. As the 1966 Award pointed out in the Palena/Rio Encuentro case: "A pecked line is the normal indication for a feature which is known to exist but whose position has not been accurately located". (United Nations, *R.I.A.A.*, vol. XVI, pp. 150-151)

In its pecked part the line can be only approximate, but this does not mean that it is superfluous. If the pecked section was devoid of legal significance, the Arbitrator would not have drawn it. But he not only drew it but stated in the Award that a *more detailed* description of the line of frontier would be found in the report and in the line drawn on his map.

It cannot be denied that the pecked line might possibly require adjustment when it is applied on the ground. But the same is true of the solid line, as is demonstrated by the practice of the Mixed Boundary Commission. This fact does not divest the line of value as an indicator of the general direction of the frontier.

The line on the Arbitrator's map shows graphically that the area which it crossed lay within Chile's claim and the territorial competence of the 1902 Arbitrator. The Arbitrator could not have allowed a line, solid or pecked, to pass through territory which he regarded as outside his competence.

The line on the Arbitrator's map has moreover a very important function: it is an essential element for resolution of the fundamental issue of the course of the frontier line between boundary post 62 and Mount Fitzroy.

The line drawn on the Demarcator's map

The significance of the line drawn on the Demarcator's map has been assessed differently by the Parties.

Argentina has argued that the Demarcator's task was to mark on the ground, by erecting boundary posts, points on the frontier line decided upon by the Award. The 1903 demarcation was not a delimitation (which had already been effected in the previous year) and therefore it is not an integral part of the 1902 Award. The 1903 maps produced by the demarcators are official evidence of the boundary posts erected. Their purpose was not to amend or alter the Award line but only to identify the position of each boundary post erected. In all matters unconnected with the task of demarcation entrusted to the Demarcator—to erect boundary post 62—his maps have, for the purposes of the 1902 Award, merely the possible value of the Demarcator's personal reading of the Award's provisions.

Chile has argued that the demarcation is part of the 1902 Award and report and that the Demarcator's map constituted the final and authorized representation of the frontier decided upon by the Award. On this map, according to Chile, the Demarcator altered the representation of the frontier.

In his submission before the Court Professor Lauterpacht, one of Chile's counsel, spelled out Chile's position on this point:

> Indeed, in law, the Demarcator's final maps must be held to have replaced the Award maps. Should I be wrong in this submission, then the authoritative quality of the demarcation and of the Demarcator's map as a contemporary interpretation of the Award by someone specifically appointed to apply (and therefore interpret) the Award and its map, must be upheld. (record No. 4 of 14 April 1994, pp. 82-83).

* * *

In the agreement of 28 May 1902 on demarcation of the frontier between Chile and Argentina the two Governments agreed "to ask the Arbitrator to appoint a commission to fix on the ground the boundary to be determined by his Award".

The Parties did not agree to authorize this commission to adapt or modify the Award line. The commission only received from the Parties competence to fix on the ground, by technical operations, the boundary determined by the Award.

The demarcation arrangements agreed between the experts of Argentina and Chile—the "General Directions" given by Holdich to the officers responsible for the demarcation—and the other circumstances of the demarcation should, in my view, be interpreted against the background of the demarcation agreement of 28 May 1902, which establishes the terms of reference of the Demarcation Commission.

I am not convinced, then, that the Demarcator had been authorized to amend or replace the line of the Arbitrator's map and that, therefore, the line drawn on his own map had that effect.

However, I think that the Demarcator's map, although it does not coincide with the line drawn by the Arbitrator, does support the general direction of this line. Both lines run in the same direction through the area now in dispute. Both confirm that the spatial ambit within which both the Arbitrator and the Demarcator worked was within their respective spheres of competence.

How and why did the 1902 Arbitrator award Atlantic territory to Chile?

The Arbitrator's knowledge of the course of the continental *divortium aquarum* could not have been different from that of the Parties themselves at the time of the 1898-1902 arbitration, which they represented on the maps submitted to the Tribunal.

These maps were:

(*a*) The ones sent by each of the Parties to the Marquis of Salisbury in 1899;

(*b*) The one submitted to the Arbitral Tribunal by Argentina in 1901 (map X);

(*c*) The map submitted by Chile to the Arbitral Tribunal in 1902 (plate IX); and

(*d*) Map XVIII-8, sent to the Arbitrator by Argentina in October 1902. This is the map which the Arbitrator regarded as the most satisfactory of the imperfect maps of the era, and so he used it and accompanied his Award with a line representing the boundary decided upon in the region.

On all these maps the continental *divortium aquarum* was represented in the region subject to the present dispute by a north-south line which turned west and then followed a generally east-west direction; the waters which flowed southwards from this line to discharge in the Atlantic Ocean constituted the Atlantic basin; those which flowed northwards from the line to discharge in the Pacific Ocean constituted the Pacific basin.

This was the 1902 Arbitrator's understanding of the course of the continental *divortium aquarum* in the region and it was used as the basis for the preparatory work of the arbitration.

This was also the understanding of the *divortium aquarum* shared by the Parties and it determined the form in which they represented their respective claims on the maps.

It has not been proved in the present arbitration that the 1902 Tribunal had any other geographical information than was contained on the maps which the Parties furnished to it, in particular map XVIII-8, which the Arbitrator used and appended to the Award.

There is no doubt that at the time the geographical knowledge of the region was incomplete, for it had been little explored, so that the line of the continental *divortium aquarum* showed some variations from map to map. It is also certain, as was to be discovered many years later, that the continental *divortium aquarum* was shown in the wrong place on the maps furnished by the Parties to the 1902 Tribunal. But that is another matter. My concern is to emphasize that the 1902 Arbitrator's understanding of the location of the continental *divortium aquarum*, and of the Atlantic and Pacific basins separated by it, derived exclusively from the geographical information which the Parties shared and furnished to him during the arbitration. This information led the Arbitrator to conclude that the area in dispute located to the north of the continental *divortium aquarum* on the maps of the time was in the Pacific basin of Lake San Martín-O'Higgins.

From this geographical standpoint the Pacific basin of this lake seemed to extend rather more to the south than it does in fact, even encompassing the continental *divortium aquarum* depicted on the maps of the era.

Thus, it is understandable that, when he defined the frontier in the area, the 1902 Arbitrator should believe that he was dividing the Pacific basin of Lake San Martín as it was known on the basis of the geographical knowledge reflected on the maps.

This is clear from the 1902 Award itself, as we shall now explain.

Article III of the Award describes the limit decided upon by the Arbitrator from Pérez Rosales Pass to Mount Fitzroy. The penultimate paragraph of this article states:

> The further continuation of the boundary is determined by lines which We have fixed across Lake Buenos Aires, Lake Pueyrredón (or Cochrane), and Lake San Martín, the effect of which is to assign the western portions of the basins of these lakes to Chile, and the eastern portions to Argentina, the dividing ranges carrying the lofty peaks known as Mounts San Lorenzo and Fitzroy.

Between Lake San Martín and Mount Fitzroy, as the Arbitrator saw it, there was only one basin: the Pacific basin of the lake. The Arbitrator used a straight line to divide Lake San Martín between Chile and Argentina, and he also divided *the basin* of this lake, as he understood it, by means of a local water-parting, assigning the western part of the basin to Chile and the eastern to Argentina.

Of course, the division of what the Arbitrator considered to be the Pacific basin of Lake San Martín had necessarily to be effected by a local water-parting. The continental divide, which separates Atlantic from Pacific basins, cannot be used to divide a single basin—in this case the basin of Lake San Martín—into two parts: one western and the other eastern. What is more, the continental water-parting lay well to the south of the area at present in dispute and followed an east-west direction.

It is revealing that Captain Robertson realised that the continental water-parting in the zone covered by his report was *an utterly unsuitable [boundary]* (*Annex of Documents*, Argentine counter-memorial, vol. A, No. 2, "Report on the Southern Section of the Chile-Argentina Boundary").

Accordingly, when the Arbitrator defined the boundary in the area currently under dispute he did so in the absolute conviction that it was on a Pacific slope lying within the lines representing the opposing claims of the Parties.

It was not until more than 40 years later that the United States aero-photogrammetric survey "filled in" the central blank area on the maps, verified the true course of the continental divide, which "rose" from the lower to the upper part of the map, and made it clear that the area in dispute did not belong to the Pacific basin of Lake San Martín, as had been believed up till then, but to the Atlantic basin of Lake Viedma.

It could perhaps be argued hypothetically that if the 1902 Arbitrator had had an accurate knowledge of the area's geography he would not have awarded to Chile any part of the Atlantic basin of the River de las Vueltas. That is possible. But neither the Arbitrator nor the Parties had such knowledge, and the Award was pronounced on the basis of what was known at the time and not of what came to be known subsequently. Following this line of speculation it might also be supposed that if the Arbitrator had not awarded to Chile any part of the Atlantic basin of the River de las Vueltas he would have compensated Chile with a larger part of the Pacific basin of Lake San Martín.

The report must be interpreted in the light of the geographical knowledge on which it was based

Geographical knowledge acquired subsequent to the Award cannot be used as the basis for its interpretation. The Award and the instruments of which it consists must be interpreted in the light of the circumstances of the time and, in particular, the geographical knowledge of which the Arbitrator took cognizance in pronouncing the Award. The task of this Court is to try to interpret the frontier which the 1902 Arbitrator fixed for the disputed zone and not the one which he would have fixed if he had had an accurate and full understanding of the true geography.

Several precedents from the case law confirm this view.

The Permanent Court of International Justice, in its Interpretive Judgment No. 8, had occasion to state:

> Moreover, the Court, when giving an interpretation refrains from any examination of facts other than those which it has considered in the judgment under interpretation, and consequently all facts subsequent to that judgment (P.C.I.J., *Collection of Judgments*, Series A, No. 13, p. 21).

And the Court of Arbitration which heard a dispute between France and Great Britain concerning delimitation of the continental shelf stated in its 1978 interpretative decision:

> [Interpretation] poses the question, what was it that the Court decided with binding force in its decision, not the question what ought the Court now to decide in the light of fresh facts or fresh arguments (United Nations, *R.I.A.A.*, vol. XVIII, p. 296).

This is also the opinion of the most authoritative doctrine. As Charles de Visscher writes:

> L'arrêt soumis à interprétation est le cadre dans lequel celle-ci se meut et d'où il ne lui est jamais permis de sortir. Il en résulte que l'arrêt interprétif écarte toute appréciation de faits non envisagés dans l'instance principale. (*Problèmes d'interprétation judiciaire en droit international public*, Paris, 1963, p. 256).[5]

The effect of res judicata

The Award—as both Parties acknowledge—is valid and is protected by the effect of *res judicata*. What was resolved by the Award is resolved. The Award became a legal reality sufficient in itself and having its own content.

Given the clear meaning of the Award which, in my opinion, accorded to Chile a substantial part of the basin of the River de las Vueltas, this decision must be respected, and there is no need to try to unravel the formulas which the Parties used to present their extreme claims in the 1898-1902 arbitration. The *res judicata* rules, and it prevails over such formulas in the event of any inconsistency with them.

* * *

I have tried to demonstrate above that:

(1) Chile's extreme claim in the 1898-1902 arbitration included a large part of the basin of the River Gatica or de las Vueltas. This is clear from the lines which represented this claim on the maps submitted by the Parties to the 1902 Tribunal.

(2) On these maps the continental divide was placed in the southern part of the zone currently in dispute and followed an east-west direction. This geographical information led the Arbitrator to think that the territory situated to the north of the continental divide thus depicted was part of the Pacific basin of Lake San Martín-O'Higgins and not of the Atlantic basin of the River de las Vueltas. On this understanding the Arbitrator proceeded to divide what he believed was a Pacific basin by means of a local water-parting. Pursuant to this decision Chile was awarded a large part of the basin of the River de las Vueltas.

(3) The Award map shows clearly that the 1902 Arbitrator, when he drew the

[5] The judgment subject to interpretation is the framework in which the interpretation operates and from which it is never allowed to depart. The result is that an interpretative judgment eschews any assessment of facts not considered in the principal court.

line shown on this map through the zone currently in dispute, believed that the zone was within the scope of his decision. The Demarcator's map confirms this.

(4) Forty-three years later, aero-photogrammetric surveys by the United States established that the continental divide in the region takes a different direction, more to the north, and that the disputed zone is not part of the Pacific basin of Lake San Martín-O'Higgins, which does not extend so far south, but is part of the Atlantic basin of Lake Viedma.

(5) The 1902 Award is valid and binding on the Parties. It produced the effect of *res judicata*. What it decided is decided, even if it was decided on the basis of geographical information which almost half a century later proved wrong. The new geographical discoveries constituted a "new fact" which cannot alter what was decided by the Award or serve as the basis for its interpretation.

(6) The fact that the Arbitrator awarded to Chile territory which was believed to be Pacific but proved to be Atlantic cannot be regarded as a decision taken *ultra vires*. The Arbitrator acted within what he thought were the extreme claims of the Parties as graphically represented on the maps which they submitted to him.

Second question: The line drawn by this Court and the continental water-parting

This has been one of the most controversial key points in these proceedings. That is understandable. The arbitration report, which gives "a more detailed definition of the line of frontier", states that the boundary between the point on the southern shore of Lake San Martín which it designates and Mount Fitzroy is "the local water-parting".

According to Argentina, a "local water-parting" in the sense of the Award is one which separates waters in a specific sector between two specified points. In Argentina's opinion, there is nothing at all to prevent a local water-parting from including a stretch of the continental divide. It would not thereby lose its local character. In the present case, Argentina argues, there is a local water-parting between boundary post 62 and Mount Fitzroy which, although coinciding in part of its course with the continental water-parting, corresponds to the line between the two points defined by the 1902 Arbitrator.

Several Argentine submissions state that in the present case the local water-parting between boundary post 62 and Mount Fitzroy "coincides" with a stretch of the continental divide. This language is ambiguous. The two water-partings can never "coincide". What happens in the present case is that the water-parting between the two points contains a section of the continental divide.

Chile, however, makes a sharp distinction between continental and local water-partings. A continental water-parting is one which separates waters flowing to different oceans; a local water-parting is one which divides waters flowing to one same ocean. According to Chile, a local water-parting cannot include segments of the continental divide without losing its local character.

The distinction between continental and local water-parting is noted in the preparatory work of the 1898-1902 arbitration. For example, the "Additional Document" submitted to the Arbitrator by Holdich in April 1899 refers to ". . . [chains or ridges] broken here and there by the passages of rivers which rising on the slopes of one side of the chains pass through the axis of the chain to the other side. . ." In such cases, he adds, the water-parting would be "local" and not "continental" ("Chile Hearing Book", 13 April 1994, document No. 1).

This passage gives one to understand that, according to Holdich, a local water-parting, in contrast to a continental one, divides waters which flow to one same ocean.

Argentina itself recognized the same distinction. For example, the "Argentine Evidence of 1901" states:

> It is impossible to imagine that the line which separates waters running to the two oceans should penetrate into the inlets of one of them. The simple fact of the penetration would show that the watershed was local and not general, since the waters, in spite of separating, would fall only in one of the seas (p. 280).

The arbitration report mentions three kinds of water-parting: water-parting (unqualified), continental water-parting and local water-parting.

The term "continental water-parting" (*divortium aquarum*) has not given rise to any difficulties of interpretation. It separates waters flowing to the Pacific from those flowing to the Atlantic. It is used three times in the report.

The term "local water-parting" appears seven times in the report. In all seven cases the local warter-parting separates waters flowing to one same ocean: the Pacific. In all these cases it also constitutes a boundary between a point situated on the bank of a river or lake and a peak (or vice-versa) or a boundary between two peaks. In no case does the water-parting so named encompass a section of the continental divide.

What is more, the report itself, having stated that the frontier between boundary post 62 and Mount Fitzroy is the local water-parting, adds in the same paragraph that the frontier shall follow "the continental water-parting to the north-west of Lake Viedma". It seems to me very significant that in one six-line paragraph the Arbitrator should name two different kinds of water-parting, for this indicates the care with which he used the terms.

The generic term "water-parting", which appears 17 times in the report, refers either to a continental water-parting or, more often, to a local one. At times it also denotes a "mixed" line which combines a local water-parting with a segment of the continental water-parting.

The report was very precise and consistent in its use of the different categories of water-parting. It never designated as local water-parting a line which included a segment of the continental. The Arbitrator, consistent with the general practice of the Award, would simply have designated such a line "water-parting" without any qualification.

Thus, it is not admissible to describe a "mixed" water-parting as "local water-parting" by the sole fact that it runs between two points in a specific area or locality. By the same criterion it would be possible to describe as "local" a segment of the continental divide which formed the boundary between two points, and this seems to me absurd.

The line which the 1902 Arbitrator prescribed as the frontier between the south shore of Lake San Martín-O'Higgins and Mount Fitzroy was, in his opinion, a local water-parting in the strict sense (not a "mixed" one). And it must have been so because the Arbitrator used it to divide what he believed was a Pacific basin of Lake San Martín-O'Higgins—and one same basin, be it Atlantic or Pacific, can only be divided by a local water-parting, not by a "mixed" one.

Furthermore, at the time of the arbitration the continental divide was located on the maps to the south of the zone currently in dispute and therefore it could not be used by the Arbitrator, not even in part, in the sector in which he used a local water-parting.

This Court relies on the principle of practical effect to confirm that the water-parting running between boundary post 62 and Mount Fitzroy corresponds to the local water-parting envisaged in the report as the boundary between the two points. I think that, by doing so, the Court has gone too far. This water-parting is not a local one in the sense used in the 1902 Award. And it is not the function of the interpreter to "improve" the instrument which he is interpreting—in this case the 1902 Award—in order to bring it into line with what he regards as its full purpose.

Thus, my conclusion on this point is that the frontier prescribed by the Arbitrator between the current boundary post 62 and Mount Fitzroy was the local water-parting in the sense which I have defined and not a water-parting which includes a section of the continental divide, as Argentina proposes.

Now, it is an indisputable fact that there does not exist on the ground, between the two specified points, a continuous local water-parting separating only waters flowing to one same ocean.

However, the Award of this Court concludes that the water-parting between boundary post 62 and Mount Fitzroy is a local water-parting which does not lose its local character because it includes in part of its course a section of the continental divide.

The subsequent conduct of the Parties

The subsequent conduct of the Parties illustrates their understanding of the meaning and scope of the 1902 Award. Although such conduct is not a decisive criterion of interpretation, it does help to point the direction and support the conclusion reached by the interpreter.

From the voluminous materials submitted by the Parties to this Court I have identified two categories of acts: the production of official maps by both Parties, and their administrative acts relating to the zone.

The cartography, taken as a whole, shows that up to 1953 Chile depicted on its official maps of the zone a frontier which followed the line of the Arbitrator's map, while Argentina used on its official maps, up to 1969, a frontier which corresponded in general terms with the line on the Demarcator's map. Not once up to those dates did the Parties depict any substantially different lines on their official maps.

The most important and significant of the administrative acts cited seem to me to be the Freudenburg Concession, granted by Chile in 1903, and the land titles, also Chilean, granted to Ismael Sepúlveda (1937) and Evangelista Gómez (1939), the limits of which lay to the south and east of the frontier claimed by Argentina in this arbitration.

These administrative acts were published in legal form. But Argentina never entered any protest, reservation or claim with respect to them, as it would have done if it had considered that they infringed its sovereign rights in the region.

Argentina did not prove in these proceedings that before 1965 it carried out any administrative acts in the area which has been the subject of this arbitration.

The claims of the Parties in the present arbitration

The task of this Court is to decide on the course of the frontier line between boundary post 62 and Mount Fitzroy. In carrying out this task it is not obliged to opt for either of the lines proposed by the Parties. The line claimed by each Party in these proceedings is no more than a proposal made to the Court. The Court may accept one or the other, or neither of them, depending on whether it considers that the proposed line corresponds to the frontier between boundary post 62 and Mount Fitzroy prescribed by the Award.

A. *The Argentine line*

In my opinion, the line proposed by Argentina as the course of the frontier between boundary post 62 and Mount Fitzroy does not satisfy the essential condition laid down in the arbitration report for the frontier in this sector: to follow a local water-parting. The Argentine line is a "mixed" line consisting of a segment of the continental divide and segments of local water-partings.

It must be borne in mind that the report's description of the frontier between boundary post 62 and Mount Fitzroy is very brief and concise ("and shall ascend the local water-parting to Mount Fitzroy"). Each word has its meaning within this context. To disregard the word "local" is to rob this brief description of an essential element and thus to vitiate its content.

The line proposed by Argentina is, moreover, undermined by the fact that the 1902 Arbitrator disregarded the Robertson-Holdich frontier proposal, at least in the area to the north of Cerro Gorra Blanca.

In fact, Captain Robertson, a member of the Technical Commission, made two alternative proposals for the boundary line between the neighbourhood of the River Mayer and Mount Fitzroy. The first proposal coincides from Cerro Trueno to Cerro Gorra Blanca with the current Argentine claim; the second lies further to the east along the continental divide identified on the map of Riso Patrón. Both proposals were examined by Holdich, who decided to put to the Tribunal a line corresponding to Robertson's first proposal.

As noted in the preparatory work, the Arbitrator disregarded the line recommended by Colonel Holdich and drew another line lying rather more to the west. The reason why he did this, without doubt, was to award to Chile more territory along the frontier from the extreme north of the Florida Peninsula in order to avoid, in the words of Robertson's report, assigning to Argentina "all the territory which has any potential value" and to Chile "an almost impenetrable mass of rugged and inhospitable peaks".

Nor does the line claimed by Argentina follow the direction of the Arbitrator's line, which, as I have pointed out, represents his intention with respect to the course of the frontier and the distribution of the territory delimited by it. On the contrary, the Argentine line ignores the Arbitrator's line and takes a totally different direction. Argentina thus disregards one of the basic instruments of the 1902 arbitration and renders it devoid of any real meaning.

As I see it, the assertion that the line claimed by Argentina does not correspond to the frontier decided upon by the Award is confirmed by the fact that Chile carried out sovereign acts to the south and east of the Arbitrator's line without the Argentine Government entering any protest or reservation. I refer in particular to the Freudenburg Concession and to the grants of land titles to Ismael Sepúlveda and Evangelista Gómez. Nor has Argentina proved that it carried out any administrative acts relating to the disputed zone before 1965.

Furthermore, almost all of the many official Argentine maps produced between 1903 and 1969 depict the frontier in the zone as following basically the Demarcator's line.

My conclusion is, then, that the course of the frontier between boundary post 62 and Mount Fitzroy proposed by Argentina does not correspond to the frontier line between these two points decided upon by the 1902 Arbitrator.

B. *The Chilean line*

According to Chile, it was the practice of the 1902 Court to define the frontier line fundamentally in terms of mountain ranges on which the water-partings follow the summit-line to its end. In the sector between the present boundary post 62 and Mount Fitzroy the 1902 Court defined the frontier line along the Cordón Oriental as "the local water-parting which ascends to Mount Fitzroy". Therefore, Chile is proposing a line which from boundary post 62 follows the Cordón Oriental to its end and then continues in a straight line to Mount Fitzroy.

The Chilean thesis is based primarily on the term "dividing ranges" used in the Award to refer to the "further continuation of the boundary" (art. III, penultimate paragraph).

However, although I admit that there is a close geographical correspondence between a mountain range and a water-parting which runs along it, I do not think that I can disregard, just as I have not disregarded them in my consideration of the line proposed by Argentina, the literal categorical terms used by the arbitration report to describe the line of the frontier between the point at which boundary post 62 is located today and Mount Fitzroy: the local water-parting in the sense which I have defined.

Now, the line proposed by Chile, like the one proposed by Argentina, is a "mixed" line consisting partly of continental divide and partly of local divides which cross two rivers: the River de las Vueltas and the River Eléctrico. It therefore does not meet the requirements of "local water-parting" in the sense used in the report and does not correspond to the frontier established by the Arbitrator between boundary post 62 and Mount Fitzroy.

It must be added that the Chilean line differs from the one drawn on the Arbitrator's map, which up to 1953 was shown as the frontier on the official Chilean maps. This line, in order to reach Mount Fitzroy, makes a significant incursion into the part of the basin of the River de las Vueltas recognized as such during the 1898-1902 arbitration.

The foregoing considerations lead me to conclude that the frontier line proposed by Chile between boundary post 62 and Mount Fitzroy is not consistent with the line decided upon by the 1902 Arbitrator in this sector.

What ought to have been the criterion for determining the course of the frontier line between boundary post 62 and Mount Fitzroy?

The fact that there is no continuous local water-parting between boundary post 62 and Mount Fitzroy makes it impossible to apply the delimitation criterion prescribed by the Award for this sector of the frontier. Only for the first 12 kilometres between these two points is there agreement between the Parties on the course of the frontier.

Beyond those 12 kilometres the Court ought to have made an effort to define a frontier line which would best interpret the intention of the 1902 Arbitrator, taking into account the two instruments in which he described the boundary which he had devised for this sector: the arbitration report and map.

The report adopted the local water-parting as the means of delimitation between boundary post 62 and Mount Fitzroy. The map depicted graphically the general direction of the frontier between these two points.

To my mind, a line which best interprets the intention of the 1902 Arbitrator would be one which, running mainly along local water-partings, would follow the general course of the line drawn on the Arbitrator's map and leave to Chile the territory situated to the north and west of such a line, including Lake del Desierto.

However, in its Award this Court decided to accept basically the same line as the one proposed by Argentina because it believes that this line corresponds to the local water-parting enjoined by the arbitration report as the frontier between boundary post 62 and Mount Fitzroy. By effect of this decision the Award leaves under Argentine sovereignty all the territory in dispute in the present arbitration.

* * *

The principal grounds of disagreement which I have stated with regard to this Award have obliged me to dissent from the decision contained therein and to vote against it.

Santiago BENADAVA