

In the matter of

THE BEAGLE CHANNEL ARBITRATION

VOLUME I

MEMORIAL

of the

GOVERNMENT of CHILE

1973

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*(Until 31st January 1973)

IN THE MATTER OF THE BEAGLE CHANNEL ARBITRATION

MEMORIAL OF THE GOVERNMENT OF CHILE

CONTENTS

	Para. No.	Page No.
CHAPTER I		
Introduction	1	1
CHAPTER II		
A description of some geographical features mentioned in Articles II and III of the Boundary Treaty of 1881		8
Point Dungeness	2	8
The Point Dungeness - Andes Boundary Line	3	8
Tierra del Fuego	5	8
Cape Espiritu Santo	6	9
The Beagle Channel	7	9
Principal Islands in Beagle Channel Area	32	17
Hoste Island	33	17
Navarino	38	18
Picton	40	18
Nueva	43	19
Lennox	45	19
Some other Islands		
Staten Island, the small Islands next to it	48	19
CHAPTER III		
The antecedents of the Territorial Settlement effected by the Boundary Treaty of 1881		
Introduction	1	21
Events before 1843	3	21
Guillermos Mission 1843	4	21
Chile-Spain Treaty 1844	5	22
Argentine Note 1847	6	22
Chilean Note January 1848; Argentine Note May 1848	7	23

	Para. No.	Page No.
Chilean Note August 1848; Argentine Note November 1848	8	23
Controversy on Titles 1852-1855	9	23
Chile-Argentine Treaty 1855	10	23
The 1865 Discussions and the Lastarria Draft	11	23
The 1872-73 correspondence	17	24
1874: Abortive Arbitration Negotiation	21	26
1875 correspondence	22	26
Barros Arana - Irigoyen Exchanges 1876	24	26
Chilean Reaction 1876	30	29
Arbitration Treaty 1878	31	29
Argentine Proposals 1878	32	29
Further Arbitration Treaty 1878	34	30
1879 Negotiations	36	31
Conclusions	37	31

CHAPTER IV

The Conclusion of the Boundary Treaty of 1881 and the Contemporary Understanding of the Settlement

(A) The Negotiations of 1881

Resumption of Negotiations 1881	1	33
Chilean Proposal	6	34
Argentine counter proposal	7	35
Chilean response	8	35
Argentine views	9	35
Modification of Chilean position	11	36
Argentine Reaction	12	36
Chilean offer of "six bases of agreement"	14	37
Argentine acceptance of second and third bases	15	38

(B) The Contemporary Understanding of the Settlement

Adhesion to Irigoyen formula of 1876	17	38
--------------------------------------	----	----

	Para No.	Page No.
French Minister's despatch and map	19	39
"Chile's 1881 Authoritative Map"	21	40
Chilean Hydrographic Notice, November 1881	23	41
Argentine map, November 1881	25	42
British Admiralty Chart No. 786	27	42
Official Reports on the Treaty	28	43
Reports of the United States Intermediaries	29	44
Statements by the parties - Argentine (Irigoyen) speech	31	45
Statements by the parties - Chilean (Valderrama) speech	32	45
Conclusions	33	45

CHAPTER V

The Provisions of the 1881 Treaty

Relevant Provisions of the Treaty	1	47
Article I	3	48
Article II	5	48
Article III - Tierra del Fuego	6	49
Article III - the other islands	7	49
Confirmation provided by historical approach	12	51
Evidential value of maps	13	51
Dominant role of intention of parties	15	52
Settlement was definitive in 1881	17	53
Conclusions	18	53

CHAPTER VI

The Treaty of 1881 and the Islands Situated in the Beagle Channel

Statement of the problem: Definition of "The Islands in the Channel"	1	55
Argument that the Islands were not dealt with by 1881 Treaty	2	55
Refutation of that argument	3	55

	Para No.	Page No.
Application of 1881 Treaty: The Treaty as a comprehensive settlement	4	56
Object and purpose of the Treaty	5	56
Terms of the Treaty	9	58
Intention of the Parties: the relevant maps	11	59
Subsequent conduct of the parties	16	61
Conclusion	23	65
Alternative interpretation of the Treaty	24	65
Terms of the Treaty	25	65
Conduct of the parties	26	65
Conclusion	33	68

CHAPTER VII

From the 1881 Treaty to the 1902 Arbitration

Argentine maps 1881 - 1893	2	69
Limited Argentine activity 1881 - 1893	4	70
Demarcation under 1881 Treaty	5	70
Immediate antecedents of 1893 Protocol	13	73
1893 Protocol	16	74
Practice subsequent to 1893 Protocol	21	77
The 1902 Arbitration	26	79
Conclusions regarding the Arbitration	34	83

CHAPTER VIII

Argentine efforts to revise the Boundary in the Beagle Channel Region

Development of Argentine cartographic chauvinism	1	85
In the context of demarcation - Argentine draft 1904	9	89
Chilean comments on Argentine 1904 draft	10	90
New Argentine Sailing Directions and chart	11	91
Further negotiations 1905 and 1907	17	93
Chilean views - Fagalde Thesis 1905	19	93

	Para No.	Page No.
Chilean views - Alvarez report	20	94
Further negotiations 1907	21	94
Cartographic reflection of Chilean view 1904-1914	22	94
Argentine literature 1904-1914	23	95
Further diplomatic exchanges 1914-1915	24	95
British Assessment of the position 1915	34	100
Moreno Memorandum	46	104
Holdich view	54	108
Admiralty Hydrographer's memorandum	58	110
Diplomatic exchanges 1917-1920	68	115

CHAPTER IX

The last period: 1920 to the commencement of the present Arbitration	118
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CHAPTER X

Acts of Jurisdiction

Section 1

Introduction	1	127
Legal Relevance of Acts of Jurisdiction	4	127
Ninety years of Chilean Administration	6	128
The Position today	7	128
Absence of Argentine activity in the islands	9	129
Limited relevance of the "critical date"	10	129
Routine flow of Chilean administration	12	130

Section 2 Chilean Acts of Jurisdiction

A. General

(1) Chilean Administrative Organisation in Magallanes from 1881	23	132
(i) 1881-92	24	132
(ii) Decree of 7 October 1892	26	133

	Para No.	Page No.
(iii) Creation of Rural Commissariats, 1902	28	133
(iv) Creation of Rural Commissariats, 1916	32	134
(v) Creation of Navarino Sub-delegation 1918-19	33	134
(2) Chilean Administrative Activity from 1891		
(i) Visits to Southern Islands by Governors and other officials	35	135
(ii) Visits by Chilean Navy 1902	40	136
(iii) Visits by Chilean Navy 1905	44	137
(iv) Visits by Chilean Navy 1910-1911	46	137
(v) Visit of a Chilean Commission 1913	49	137
(vi) Visits by the Chilean Navy 1913-1915	50	138
(3) Naval Investigation into death at sea	52	138
(4) Judicial Administration	53	138
(5) Transport and Navigation	54	138
 B. Administrative and Judicial Activities in relation to Picton, Nueva and Lennox Islands		
(1) (i) Introduction	56	139
(ii) Legislation relating to Occupation Leases	58	140
(2) Picton Island		
(i) Occupation Permits; Government Leases	67	142
(ii) Mining Rights	91	148
(iii) Judicial Administration	93	149
(iv) Establishment of Postal Agency, 1905	95	149
(v) Acts connected with the Chilean Navy	97	149
(vi) Police establishments	100	150
(vii) Other applications of Chilean Law	101	151
(3) Nueva (New) Island		
(i) Occupation Permits; Government Leases	102	151
(ii) Mining Rights	107	152
(iii) Judicial Administration	121	155

	Para No.	Page No.
(iv) Notarial Act	123	155
(4) Lennox Island		
(i) General Administration 1892-3	124	156
(ii) Occupation Permits and Government Leases	130	157
(iii) Mining Rights	143	160
(iv) Judicial Administration	164	166
(v) Notarial Acts effected at Punta Arenas in connection with matters on Lennox Island	169	168
(vi) Naval matters	173	168
(5) The Appurtenant Islands: Snipe Becasses, Solitario, Hermanos, Gardiner, Reparo and Augustus	175	169
Beacons	179	170
Judicial Investigation into a death	181	170
Section 3 The Argentine Position and Conclusion		
The Argentine position	182	170
Conclusion	198	174

CHAPTER XI

The Principal contentions and request of the Government of Chile

Principal conditions	1	175
Request	3	176

NOTES

1. In this Volume:

"Annex No. " denotes a reference to an item in Volume II;

"Doc. " denotes a reference to a document in Volume III;

"Plate " denotes a reference to a map or maps in the Atlas.

2. The Government of Chile reserves the right at any time to refer to the original of any text which is translated from a foreign language.

CHAPTER I

INTRODUCTION

1. The present Memorial is submitted to the Court of Arbitration by the Government of Chile pursuant to the order of the Court made on 10 June, 1972.
2. In this Memorial the Government of Chile will develop its arguments regarding the question formulated and appearing in the second paragraph of Article I of the Agreement for Arbitration (Compromiso) of 22 July 1971 in the following terms:

"The Republic of Chile requests the Arbitrator to decide, to the extent that they relate to the region referred to in paragraph (4) of this Article, the questions referred to in her Notes of 11 December 1967 to Her Britannic Majesty's Government and to the Government of the Argentine Republic and to declare that Picton, Lennox and Nueva Islands, the adjacent islands and islets, as well as the other islands and islets whose entire land surface is situated wholly within the region referred to in paragraph (4) of this Article, belong to the Republic of Chile."¹

3. Paragraph (4) of the same Article defines the region in question thus:

"The region referred to in paragraphs (1) and (2) of this Article is determined by six points the geographical co-ordinates of which are the following:

	Latitude (S)	Longitude (W)
A	54° 45'	68° 36' 38.5''
B	54° 57'	68° 36' 38.5''
C	54° 57'	67° 13'
D	55° 24'	67° 13'
E	55° 24'	66° 25'
F	54° 45'	66° 25' * *

4. The question framed by the Argentine Government appears in the first paragraph of Article I of the Compromiso in the following terms:

"The Argentine Republic requests the Arbitrator to determine what is the boundary-line between the respective maritime jurisdictions of the Argentine Republic and of the Republic of Chile from meridian 68° 36' 38.5'' W., within the region referred to in paragraph (4) of this Article, and in consequence to declare that Picton, Nueva and Lennox Islands and adjacent islands and islets belong to the Argentine Republic."

¹ The texts of the Chilean Notes of 11 December 1967 to the British and Argentine Governments appear at Annexes Nos. 316 and 315.

* The points here listed are marked on Maps B and C, which may be found in the pocket of this volume. These maps are two of three which have been prepared to illustrate the case. Map A shows the general boundary between Chile and Argentina. Map B shows the region of Tierra del Fuego and the Beagle Channel. Map C is an enlargement of the eastern section of the Beagle Channel region.

5. It will readily be apparent to the Court of Arbitration that the Argentine request differs from the Chilean request, especially in the reference in the Argentine request to the determination of "the boundary-line between the respective maritime jurisdictions" of the two Parties. The Government of Chile does not consider itself called upon at this stage of the proceedings to venture an interpretation of or a comment upon the Argentine formulation of the question. No doubt the Argentine Memorial will contain an elaboration of the Argentine thesis in a form lending itself to reply. In that case the Chilean Government will, of course, respond in all necessary detail to the arguments advanced by the Argentine Government. In the meantime, however, the present Memorial will be limited, as already stated, to the development of the positive Chilean case.

6. As the Chilean Government sees this case, it is not a complicated one. The principal issue between the Parties is the determination of sovereignty over the islands of Picton, Lennox and Nueva and adjacent islands or islets which, so Chile contends, lie south of the Beagle Channel. A secondary issue is the determination of sovereignty over a number of islands and islets which lie within the Beagle Channel.

7. The essentials of the problem appear unlikely to give rise to major contention between the Parties on points of law. It turns, as the Argentine Government has expressly recognised, on the interpretation of the Boundary Treaty of 1881 (Annex No. 40). The principles of interpretation applicable to this category of instrument are well established. They have been expressly affirmed by the Argentine Government vis-à-vis the Government of Chile in two major pertinent respects.

8. First, the Argentine Government, in stating to the Arbitration Tribunal of 1902 its understanding of the rules of interpretation governing boundary treaties said:

"The Chilean Republic invoked, as a rule of interpretation, a paragraph of Pradier Fodere. The Argentine Republic accepts it in every particular. These are his words: 'As the interpretation of a document must aim only at the discovery of the intention of its author or authors, it is necessary to seek such intention and to interpret it accordingly, carefully examining the facts, the circumstances immediately preceding the signature of the Agreement, the Protocols, the Minutes of the proceedings and the different writings of the Negotiators; the causes which have given rise to the Treaty must be studied, taking into consideration the object which the Parties had in view at the commencement of the negotiations.' " (Argentine Evidence to the Arbitral Tribunal of 1899-1902, p. xv.)

9. Second, in a note of 23 December 1967 to the Chilean Government, the Argentine Government said: "There is no doubt that the best interpretation of a Treaty is that given by the conduct of the Parties". The general agreement of the Chilean Government with that principle is stated in a Chilean note of 16 January 1968 addressed to Her Majesty's Secretary of State for Foreign Affairs: "My Government accept that the conduct of the Parties is one of the criteria which may be considered in the interpretation of Treaties..."

10. The central provisions of the 1881 Boundary Treaty are Articles II and III, which provide as follows:

Article II

"In the southern part of the Continent, and to the north of the Straits of Magellan, the boundary between the two countries shall be a line which, starting from Point Dungeness, shall be prolonged by land as far as Monte Dinero; from this point it shall continue to the west, following the greatest altitudes of the range of hillocks existing there, until it touches the hill-top of Mount Aymond. From this point the line shall be prolonged up to the intersection of the 70th meridian with the 52nd parallel of latitude,

and thence it shall continue to the west coinciding with this latter parallel, as far as the divortia aquarum of the Andes. The territories to the north of such a line shall belong to the Argentine Republic, and to Chile those extending to the south of it, without prejudice to what is provided in Article III, respecting Tierra del Fuego and adjacent islands.

Article III

In Tierra del Fuego a line shall be drawn, which starting from the point called Cape Espiritu Santo, in parallel $52^{\circ} 40'$, shall be prolonged to the south along the meridian $68^{\circ} 34'$ west of Greenwich until it touches Beagle Channel. Tierra del Fuego, divided in this manner, shall be Chilean on the western side and Argentine on the eastern. As for the islands, to the Argentine Republic shall belong Staten Island, the small islands next to it, and the other islands there may be on the Atlantic to the east of Tierra del Fuego and of the eastern coast of Patagonia; and to Chile shall belong all the islands to the south of Beagle Channel up to Cape Horn, and those there may be to the west of Tierra del Fuego."

11. Of these two Articles, the latter is the one which refers most immediately to the islands at present in dispute. However, the Chilean Government will submit that Article III must be read in the light of the Treaty as a whole and, in particular, of Article II. In understanding the effect of this Article it is helpful to recall that the boundary running from north to south between Chile and Argentina had been established by Article I as the divortia aquarum of the Andes. However, this line was not extended south of the point where the divortia aquarum met the 52nd parallel of latitude. From that point the line selected represented a compromise between the competing claims of Chile and Argentina to Patagonia, the Straits of Magellan and territory south of the Straits. The idea behind the claim of Argentina was that it should exercise jurisdiction over the Atlantic coasts "to the extreme end of the continent, that is, to the island of Los Estados". (Annex No. 17)

12. The line agreed in Article II involved effectively the drawing of a west-east boundary from the point at which the divortia aquarum of the Andes reached the 52nd parallel until, after some minor changes of direction, it met the eastern entrance of the Straits of Magellan. Article II then stipulated that the territories north of this west-east line should be Argentinian and those south of it Chilean - a division which, if not qualified by Article III, would have given to Argentina nothing south of the Straits of Magellan.

13. The method of division adopted in Article III was to prescribe the drawing of a north-south line in Tierra del Fuego from a point (Cape Espiritu Santo) chosen so as to leave to Chile the whole of the Straits of Magellan. This north-south line was to be prolonged until it touched the Beagle Channel; all the lands to the east of it being allotted to Argentina and those to the west to Chile. Then followed the words which are central in the present dispute:

"As for the islands, to the Argentine Republic shall belong Staten Island, the small islands next to it, and the other islands there may be on the Atlantic to the east of Tierra del Fuego and of the eastern coast of Patagonia; and to Chile shall belong all the islands to the south of the Beagle Channel up to Cape Horn, and those there may be to the west of Tierra del Fuego."

14. The Government of Chile construes this fundamental provision as establishing a comprehensive division of territory between the Parties in the region of the Beagle Channel in the same way as elsewhere along their continuous borders. The 1881 Treaty was intended to put an end to all territorial problems arising between the two countries. In the region south of the Straits of Magellan this was done by allocating specific territories to Argentina and the remainder to Chile.

15. In the present case no problem exists in connection with the abovementioned north-south

line in Tierra del Fuego. The difficulty, raised by Argentina long after the Treaty was concluded, concerns sovereignty over some of the territories which lie south of Tierra del Fuego.

16. It is in this connection that reference must first be made to the expression "The Beagle Channel" specifically employed in the 1881 Treaty. The Chilean Government submits that in referring to the Beagle Channel the Parties had in mind the west-east waterway lying immediately south of Tierra del Fuego and running into the ocean north of the islands of Hoste, Navarino, Picton, and Nueva. It also submits that by doing so, they intended to assign to Chile these islands, Lennox, and all the other islands and islets appurtenant to them, and indeed, the whole of the archipelago down to Cape Horn.

17. This submission rests principally on the clear meaning given to the expression "Beagle Channel" by the Parties in the immediate context of the conclusion of the 1881 Treaty. The precise interpretation of the concept is to be derived principally from the study of maps which indicate the intentions and understandings of the Parties at that time. Appreciation of the full significance of these maps depends in large part upon the knowledge that the 1881 Treaty was the outcome of negotiations between the parties conducted over a period of years and only brought to fruition in 1881 by the assistance of the United States Ministers in Chile and Argentina.

18. The most crucial of the earlier attempts to conclude a treaty had taken place in 1876 between Sr. Barros Arana, the Chilean Minister in Buenos Aires, and Sr. Bernardo Irigoyen, the Argentine Foreign Minister. In the course of these negotiations Sr. Irigoyen made a proposal to Sr. Barros Arana which included, in respect of the area now under consideration, the following terms:

" 'Point of division on the Strait', Mount Dinero, latitude $52^{\circ}19'$. The line would run from that point following the highest peaks of the chain of hills extending westwards as far as the height called Mount Aymond, at latitude $52^{\circ}10'$. From this point a line would be drawn which, coinciding with latitude $52^{\circ}10'$ would extend to the Andes. This would be the dividing line between the Republic of Argentina which would lie to the north and the Republic of Chile to the south.

'Tierra del Fuego'. - From the point called Cape Espiritu Santo on latitude $52^{\circ}40'$, a line would be drawn southward coinciding with the line of longitude $68^{\circ}34'$ west of Greenwich, this line being extended to the Beagle Channel. Tierra del Fuego, divided in this manner, would be Argentinian on the east and Chilean on the west.

'Islands'. - Staten Island, the islets in the immediate vicinity of this island and other islands in the Atlantic Ocean east of Tierra del Fuego and the eastern coasts of Patagonia would belong to the Republic of Argentina, and all the other islands south of the Beagle Channel up to Cape Horn, as well as those which lie west of Tierra del Fuego, would belong to Chile." (Annex No. 22)

19. As will be seen, this appears to have been the first time that any reference had been made to the concept of the Beagle Channel as an element in the boundary; and it so happens that there can be no doubt about what both Sr. Irigoyen and Sr. Barros Arana understood by this expression; Sr. Barros Arana, in reporting to the Foreign Minister in Santiago, enclosed with his despatch a map on which he marked in red ink the approximate line of the boundary proposed by Sr. Irigoyen (Plate 8). The line thus drawn passes to the north of the islands of Picton, Nueva and Lennox, leaving them to Chile.

20. The fact that these negotiations were not successfully concluded in 1876 does not deprive this map of its cardinal illustrative importance, for the language of the 1876 proposal formed the

basis of, and reappears in virtually identical terms in, Article III of the Treaty eventually concluded in 1881.

21. Another map of great significance as demonstrating the real understanding of the Parties regarding the course of the Beagle Channel is one produced in 1878 by Sr. Elizalde, who had replaced Sr. Irigoyen as Argentine Foreign Minister in 1877. This map which was actually signed by Sr. Elizalde and is dated 30 March 1878, illustrates a proposal, which he made in a note of that date (Annex No. 29), that, in so far as here relevant, the boundary should run south across Tierra del Fuego to the Beagle Channel "and then following it parallel to latitude 55°S until the Atlantic Ocean". The map again shows a line which runs eastwards along the Beagle Channel and passes into the ocean north of Picton, Nueva and Lennox islands. Moreover, this understanding was fully reflected in Sr. Barros Arana's own sketch map (Plate 10) drawn by him at the time and sent to Santiago with his despatch reporting Sr. Elizalde's proposal.

22. In the fact that for five years prior to the conclusion of the 1881 Treaty the Parties both had a clear and common understanding of the concept of the Beagle Channel, there lies, so the Chilean Government submits, the key to the interpretation of Article III of the Treaty.

23. However, to the pre-1881 maps there must be added the maps subsequently prepared and which evidence the understanding not only of the Parties but generally of those interested in the problem. The first is the sketch map prepared by the French Minister in Santiago a few days before the formal signing of the Treaty to illustrate his report of its terms. This map (Plate 12 sketch B) draws a line to illustrate the Beagle Channel which passes to the north of Picton, Nueva and Lennox Islands.

24. More pertinent still is the authoritative map prepared in August 1881 by Carlos Prieto under the Direction of the Chilean Hydrographic Office and published by order of the Chilean Government (Plates 13 to 19). This map, too, unmistakably designates Picton, Nueva and Lennox Islands as Chilean. This map was widely circulated. On 26 October 1881 three copies were given to the British Minister in Santiago by the Chilean Under Secretary for Foreign Affairs, and were later forwarded by him to London. Immediately after ratifications of the Treaty had been exchanged, the map was published in the leading Santiago newspaper. Copies of it were also sent to their governments by the diplomatic representatives of Italy, France, Germany, Switzerland, Brazil and Belgium. It is highly unlikely that this map did not come to the notice of the Argentinian representatives in Santiago and through them to the Argentine Government.

25. That the same understanding prevailed in Argentinian official circles is shown by no less than four pieces of cartographic evidence of Argentinian origin. First, on 27 October 1881, the Argentine Minister in London, Sr. Garcia, called on Lord Tenterden at the Foreign Office and left with him "a plan of the southern regions which includes the new boundary". Although Sr. Garcia's plan has not been found, a contemporary Admiralty map illustrating the Treaty "as communicated by Senor Garcia" has - and shows the Beagle Channel as running north of Picton, Nueva and Lennox islands (Plate 20). Second, a map appeared in an Argentinian magazine "La Ilustracion Argentina" for 10 November 1881 depicting Picton, Nueva and Lennox as Chilean. A copy of this map was sent to the British Minister in Buenos Aires by Sr. Irigoyen, the Argentine Foreign Minister (Plate 21).

26. The third and fourth items are Argentinian official maps published in 1882 and 1888 - both depicting the Beagle Channel line as passing north of Picton, Nueva and Lennox. The map of 1882 is of particular importance, having been included in an "official publication" issued by the Argentine Government. (Plates 25 and 38)

27. As will be seen in Chapter IV where the material is set out fully, there is much other contemporary evidence, in the form of reports of the United States Ministers and the speeches of the Chilean and Argentine Foreign Ministers to their respective Congresses, which points to a uniform and unequivocal intention of the Parties to assign to Chile all the islands on the south side of a channel, designated the Beagle Channel and running eastwards to the north of Picton, Nueva and Lennox islands. Nowhere is any contrary suggestion to be found; the concordance of the evidence is absolute.

28. Now, it is the clarity of this evidence or, in other words, the specific facts of the present case, which render it unnecessary at this stage to enter into a detailed analysis of any so-called "objective" or "geographic" meaning which might have attached to the expression "Beagle Channel" in or about 1881. The determination by the Parties of the meaning that they proposed to give it, and did give it, is alone enough for present purposes. This is not to say that there is anything inconsistent between the Chilean contention and the general geographic understanding of the time. It is only to maintain that the evidence of what the Parties actually meant must control the situation.

29. If in this summary statement of the Chilean case special emphasis has been placed on the significance of contemporary maps, it is because these maps in a quite striking way make abundantly clear what the Parties had in mind as the result of employing the concept of the Beagle Channel as an element in the description of the boundary. Moreover, when a detailed literal examination of the text of Articles II and III of the 1881 Treaty is carried out in Chapter V below, it can readily be seen that the effect of the maps and of the literal interpretation is identical. Thus, the language used indicates quite clearly that Articles I, II and III contain a comprehensive settlement of the boundary and that, without prejudice to what is provided in Article III, Article II deals with all territory south of the 52nd parallel - allocating it all to Chile. Especially, it may be said, there is nothing in Article III which expressly allocates to Argentina any territory south of Tierra del Fuego or, in particular, either the islands of Picton, Lennox and Nueva or any other islands appurtenant to Chilean territory.

30. The reasons given above for the contention that Picton, Lennox and Nueva and the other islands appurtenant to them and other Chilean territory in the defined region all belong to Chile are not exhaustive. The same conclusion can be reached by a variety of means, for example on the grounds that these islands are south of Tierra del Fuego or that they are appurtenances of and inseparably associated with territories to which Chilean title cannot for a moment be in doubt.

31. Whichever way the matter is put, the Chilean case finds significant support in the conduct of the Parties on the ground. As will be shown in detail, within a few years of the conclusion of the 1881 Treaty Chilean administration was treating the islands of Picton, Nueva and Lennox as Chilean territory. The Chilean authorities exercised governmental functions there: they were concerned, especially in the period of intense gold-mining activity from 1891 onwards, to establish an effective administration there, to secure the application of the criminal law and to ensure the maintenance of health. The Chilean Navy paid regular visits to the islands. The islands were treated as Chilean by those who lived and worked in them. They sought and obtained Chilean permits to occupy and exploit the land; they registered their legal acts with the Chilean authorities in Punta Arenas; and they used the Chilean courts. All this was open, public and consistent. By contrast there was no Argentinian official activity in the islands, and for all purposes, the arm of Argentine activity stretched no further than the south shore of Tierra del Fuego.

32. An important feature of Chilean official activity in and in relation to the islands is its consistency. It continued much as it began. It has never had to be intense, for once the gold-mining declined, as it did by about the turn of the century, the islands lapsed into small pastoral communities, inhabited by no more than a few families. None of the events on the diplomatic scene, of which the Court of Arbitration will undoubtedly hear much, made any difference. As the Court of Arbitration will see from the documents, there is a steady record of Chilean activity evidenced by material dating from 1889 onwards (and only lacking for the years before that because of destruction of records in a fire in Punta Arenas in 1887). Against this there was no Argentine protest in the critical period of nearly a quarter of a century following the 1881 Treaty. The first indication of an Argentine claim was made in the course of the 1904 talks; the first formal protest against any Chilean act was made in 1915. The subsequent flow of protest was intermittent and noticeably superficial. Diplomatic correspondence would be exchanged about trifles; but about the essentials of Chilean administration, nothing was heard from the Argentine Government.

33. What has been said so far in this introductory summary consists of the main elements of the positive Chilean case; and it is not believed that the Court of Arbitration will expect the Government of Chile to explore at this stage of the proceedings, and on a speculative basis, the type of argument which the Argentine Government may in due course adduce. It is right, however, to state even now that in the submission of the Government of Chile no subsequent diplomatic arrangements or exchanges between the Parties have altered the basic position as established by the 1881 Treaty properly interpreted in the light of the known intentions of the Parties and their subsequent behaviour. This is true, in particular, of the 1893 Protocol.

34. In the pages which follow the Government of Chile will develop its arguments in detail. However, before doing so, the Government of Chile believes it may be of assistance to the Court if a brief description is given of some of the geographical features involved in this case. At the same time, the Government of Chile ventures to emphasize that purely geographical considerations cannot override the clearly evidenced will of the Parties to the 1881 Treaty.

CHAPTER II

A DESCRIPTION OF SOME GEOGRAPHICAL FEATURES MENTIONED IN ARTICLES II AND III OF THE BOUNDARY TREATY OF 1881

1. Articles II and III of the Boundary Treaty of 1881 determine the division of territory between Chile and Argentina in the southern area. The meaning to be given to the detailed provisions of these Articles in conformity with the accepted principles for the interpretation of treaties will be fully examined hereafter in Chapter V. Since, however, these two Articles govern the respective rights of the two countries to the territories now in dispute, the Chilean Government thinks it desirable to describe briefly some of the geographical features mentioned in them.
2. **Point Dungeness.** Article II of the Treaty provides that the boundary between the two countries to the north of the Straits of Magellan shall start from Point Dungeness. As may be seen on Map B, this headland is situated at the eastern entrance to the Straits on their north shore. It was carefully selected as the starting-point of the boundary in order to leave all the northern shore of the Straits within Chile and at the same time assign the adjacent Atlantic coast of Patagonia to Argentina.
3. **The Point Dungeness - Andes Boundary Line.** Under Article II the boundary runs from Point Dungeness roughly in a north-westerly direction so as to pass through Monte Dinero to Monte Aymond. These two hills are shown on Map B a short distance inland from the north shore of the eastern mouth of the Straits, and the boundary thus retains a narrow strip of territory under Chilean sovereignty. From Monte Aymond the boundary is prolonged in a northwesterly direction until it meets the point of intersection between latitude 52° S. and longitude 70° W., and then continues due westwards along latitude 52° S. to the divortia aquarum of the Andes. The net result is that Article II of the Treaty establishes a, broadly speaking, east-west boundary from Point Dungeness across Southern Patagonia to the Andes as the line dividing the territory of the two countries "in the southern part of the Continent".
4. No difficulty presents itself in regard to the identification of this east-west dividing line, the demarcation of most of which on the ground was indeed carried out by a joint committee of experts in 1897-98. Nor is any part of the region to the north of the Straits of Magellan the subject of the present arbitration. Nevertheless, the east-west boundary line established by Article II to the north of the Straits is of great importance for the determination of the present case. This importance stems from the final sentence of Article II, which reads:

"The territories to the north of such a line shall belong to the Argentine Republic, and to Chile those extending to the south of it, without prejudice to what is provided in Article III respecting Tierra del Fuego and adjacent islands". (Underlining added)

Thus, according to the express terms of this provision, all the territories extending to the south of the Point Dungeness - Andes line are assigned to Chile "without prejudice to what is provided in Article III respecting Tierra del Fuego and adjacent islands."
5. **Tierra del Fuego.** This term is sometimes used to denote the whole complex archipelago of islands situated to the south of the Straits of Magellan and sometimes the large island of that name which lies between those Straits and the Beagle Channel. No difficulty arises, however, from this

ambiguity in the present instance because the context makes it crystal clear that in Articles II and III of the 1881 Treaty the term refers to the large island alone (see Chapter V, paragraph 6). From the Straits of Magellan in the north the large island of Tierra del Fuego extends south-eastwards along its Atlantic coast to the Le Maire Strait and southwards to the Beagle Channel. On the west it is bounded by the Straits of Magellan, Useless Bay and Admiralty Sound; and in the south-west it projects westwards in a long, heavily indented, peninsula almost to the Pacific Ocean.

6. **Cape Espiritu Santo.** Article III provides for the division of the island of Tierra del Fuego between Chile and Argentina by a line starting from Cape Espiritu Santo in the north and continuing due southwards along longitude 68° 34' West until it touches Beagle Channel. A minor difficulty regarding the precise position of Cape Espiritu Santo was later resolved, and the boundary line was finally demarcated by a joint commission of experts in 1894-5. It will be seen from Map B that, as in the case of Point Dungeness on the north shore of the Straits of Magellan, Cape Espiritu Santo was carefully chosen as the starting point of the boundary in Tierra del Fuego in order to leave the entire south shore of the Straits within Chile and at the same time assign the adjacent Atlantic coast of that island to Argentina.

7. **The Beagle Channel.** The Beagle Channel figures in two separate dispositions of Article III. The first has already been mentioned: the prolongation of the boundary line from Cape Espiritu Santo southwards along the meridian of that Cape "until it touches Beagle Channel". The second is the final disposition in that Article which states that "to Chile shall belong all the islands to the south of Beagle Channel up to Cape Horn". It will be shown in Chapter V, by a detailed analysis of the terms of the 1881 Treaty and of the evidence relating to its conclusion, that what those who drew up the dispositions of Article III understood as the Beagle Channel was the Channel which runs from west to east almost in a straight line between Tierra del Fuego in the north, and Hoste, Navarino, Picton and Nueva Islands on the south. In its western section, the channel has two arms, called the south-west and the north-west arms. The eastern section of Beagle Channel, which is of special interest in this case, has no bifurcation, and its mouth is located between Cape San Pio and Nueva Island, so that the northern coast of this island forms the extreme of the southern shore of the channel.¹ In the view of the Chilean Government, that analysis establishes in the clearest manner that such was the meaning attached to the term Beagle Channel by the Parties when they concluded the 1881 Treaty.

8. The Beagle Channel was so named in honour of His Majesty's ship "Beagle", whose ship's company, under the command of Captain Fitzroy, R.N., discovered the existence of this channel traversing the Fuegian archipelago from west to east almost in a straight line. The discovery was made in the course of a comprehensive survey "of the Southern Coasts of the Peninsula of South America ... and of Tierra del Fuego", carried out by H.M. ships "Adventure", "Adelaide" and "Beagle" between 1826 and 1830 by direction of the British Admiralty. The over-all commander of the surveying expedition was Captain Parker King of the "Adventure"; Captain Fitzroy was appointed to the command of the "Beagle" on the death of Captain Stokes^{1*} in 1828. Towards the end of 1829 Captain Fitzroy was ordered by Captain King to survey the coasts of Tierra del Fuego; and it was during March, April and May 1830 that his surveys of the islands and channels to the north of Cape Horn led to the exploration and identification of the channel which he and Captain King afterwards named the Beagle Channel.

¹ Each time the term "Beagle Channel" is used in this Memorial, its eastern section will be understood as so defined.

^{1*} Not to be confused with Midshipman Stokes, who served in the "Beagle" under Captain Fitzroy.

9. Cape San Pio and Nueva Island at the eastern entrance to the channel had been observed by some previous expeditions, such as those of Captain James Cook (1768-75) and Juan Elizalde (1792). Indeed, Cape San Pio derives its name from Juan Elizalde's brigantine, the "San Pio". The "Beagle's" discovery was the existence of a channel traversing the whole southern archipelagos from the bay north of Christmas Sound (Cook Bay), in the west, to Cape San Pio and Nueva Island in the east, and it comprised four main elements.

10. First, between the 2nd and 14th March 1830, when the "Beagle" was anchored near Christmas Sound a little to the south of the western entrance of what is now known as the south-west arm of the Beagle Channel, Master Matthew Murray proceeded by ship's boat north-westwards through Christmas Sound. The results of this exploration were briefly summarised by Captain Fitzroy as follows:

"Mr. Murray penetrated nearly to the base of the snow-covered mountains, which extend to the eastward in an unbroken chain, and ascertained that there are passages leading from Christmas Sound to the large bay where the whale-boat was stolen; and that they run near the foot of the mountains. He also saw a channel leading farther to the eastward than eye-sight could reach, whose average width seemed to be about a mile."¹

The "passages" referred to by Captain Fitzroy in the first sentence are those leading northwards from Christmas Sound into what is now called Darwin Sound and thence westwards to Whaleboat Sound. On the north shore of Darwin Sound rise the range of "snow covered mountains which extend to the eastward in an unbroken chain" along the north shore of what was later found to be the north-west arm of the Beagle Channel. No less significant for present purposes, however, was Master Murray's discovery of the "channel leading farther to the eastwards than eye-sight could reach, whose average width seemed to be about a mile". This is what was later found to be the south-west arm of the Beagle Channel.

11. Secondly, between the 6th and 14th April 1830, when the "Beagle" was anchored in Orange Bay on the east coast of the Hardy Peninsula, Master Murray penetrated northwards by ship's boat through Nassau Bay and Ponsonby Sound into what are now called the Murray Narrows and then into the Beagle Channel. Of this exploration Captain Fitzroy wrote in the Narrative (Vol. I, p.429):

"14th. The master returned, and surprised me with the information that he had been through and far beyond Nassau Bay. He had gone very little to the northward, but a long distance to the east, having passed through a narrow passage, about one-third of a mile wide, which led him into a straight channel, averaging about two miles or more in width, and extending nearly east and west as far as the eye could reach. Westward of the passage by which he entered, was an opening to the north-west but as his orders specified north and east, he followed the eastern branch of the channel,² looking for an opening on either side, without success. Northward of him lay a range of mountains, whose summits were covered with snow, which extended about forty miles, and then sunk into ordinary hills that, near the place which he reached, shewed earthy or clayey cliffs towards the water. From the clay cliffs his view was unbroken by any land in an E.S.E. direction, therefore he must have looked through an opening at the outer sea. His provisions being almost exhausted, he hastened back." (Underlining added)

¹ "Narrative of the surveying voyages of His Majesty's ships Adventure and Beagle...". London 1839, Vo. I p.417.

This book will be hereafter referred to as "the Narrative".

² I.e. the Beagle Channel eastwards of the Murray Narrows.

This extract from the Narrative contributes two important points to the description of the Beagle Channel. One is the straightness of the Channel. The second is the nearly direct east-west axis of the Channel on either side of the Murray Narrows as far as the eye could reach. The third is the unbroken east-south-east direction of the Channel from the clay cliffs eastwards to the open sea. These clay cliffs, as a visit to the spot shows, are a most conspicuous feature of the Channel eastwards of the Murray Narrows, and are easily identifiable as the clayey coast of Gable Island, which was not then known to be separated from Tierra del Fuego. It follows that the eastern reach of the Beagle Channel was conceived of by Master Murray and Captain Fitzroy as extending on an unbroken straight course in an east-south-easterly direction from Gable Island to the open sea.

12. Thirdly, between the 4th and 13th May 1830, when the "Beagle" lay in a cove on Lennox Island, Captain Fitzroy himself went by ship's boat through the Murray Narrows to confirm Master Murray's report of the newly discovered east-west Channel. In his entry in the Narrative for 7th May he wrote "The Murray Narrow is the only passage into the long channel which runs so nearly east and west". On the three following days he explored the channel to the westward of Murray Narrows, ascertaining that after some miles the channel divided into two channels. One he described as leading westwards and the other as a channel leading rather to the southward of west which appeared to open into the sea. He went far enough along what he afterwards called the north-west arm of the channel to satisfy himself that it must lead towards the bay or sound to the north-west of Christmas Sound. In other words, by his survey westwards from the Murray Narrows he satisfied himself that the newly discovered channel joined up with the channels north of Christmas Sound which had been explored by Master Murray some two months earlier.

13. Fourthly, while the "Beagle" was anchored in Orange Bay, Stokes' surveys "united to Mr. Murray's almost completed the north and west part of Nassau Bay; and only the east side remained to be explored" (Narrative, Vol. I p. 430).

Between the 4th and 17th May 1830, while the "Beagle" was still at Lennox Island, Midshipman Stokes was sent in a ship's boat "to continue the survey of the coast from the east side of the head of Nassau Bay to the vicinity of New Island". (Narrative, Vol I p.437).

Captain Fitzroy's reference in the Narrative to Midshipman's Stokes' expedition is unfortunately very brief. He only mentions an interruption in the voyage due to an accident suffered by a seaman, and when Stokes returns for the second time on board, on 17th May, he simply writes:

"Soon after the Master¹ came alongside, Mr. Stokes also returned, having been a long way into the channel first discovered by Mr. Murray, and having examined all the shores about its eastern communication with the sea" (Narrative, Vol. I p. 449).

No record appears to have survived of the course followed by Midshipman Stokes. But, as was pointed out by the Hydrographer of the British Admiralty in 1918 (Annex No. 122), it is possible to reconstruct Stokes' track by the depth-soundings afterwards given by Captain Fitzroy on his first Chart (see Plates 1 and 116, Sketch A). This reconstruction shows that Midshipman Stokes surveyed the region between Cape San Pio and Nueva Island, and then followed westwards the channel discovered by Master Murray until reaching, probably, Gable Island. At any rate, the return of Midshipman Stokes' expedition of Lennox Island, completed Captain Fitzroy's surveys of the newly discovered channel during this first voyage of the "Beagle" to the Fuegian archipelago.

¹ Master Murray had been exploring the coast of Tierra del Fuego to the eastwards of Point Jesse.

That excellent chart made immediately after this first voyage, provides evidence that the expedition under the command of Captain King obtained a complete vision, and a very accurate concept of the whole of the eastern part of the channel.

14. The "Adventure" and the "Beagle" arrived back in England on 14 October 1830; and it seems that on the voyage home Captain Parker King, Commander of the whole expedition, had been preparing a summary report of its activities for the Admiralty. At any rate, on the day after his arrival he addressed a letter to the Admiralty enclosing a "sketch of the results of the Survey of the South extremity of South America". This letter and the "sketch", which have been found in the Public Record Office in London, are reproduced in Annex No. 1A. The letter consists mainly of reports on the conduct of officers and men of the ships under his command. In the "Sketch" it is only the ante-penultimate paragraph which is of immediate interest to the Court. In that paragraph Captain King, speaking of the "Beagle's" survey of the "Southern shores of Tierra del Fuego", reported

"The whole extent has been most fully explored together with the Islands of Diego Ramirez and the Ildephonsos. Among the most remarkable features of this survey is a Channel leading in almost a direct line between Cape San Pio and Christmas Sound one part of which is within 25 miles of the bottom of Admiralty Sound." (Underlining added)

And in the margin of his report are written the words "Beagle Channel". Accordingly, there can be no doubt that in this official report to the Admiralty by the commander of the expedition which discovered and named the Beagle Channel, the latter was characterised as an almost straight channel traversing the whole length of the Fuegian archipelagos from Cape San Pio in the east to Christmas Sound in the west.

15. Consequently, when Captain King gave a similar description of the Beagle Channel in a lecture to the Geographical Society in London given in two parts in April and May 1831, he was only confirming before this learned body what he had already said in his official report. In that lecture he spoke of "the Beagle Channel, which extends from Christmas Sound to Cape San Pio, a distance of a hundred and twenty miles, with a course so direct that no points of the opposite shores cross and intercept a free view through; although its average breadth, which also is very parallel, is not much above a mile, and in some places is but a third of a mile across."

Captain King in that lecture used a chart that shows the surveys of the expedition (see Plate 2).

16. Consequently, the first voyage of the "Beagle" permitted Captains King and Fitzroy to identify and describe the Beagle Channel. On the "Beagle's" first chart (see Plate 1), as well as in Captain King's report to the Admiralty, and in his lecture to the Geographical Society in London, illustrated with a map, its geographical form and extent were established: a channel extending for one hundred and twenty miles, with parallel shores, running in almost a direct line between Cape San Pio and Christmas Sound; a channel with a course so direct that no point of the opposite shores cross and intercept a free view through.

The words of Captain King thus indicate a channel which in its eastern reach continues on an unbroken straight course in an east-south-east direction to the open sea at Cape San Pio; in other words, a channel which runs to the north of Picton and Nueva Islands and reaches the open sea between Cape San Pio and Nueva Island.

17. In November 1831 the "Beagle" sailed again for South America on a surveying expedition in the course of which Captain Fitzroy returned to Ponsonby Sound three Fuegians whom he had taken to England at the end of his first voyage. In addition to surveying, this expedition had a scientific object, and on board with Captain Fitzroy was Charles Darwin, whose observations were published as Volume III of the Narrative and later as his book "A Naturalist's Voyage round the World".

18. Captain Fitzroy's original intention was to enter the Beagle Channel from the Pacific, complete his survey of its two western arms, and then proceed eastwards along the Channel in order to land the three Fuegians with their tribes. Contrary gales, however, forced him to take the "Beagle" by a more southerly route to the east coast of Navarino Island, where he anchored her in Goree Road on 18 January 1833 (Narrative, Vol. II p. 127). Fitzroy says: "My intention was to go round the northeast part of Navarin Island, along the eastern arm of the Beagle Channel, through Murray Narrow ..." (ibidem).^{*} From Goree Road he took a yawl and three ship's boats northwards into the Beagle Channel and then westwards to the Murray Narrows. After landing the Fuegians, he continued westwards to Point Divide on Gordon Island, where the Beagle Channel divides into its north-western and south-western branches. Having followed the north-western branch as far as Darwin¹ and Whale-boat Sounds, he proceeded southwards and returned to Point Divide by the south-western arm of the Beagle Channel. From there he continued eastwards to the Murray Narrows, through which he entered Ponsonby Sound in order to visit his three Fuegians. He did not re-enter the Beagle Channel, and returned to Goree Road through Ponsonby Sound and Nassau Bay. A year later, however, anxious to re-visit his Fuegians, and see if a Mission could be founded, before leaving South America, Captain Fitzroy did again pass along part of the eastern reach of the Beagle Channel. This is the only occasion on which the "Beagle" herself was taken into the Channel.

19. The Beagle Channel, having been described and defined with absolute clarity right after the thorough surveys made during the "Beagle's" first voyage, Captain Fitzroy made no modifications on this second expedition, but confined himself to completing the exploration of the western arms. In the Narrative, he confirms what had been previously observed (Vol. II pp. 202-3).

"This singular canal-like passage is almost straight and of nearly an uniform width (overlooking minute details) for one hundred and twenty miles.

We passed the clay cliffs, spoken of in the former volume, first visited by Mr. Murray. They narrow the channel to less than a mile, but, being low, were beneath the horizon of our eye at Cutfinger Cove: - westward of them the channel widens again to its usual breadth of two miles." (Underlining added)

20. Charles Darwin, on the other hand, was seeing the Beagle Channel for the first time, and his journal contains a fuller statement of his impression of the Channel (Narrative, Vol. III p. 237):

"This channel which was discovered by Captain Fitzroy during the last voyage, is a most remarkable feature in the geography of this, or indeed of any other country. Its length is about 120 miles with an average breadth, not subject to any very great variations, of about two miles. It is throughout the greater part so extremely straight, that the view, bounded on each side by a line of mountains, gradually becomes indistinct in the perspective. This arm of the sea may be compared to the valley of Lochness in Scotland, with its chain of lakes and entering friths. At some future epoch the resemblance perhaps will become complete. Already in one part we have proofs of a rising of the land in a line of cliff, or

¹ So named by Captain Fitzroy on this occasion.

terrace, composed of coarse sandstone, mud, and shingle, which forms both shores. The Beagle Channel crosses the southern part of Tierra del Fuego in an east and west line; in its middle it is joined on the south side by an irregular channel at right-angles to it, which has been called Ponsonby Sound¹. (Underlining added)

21. Captain King and Captain Fitzroy translated the results of their surveys of South America into (1) "Sailing Directions" and (2) Charts published under the auspices of the Hydrographic Office of the British Admiralty, which formed the basis of the subsequent cartography of the Beagle Channel. As to the "Sailing Directions", the first edition was drawn up by Captain King and published in 1832. His references to the Beagle channel were brief because, owing to the difficulty of sailing vessels using its narrow waters, he regarded it as suitable only for boats. The main reference reads as follows:

"To the north of Lennox Island is the eastern opening of the Beagle Channel. It is easy of access, but useless to a ship. Boats may profit by its straight course and smooth water. It runs one hundred and twenty miles, in nearly a direct line between ranges of high mountains, covered always with snow. The highest are between three and four thousand feet above the sea. This channel averages one mile and a half in width, and in general has deep water; but there are in it many islets, and rocks near them." (Underlining added)

The opening words "to the north of Lennox Island is the eastern opening of the Beagle Channel", as the Hydrographer of the Admiralty pointed out in 1918 are somewhat ambiguous, since they might indicate an entrance between Picton and Navarino Islands. The explanation, as the Hydrographer then suggested, (Annex No. 122) may be that Captain King meant no more than in "a generally northerly direction" or was referring to "magnetic north", which at that date was some 23° east of true north and would place the entrance in the vicinity of Cape San Pio.* But whichever be the correct explanation of those words, there can be no doubt as to where Captain King intended to place the entrance to the Beagle Channel. As the "Sailing Directions" was a very substantial book covering large sections of the east and west coasts of South America, the fact that it was published in 1832 indicates that Captain King must have been working on it either before, or much about the same time as he was preparing the lecture delivered by him to the Geographical Society. From that lecture, as also from his official report to the Admiralty on 14 October 1830, we know that the author of the "Sailing Directions" considered the eastern entrance to the Beagle Channel to be at Cape San Pio.

22. As to the cartography which resulted from the "Beagle's" surveys, the earliest was the above mentioned manuscript Chart of high quality made on the basis of the survey carried out during her first expedition (Plate No. 1). This Chart marked the words "Beagle Channel" inside the channel along the reach between Navarino Island and Tierra del Fuego. The final "L" of "channel" was placed slightly to the west of what we now know as Gable Island. It is, of course, normal practice to place the name of a lengthy geographical feature in a central position in relation to that feature, leaving its extension on either side of the name to be understood. In the present instance, the Chart having been prepared on the basis of the surveys of the "Beagle's" first voyage, there can be no doubt of the intention to represent the Beagle Channel as extending eastwards to the open sea between Cape San Pio and Nueva Island. The same is manifestly true of the "Chart of a Part of South America", engraved by John Gardner, which was expressly based on the surveys of 1826-30 and was published in 1831 for the Journal of the Royal Geographical

¹ More accurately "Ponsonby Sound and the Murray Narrow"

* An indication of the effect of this deviation can be seen on Plate 3 of the ATLAS.

Society by John Murray of London (Plate No. 2), for this Chart was included in Volume I of the Society's Journal in order to illustrate the lecture given by King, in which he described the Beagle Channel as a channel "which extends from Christmas Sound to Cape San Pio". (See paragraph 15 above). The name "Beagle Channel", again given a roughly central position, was there placed above the north shore of the Channel. An almost identical version of the same chart, published by Henry Colburn of London in 1839, was included between pages 462 and 463 of Volume I of the Narrative, for which Captains King and Fitzroy were jointly responsible; and similar observations therefore apply.

23. The Narrative also included three maps of the Beagle Channel not inserted in the text. Those in Volumes I and II simply located the name "Beagle Channel" in a roughly central position on the north bank of the channel (Plate 3). The map included in Volume III, while again locating the name more or less centrally, abbreviated it to "Beagle Chan.". The significant point is that, despite being shortened by three letters, the writing of the name was so spaced out that the "n" of "Chan." was placed to the north of Picton Island: a clear indication that the Beagle Channel was understood as extending not only as far as, but eastwards of, Picton Island.

24. In 1841 the Hydrographic Department of the Admiralty published the first edition of its standard Chart for the area, No. 1373, entitled "The South Eastern Part of Tierra del Fuego with Staten Island, Cape Horn and Diego Ramirez Islands" and compiled from Captain Fitzroy's surveys (Plate 4). On the Chart, as in the first Chart, the name "Beagle Channel" was marked within the channel in a central position, and the observations made in paragraph 22 above in regard to the first Chart also apply to Chart No. 1373. Further editions of Admiralty Chart No. 1373 were published at intervals; but in all material points it remained unchanged until well after the conclusion of the 1881 Treaty.

25. The several Charts compiled from the surveys of Captains Parker King and Fitzroy gave cartographical expression to the detailed geographical features of the "Beagle Channel" as these had been observed and reported by the ship's company of the "Beagle". They showed what charts of the southern part of America all show: a channel traversing the Fuegian archipelagos; a channel composed at its western end of two arms, a north-western and a south-western arm, which merge at Point Divide; a channel which thereafter continues as a single channel of almost uniform width, almost straight and almost directly eastwards until it reaches its eastern entrance between Cape San Pio and Nueva Island; a channel which in a most striking fashion divides the large island of Tierra del Fuego from all the islands of the complex archipelago that lies to the south of that island. These features of the channel appear from the Charts themselves, regardless of nomenclature. Furthermore, they were given prominence not only by the publication of the Charts but also by the publication of the Narrative which attracted worldwide attention.

26. The concept of the "Beagle Channel" as a more or less straight east-west Channel dividing Tierra del Fuego from the archipelago to its south was then adopted by cartographers and appeared in general Atlases. Thus, a map of South America published in England in 1842 by the "Society for the Diffusion of Useful Knowledge" (Plate 5), despite its small scale, clearly showed the Beagle Channel as a channel separating Tierra del Fuego from the archipelago to the south. It also located the name "Beagle Channel" in the open sea opposite the eastern entrance to the channel, with the "B" of "Beagle" placed to the north-east of Nueva Island. This is equally the case in the "Map of South America" included in the first edition of The Harrow Atlas of Popular Geography (Plate 7), published some fourteen years later, though the definition of the channel was less clear on that map. Another and very clear example is a map of South America, drawn by J.W. Lowry and published by Chapman and Hall of London in circa 1850 (Plate 5). On this map the Beagle Channel as a channel crossing this part of South America almost directly from west to

east along the south shore of the large island of Tierra del Fuego and dividing the latter from the archipelago to the south was made to stand out very distinctly by reason of the ochre colouring of the land on either side of the channel. Moreover, the name "Beagle Channel" was located along the south shore of Tierra del Fuego and, even although abbreviated, was so printed as to extend fully as far as Cape San Pio. The same is true of a map "Amerique du Sud" prepared by E. Andriveau Goujon and published in Paris in 1854 as sheet No. 25 of their "Atlas Universal" (Plate 52). In this instance, the land on either side of the channel was coloured green; the name "Canal du Beagle", marked in full along the south shore of Tierra del Fuego, was so printed as to extend to Cape San Pio. Further editions of this map appeared in the same form in 1856, 1866, 1873 and in 1876.

27. In 1875 an important Argentine map which showed the Beagle Channel was published in Buenos Aires. It was compiled by A. de Seelstrang and A. Tourmente under the direction of the official committee responsible for organising Argentina's exhibits at the Philadelphia Fair (Plate 8). The boundary marked on the map was drawn in accordance with the extreme territorial pretensions of Argentina which at that date embraced all islands south of the Straits of Magellan, including those on the Pacific coast. More significant for present purposes is the manner in which the Beagle Channel was depicted on the map. By the well-defined marking of the coast-line on either side of the channel this map, shows very clearly the Beagle Channel as a channel crossing this part of South America almost directly from west to east along the south shore of the large island of Tierra del Fuego and dividing the latter from the archipelago to the south. The name "Beagle Channel" was printed in a more or less central position and inside the channel.

28. A similar depiction of the Beagle Channel was given by a map entitled "Amerique du Sud" and published in Paris in 1876 by E. Andriveau Goujon as sheet No. 25 of his "Classical Universal Atlas of Ancient and Modern Geography". Moreover, on this map the name "Beagle Channel" was printed on the north bank of the channel with the letters so spaced along the coast of Tierra del Fuego as to begin near Point Divide in the west and to extend to Cape San Pio in the east.

29. The interest of the Seelstrang-Tourmente map mentioned in paragraph 27 above is enhanced by the fact that in the following year, 1876, the Argentine Foreign Minister made proposals for settling the territorial dispute between the two countries which included the use of part of the Beagle Channel as their southern boundary.¹ Immediately upon the Argentine Foreign Minister's having explained his proposals to the Chilean Minister in Buenos Aires, the latter transmitted to the Chilean Government a copy of the Seelstrang-Tourmente map on which he had marked the proposed boundary by a red line (Plate 8). This red line first divided the large island of Tierra del Fuego from north to south along longitude 68° 34' W. It was then drawn at a right-angle eastwards along the Beagle Channel into the Ocean beyond Cape San Pio, thus passing between the south shore of Tierra del Fuego, on the one hand, and the north shore of Hoste, Navarino, Picton and Nueva Islands, on the other. As a glance at this Argentine map shows, the red line follows the natural west-east axis of the Beagle Channel and, in doing so, emphasises the Beagle Channel as an almost straight channel dividing the large island of Tierra del Fuego from the archipelago to the south.

30. In the period 1876-1881 various other maps, sketches and charts, including the British Admiralty Chart, were used to depict the boundary proposed by Argentina in 1876, which was agreed in 1881 and embodied in the Boundary Treaty (Plates 8 to 21). The provenance of these maps, sketches and charts, their connection with the conclusion of the 1881 Treaty and their significance for its interpretation will be fully explained to the Court in Chapter IV. The Court is now asked to refer to them only to note how in all of them the Beagle Channel as a channel having an almost straight west-east axis and dividing the large island of Tierra del Fuego

¹ These proposals, which later formed the basis of the 1881 Treaty, will be examined in detail in Chapter IV.

from the archipelago to the south appears very clearly. Particularly striking are the Chilean authoritative map published in August 1881 (Plate 13), the Sketch of Baron D'Avril, French Minister in Santiago (Plate 12 sketch B) and the section of Chart No. 786 used by the Admiralty in 1881 to illustrate the boundary settlement as communicated to them by the Argentine Minister in London (Plate 20). Indeed, the last-mentioned Chart gives additional emphasis to this concept of the Beagle Channel in that the name "Beagle Channel" is printed in the open sea opposite both its western and eastern entrances. Moreover, at the eastern entrance the "B" of "Beagle" is so printed as clearly to be located between Cape San Pio and Nueva Island. It may be added that the first official Argentine map published after 1881 with the new boundary printed upon it also shows in a conspicuous manner the Beagle Channel as an almost straight west-east channel dividing the large island of Tierra del Fuego from the archipelago to the south.

31. That very distinctive character of the Beagle Channel, as already pointed out, was not a question of terminology, although it was reflected in the nomenclature found in the cartography. It derived simply from the geographical features of the Channel as accurately surveyed and reported by Captains King and Fitzroy. Since these geographical features and that distinctive character of the Channel were clearly portrayed in the subsequent cartography, it is scarcely surprising that the Argentine Foreign Minister should have had the idea in 1876 and again in 1881 of using the Beagle Channel as a clear and appropriate dividing line between Tierra del Fuego and all the islands to the south of it. That this was the basis of his proposal in regard to Tierra del Fuego and the southern islands, and that this was how his proposal was understood by Chile, is manifest (even without reference to other elements of evidence) from the various maps, sketches and charts mentioned above. These maps, sketches and charts further make it manifest that both Argentina and Chile regarded Picton, Nueva and Lennox as separated from Tierra del Fuego by the Beagle Channel and as forming part of the archipelago to the south.

I. Principal islands in Beagle Channel area

32. As can most readily be seen by an examination of Map B, all the islands and islets south of Tierra del Fuego form a large geographical entity. This group of islands can be described in a variety of ways. One is to compare them collectively in shape with an inverted triangle of which the extremities of the northern base are Hoste Island at the west and Nueva Island at the east, and the apex at the south is Cape Horn. Or they can be described in the language of Sr. Senoret, the Chilean Governor of Magallanes in 1892:

"In the lands which extend to the south of the Beagle Channel three well-determined groups or archipelagos may be distinguished; that of Hoste, Gordon and innumerable smaller islands to the west; that of Navarino, Picton, Lennox and Nueva Islands and others to the east; and, finally, that of Wollaston with the Hermite Islands to the S.E." (Doc. 28, Official Gazette No. 4407 of 26 December 1892). (Underlining added)

33. **Hoste Island** is situated in the southwestern part of the archipelago which lies to the south of the Tierra del Fuego, and forms the southern shore of the Beagle Channel. The eastern extremity of Hoste Island is called Dumas Peninsula.

34. Between the south-west and the north-west arms of the Beagle Channel lies Gordon Island, the eastern extremity of which is Point Divide.

35. In his description of the group of islands comprising Navarino, Picton, Nueva and Lennox Sr. Senoret continued as follows:

"(it) offers an appearance entirely different from the previous, there are high mountains of—

three to four thousand feet, but also broad valleys, hills of moderate height and soft plains, and protected by the high land of the west, rich vegetation and well-populated forests of excellent woods prosper. Here there are fields for cattle and for agriculture." (Doc. 28)

36. In November 1938 the Chief of the General Staff of the Naval Station of Magallanes reported that

"Navarino, Picton, Lennox and Nueva Islands and in general all those which include the region of the Beagle, present great hopes for livestock production and wood exploitation, the only branches of agriculture which are today developed in them." (Doc. 302)

37. As will become apparent from the details in this Chapter and Chapter X on the exercise of Chilean sovereignty in the disputed area, the region has little in it to attract permanent settlers. The further south one goes the harder the climate becomes. The seas are stormy; the coasts treacherous because of reefs and currents. Settlement has, accordingly, been discontinuous. In the 1890s there was a gold rush. Within two decades later it was virtually over. After that, cattle farmers come and go, trying to eke a bare subsistence out of the land with a commodity as exposed as any to fluctuations in world prices. Nonetheless, the islands form part of an area which remains of importance to Chile. They have come to be accepted as integrally part of Chile, in the same way as the neighbouring islands of the archipelago; and they, their natural resources, and their tourist potential remain part of the Chilean national domain.

38. **Navarino.** The island was described in 1892 by Sr. Senoret in these words:

"It measures forty miles from east to west with a width of about twenty. Along its northern coast runs a cordon of snow-covered mountains of three of four thousand feet whose last branches to the east end near Puerto Toro. Other mountains cut it in several directions, particularly in the western part, but leaving spacious valleys between them, bathed by rivers having much water and considerable lakes. In the rest it is covered by highlands and hills of little elevation with woody skirts and gorges. At the top the trees are few in number but pasture-land abounds. To the south, from Guanaco Point to the north, a large plain runs which recalls the pampas of Patagonia." (Doc. 28).

39. The first organized settlement in the island was, in 1892, at Puerto Toro, on the northeast side of Navarino, which was set up primarily to serve as an administrative and commercial base for servicing Lennox, Picton and Nueva Islands, and other southern islands. Applications for grazing concessions had been made in the previous year. By October 1892 two hundred persons were estimated to be living on the island, mainly employed in seeking gold.

At the present time, the whole island is largely dependent on Puerto Williams, a naval base on its north coast.

40. **Picton.** The area of the island is about 10,000 hectares, of which approximately one quarter consists of mountains, lakes and swamps. The rest of the island consists, like its neighbours, of trees, scrub and grass. It has a considerable stock-breeding capacity. As early as 1892 applications were being made to the Chilean Government to bring in cattle.

41. The principal port is Banner Cove. This was described by an Argentinian officer in 1885 in these words:

"We ... went to spend the night of the 27th in the port of Banner, located on the Chilean island of Picton. Banner Cove is the first good port that there is on entering the Beagle Channel through the eastern end, and one of the largest in the Archipelago..." ("Islands of Los Estados. Summary. Journey of the Steamer Comodoro Py from San Juan to Ushuaia.

42. The islands or islets of Snipe, Solitario, Becasses, Hermanos, Gardiner and Reparo have generally been treated in association with Picton Island when, for example, it came to the granting of concessions for land use. (See e.g. the Decree No. 384 of 27 March 1911 which appeared in the Official Gazette No. 9961 of 22 April 1911, Doc. 226). Sometime before 1904 the Chilean Navy constructed a light on Gardiner (Doc 114 (a)).

43. **Nueva.** Gold was also found and exploited on this island in the last decade of the nineteenth century and first decade of the present century. In addition, concessions for sheep and cattle grazing there were granted by the Chilean Government during the last decade of the nineteenth century. There is a note of 1908 recording that at that time the island was occupied by Mariano Edwards who was keeping from 2,000-3,000 sheep there under the care of four men.

44. **Augustus** Island lies just off the south-west coast of Nueva and has generally been dealt with in association with it.

45. **Lennox.** The island, which has an approximate area of 13,000 hectares, is covered with scrub, small trees and sparse grazing for a few cattle.

Prior to 1889 little interest was shown in Lennox. In that year, however, gold was discovered and for about a decade boom conditions prevailed there. In 1892 estimates of the population there varied between three and seven hundred persons.

46. Luff, Ormeno and Raquel Islands, Teran and other islets, are commonly treated as appurtenances of and in association with Lennox Island.

47. **Gable.** This island was described in a report published by the Argentinian Geographic Society in 1885 under the title: "Islands of Los Estados. Summary. Journey of the Steamer Comodoro Py from San Juan to Ushuaia. Journey around Tierra del Fuego". The author was Federico Mousglier. He said (at p. 85):

"Gable is located to the north of the Beagle and is 25 or 30 miles to the east of Ushuwaia. It is a peninsula which stands out from the mainland at high tide, but at high (?low) tide communicates with small passes. It has some native population, which also depends on the Mission: they have good lands from which they supply us with vegetables in exchange for sea biscuits and ropes which we give them."

This description agrees with early maps where Gable appears as a peninsula (see for example British Admiralty Chart 1373 of 1841, Plate 4.).

II. Some other islands

"Staten Island, the small islands next to it".

48. **Staten Island** and the small islands next to it which Article III of the 1881 Treaty specifically states belong to Argentina, give rise to no problems in connection with the present case. The group is 68 miles distant from the nearest disputed island, Nueva, and lies outside the region defined in paragraph (4) of Article I of the Compromiso. The small islands next to Staten Island are the New Year Islands.

49. Apart from the specific mention of Staten Island in the 1881 Treaty, it may be remembered that the island was referred to in an Argentine Note of 30 June 1875 as being "the extreme end of the continent" (see Ch. III, para. 22). ~~"The other islands there may be on the Atlantic to the east of Tierra del Fuego and of the eastern coast of Patagonia."~~

The other islands there may be on the Atlantic to the east of Tierra del Fuego and of the eastern coast of Patagonia.

50. Among such islands and islets depicted in British and French nautical charts contemporary to the 1881 Treaty, the following may be mentioned:

Hidden (Escondida), Blanca, Moreno, Sola, Arce, Leones, Rasa, Valdes, Tova, Robledo, Lobos, Galiano, Ceballos, Viana, Vernaci, Quintana, Blanche, Pingouins, Plain, Jumelles.

Argentine sovereignty over them is not in issue in this case, but they are mentioned here because of the terms of the 1881 Treaty.

The Malvinas or Falkland Islands are also on the Atlantic to the east of Tierra del Fuego and Patagonia, but no reference to them has been found in the material concerning the negotiations which led to the conclusion of the 1881 Treaty.

Early Inhabitants.

51. The region to the south of the Straits of Magellan was formerly inhabited by Indians called Fuegians, who arrived in the area in remote times. They were divided into three groups. First, there were the Selkman or Onas who settled in Tierra del Fuego, people of great stature and strength, dedicated mainly to hunting. Secondly there were the Yamanas or Yahgans, whose habitat was the archipelago south of that island, specially the islands of Hoste, Navarino, Lennox, Nueva and Picton. The Yamanas were a people of lesser height, and obtained their means of subsistence mainly from the sea. Only occasionally did they occupy the southern coast of Tierra del Fuego, as the Beagle Channel formed a natural barrier that protected them from their northern neighbours. Lastly, in the archipelagos north and south of the western entrance to the Straits of Magellan, lived the Alakalufs, an essentially sea-faring people.

Those tribes have been the subject of study by ethnologists and especially Professor Martin Gusinde between 1918 and 1924.⁽¹⁾

In the mid - nineteenth century missionary activity was begun in the area by Anglican missionaries. Later, similar work was undertaken by members of the Salesian Order.

(1) "Die Fueurland-Indianer" (Vienna 1931)

THE ANTECEDENTS OF THE TERRITORIAL SETTLEMENT
EFFECTED BY THE BOUNDARY TREATY OF 1881

1. **Introduction.** The Government of Chile, as stated in the Introduction, maintains that the sovereignty of the islands in the Beagle Channel area and the boundary between the territories of Chile and Argentina in that area were definitively settled by the 1881 Treaty. This Treaty brought to a conclusion a controversy which had existed between the two countries for upwards of 30 years concerning their respective territorial rights in Patagonia, in and around the Straits of Magellan, in Tierra del Fuego and in the other islands as far southwards as Cape Horn. It did so by effecting a compromise between the rival claims. Inevitably, therefore, it is to the Treaty of 1881 that the Court of Arbitration^{*} must primarily look in answering the questions which have been referred to it for decision.
2. It also follows that the Court of Arbitration is not in the present case concerned with the legal merits of the pretensions of Chile, on the one hand, and Argentina, on the other, under titles derived from the Spanish Crown in accordance with the doctrine of *uti possidetis*. The titles of the Parties to the territories now in dispute in the Beagle Channel area spring from the Treaty of 1881 itself, by which they agreed to compromise their conflicting claims on the terms written into the Treaty. The Chilean Government does not, therefore, propose to trouble the Court in the present Chapter with lengthy explanations of the historical titles invoked by the Parties prior to the settlement of their territorial dispute in 1881. Nevertheless, the provisions of the 1881 Treaty relating to the Beagle Channel area form only one part of a much larger complex of boundary questions inherited by Chile and Argentina when they broke away from Spain and became two separate independent States. In consequence, the meaning and scope of those provisions can be properly understood and interpreted only in the context of the larger settlement of boundary questions which the Parties sought to achieve in the 1881 Treaty. The Chilean Government, accordingly, thinks it necessary in this Chapter to present to the Court of Arbitration a brief account of the claims and negotiations of the Parties in regard to their territorial rights in the southern regions of South America before 1881, since these constitute an essential basis for the interpretation of the settlement embodied in the Boundary Treaty of that year.
3. **Events before 1843.** An early agreement between the Republics of Chile and the United Provinces of Rio de la Plata contained a provision (Article 3) whereby they bound themselves "to guarantee the integrity of their territories and to act against any foreign power attempting to change by force their boundaries, either as recognised before their emancipation, or later by virtue of special treaties" (Annex No. 1). The early Constitutions of Chile, namely those of 1822, 1823, 1828 and 1833, even contained descriptions in broad terms of the territories of the Republic. The 1833 Constitution, for example, stated that Chilean territory extended up to Cape Horn, including Chiloe Archipelago¹, all the adjacent islands and the Islands of Juan Fernandez². In the first years of their existence, however, the new Republics were more preoccupied with securing their independence from Spain and stabilising their own internal political organisation than with determining the precise limits of the territories to which they had respectively succeeded.
4. **Guillermos mission 1843.** It was in these circumstances that in 1843, on instructions from President Manuel Bulnes, the Intendente of Chiloe Province gave written orders to Captain Juan

¹. Situated about 42°S. and 1,000 kilometres north of the Strait of Magellan.

². Situated far out in the Pacific, some 360 miles west-north-west of Valparaiso.

Guillermos to build a fort on territory in the Strait of Magellan and then formally to "take possession of that territory in the name of the Government of Chile, to whose Republic it belongs in accordance with the declaration in Article 1 of its Political Constitution" (Annex No.2). The Fort was to be named Fort Bulnes after the President of the Republic, the Chilean flag hoisted and a copy of the formal act of possession deposited at the foot of the flag-staff. Captain Guillermos was further instructed that, in the unforeseen event of his finding any foreign settlers on any part of the territory, he was to protest against their occupation as "an attempt against the integrity of the territory of the Republic of Chile". This protest he was to base on the description of the boundaries of Chilean territory given in Article 1 of the Constitution. Moreover, if it should be claimed by the foreign settlers that the boundaries of Chile on the east were formed by the Andes Mountains, he was to rebut the claim with the statement:

"Since the Andes ridge ends a long distance to the north of the Strait of Magellan, this Strait belongs entirely to the Republic of Chile, as its boundaries stretch to the south as far as Cape Horn, as also does the whole of Tierra del Fuego for the same reason that the said range is not in existence there".

In the event, no such foreign settlers were encountered and, in accordance with his instructions, Captain Guillermos formally took possession of the Strait of Magellan and its territory in the name of the Republic of Chile (Annex No.3). He built Fort Bulnes on the north shore of the Strait, near its centre and some thirty miles to the south of where Punta Arenas now stands; and thereby began the establishment of Chile's presence in her southern lands.

5. **Chile-Spain Treaty 1844.** The following year, 1844, Chile concluded a Treaty of Peace and Friendship with Spain, by which the latter recognised Chile as extending up to Cape Horn (Annex No. 4).

6. **Argentine note, 1847.** Reports of the founding of Fort Bulnes made to the Chilean Congress drew Argentina's attention to the establishment of the Chilean settlement in the Straits of Magellan, and on 15 December 1847 she addressed a diplomatic Note to the Government of Chile claiming that the areas in question were Argentine territory (Annex No.5). Inter alia, the Argentine Note stated:

"The great chain of the Andes has been the boundary of the territories of the Argentine Confederation and these natural boundaries have been those which for all time have been recognised as those of the Republic of Chile. In the eastern summit of that chain the Argentine territory begins, which it delimitates in all its extent as far as Cape Horn

.... From the remotest time in which the Spanish monarchy took possession of this part of America and in which it established the Gobernaciones and Intendencias of the present Republic of Chile as well as of the Confederation, the orders for the protection and police of the Straits of Magellan, as well as for other purposes appertaining thereto, as likewise those for the adjacent islands and Tierra del Fuego, were always addressed to the Governors and Viceroy of Buenos Aires as the authority to which all that part of the territory was subject.

The Republics of South America, when severing the ties which connected them with the metropolis and when constituting themselves as sovereign and independent states, adopted as a basis for their territorial division the same demarcation which existed between the various Viceroyalties which constituted it".

In short, Argentina put her claim in two ways: (1) she maintained that the Chain of the Andes was the boundary and that this Chain extends as far as Cape Horn; and (2) invoking the uti possidetis principle, she maintained that in Spanish times the Straits of Magellan, the adjacent islands and Tierra del Fuego had been under the Governors and Viceroy of Buenos Aires and thus belonged to Argentina.

7. **Chilean Note Jan. 1848; Argentine Note May 1848.** Chile, as the Argentine Minister Plenipotentiary was expected to arrive in Chile in the near future to discuss boundary problems, replied on 31 January 1848 merely expressing surprise at the Argentine claim and asserting the existence of "titles justifying the indisputable right of Chile, not only over the land occupied by the colony recently set up in Magellan, but over all the Straits and the lands adjacent thereto and others designated by such titles" (Annex No.6). This Note was followed by a further Argentine Note of 16 May 1848 in which the Argentine Government declined to accept the Chilean statement as to the existence of Chilean titles to the territories in question and re-affirmed its own claim (Annex No.7).

8. **Chilean Note, Aug. 1848; Argentine Note, Nov. 1848.** It then became apparent that the controversy embraced the whole of the southern part of South America. In its Note of 30 August 1848 (Annex No. 8) the Chilean Government, still having in mind the arrival of an Argentine mission to Chile, proposed that the two Governments "should reciprocally communicate the foundations of their claims and should proceed to the exact demarcation of the boundary where the Chilean territory and that of the Federal provinces touch". In regard to the Cordilleran pastures (potreros) it also suggested that Commissioners from both countries might visit the disputed territory and try to trace the boundary-line by mutual accord. In its reply of 16 November 1848 the Argentine Government, while agreeing upon the need for the two Governments to communicate to each other their respective titles to the disputed territories, considered that the despatch of Commissioners to the Cordilleras would be premature.

9. **Controversy on titles, 1852-55.** An interlude of some seven years followed, during which there occurred a discussion about the sovereignty of the territories of the southern part of South America, which was carried on in books published in Chile and Argentina. In 1852 the General Custodian of the Archives in Buenos Aires published a booklet entitled "Historical Memorial of the rights of the Argentine Confederation to the Sovereignty and Dominion of the Southern Part of the American Continent, extending from the Coasts of the Atlantic Ocean to the great Cordillera of Los Andes, from the mouth of the Rio de la Plata to Cape Horn, including Staten Island, the Tierra del Fuego and the Straits of Magellan in all their extension". The booklet was countered on the Chilean side by a publication "Titles of the Republic of Chile to the Sovereignty and Dominion of the Southern Extremity of the American Continent", written by the historian, Miguel Luis Amunategui, at the request of the Government. This was followed by the publication, at the request of the Argentine Government, of a book by Dalmacio Velez Sarsfield, entitled "Arguments against the Titles of the Government of Chile to the Lands of the Straits of Magellan". Finally, and at the request in turn of the Chilean Government, the arguments of Velez Sarsfield were rebutted in a further publication by Miguel Luis Amunategui in 1855.

10. **Chile-Argentine Treaty, 1855.**¹ Meanwhile, negotiations between the two Governments to resolve their differences of view regarding the boundaries remained in suspense. Moreover, although in 1855 they concluded a General Treaty of Peace, Friendship, Commerce and Navigation, they specifically agreed, in Article 39 of that Treaty, to postpone the discussion of any questions relating to their boundaries until a later date (Annex No. 9). Otherwise, they limited themselves to acknowledging "as the boundaries of their respective territories those existing as such at the time they broke away from the Spanish domination in 1810". In short, they merely reiterated in general terms their recognition of the uti possidetis principle.

11. **The 1865 discussions and the Lastarria draft.** It was not until nearly ten years later that discussion of the boundary questions was resumed between the two Governments. In a despatch of 22 February 1865 Sr. J.V. Lastarria, Chilean Minister in Buenos Aires, reported that he had received from the Argentine Government "a large number of suggestions intended to extend and

¹ In some documents this Treaty is mentioned as "the 1856 Treaty" on account of the year of its ratification.

supplement the Treaty'' (of 1855) with a view to strengthening good relations between the two countries (Annex No. 10). He said that in the light of these suggestions he had himself prepared the draft of a treaty which covered a wide range of matters relating to communications and trade and which for purposes of identification he designated ''Copy No. 1''. At the same time, he enclosed the draft of a boundary treaty ''to settle in a friendly manner the question of borders'' which the two Governments had ''left pending by virtue of Article 39 of the Treaty of 1855''. With regard to this draft he explained that he had proposed a compromise but that he thought there was little value in it, and so had also proposed arbitration. Sr. J.V. Lastarria, it has to be added, although instructed to take advantage of the opportunity to raise the question of the boundaries, had not received instructions in regard to any compromise between the conflicting claims of the two countries.

12. The text of Sr. J.V. Lastarria's proposal is reproduced in Annex No. 11 of this Memorial, where it will be seen that the compromise which he had in mind for settling the boundary disputes included the recognition as Chilean of

''All territory to the west of San Gregorio Bay and all islands to the south of the Straits of Magellan, including Tierra del Fuego''. (Underlining added)

The Argentine President and Minister, with whom Sr. J.V. Lastarria discussed his proposals, not surprisingly informed him that they needed time in which to study them more fully.

13. The proposals, as already indicated, were of Sr. J.V. Lastarria's own devising, and in his despatch he sought to commend them to the Chilean Government.

14. Replying in a despatch of 30 March 1865, (Annex No. 12), the Chilean Foreign Minister informed Sr. J.V. Lastarria that the Chilean Government preferred, if possible, to settle the boundary questions by direct negotiation rather than by arbitration; and that he should therefore do everything in his power to avoid the need to go to arbitration. The Foreign Minister then informed him of the views of the Chilean Government on the basis for a settlement contained in the draft treaty and continued

''We therefore expect you to try to reach an agreement with the Argentine Government with a view to fix completely and definitively the boundaries between the two republics on the following basis: (1) between latitudes 23°S to 50°S the boundaries between Chile and the Argentine Republic shall be the summits of the easternmost chain of the Andes; (2) the lands stretching south of the 50°S parallel shall belong to Chile.''(Underlining added)

15. Thus, the Chilean Government took the position that north of latitude 50°S (i.e. approximately the latitude of the Rio Santa Cruz) the boundary should be the summits of the easternmost chain of the Andes, but that all the territory south of the same latitude, including all the southern part of Patagonia right up to the Atlantic coast, should be acknowledged as Chilean.

16. The correspondence shows that Chile believed herself to be entitled to Patagonia and to all the territories situated to the south of the Straits of Magellan. On the other hand, although she was particularly interested in obtaining a definitive settlement of the boundary north of latitude 50°S, at no time had Chile contemplated giving up her rights to the territories south of the Straits of Magellan.

17. **The 1872-3 Correspondence.** No further discussion of the boundary questions took place between Chile and Argentina until 7 February 1872 when the Chilean Foreign Minister reopened them in a letter to the Argentine Minister in Santiago (Annex No. 13). In this letter he pointed

out that, as the area developed, failure to settle the boundary was becoming increasingly prejudicial to both countries and aggravated the risk of encroachments by Europeans. He proposed that, pending a solution on the boundary questions, they should enter into an arrangement for a division of the territories unless and until a different solution was reached by later agreement or arbitration. Under the proposed arrangement a line was to be drawn from Puerto Deseado on the Atlantic coast of Patagonia to the Andes, i.e. approximately along latitude $47\frac{1}{2}^{\circ}\text{S}$; all the territories to the south of this line were to be assigned to Chile comprising inter alia the whole of Tierra del Fuego and the adjacent islands. The Note also stated the intention of Chile to take certain steps to prevent any foreign power from relying on the presence of missionaries on Navarino Island as a basis for an assertion of title to those territories.

18. In making this proposal the Chilean Foreign Minister had invoked the fact that Chile was "already in possession of a growing and prosperous colony in the Straits of Magellan". Replying in a Note of 1 October 1872 (Annex No. 14), the Argentine Minister in Santiago reminded the Foreign Minister that Chile's possession of Punta Arenas had not gone unchallenged by Argentina. He then made a counter-proposal under which at its eastern end the starting-point of the boundary line was to be Peckett Bay in the Straits of Magellan from which it was to be drawn westwards until it reached the Andes. Peckett Bay is situated approximately at latitude $52\frac{1}{2}^{\circ}\text{S}$ and a little to the north of Punta Arenas which, together with the Brunswick Peninsula and the rest of the north shore of the Straits to the west would therefore have been assigned to Chile. The rest of Patagonia, on the other hand, including part of the north-eastern shore of the Straits of Magellan, would have been assigned to Argentina. The Note added that if the Argentine counter-proposal was accepted by Chile, "the division of the opposite coast of the Straits and of Tierra del Fuego would be easily settled".

19. The Argentine counter-proposal elicited from the Chilean Foreign Minister a long Note of 29 October 1872 (Annex No. 15), in which he reasserted Chile's titles to the whole of Patagonia, the Straits of Magellan, and indeed the whole of the southern part of South America. In this Note he underlined the importance attached by Chile to "possession of the entire length of the Straits of Magellan" as the essential means of communication for her trade and industry with Europe; and said that Chile could not renounce her claims to the eastern mouth of the Straits. In answer to this proposal of Sr. Frias, he argued that a fairer solution would be to divide Patagonia in half, but aware of the lack of knowledge of the interior, and possibly of the lack of physical features, he suggested drawing a line east-west from the Atlantic to the Andes along latitude 45°S . Under this Chilean proposal "the Argentine Republic would thus acquire the greater part of Patagonia and Chile would hold the southernmost part to Cape Horn".

20. Accordingly, in 1872 the Chilean Government was still asserting Chile's titles to the whole of Patagonia and declining to entertain any proposals for settling the boundary question which did not leave to Chile all the southern part of Patagonia eastward to the Atlantic coast and all the territory southwards to Cape Horn. At the same time, as may be seen in the last-mentioned Note of 29 October 1872, Chile was complaining of recent grants by Argentina of concessions relating to the islands of Estados (Staten Islands) and to certain places on the Atlantic coast of Patagonia as violations of the status quo. The Court of Arbitration's attention is drawn particularly to this reference to the islands of Estados because those islands, which lie some miles off the south-eastern extremity of Tierra del Fuego, were afterwards to receive specific mention in the Boundary Treaty of 1881. Moreover, the newly developed Argentine activity on the Atlantic seaboard of southern Patagonia was also to influence the terms of the settlement reached in 1881.

21. **1874: abortive arbitration negotiation.** There then followed an exchange of correspondence between the Governments which contained detailed discussion of their colonial titles but there appears to be no present need to examine these Notes at this stage, since as is explained later, the Treaty of 1881 settled the problem without reference to that subject. In 1874, on instructions from the Chilean Government, the Chilean Minister in Buenos Aires proposed formally to the Argentine Government that the dispute be submitted to arbitration in accordance with the Treaty of 1855. He subsequently reported back that the Argentine Foreign Minister was agreeable to an arbitration covering the whole of Patagonia, the Straits of Magellan and Tierra del Fuego. In the middle of that year, however, after acceptance of arbitration by Chile, changes occurred in the Foreign Ministry in Argentina and the negotiations came to nothing. Inter alia, the new Foreign Minister, Sr. Bernardo de Irigoyen, in a change of policy (which he openly admitted later) refused to allow Patagonia to be included in any arbitration.

22. **1875 correspondence.** The next development in the dispute between the two countries concerning their southern boundary was the passing of a law in 1875 in the Argentine Congress authorising the Executive to subsidise sea communications between Buenos Aires and the coasts of Patagonia, including those south of the River Santa Cruz (approximately latitude 50°S). In a Note of 16 June 1875 (Annex No. 16), the Chilean Minister in Buenos Aires protested against this law as a violation of the status quo, saying that his Government would not consent to its application south of that River. The Argentine Government rejected the protest in a Note of 30 June 1875 (Annex No. 17), in which it made counter-charges of alleged violations of the status quo by Chile. Inter alia, it maintained that Chile had made known her claims to the whole of Patagonia only in 1872 and that Argentina had extended her acts of jurisdiction "to the extreme end of the continent, that is to the island of Estados" prior to that date; and it also referred to certain acts of the Spanish Crown as allegedly evidencing Argentina's title to the Patagonian coast.

23. The Chilean Foreign Minister replied in a Note of 31 July 1875 (Annex No. 18), objecting that Chile was not making any new claims and pointing out that, once a dispute has arisen, neither party should try to improve its position. The Chilean Government, he said, did not want to terminate the negotiations but, if recourse must be had to arbitration, this would have to cover all the areas in dispute. The indication given by Chile that she desired to continue negotiations on the boundary questions met with a favourable response from Sr. Bernardo de Irigoyen, Argentina's Foreign Minister. In a Note of 4 September 1875 (Annex No. 19), while reaffirming Argentina's claims and contentions in regard to the southern lands, he welcomed the Chilean Government's suggestion not to put an end yet to the negotiations, and agreed that, if these should nevertheless fail to produce a settlement, the Parties should hasten to arrange an arbitration. Both Governments being thus anxious that further efforts should be made to negotiate a settlement of the boundary questions, there followed in 1876 prolonged discussions in Buenos Aires between the Chilean Minister to Argentina and Sr. Bernardo de Irigoyen. Proposals made by the latter in the course of these discussions are of considerable importance for the understanding and interpretation of the Treaty of 1881, and must therefore be set out here in detail.

24. **Barros Arana-Irigoyen exchanges 1876.** In 1876, Sr. Diego Barros Arana had been appointed Chilean Minister to the Argentine Republic and in a despatch of 4 May 1876 (Annex No. 20) the Chilean Foreign Minister gave him the Chilean Government's instructions in regard to the settlement of the boundary questions. After setting out the Government's views concerning the form and subject-matter of an arbitration, should this ultimately be the solution agreed upon, the Foreign Minister indicated to him the kind of boundary settlement which Chile might be ready to accept as a compromise:

"1. My Government would be willing to cede to the Argentine Government all their (Chile's) rights over all Patagonia, if the said Government recognises as their (Argentina's) definitive boundary with our territory, the southern bank of the Santa Cruz River in all its course, from its mouth in the Atlantic to its source, and from there as far as the cordillera de los Andes, following a line that would be perpendicular to the respective meridian;

2. All the territories situated to the south of the said line, including the Straits and the Tierra del Fuego, would therefore, be acknowledged as an integral part of the Chilean territory;

3. If the foregoing proposition is not acceptable to that Government, our vehement desire for an arrangement that would remove for ever any possible cause of disagreements with the Argentine Republic, would take us even as far as to circumscribe our claims to the Gallegos River granting to that country all the vast territory that extends to the north of the mouth of the said river and of a line that, running parallel to the 50° parallel of latitude, would cut the interior of the land of Patagonia." (Underlining added)

Thus, Sr. Barros Arana was at first to try for a boundary by which Chile would retain all territory south of the River Santa Cruz, situated approximately at latitude 50°S; failing that, he was authorised to fall back on a boundary by which Chile would retain all territory south of the River Gallegos, situated nearly two degrees of latitude further to the south but still about half a degree of latitude to the north of the Atlantic entrance to the Straits of Magellan.

25. In a telegram of 5 July 1876 (Annex No. 21), Sr. Barros Arana duly reported that he had had "four long conferences and many discussions" with Sr. Bernardo de Irigoyen concerning the terms for a friendly settlement of the boundary questions. He set out the proposals of the Argentine Government for such a settlement north of the Straits, adding that "South of this line, would be Chilean territory". Further he stated that (so far as the territory under dispute in this Arbitration is concerned.)

"Tierra del Fuego would be divided in the following manner: from the point called Cape Espiritu Santo, on 52° 40', a line would extend south, coinciding with meridian 68° 34', being extended up to the Beagle Channel. To the west of this line would be Chilean territory. The Islands would be divided in the following manner: Staten Island, the neighbouring islets and other islands in the Atlantic Ocean would be Argentinian. The other islands located south of the Beagle Channel down to Cape Horn would be Chilean. Thus all other islands to the south of the Strait would be Chilean." (Underlining added)

At the same time he recommended that reference should be made to the "map of the Strait of Captain Mayne" in order to understand the Argentine proposals.¹ As to the proposals themselves, these were reproduced textually in a long despatch sent by Sr. Barros Arana a few days after his telegram and will be set out in full in the next paragraph.

26. In that despatch dated 10 July 1876 (Annex No. 22), Sr. Barros Arana reported that he had resolutely tried to defend Chile's right to a boundary at the River Santa Cruz or at least at the River Gallegos; and that, in particular, he had strongly pressed both the economic importance to Chile of the Straits of Magellan and the valuable work she had done in buoying and lighting the

¹. The "map of the Strait of Captain Mayne" mentioned by Barros Arana has not been traced but it is believed to be one of the nautical charts issued by the Hydrographic Office of the Admiralty, in the 1870's. This may be deduced from what Barros Arana himself wrote in 1890: "The Governments of Chile and of the Argentine Republic, on establishing the boundary line in the Austral Region, referred to the great Hydrographical chart of Captains Parker King and Fitz Roy, drawn up following a most exhaustive study between the years of 1826 and 1834, with some details completed by Captain Mayne in 1867, all three Captains from the British Royal Navy" (see Barros Arana's report of 25 October 1890, Annex No. 58).

dangerous channels in its waters. The Argentine Foreign Minister, he said, informed him that Argentina could not accept that Chile's dominion should extend to any point on the Atlantic coast and after some discussion finally proposed the following dividing line:

' "Point of division on the Strait", Mount Dinero, latitude $52^{\circ}19'$. The line would start from that point following the highest peaks of the chain of hills extending westwards as far as the height called Mount Aymond, at latitude $52^{\circ}10'$. From this point a line would be drawn which, coinciding with latitude $52^{\circ}10'$ would extend to the Andes. This would be the dividing line between the Republic of Argentina which would lie to the north and the Republic of Chile to the south.

"Tierra del Fuego". - From the point called Cape Espiritu Santo on latitude $52^{\circ}40'$, a line would be drawn southward coinciding with meridian $68^{\circ}34'$ west of Greenwich, which would extend to the Beagle Channel. Tierra del Fuego, divided in this manner, would be Argentinian on the east and Chilean on the west.

"Islands". - Staten Island, the islets in the immediate vicinity of this island and other islands there may be in the Atlantic Ocean east of Tierra del Fuego and the eastern coasts of Patagonia belong to the Republic of Argentina, and all the other islands south of the Beagle Channel up to Cape Horn, as well as those which lie west of Tierra del Fuego, shall belong to Chile.' (Underlining added)

The Argentine Foreign Minister also indicated that, if a treaty was to be concluded on the basis of these proposals, Argentina would like it to include a general principle, which would serve for demarcating the boundary throughout the length of the Andes range. In his despatch Sr. Barros Arana emphasised that, in his view, Argentina was unlikely to accept any settlement more favourable to Chile than Sr. Bernardo de Irigoyen's proposals, and that approval of even these proposals could only be obtained from the Argentine Parliament after long and difficult debate.

27. The special importance of the proposal put forward by Sr. Bernardo de Irigoyen lies in the fact that in all respects material to this case it is identical with the settlement ultimately agreed to in 1881. The precise nature of the boundary proposed by the Argentine Foreign Minister in these discussions is therefore a matter which merits the particular attention of the Court of Arbitration. Fortunately, it is also a matter on which the evidence leaves the Court in no doubt whatever. This is because Sr. Barros Arana enclosed with his despatch the copy of a map on which he marked in red ink "the approximate line" of the boundary proposed by the Argentine Foreign Minister. Seeking to persuade the Chilean Government that the proposal was "not so disadvantageous as appears at first sight", Sr. Barros Arana explained how much more favourable to Chile it was than the previous Argentine proposal of 1872. In order to illustrate the point, he used a copy of a map which had been produced in 1875 on the instructions of the Argentine Central Committee for the preparation of Argentina's exhibition at the Philadelphia Fair. On this map he drew in red ink the version of the boundary proposed by Sr. Bernardo de Irigoyen in 1876 (Plate 8). On the left-hand side of this map is written: "The red line indicates the proposal to which reference is made in the above despatch". Accordingly, no doubt can possibly exist either as to the authorship or the signification of the red line shown on this Map. Moreover, as will be seen in Chapter 4, the red line there shown corresponds with the lines marked on later maps as depicting the boundary settlement of 1881, which had as its basis the proposals made by Sr. Bernardo de Irigoyen in 1876.

28. If the map in question is examined, it will be seen quite clearly that to the south of the Straits of Magellan the boundary proposed by Sr. Bernardo de Irigoyen divided Tierra del Fuego by a line drawn from the Straits southwards along longitude $68^{\circ}34'$ S. until it reached the Beagle Channel, and then proceeded eastwards along the Beagle Channel out into the ocean past Cape San Pio. The words in which Sr. Bernardo de Irigoyen formulated his proposal do not actually speak of a boundary line in the south, but the fact that he intended the Beagle Channel to form Argentina's

southern boundary with Chile to the east of longitude 68° 34' S. is apparent for his allocation to Chile of "all the other islands south of the Beagle Channel up to Cape Horn". The red line drawn by Sr. Barros Arana eastwards along the Beagle Channel out into the Ocean past Cape San Pio therefore reflects the evident intention of the Argentine Government in the 1876 negotiations. Accordingly, it is of the highest significance in the present case that this red line, depicting cartographically the meaning and effect of the terms of settlement proposed by Argentina, passes to the north of Picton, Nueva and Lennox Islands which, therefore, it unequivocally allocates to Chile. This is entirely consistent with the telegram of 5 July 1876 referred to in paragraph 25 above.

29. The reference to the Beagle Channel in the terms of settlement proposed by Sr. Bernardo de Irigoyen was the first occasion on which the Beagle Channel appears to have been mentioned in the negotiations between Argentina and Chile. The Court of Arbitration is, in consequence, asked particularly to note that, on this occasion of the introduction of the Beagle Channel into the discussion of the terms for settling the boundary questions, the evidence shows that Sr. Bernardo de Irigoyen and Sr. Barros Arana both understood the course of the Beagle Channel to run to the north of Picton and Nueva Islands and to enter the ocean between Cape San Pio and the latter.

30. **Chilean reaction 1876.** In a letter of 1 August 1876 (Annex No. 23) the Chilean Foreign Minister informed Sr. Barros Arana that, despite the considerations advanced by the latter in favour of the proposed compromise, the Chilean Government could not accept it. The draft terms of settlement, the Foreign Minister said, were still far from satisfying the well-founded aspirations of Chile. Stressing Chile's need for full and complete possession of all the Straits and the adjacent zones, he encouraged Sr. Barros Arana to continue the negotiations. However, efforts to obtain more favourable terms proved fruitless, and the Chilean Foreign Minister in a further letter of 23 October 1876 (Annex No. 24) informed Sr. Barros Arana that it had become necessary to proceed to arbitration. The letter contained instructions concerning certain points to be inserted in the agreement for arbitration.

31. **Arbitration Treaty 1878.** During the course of 1877 Sr. Bernardo de Irigoyen was succeeded by Sr. Rufino de Elizalde as Foreign Minister of Argentina; and in a letter of 7 January 1878 (Annex No. 26) Sr. Barros Arana informed his Government that he had initiated negotiations with the new Minister concerning the submission of the boundary questions to arbitration. This letter was followed by a despatch, dated 24 January 1878 (Annex No. 28), in which Sr. Barros Arana reported at length on these negotiations. Enclosed with the despatch was a treaty of arbitration which Sr. Barros Arana and the Argentine Foreign Minister had signed at the conclusion of the negotiations (Annex No. 27). This Treaty, in effect, provided for the submission of the boundary questions to arbitration except in so far as any principle or fact might be agreed by the Parties, in which case this principle or fact would be excluded from the arbitrator's power of decision.

32. **Argentine proposals 1878.** The treaty was signed, subject to ratification. As opposition to the treaty developed in both countries, Sr. Rufino de Elizalde, the Argentine Foreign Minister, reopened the matter by addressing a Note of 30 March 1878 to Sr. Barros Arana. This Note is of considerable importance because of the further light which it throws both on Argentina's understanding of the concept of the Beagle Channel and on her intentions regarding the southern boundary in that area (Annex No. 29). The basic agreement to submit the boundary questions to arbitration having been negotiated, the Argentine Foreign Minister said that the moment had come to try and carry the matter further by negotiating either a comprehensive compromise of the rival boundary claims or a partial compromise plus a limited arbitration. Setting out his proposals for a comprehensive compromise, he suggested a boundary line which, inter alia, would pass from the north of the Brunswick peninsula southwards across the Straits of Magellan and through

Admiralty Channel, across Tierra del Fuego from Mount Hope to the Beagle Channel "and then following it parallel to 55°S latitude until the Atlantic Ocean". The Argentine Foreign Minister clearly meant to convey by his reference to the line of latitude that the boundary would run directly eastwards along the Beagle Channel until it reached the ocean. He did not, in fact, leave Sr. Barros Arana in any doubt on this point. In order, as he said, "to clarify further the lines representing the bases for compromise and limitation" which he had proposed, he enclosed a map on which those lines were traced (Plate 9).

33. The map in question was signed by Sr. Rufino de Elizalde and bears the same date - 30 March 1878 - as the Note with which it was enclosed. As the Court will observe, the boundary line in the south runs directly eastwards along the Beagle Channel north of Picton Island and thence between Cape San Pio and Nueva Island out into the ocean to beyond the islands of Estados. If the Court turns to Plate 10 it will also find a sketch made by Sr. Barros Arana and depicting the compromise proposed by Sr. Rufino de Elizalde. This sketch he sent to the Chilean Foreign Ministry as an enclosure to his despatch of 13 April 1878 (Annex No. 30) and with the following explanation: "For easier understanding of these proposals, I have made a rough sketch of the map of the regions near the Straits, in order to trace the line of demarcation which is proposed to us." Sr. Barros Arana, retained for his own use the map sent him by Sr. Rufino de Elizalde and forwarded this sketch map to Chile to illustrate the terms of settlement offered by the Argentine Foreign Minister. At any rate, in the Beagle Channel area the compromise boundary shown on Sr. Barros Arana's sketch map corresponds with the line drawn on the map sent to him by Sr. Rufino de Elizalde; for it likewise runs directly eastwards along the Beagle Channel, passing to the north of Picton Island and thence between Cape San Pio and Nueva Island into the ocean to beyond the islands of Estados. Consequently, there can be no possible question as to what both Argentina's Foreign Minister and Chile's Minister Plenipotentiary understood in 1878 by a boundary defined by Argentina as following the Beagle Channel until the ocean. It was a line running to the north of both Picton and Nueva islands. This was also the understanding of the President of Argentina and of former Foreign Minister Sr. Irigoyen and of other experts, as is evidenced by the following statement of Sr. Elizalde: "After a special resolution of the Government, the President and the ex-Minister Dr. Irigoyen approved the bases and map which I presented, having consulted with competent persons, and they authorised me to send the note which I sent to the Minister of Chile, to which he has still not replied." (Report of Dr. Rufino de Elizalde to Argentine Foreign Minister of 16 May 1878 - Cuestion Límites Con Chile, Buenos Aires p.5).

34. **Further Arbitration Treaty 1878.** The negotiations between Sr. Barros Arana and the Argentine Foreign Minister broke down because of feelings in both countries and neither Government submitted the treaty to their legislatures. The negotiations having thus proved abortive, the Chilean Government in May 1878 terminated Sr. Barros Arana's mission. In the latter part of 1878 further negotiations took place in Santiago between the Chilean Foreign Minister and the Argentine Consul General which ended with their signing a new treaty on 6 December of that year (Annex No. 31). The Treaty provided for the formation of a "Mixed Tribunal" composed of two Chileans and two Argentines empowered to resolve disputed questions of sovereignty and to appoint a neutral Umpire to decide matters on which the Tribunal itself could not reach agreement. This Treaty obtained the approval of the Chilean Congress but was rejected by the Argentine Parliament.

35. Both the treaties of arbitration mentioned in the previous paragraphs envisaged the settlement of the respective territorial claims of Chile and Argentina on the basis of the uti possidetis principle; and on the basis that in the American Continent no territory was to be considered as having the character of res nullius, so that all the disputed territory must be regarded as belonging either to Chile or to Argentina. They also contained provisions for the interim exercise of

jurisdiction, without prejudice to the respective claims of the Parties, in the disputed territories pending the outcome of the arbitration. These provisions were broadly the same in both Treaties and it therefore suffices to refer to the version found in Articles VI and VII of the second Treaty of 6 December 1878 (Annex no. 31).

Art. VI - "Until the Tribunal settles the matter of borders, the Republic of Chile shall exercise jurisdiction over the sea and coasts of the Straits of Magellan, channels and adjacent islands, and the Republic of Argentina over the sea and coasts of the Atlantic Ocean and the adjacent islands."

Art. VII - "The jurisdiction established in the above Article shall not affect the rights of dominion which each of the two nations may have, and no titles which may be invoked before the Tribunal will be founded thereon."

As to the subject-matter of the arbitration, no part of the disputed territory was excluded from its scope except in the case of the second treaty, as might otherwise be agreed by Plenipotentiaries of the two Governments. The jurisdictional provisions were drafted entirely on a "without prejudice" basis and neither treaty came into force, but it should be noted that, to illustrate the provisions of the treaty of 6 December 1878, a plan was issued in Santiago (Plate 11). It was published in the press, and at least one foreign diplomat, Baron d'Avril, French Minister in Santiago, considered it as shewing "the dividing line intended to indicate the status quo" (Annex No. 32). It will be seen that the provisions of Art. VI quoted above (which left to Argentina the exercise of jurisdiction "over the sea and coasts of the Atlantic Ocean and the adjacent islands") are shewn on this plan as leaving under Chilean jurisdiction the islands and coasts south of the Strait of Le Maire. In other words, Picton, Lennox and Nueva Islands were not considered in 1878 as being covered by the expression "sea and coasts of the Atlantic Ocean and the adjacent islands."

36. **1879 negotiations.** In 1879, there was one further series of discussions prior to the final stage of the negotiations in 1881. Chile accredited Sr. Jose Manuel Balmaceda as Minister in Buenos Aires with the object of trying to obtain Argentina's ratification of the second arbitration treaty of 6 December 1878. The Argentine Government soon made it clear to him that there was no possibility of that treaty's being ratified and instead put forward new terms for settling the boundary questions. These new terms at once elicited from Sr. Jose Manuel Balmaceda the comment that they were much less favourable to Chile than either the Lastarria proposals of 1865 or the Irigoyen proposals of July 1876. The Argentine Foreign Minister, Dr. Montes de Oca, admitted the correctness of this comment; for the boundary he now proposed would have cut the Straits of Magellan not far from Punta Arenas itself, then run south-eastwards so as to cut the Beagle Channel opposite the Murray Narrows and afterwards pass between Hoste and the Wollaston Islands on the west and Navarino Island on the east. Under these proposals, therefore, almost the whole of Patagonia, a large part of Tierra del Fuego and Navarino Island, some of the adjacent islands together with a large part of the Straits of Magellan to the east, would have been allocated to Argentina. In consequence, Sr. Jose Manuel Balmaceda and the Argentine Foreign Minister could do no more than draw up a Protocol of their conference recording what had transpired (Annex No.33). Afterwards, they discussed and signed a so-called "status quo" agreement designed to establish a modus vivendi until the disputes could be settled. This repeated the provisions concerning exercise of jurisdiction in the disputed territories mentioned in paragraph 31 above, but did not advance the negotiations for the settlement of the boundary questions any further.

37. **Conclusions.** In the submission of the Chilean Government, five significant points emerge from the account of the negotiations concerning the rival claims of Chile and Argentina in Patagonia, Straits of Magellan and the territories south of the Straits which has been given in the present chapter.

38. **First**, both Parties vigorously asserted their claims to the whole of the disputed territory under the uti possidetis principle; and neither Chile nor Argentina was prepared to abandon her claims, except on the basis of arbitration or of a compromise.

39. **Second**, one of Chile's main objectives which never altered throughout the negotiations was to maintain for herself the whole of the Straits of Magellan and all the territories south of the Straits.

40. **Third**, one of Argentina's main objectives was to obtain jurisdiction over the Atlantic coasts of Patagonia and Tierra del Fuego which she had recently begun to assert "to the extreme end of the continent, that is, to the island of Estados" (see paragraph 22 of this Chapter).

41. **Fourth**, from the point of view of Sr. Irigoyen the terms of settlement proposed by him in 1876 appeared to be an ingenious compromise designed to reconcile the conflicting objectives of Chile and Argentina as far as possible. By retaining almost the whole of Patagonia for Argentina, he met his own country's primary objective. At the same time he tried to appease Chile's pre-occupations concerning control of the Straits by recognising as belonging to her on the north shore a small strip of Patagonia extending nearly to, but not quite as far as, the Atlantic coast and by dividing Tierra del Fuego in such a way as to leave Chile in possession of the south shore of the Straits. By thus retaining for Argentina a small strip on the north shore of the Straits and by assigning to her the eastern half of Tierra del Fuego together with the Island of Estados, he tried to meet his own country's demands in regard to the exercise of jurisdiction on the Atlantic coast. Finally, with the reference to the meridional line in Tierra del Fuego and to the channel dividing Tierra del Fuego from Hoste, Navarino, Picton and Nueva Islands, he purported to make some concession to Chile's claims to the south of the Straits of Magellan. His Beagle Channel boundary, reaching the ocean between Nueva Island and Cap San Pio, at the same time fully respected Argentina's pretensions to the exercise of jurisdiction on the Atlantic coast "to the extreme end of the continent, that is, to the island of Estados". Thus, from the Argentine point of view the Irigoyen proposals, which afterwards became the basis of the 1881 Treaty, represented a thoroughly logical scheme of compromise.

42. **Fifth**, the evidence unequivocally establishes that in the five years immediately preceding the conclusion of the 1881 Treaty:

(a) What the Argentine Government understood by the Beagle Channel was the channel which runs between, on the north, Tierra del Fuego and, on the south, Hoste, Navarino, Picton and Nueva islands;

(b) The Minister Plenipotentiary of Chile and, through him, the Chilean Government were in two separate negotiations (in 1876 and 1878) led to believe that such was the understanding of the Argentine Government of the Beagle Channel when the latter proposed that channel as an element of reference for distribution of the territories in that area.

THE CONCLUSION OF THE BOUNDARY TREATY OF 1881 AND
THE CONTEMPORARY UNDERSTANDING OF THE SETTLEMENT

(A) The Negotiations of 1881

1. **Resumption of negotiations 1881.** The negotiations in 1879 described at the end of the previous Chapter having failed, the Chilean Minister in Buenos Aires was in due course recalled; and, as at this date Argentina had no Minister in Santiago, no diplomatic channel was in operation between the two Governments when, late in 1880, there was a fresh initiative to solve the boundary questions. The United States Ministers in Santiago and Buenos Aires were asked to lend their good offices for the purpose of reopening negotiations between the two countries. As a result, these negotiations, which led to the conclusion of the Boundary Treaty of 1881, were conducted between the Chilean and Argentine Governments largely through these Ministers.

2. By a strange coincidence the United States Ministers in Santiago and Buenos Aires had almost identical names, the Minister in Santiago being called Mr. Thomas A. Osborn, and the Minister in Buenos Aires being called Mr. Thomas O. Osborn. Accordingly, in order to avoid confusion, they will not be referred to in the present Chapter by their names but as the United States Minister in Santiago and the United States Minister in Buenos Aires. These two Ministers played a considerable role in assisting the Chileans and Argentines to come to an agreement, thereby rendering a notable service to the two countries.

3. The reopening of the negotiations was reported by the United States Minister in Buenos Aires to his Secretary of State in Washington in a despatch of 4 April 1881 (Annex No. 35). He informed the Secretary of State that relations between Chile and Argentina in regard to the boundary question in Patagonia were still critical, but that in the previous December he had received a letter from the United States Minister in Santiago saying that Chile was anxious to arrive at a peaceful termination of the dispute. The United States Minister in Santiago had, moreover, been authorised to say that Chile would consent to an arbitration in either of two specified forms. The United States Minister in Buenos Aires told his Secretary of State that, on receiving the letter from Santiago, he had asked for a private interview with Dr. Irigoyen, Argentine Minister of Foreign Affairs, who had then consulted the President and Cabinet. Later, Dr. Irigoyen had given him the views of the Argentine Government, on the basis of which he had sent off a reply to the United States Minister in Santiago. The gist of his reply to his colleague in Santiago (Annex No. 34) was that Argentina was unlikely to accept arbitration in either of the forms suggested by Chile or any form of arbitration which extended to the determination of the sovereignty of Patagonia as distinct from the question merely of its boundary with Chile. At the same time, he expressed the view that, if a direct "compromise" or settlement of the boundary could be arranged, the good offices of the two United States Ministers would be fully appreciated by both Governments.

4. In that same despatch to his Secretary of State the United States Minister in Buenos Aires recalled:

"In my last interview, 31st of March last, with the Minister of Foreign Affairs, he pointed out to me on the map the boundary line which his Government was willing to accept - see Map 1876 line and dots-¹ which yields to Chile all below the Straits and that portion north of the Straits from a point on the summit of the Andes to a point on Straits including Punta Arenas, a Chilean Colony or town. But he said the pretensions of Chile were so great that it appeared to be impossible to find a basis on which they

¹ This map is not reproduced in the Atlas which accompanies this Memorial. A copy of it is in the hands of the Agents for Chile, and if requested, may be made available to the Court of Arbitration or to the Argentine Agents.

could come to an understanding and arrive at a solution, and that he desired me to accompany him in the settlement of the question."

He concluded by saying that he had offered his good offices to the Argentine Government in preventing a devastating war between the two Republics.

5. There was at much the same time a parallel exchange of ideas on a settlement taking place between the Argentine Consul-General in Chile, Sr. Mariano de Sarratea, and Dr. Luiz Saenz Pena, a prominent Argentine public figure. The texts of two of their telegrams were transmitted by the United States Minister in Argentina to his colleague in Chile in a telegram of 30 April 1881 (Annex No. 36(B)). It will there be seen that the Consul-General informed Dr. Saenz Pena of the terms of settlement which, if acceptable to Argentina, he thought would probably also be acceptable to Chile. These terms were an out and out compromise of the rival claims on the bases proposed in 1876 by Sr. Bernardo de Irigoyen to Sr. Barros Arana and a limited arbitration. The "limited arbitration" envisaged a division of the Straits and Tierra del Fuego between the two countries in conformity with the bases proposed by Sr. Bernardo de Irigoyen in 1876, leaving for arbitration a small stretch of territory on the north shore of the Straits and a small area on the continent south of 52°S. Two days later, in a telegram of 10 March 1881, Dr. Saenz Pena replied that he thought limited arbitration possible, subject to what he referred to as the following explanations:

"1st. The neutralisation of the Straits, and to accomplish this efficiently, both parties bind themselves not to raise fortifications on the coasts thereof.

2nd. To fix in clear terms your indication as to the subject matter for arbitration. Part of the Straits submitted for arbitration: From Mount Dinero up to Delgado Point in Possession Bay; East side, Fitz Roy's chart 1878. Chile is to be the owner of all the part of the Straits to the West of Delgado Point, and the Argentine Republic of that to the East of Mount Dinero.

Terra firme: From Mount Dinero to Mount Aymont will be submitted to arbitration and from the point in a straight line up to latitude 52° southwards and by this circle up to the Cordillera. Tierra del Fuego as proposed by Irigoyen"

Commenting on the above telegrams, the United States Minister in Buenos Aires said that it seemed beyond doubt that President Pinto of Chile was aware of the Argentine Consul-General's propositions and that Sr. Bernardo de Irigoyen was acquainted with those of Dr. Saenz Pena. Adding that there was no material difference between the two sets of propositions, he suggested that he and his colleague should proceed at once to arrange a conference between the Parties. In point of fact, however, the negotiations continued in the form of a series of telegrams between the two United States Ministers transmitting the proposals and counter-proposals of the Governments to which they were respectively accredited.

6. **Chilean proposal.** In a telegram of 9 May 1881 (Annex No. 36 (C)) the United States Minister in Santiago reported to his colleague that the Government of Chile would be disposed to settle all questions on the following bases:

"From the watershed of the Andes, Latitude 52° a line would be drawn to the meridian Longitude 70°, and from the point of intersection of said line, would take an oblique direction southwards up to Cape Virgines. The region to the South of this line, with the exception of the Island Los Estados, which would be Argentine, would belong to Chile. The region to the North to the Argentine Republic.

This agreement would be held as definite, but should one or both Parties insist upon Arbitration, (Underlining added)

These proposals differed substantially from those previously transmitted by the Argentine Consul-General. Under them Chile, inter alia, claimed that north of the Straits the boundary should end on the Atlantic coast at Cape Virgenes, thus giving her a small stretch of the Atlantic coast north of Point Dungeness; and that all the territory south of the Straits should be assigned to Chile with the single exception of the Island of Estados.

7. **Argentine counter-proposal.** The Argentine Government not unnaturally pointed out these differences to the United States Minister in Buenos Aires who, in a telegram of 11 May 1881 (Annex No. 36 (D)) transmitted to his colleague in Santiago a counter-proposal from the Argentine Government under which the whole of the area south of 52°S., with the single exception of the Island of Estados, was to be submitted immediately to the decision of the President of the United States. The United States Minister in Buenos Aires, however, added that, being interested in facilitating a settlement, he had obtained a further formula from the Argentine Government for a definitive compromise which would put an end to all questions. This further formula was:

"Straits neutralised as you propose. Staten Island to be Argentine as you also propose.

As a divisional line, one will be admitted, which, starting from the Andes watershed, 52°, shall, in a straight line, continue up to Point Dungeness.

Tierra del Fuego and Islands will be divided between the two Republics, in accordance with the terms agreed upon by Messrs. Barros Arana and Irigoyen in July 1876." (Underlining added)

8. **Chilean response.** In a telegram of 18 May 1881 (Annex No. 36 (E)) the United States Minister in Santiago said that the Chilean Government had queried whether the reference in the Argentine proposal to a straight line from the Andes to Point Dungeness was correct, as this made the line pass at some points over water. He then went on:

"As regards Tierra del Fuego, the Chilean Government in its desire to do away with every cause for ulterior disagreement owing to the boundaries not being fixed on, as would be the case according to the proposed form, thinks that a speedy solution might be accomplished should said Tierra del Fuego, be wholly reserved for this country.

The division indicated would, in the opinion of Chile, give rise to confusions as to jurisdiction in future, and thus affect the friendly feelings which ought to unite the two Countries." (Underlining added)

According to the United States Minister in Santiago, therefore, Chile was still unwilling to give up her claims to the whole of Tierra del Fuego.

9. **Argentine views** Two days later, on 20th May 1881, the United States Minister in Buenos Aires telegraphed that he had had a conference concerning the Chilean proposals transmitted in his Colleague's telegram of 18 May. As to this he reported (Annex No. 36 (F)):

"This Government maintains the division of Tierra del Fuego and Islands according to the draft drawn up with Barros Arana in 1876. This cannot be changed by a compromise."

Having then commented on the question whether the line between the Andes and Dungeness would pass over water and compared the Chilean and Argentine positions in regard to arbitration, he concluded his telegram with the firm statement: "Here it is not thought possible to modify the propositions contained in my telegram of the 11th instant". His telegram, therefore, made it clear to his colleague in Santiago that Argentina was not prepared to yield on the question of the division of the Tierra del Fuego as proposed by Sr. Bernardo de Irigoyen in 1876.

10. In a further telegram of 23rd May 1881 (Annex No. 36 (H)) the United States Minister in Buenos Aires first sought to clear up possible misunderstandings concerning the bases for a "limited arbitration" contained in previous proposals. He insisted that Chile could not expect to have the whole of the Straits, the Brunswick peninsula and Tierra del Fuego ceded to her definitively and then submit everything else which had been contested on both sides to arbitration. Then, he said that the Argentine Government was very anxious that any arrangement which might be reached should be clear and without obscure terms likely to give rise to subsequent difficulties; and that it considered the two propositions in his own telegram of 11th May to be very explicit. Those propositions, he added, could not be modified.

11. **Modification of Chilean position.** At this juncture the Chilean Government inclined strongly to a direct settlement between the Parties, and at the same time became convinced that there was no further hope of obtaining Argentina's agreement to the allocation of the whole of Tierra del Fuego to Chile. So it was that in a telegram of 28th May 1881 (Annex No. 36(I)) the United States Minister in Santiago informed his colleague in Buenos Aires that, in order to obtain such a direct settlement, the Chilean Government would, he believed, accept the following bases for the settlement:

"Tierra del Fuego and the Islands would be divided in accordance with the proposition made by Mr. Irigoyen to Barros Arana in 1876.

Point of division on the Straits as follows:

From Point Dungeness a line would be drawn overland up to Mount Dinero.

The line would run on from Mount Dinero following the highest elevations of the chain of hillocks which extends to the West until it should reach Mount Aymond. From this point the line would run on up to the intersection of the 52nd parallel of latitude and the 70th Meridian of longitude, and from this point would continue in the direction of the 52nd degree, up to the watershed of the Andes.

The neutralization and free navigation of the Straits would be stipulated and there would be a formal agreement not to raise fortifications that may prevent either one or the other."(underlining added)

These "bases" reproduced the "terms of settlement" proposed by Sr. Bernardo de Irigoyen in 1876 with only minor modifications or precisions in regard to the boundary north of the Straits of Magellan (see paragraph 26 of the previous Chapter).

12. **Argentine reaction.** Replying by a telegram of 31st May 1881 (Annex No. 36(J)), the United States Minister in Buenos Aires reported that he had had a "lengthy conference". He then said:

"The division of the Tierra del Fuego and Islands as indicated by you will be accepted in accordance with the proposition Irigoyen-Barros Arana 1876.

The neutralization and free navigation of the Straits, will be stipulated as you likewise indicate, with the formal agreement not to raise fortifications or military establishments." (Underlining added)

After referring to certain precedents concerning the neutralisation of seas, rivers and channels, he continued:

"As to the division that you propose on terra-firme, I am satisfied that in view of our good offices to both Governments, although this Government hesitated very seriously as to accepting that division, I have at length managed to get it to agree thereto in order to accomplish peace and a speedy settlement of all possible difficulties.

Here I will repeat the division as indicated, in order that there may be no room for any doubt:

From Point Dungeness a line would be drawn overland up to Mount Dinero....."

He ended with the words:

"so that all the conditions you propose will be accepted. If you can manage to have this proposition made officially by the Chilean Government and communicate it to me by telegraph, I will hand it in to the Minister for Foreign Affairs and I am sure to get his assent thereto."

13 Before passing to the final state of the negotiations, the Government of Chile asks the Court of Arbitration to note that the difficulties encountered by the United States Minister in obtaining the assent of the Argentine Government did not relate to Tierra del Fuego or to the Beagle Channel area. As the telegram makes plain, these difficulties concerned the strip of Patagonia accorded to Chile on the north shore of the Straits of Magellan. In contrast, the partition of Tierra del Fuego and the islands in conformity with the Irigoyen proposals of 1876 gave rise to no difficulty on the part of Argentina.

14. **Chilean offer of "six bases of agreement"** On 3 June 1881 the Chilean Minister for Foreign Affairs asked the United States Minister in Santiago to transmit to the Argentine Government six "bases of agreement" which the Chilean Foreign Minister believed to answer to the ideas recently expressed by both Governments (Annex No. 36 (K)). The first "basis" concerned the problem of the boundary along the Cordilleras of the Andes north of 52°S; it provided for a boundary along "the highest peaks of said Cordilleras as may divide the waters" and for a commission of experts to determine the boundary where the water-parting line should not be clear. The next two "bases" then read as follows:

"**Second Basis:** In the Southern part of the Continent and to the North of the Straits, the boundary between the two countries will be a line, which, starting from Point Dungeness, will be continued overland up to Mount Dinero; thence it will proceed westward following the highest elevation of the chain of hillocks that exist there, until reaching Mount Aymond.

"From this point the line will be continued up to the intersection of meridian 70°, with parallel 52° latitude, and thence westward, coinciding with this last parallel up to the watershed of the Andes.

"The territories to the north of said line will belong to the Argentine Republic, and those to the South will belong to Chile, without this affecting what the third basis determines as regards Tierra del Fuego and the adjacent Islands.

"**Third Basis:** In Tierra del Fuego a line will be drawn which, starting from the point called Cape Espiritu Santo, latitude 52° 40', would continue towards the South, coinciding with the western meridian of Greenwich 68° 34', until it should strike Beagle Channel.

"Tierra del Fuego, divided in this manner, will be Chilean on the Western and Argentine on the Eastern side.

"As regards the Islands, the Island of Los Estados, the remaining small islands there may be in the immediate vicinity thereto on the Atlantic, to the East of Tierra del Fuego, and eastern coast of Patagonia, will belong to the Argentine Republic; and all the Islands to the south of Beagle Channel up to Cape Horn, and such as there may be to the West of Tierra del Fuego will belong to Chile."(Underlining added)

The Fourth "basis" provided that the Commission of Experts should also demarcate the boundary lines indicated in the second and third bases. The fifth declared:

"The waters of the Straits are neutralised and free navigation thereon insured to the Flags of all Nations: no works of defence will be allowed to be raised that may impede or trammel the free passage through the canal." The sixth emphasised the definitive character of the compromise and provided for the settlement of any questions arising from it by "the decision of some friendly power".

15. **Argentine acceptance of second and third bases.** The second "base" reproduced in the preceding paragraph was a slightly modified formulation by Chile of the corresponding Irigoyen proposal of 1876, while the third "base" was in substance the same. (See Chapter III, para 26). Since Irigoyen Argentina's Foreign Minister in 1876 had himself been conducting these 1881 negotiations from the outset, the Court will not be surprised to learn that when, on 6 June 1881, the United States Minister at Buenos Aires telegraphed to his colleague the Argentine reaction to Chile's "bases of agreement", no objection whatever was raised by Argentina with respect to these two bases (Annex No. 36(L)). On the contrary, the Argentine reply simply said: "Second basis: accepted as proposed. Third basis: accepted as proposed." On the Chilean "bases of agreement" as a whole, Argentina raised only two points. One was a small addition to the wording of the first "basis" which, as the United State Minister in Chile reported in his telegram of 11 June 1881 (Annex No. 36 (M)), gave rise to no objection from Chile. The other concerned the neutrality of the Straits of Magellan provided for in the fifth "basis". Argentina desired that the fifth basis should be revised so as to lay down an express and complete prohibition on the construction of fortifications or military works on any of the coasts of the Straits. So absolute a prohibition, which would preclude her from erecting any kind of defence works on her own territory even for the protection of remote settlements, was considered too stringent by Chile. However, after further exchanges between Buenos Aires and Santiago (Annexes No. 36(N), No. 36(O), and No. 36(P)), a new formula was found which resolved this point to the satisfaction of both Governments. Thus, subject to the small modifications to the first and fifth "bases" mentioned in the present paragraph, the "bases of agreement" set out in the United States Minister in Santiago's telegram of 3 June 1881 obtained the endorsement of both Governments.

16. The "bases of agreement", as so modified, were then cast into the regular form of a treaty, and on 23 July 1881 the Boundary Treaty was signed in Buenos Aires by the Consul-General of Chile, Sr. Francisco de B. Echeverria, and by Sr. Bernardo de Irigoyen, Minister of Foreign Affairs in Argentina. An additional Protocol was signed on 15th September 1881 for the purpose of extending the period allowed by the Treaty for ratification. The approval of the legislatures of both countries having been obtained, ratifications were exchanged in Santiago on 22 October 1881, on which date the Treaty entered into force for both countries.

(B) **The Contemporary Understanding of the Settlement**

17. **Adhesion to Irigoyen formula of 1876.** The Court of Arbitration is asked to note that at no point in the final stage of the negotiations did either Government suggest a division of Tierra del

Fuego and the islands otherwise than in accordance with the Irigoyen formula of 1876. In particular, neither Sr. Bernardo de Irigoyen himself nor any other Argentine negotiator did or said anything which might suggest to Chile either that Argentina was claiming a division of the southern islands different from that communicated by Sr. Barros Arana to the Chilean Government in 1876 as representing the proposal of Sr. Bernardo de Irigoyen, or that she now had any different concept of the Beagle Channel. The "bases of agreement" accepted by the two Governments in 1881, so far as they related to Tierra del Fuego and the adjacent islands, were avowedly the very proposals that had been made by Sr. Bernardo de Irigoyen in 1876. Accordingly, in the submission of the Chilean Government, it is highly significant that neither the evidence reviewed in the previous Chapter nor the evidence reviewed in the present Chapter discloses the slightest indication that the division of the territories south of the Straits proposed by Sr. Bernardo de Irigoyen and accepted by the two Governments was anything other than that depicted by red lines on the map transmitted by Sr. Barros Arana to the Chilean Government in 1876 (Plate 8).

18. The very fact that the Chilean and Argentine Governments explicitly adopted the Irigoyen proposals of 1876 as the bases for their agreement in the 1881 Treaty suffices to link Sr. Barros Arana's map illustrating those proposals directly to the corresponding terms of the Treaty. Consequently, even if there were no further evidence of the meaning attached by the two Governments to the terms of the treaty relating to Tierra del Fuego and the adjacent islands, the Court would be fully justified in deciding that the red lines marked on the map in that area transmitted to the Chilean Government by Sr. Barros Arana conclusively establish that meaning. In fact, however, there is ample further evidence that those red lines do faithfully reproduce the intentions of the two Governments in the 1881 Treaty with respect to the division of Tierra del Fuego and the southern islands.

19. **French Minister's despatch and map.** On 2 July 1881, i.e. a few days after the "bases" of agreement had been finally accepted but three weeks before the signature of the Treaty itself, the French Minister in Santiago sent a despatch to the French Ministry of Foreign Affairs informing it of the proposed boundary settlement between Chile and Argentina (Annex No. 38). In his despatch the French Minister commented.:

"The conciliatory provisions show themselves in the acceptance of a dividing line giving the whole of the Atlantic Coast to the Argentine Confederation, together with a part of Tierra del Fuego, Cape Virgenes and the Islands of Los Estados." (Underlining added)

Against this passage in the margin of the despatch are written the words: "See Annexed sketch". This sketch, as the Court can see from Plate 12, is a hand-drawn sketch of the southern regions of America from 45°S to Cape Horn. On it is marked the "Ligne de la frontiere projetee" by a pecked redblack line, while at the foot of the sketch are the words: "Projet de delimitation entre le Chili et la Confederation argentine". True, a postscript to the despatch makes the reservation "To the south of Latitude 52°, I have only been able to draw approximately the proposed new frontier-line"; and the line is not in fact exact at the eastern end of the Straits of Magellan. But the postscript continues: "My line is accurate as a general provision" and this claim is well justified so far as concerns Tierra del Fuego and the southern islands. Allowing for the rough character of the sketch, the Court will see that the boundary in this area to all intents and purposes coincides with the red line marking the Irigoyen proposal of 1876 on Sr. Barros Arana's Map. It runs eastwards along the Beagle Channel, enters the ocean between Cape San Pio and Nueva Island and, continuing directly eastwards, passes some miles to the south of the islands of Estados.

20. The Court is also asked to note that the French Minister, in his comment reproduced in the preceding paragraph, appears to have had the same concept of Argentina's claims on the "Atlantic Coast" as may be seen running through Argentina's proposals in the years 1875-81: namely, to the Atlantic coasts of Patagonia and Tierra del Fuego "to the extreme end of the continent, that is to the island of Estados".

20A. The French Minister's understanding was, it appears, fully shared by the Secretary-General of the Paris Geographical Society, M. Ch. Maunoir in his "Report on the work of the Society, and the Progress of Geographical Science in 1881." After mentioning the earlier proposals for a boundary agreement, he referred to the 1881 Treaty in these terms:

"The solution of this year agrees very closely with the proposals presented in 1876.

Starting from the north, the boundary will follow, to run to the south, the highest crest of the Cordilleras, as far as 52° latitude south, from where it will run to the east as far as the intersection of the 52nd degree of latitude with the 70th of longitude west (Greenwich). Bending then to the east-south-east, it will follow the mountain chains of Los Cuatro Hijos, Mount Aymon and Mount Dinero, as far as Dungeness Point, a little to the south of the Cape of the Virgenes, at the entrance of the straits.

The division of Tierra del Fuego will be made according to meridian 68° 34', between Cape Espiritu Santo to the north, and the Beagle Channel to the south. Chile will own the whole part to the west of this line and to the south of the Beagle Channel and its prolongation.

Under the treaty, Chile will only have the narrow strip of continent to the West of the Cordillera; besides, starting from the 52nd degree of latitude south, the portion of the mainland bounded by Brunswick Peninsula. In return, it has all the islands of the west and of the south. The Argentine Republic, with only Staten Island and a third of Tierra del Fuego, will have the large zone of continental land which includes the basins of the Gallegos, the Coile, the Santa Cruz, the Chupar, etc. The Straits of Magellan, having been declared neutral, remain open to the flags of all nations" (Annex No. 47(b)). (Underlining added)

21. "**Chile's 1881 Authoritative Map**" In August 1881, i.e. almost immediately following the signing of the Boundary Treaty and before it had been ratified, there was published by order of the Chilean Government and under the directions of its Hydrographic Office a map drawn by Carlos Manuel Prieto and designed to show the allocation of territory of 1881 as well as the different boundary lines proposed in the 1872, 1876 and 1879 negotiations. (Plates 13 to 19). On this Map, which will be sometimes called "**Chile's 1881 Authoritative Map**", the territorial settlement effected by the 1881 Treaty, which is shown by a green colouring for Argentine territory and a pale pink colouring for Chilean, is south of the Straits identical with that resulting from the line illustrating the Irigoyen proposals of 1876. Thus, this Map designates Picton, Nueva and Lennox Islands as unmistakably Chilean under both the 1876 and 1881 proposals. That this was the understanding of the Chilean Government as to the effect of the 1881 Treaty, when it was concluded, is, accordingly, crystal clear.

22. Furthermore, on 27 October 1881, three copies of this Map were forwarded to the British Foreign Secretary by the British Minister in Santiago as an enclosure to a despatch of that date (Annex No. 46). Annexed also to the despatch was a copy of the 1881 Treaty together with an English translation. Explaining the provenance of the maps, the British Minister said:

"I enclose also three copies of a map defining the limits as now established, and which, as they were given to me yesterday by the Under Secretary of State, at the Moneda,¹ may I presume be looked on as authentic for all practical purposes". (Underlining added)

¹ Residence of the President of Chile and Chilean Foreign Office.

Chile's 1881 Authoritative Map was widely circulated, both publicly and diplomatically. On 23 October 1881, the day after the exchange of ratifications, a copy, in colours, was included in "El Ferrocarril", the leading Santiago newspaper. The press of, "El Mercurio", the leading Valparaiso newspaper, also issued coloured copy. On its front page, "El Mercurio", referred to it as "a map which shows the boundaries in accordance with the Treaty approved by the Congresses of both countries". Copies of the map were sent by the diplomatic representatives of Italy, France, Germany, Switzerland Belgium and Brazil to their Governments; (Plates 13, 14 15 & 18) the Italian envoy referred to it as "a geographical chart shewing the new boundary" (Annex No. 42(a)): the French Minister, who sent the text and a French translation of the Treaty at the same time wrote that the Map gave "an exact indication of the frontier referred to in it" (Annex No. 43): the German Representative explained that the Map of "the new boundary between Chile and Argentina" had been annexed to the newspaper of the previous day, (Annex No.44), and the Swiss Consul wrote that it was "a map of the boundary line now agreed upon between the two countries". (Annex No. 45). Argentina was at this time represented in Santiago by a Consul General and it is to be presumed that a copy of the map reached the Government in Buenos Aires.

23. **Chilean Hydrographic Notice, Nov. 1881.** On 10th November 1881 a Hydrographic Notice (Annex No. 46(c)) was issued in Santiago and afterwards published in the Official Journal, setting out the boundaries between Chile and Argentina "according to the Boundary Treaty entered into, 22 October 1881". Copies of the Notice and of Chile's 1881 Authoritative Map were sent to the Admiralty in London, where in January 1882 they were circulated internally by the Hydrographic Department, with English translations of the Notice and the information on the Map. In an explanatory note the Admiralty recorded that the Map said "This division coincides with that of 1876 from Mount Aymón to Mount Dinero, and throughout its course over Tierra del Fuego and through Beagle Channel." In fact the Admiralty had already received from the Foreign Office on 15 December 1881 "a copy of a Map received from H.M. Minister in Santiago shewing the boundaries agreed to under the Treaty" which was one of three copies referred to in para 22 above. (Annex No. 46(D)).

24. The Court of Arbitration is also asked particularly to note paragraph 2 of the Chilean Hydrographic Notice itself. Describing in that paragraph the boundary south of the Straits, the Notice announced:

"To the South of the Strait of Magellan: a line, which starting from Cape Espiritu Santo, runs along the true meridian of that Cape towards the South until it falls into Beagle Channel; thence along this Channel until it enters the Atlantic. Thus the South-Eastern point of Tierra del Fuego and the island of Estados remain in the possession of the Argentine Republic." (Underlining added)

Neither the Bases of Agreement of 3 June 1881 nor the text of the 1881 Treaty actually spoke of a boundary line along the Beagle Channel, as Sr. Elizalde had done in his 1878 proposals; they expressed the matter rather in the form "and to Chile shall belong all the islands to the south of Beagle Channel". But in this Hydrographic Notice, issued soon after the conclusion of the 1881 Treaty, the Chilean Government evidently understood that the two formulae were only different ways of saying the same thing: the dividing line was to be in the Channel running to the north of Picton Island and entering the ocean between Cape San Pio and Nueva Island. Nor will the Court fail to observe in that paragraph the understanding of the Chilean Government in 1881 as to the limit of Argentina's territory on the Atlantic coast. Clearly, Chile's understanding was that Argentina's territory was to extend no further than to the south-eastern point of Tierra del Fuego and to the island of Los Estados lying off that extreme point.

25. **Argentine Map, Nov. 1881.** The first map in Argentina known to the Chilean Government which showed the boundary laid down in the 1881 Treaty is one enclosed with the edition of the magazine "La Ilustracion Argentina" for 10 November 1881 (Plate 21). This map was coloured so as to show in an orange tint "the territory disputed by Chile since 1865" and in a crimson tint "the territories which belong to her according to the 1881 Treaty". On this map published in Argentina less than a month after the Exchange of Ratifications of the 1881 Treaty, Picton, Nueva and Lennox Islands are all coloured crimson and, therefore, are all unmistakably designated as Chilean.

26. A copy of this very map was sent to the British Minister in Buenos Aires by none other than Sr. Bernardo de Irigoyen himself, the Foreign Minister of Argentina, chief negotiator and architect of the Treaty. It was apparently a private production, because it bears the words "(Private Publication)" but communication of it by such a person makes it plain that it did reflect the intentions of the Argentine Government when concluding the Treaty and their understanding of it immediately afterwards. Forwarding two copies of the map to the British Foreign Secretary in a despatch of 20 December 1881 (Annex No. 47), the British Minister commented:

"I have now the honour to inclose two copies of the Map showing the line of frontier established by the Treaty, which Dr. Irigoyen has been kind enough to send to me privately.

The coloured portion of the Map, which includes the whole of Patagonia, as far as Rio Negro to the North, and Tierra del Fuego with the islands to the South, represents the territory the ownership of which was disputed by Chile, whereas the part which is coloured with a deeper shade of crimson, comprising the Straits of Magellan, half of Tierra del Fuego, and all the southern islands, represents what has been actually ceded to Chile by the recent Treaty.

The Argentine Republic, as your Lordship will see, is left in full possession of the Atlantic seaboard. (Underlining added)

Accordingly, there can be no shadow of doubt that Argentina's Foreign Minister, who drew up the Treaty, and the British Minister in Argentina at the time understood the 1881 Treaty to allocate Picton, Nueva and Lennox to Chile. Furthermore, the final paragraph of the British Minister's comment again throws a clear light on the notion of Argentina's interests on the Atlantic coast in 1881. Confronted with a map which showed Navarino, Picton, Nueva, Lennox and the Wollaston Islands as unmistakably Chilean and Argentina's Atlantic territory as unmistakably terminating at the "extreme end" of Tierra del Fuego and the Islands of Estados, the British Minister thought it quite obvious that the map left the Argentine Republic with "full possession over the Atlantic coastline".

27. **British Admiralty Chart no. 786.** Another map which throws a clear light on the interpretation put upon the 1881 Treaty at the time when it was concluded is reproduced in Plate 20. On 17 October 1881, i.e. after the Argentine Congress had approved the Treaty but before the exchange of ratifications took place, the Argentine Minister in London, Sr. Manuel R. Garcia, sent a Note to the British Foreign Secretary asking to be received on the subject of the neutrality of the Straits of Magellan laid down in the Treaty recently signed by Argentina and Chile. In the event, it was the Permanent Under-Secretary of State, Lord Tenterden, who received Sr. Garcia and the interview took place on 27 October at the Foreign Office. Lord Tenterden afterwards made a Minute of the interview for submission to the Foreign Secretary, Lord Granville, and this Minute is included in Foreign Office volume No.6/372 now in the Public Record Office. According to this Minute, the Argentine Minister left with Lord Tenterden a "newspaper extract containing the Treaty which has been concluded with Chile", saying that it had "now been ratified by the Assembly and was completed".

He called attention to the provisions relating to the free navigation and neutrality of the Straits of Magellan, and intimated that, in view of the numerous British interests in the Argentine Republic, etc., "it would be very gratifying if he were to receive some acknowledgment expressing the satisfaction with which Her Majesty's Government received the intelligence of the conclusion of the Treaty, and especially of these provisions". In addition to Lord Tenterden's Minute of this interview, Sr. Garcia himself sent a report of it to the Argentine Minister of Foreign Affairs on 30th October (Annex No. 46(A)) in which he stated that he presented to Lord Tenterden "a plan of the southern regions which includes the new boundary". Immediately after Lord Tenterden's Minute, there is bound in the same Foreign Office volume a section of Admiralty Chart No. 786 depicting the territorial dispositions of the 1881 Treaty. It is a copy of that section of Admiralty Chart No. 786 which the Chilean Government has submitted to the Court. (Plate 20.).

27(a). On the back of the Map in the Foreign Office volume appears the inscription:

"Map to illustrate Boundary Treaty between Chile and Argentine Republic".

And beneath that inscription there follow the words:

"As commd. [communicated] by Senor Garcia Oct. 27. 1881 & procured from the Admiralty by the Librarian".

Accordingly, it appears that after the interview the Foreign Office Librarian (Sir Edward Herstlet) asked the Admiralty to produce a map on the basis of the plan given by Sr. Garcia. The Admiralty, using Chart No. 786 for the purpose, marked on it in hand-writing the names of the geographical features mentioned in the Treaty and broad designations of the territories which were to be Chilean and Argentine under the Treaty.

27(b). Although Sr. Garcia's plan has not been traced, it can be inferred with little doubt that it shewed a boundary line running to the north of Picton and Nueva Islands. Two points, for present purposes, stand out on the Chart produced by the Admiralty. First, at the eastern end of the Beagle Channel the words "Beagle Channel" are written directly opposite the most northerly entrance, the "B" in Beagle actually being placed between New (Nueva) Island and Tierra del Fuego. Secondly, the boundaries also are marked by a pecked, handwritten, line and in the south the pecked line runs along the north shore of the Beagle Channel (i.e. along the Argentine coast-line of the Channel) and does so all the way to Cape San Pio. Across Hoste and Navarino Islands is written the broad designation "to Chile" laterally - that is from west to east - and it is manifest from the map that this was intended to cover everything south of the pecked line along the Beagle Channel. On the Map are marked the outlines of Nueva, Picton and Lennox Islands, though only Nueva (New) is given its name; all three islands are unmistakably to the south of the pecked boundary line and thus characterised as Chilean under the Treaty.

28. **Official Reports on the Treaty.** There is much further cartographic and other evidence subsequent to 1881 which confirms the conclusions reached in the preceding paragraphs and to which reference will be made in due course. In the present Chapter, however, the Chilean Government is confining itself to setting out evidence which is so closely linked to the actual negotiation and conclusion of the 1881 Treaty as to furnish contemporaneous and positive indications of the intentions of the Chilean and Argentine Governments when they signed and ratified the Boundary Treaty. Of this evidence there remain two further elements to be examined: first, the reports on the negotiation of the Treaty sent to the United States Secretary of State by the United States Ministers in Chile and Argentina through whose good offices the two countries had been brought to agree; and, secondly, the official reports of Chilean and Argentine Ministers communicated to their respective Congresses for the purpose of obtaining parliamentary approval for the ratification of the Treaty.

29. **Reports of the United States intermediaries.** In a despatch of 1 July 1881, i.e. after the bases of agreement" had been accepted by both Governments, but before the Treaty itself had been signed, the United States Minister in Buenos Aires described to his Secretary of State the nature of the settlement arrived at in the negotiations (Annex No. 37). Inter alia, he stated:

"In the Southern part of the Continent and to the North of the Straits, the boundary will be a line starting from Point Dungeness, will be continued overland up to Mount Dinero, thence will proceed westward following the highest elevation of the chain of hills, until reaching Mount Aymond.

From this point the line will be continued to the intersection of Meridian 70° with parallel 52° latitude, and thence westward, coinciding with this last parallel to the watershed of the Andes.

The territory to the North of this line, Argentine, to the South, Chilean.

"In Tierra del Fuego a line will be drawn, starting from the point called Cape Espiritu Santo, latitude 52° 40', continuing towards the South, coinciding with the Western meridian of Greenwich 68° 34', until it should strike Beagle Channel.

On the East side of this line will be Argentine, and the West side Chilean.

The Islands of Los Estados, the remaining small islands there may be in the immediate vicinity thereto, on the Atlantic, to the East of Tierra del Fuego, and eastern coast of Patagonia will belong to the Argentine Republic, and all the islands to the South of Beagle Channel up to Cape Horn, and such as there may be to the west of Tierra del Fuego, will belong to Chile. (Underlining added)

The waters of the Straits are neutralised forever" (Underlining added)

In a similar despatch to the Secretary of State on 22 July 1881 (Annex No. 39) the United States Minister in Santiago sent his description of the Line of Division fixed by the settlement which included the following passage:

"South of the Straits the line commences at Cape 'Espiritu Santo', in latitude 52°40', and runs thence south upon the longitudinal line of 68° 34', until its intersection with Beagle Channel. The territory to the east of this line, together with State Island¹ and the adjacent Keys, belongs to the Argentine Republic; that to the west, with the remaining islands, is conceded to Chile."

30. Both descriptions entirely confirm the point regarding the limit of Argentine territory on the Atlantic coast, to which attention has repeatedly been drawn in this, and the previous, Chapters. In dealing with the allocation of the islands, the United States Minister in Buenos Aires formulated his description of the allocation from the South northwards: "The islands of Los Estados, the remaining small islands there may be in the immediate vicinity thereto on the Atlantic, to the East of Tierra del Fuego and eastern coast of Patagonia will belong to Argentina". The Estados are indeed a group of islands consisting of one large island of that name and a few small attendant islets in its "immediate vicinity"; and by no possible stretch of imagination could Nueva, Picton or Lennox also be considered in the "immediate vicinity" of Estados Island. Thus, it is manifest that the United States Minister in Buenos Aires understood the Estados group to be the most southerly of the "Atlantic" islands recognised in the Treaty as Argentine. That this was also the understanding of the United States Minister in Santiago is no less manifest. The two sentences from his despatch reproduced above were directed exclusively to the area South of the Straits of Magellan. Having given the Cape Espiritu Santo line of longitude as the North-South boundary in Tierra del Fuego, he mentioned State Island (Estados) "and the adjacent Keys" alone as islands

belonging to the Argentine Republic in that area to the east of the boundary line; and at the same time he stated that the territory "to the west, with the remaining islands" was conceded to Chile. Here again, by no possible stretch of imagination could "State Island and the adjacent Keys" be taken to cover anything more than the Island of Estados and its attendant islets. Thus the views of both United States Ministers who were instrumental in the negotiation of the Treaty, exactly coincide with those of Irigoyen, as demonstrated by the Map he sent to the British Minister in Buenos Aires.

¹ Staten or Estados Island.

31. **Statements by the Parties - Argentine (Irigoyen) speech.** In the Argentine Congress the history of the boundary disputes and the territorial settlement which the Congress was being asked to approve were explained by Sr. Bernardo de Irigoyen himself in a speech extending over 31 August and 1st and 2nd September. Extracts from his speech are set out in Annex No. 42, where it will be seen that he placed considerable emphasis on the point that Chile had originally claimed the whole territory as far north as latitude 45° S. but had been induced to accept latitude 52° S. as the northern limit of the disputed territory. He then continued:

"It follows that latitude 52° is the limit of the dispute. It is not the compromise boundary line because south of this latitude we retain part of the territories of Tierra del Fuego, Staten Island, and the area lying between the said latitude, the Strait and the foothills of Mount Aymond." (Underlining added)

In order to obtain approval for the ratification of the Treaty Sr. Bernardo de Irigoyen was necessarily concerned to convince the Argentine Congress of its satisfactory character from the point of view of Argentina. Therefore, it is hardly conceivable that, if he had considered the Treaty to allocate to Argentina further territory South of the Straits of Magellan additional to part of Tierra del Fuego and the Islands of Los Estados, he would have failed to mention it. His failure to mention any such further territory, on the other hand, accords entirely with the distribution of territory between Chile and Argentina shown on all the maps mentioned in this and the previous Chapter as illustrating the Irigoyen proposals of 1876 and the settlement agreed upon in 1881. Furthermore, later in his speech he gave a solid reason why Argentina should be content with such a settlement:

"I bring you a Treaty under which we only yield our rights to the eastern waters of the Strait and an adjoining strip of land a Treaty by which, in exchange for this concession, we ensure the neutrality of the Strait for all time, and our dominion over half the island called Tierra del Fuego where our rights are questionable." (Underlining added)

32. **Statements by the Parties - Chilean (Valderrama) speech.** In Chile the most explicit statement of the Government's view of the settlement effected by the 1881 Treaty is to be found in the Report addressed by Foreign Minister Melquiades Valderrama to the National Congress of Chile on 17 September 1881, (Annex No. 41). Having given the historical background to the negotiation and conclusion of the Treaty, the Report to the Congress summarised its effect:

"The Treaty ensures for Chile the dominion of the Straits of Magellan, the major part of Tierra del Fuego, and all the islands to the south of Beagle Channel and to the west of Tierra del Fuego; in other words, the Straits and all the territories extending to the south with the exception of a section of Tierra del Fuego bathed by the Atlantic and the island of los Estados, belong to Chile." (Underlining added)

The Chilean Government, therefore, evidently understood the Treaty to allocate to Chile everything south of the Straits with the exception of the eastern part of Tierra del Fuego and the islands of Estados.

33. **Conclusions.** The Court of Arbitration will observe from the two preceding paragraphs that the effects attributed to the Treaty south of the Straits of Magellan by the Argentine and Chilean Governments before their respective Congresses, although expressed from different points of view, were really identical. According to Sr. Bernardo de Irigoyen, south of the Straits all that Argentina retained was "part of the Tierra del Fuego" and "the Islands of Estados"; according to Sr. Melquiades Valderrama, Chile was assured of "all the territories extending to the south (of the Straits) with the exception of a section of Tierra del Fuego bathed by the Atlantic and the island

of los Estados". Under both formulae Argentina's possessions south of the Straits were stated as, in substance, limited to the eastern - Atlantic - part of Tierra del Fuego and the Estados islands.

34. If the Court reviews the evidence in the present Chapter relating to the conclusion of the 1881 Treaty, together with the evidence in paragraph 24 of the previous Chapter relating to the Irigoyen proposals of 1876, it cannot fail to be struck by the absolute concordance of all this evidence on the crucial point at issue in the present case: namely, the division of territory in the Beagle Channel area envisaged in the 1876 proposals and incorporated in the 1881 Treaty to form part of the global settlement of the rival territorial claims of the two countries. All this evidence points uniformly and unequivocally to an intention to assign to Chile all the islands situated on the south side of a Channel, designated the Beagle Channel and running eastwards to the north of Hoste, Navarino, Picton and Nueva islands until its entry into the ocean between Cape San Pio and Nueva Island. Neither in the proposals and statements of the negotiators, nor in official statements relating to the negotiations nor in the several contemporary maps illustrating the proposed settlement is there one single indication to the contrary. Similarly, in none of these proposals, statements or maps is there the slightest indication that anyone connected with the negotiations or settlement ever doubted that the Beagle Channel was the Channel having that particular course and no other. The absolute concordance of the evidence in regard to the understanding of the Parties on these points in 1876 and 1881 is, in the submission of the Chilean Government, a fact of the highest significance in the present case.

Chapter V

THE PROVISIONS OF THE 1881 TREATY

1. **Relevant Provisions of the Treaty.** The account given in Chapters III and IV of the antecedents of the Boundary Treaty of 1881 and of its conclusion furnish the clearest indications as to the intentions of the Parties regarding Picton, Nueva and Lennox Islands when they entered into the Treaty. The Chilean Government, however, recognises that it is the territorial settlement resulting from the provisions of the 1881 Treaty itself that is binding upon Chile and Argentina; and it is, therefore, now necessary to examine the actual provisions of the Treaty and their legal effect.
2. The full text of the 1881 Treaty is set out in Annex No. 40. For present purposes, however, the relevant provisions are those embodied in Articles I to IV, which read as follows:

"Article I

The boundary between Chile and the Argentine Republic is from north to south, as far as the 52nd parallel of latitude, the Cordillera de los Andes. The boundary-line shall run in that extent over the highest summits of the said Cordilleras which divide the waters, and shall pass between the sources (of streams) flowing down to either side. The difficulties that might arise owing to the existence of certain valleys formed by the bifurcation of the Cordillera, and where the water divide should not be clear, shall be amicably solved by two Experts, appointed one by each party. Should these fail to agree, a third expert, selected by both Governments, will be called in to decide them. A Minute of their proceedings shall be drawn up in duplicate, signed by the two Experts on those points on which they should be in accord, and also by the third Expert on the points decided by the latter. This Minute shall have full force from the moment it is signed by the Experts, and it shall be considered stable and valid without the necessity of further formalities or proceedings. A copy of such Minute shall be forwarded to each of the Governments.

Article II

In the southern part of the Continent, and to the north of the Straits of Magellan, the boundary between the two countries shall be a line which, starting from Point Dungeness, shall be prolonged by land as far as Monte Dinero; from this point it shall continue to the west, following the greatest altitudes of the range of hillocks existing there, until it touches the hill-top of Mount Aymond. From this point the line shall be prolonged up to the intersection of the 70th meridian with the 52nd parallel of latitude, and thence it shall continue to the west coinciding with this latter parallel, as far as the divortia aquarum of the Andes. The territories to the north of such a line shall belong to the Argentine Republic, and to Chile those extending to the south of it, without prejudice to what is provided in Article III, respecting Tierra del Fuego and adjacent islands.

Article III

In Tierra del Fuego a line shall be drawn, which starting from the point called Cape Espiritu Santo, in parallel 52°40', shall be prolonged to the south along the meridian 68° 34' west of Greenwich until it touches Beagle Channel. Tierra del Fuego, divided in this manner, shall be Chilean on the western side and Argentine on the eastern. As for the islands, to the Argentine Republic shall belong Staten Island, the small islands next to it, and the other islands there may be on the Atlantic to the east of Tierra del Fuego and of the eastern coast of Patagonia: and to Chile shall belong all the islands to the south of Beagle Channel up to Cape Horn, and those there may be to the west of Tierra del Fuego.

Article IV

The Experts referred to in Article I shall mark out on the ground the lines indicated in the two preceding Articles, and shall proceed in the manner therein indicated."

(Underlining added)

3. **Article I.** Article I deals exclusively with the delimitation of the boundary between Chile and Argentina along the Andean watershed north of 52°S., and does not therefore directly concern the boundary question in the Beagle Channel area. The definition of the boundary contained in Article I was, however, afterwards to give rise to a major dispute which was the cause, first, of the conclusion of a Protocol of 1 May 1893 and, secondly, of the important Arbitral Award of His Majesty King Edward VII in 1902. Since the 1893 Protocol has repeatedly, though quite wrongly, been alleged by Argentina to support her claims to Picton, Nueva and even Lennox Islands, Article I of the 1881 Treaty has a certain interest for the Court of Arbitration, even although the delimitation provided for in that Article does not affect the present case.

4. Article I is also of interest to the Court of Arbitration as a reminder of the global character of the settlement of the rival territorial claims of Chile and Argentina embodied in the 1881 Treaty. As pointed out in Chapters III and IV, Chile's territorial claims under the uti possidetis principle extended over large areas of Patagonia as far north as latitude 45° S. These larger claims she ultimately abandoned only in order to make sure of her control of the Straits of Magellan and of her titles to the southern lands. Consequently, although Article I appears in the 1881 Treaty simply as a question of the delimitation of the frontier in the Andes, it also tacitly registered Chile's abandonment of almost all of her Patagonia claims as part of the global settlement arrived at in 1881. A treaty has to be interpreted in the light of its object and purpose. A recent statement of this fundamental proposition is to be found in Article XXXI(1) of the Vienna Convention on the Law of Treaties. An earlier statement of what is in effect the same proposition may be found in the "Rules of Interpretation" adopted by the Argentine Government in the 1902 Arbitration. These included the following:

"2. In interpreting any expression in a Treaty, regard must be had to the context and spirit of the whole Treaty.

.....
4. "The interpretation should be suitable to the reason of the Treaty." (Argentine Evidence, 1900, in the Proceedings leading up to the 1902 Award, p. XIV)"

Accordingly, in the view of the Chilean Government, the Boundary Treaty of 1881 has to be interpreted in the light of the fact that its object and purpose was to effect a global compromise of the rival territorial claims of the two countries from latitude 45° S. to Cape Horn.

5. **Article II.** What has just been said regarding the object and purpose of the Treaty applies to the interpretation of Article II. This Article lays down with considerable precision a line beginning at Point Dungeness on the Southern coast of Patagonia and running north-westwards and then westwards to the divortia aquarum of the Andes at latitude 52°S. Thus, it is an east-west boundary drawn across southernmost Patagonia slightly to the north of the Straits of Magellan. The final sentence of Article II then states specifically what is to be the division of territory effected by this east-west line:

"The territories to the north of such a line shall belong to the Argentine Republic, and to Chile those extending to the south of it, without prejudice to what is provided in Article III respecting Tierra del Fuego and adjacent islands." (Underlining added)

In the submission of the Chilean Government, this provision according to the ordinary meaning to be given to its terms in their context means, and can only mean, that all the territories to the south of the prescribed line are to belong to Chile, except as otherwise provided in Article III respecting "Tierra del Fuego and adjacent islands". This meaning is, furthermore, entirely in accord with the object and purpose of a treaty effecting a global settlement under which Argentina's claims were to be recognised over most of Patagonia in return for recognition of Chile's claims over most of the southern lands.

6. **Article III - Tierra del Fuego.** Article III contains two distinct provisions: one providing for the division of Tierra del Fuego, and the other providing for the disposition of "the islands". The terms in which the first provision expresses the division of Tierra del Fuego merit the Court's close attention, because they are important for the understanding of the second provision regarding the islands. The first sentence of Article III specifies that in Tierra del Fuego a line is to be drawn from Cape Espiritu Santo southwards along the meridian 68° 34' W. until it touches the Beagle Channel, thus splitting Tierra del Fuego in two by a straight north-south line. The fact that this line terminates when it "touches" the Beagle Channel in itself indicates that by "Tierra del Fuego" the Treaty means exclusively the large island which is bounded on the north by the Straits of Magellan. That such is the meaning given to Tierra del Fuego in the Treaty is made even clearer by the rest of Article III, which continues "Tierra del Fuego, divided in this manner, shall be Chilean on the western side and Argentine on the eastern." Tierra del Fuego divided by the line specified in the first sentence cannot possibly be anything other than the large island of that name. The final sentence then goes on to dispose of islands mentioned as to "the east" and "to the west" of Tierra del Fuego and "to the south of the Beagle Channel". This sentence again, when it refers to Tierra del Fuego, can only mean the large island of that name as described above. Moreover, all the contemporary maps mentioned in Chapters 3 and 4 as having been used to illustrate either the Irigoyen proposals of 1876 or the proposals accepted in 1881 also relate the name "Tierra del Fuego" (in one case Terre de Feu) unmistakably and exclusively to that same large island. Moreover, Irigoyen in his speech quoted above (Chapter IV para 31) referred to "the island called Tierra del Fuego."

7. **Article III - the other islands.** Accordingly, in the view of the Chilean Government it must be regarded as axiomatic that in Article III the expression "Tierra del Fuego" means, and means only, the large island the broad identifying features of which it has set out in the preceding paragraph. Once that point is established, it places clear limits upon the interpretations that may be given to the words in the final sentence of Article III distributing the islands between Argentina and Chile. The final sentence provides:

"to the Argentine Republic shall belong Staten Island, the small islands next to it, and the other islands there may be on the Atlantic to the east of Tierra del Fuego and of the eastern coast of Patagonia".

This provision, the Court will observe, defines the islands allocated to Argentina from south to north: first and most southerly, Estados Island (Staten) and the small islands next to it; then the other islands on the Atlantic to the east of Tierra del Fuego; lastly, and still further to the north the other islands on the Atlantic to the east of the eastern coast of Patagonia. Three cardinal points thus stand out from the terms in which the allocation of islands to Argentina is made in Article III. One is that all the islands designated as belonging to Argentina are to the east of the Atlantic coastline of the continent formed by Patagonia and Tierra del Fuego; and a single glance at the map will suffice to convince the Court that by no possible stretch of imagination can Picton, Nueva or Lennox Islands be considered as "to the east of Tierra del Fuego". The second is that a double condition has to be fulfilled, viz, both "on the Atlantic" and "to the east of Tierra del Fuego". The third point which stands out, even if it be merely the corollary of the first point, is that Article III does not make any allocation to Argentina of islands to the south of Tierra del Fuego. Consequently, as Picton, Nueva and Lennox are due south of Tierra del Fuego, Article III certainly did not mean to allocate them to Argentina. This is manifest from the terms of Article III, whether those islands are or are not properly to be considered as "islands on the Atlantic"; for they do not lie to the east of Tierra del Fuego.

8. That same sentence of Article III, in making its allocation of islands of Chile, provides:

“and to Chile shall belong all the islands to the south of Beagle Channel, up to Cape Horn, and those there may be to the west of Tierra del Fuego”.

The Court is asked particularly to note the word “all” which appears in the disposition of islands to Chile but not in that to Argentina. The logical conclusion to be drawn from this is that, whereas Article III intended to designate specifically the islands allotted to Argentina on the eastern seaboard of the Continent, it intended to make a comprehensive, all-inclusive, allocation to Chile of islands “to the south of Beagle Channel up to Cape Horn” and “to the west of Tierra del Fuego”. Furthermore, this is precisely what is to be expected in the light of the final provision in Article II of the Treaty giving to Argentina the territories to the north of the Point Dungeness - Andes line and to Chile the territories “extending to the south of it, without prejudice to what is provided in Article III, respecting Tierra del Fuego and adjacent islands”. In the light of that provision in Article II, it is only to be expected in Article III that what is not specifically allocated to Argentina should all be comprehensively assigned to Chile. Picton, Nueva and Lennox are as clearly islands to the south of Tierra del Fuego as Navarino Island, which is indisputably Chilean; and they are also as clearly as Navarino outside any allocation of islands to Argentina contained in Article III of the 1881 Treaty. In principle, therefore, the treatment of these islands as allocated to Chile is strongly indicated by the ordinary meaning to be given to the terms of Articles II and III in their context.

9. If the question is then asked why Article III assigns to Chile all the islands to the south of Beagle Channel, rather than to the south of Tierra del Fuego, the answer seems clear. Having agreed that the eastern triangle of Tierra del Fuego should be assigned to Argentina, the Parties viewed the Beagle Channel as a geographical feature which would constitute a natural and obvious boundary between Argentine Tierra del Fuego and the group of territories lying between it and Cape Horn which were to be recognised as belonging to Chile. Accordingly, it was entirely logical for them to express their recognition of all the southern islands as Chilean in terms of an assignment to Chile of all the islands “to the south of Beagle Channel”. Furthermore, as the allocation of islands to Argentina in the very same sentence was in terms limited to islands to the east of Tierra del Fuego, they had no reason to imagine that such a reference to the Beagle Channel could be understood by anybody as assigning to Argentina islands lying unequivocally to the south of Tierra del Fuego. In short, they had no cause to foresee any dispute arising from their use of the expression “south of Beagle Channel” in Article III when making a comprehensive assignment of all the southern islands to Chile.

10. Again, it would be completely unrealistic to assume that those who negotiated and drew up the terms of the 1881 Treaty did so without referring to maps. In the case of a complex territorial settlement like that in the Boundary Treaty of 1881, such a thing is inconceivable; and the evidence presented to the Court in Chapters III and IV in fact shows that certain maps were in the hands of the Parties in the present instance. These maps all indicate clearly the outlines of Picton, Nueva and Lennox islands, with or without their names, placing them in approximately their correct positions to the east of Navarino Island and to the south of Tierra del Fuego. Moreover, apart from Navarino Island, Picton, Nueva and Lennox are the only islands in the Beagle Channel area that are shown on the Argentine and Chilean maps used to illustrate the various proposals. On these maps they appear as small but substantial islands situated near to and in the same latitudes as Navarino Island, itself manifestly constituting one section of the south shore of the Beagle Channel. On these maps, also, from the point where the Tierra del Fuego boundary line was to meet the Beagle Channel this channel appears as running almost in a straight line eastwards along the Argentine coast of Tierra del Fuego until Cape San Pio, with Picton, Nueva

and Lennox lying clearly to the south of that straight line. In consequence, it is entirely understandable that Sr. Irigoyen in 1876 and those who drew up the Treaty in 1881, intending to make a comprehensive allocation of all the islands to the south of Tierra del Fuego as far as Cape Horn, should have thought it perfectly adequate to refer to those islands as "to the south of Beagle Channel up to Cape Horn".

11. In any case, bearing in mind that Article III makes a most deliberate and specific allocation of islands to Argentina to the east of Tierra del Fuego, is conspicuously silent about any such allocation of islands to Argentina to the south of Tierra del Fuego and at the same time makes a comprehensive allocation of all the islands to the south of Beagle Channel to Chile, the only interpretation of the expression Beagle Channel that is logically consistent with the other provisions of Article III is one which treats Picton, Nueva and Lennox as situated "to the south of Beagle Channel". In short, the concept of the Beagle Channel as the Channel running almost straight eastwards to the north of Navarino, Picton and Nueva Islands and entering the ocean between Cape San Pio and Nueva Island is one that is dictated by the very logic of Article III itself. In the view of the Chilean Government, therefore, Article III of the 1881 Treaty, when interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of the object and purpose of the Treaty, requires that the geographical expression "Beagle Channel" shall be given the meaning just stated.

12. **Confirmation provided by historical approach.** Accordingly, the Chilean Government submits that, even without any recourse to the evidence which it has presented in Chapters III and IV, the Court would be bound to conclude that Article III of the 1881 Treaty assigns to Chile all the islands to the south of the channel which runs almost straight eastwards to the north of Navarino, Picton and Nueva Islands and enters the ocean between Cape San Pio and Nueva Island. But recourse to that evidence is clearly permissible for the purpose of confirming that such was indeed the meaning intended by the Parties to be given to those words in Article III or, if Article III leaves the Court in any doubt as to its meaning, for the purpose of resolving the obscurity (Article XXXII of the Vienna Convention on the Law of Treaties). In the submission of the Chilean Government, the circumstances of the negotiations, the statements of the negotiators, the official explanations of the two Governments and the maps used to illustrate the negotiation and conclusion of the 1881 Treaty together provide absolutely incontrovertible proof that the meaning deduced above from the terms of the 1881 Treaty is in fact the meaning that was intended by the Parties to be given to those terms when they concluded the Treaty. While, therefore, invoking and relying upon the evidence presented in Chapters III and IV, the Chilean Government underlines that it does not do so for the purpose of contradicting the ordinary meaning to be attributed to the terms of the 1881 Treaty. On the contrary, the strong submission of the Chilean Government is that the evidence which it has presented and the terms of the 1881 Treaty interpreted in accordance with their ordinary meaning lead to precisely the same conclusion as to the intention of the Parties is assigning "all the islands to the south of Beagle Channel up to Cape Horn" to Chile.

13. **Evidential value of maps.** As pointed out at the end of Chapter IV, the evidence presented in Chapters III and IV is entirely concordant as to the intentions of the Parties in that regard. Even without the illustrative maps, therefore, the evidence in those Chapters confirms that what the Parties meant by "Beagle Channel" was the channel which runs almost straight eastwards to the north of Navarino, Picton and Nueva and enters the ocean between Cape San Pio and Nueva Island. But the illustrative maps give such complete precision to the intention of the Parties on this point that they have particular relevance as evidence of that intention. Although none of the maps in question was annexed to the Treaty of 1881 or otherwise incorporated into the Treaty by reference, each of the maps was used to illustrate either proposals which subsequently formed the basis of the 1881 Treaty or the division of territory effected by the terms of the Treaty itself. Each one of

them emanated either directly or indirectly from individuals engaged on one side or the other in the negotiation or conclusion of the Treaty. Indeed, in one case the map appears to have conveyed the understanding of one Party regarding the settlement proposed in the Beagle Channel region directly to the other Party. Thus, in 1876 Sr. Barros Arana, fresh from his "four long conferences and many discussions" with Sr. Bernardo de Irigoyen, transmitted to the Chilean Government an Argentine map on which were marked lines defining the boundary settlement proposed by the Argentine Foreign Minister (see Chapter III, paragraphs 25-29).

14. If the value of maps as evidence in territorial disputes has sometimes been questioned, international courts have frequently given full weight to an obviously pertinent map in appropriate cases (see generally G. Weissberg, American Journal of International Law, 1963, Vol. 57, pp. 781-803). In the view of the Chilean Government, the value of a map for the interpretation of a boundary Treaty is dependent primarily on the quality of the map itself and its particular relation to the Treaty. In the present instance the quality of the Argentine, Chilean and British maps in question, and even of the sketches, is fully sufficient to sustain their value as evidence for the interpretation of the 1881 Treaty. As to their relation to the Treaty, this has been fully set out in Chapters III and IV. Although not part of the Treaty, they are, as it were, redolent either of its negotiation or conclusion and reflect directly the understanding of one or other party concerning the meaning of its provisions. Furthermore, as previously underlined, these maps in no way contradict any provision expressed in the Treaty; on the contrary, they are fully consonant with the ordinary meaning to be given to the terms of the Treaty in their context. Their evidentiary value for the interpretation of the 1881 Treaty is that they give further precision to the intention derived from the ordinary meaning of the terms, and thereby negative in limine any attempt to attribute any other meaning to those terms. In the submission of the Chilean Government, the concordant evidence furnished by these maps of the intentions of the Parties to the 1881 Treaty is completely decisive as to their intention in assigning to Chile "all the islands to the south of Beagle Channel".

15. **Dominant role of intention of parties.** The Chilean Government emphasises that, in its view, the question for the Court of Arbitration is: what did the Parties to the 1881 Treaty mean by the words "to the south of Beagle Channel" when they concluded the Treaty? It is not: what do those words mean according to the best cartographical or geographical opinion? In fact, there is a heavy preponderance of cartographical and geographical evidence in favour of the view that the Beagle Channel is the Channel which runs almost directly eastwards to the north of Navarino, Picton and Nueva and enters the ocean between Cape San Pio and Nueva Island. But whatever may be the answer given by cartographers or geographers to the question what is the true course of the Beagle Channel is of no interest except in so far as it is shown to have determined the concept of the Beagle Channel in the minds of those who framed the 1881 Treaty. The preponderant cartographical and geographical opinion, as stated above, in fact endorses the concept of the Beagle Channel which the Chilean Government maintains was in the minds of the Parties to the 1881 Treaty when they concluded it; and this is no less true of the scientific opinion current in 1881. Even if this were not so, the Chilean Government submits that the concept of the Beagle Channel which the evidence in Chapters III and IV establishes as having been in the minds of the Parties to the Treaty and which is required by the very logic of its terms must prevail.

16. Thus, even if it could be shown - which is far from being the case - that the generally accepted meaning of the geographical expression "Beagle Channel" is a Channel which at its eastern end passes to the south of Picton Island or embraces the channels on both sides of that island, the meaning which the Chilean Government has shown to have been given to that expression by the Parties to the 1881 Treaty would still determine their rights under that Treaty.

Under the general law of treaties, as formulated in Article XXXI, paragraph 4, of the Vienna Convention on the Law of Treaties, "a special meaning shall be given to a term if it is established that the parties so intended". In that event, no doubt, the burden would lie on a Party alleging that some unusual or exceptional meaning is to be attributed to the expression (Legal Status of Eastern Greenland case, P.C.I.J., 1933, Series A/B No. 53, p.49). But once it is established that the Parties intended an expression to have a special meaning, their intention will unquestionably prevail. In the present instance the evidence presented in Chapters III and IV and the logic of the terms of the 1881 Treaty itself establish incontrovertibly that the Parties intended the expression "to the south of Beagle Channel" to have the meaning now attributed to it by the Chilean Government. Accordingly, whatever might in the abstract be the meaning of that expression, it is the meaning with which the expression was used by the Parties in 1881 which alone concerns the Court of Arbitration.

17. **Settlement was definitive in 1881.** Finally, the Chilean Government submits that the meaning given to the provision "all the islands to the south of Beagle Channel" in Article III by the Parties in 1881 determined definitively their rights in the Beagle Channel area under the territorial settlement agreed in the Boundary Treaty of that year. One of the primary objects of a boundary treaty, as the International Court emphasised in the case concerning the Temple of Preah Vihear (I.C.J. Reports, 1962, p. 34) is to achieve stability, certainty and finality in regard to the frontier which the Treaty is designed to establish. That case concerned an alleged error in a map delimiting a Treaty boundary, and the International Court pointed out that stability and finality are impossible if the line of a frontier "can, at any moment, and on the basis of continuously available process, be called in question, and its rectification claimed, whenever any inaccuracy by reference to a clause in the parent treaty is discovered". This reasoning applies a fortiori if a frontier established by Treaty could be called in question whenever any geographical expression was claimed by one Party to have a different meaning from the one manifestly intended by the Parties at the time they concluded the Treaty. In short, it would be completely incompatible with a primary object of the 1881 Treaty that it should now be open to Argentina to call in question the territorial settlement established by the assignment to Chile of "all the islands to the south of Beagle Channel" by alleging that the expression "Beagle Channel" has afterwards been characterised by Argentine cartographers as having a meaning different from that intended in 1881. The case is quite different from the one where nature itself changes a geographical feature, as by changing the course of a river designated as the boundary between two territories. In the present instance the terms of the Treaty and the evidence establish incontrovertibly that the Parties, when they referred to the "Beagle Channel", intended the particular Channel which runs directly eastwards to the north of Navarino, Picton and Nueva Islands and enters the ocean between Cape San Pio and Nueva Island. No subsequent cartographical assessment or invention in regard to the Beagle Channel could alter that particular intention of the Parties in 1881.

18. **Conclusions.** In the light of the foregoing considerations, the Chilean Government submits:

(1) The Boundary Treaty of 1881, interpreted in good faith in accordance with the ordinary meaning to be given to their terms in their context, assigns to Chile all the islands to the south of the Channel, designated in Article III the Beagle Channel, which runs almost directly eastward to the north of Navarino, Picton and Nueva Islands and enters the ocean between Cape San Pio and Nueva Island.

(2) In particular, the words in Article III "all the islands to the south of Beagle Channel", interpreted in accordance with the ordinary meaning to be given to them in their context, mean all the islands to the south of the channel defined in (1).

(3) The submissions in (1) and (2) are in full accord with, and confirmed by, the evidence presented in Chapters III and IV of the present Memorial.

(4) Accordingly, it is an established and basic fact in the present case that the Parties to the 1881 Treaty intended to assign, and did assign, to Chile all the islands to the south of the channel defined in (1), including Picton, Nueva and Lennox.

(5) The assignment to Chile by the 1881 Treaty of all the islands to the south of the channel defined in (1), including Picton, Nueva and Lennox, was definitive and final, and could not therefore be affected by any subsequent changes in cartography or geographical nomenclature which may be alleged to have possibly taken place.

(6) The 1881 Treaty, interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context, assigns to Argentina "on the Atlantic" Staten (Estados) Island, the small islands next to it, and any other islands off the eastern coasts of Patagonia and Tierra del Fuego as far as the extreme south-easterly point of Tierra del Fuego opposite the islands of Estados; and no other islands "on the Atlantic".

(7) The submission in (6) is in full accord with, and confirmed by the evidence presented in Chapters III and IV of the present Memorial.

(8) Accordingly, it is an established and basic fact in the present case that the Parties to the 1881 Treaty intended to assign, and did assign, to Argentina no islands "on the Atlantic" other than the Island of Estados, together with the small islands next to it, and any islands lying to the east of Tierra del Fuego and of the eastern coast of Patagonia.

CHAPTER VI

THE TREATY OF 1881 AND THE ISLANDS SITUATED IN THE BEAGLE CHANNEL

1. **Statement of the Problem: Definition of "the islands in the Channel"**. In the previous chapters, which are devoted to the origins and to an analysis of the Boundary Treaty of 1881, the Chilean Government has concentrated its attention more particularly on the legal status of the islands of Picton, Lennox and Nueva, situated to the south of the Beagle Channel.

The Chilean Government will now proceed to examine, once again in the light of the Treaty of 1881, the legal status of some dozens of islands, islets and rocks which are to be found in the eastern section of the Channel itself, between the coast of the Argentine part of Tierra del Fuego to the north, and the shores of the islands of Navarino, Picton and Nueva to the south. Among these there may be mentioned, from the meridian $68^{\circ}36'38.5''$ west of Greenwich: Peron, Redonda, Whaits, Lawrence, Bartlett, the Bridges group, the Eclaireurs group, Gable and adjacent islets, Barlovento, Eugenia, Snipe, and Becasses. ⁽¹⁾

The most important of these islands is Gable which occupies an area of 19 square kms; the others are very much smaller.

2. **Argument that the islands were not dealt with by 1881 Treaty.** A hasty and superficial reading of the Treaty of 1881 could lead to the conclusion that it left the legal status of these islands undetermined.

The following line of argument could be advanced:

In 1881, in order to delimit their respective sovereignties to the south of the Straits of Magellan, the Parties adopted two axes forming a right angle; the imaginary line from north to south along the meridian of Cape Espiritu Santo, on the one hand, and the natural west-east line formed by the Channel which in a quasi-rectilinear fashion cuts across the southern part of South America, on the other. The lands situated inside this right angle - that is, those which are both to the east of the meridian and to the north of the channel - were given to Argentina, those outside this right angle - that is, to the west of the meridian or to the south of the Channel - were granted to Chile. Thus, it seems natural that, as the Parties regulated the status of the lands situated to one side or the other of the stretch of water separating their sovereignties, they did not, for one moment, concern themselves with the islets to be found inside this stretch of water itself. Thus the fact that the dividing line which crosses Tierra del Fuego from north to south was only defined as far as its meeting place with the Channel, and not beyond it, and also the fact that one may search in vain in that part of Article III devoted to the question of the islands for any mention of the islands situated inside the Channel, could both be explained.

3. **Refutation of that Argument.** In the opinion of the Chilean Government, such a way of looking at the matter is precluded by a three-fold consideration.

⁽¹⁾ For convenience's sake, these islands, islets and rocks which lie in the eastern section of the Beagle Channel will be mentioned simply by the expressions: "the islands of the Channel", or "the islands in the Channel."

First of all, to interpret the Treaty of 1881 as having left the question of sovereignty over the islands in the Channel outside its field of application, would be a serious misunderstanding of its purport, for its object was to settle the territorial problems between the two countries in the regions under consideration.

Secondly, the two Governments showed precisely and in a clear manner their determination as regards the solution they intended for this question in the context of the global territorial settlement to which they were proceeding.

Lastly, the subsequent conduct of the Parties has been such as to confirm their intention as it was expressed on the occasion of the conclusion of the Treaty of 1881.

4. **Application of 1881 Treaty: The Treaty as a comprehensive settlement.** In the first place, the Treaty of 1881 cannot in principle be interpreted as if it contained a gap in the territorial settlement which it effected in the regions with which it dealt. This is contradicted by both the object and purpose of the Treaty and by certain of its provisions.

5. **Object and purpose of the Treaty.** The object and purpose of the Treaty of 1881 are too well known to the Court for it to be necessary to dwell on them at great length. The Chilean Government has already had occasion in the earlier chapters of this Memorial, to recall the historical origins of this convention, which elucidate what in the case-law is termed its "general purpose", its "function", its "role".⁽¹⁾ It has demonstrated that the "idea which forms the basis"⁽²⁾ of the Treaty of 1881 was the desire of the two Governments to put an end fully and definitively to the controversies which had been caused by attempts to determine the actual content of the principle of *uti possidetis* laid down by Article 39 of the 1855 Treaty. In order to bring this about, each of the Parties was compelled to consent to make certain concessions whose actual terms were made the subject of long and difficult negotiations. This "compromissory" character of the settlement of 1881 was stressed numerous times;⁽³⁾ it found its most noteworthy expression in Article VI of the Treaty, which termed the latter, most accurately, a *transaccion*, that is, a compromise.⁽⁴⁾

Thence flow two fundamental characteristics which cannot be overlooked in any interpretation of the Treaty.

6. The first, which it is enough to mention in passing, is that the compromise thus attained came henceforth to constitute, in those regions settled by the Treaty, the sole legal source of the respective rights of the Parties in territorial matters: the earlier titles and claims were set aside; a new situation was created, which put an end to former controversies.

⁽¹⁾ On the importance of the historical origins of a Treaty for its interpretation see Ch. de Visscher, *Problemes d'interpretation judiciaire en droit international public*, Paris, 1963 pp.74 et seq. See the *North Sea Continental Shelf Case*, ICJ Reports 1969 pp. 32,33

⁽²⁾ This expression is used in the opinion of the Permanent Court on the *Minority Schools in Albania*, PCIJ, sc. A/B No. 64 p.17

⁽³⁾ See the declarations of the Chilean and Argentine Governments at the time of the Arbitration of 1898 - 1902, Chapter VII para 26 below. cf. L. Varela, "Histoire de la Demarcation de leurs Frontieres". Buenos Aires, 1899 vol. 1, p.22 who presents the Treaty as a "true compromise between extreme claims".

⁽⁴⁾ See the definition of "transaccion" given by the eminent Chilean jurist Andres Bello, (*Obras Completas*, Vol X, *Derecho Internacional*, Santiago, 1886 p. 182). "a compromise is a method by which each of the litigating parties surrenders some of its claims in order to secure the remainder in return."

7. The second, on which it is necessary to dwell at some length, is that the settlement arrived at by the Parties was altogether complete and definitive. The Parties intended to answer all boundary questions which had been discussed for several decades by a global compromise, and they intended to do it definitively, in the sense that should any doubt arise in the future, it would be settled upon the basis of the principles contained in the Treaty, all other considerations arising earlier being excluded beforehand.

The Treaty is quite clear about this. In its preamble the two Parties affirm themselves to be "animated by the desire of resolving the frontier controversy, in fulfilment of Article 39 of the Treaty of April 1856", that is to say, to put an end both complete and definitive to the difficulties arising from the application of the principle of uti possidetis. This is a most valuable indication, for the preamble of a treaty indicates what has been called the "juridical climate in which the operative clauses should be read, liberally or restrictively, broadly or strictly." ⁽¹⁾ In the absence of any contrary indication clearly appearing in its text, the 1881 Treaty should therefore be interpreted as having finally settled the problem of the islands in the Channel as well as having settled all the other frontier questions between the two countries which had arisen in this area. Article VI is moreover quite explicit as to the complete and definitive nature of the settlement of 1881 since it provides:

"The Governments of Chile and the Argentine Republic shall perpetually exercise full dominion over the territories which respectively belong to them according to the present Arrangement. Any question which may unhappily arise between the two countries, be it on account of the present Arrangement or be it from any other cause whatsoever, shall be submitted to the decision of a friendly Power; but in any case the boundary specified in the present Arrangement will remain as the immovable one between the two countries.

8. The preceding considerations carry even more weight since case law does not easily admit the force of the argument that conventions which are meant to settle controversial matters should be interpreted as containing any gaps.

Thus the Permanent Court rejected an interpretation which

"would amount to the maintenance over the Danube system of an uncertain and precarious situation" ⁽²⁾

as well as an interpretation by which

"the appeasement which was aimed at would not really have been attained" ⁽³⁾

⁽¹⁾ G. Fitzmaurice, The Law and Procedure of the International Court of Justice: British Yearbook of International Law, Vol. 28 (1951) p.25 and Vol. 33(1957)p.227. On the importance of the preamble for the interpretation of a boundary treaty see Ch. Rousseau, Droit International Public Vol. I, Paris, 1971, pp. 286-7; see also the Chamizal Arbitration, U.N. Reports of International Arbitral Awards, Vol. XI p. 324.

⁽²⁾ Case concerning the European Commission of the Danube. PCIJ ser. B. No. 14 p. 27

⁽³⁾ Pajs, Csaky, Esterhazy Case PCIJ ser A/B No. 68 p.60 See also case concerning the Interpretation of the Statute of the Memel Territory PCIJ Ser A/B No. 49 p. 316.

This case law is re-affirmed with particular force in the case of boundary treaties, because such treaties above all others call for an interpretation which affords entire assurance that they **can** fulfil their function of complete and definitive settlement. ⁽¹⁾ In the case concerning the Interpretation of the Treaty of Lausanne, the Permanent Court declared:

"It is, however, natural that any article designed to fix a frontier should, if possible, be so interpreted that the result of the application of its provisions in their entirety should be the establishment of a precise, complete and definitive frontier." ⁽²⁾

The International Court of Justice, for its part, emphasised, in the case concerning Sovereignty over Parcels of Frontier Lands that:

"Any interpretation under which the Boundary Convention is regarded as leaving in suspense and abandoning for a subsequent appreciation of the status quo the determination of the right of one State or the other to the disputed plots would be incompatible with that common intention." ⁽³⁾

So also, one may cite the following well-known passage from the judgment of the Court in the case concerning the Temple of Preah - Vihear.

"In general, when two countries establish a frontier between them, one of the primary objects is always to achieve stability and finality." ⁽⁴⁾

The Chilean Government could do no better than to say that it shares to the full the point of view expressed by the Argentine Government in its Memorial in the Palena Case:

"The main object of international law in relation to frontier questions is to achieve finality and stability". ⁽⁵⁾

9. **Terms of the Treaty.** Any suggestion that the Treaty of 1881 contains a lacuna in respect of the islands of the Channel is thus wholly contrary to all that is known of the object and of the purpose of the Treaty. Such an interpretation is moreover extremely unlikely. The negotiators of the Treaty knew that there existed islands within the stretch of water which they had selected as the axis for the separation of the two areas of sovereignty. Admittedly their knowledge of these islands was incomplete: a detailed survey of the Channel was not actually carried out until the explorations of Giacomo Bove in December 1881 and of the Romanche in September 1882. Nevertheless they knew of the existence of most of them, for the maps which they used, in particular the British Admiralty Map No. 1373, notably in its 1841 and 1877 editions, showed a number of them, and in some cases by their names. In those circumstances, it is difficult to imagine that Governments which were so anxious not to leave between them any ground for disagreement could with full knowledge of the facts content themselves with defining only to whom should belong the

⁽¹⁾ Ch. de Visscher op.cit. p.83. Problemes de confins en droit international public, Paris, 1969, p.28

⁽²⁾ PCIJ Ser. B. No. 12 p.20

⁽³⁾ ICJ Reports 1959 pp 221-22

⁽⁴⁾ ICJ Reports 1962 p.34

⁽⁵⁾ Paragraph 209 p. 192

territories to the one side or the other of the Channel, thus leaving between these territories a zone of indeterminate status. The decision to make the Channel the line of separation of their southern territories could not but have been accompanied by adopting a position, though it be only one of principle, as to the delimitation which should be laid down in the interior itself of the Channel. Any interpretation by which the Treaty could be regarded as having settled the problems of boundaries in all the areas surrounding the Beagle Channel but as also leaving a hiatus, a void, a "blank", of some kind, as regards the islands situated in the Channel itself would be in truth unreasonable.

10. An analysis of the actual provisions of the Treaty confirms the analysis of its objects and purpose.

As the Chilean Government has shown in Chapter V of the present Memorial, Article III of the Treaty cannot be taken out of its immediate context, that is to say, the final provision of Article II, which clarifies and completes it: these two provisions form "a complete whole the different provisions of which cannot be dissociated from the others and considered apart by themselves." ⁽¹⁾ Taken together the last sentence of Article II and Article III provide absolute proof, by the clear and natural sense of the terms used, that insofar as they are not otherwise provided for by Article III respecting Tierra del Fuego and the adjacent islands, all the territories to the south of the line defined by Article II should belong to Chile. So, the combination of Articles II and III, provides machinery which in principle renders inconceivable any gap in the territorial settlement of the lands to the south of the Straits of Magellan, since all the territory forming part of Tierra del Fuego and the adjacent islands not otherwise provided for by Article III falls back automatically within Chilean sovereignty. ⁽²⁾ Thus the Treaty of 1881 cannot but provide a solution for the problem of the islands of the Channel and the question may be reduced to that of inquiring what Article III provides in respect of these islands.

11. **Intention of the Parties: the relevant maps.** The Chilean Government believes - and this will be the second and positive limb of its contention - that there are available proofs of the manner in which the Parties conceived the provisions of Article III in connection with the islands of the Channel, and thereby, of the solution which they intended to provide for the problem of sovereignty over the islands in the context of the global territorial settlement. It suffices to refer to the maps illustrating the conclusion of the Treaty and which are inseparable from it in order to show that the intention of the Parties was, by means of Article III to grant to Argentina, together with the eastern part of Tierra del Fuego, those islands and islets appurtenant to its coast and to Chile, along with the whole of the islands to the south of the Channel, the islands and islets appurtenant to them. That this is what was being represented by the drawing on the relevant maps of a frontier line following the direction of the Channel eastwards from the meridian of Cape Espiritu Santo as far as the ocean between Cape San Pio and Nueva Island could scarcely be more obvious.⁽³⁾

⁽¹⁾ Case concerning the Waters of the Meuse PCIJ Ser A/B No. 70 p. 21.

⁽²⁾ See Chapter V. paras. 5 and 7-9.

⁽³⁾ These maps are to be found explained from other angles in Chapters III and IV above and in "Some Remarks concerning the Cartographical Evidence" submitted with the Memorial.

Of course, the marking of the frontier was not there carried out down to its minutest details; also, of course, the Parties did not deem it necessary to devote any specific provisions of the Treaty to this relatively minor question which had never caused any difficulty between them and for which they adopted a solution which seemed to them self evident as being in full conformity with both good sense and international law.

It is no less certain that their intention was to make the boundary run roughly along the middle of the Channel, thus leaving the islands appurtenant to the northern coast to Argentina and those appurtenant to the southern coast to Chile.

12. Plate 8⁽¹⁾. This document consists of an Argentine map of 1875 on which the Chilean Minister at Buenos Aires, Diego Barros Arana, reproduced in 1876 by a red line, the proposals for the settlement which had just been made to him by the Argentine Minister for Foreign Affairs, Bernardo de Irigoyen. This map was attached to the report of Barros Arana to the Chilean Minister for Foreign Affairs of 10 July 1876. (Annexe No. 22).

Herein, certainly, is one of the documents which are fundamental to the negotiations for two reasons. One, because it is the first time that the Beagle Channel seems to have been mentioned by the Parties as the frontier between their territories; that is to say, the interest of this map is that it enables us to know their conception of the several ideas and geographical names used by them. The second reason is that, as regards Tierra del Fuego, the Beagle Channel and the islands, Article III of the Treaty confirms the Irigoyen proposal and, in consequence, confirms the lay-out of Plate 8; this will moreover be brought out expressly by an examination of Plate 13.

A glance at the map here being examined is enough to understand how the negotiators, Irigoyen on the Argentine side, Barros Arana on the Chilean, understood the distribution of the territories between the two countries in the region of the Channel. After having descended from Cape Espiritu Santo down to the Channel, the red line follows it from west to east near to its centre and is prolonged into the ocean by following the direction of the line of the Channel. Of course, no island is drawn on the map inside the Channel, but this fact, which can be explained by the scale of the map (1: 4,000,000) does not minimise the significance of the document as an expression of the intention of the Parties to award to Argentina the territories - including the islands in the Channel - to the north of the line, and to Chile those - including the islands - to the south of the line.

13. Plates 9 and 10⁽²⁾. These maps illustrate the proposal made in 1878 by the Argentine Minister Rufino de Elizalde to Barros Arana: the first was annexed to the note sent on 30 March 1878 by Elizalde to Barros Arana; the second was drawn by Barros Arana to the attention of the Chilean Government. These maps, which faithfully relate how the Argentine Government then envisaged the demarcation of the frontier in the Beagle Channel, both show the frontier line running roughly along the centre of the Channel.

(¹) See Chapter III, paras. 27-29.

(²) See Chapter III paras 32-3

14. Plate 12 ⁽¹⁾ This map, whose original is to be found in the archives of the French Ministry of Foreign Affairs, consists of a sketch annexed to political despatch No. 217 addressed on 2 July 1881 to the French Foreign Minister by Baron d'Avril, Minister for France at Santiago.

The French diplomatist, who kept his Government regularly informed as to the negotiations between Chile and Argentina, gave it the news, in this detailed despatch (Annex No. 38) of the "bases of agreement" to which the two Governments had just subscribed and which came to be incorporated some days later in the Treaty of 23 July ⁽²⁾. In particular he explained to his Government how the "conciliatory disposition" of the Chilean Government had led it to make concessions, which he moreover considered to be too great, notably as far as the division of Tierra del Fuego was concerned, and he transmitted for the better understanding of the settlement arrived at, a rather rough sketch which he had drawn himself. Now, on this sketch, the red dotted line which marks the delimitation agreed upon by the Parties follows approximately the middle of the Beagle Channel, showing thus a delimitation identical to that proposed by Irigoyen in 1876 (Plate 8) and to that which came to be fixed by the Treaty itself (Plate 13).

15. Plates 13 to 19 ⁽³⁾. The Chilean Government has already on several occasions stressed the importance which this map, called "Chile's 1881 Authoritative Map", has for the interpretation of the Treaty. This is because it is a map "showing the various proposals for settling the question of boundaries between Chile and Argentina" prepared in August 1881 on the orders of the Chilean Government under the direction of the Hydrographic office. This map, illustrating the proposals of 1872, 1876, 1879, and 1881, records that the division of 1881 "coincides with that of 1876 from Mount Aymon to Mount Dinero, and throughout its course over Tierra del Fuego and through Beagle Channel." (Plate 17).

The particular importance of this map arises from the fact that it was communicated to their respective Governments by a number of diplomatic agents accredited to Santiago who saw in this document an exact rendering of the Treaty which had just been concluded. (See Chapter IV paras 21, 22 and 23 above).

Like the Barros Arana map of 1876, "Chile's 1881 Authoritative Map" traces a line near the centre of the Channel. It is true that, once more, no island appears on the map, but again this fact, which can be explained by the scale (1: 2,000,000), does not detract from the significance of the line which follows almost along the middle of the Channel.

Since the Argentine Government never raised the slightest protest or reservation against this well-known map, it must be considered as a faithful translation of the settlement arrived at by the Parties in 1881.

16. **Subsequent conduct of the Parties.** The subsequent conduct of the Parties confirms that their intention in 1881 was that the boundary should run roughly along the centre of the eastern section of the Channel and to attribute to each of the two coastal states the islands appurtenant to its own coast.

⁽¹⁾ See Chapter IV para 19 and also the Cartographical remarks.

⁽²⁾ See Chapter IV para 14 et seq.

⁽³⁾ See Chapter IV paras 21, 22.

Several facts merit some remark in this respect.

17. First of all, there are available some Argentine and Chilean maps which, following the conclusion of the Treaty of 1881, indicate a boundary line following approximately the middle of the Channel. Certain of these maps were published by governmental authorities or under their control, others are due to geographers or to well-known persons; none has ever evoked the slightest protest from the other party. Without wishing to attach an exaggerated importance to this cartography - for other maps of the same period do not show this frontier in the same manner - the Chilean Government nevertheless believes that it sheds a useful light on the way in which the authorities and experts in the two countries looked upon the matter in the decades following the signature of the Treaty.⁽¹⁾

18. Among the maps of an Argentine origin, particular attention should be given to Plate 34 which forms Plate XXVII of the Atlas of the Republic of Argentina, whose first edition was published at Buenos Aires in 1886.

There is here in fact a semi-official document, since this Atlas was published under the auspices of the Argentine Government, by the Argentine Geographical Institute, which was financed by that Government. Among the members of the Special Commission of the Atlas were Argentine statesmen and cartographers of the first rank, such as Virasoro who became the Argentine expert in the boundary demarcation operations with Chile. Now, this map bears a frontier line which follows the Channel roughly in the centre to the longitude of Cape San Pio. This shows that in 1885, just a few years after the Treaty was signed, the highest Argentine political and scientific authorities thought that the islands of the Channel were to be attributed to one or other of the Parties according to whether they were to be found on one side or the other of a line running approximately along the mid-Channel.

Also worthy of remark is another Argentine map. This is Plate 38 published in 1888 by the Argentine Government office in London; the map has an official character, the Information Office having been created by decree of 25 November 1886 and financed from the budget of the Argentine Ministry of Foreign Affairs. On this map as on the preceding one the boundary between the two countries is shown by a line running along the Channel, about its centre, between the coasts of Tierra del Fuego and those of Navarino, Picton and Nueva.

19. The same characteristic appears on several maps of Chilean origin among which may be cited:

- Plate 29, produced circa 1884 by the French geographer Pissis employed by the Chilean Government.

⁽¹⁾ Perhaps it is not without interest to note that the frontier line approximately in Mid-Channel is to be found on many maps from third countries. Thus may be cited:

- Some English maps, Plate 76 (1896), Plate 47 (1890), Plate 92 (1904), the last of which was prepared by Sir Thomas Holdich to illustrate the frontiers as a result of the arbitral award of King Edward VII in 1902. This formed part of Holdich's work published as The Countries of the King's Award (London, 1904)
- The German maps, Plate 98 (1888), Plate 109 (1889) and Plate 113 (1913)
- The Scandinavian map (1899) Plate 80.
- Plate 87, Map published by the Bureau of the American Republics (1903)

- Plate 49. Chilean Boundary Commission Map, attached to Report from Chilean Expert, Barros Arana, dated 1890.
- Plate 74 published in 1897 by the Directorate of Public Works of Chile
- Plate 75, from the Chilean Demarcation sub-Commission in 1897
- Plate 86, published in 1902 in the journal El Ferrocarril to indicate the frontiers as a result of the Arbitral Award of 1902
- Plate 91, published in 1904, which states that it was made in conformity with studies undertaken by the Demarcation Commissions of Chile and Argentina, the Navies of the two countries, engineers and private explorers, and that it was approved by the office for Frontier Demarcation and the Inspectorate-General of Lands and Colonisation; moreover it bears the official stamps of these two public bodies
- Plate 94, of 1904, revised and approved by the Director of the Office of Boundary Demarcation
- Plate 97, approved in 1905 by the Inspector for Lands and Colonisation
- Plate 99, published in 1906 by the Chilean Boundary Office.

20. More important than this cartographical data is the fact that, if there had been the slightest doubt in the mind of one or other of the Parties as to the delimitation of their sovereignties as shown in the relevant maps, the question would quite certainly have been raised by that Party on one of the occasions which presented themselves in the months and years which followed the conclusion of the Treaty.

The negotiation of the Protocol of 1893 provided one of such opportunities, since it was then that certain difficulties which had been met with in applying the Treaty of 1881 on the ground were aired. However, the question of delimitation in the Channel was not even mentioned in the course of the negotiations, as it surely would have been if the problem had remained in the least uncertain after 1881.

Neither did the two Governments include this question amongst those they submitted to the arbitration of the British Sovereign in 1898.

But the following is perhaps even more significant. It was in August 1904 that the question of the islands inside the Channel was raised for the first time in a draft protocol handed by the Argentine Minister for Foreign Affairs Terry to the Chilean representative at Buenos Aires. (Annex No. 69). It is striking to discover that this document does not contemplate the delimitation of the boundary inside the Channel, but its demarcation, that is to say, "the technical operation of execution which reproduces on the ground the terms of a delimitation already laid down".⁽¹⁾ Referring to Article IV of the Treaty which lays down that:

"The experts ... shall mark out on the ground the lines indicated in the two preceding articles" the Argentine draft maintains that among the "lines" to be demarcated only that one dividing the Channel had not yet been drawn and suggest that this work should be confided to two experts:

⁽¹⁾ Ch. de Visscher, Problemes de confins en droit international public, p. 28.

"The axis of the Beagle Channel has not been traced yet by representatives of both Governments; ... this is the only section of the border common to both nations the material demarcation of which has not been effected yet, and ... they are anxious to go ahead with the proposal to complete finally tracing the Border. Consequently they have agreed as follows:

1. The axis of the Beagle Channel will be determined by two experts ..."

Thus in 1904 the Argentine Government considered it as quite evident that the legal problem of sovereignty over the islands in the Channel had been settled in principle since 1881 and that all that now remained to be done was to carry out an actual demarcation. For the Chilean authorities this demarcation did not seem to be indispensable, it being possible to divide the islands on the basis of the delimitation laid down in principle in 1881. ⁽¹⁾ The two countries were at all events agreed in considering that the question of principle had been settled with the conclusion of the Treaty.

21. Though it does not possess an official status, one may also mention the position adopted in 1918 by an Argentine personality of the first rank, who was very closely involved in the frontier question between the two countries. It is a memorandum sent on 17 July 1918 to Sir Reginald Tower, the United Kingdom representative in the Argentine (and sent on by him to the Foreign Office) by Francisco P. Moreno, Argentine "expert" in the field of the Application of the Treaty of 1881, Argentine representative in the 1902 Arbitration, and Argentine delegate on the Boundary Commission in 1903. In that lies the document's interest, to which there will be occasion to return. ⁽²⁾

Having recalled the apparent silence of the Treaty on the subject of the islands in the Channel, and the attitude of the Parties to it during the years following the Treaty's conclusion, the eminent Argentine expert wrote thus:

"From this one may gather that the Chilean Government interpreted that part of the Treaty in the same manner as the Argentine Government, namely that the dividing line should be along the main deep-water channel or in other words the mid-channel line of the Beagle Channel. There was no need for tracing a line there, for common sense fixed it, viz: the north side of the Channel to Argentine and the south side to Chile ...

As for me, both as a private individual and as Argentine expert, I never doubted that the boundary in the far south might be any other. The mid-channel line of the waters of the Beagle Channel was that of the Treaty of 1881." (Annex No. 113)

Moreno added that if the parties had had the slightest doubt on this point they would have raised it in 1893 as they had with respect to other aspects of the Treaty.

The principle of a boundary running along mid-channel being thus recalled, Moreno added that there remained only the question of the actual marking of this line, but this was, according to him, a problem which it would be easy to deal with:

"Undoubtedly it will be necessary to determine the location of the mid-channel line of the Beagle Channel, where the frontier lies along that Channel, but this simple operation cannot give rise to any difficulty."

⁽¹⁾ See the Report of the Office of Boundary Demarcation of 30 September 1904 (Annex No. 72).

⁽²⁾ See Chapter VIII, para. 46 et seq.

22. The most important evidence as to the manner in which the Parties, by their subsequent conduct, interpreted the Treaty of 1881 in so far as it was concerned with the delimitation of their respective sovereignties remains however those acts of sovereignty which each of the two states has carried out over the islands appurtenant to its own coast. This question will be studied in Chapter X below.

23. **Conclusion.** In the light of the foregoing, the Chilean Government hopes to have succeeded in establishing that the question of sovereignty over the islands in the interior of the Beagle Channel eastwards from the meridian of Cape Espiritu Santo to the ocean between Cape San Pio and Nueva Island, was settled by the Boundary Treaty of 1881 in the same manner and at the same time as all the other frontier questions between the two states in those areas dealt with in the Treaty. The intention of the two Governments as shown by relevant maps and the subsequent conduct of the Parties was to delimit the respective sovereignties of the two countries along a line following roughly the middle of the Channel, so as to leave to each of the coastal states the islands appurtenant to its own coast. For this reason Article III of the Treaty should be interpreted as giving to Argentina, together with the eastern section of Tierra del Fuego, the islets appurtenant to the northern shore of the Beagle Channel and to Chile, together with all the islands to the south of the Channel, the islets appurtenant to its southern shore.

This is in the opinion of the Government of Chile the correct interpretation of the Treaty as derived from its historical origins, from the maps which clarify it and are inseparable from it, from its object and purpose, as well as from its provisions themselves.

24. **Alternative interpretation of the Treaty.** Should the Court of Arbitration be of the opinion that this interpretation of the Treaty cannot be sustained, then the only conceivable other interpretation would be that by which all the islands in the Channel belong to Chile. This alternative interpretation, which the Chilean Government now proposes to expound finds support both in the text of the Treaty itself and in the conduct of the Parties.

25. **Terms of the Treaty.** It is a literal reading of the Treaty that obviously most strongly militates in favour of such an interpretation. Although Article III mentions a number of territories in the region of Tierra del Fuego and its adjacent islands in order to award them either to Argentina or to Chile, it is silent as to the islands situated within the Channel. Thus they are not explicitly awarded either to Argentina or to Chile. From this it results that, since Article III does not deal with them expressly, these islands all belong to Chile in accordance with the principle stated in Article II.

26. This argument can equally be supported by an interpretation which is slightly different, and by which the last sentence of Article II enunciates a principle to which Article III lists exceptions which are exhaustively stated: from a combination of these two Articles the result is that all the territory to the south of the Straits of Magellan which Article III does not expressly award to Argentina belongs ipso facto to Chile.

The justification for such an interpretation could be found in the origins and significance of the territorial Settlement of 1881. As has been shown already, the compromise arrived at by the negotiators of the Treaty involved a partial renunciation, by Chile of its traditional position according to which all the southern lands were under its sovereignty. ⁽¹⁾ By this compromise Chile not only renounced its claim to a frontier line near to the level of 45° south latitude in order

⁽¹⁾ See Chapter III para. No. 14 et seq.

to accept a line well to the south thereof, at the 52° parallel; it also accepted that south of that line certain territory - the eastern part of Tierra del Fuego and Staten Island - should be granted to Argentina. No doubt Chile obtained something in return, in particular the control of the Straits of Magellan and the certainty that its ownership of the islands to the south of the Beagle Channel should no longer be denied her. But it is clear that the main concessions were made by Chile in order to bring about a peaceful settlement. Already on 2 July 1881, Baron d'Avril, French Minister at Santiago, emphasised in his despatch No. 217 to the French Minister of Foreign Affairs, the "conciliatory disposition" of the Chilean Government which had led it to give up part of Tierra del Fuego: "if I had been chosen as arbitrator", declared the French diplomatist, "I would have given Chile the whole of Tierra del Fuego." (Annex No. 38(b)) It may be called to mind in this connection, that in his explanation to the Argentine Congress of the Treaty he had just signed a few weeks beforehand Bernardo de Irigoyen congratulated himself on having obtained for Argentina part of Tierra del Fuego "where our rights are questionable"⁽¹⁾ In analysing the Treaty once more for the benefit of his Government, Baron d'Avril found it necessary to dwell on the fact that "the first claims by Chile, and even the line of the Rio Santa Cruz, which were in fact those of the status quo, have been abandoned by the Government at Santiago, which in fact made nearly all the concessions... looked at objectively, the settlement is not particularly bright for Chile." (Annex No. 43). This being the case, it follows that the provisions of the Treaty which involve any abandonment by Chile of its traditional claims must be interpreted restrictively, and this is required moreover by the wording of Article III, which awards to Argentina certain territory specifically described whereas it recognises Chilean sovereignty over territory which is defined generally and comprehensively ("all the islands").⁽²⁾ Thus it would not be unreasonable to interpret the last sentence of Article II as meaning in principle that all the territory to the south of the Dungeness-Cordillera of the Andes line which Article III does not attribute expressly to Argentina belongs automatically to Chile.

Now, it is easily established that Article III only gives to Argentina two categories of territories. In the one category, the eastern section of Tierra del Fuego down to the Beagle Channel, but not beyond; the north-south dividing line only runs to the point at which it meets the Channel, and it is Tierra del Fuego "divided in this manner" which is Chilean on the one side, Argentine on the other; this line is not prolonged beyond its point of intersection with the Channel. In the other category are Staten Islands, the immediately adjacent islets and the other islands to be found in the Atlantic to the east of Tierra del Fuego and the eastern coasts of Patagonia. No island within the Channel is, on the other hand, attributed to Argentina by Article III; whence it results that, by the application of the principle enshrined in the last sentence of Article II, these islands belong, all of them, ipso facto to Chile.

27. The same interpretation could equally be supported by that provision of Article IV under whose terms:

"The experts... shall mark out on the ground the lines indicated in the two preceding articles..."

The text of this Article thus provides for a physical demarcation by the experts in all those areas where the Treaty lays down a frontier line between the two countries. If Articles II and III clearly make mention of such a "line" in the Andes and in Tierra del Fuego, they do not state any

(¹) See Chapter IV, para 31

(²) See Chapter V, para 8

"line" of this kind in the interior of the Beagle Channel itself. This is only explicable insofar as the Channel did not comprise any territory at all which needed to be demarcated, that is to say, in as much as the islands therein were acknowledged as belonging to Chile.

28. **Conduct of the Parties.** The alternative interpretation put forward by the Government of Chile may also be supported by the conduct of the Parties during the negotiation of the Treaty and after its conclusion. The following facts are relevant in this regard.

29. In reporting to his Government the proposal of Argentine Minister Irigoyen in 1876 - from which Article III of the Treaty is directly derived - the Chilean representative Barros Arana explained this proposal as follows:

"The islands would be divided in the following manner: Staten Island, the neighbouring islets and other islands in the Atlantic Ocean would be Argentinian.

The other islands located south of the Beagle Channel down to Cape Horn would be Chilean. Thus all other islands to the south of the Strait would be Chilean." (Annex No. 21)

(Underlining added)

The spirit of the Argentine proposal and, consequently, Article III of the Treaty also tend to recognise the islands inside the Channel as Chilean.

30. It might also be possible to draw a similar conclusion from the interpretation given officially a short time after the signature of the treaty by the Foreign Ministers of the two states.

As above recalled, in his report to the National Congress of Chile on 17 September 1881, the Chilean Foreign Minister explained that all the territories to the south of the Strait of Magellan belonged by the Treaty to Chile with the sole exception of the eastern section of Tierra del Fuego and Staten Island.

As to the Argentine Minister Irigoyen, he explained, in his speech to the Argentine Congress in August and September 1881 that south of the Straits of Magellan the Treaty accorded to Argentina, only part of Tierra del Fuego and Staten Island. (Annex No. 42) Since the Minister was intending to stress before the members of Congress the advantages which the Treaty gave to his country (in particular in the island of Tierra del Fuego "where our rights are questionable"), it could be maintained that if the Treaty had awarded to Argentina any island inside the Channel, he would not have omitted to mention the fact.

31. It is possible also to make mention of certain documents with an Argentine origin which are not entirely without interest.

The first is the report sent to his Government by the Argentine Governor of Tierra del Fuego in April 1885 on the subject of the territorial divisions in that southern region of Argentina. In this very precise and detailed study the only island mentioned is Staten Island: no island inside the Channel is included in the districts which are considered, any more than are Picton, Lennox or Nueva. (Annex No. 49).

The second is the Argentine Decree of 27 June 1885 organising the Gobernacion of Tierra del Fuego. This decree gives as the southern boundary of this administrative division the Beagle Channel; no island inside the Channel is mentioned, any more than is the case with Picton, Nueva and Lennox.

32. Lastly, there may be mentioned in support of the alternative interpretation of the Chilean Government, maps which draw the frontier along the north shore of the Channel.

Among these maps the following are of particular interest:

- map on which the British Admiralty transcribed in 1881, upon the basis of information given by the Argentine representative in London, the frontiers resulting from the Treaty (Plate 20)
- map of the Archipelago of Tierra del Fuego by B. Bossi, 1882 (Plate 24).

33. **Conclusion** The preceding observations enable one to draw the conclusion that the interpretation, that the Treaty of 1881 recognised the sovereignty of Chile over all the islands in the Channel, rests on substantial grounds. The Chilean Government advanced this interpretation in the note which it addressed on 11 December 1967 to the Argentine Ambassador in Santiago and which it has, in Article 1 (2) of the Compromiso of 22 July 1971, asked the Arbitrator to confirm. In the opinion of the Chilean Government, it should be repeated; with reference to the islands in the Beagle Channel, the intention of the Parties was to attribute to each of the coastal states the islands appurtenant to its respective shores: this intention is demonstrated unequivocally particularly by the maps and other documents pertaining to the negotiation as well as by the subsequent conduct of the Parties, and most of all by the acts of sovereignty performed by each of them on the islands appurtenant to its own coast without calling forth reservations on the part of the other Government. Should the Court find that it cannot accept that interpretation, then the only possible interpretation is one which leaves to Chile all the islands within the Channel.

FROM THE 1881 TREATY TO THE 1902 ARBITRATION

1. The Boundary Treaty of 1881, as has been shown in the previous Chapter, was intended to effect a comprehensive and final settlement of the rival claims of the two countries from Patagonia to Cape Horn. Furthermore, the travaux préparatoires of the Treaty, the terms of the Treaty itself, the explanations given by responsible authorities in Chile and Argentina directly after its adoption and cartographical evidence of the most relevant and precise character combine to establish with absolute certainty the agreement of the two Governments, expressed in the Treaty, to allocate Picton, Nueva and Lennox islands to Chile. Consequently, it would require the clearest proof of the subsequent agreement of Chile and Argentina to annul or to revise the settlement effected by the Treaty in order to set aside or modify the allocation of those three islands to Chile in 1881. As the present Chapter will show, there was no such subsequent agreement either in the 1893 Protocol or otherwise.

2. **Argentine maps 1881 - 1893.** In Chapter IV mention has already been made of a number of maps used in 1881, immediately upon the conclusion of the Boundary Treaty, to depict the distribution of territory effected by the Treaty and showing Picton, Nueva and Lennox islands as unmistakably designated as Chilean. Between 1881 and the conclusion of the 1893 Protocol to the Treaty, nearly forty further maps were issued in Chile, Argentina and various other countries showing Picton, Nueva and Lennox as Chilean islands. This cartographic evidence is examined more fully in other parts of this Memorial and in "Some Remarks concerning the Cartographical Evidence" submitted with this Memorial. It suffices here to note that amongst the maps issued in Argentina during this period were some having an official character. Thus, a map of 1882, which marked the three islands as Chilean, was published by order of the Argentine Government and under the direction of F. Latzina, Director of the Office of National Statistics (Plate 25). Moreover, it was included in an official publication "La Republica Argentina como destino de la Emigracion Europea", which was widely distributed in European countries in the Spanish, English, French, German and Italian languages. Another map of 1885, (Plate 34), which also marked Picton, Nueva and Lennox as Chilean, was included in the Atlas of the Argentine Republic published by resolution of the Argentine Government. This map was prepared under the auspices of a high-powered Special Commission set up by the Argentine Government, and the Atlas itself expressly states that its makers had in front of them "the Treaty of July 23rd, 1881". Again, in 1888 the Information Office of the Argentine Republic in London, set up to supply information concerning Argentina to anyone asking for it, published a map (Plate 38) showing the boundary line drawn along the Beagle Channel to the north of Picton and Nueva islands. The map was included in an Official Booklet on the title page of which was written "Argentine Government Information Office". It is significant to note that this last mentioned map was a corrected version of a map issued by the Information Office the previous year, on which the boundary was shewn as prolonged due south from Tierra del Fuego.

3. Although not having an official character, another Argentine map merits mention by reason of its having been based on information supplied by eminent experts Francisco P. Moreno and Manuel Olascoaga, as well as on "the most modern official data". As mentioned above (Chapter VI. Para 21) Moreno was a noted explorer of the Andean regions who became the expert of the Argentine Republic in the Boundary Question with Chile; the latter was an Argentine soldier and explorer who became Head of the Military Typographic Office, afterwards known as the Instituto Geografico Militar. The map in question, the General Map of the Argentine Republic and Bordering Countries, was a revised version made in 1886 (Plate 35) of a map drawn about 1880 and showed the boundary line drawn along the Beagle Channel to the north of Picton and Nueva islands and

entering the ocean between Cape San Pio and Nueva. In 1886, therefore, official sources, and these two eminent Argentine experts appear to have shared the general understanding of Article III of the 1881 Treaty: namely, that it assigned to Chile not only Navarino Island but also Picton, Nueva and Lennox as islands "to the south of the Beagle Channel". The Court's attention is drawn particularly to the fact that one of these experts was F.P. Moreno, because more will be heard later of his opinion regarding the boundary in the Beagle Channel region.

4. **Limited Argentine activity 1881-1893.** During the period immediately following the Treaty there were several Argentine expeditions to the area, one was an Argentine naval expedition under Lasserre in 1884 to Tierra del Fuego and Staten Island (los Estados), following which the Report of the Argentine Ministry for the Navy referred to the pressing need for erecting a lighthouse on Staten Island (los Estados), "the meridional extreme of our sea dominions." (Revista de la Sociedad Geografica Argentina Vol. I Buenos Aires 1884). Also in 1884, the Argentine Midshipman Noguera, who had been a member of the Argentine Government expedition to Tierra del Fuego and the Southern seas under Giacomo Bove, and who had been ordered to survey "the channels and islands south of the Beagle", gave a lecture on his travels. He mentioned Picton Island, Lennox Island and Navarino Island, and clearly regarded them as being south of the Beagle Channel. (Boletin del Instituto Geografico Argentino Vol. V Buenos Aires 1884). Shortly afterwards the Argentine Government decided to appoint a Governor for the Argentine territory of Tierra del Fuego, and the person appointed was Sr. Felix Paz. He went on an expedition to the area, by sea at the beginning of 1885, and visited, among other places, Banner Cove on Picton Island. In his subsequent report to the Argentine Government he referred to a night spent "in Banner Cove, a Chilean port." (Annex No. 49). One of the members of the same expedition, Captain Mouglier (who was highly recommended by Sr. Paz) afterwards wrote "we came to spend the night of the 27th" (February 1885) "in the Port of Banner, located on Picton, a Chilean island. Banner Cove is the first good port which there is on entering Beagle Channel from the East" (Revista de la Sociedad Geografica Argentina Vol. III Buenos Aires 1885). It is clear that for Captain Mouglier, not only did Picton Island unquestionably belong to Chile, but also the Beagle Channel extended east of Banner Cove. The evidence of these expeditions all strongly supports the main submissions of the Government of Chile in the present case. Apart from these expeditions, and the cartographic activity already mentioned, the main events between the Boundary Treaty of 1881 and the conclusion of the 1893 Protocol were Argentina's establishment of a navy "sub prefectura" at Ushuaia in Tierra del Fuego in 1884 and the initiation of measures for the demarcation of the boundary lines laid down in the 1881 Treaty. The establishment at Ushuaia on the north shore of the Beagle Channel may have stimulated acquisitive ideas with regard to Picton and Nueva in some Argentine circles. But it was strictly in accordance with the terms of the 1881 Treaty and gave rise to no misgivings on the part of Chile. As to the measures initiated for the demarcation of the lines laid down in the Treaty, these were the immediate cause of the conclusion of the 1893 Protocol and require detailed examination.

5. **Demarcation under 1881 Treaty.** Article I of the 1881 Treaty, which defined the boundary along the Cordillera of the Andes from the north southwards as far as latitude 52°S., provided for the creation of a Commission to demarcate that section of the boundary. This Commission was to consist of one Expert appointed by each country and, if these two Experts should fail to agree, the two Governments were mutually to agree upon a third Expert to decide the matters in question. Article IV of the Treaty then provided that the same Commission of Experts should also "mark out on the ground the lines indicated" in Articles II and III. In other words, they were also to be responsible for demarcating the east-west line to be drawn to the north of the Straits of Magellan from Point Dungeness to the divortia aquarum of the Andes (Article II) and the land boundary in Tierra del Fuego to be drawn southwards from Cape Espiritu Santo to the Beagle Channel (Article III).

6. In the event, it was not until 1888 that steps were taken to establish the Commission of Experts. In that year the two Governments concluded a "Delimitation Convention", by which each Party was to appoint its Expert within two months of the ratification of the new Convention, which took place in January 1890 (Annex No. 50). Provision was also made in the Convention for the nomination by each Government of five Assistants for their Experts. The task given to the Experts was specifically stated to be to "carry out on the ground the demarcation of the lines indicated in Articles I, II and III of the Boundary Treaty". At the same time, the Experts were empowered to "entrust the execution of the works to Commissions of Assistants", subject to the condition that the Commissions must proceed "according to the instructions given by the Experts by joint accord and in writing". Again, as provided in the 1881 Treaty, the Experts were to communicate immediately to their Governments their failure to agree upon any point in order that the latter might proceed to appoint the third Expert to settle it. The 1888 Convention was thus nothing more than it purported to be: a subordinate agreement for marking out on the ground certain specified boundary lines already in principle laid down by the Treaty of 1881.

7. The Chilean Government appointed Sr. Barros Arana himself as its Expert and the Argentine Government Sr. Octavio Pico. The two Experts began their meetings in Chile on 20 April 1890 and had little difficulty in agreeing that in principle the demarcation should start in the north at the San Francisco Pass and proceed southwards (Annex No. 52). Sr. Barros Arana, however, proposed that, as the absence of any precise boundary demarcation in Tierra del Fuego was giving rise to difficulties, a second Commission should simultaneously undertake the demarcation of the line in that island in conformity with Article III of the 1881 Treaty. To this proposal the Argentine Expert gave his assent after obtaining the approval of his Government (Annexes No. 52-4). These points having been settled, the Argentine Expert returned to Buenos Aires to make preparations for beginning the work in the following October. During the interval, Sr. Barros Arana wrote to his Argentine colleague inviting him to deal by letter with the question of the written instructions to be given to the respective Commissions in accordance with Article IV of the 1888 Convention (Annex No. 56). The Argentine Expert, however, preferred not to discuss that question in advance of the next meetings to be held in Santiago, and later informed Sr. Barros Arana that owing to internal disturbances in Argentina these meetings would have to be postponed until November 1890.

8. At this juncture - on 25 October 1890 - Sr. Barros Arana drew up a full report on the progress of the demarcation proceedings up to date for submission to the Chilean Minister for Foreign Affairs (Annex No. 58). The Argentine Expert, he said, seemed to envisage the instructions to be given to the Commissions as concerned only with technical matters, such as geodetical procedures. He himself, however, considered that the instructions ought to be of a geographical character providing guidance for solving the difficulties caused by accidents of terrain. "Instructions of this nature", he observed to his Minister, "based strictly on the provisions of the Boundary Treaty of 1881, cannot but be an extension of these provisions, with indications aimed at facilitating their implementation". Sr. Barros Arana then set out for his Minister his observations concerning the rules that should be included in the written instructions to be given to the Commissions; and these observations he divided into three parts corresponding to the three sections where the demarcation was to be carried out.

9. In Part I, covering the northern section of the line, Sr. Barros Arana considered that the very terms of Article I of the 1881 Treaty should be sufficient to solve any difficulties. He noted two forms of accident of terrain that might present problems, but did not think that they would constitute serious difficulties. In this he was over optimistic, as later events showed. In Part II covering the Magellan section of the line from Point Dungeness to the divortia aquarum of the Andes he stressed that the line of the divortia aquarum would have to be so drawn as to leave

on the Chilean side all the hydrographic systems stretching to the west and on the Argentine side all the hydrographic system stretching to the east. At the same time he drew his Minister's attention to recent publications in Argentina asserting that "because the main ridge of the mountain chain runs towards the sea, breaking up there to form islands, the secondary ridge forming the divortium aquarum mentioned in the Treaty and separating the hydrographic regions stretching towards the Pacific to the west and to the Atlantic to the east must not be taken into account". He pointed out that, according to this theory, the dividing line coinciding with latitude 52°S. would be extended through the channels as far as these islands with the result that Argentina would have ports in the Pacific and Chile lose the continuity of her continental territory. He added that, if the Argentine Government were to put forward these "indefensible pretensions" in any form, which he did not believe that they would, he would necessarily have to suspend all operations forthwith.

10. The Court of Arbitration is asked particularly to observe that Sr. Barros Arana's mention of the possibility of indefensible Argentine pretensions to ports in the Pacific related exclusively to the area north of the Straits of Magellan in the vicinity of latitude 52° S. As will appear in the next two paragraphs, the points which he discussed in Part III covering Tierra del Fuego and the Southern Archipelagos had nothing whatever to do with any question of Argentine ports in the Pacific.

11. In Part III, while characterising Article III of the 1881 Treaty as laying down a "clear and precise demarcation", Sr. Barros Arana said that it gave rise to two doubts of minor importance. The first concerned the starting point of the boundary line in the north of Tierra del Fuego and resulted from the fact that the negotiators of the 1881 Treaty had taken the geographical position of Cape Espiritu Santo from the Chart of Captains Parker King and Fitzroy as completed in 1867 by Captain Mayne. Despite the general excellence of that Chart, the longitude given on it for Cape Espiritu Santo had been found not to be the true one. Sr. Barros Arana added that having participated in the preparation of the Treaty, he knew for certain that the intention had been to fix the boundary line along the longitude of Cape Espiritu Santo. He suggested that the Engineers entrusted with the demarcation should begin by verifying this point, and that an interpretation should then be obtained from the two Governments as the experts did not seem to have sufficient powers to solve such a problem.

12. The second point of doubt, Sr. Barros Arana said, was "due to the existence of several small islands in the area where the Beagle Channel separates Tierra del Fuego from the islands due South". "The Treaty", he continued, "does not solve anything on this subject, and I think that this doubt should be resolved in accordance with the general principles of international law. According to these principles, the boundary line should pass through the centre of the Channel and the small islands close to the Argentine coast should belong to the Argentine Republic and the small islands adjacent to the Chilean coasts should belong to Chile." Sr. Barros Arana, as the Court will recall, had communicated to the Chilean Government in 1876 a map on which was drawn a line along the Beagle Channel depicting the boundary according to Sr. Bernardo de Irigoyen's proposals (see Chapter III, paragraphs 27-8). This line ran eastwards along the Channel which has as its north shore the coast of Tierra del Fuego and its south shore the coasts of Hoste, Navarino, Picton and Nueva islands. Consequently, there can be no doubt that the "small islands" to which Sr. Barros Arana referred in his report in 1890 were simply those islands, like the Whaits, the Eclaireurs and Becasses, which lie in the Channel between, on the one side, Tierra del Fuego and, on the other, Hoste, Navarino, Picton and Nueva. That this is so is clearly shewn by the Map attached to the Report (Plate 49), which contains a boundary line running eastwards through the Channel to the north of Picton, Lennox and Nueva Islands, marked "Boundary line according to the Treaty of 1881".

13. **Immediate Antecedents of 1893 Protocol.** In the event, owing to political disturbances having occurred in Argentina and in Chile, discussion of the demarcation was not resumed until the latter part of 1891, when differences between the Experts soon appeared. These differences were most acute in regard to the Andean section of the line governed by Article I of the 1881 Treaty, as a long Note of 18 January 1892 from Sr. Barros Arana to the Argentine Expert makes clear (Annex No. 59). In regard to this section, the Chilean Expert expressed his opposition to any interpretation of the principle of the divortium aquarum of the Andes which might admit the pretensions of certain Argentine authors under which Argentina would have ports on the Pacific and the continuity of Chilean territory be broken; and on this point he sought the agreement of his Argentine colleague to a declaration excluding any such Argentine ports on the Pacific. The Experts ultimately concluded that they could give only general instructions to the Commissions, and this they did in a brief agreed Minute of 24 February 1892 (Annex No. 60). In accordance with these instructions, a Sub-Commission consisting of Sr. Vicente Merino Jarpa of Chile and Sr. Valentin Virasoro of Argentina proceeded to Tierra del Fuego in April 1892. Being unable, however, to reach agreement on the true position of Cape Espiritu Santo, they had to content themselves with drawing up a Minute recording their disagreement on this cardinal point and giving a brief summary of their respective arguments (Annex No. 61). For present purposes it suffices for the Court to note that the difference of opinion concerning the true position of Cape Espiritu Santo was the sole point of disagreement recorded by the Sub-Commission for the area south of the Straits of Magellan.

14. The Experts met again early in 1893 and on 10 March of that year drew up an Act of Agreement which they submitted to the two Governments (Annex no. 63). This Act of Agreement contained nine dispositions, clause (a) of which provided for the demarcation to begin simultaneously the next spring in the Cordillera of the Andes and in Tierra del Fuego. Clauses (b) to (g) then covered the demarcation of the boundary in the Cordillera of the Andes and one of these - clause (c) - dealt with the point which had been raised by Sr. Barros Arana about the "indefensible pretensions" of certain Argentine authors in regard to Argentine ports in the Pacific coasts. In explicitly negating those pretensions the Experts formulated their agreement on the matter as follows:

"(c) The Experts declare that in their judgment, and according to the spirit of the Boundary Treaty, the Argentine Republic retains her dominion and sovereignty over all the territory extending to the east of the main range of the Andes as far as the Atlantic Coasts, and Chile the territory to the west as far as the Pacific coasts; it being understood that, by the provisions of this covenant, the sovereignty of each State over the respective littoral is absolute, so that Chile cannot claim any point towards the Atlantic, nor can the Argentine Republic claim any point on the Pacific coasts. If, in the Peninsular district in the south nearing the fifty-second parallel, the Cordillera should be found to penetrate between the inlets of the Pacific which exist there, the boundary line shall be traced along the inland summits or heights which shall leave to Chile the coasts of these inlets."

Clause (c), as already indicated, was the second of six clauses dealing with the demarcation of the boundary in the Cordillera of the Andes. This in itself signifies that the understanding of the Experts expressed in this Clause regarding Chilean "points towards" the Atlantic and Argentine "points on the Pacific coasts" related only to the Andean section of the boundary. But the language of clause (c) in any event removes any conceivable doubt on the subject. Its first sentence unambiguously related the declaration of the Experts to the territory extending to the east or to the west of "the main range of the Andes"; and it is specifically in that connection that clause (c) recorded their understanding regarding Chilean points towards the Atlantic and Argentine points on the Pacific coasts. Then the second sentence, by speaking of "the Peninsular district in the south nearing the fifty-second parallel", underlines that the previous sentence, recording that understanding related to the boundary in the Cordillera of the Andes from the fifty-second parallel of latitude northwards. Latitude 52° S., it may be recalled, is where the Andean Section of the boundary, covered by Article I of the 1881 Treaty, meets the section of the boundary

running from Point Dungeness to the divortia aquarum of the Andes and covered by Article II of the Treaty. It is therefore crystal clear that the agreed understanding of the Experts regarding Chilean points towards the Atlantic and Argentine points on the Pacific coasts related specifically to the regions to the north of the Straits of Magellan.

15. The Experts dealt with the demarcation of Tierra del Fuego quite briefly in clause (h), their only concern being to remove the difficulty regarding the true position of Cape Espiritu Santo. This difficulty they agreed in clause (h) should be resolved as follows:

"The demarcation of Tierra del Fuego shall begin simultaneously with that of the Cordillera of which mention has previously been made, and shall start from the point called Cape Espiritu Santo. There being in sight from the sea at that point three heights or hillocks of moderate elevation, the middle, or intermediary one, which is the highest, shall be taken as a starting point, and on its summit shall be placed the first landmark of the boundary line which shall continue southward along the meridian."

That was all that the Experts found it necessary to say about the demarcation of the boundary in the Tierra del Fuego area. It is therefore clear that there was never any question in the mind of the Experts of their agreed understanding regarding Chilean points towards the Atlantic having any relation to the Straits of Magellan or south of them. It is, indeed, also manifest that in their Act of Agreement of 10 March 1893 the Experts did not touch upon any question which may be relevant to the distribution of the territories south of Tierra del Fuego.

16. **1893 Protocol.** Apprised of the difficulties encountered by the Experts and of the understandings reached by them in the Act of Agreement, the two Governments decided to incorporate these understandings in a Protocol. Accordingly, on 1 May 1893 Don Isidoro Errazuriz as Plenipotentiary ad hoc for Chile and Don Norberto Quirno Costa as Plenipotentiary for Argentina met in Santiago and signed the Protocol the full text of which is set out in Annex No. 62. This Protocol, it is clear, was not intended to amend or revise the 1881 Treaty. On the contrary, as its Preamble indicates, it was designed merely to facilitate the application of that Treaty by the Experts appointed "to carry out the boundary demarcation between Chile and the Argentine Republic in conformity with the Boundary Treaty of 1881." Indeed, Article X expressly states that the preceding stipulations of the Protocol are not to "impair in the very least the spirit of the Boundary Treaty of 1881". Furthermore, the provisions of the Protocol are to a very large extent simply a repetition of the nine clauses of the Act of Agreement drawn up by the Experts some seven weeks earlier; and it was certainly no part of the function or purpose of the Experts to amend or revise the 1881 Treaty. In order to facilitate the comparison of the contents of the Act of Agreement with those of the Protocol, the clauses of the former are reproduced in the left-hand column in Annex No. 63 and the corresponding provisions of the Protocol are then placed opposite to them in the right-hand column. Apart from some rearrangement of the order of the clauses and some changes of language necessary to convert the agreed understandings of the Experts into the provisions of a treaty, the first nine dispositions of the two instruments differ in only minor respects. Article I of the Protocol, like clause (b) of the Act of Agreement, recites the divortium aquarum principle laid down in the 1881 Treaty for the Cordillera of the Andes; but it then has an additional paragraph spelling out in detail the implications of this principle in terms of the distribution of lakes, lagoons, rivers and parts of rivers, brooks and springs. Article II of the Protocol, like clause (c) of the Act of Agreement, deals with "the Peninsular district in the south nearing the fifty-second parallel" and provides for a line leaving the coasts of the Pacific inlets to Chile. But it differs from clause (c) in calling for a survey of the ground and the determination of the line by the two Governments in the light of that survey. Again, Article VIII of the Protocol, which otherwise corresponds almost exactly with clause (g) of the Act of Agreement, has an additional provision expressing the agreement of the two Governments to a review of the demarcation of the northern starting point of the frontier in the Cordillera of the Andes.

17. The points of difference between the Act of Agreement of the Experts and the 1893 Protocol have no bearing on the matters now in dispute. Their only significance for the Court is in confirming the Protocol's character as essentially a mere endorsement of the understandings of the Experts and as a purely supplementary instrument for executing the 1881 Treaty. Nor is this impression of the character of the 1893 Protocol in any way changed by its two final provisions which have no counterpart in the Act of Agreement. Article X, to which reference has already been made in the previous paragraph, reads:

"The preceding stipulations do not impair in the very least the spirit of the Boundary Treaty of 1881, and it is therefore declared that there subsist in their full strength the conciliatory means for settling any difficulty which Articles I and VI of that Treaty prescribe."

The express purpose of this Article, according to its clear terms, was to underline that nothing in the Protocol was to be understood as derogating "in the very least" from the agreements embodied in the Boundary Treaty of 1881. Article XI of the Protocol then added:

"The undersigned Ministers understand, and hereby declare, that on account of the nature of the preceding stipulations, and in order to invest the solutions arrived at with a permanent character, this Protocol must be previously laid before the Congresses of both countries, which will be done in the next ordinary sessions, keeping it in private in the meantime."

This declaration by the Ministers did not imply that the Protocol was regarded by them as containing new and autonomous provisions going beyond those of the 1881 Treaty and for that reason requiring endorsement by their respective Congresses. The reason was simply that the object of the Protocol was to provide solutions for differences encountered in the interpretation and application of a Treaty which had been ratified by the Congresses of the two countries in conformity with their respective constitutions.

18. The 1893 Protocol, as has been explained, was in essence simply the formal endorsement in a treaty of the agreed understandings and proposals of the Experts charged with the demarcation of the 1881 Treaty. Neither any provision of the 1888 Convention setting out the directives of the two Governments to the Experts nor any provision of their Act of Agreement or of the 1893 Protocol itself affords the slightest basis for suggesting that either the Experts in their Act of Agreement or the Governments in the 1893 Protocol in any way concerned themselves with the interpretation, still less the revision, of the allocation by Article III of the 1881 Treaty of "all the islands to the south of Beagle Channel up to Cape Horn" to Chile. On the contrary, the sole point raised in any of those instruments in connection with Article III of the Treaty, and the sole point raised in connection with any part of the area to the south of the Straits of Magellan, was the precise position of the starting point of the boundary in Tierra del Fuego designated as Cape Espiritu Santo in Article III. On this matter the directive in Article 4 of the 1893 Protocol reproduced almost word for word the directive proposed by the Experts in clause (h) of their Act of Agreement. Thus, Article IV of the Protocol simply stated:

"The demarcation of Tierra del Fuego shall begin simultaneously with that of the Cordillera and shall start from the point called Cape Espiritu Santo. There being in sight from the sea at that point three hillocks of moderate height, the middle one, which is the highest, shall be taken as the starting point, and on its summit shall be placed the first land-mark of the boundary line which shall continue southward along the meridian."

Not a trace is to be found here of any question concerning points towards the Atlantic; not a trace is to be found of any problem concerning the identity of the Beagle Channel mentioned in the 1881 Treaty or of the islands specified in the Treaty as "to the south of the Beagle Channel".

19. Finally, if the 1893 Protocol is read as a whole, its very structure unequivocally indicates that the declaration of the two Governments in Article II regarding Chilean points towards the Atlantic and Argentine claims in the Pacific related exclusively to the boundary in the Cordillera of the Andes from latitude 52° S. northwards. The first three Articles of the Protocol, as their language makes abundantly clear, deal with the problem of the boundary in the Cordillera from its starting point in the north to latitude 52° S.; and, more particularly, with the difficulties in applying the divortium aquarum principle in that section of the boundary. Article I of the Protocol is quite express upon the point:

"It being provided by Article I of the Treaty of 23 July 1881 that 'the boundary between Chile and the Argentine Republic is from north to south as far as the 52nd parallel of latitude, the Cordillera de los Andes' " etc.

Moreover, in the remainder of the Article there are three further references to the Cordillera de los Andes, Article III of the Protocol is no less clear upon the point, since it opens with the words:

"In the case foreseen in the second part of Article I of the Treaty of 1881, of difficulties that might arise 'owing to the existence of certain valleys formed by the bifurcation of the Cordillera, and where the water-divide should not be clear' " etc.

As Article I of the 1881 Treaty is by its terms specifically concerned with the boundary "from north to south as far as the 52nd parallel of latitude", Article III of the Protocol is likewise specifically concerned with the problems resulting from bifurcation of the Cordillera in that section of the boundary. Between those two Articles of the Protocol dealing with the boundary in the Cordillera north of latitude 52° S. is Article II, the Article containing the declaration regarding Chilean points towards the Atlantic and Argentine claims in the Pacific. The terms of this Article are for present purposes virtually identical with those of clause (c) of the Act of Agreement of the Experts which has already been analysed in paragraph 14 of the present Chapter. As in the case of clause (c) of the Act of Agreement, Article II of the Protocol, by its express reference in the first sentence to the territory extending to the east or to the west of "the main range of the Andes" and by its express reference in the second sentence to "the Peninsular district in the south nearing the fifty-second parallel", unambiguously linked the declaration which it contains to the boundary line in the Cordilleras northwards of latitude 52° S. There is not a word in Article II to connect that declaration to the region south of the Straits of Magellan; nor is there any word in Article IV, which deals completely independently with the demarcation of Tierra del Fuego, to connect Tierra del Fuego or any of the other islands to the south of it with the declaration.

20. In the submission of the Chilean Government, therefore, it would be wholly inadmissible to interpret the declaration in Article II of the Protocol regarding Chilean points towards the Atlantic and Argentine points towards the Pacific as relating to the islands south of the Straits of Magellan. Such an interpretation of Article II violates the most fundamental rule of treaty interpretation, namely, that the terms of a treaty are to be interpreted in good faith in accordance with the ordinary meaning to be given to them in their context and in the light of the object and purpose of the treaty. Only by disregarding the words in Article II which restrict its provisions to the boundary in the Andes north of latitude 52° S., only by applying the declaration in Article II outside its context in the Protocol, only by disregarding the object and purpose of the Protocol as a mere supplementary instrument for the execution of the Boundary Treaty of 1881, would it be possible to give some support to this interpretation. The provision in the Agreement of the Experts which corresponded with Article II of the Protocol was summarised by Don Norberto Quirno Costa, Argentina's negotiator and a signatory of the Protocol, as "nothing for the Argentine Republic on the coasts of the Pacific and nothing for Chile in Patagonia or to the east

of the main range of the Andes'' (Underlining added) (Report of Argentine Expert Virasoro to the Argentine Foreign Minister quoted by Montes de Oca in his ''El Divortium Aquarum Continental ante el Tratado de 1893'', Buenos Aires 1899).

21. **Practice subsequent to 1893 Protocol.** There is nothing in the subsequent practice of the Parties in applying the 1893 Protocol which could possibly provide a basis for a strained interpretation of Article II. After the conclusion of the Protocol the two Governments agreed that the Experts should instruct the Sub-Commissions to proceed with the demarcation in the following January (Annex No. 64). Accordingly, on 1 January 1894 the Experts issued instructions to the Sub-Commissions giving effect to the agreements embodied in the Protocol (Annex No. 65). So far as concerns Tierra del Fuego, these instructions reproduced the agreement in Article IV of the Protocol concerning the starting point of the boundary at Cape Espiritu Santo but otherwise dealt with purely technical aspects of the work of demarcation. No reference was made by the Experts to any question regarding islands in the Atlantic or islands to the south of the Beagle Channel. In short, the Experts specifically charged with the task of applying on the ground the provisions of the 1881 Treaty and the 1893 Protocol showed themselves to be entirely unconscious of any possible relation between the declaration in Article II of the Protocol and the provisions of the 1881 Treaty regarding the other southern islands.

22. During the years 1894-5 the Sub-Commission appointed for the purpose duly carried out the demarcation of the boundary in Tierra del Fuego, placing the first boundary post at Cape Espiritu Santo and then twenty-four further posts southwards along the meridian of the first. The last boundary post, No. 25, they placed on the summit of the range which runs along the north bank of the Beagle Channel. Finally, having received the plans, minutes and reports of the Sub-Commission, the Experts met together in Santiago on 9 October 1895 and drew up a formal Minute of Approval of the Work of Demarcation of Tierra del Fuego (Annex No. 66). In their concluding paragraph the Experts expressly stated that ''the operation of demarcation and marking of Tierra del Fuego was terminated''. The reference in the Minute to reports and plans was to those by the Assistants on each side, and as far as is known there were no joint or agreed reports or plans. The report by the Chilean Assistant, Lindor Perez (Annex No. 65A) was dated 29 May 1895 and referred to a plan which showed a line along the meridian in Tierra del Fuego, and for a short distance in the Channel. The report of the Argentine Assistant, Juan Martin, is not known to the Chilean Government, but it is known that he reported to his Government that he believed that ''the two islands, Picton and Nueva, belong to Chile both by treaty and by nature''.¹ Furthermore, with the signing of this Minute the Experts treated their task in the region to the south of the Straits of Magellan as completed. Nor was any suggestion ever made by either of them that it might be necessary to consider the implications of the declaration in Article II of the Protocol with respect to the islands to the south of Tierra del Fuego. Since the whole purpose of the 1893 Protocol was to resolve the difficulties encountered by the Experts in the application of the 1881 Treaty, the necessary conclusion is that in the view of the Experts Article II of the Protocol had nothing whatever to do with the islands to the south of Tierra del Fuego. This conclusion is supported by a map prepared by the Chilean Demarcation Sub-Commission for Tierra del Fuego (Plate 75) on which a boundary line appears running eastwards to the north of Picton and Nueva Islands. After the demarcation work of the Vth Sub-Commission was completed a Report on its work was published by the Chilean Boundaries Office which included a Map (Plate 99) showing the boundary posts and line in Tierra del Fuego, the line continuing through the Beagle Channel and out into the ocean to the north of Picton and Nueva Islands. (''Demarcacion de la linea de frontera en la parte sur del territorio'', Santiago, 1906).

¹ Memorandum by Dr. Moreno (Annex No. 113). In addition the same statement of Juan Martin, in his capacity as Head of the Argentine Demarcation Commission, was quoted in a note by the Foreign Minister of Argentina, Dr. Montes de Oca (Paul Groussac, *La Nacion*, Buenos Aires, 21 January 1915).

23. Notwithstanding the agreements reached in Articles I, II and III of the 1893 Protocol, the Experts and their Sub-Commissions continued to encounter difficulties in the demarcation of the boundary in the Cordillera of the Andes. In consequence, on 17 April 1896 the two Governments concluded an Arbitration Agreement under which they undertook to submit to the Arbitration of Her Britannic Majesty's Government any differences between the Experts which it might not be possible to remove by friendly arrangement between the Governments (Annex No. 67). For present purposes it suffices for the Court to note that the only disagreements mentioned in the Arbitration Agreement are disagreements relating to the line of the boundary north of the Straits of Magellan.

24. By September 1898 it was apparent that the disagreements regarding the boundary in the Cordillera of the Andes were not capable of resolution by "friendly arrangement between the Governments". Accordingly, the Chilean Minister of Foreign Affairs and the Argentine Minister in Santiago drew up a series of agreed Minutes as a preliminary to the submission of the disagreements to the arbitration of the British Government (Annex No. 68). The first of these Minutes, dated 15 September 1898, specified three "points", or rather areas, of disagreement:

"(a) That relating to the boundary in the region comprised between parallel 23° and 26° 52' 45" south latitude.

(b) That relating to the boundary from the parallel 26° 52' 45" to the proximity of parallel 52°.

(c) That relating to the boundary in the region neighbouring parallel 52°, to which the last clause of Article 2 of the Protocol of 1893 refers."

As to point (a), where the interests of Bolivia were also involved, the two Ministers in a second Minute, dated 17 September 1898, simply recorded that it had not been possible to arrive at any mutual conclusion and that it had been resolved to suspend the consideration of the matter. Point (b), which concerned the section of the boundary in the Andes covered by Article 1 of the 1881 Treaty, they dealt with in a third Minute dated 22 September 1898. In this Minute they set out *seriatim* the various points of agreement and of disagreement in each segment of the Andes chain and recorded their agreement to transmit the differences to Her Britannic Majesty for decision. Finally, in a fourth Minute, dated 22 September 1898, they recorded both the disagreements of the Experts with respect to point (c), which related to "the region neighbouring parallel 52° south latitude", and the agreement of the two Governments to remit these differences to Her Britannic Majesty for settlement. Then, on 23 November 1898, each Government addressed a letter to the British Secretary of State for Foreign Affairs, formally submitting the differences between them with respect to points (b) and (c) to the decision of Her Britannic Majesty in accordance with the Arbitration Agreement of 1896.

25. The Court will have observed that the sections of the boundary to which the differences comprised in points (b) and (c) relate were precisely the sections in the Cordillera of the Andes that were covered by Article I, II and III of the 1893 Protocol. The demarcation of the boundary in Tierra del Fuego had been successfully completed in accordance with Article IV of the Protocol; and the demarcation of the east-west boundary from Point Dungeness to the divortium aquarum of the Andes had been carried out by the Experts without giving rise to any insoluble differences between them. The differences which still subsisted between the Experts and between the Governments concerned the application of the principle of the divortium aquarum in the Andes chain from the San Francisco Pass southwards to latitude 52° S. and were the differences the solution of which Articles I, II and III of the 1893 Protocol had been designed to facilitate. No difference, nor even any possibility of difference, was ever suggested in 1898 either by the Experts or by the Ministers with regard to the application of the 1881 Treaty or the 1893 Protocol

to the south of the Straits of Magellan; nor was any mention made either by the Experts or by Ministers of any connection between Article II of the 1893 Protocol and islands to the south of those Straits. The only difficulties in the execution of the Boundary Treaty of 1881 mentioned by the Experts and the Ministers as still subsisting in 1898 were the differences relating to the boundary in the Cordillera of the Andes between the San Francisco Pass in the north and latitude 52° S., the section of the boundary delimited by Articles I and II of the 1881 Treaty and referred to in Articles I, II and III of the 1893 Protocol. This very fact, in the view of the Chilean Government, strongly confirms the essential unity of the provisions of Articles I, II and III of the Protocol and the relevance of the declaration in Article II only to the boundary in the Cordillera of the Andes.

26. **The 1902 Arbitration.** The letters addressed by each Government to the British Foreign Secretary on 23 November 1898 set in motion the major boundary arbitration which culminated in the award of His Majesty King Edward VII of 20 November 1902. Since the competence of the Arbitrator was limited to the region from the San Francisco Pass to latitude 52° S., neither the Award nor the Report of the Tribunal¹ has any application with respect to the Beagle Channel region with which the present arbitration is concerned. Nevertheless, statements made by the Parties in that earlier arbitration throw light on some aspects of the present case, and reference will therefore now be made to certain points in those proceedings.

27. In the first place, the proceedings in the 1898-1902 arbitration contain ample evidence to confirm the point made in Chapter IV of the present Memorial that the settlement embodied in the 1881 Treaty was essentially a compromise between the rival claims of Chile and Argentina in South America from Patagonia to Cape Horn; for both Parties unequivocally took this view of the 1881 Treaty in the proceedings. Chile, for example, on Page VII of the Introduction to her written Statement presented to the Tribunal in 1901 observed:

"A consideration which must be dealt with in the first place is that the Treaty of 1881 must not be regarded simply as a covenant stipulated to give a frontier line to two neighbouring countries, since, as is acknowledged, it was the result of a compromise. The statesman who negotiated it on the part of the Argentine Republic said, in explaining it before Congress: 'I am now about to give an account of the reasons which may be called the determinants of the negotiation. It has been effected on the ground of compromise.' For these reasons, in order to interpret it in that part which might seem obscure and the application of which has given rise to the divergencies submitted to arbitration, it must be considered principally in its character as a conventional arrangement, involving mutual concessions to which the Treaty owes its existence. Consequently, the antecedents which will be of most use in helping to determine its true meaning will be those expressing the intentions which the Parties had in view when negotiating it." (Emphasis in the original).

Similarly, in his statement read to the Tribunal on 11 May 1899 the Argentine Plenipotentiary, Sr. Don Florencio Dominguez, said:

"The boundary controversy began during the first half of this century by the occupation by Chile of a harbour in the Straits of Magallanes - an occupation that was immediately protested against by the Argentine Government. The Argentine Republic contended that her western boundary from north to south was the Cordillera de los Andes, and that, in consequence, she had the property and dominion of all the territory eastward of the crest of the Cordillera, the greater part of the Strait of Magallanes, and the whole of the Tierra del Fuego. Chile, on her part, contended that

¹ Composed of Lord Macnaghten (President), Major-General Sir John Ardagh and Colonel Sir Thomas Holdich.

the Cordillera in its whole length was not the boundary; that many of the territories eastwards of the crest were Chilean; and claimed the whole of the Strait of Magallanes, the Tierra del Fuego, and Patagonia. The discussion was protracted, and after passing through various stages, the differences were finally settled by the Treaty of 1881. This Treaty, which ended the dispute, was a compromise between the extreme contentions of each country. Chile acknowledged in the said Treaty that the Cordillera de los Andes separates the two countries, and the Argentine Republic, in return, acknowledged on her part, as Chilean territory the coasts of the Strait of Magallanes (which was declared neutral), and the greater part of the Tierra del Fuego and the southern islands.

(Underlining added)

In the 1898-1902 proceedings, therefore, the Argentine Government expressly recognised both the fact that the 1881 Treaty was a compromise and the nature of that compromise in the Treaty: viz., that in return for Chile's recognition of the Cordillera as the boundary in Patagonia, Chile should have the Straits of Magellan and "the greater part of Tierra del Fuego and the southern islands."

28. Secondly, the statements made by both Parties to the 1898-1902 proceedings confirm what has been said in the present Chapter concerning the 1893 Protocol and more especially the restriction of its scope to the Andes boundary northwards of latitude 52° S. In its written Report presented to the Tribunal in December 1899, after advancing the extravagant proposition that the Chilean thesis of the continental divide was without any foundation in the 1881 Treaty, the Argentine Government said (page 258):

"The Argentine Government desired, once for all, to avoid ambiguous interpretations and to determine the true, real and sole meaning of the Covenant [i.e. the 1881 Treaty]. This was the origin of the Protocol of May 1, 1893."

In other words, the Argentine Government underlined that the origin and object of the 1893 Protocol was merely to clarify the interpretation of the 1881 Treaty.

29. The Argentine Government then went on to state the points of difference which gave rise to the need for an interpretative Protocol (pages 2589):

"Moreover, at the time in which this agreement [i.e. the Protocol] was transacted, the continental divide was not the only obstacle that hindered the execution of the Treaty. There were five points in which the opinions of the Experts differed, viz.:-

1. Whether the divide of Tierra del Fuego was to be carried out after previously studying the situation of Cape Espiritu Santo - which was the starting point - or whether, in order to determine it, they were only to follow the indications of geographical maps.
2. Whether the Sub-Commissions were to decide in a definite manner on the placing of the landmarks, or whether their decision was to be merely provisional, they being likewise entrusted with the drawing up of maps, in order that the Experts themselves might with due knowledge make the final determination.
3. Whether the San Francisco landmark was placed in the Cordillera de los Andes as provided by the agreements, or whether it was necessary to remove it after a fresh survey.
4. Whether it was possible, according to the Convention of 1881, that the Argentine Republic should have territory on the shores of the Pacific, or whether Chile was to have exclusive sovereignty over the coast regions of said ocean in the southern part of America.
5. Whether Article 1 of the Treaty of 1881 provided that the boundary line was to follow the continental divide, or whether it established that it should run along the most elevated crests of the main range of the Cordillera that may divide the waters." (Underlining added)

The Court will observe that any question regarding islands on the Atlantic is conspicuously absent from this Argentine list of "points in which the opinions of the Experts differed". Furthermore, even point (4), which does deal with the difference regarding Argentine ports "on the shores of the Pacific", is wholly silent concerning any difference on the Atlantic. As to Tierra del Fuego and the southern islands, the sole point of difference mentioned by Argentina in 1899 was "the situation of Cape Espiritu Santo".

30. The Argentine Government added brief explanations of each point of difference. With regard to point (4), it recalled that Sr. Bernardo de Irigoyen, when defending the 1881 Treaty before the Argentine Congress, had cited an opinion of the Argentine geographer Sr. Moreno for the proposition that the Treaty would admit of Argentina's having "ports in the waters of the Pacific" (pages 260-1). At the same time, it also recalled the strong feelings which this claim had aroused in Chile and the contrary contentions of Sr. Barros Arana (page 261). Commenting on the settlement of this point which had been reached in Article II of the Protocol, the Argentine Government later explained (page 264):

"The fourth question, which so deeply affected the press and opinion in Chile - that which referred to the possibility of the existence of Argentine access to Pacific waters - was arranged by means of the compromise indicated in the second Article, the text of which, in the first part at least, seems to have been somewhat neglected by Chilean writers, notwithstanding its undoubted capital importance for the right interpretation of the Treaty. As regards the Pacific territories, it would perhaps suffice to quote the final part, but it is necessary to read the whole Article if one wishes to find the scope and signification of the Convention of 1893 in all its projections. It may be said in synthesis, that as a result of the compromise mentioned in the Article, the Argentine Republic waived its eventual rights to the access to the Pacific, provided that the idea was abandoned of altering the boundary agreed upon, by removing it from the elevated crests of the Cordillera, and placing it along the sources of the rivers subject to manifold changes....." (Underlining added)

The Argentine Government, as Chile pointed out in her reply was here concerned to argue that by Article II of the Protocol Chile had accepted an undiluted orographical boundary - the elevated crests of the Cordillera - in the Andes, without any element of *divortium aquarum*; and that in doing so it was constrained to advance the inadmissible contention that Article II of the Protocol was the primary Article for the interpretation of Article I of the 1881 Treaty rather than Article I of the Protocol, the express purpose of which had been to settle the interpretation of Article I of the Treaty. The merits or demerits of Argentina's arguments on this question are of no concern to the present Court. What is of concern to the Court is the explanation offered by Argentina in 1899 of Article II of the Protocol. That explanation contained no reference whatever to the exclusion of Chile from ports, or islands, "on the Atlantic" as an objective of Argentina in the negotiation of the 1893 Protocol. On the contrary, Argentina represented the declaration in Article II of the Protocol regarding Argentine ports in the Pacific purely and simply as a concession by her in order to obtain Chile's recognition of "the elevated crests of the Cordillera" as the boundary in the Andes. Indeed, she repeated this explanation of Article II of the Protocol on pages 280 and 281 of her Report to the Tribunal.

31. If any further confirmation were needed of Chile's contention that Article II of the Protocol was exclusively concerned with the boundary in the Andes north of latitude 52° S., this would be supplied by the construction thus put upon Article II by Argentina in 1899. The whole point of Article II, she then maintained, was the settlement of the dispute concerning the line laid down in the 1881 Treaty along the Andes chain on the basis of an interpretation whereby Argentina would cede her claim to ports in the Pacific in exchange for Chile's agreement not to overstep "the barrier of the most elevated crests of the Andes" for purposes of depriving Argentina of Patagonian valleys situated on the eastern side of the Cordillera (see page 280). Indeed, in

another passage the Argentine Government said of Article II of the Protocol (pages 278-279):

"The whole of the Treaty of 1881 is expressed in this Article. It is the 'main chain of the Andes' which must be sought by the Experts to apply to it the letter and spirit of the Treaty of 1881 and of the Protocol itself, settling in a friendly manner the difficulties which might arise concerning matters within that chain. It is that chain which separates the sovereignties and dominions which the same Article defines, and which will continue to separate them. In it alone can differences arise regarding the marking-out of the boundary line; the boundary is in the main chain of the Cordillera, and those differences cannot occur outside it." (Emphasis in the original).

Here Argentina underlined again and again that it was the boundary line in the main chain of the Andes with which Article II of the Protocol was alone concerned. Nor can there be any doubt that Argentina was there speaking only of the region northwards of latitude 52° S.; for in the concluding paragraph of this part of her argument Argentina also has occasion to underline that "the Cordillera de los Andes is the boundary from north to south as far as parallel 52° S."

32. Chile, as already mentioned, did not accept the Argentine thesis that in Article II she had agreed to the "elevated crests of the Andes" undiluted by any element of divortium aquarum as the boundary northwards of latitude 52° S. In her written Statement presented to the Tribunal in 1902 she devoted Chapter XV to the "Negotiation of the Protocol of 1893 and Antecedents for its Interpretation" (pages 446-507). Inter alia, she there pointed out that the sole purpose of the 1893 Protocol, as defined in its Preamble, was to remove the difficulties encountered by the Experts in the demarcation of the 1881 Treaty; that most of the provisions of the Protocol were an almost literal copy of corresponding provisions of the Act of Agreement of the Experts; and that it had not been within the power of the Experts to alter in the slightest degree the principle of demarcation established by the 1881 Treaty. Having referred to the alarm caused in Chile by statements in Argentina apparently indicating pretensions to ports in the Pacific, Chile then said (pages 461-2):

"The origin of the declaration stipulated in the Act of the Experts of May 10 [sic], and which the Protocol of 1893 reproduced in the first part of clause 2, is herein found

The mere fact that this declaration should have been included in a Minute of the deliberations and agreements of the Experts, clearly reveals its object. Owing to the nature of their offices, the Experts were not called upon to make a declaration of this kind; but they held a high public office, they enjoyed the confidence of their respective countries, and on this account, and even owing to the circumstance of their past disagreements, it would have sufficed for them to make such a declaration in order to restore harmony."

In other words, Chile took the position that the origin and object of the declaration in Article II of the Protocol was simply the desire to remove the tensions created in Chile by news of possible Argentine pretensions to ports in the Pacific.

33. The Chilean Statement continued with detailed arguments refuting the Argentine contention that Article II embodied a compromise under which Chile had made a concession with respect to the criterion for determining the boundary in the Andes. It then observed (page 469):

"Now, if there were no compromise, Article 2 of the Protocol, which, according to the Argentine Representative, is the one that stipulates it, loses the exceptional importance which he ascribes to it in the comments of his Statement; it ceases to be the fundamental clause of the Protocol, and is reduced to what it was at its origin in the Act of the Experts of March 10: a declaration made by the Argentine Government with a tranquillising object, loyally admitting that they had never put forward pretensions to ports on the Pacific.

This declaration was made in a reciprocal form in accordance with diplomatic usage, and to avoid ill-feeling in Argentine public opinion." (Underlining added)

After having set out at some length the reasons why Article II of the Protocol could not be understood as involving a concession on the part of Chile with respect to the adoption of a purely orographical criterion of the Andes boundary, Chile concluded the Chapter as follows (pages 506-7):

"We must not omit to observe in closing this chapter that the agreement stipulated in the Experts' Act of March 10, 1893, and afterwards in the Protocol of May 1, made important concessions to the Argentine Republic.

One of them was the correction of an error of the Treaty of 1881, favourable to Chile in the determination by a given meridian, of the starting point of the demarcation in Tierra del Fuego, fixing this, in conformity with the spirit expressed by clause 4 of the Protocol which adjudges to the Argentine Republic a larger portion of territory.

The other was the assent to her request to make fresh surveys of the locality where the San Francisco land mark was erected, and to authorise its removal in case 'any error be discovered' in its location. The Government of Chile had, as will be seen later, the best of reasons for believing and maintaining that the act of placing this landmark was irrevocable However, the Argentine request was conceded as a mark of cordiality.

It may be maintained that the Argentine Government, favoured by these two concessions, made by way of reciprocity the declaration that they had no right to claim ports in the Pacific, whereby, though they on their part conceded nothing, they also contributed to re-establish harmony between both countries.

The stipulations relative to the demarcation in Tierra del Fuego and to the San Francisco landmark were agreed by the Experts, as is shown by the Act of March 10: However, by their nature they were more properly matter for a Treaty, and on this account the said Act was transformed into a Protocol which had to be submitted to the approval of the Congresses."

According to Chile, therefore, the compromise, so far as there was one in the 1893 Protocol, concerned the starting point of the line in Tierra del Fuego and the review of the boundary mark already sited in the San Francisco Pass.

34. **Conclusions regarding the Arbitration.** Whatever difference there may have been between the Chilean and Argentine Governments in the 1898-1902 proceedings in regard to the nature of any compromise embodied in the 1893 Protocol, they were completely unanimous on three points. First, they were at one in interpreting Article II of the Protocol as relating to the Andean section of the boundary and as having no effect south of the Straits of Magellan. Secondly, they were at one in discussing the declaration in Article II only in terms of the territory on either side of the Andes boundary north of latitude 52° S. Thirdly, they were at one in making no reference whatever to any connection between Article II of the Protocol and any territory to the south of 52° S., and still less any territory to the south of Tierra del Fuego. Thus, the interpretations given to Article II of the Protocol by both Parties in the 1898-1902 proceedings are wholly adverse to its application to islands situated to the south of Tierra del Fuego.

35. Indeed, the whole of the arguments and evidence submitted by both Governments in the 1898-1902 proceedings contains, with one exception, not the slightest indication of the existence of any possible question in regard to islands or ports on the Atlantic to the south of the Straits of Magellan. This exception was the inclusion of a certain map, marked sheet No. XIV, in the collection of maps which accompanied the Argentine Evidence of 1902 (Plate no. 84) which showed the Beagle Channel boundary as turning south-eastwards so as to pass between Picton and Navarino

Islands and then between Nueva and Lennox Islands instead of continuing directly eastwards to the north of Picton and Nueva. That boundary not being then in issue, no comment was made on the aberration in the 1898-1902 proceedings. Furthermore, as will shortly be shown, the erroneous line marked on the map was afterwards completely disavowed by Sr. F.P. Moreno Argentina's geographical expert and principal technical adviser in those proceedings. (See para 50 of Chapter VIII below and "Some Remarks concerning the Cartographical Evidence").

ARGENTINE EFFORTS TO REVISE THE BOUNDARY IN THE BEAGLE CHANNEL REGION

1. **Development of Argentine cartographic chauvinism** The genesis of Argentina's efforts to revise the boundary in the Beagle Channel region seems to have been misinterpretations of the 1881 Treaty rather than Article II of the 1893 Protocol, though the latter was afterwards called in aid to support her pretensions. The earliest misinterpretation, departing radically from the continuous west to east line which formed the basis of Article III of the 1881 Treaty was advanced in Buenos Aires by Sr. M.F. Paz Soldan, a Peruvian geographer! Sr. Paz Soldan apparently understood the line dividing Tierra del Fuego southwards from Cape Espiritu Santo along longitude $68^{\circ} 34'$ W. as the boundary not merely in the large island of Tierra del Fuego but in all the southern archipelago. In consequence, he treated not only Picton, Nueva and Lennox but also Navarino, part of Hoste, the Hermites, the Wollastons and various other islands south of the Beagle Channel as having been assigned to Argentina. This evident misinterpretation of the 1881 Treaty was corrected by Sr. Paz Soldan himself in maps published by him in 1887 in which the boundary extended directly eastwards until south of the island of Los Estados. (Plates 36 and 37) Even so, it seems to have found an echo in a map prepared in 1893 by Sr. Estanislao Zeballos, at one time Foreign Minister of Argentina, for the arbitration on the Misiones Territory (Argentina vs. Brazil) which showed the boundary as running southwards along the meridian $68^{\circ} 34'$ as far as Hoste Island; and Navarino, Picton, Nueva, Lennox the Wollastons etc. as Argentine islands (Plate 62). In general, however, even the most ardent supporters of Argentine pretensions have shrunk from advancing this quite fantastic interpretation of the 1881 Treaty.

2. Inspiration for the new Argentine pretensions to Picton and Nueva seems rather to have come from a map compiled by Julio Popper, a Roumanian mining engineer and explorer, which he published in Buenos Aires in 1891 (Plate 55). Prior to this date he had organised, and himself participated in, an Argentine expedition to prospect for gold in Tierra del Fuego in the course of which he entered the Beagle Channel area. Gold deposits were found in the southern area of Argentine Tierra del Fuego; and it may be that it was this fact which led Julio Popper to place in his map the islands of Picton and Nueva on the Argentine side of the boundary. At any rate, neither on the map nor in the lecture which he gave to the Argentine Geographical Institute later in 1891 did he offer any explanation as to why he had drawn the Beagle Channel boundary in a manner which conflicted with the division of territory shown on every Argentine and Chilean map of any official character published since the 1881 Treaty. It also conflicted with the description he himself had given in articles he had written only the year before, in which he said "the Argentine Republic ends in its southern extremity in a promontory formed by Cape San Pio and Slogett Bay". (Tierra del Fuego, Popper, Buenos Aires, 1890 p.3). In his lecture Julio Popper gave detailed explanations concerning modifications he had introduced into the geography of Tierra del Fuego but gave none for his alteration of the course of the Beagle Channel. Three years later (1894) equally without any explanation, the Argentine Geographical Institute in the second edition of its Atlas of the Argentine Republic substituted for Sheet XXVII of the first edition a new sheet (Plate 63) reproducing the boundary, and indeed almost all the place-names, as shown on Julio Popper's map. The corresponding sheet in the first edition of the Atlas, as has been mentioned in paragraph 2 of the previous Chapter, showed Picton, Nueva and Lennox as all Chilean islands.

¹ Paz Soldan, "Diccionario Geografico Estadistico Nacional Argentino" (Buenos Aires, 1885)

The unexplained substitution of the Julio Popper version of the boundary was all the more remarkable because in that same year the Museum of La Plata published a Relief Map of the Argentine Republic, compiled by Enrique S. Delachaux, Director of its Cartographic Division and Head of the Cartographic Division of the Boundary Commission with Chile, which showed all three islands as Chilean. (Plate 64) Furthermore, it appears that the Geographical Institute itself in the next - third - edition of the Atlas published in 1898 dropped the Julio Popper form of Sheet XXVII, reverting to the original form of this Sheet found in the first edition of 1885. In other words Sheet XXVII of the 1898 edition in agreement with plate II of that Atlas once again showed the boundary as running eastwards along the Channel to the north of Navarino, Picton and Nueva (Plate 78).

3. The supposition that it was from seeds sown by Julio Popper that Argentine pretensions to Picton and Nueva began to grow seems to be borne out by another Argentine map published circa 1894. This was the "Topographical Map of the Argentine Republic" compiled by H.D. Hoskold (Plate 61) who - significantly - was the Director General of the National Department of Mining and Geology and therefore fully apprised of the gold-prospecting activities of Julio Popper. At any rate, and again without explanation, the Director-General went even further than Julio Popper in diverting the Beagle Channel boundary to the south. No actual boundary line was drawn on the map, but the colouring showed Picton, Nueva and Lennox as Argentine. Furthermore, to the south of Lennox there was a note which read "Boundary to be determined". According to H.D. Hoskold in his book "Cuestiones de Limites o Lineas Divisorias", the map was approved by a Decree of 5 July 1894 and "corrected on two occasions by the Boundary Office of the Ministry of Foreign Affairs". On what basis, other than the lure of gold, Picton, Nueva and Lennox were considered as Argentine does not, however, appear. Equally without explanation was the adoption of what was in effect the Julio Popper version of the boundary in the General Map of the Argentine Republic and Bordering Countries, published by the Argentine Geographical Institute in 1896. (Plate 68) Although the actual boundary line was not drawn on this map, the different colouring assigned Picton and Nueva to Argentina and only Lennox Island to Chile.

4. In order to get these early flirtations of certain Argentine cartographers with the Julio Popper version of the boundary into their true perspective, it is necessary to view them against the background of the work of other cartographers prior to 1904, the date when the Argentine Government itself began to assert pretensions to the islands in question. Including the extremely significant maps published in 1881 in connection with the conclusion of the Boundary Treaty, the "Atlas" submitted with this memorial reproduces nearly forty further maps issued between 1881 and the conclusion of the 1893 Protocol showing Picton, Nueva and Lennox as Chilean islands; and a number of these were Argentine maps of an official or authoritative character (see Chapter VII paragraphs 2 and 3 above). Then, in the period from 1893 to 1904 a number of maps were published in Chile, Argentina and various other countries which showed Picton, Nueva and Lennox as Chilean; nearly thirty of them are reproduced in the "Atlas" (In a few cases one of the three islands was not actually delineated on the map, but it is clear that the boundary was conceived of as to the north of all three islands). Five of these maps were Argentine maps of an official or authoritative character. Mention has already been made of the "Relief Map of the Argentine Republic" published by the Museum of La Plata and of the third - 1898 - edition of the Atlas of the Argentine Republic, published by the Geographical Institute, which abandoned the Julio Popper boundary found in the second edition (paragraph 2 above). In 1895 the third edition and in 1904 the fourteenth edition, together with all the intervening editions, of the "Geography Course Adjusted for use in the Schools of the Argentine Republic" included a map which, by its colouring, showed Picton, Nueva and Lennox as Chilean (Plate 65). In 1897 the "Second Census of the Argentine Republic", published under the direction of the Commission in charge of the Census, contained a map the colouring of which, if imperfect,

designated Picton, Nueva and Lennox as Chilean (Plate 72). Similarly, in 1904 the second edition of the Argentine Ministry of Agriculture's booklet "Brief Description of the Argentine Republic as an Immigration Country" included a map which by its colouring marked both Nueva and Lennox islands as Chilean; Picton Island, though not delineated on the map, could clearly only have had the same status as Nueva (Plate 93).

5. The many maps published in countries other than Argentina during the period 1881 to 1904 consistently placed Picton, Nueva and Lennox, or such of these islands as they delineated, under Chilean sovereignty with only one exception. This was the 1888 edition of the Universal Geographical Atlas compiled by Sr. Elias Zerolo of Seville and published in Paris (Plate 70), the relevant sheets of which marked not only Picton, Nueva and Lennox but also Navarino, the Wollastons and Hermites as Argentine. It can only be supposed that the source of this aberration was the eccentric misinterpretation of Sr. Paz Soldan advanced in Buenos Aires three years earlier (paragraph 1 above). At any rate, like Sr. Paz Soldan, Sr. Elias Zerolo corrected the error in his next edition published in 1891 which showed the Beagle Channel as running to the north of Picton Island and coloured all three islands as Chilean. Another map that merits particular mention is the "Sketch Map of Tierra del Fuego" compiled by a Swedish Zoologist Axel Ohlin to illustrate an article contributed by him to Volume IX of "Natural Science" and entitled "Zoologist in Tierra del Fuego: some account of the Swedish Expedition 1895-6". (Plate 76). The particular interest of the map is that the author signified that it was a copy of the map published by the Argentine Geographical Institute in 1893, with a few corrections. As mentioned above, that map was Sheet XXVII (Plate 63) of the "Atlas of the Argentine Republic" on which the boundary was shown as following the course invented by Julio Popper. But significantly this was one of the "corrections" made by the Swedish Zoologist, whose map depicted the boundary as a line of "dashes" running along the centre of the Beagle Channel, so as to pass to the north of Picton and Nueva in the orthodox manner intended by the negotiators of the 1881 Treaty. Particular interest also attaches to the "Map of the Southern Regions of the Republics of Argentina and Chile" included by Sir Thomas Holdich in his book "The Countries of the King's Award", which was published in 1904 (Plate 92). Sir Thomas Holdich was Vice-President of the Royal Geographical Society and the member of the 1898-1902 Arbitration Tribunal chiefly responsible for the reports on which the Tribunal's Award was based. The map in question, although primarily designed to illustrate the boundary determined by the 1902 Award, also showed the boundary in the Beagle Channel. This took the form of a dotted line drawn along the middle of the channel proceeding eastwards to the north of Picton Island. Near to the dotted line on the northern side is a continuous red line marking the territory as Argentine. Then, on the southern side there is a wide yellow line marking Chilean territory, and Picton, Nueva and Lennox are given as Chilean. Attention is drawn to this map not only because of Sir Thomas Holdich's authorship of it, but also because reference will later be made to a slightly different opinion of the allocation of the islands given by Sir Thomas fourteen years later (see paragraphs 55-57).

6. The cartographic chauvinism which manifested itself in certain circles in Argentina in the period between 1893 and 1904 has also to be viewed against the background of Chile's peaceful display of State activity with respect to the three islands from 1892 onwards. Chile's acts of jurisdiction in regard to the Beagle Channel region are set out in extenso in a later chapter (Chapter X). Here it may be said in anticipation that the incursion of gold-miners into the Beagle Channel area, and especially into Nueva and Lennox islands, created an urgent need for the exercise of governmental authority in the area. That there was a need is demonstrated by the despatch dated 10 April 1892 from the British Minister in Buenos Aires to the Foreign Office in London (Annex 60(A)), in which, after referring to the Julio Popper map, the British Minister wrote that he had received a private letter from Captain Lang of H.M.S. Cleopatra, then in command of the South Atlantic Station, who had mentioned that a considerable amount of gold was being taken

from Nueva and Lennox Islands and said that "it was unfortunate that the Chileans had no officials there, for the Government made nothing by it, and no export duty was paid". The British Minister added that he had "mentioned Captain Lang's report, privately, to the Chilean Minister, and he doubtless will take whatever steps he considers necessary to inform his Government." The Foreign Office in London, however, sent a copy of the despatch to the British Minister in Santiago, who replied on 22 July 1892 (Annex 61 (B)), that he had communicated with the Chilean Foreign Minister about the "discrepancy of the maps in the matter of the ownership of the Islands to the south of Tierra del Fuego." He continued that the Under-Secretary for Foreign Affairs had shewn him "the Treaty with Argentina 1882 (sic), Article III of which provides that Tierra del Fuego should be divided by a line drawn south from Cape Espiritu Santo to Beagle Channel of the Islands, that of Los Estados belongs to the Argentine Republic and all the Islands to the south of Beagle Channel to Chile...." He added that "with such a precise description of the possessions of the two countries in the Treaty", the Under-Secretary had said it was "immaterial what geographers chose to publish on the subject." In addition, in early May 1892 a report appeared in the newspaper in Santiago to the effect that Julio Popper had applied for a concession to fish off the islands situated east of the Cape Horn Meridian as far as the 60° parallel. The report was noticed by Sr. Barros Arana who felt it necessary to draw it to the attention of the Chilean Foreign Minister. (see Annex 61(a)). After stating that such a concession from the Argentine Government would cover territories which belonged exclusively to Chile, Sr. Barros Arana added:

"Referring to the islands surrounding Tierra del Fuego, Article 3 of the Boundary Treaty of 23rd July 1881 states as follows:-

"As for the islands, to the Argentine Republic shall belong Staten Island, the small islands next to it, and the other islands there may be on the Atlantic to the east of Tierra del Fuego and of the eastern coast of Patagonia; and to Chile shall belong all the islands to the south of Beagle Channel up to Cape Horn, and those which may exist to the west of Tierra del Fuego."

It is beyond discussion that all islands situated south of Tierra del Fuego, whether east or west of Cape Horn's Meridian, are the property of Chile, and it is the Government of Chile which alone can grant concessions of the kind that, according to the above mentioned telegram, has been requested from the Argentine Government.

To make this absolutely clear I enclose a map of Tierra del Fuego and Magellanic territories on which the region belonging to the Argentine Republic on the basis of the 1881 Treaty is marked in green ink, and the region belonging to Chile is marked in pink ink.

I am reminding you of these facts because I deem it necessary to ask the Chilean Minister in Buenos Aires to make suitable representations to prevent such a concession being granted, as being against the authority of our Republic as well as a possible source of difficulties and embarrassment. It would be advisable that the Minister of Chile in Buenos Aires should study the map enclosed with this note. He will also be able to obtain in Buenos Aires Plate XXVII of the Atlas of the Argentine Republic published by the Geographical Institute there. This Plate, which was published in 1885, comprises "the Governorship of Tierra del Fuego and the Magellanic Islands", and it fixes the dividing line as defined by the 1881 Treaty, showing as the property of Chile all the islands south of the Beagle Channel. He could also look at two other maps of that area published in Buenos Aires in 1881, immediately after the Boundary Treaty was signed, on both of which the same dividing line was drawn."

A copy of Sr. Barros Arana's despatch was sent by the Chilean Foreign Ministry to the Chilean Minister in Buenos Aires and as far as is known no concession was ever granted to Julio Popper by Argentina which would have affected Chilean sovereign rights as explained in the despatch i.e. south of Tierra del Fuego.

In 1892 the Chilean Government, through its Governor in Punta Arenas, did begin to exercise its authority locally with respect to Navarino, Picton, Nueva, Lennox and other islands to the south of the Beagle Channel, openly and as matter of course, in conformity with its understanding of the territorial dispositions effected by Article III of the 1881 Treaty. Nor did Chile's display of State activity in regard to these meet with any opposition from the individuals of various nationalities whom it affected or from the Argentine authorities in Ushuaia or from Argentina herself.

7. It should also be noted that during this same period the 1900 edition of the Argentine Derrotero de las Costas Argentinas (Pilot of the Coasts of Argentina), officially published by the Hydrographic, Lighthouses and Beacons Division of the Argentine Government, contained the following statement:

"Nueva, Lennox, Picton Islands and Banner Cove are Chilean positions."

8. Accordingly, the submission of the Chilean Government, it is clear that when, in 1904, the Argentine Foreign Minister took up with the Chilean Minister in Buenos Aires the question of appointing experts to determine the axis of the Beagle Channel, there was no legitimate basis for Argentine pretensions to Picton, Nueva, Lennox or any other island to the south of the Channel which runs eastwards to the north of Navarino, Picton and Nueva. There was no legal basis for such pretensions in Article III or any other provision of the 1881 Treaty. There was no legal basis for such pretensions in Article II or any other provision of the 1893 Protocol. There was no legal basis for such pretensions in acts of either of the Parties subsequent to the conclusion of 1881 the Treaty. On the contrary, the evidence strongly indicates that these pretensions took their inspiration from erroneous, not to say fanciful, cartography published in 1891 and wholly inconsistent with almost all Argentine cartography of an official character published up to 1904.

9. **In the context of demarcation - Argentine draft 1904.** In August 1904 a draft Agreement for the appointment of Experts to delimit the axis of the Beagle Channel was communicated by the Argentine Foreign Minister to the Chilean Minister in Buenos Aires (Annex No. 69). The preamble to the draft recited that the Beagle Channel was the only section of the common frontier of the two countries the "material demarcation" of which had not yet been effected. Paragraph 1 provided for the appointment of the Experts, while paragraph 3 read:

"The Experts must study the Beagle Channel from the meridian of Espiritu Santo to the Atlantic Ocean, making the soundings and carrying out any other scientific operations they consider necessary to determine the axis of the Channel, and they will indicate on plans drawn up in accordance with the studies they will carry out the detail collected and the Argentinian or Chilean ownership of the islands located in the zone referred to."

The final paragraph provided that, in the event of the Experts' failing to agree, they should "advise their Governments respectively for the latter to settle the disagreement in accordance with the treaties in force." The last reference was more particularly to the General Treaty of Arbitration which the two countries had deliberately concluded in 1902 before the delivery of the Award of His Majesty King Edward VII as a means of easing the acute tensions which had then existed between them. On being informed of this démarche, the Chilean Minister of Foreign

Affairs informed the Chilean Minister in Buenos Aires that he would duly let him have the Government's comments in the matter (Annexes No. 70-71).

10. **Chilean Comments on Argentine 1904 draft.** Meanwhile, the Argentine proposal had been referred by the Chilean Foreign Minister to Sr. Alejandro Bertrand, Director of the Chilean Boundary Demarcation Office, who submitted his comments in a Report of 30 September 1904 (Annex No. 72). The first point made by the Director was that demarcation by Experts had not been prescribed by the 1881 Treaty for the Beagle Channel, in sharp contrast with the sections of frontier running over land for which it had prescribed such demarcation. The only thing that remained to be done, he suggested, was to add a few details to the awarding of islands done in the 1881 Treaty; and for this the appointment of Experts was not necessary, as adequate maps of the Channel were already available. Next, he set out his views regarding the Bridges Group - Gable island and other islands in the narrow reaches of the Channel, and then continued:

"From 10 miles to the west of Picton island, the general direction of the Beagle Channel, which is from east to west, inclines a few degrees to the south and leads in this direction to the Antarctic Ocean, passing between the aforementioned Picton island and Tierra del Fuego. Inspection of any survey maps of the region, and reading Article 3 of the Treaty leaves no doubt that Picton island which is to the south of the Beagle Channel" belongs to Chile.

This is how it was understood by the Argentine geographers after Concluding the Boundary Treaty, as proven by examination of Sheet XXVII of the "Atlas of the Republic of Argentina" published in 1885 by the Geographical Institute of Argentina, a plan drawn up by the official geographer, Mr. Arturo Seelstrang and on which the Beagle Channel dividing line goes out to the Antarctic Sea in the aforesaid manner.

Subsequently, however, in 1893 the aforementioned Institute published a new edition of the same sheet XXVII of its Atlas on which the Beagle Channel dividing line, before reaching Picton Island, twisted violently to the south-east and then to the south in the direction of the Pole, which resulted in the award to the Republic of Argentina not only of Picton Island but also of Nueva Island.

It is almost unnecessary to show that this drawing of the line has no basis whatsoever in the Treaty. Even assuming that it was desired to consider the passage which exists between the Navarino and Picton Islands as an arm of a bifurcation of the Beagle Channel, it would still result that the arm which separates Picton Island from Tierra del Fuego is the main arm of the Beagle Channel, and for two reasons; on the one hand because, of the two arms, it is the one which deviates least from the general direction of the Channel, and on the other because it is by far the broader of the two arms.

In addition, both arms are clear and open to any class of navigation, their depths going to 100 metres; it goes without saying that since it is a matter of these depths in which no ship can founder, there is absolutely no importance in the fact that the arm which separates Picton Island from Navarino exceeds by some few metres in depth the arm which separates that island from Tierra del Fuego. Consequently, it would be completely unnecessary and incongruous to carry out soundings and other scientific operations to determine "the axis of the Channel", since this can be done easily, and with more than sufficient accuracy for the object in view on the Argentine hydrographic charts the precision and care of which I would like to commend.

I may add that the interpretation of the Boundary Treaty which I have mentioned has been adopted by the author of the most authoritative map of the Republic of Argentina up to date in the world of geography, Dr. Luis Brackebusch, published in Gotha in 1891. The same interpretation was accepted by the French geographers Vivien de Saint Martin and F. Schrader on their map of South America in 5 sheets, published in Paris in 1891." (Underlining added)

Sr. Alejandro Bertrand concluded his Report with the suggestion that an Agreement additional to the 1881 Treaty should be concluded dealing with the details omitted from the Treaty in awarding the islands. For this purpose he appended to his Memorandum the draft of such an agreement (Annex No. 73).

11. **New Argentine Sailing Directions and Chart.** Considering the observations of Sr. Bertrand "well founded", and accepting his solution as "simple and expeditious", the Chilean Foreign Minister sent instructions to the Chilean Minister in Buenos Aires on 10 October 1904 to try and reach agreement with the Argentine Foreign Office to proceed on those lines (Annex No. 74).

12. In about April 1905, while conversations were in progress in Buenos Aires, the Ministry for Foreign Affairs in Santiago learned that the Argentine Sailing Directions (or Pilot) contained statements which appeared to have some relation to the question being dealt with by the Chilean Minister in Buenos Aires.

13. In connection with Picton Island the new Argentine Pilot read:

" 'Picton Island' - Divides Moat Channel from the Beagle Channel proper, the joining of which takes place to the East of the Becasses group, Snipe and the series of shallow rocks and small islands which, so to speak, extend Picton Island as far as opposite the eastern mouth of Mackinlay Pass".

This Argentine reference to a "channel" never mentioned before for that region makes it necessary to bring to the attention of the Court certain developments which are of some significance since they underline the remarkable artificiality of and lack of basis for the Argentine claims. In 1899-1900 the Argentine Government had sent the battleship "Almirante Brown", under the command of Commander J.P. Saenz Valiente to Tierra del Fuego to survey and map the Beagle Channel. In 1901 the Hydrographic Department of the Ministry of the Navy produced in three sheets a Chart of the Beagle Channel which incorporated the results of the Survey and which it distributed within the Argentine Navy. This Chart is also communicated to certain foreign Hydrographic Offices, with the curious omission of that of Chile, the country most concerned. The British Hydrographic Office reproduced a two-sheet version of the Chart in 1904, (Plate 90), which the United States Office copied and distributed to all other Hydrographic Offices, including that of Chile. The Chilean Hydrographic Office having thus eventually learned of the new Argentine Chart and also of the existence of a new Argentine Sailing Directions, wrote officially to the Argentine Office asking to be sent copies. When they came to hand, the Chilean Hydrographic Office found that two significant changes had at the same time been made in the topography of the eastern end of the Beagle Channel on the new Argentine Chart.

14. The first of these changes was the substitution for the name "Moat Bay" of the words "Moat Channel". In all previous cartography, where the name occurred at all, it had been given as "Moat Bay" and placed either along or opposite the concave curve in the Tierra del Fuego coastline to which that name, in the form "Moat Bay", had originally been attached during the voyage of the Beagle. Nothing discovered in the survey carried out by the Almirante Brown could possibly call for this change in the historic toponomy of the waters in question. On the other hand,

if Argentina intended to divert the Beagle Channel violently southwards from its hitherto straight eastwards course north of Picton Island so as to make it pass to the south of that island, there was every reason for the Hydrographic Section of the Argentine Navy to try to create the legend that the passage to the north of Picton Island was a "Channel" known under a name other than "Beagle". When the Chilean Hydrographic Office wrote challenging this juggling with the name, the Chief of the Hydrographic Section Senor G. Mac-Carthy replied that he was not allowed to discuss changes of names which the Ministry itself had made (Annex No. 75). He stated as his private opinion, however, that the channel running north of Picton Island had been named Moat Channel instead of Bay because, in itself, it was "more a channel than a bay". However Captains Fitzroy and Parker King the discoverers, and early explorers of the region, who were aware of the geography, did not regard the stretch to the north of Picton as a separate channel, but only as part of the Beagle Channel which extends westwards almost straight from Cape San Pio. Furthermore, the name "Moat" had always been reserved by them, and all charts until then, for a bay within the Channel. Mac-Carthy also invoked the statement in the British "Sailing Directions for South America" (Part II, 4th ed., 1856, pp. 167-8): "To the north of Lennox Island is the eastern opening of the Beagle Channel", presumably seeking thereby to justify at once the diversion of the course of the Beagle Channel through the passage between Lennox and Picton and the rejection of Moat Bay as a bay within the Beagle Channel. The Chilean Hydrographic Office responded by referring to the difference between true north and magnetic north and to the different way in which the matter was stated in later editions of the British "Sailing Directions". The correspondence closed with a simple reassertion of his contentions by the Argentine Hydrographer.

15. The second innovation in the new Argentine Chart and "Sailing Directions" was explained in the following paragraph of the latter:

"Nueva Island - Its geographic position, both on the British Map and on the French is erroneous. The size of the error of location is approximately four miles to the West, which would give it the following approximate position: Latitude 55° 12' 46" S. and Longitude 66° 26' 51" West of Greenwich, placing the island four miles further to the east."

On another page of the Sailing Directions the magnitude of the error was put as even larger, namely of 4½ miles. The Director of the Chilean Hydrographic Office, when writing to the Chief of the Hydrographic Section of the Argentine Navy, pointed out that the longitude given by the Argentine publication as the true one was exactly the same as that already given on the British Chart for the centre of the island and asked for further information. The Chief of the Hydrographic Section replied to the effect that the "northern nipple" of Nueva Island, called "Asses Ears Hill" (Cerro Orejas de Burro) in the British Charts, had been found to be at lat. 55° 12' 46" S. and longitude 66° 26' 51" west, so that its correct position was 4½ miles further to the east than the position assigned to it in the British Chart. It may be added that the queries expressed by the Director as to the accuracy of the survey carried out by the Almirante Brown proved to be well justified because the Argentine Sailing Directions were themselves in error in placing Nueva Island some four miles to the east of its actual position.

16. Whatever the cause of this error, the resulting attribution of a more easterly position of

Nueva Island fitted in well with Argentina's thesis denying that the eastern entrance to the Beagle Channel is situated between Cape San Pio and Nueva Island. If the position of Nueva were to be situated some four miles further to the east, it would weaken the case for regarding Nueva, together with Picton, as the natural prolongation of the southern shore of the Beagle Channel east of Navarino Island, and make Nueva appear to be an island unconnected with the entrance to the Beagle Channel. The Argentine "Sailing Directions", also showed a disposition to depreciate the importance of the islands, especially Picton, in its description of them. On the other hand, it may be conceded that, the paragraph of the Argentine Sailing Directions on "Picton Island", which has been reproduced above, itself contained a geographical observation that was both correct and clearly adverse to the Argentine thesis that the Beagle Channel deviates ~~that was both correct and clearly adverse to the Argentine thesis that the Beagle Channel deviates~~ to the south-east between Picton and Navarino islands. That paragraph spoke of "the Snipe and the series of shoals, rocks and islets that it might be said, prolong Picton Island towards the eastern mouth of Mackinlay Pass." Snipe and a series of shoals, rocks and islets do indeed string out westwards from Picton towards the northern coast of Navarino and, almost like buoys put there for the purpose, virtually mark the continuous southern border of the straight course of the Beagle Channel passing to the north of Navarino and Picton Islands. True, Snipe and the series of shoals, rocks and islets, although they partially obstruct, do not close the opening between Picton and Navarino islands and there remains a navigable channel. But, as a visit to the spot immediately makes clear, they render the wide channel to the north of Picton islands both a much superior channel of navigation and the natural continuation of the straight channel which runs eastwards from Gable Island between Navarino Island and Tierra del Fuego.

17. **Further negotiations 1905 and 1907.** On 18 July 1905 the Chilean Minister of Foreign Affairs asked the Chilean Minister in Buenos Aires for information as to the state of the negotiations (Annex No. 76). By a telegram of 19 (Annex 76A) and a despatch of 25 July 1905 (Annex No. 77) the Minister in Buenos Aires replied that the Argentine Government favoured the submission of the dispute to arbitration. Reporting that he and the Argentine Foreign Minister were convinced that no direct settlement could be reached between the two Governments, he enclosed the draft of an Agreement for the purpose which they had jointly prepared (Annex No. 78). In substance, the draft provided for a line to be drawn along the Beagle Channel in the undisputed part of its course and the islands on the north and south sides to be assigned respectively to Argentina and to Chile; and it then provided for the dispute regarding the boundary to the east of longitude 67° 15' W. to be referred to the British Government for arbitration. Experts were, however, first to be appointed to draw up a map of the relevant sections of the Beagle Channel. It should be noted that Argentina who had been a party to the draft, in it recognised two factors (a) that the Beagle Channel did not end at 67° 15' W, the eastern end of the narrows, and (b) that the difference of opinion was over which of two courses was the Beagle Channel: either north east, or south west of Picton.

18. The Chilean Foreign Minister referred the draft Agreement to the Boundary Office which suggested, in a report of 17 August 1905, that the preparation of a new map was unnecessary and that Article II of the draft should therefore be deleted (Annex No. 79). Inter alia, it also suggested the following amendment to a paragraph in the preamble to the draft, viz: that the phrase "that from the last-mentioned meridian towards the east, there is a bifurcation of Channels to the north-east and south-west of Picton Island" should be replaced by "there are two channels that surround Picton Island". It also suggested the addition of a new article expressly putting on record Chile's title to Lennox Island. Chilean counter-drafts incorporating the suggestions of the Boundary Office were then prepared and handed to the Argentine Minister in Santiago (Annex No. 80).

19. **Chilean views - Fagalde Thesis 1905.** At this point mention may, in passing, be made of the appearance in Chile in 1905 of the so-called Fagalde thesis regarding the interpretation of Article III

of the 1881 Treaty and the Beagle Channel boundary. Sr. Alberto Fagalde, a Chilean journalist, published in the issue of the Maritime Journal of Chile for 2 April 1905 a carefully reasoned article in which, inter alia, he drew the following interpretation from the wording of Article III:

"As may be noted, this Article was most conclusive that the division of Tierra del Fuego be made until it touches the Beagle Channel, so that the Treaty has respected and left wholly to Chile the said Channel."

In other words, according to the Fagalde thesis, Article III makes the actual coastline of Tierra del Fuego itself the boundary between the two countries in the Beagle Channel region. It is not, however, proposed to examine this matter further at this stage.

20. **Chilean views - Alvarez report.** At this point mention may also be made of a Report submitted on 19 January 1906 to the Ministry of Foreign Affairs by the distinguished Chilean jurist, Sr. Alejandro Alvarez, later Judge of the International Court of Justice (Annex No. 82). In brief, he adopted the same interpretation of Article III of the 1881 Treaty as in the Fagalde thesis, contending that the boundary along the coast, instead of in the Channel, could not be said to be contrary to international law as it resulted from an express treaty provision. As to the course of the Beagle Channel, he considered the text of the 1881 Treaty to be both clear and conclusive regarding the understanding of the Beagle Channel which the two Governments had at that time. He further commented that, even if subsequent investigations should show that geographically and hydrologically the channel did not follow the course accepted in 1881, this would be irrelevant from the point of view of international law under which it was the understanding of the Parties in 1881 to which consideration must be given. His general conclusion was that it was the duty of the Chilean Government to point out the errors and put a firm end to the Argentine demands.

21. **Further negotiations 1907.** The Beagle Channel dispute continuing unsettled, on 6 September 1907 the Chilean Foreign Minister transmitted to the Argentine Minister in Santiago a new draft of an Agreement containing a "package deal" designed to dispose at the same time both of this dispute and of differences arising between the two countries regarding their claims in Antarctica (Annex No. 83). This initiative came to nothing, and it suffices to note that in Article 1 dealing with the Beagle Channel the boundary was drawn along the middle of the narrow section of the Channel and then continued in mid-Channel north of Picton Island, and out to the ocean, clearly leaving Nueva to Chile. (Plate 101)

22. **Cartographic reflection of Chilean view, 1904-1914.** There the matter rested until the outbreak of the first world war in August 1914. It may be added, however, that during the period from 1904 to 1914 cartography of the Beagle Channel region, including Argentine cartography, continued with a marked consistency to show Picton, Nueva and Lennox as Chilean. A book published in Buenos Aires in 1907 and entitled "Notions of Argentine and General Geography", for example, included a map which, by colouring, showed the three islands as Chilean. This book was expressed to be made "in accordance with the study programs for the Schools of the Federal Capital, Province of Buenos Aires" and with general information taken from the last National Census, and subsequent data from official sources". Again, in 1911 a "Map of the Territories of Santa Cruz, Magallanes and Tierra del Fuego" was published by Engineer Norberto B. Cobos, which showed the boundary line running along the middle of the Beagle Channel and passing north of Picton Island so as to assign all three islands to Chile (Plate 108). If this map was a private publication, its author was later Head Engineer of the Boundary Department of Argentine Foreign Ministry and a member of the Chile-Argentina Mixed Boundary Commission. In the "Official Year-book of the Argentine Republic", on the other hand, which was first published in 1912, there seem to be signs of confusion on the question of the boundary (Plate 110). The Yearbook contained three

maps, two of which, by colouring, showed all three islands as Chilean, namely, the "General Map of the Argentine Republic" and "Governorships of Santa Cruz and Tierra del Fuego". On the other map, "Argentine Republic - Ministry of Agriculture - Statistics and Rural Economy Department", Argentine territory was coloured in a yellowish shade, while Chilean territory was left uncoloured. On Nueva and Lennox the author placed a yellow point or dot, but Picton he left uncoloured and Chilean - a somewhat bizarre application of the 1881 Treaty.

23. Argentine literature 1904-1914 During this same period a number of different versions of the eastern mouth of the Beagle Channel began to be propounded in literature published in Argentina. According to one version (Sr. Zeballos), the mouth of the Beagle Channel was regarded as a line drawn from Cape San Pio on Tierra del Fuego to Point Guanaco near the south-eastern extremity of Navarino Island. According to another version, the closing line should be drawn either from Cape San Pio on Tierra del Fuego, or from Point Jesse a little to the east of that Cape, to Point Yawl, a point on the coast of Navarino Island to the north-west of Lennox. These versions of the mouth, it will be seen, leave both Nueva and Lennox islands outside the Beagle Channel, which they treat as having two entrances on either side of Picton Island. According to yet another version (Capt. Storni), the mouth was constituted by lines drawn from Point Jesse on Tierra del Fuego to Point Waller on Nueva Island, from the southern tip of Nueva to the southern tip of Lennox, and from there to Point Guanaco on Navarino Island. This version thus included Nueva and Lennox within the concept of the Beagle Channel, which it treated as having three entrances. Another map which appeared with an official Argentine Publication printed in 1908 (*La Frontera Argentino - Chilena*) showed the boundary line in the Channel as passing between Navarino and Picton Islands but Nueva and Lennox Islands are off the map and its further course is not shown. As stated in the *Palena case* (Argentine - Chile Frontier Case 1966, Transcript of Oral Hearings - Day 18 @ page 169) this publication did not come to the knowledge of the Chilean Government until many years later, and there are several indications that the existence of the publication was not generally known; for instance, in 1966 the Library of the Royal Geographical Society had no copy of it nor any note of it in its Catalogue, and there was no copy of it in the British Museum Library. Versions of the Beagle Channel such as these were essentially geographical constructions varying according to the predilections of their authors. Their authors took no account of the difficulty of reconciling their constructions with the wording of the disposition regarding islands in the 1881 Treaty, no account of the clear and precise cartographical evidence as to the meaning attached to the term Beagle Channel by the negotiators of that Treaty and no account of the mass of subsequent cartography which reflected and confirmed that meaning. In consequence, the chief significance of these different versions of the Beagle Channel in Argentine literature is the light which they throw on the confusion that existed in Argentina on the whole question of how best her new pretensions to Picton and Nueva and Lennox could be given even a semblance of plausibility in face of the wording of the 1881 Treaty and the cartographical evidence.

24. Further diplomatic exchanges 1914-1915. Not long after the outbreak of the first world war - on 5 November 1914 - the Chilean Government issued a Decree declaring that Chile's jurisdictional or neutral waters, for the purpose of her rights and duties as a neutral, extended to a distance of three miles measured from low-water mark (Annex No. 84). This was followed on 15 December 1914 by a further Decree which read as follows (Annex No. 85):

"Whereas both the Straits of Magellan and the southern channels are within the international limits of Chile and form, consequently, part of the territory of the Republic,

It is declared that for the purposes of the neutrality covered by Decree No. 1857 of 5 November last issued by the Ministry of Foreign Affairs, the waters inside the Straits of Magellan and the southern channels even in the sections more than three miles from one or other shore must be considered as jurisdictional waters."

A copy of this Decree was communicated to the Argentine Charge d'Affaires in Santiago under cover of a letter - 21 December 1914 - which stated: "By this Act, the Government of Chile does not intend to modify in any way the situation created by the Treaties between Chile and the Republic of Argentina, in the Straits of Magellan and in the channels of the South." (Annex No. 86(a)).

25. Another Chilean Decree, relating to a quite different matter but also issued on 15 December 1914, gave rise to a discussion which was not so easily resolved and led to the drafting of yet another agreement for the settlement of the Beagle Channel question. This Decree (Annex No. 86) approved the extension for fifteen years of an existing occupation permit held by Sr. Mariano Edwards Ariztia for Picton, Nueva, the Augustus group, Hermanos, Snipe, Garden, Becasses and the Reparo islets. The existing occupation permit he had obtained by transfer from two men who were themselves transferees of a concession dating from the last decade of the XIX century, (see Chapter X, paragraph 84). In short, there was nothing new in Chile's exercise of State authority with respect to the islands in question.

26. In its Note of 8 March 1915 (Annex No. 88), however, the Argentine Government after referring to the Chilean statement that the jurisdictional waters Decree was not intended to change the existing situation, complained of the renewal of the occupation permit as a disposal of Picton and Nueva Islands by Chile as if they formed part of her territory. The Argentine Note went on to state - as was quite untrue - that "before and after the Treaty of 1881, throughout the long process of discussion of the border between Chile and Argentina, the same as before and after the Treaty of 1893, and subsequently to this date, there has always existed a difference in opinion concerning the islands." Asserting that Chile had no right to exercise acts of sovereignty over territories in dispute, the Argentine Government declared that they maintained all the arguments which they had advanced in the dispute and could not recognise the validity of Chile's acts of jurisdiction.

27. The Chilean Foreign Minister, in a Note of 20 April 1915 (Annex No. 97), after disposing of some preliminary misunderstandings, said that Chile could not accept the thesis that a State must stop exercising its sovereignty over any part of the territory in its possession by reason merely of the fact that another State made pretensions to exercise sovereignty over the same region. He went on as follows:

Since the Treaty of 1881, Chile has maintained its sovereignty over these territories under protection of Article 3, which expressly assigns to it all those islands situated south of the Beagle Channel. At the time when the aforementioned agreement was signed, there were no doubts put forward by the Governments that the islands referred to were to the south of the Beagle Channel. The negotiators proceeded, in drawing up the Treaty, on the basis of the maps of Fitz Roy, which show the position of the Beagle Channel to the north of these islands; and the agreement which, at least since then, existed between both parties on this matter is manifest, not only because among the matters submitted to the arbitrator was there no inclusion of the matter which now gives rise to Your Excellency's note, but also due to the fact, no less revealing, that all Argentinian maps published for many years after the signing of the Treaty of 1881, show the Beagle Channel in the same way as in the Chilean maps, that is to say, they are all in agreement with the maps of Fitz Roy, the basis of the Treaty.

Official acts of my Government show in documented form the sovereignty which Chile has exercised over these territories, without any discussion from anybody. Among these may be mentioned the concession of Picton Island, granted for a period of 15 years, by virtue of decree No. 2087, of 31 October 1905, and precisely the resolution of the 15 December last, mentioned by Your Excellency in your note, which is no more than a prorogation of the same concession accorded in order to eliminate the difficulties existing with reference to similar concessions granted on Navarino Island. The aforementioned resolution consequently does not mean an alteration of the present state of affairs, but

its maintenance, in the previous same conditions, and by this the Chilean Government has not wished to alter the basis of the disagreement to which Your Excellency refers, but to maintain the status quo existing in this respect between the Argentine Republic and Chile.

My Government is ready to seek a solution to this resulting disagreement by all the means established by the pacts.

In short, the Chilean Government insisted that Chile's title to the islands had been unequivocally recognised in the 1881 Treaty and that her subsequent peaceful exercise of sovereignty in respect of them had been in virtue of that title under the Treaty.

28. In the previous month conversations had meanwhile been initiated by the Argentine Foreign Minister with a view to settling the question of the southern islands by arbitration, as the Chilean Minister in Buenos Aires reported in a despatch of 17 March 1915 (Annex No. 91). The Chilean Envoy, in accordance with the instructions of the Chilean Minister of Foreign Affairs, had expressed Chile's wish to put an end to the question as soon as possible; and he had proposed that, in order to avoid the expense and delays of another Field Commission, the Arbitrator should simply be asked to refer to an accurate map and trace the line on it in accordance with the provisions of the 1881 Treaty. The upshot was that the Argentine Foreign Minister, after consulting the President of Argentina, had handed the Chilean Minister a draft Agreement for submitting the question to arbitration.

29. The Argentine draft (Annex No. 92) is extremely revealing as to how sensible the Argentine Government was of the flimsy character of its pretensions and how shifting were the grounds advanced to support them. For the draft contained three provisions designed to shape the issues in the case in Argentina's favour on three separate points, and to open the way for new Argentine arguments. The first of these provisions was in paragraph 2 of the Preamble:

"That the fundamental principles to which the determination of the dividing line should be adjusted, and the manner for settling any difference that might arise during this operation, are set forth in the Boundary Treaty of 23 July 1881, and in the Additional and Clarifying Protocol of 1 May 1893, the provisions of which should be applied in the solution of the pending question." (Underlining added)

The inclusion of the 1893 Protocol in this specific directive to the Arbitrator as to the legal bases of his decision was repeated in Article V of the draft. It meant that Argentina was now looking for a new way to escape from the clear provisions of the 1881 Treaty. As pointed out earlier in the previous chapter, such a linking of the Protocol with the provisions of the Treaty dealing with Tierra del Fuego and the southern islands does violence to the terms of the Protocol and was never intended by those who concluded it. So by this paragraph of the Preamble the Argentine Government sought to foreclose in advance the legal issue of the relevance of the 1893 Protocol to the question of the southern islands.

30. The second provision was in a later paragraph of the Preamble

"That the purely geographical nature of the dispute existing between both Governments, facilitates its immediate submission to the decision of the Arbitrator..." (Underlining added)

This quite unnecessary characterisation of the nature of the dispute was, again, a complete distortion of the legal issue for decision. According to the Chilean Government and to the most elementary principles of Treaty law, the issue was not essentially geographical; the true issue was the understanding of the will of the Parties to the 1881 Treaty at that date and, in particular, of the words "all the islands to the south of the Beagle Channel". That issue being adverse to Argentina, she

was seeking to convert it into a geographical debate. This purpose was made quite explicit in Articles III and IV of the draft, discussed in the next paragraph, by which she sought to reduce the function of the Arbitrator to a purely geographical exercise.

31. The third provision was in Article III of the draft:

"The Arbitrator shall decide whether the Beagle Channel terminates in the vicinity of the Meridian of 67° 15' West of Greenwich or if it is prolonged until it flows into the Atlantic."

This provision introduced a line of argument even more extreme than that adopted in 1904 when Argentina recognised that the Beagle Channel extended east of 67° 15' and the question for decision was on which side of Picton Island did it run. In addition it was not unconnected with Argentina's new idea of wresting the declaration regarding "points towards the Atlantic" from its context in Article II of the Protocol of 1893 and applying it to the disputed islands. The line of longitude given in the above provision crossed the Channel at the eastern end of Navarino Island. Hitherto, the different Argentine versions of the Beagle Channel had turned on whether its course ran to the north or south of Picton and Lennox islands, whether it had more than one entrance channel, or where its closing line should be drawn to the east of Picton Island. Now regardless of all that had gone before, the notion was insinuated into the dispute between the two Governments that the Beagle Channel terminated at the eastern end of the narrows between Navarino Island and Tierra del Fuego, leaving Picton, Nueva, Lennox, Snipe, Becasses, etc. divorced from it. In conformity with this new notion, Article IV of the Argentine draft proceeded to direct the Arbitrator that should he determine the eastern extremity of the Channel to be in the vicinity of the meridian in question, he was to decide to which of the two countries the disputed islands belonged. Should, however, he consider the Channel to be "prolonged as far as the Atlantic", he should determine its main arm and also the boundary along this arm, and decide the apportionment of the islands accordingly. The tendentious character of this direction to the Arbitrator requires no underlining.

32. Commenting on the Argentine draft in his despatch (Annex No. 91), the Chilean Minister in Buenos Aires, inter alia, drew attention both to the irrelevance of the 1893 Protocol to the question of the islands and to the new notion of a Beagle Channel terminating at longitude 67° 15'. These features of the draft he suggested were inadmissible, and also "the bringing into the discussion of the question which of the arms of Beagle Channel is the main one, although our Foreign Department accepted some years back that the problem be approached on this ground".

33. The Chilean Foreign Minister shared the opinion of the Chilean Envoy, and under cover of a despatch dated 21 April 1915 (Annex No. 98) sent to him a counter-draft in a much simpler form (Annex No. 99). The single operative provision directed the Arbitrator:

"To determine in accordance with the 1881 Treaty to which of the High Contracting Parties corresponds the sovereignty over Picton, Nueva and Lennox Islands and adjacent small islands, and other islands located in the Beagle Channel between Tierra del Fuego to the North and Dumas Peninsula and Navarino Island to the South."

The Chilean Minister in Buenos Aires had suggested the specific exclusion of the 1893 Protocol, but the Foreign Minister in his despatch said that the Chilean Government had no reason to try and restrict the "means of defence" since it had "a superabundance of arguments and acts forming the basis of the justice of its cause". Commenting on the restriction of the arbitration in the Argentine draft to Picton, Lennox, Nueva Islands and adjacent islets, the Chilean Foreign Minister made the following extremely pertinent observations by way of guidance to the Chilean Minister in his negotiations:

"... it is a fact that the 1881 Treaty, justly called therein a compromise, was intended to point out the demarcation of Chile and the Republic of Argentina throughout its extension without leaving any gaps or spaces of any kind whatsoever which were not included precisely and categorically. The Contracting Parties, after indicating in the Treaty the demarcation of both countries on the Continent and in the Straits of Magellan, divided into two parts, from North to South, the island of Tierra del Fuego, assigning to Chile the Western part and to the Republic of Argentina the Eastern part and finally distributing the islands located to the East, to the South and the West of Tierra del Fuego. The Republic of Argentina got the archipelago which is to the East, or the islands of Los Estados. Chile got the islands to the West of Tierra del Fuego and to the South of the same.

With respect to the latter, a very comprehensive formula was used to describe them. Tierra del Fuego being bordered to the South by the Beagle Channel, it is sufficient to state, to embrace all of them, that those to the South of this channel belong to Chile, up to the last of them, Cape Horn. Within this sentence there is no doubt that the three islands under question and their adjacent small islands are included. That such was the spirit and letter of the Treaty of 1881 in this respect cannot be doubted in any way, since the negotiators of the Treaty referred to had in front of them at the time when that "compromise" was done the geographic maps of Fitz-Roy showing the Beagle Channel as the Southern limit of Tierra del Fuego, which begins to the East, according to these maps, from Cape San Pio.

It cannot possibly be conceived that if, as believed by these negotiators, the Beagle Channel had its origin on the Eastern side or in the area of the meridian of $67^{\circ}15'$, as claimed today by Argentina, they would have left the islands mentioned above without attributing them to any owner, as res nullius, as a thing abandoned to the first occupant who presented himself.

And supposing that these negotiators had such a strange idea, supposing as the Republic of Argentina wishes, that is to say, that the Beagle Channel commences around the meridian of $67^{\circ}15'$ so that the islands referred to are not to the South of the Channel, what would the Republic of Argentina have gained by this? Would she have strengthened her claim? Would the Treaty of 1881 state that the lands which she had not disposed of in it would belong to her? None of this is to be found in the Treaty. The Argentinian's claim to shorten what has always been understood by Beagle Channel, would bring us solely to this single conclusion: there are a number of islands concerning which the negotiators of the Treaty of 1881 said nothing, and resolved nothing as regards their sovereignty.

Then it would be necessary to define the question of their sovereignty without having reference to this Treaty.

And in this case there will be no other country who could allege a right to the sovereignty of these islands than the one occupying them. And if to this is added that it occupies them in every way, politically and socially, publicly and to the knowledge of its neighbour, the Republic of Argentina, with no contradiction from anyone, until only these last few years, during which the idea has arisen of shortening the Beagle Channel, to exclude them from the Treaty of 1881, we arrive perforce at the deep conviction that there can be no arbitrator in the world, who, called upon to settle the dispute which has arisen concerning the sovereignty of these islands, could decide that they belong to any country other than the State which occupies them.

As a result of these considerations, it is sufficient for the Government of Chile that the arbitration projected should be set up in good faith, with a wide and complete formula, without phrases leading to interpretations limiting the amplitude of its right, to consider the question under discussion as one, whatever the legal principle used as a basis for the arbitration to resolve the question submitted to its judgement, whether the compromise of 1881, or the present and past occupation.

Before concluding, it is fitting not to forget that the Treaty of 1893, as you state, solves nothing concerning the islands in question. Article 2 of this Treaty, refers to

ports on the Continent. If it was claimed that it extended to ports in the Southern Islands, we would arrive at the absurd conclusion that as Argentina today calls the sea which bathes these islands on the Eastern side "Atlantic", Chile would not have any port in the Eastern region of Navarino Island, nor in any of the islands continuing further South, concerning which it has so far occurred to no one to question the sovereignty of Chile" (Annex No. 98).

34. **British Assessment of the position 1915.** The Argentine Foreign Minister persisted, however, in his contention that the 1881 Treaty and the 1893 Protocol complemented each other and were inseparable (Annex No. 103). After further negotiation the difficulty on this point was avoided by inserting in the final text of the Protocol the neutral phrase "in accordance with the Treaties at present in force." The Chilean simplified draft, so amended, was thus adopted as the Protocol for the arbitration and was signed by the Argentine Foreign Minister and the Chilean Minister Plenipotentiary in Buenos Aires on 28 June 1915 (Annex No. 102). In September 1915 the Protocol received the approval of the Argentine Senate and in November 1915 that of the Chilean Senate. In the event, however, the Protocol was not approved by the House of Representatives in either country and so never came into force. During the negotiation of the Protocol the British Government was, of course, informed of the intention of the two Governments to ask it to assume the position of Arbitrator in the dispute; but, understandably, it intimated its reluctance to act in that role while the First World War was still in progress. Nevertheless, the negotiations continued and the question of the British Government's acting as Arbitrator recurred from time to time during the war. As the British files contain material which deserve the attention of the present Court of Arbitration, this Chapter must conclude with an examination of that material.

35. The material in question consists of diplomatic Notes, despatches, letters, telegrams, minutes, memoranda etc. most of which are now in the Public Record Office in London. Only the more pertinent of these documents are included in the Annexes to the present Memorial.

36. In a despatch of 5 March 1915 (Annex No. 87) Sir R. Tower, British Minister in Buenos Aires, alerted the Foreign Office to the possibility of "the question of the Chilean-Argentine frontier" being re-opened by reason of an Argentine claim "being mooted with regard to the islands of Picton and Nueva". He referred to a recent article in the Press by Dr. Zeballos, ex-Foreign Minister of Argentina, and to Argentine complaints regarding the renewal of the leases of the islands. Having also recalled the provisions of Article III of the 1881 Treaty, the 1896 Agreement to submit any disagreement between the Experts to Her Majesty's Government's arbitration, and King Edward VII's Award, the British Minister observed:

"It is to be remarked that no mention was made in that Award of the southern frontier between Chile and Argentina, it being considered by both Parties that the terms of Article III of the Treaty of 1881 were sufficiently explicit to require no further elucidation.

My object in quoting the above is to show that no question has apparently been raised by Argentina as to the interpretation of the said Article, and that Maps, issued either by Argentina or Chile, appear to have marked the Beagle Channel as running to the north of Picton and Nueva Islands. This being so, both Islands would fall under Chilean jurisdiction." (Underlining added)

Remarking, however, that an Argentine map of 1910 showed the frontier as passing between Picton and Lennox (the Julio Popper version), he said that no representations appeared to have been made by Chile but that the Chilean lessees of Picton continued in undisturbed enjoyment of their sheep farming. He added that he had had a long talk with the Chilean Minister in Buenos Aires whom he reported as saying that:

"the tracing of the Beagle Channel had never been in doubt; that his Government were perfectly prepared to abide by the terms of the Chile-Argentine Treaty of 1881 as illustrated by all contemporary maps and charts." (Underlining added)

37. A second despatch followed on 10 March 1915 (Annex No. 89) in which Sir R. Tower reported the Argentine Foreign Minister as saying that both Governments were now agreed on the principle of asking the British Crown to arbitrate and thus complete the 1902 Award; and that the Argentine Government would advance two lines of argument. These would be: (1) that the Beagle Channel ended before reaching Picton and that island, being thus in the open sea could not be affected by the provisions of Article III of the 1881 Treaty concerning "islands south of the Beagle Channel"; (2) that the Channel, if it were extended out to the sea, must be taken as the waterway with the deepest soundings, with the result that it would pass not to the north but to the south of Picton and Nueva islands. In a further despatch five days later (Annex No. 90), Sir R. Tower drew attention to a leading article published in the Argentine newspaper "La Prensa" of 15 March, which he assumed also to be by Dr. Zeballos, and the purport of which was that Chile was said to be overlooking the alleged significance of Article II of the 1893 Protocol.

38. Although no official request for arbitration had yet been received, the Foreign Office on 7 April 1915 telegraphed a warning to the British Ministers both in Buenos Aires and in Santiago that as long as the war lasted any such request would be very inconvenient to the British Government (Annex No. 93). On 9 April 1915 (Annex No. 94) the British Minister in Santiago replied by telegram that he had so informed the Chilean Government. The following day - 10 April 1915 - he sent a despatch to the Foreign Office (Annex No. 95), reporting the strong wish of the Chilean Government that the Beagle Channel controversy should be submitted to arbitration and that His Majesty's Government should accept the role of Arbitrator. On 17 April he sent a further despatch (Annex No. 96) with which he enclosed a copy of a Memorandum on the Beagle Channel controversy given to him privately by the Chilean Under-Secretary for Foreign Affairs in response to his inquiries. This memorandum was the Alvarez report of January 1906 which is referred to in paragraph 20 above and an English translation of which is in Annex No. 82. Giving an account of "the essential facts of the case" as they appeared to him, the British Minister in Santiago, inter alia, said:

"The Argentine Republic claims that the three islands of Picton, Lennox and Nueva are situated in the Atlantic and east of a line drawn from the eastern end of the Beagle Channel to Cape Horn, whilst Chile contends that the Beagle Channel continues east between the mainland and the eastern extremity of Picton Island, and that therefore these islands lie south of the Beagle Channel and west of a line drawn from its eastern extremity to Cape Horn." (Underlining added)

In the underlined phrases of the above passage the British Minister introduced an element - the concept of a line drawn from the eastern extremity of the Beagle Channel to Cape Horn - which has no basis in the 1881 Treaty or in the 1893 Protocol or in any contention ever advanced by either Government. This concept therefore seems to have been simply a misguided effort at summarising the difference between the two countries on the question of the three islands. Mention is made of it here only because the Foreign Office echoed it in a letter asking for the opinion of the Admiralty, and thereby misstated the point to be determined, as in due course the Admiralty did not fail to point out.

39. On 9th June 1915 the Foreign Office wrote identical letters to the Admiralty and to the Director of Military Operations at the War Office (Annex No. 100), transmitting to them copies of Mr. Strange's despatches of 10th and 17th April and stating:

"It appears that a line drawn from the eastern end of the Channel to Cape Horn separates Chilean territory (west) from Argentine territory (east). The arbitrators, therefore, would have to determine the position of the eastern end of the Beagle Channel, which may prove a difficult point to decide without further examination of the locality and, perhaps, a new survey."

Observing that it would be very difficult to spare British Officers during the war and that a request for arbitration would therefore be very inconvenient, the Foreign Office asked for their views "in regard to the question at issue".

40. The War Office replied on 16 June 1915 (Annex No. 101), agreeing that it was not possible to spare British Officers during the war and suggesting that before an answer was sent the question should be referred to Sir T. Holdich for his observations. The Admiralty, who were more closely concerned with the matter, took longer to consider their reply, but on 1st October 1915 stated (Annex No. 105):

"... their opinion, so far as they can at present see, and with only imperfect information before them, is that the islands in the vicinity of the Beagle Channel which are in dispute between the Argentine and Chilean Governments are Chilean."

Adding that they understood the two Powers to have agreed to defer the submission to arbitration until after the war, they continued:

"If the Admiralty will be required to produce evidence or memoranda on the matter in dispute this postponement is certainly preferable, as it would be hardly practicable at the present time for the Department to devote sufficient attention to a subject requiring elaborate research."

41. This reply was the outcome of an examination of the question by the Director of Intelligence and by the Hydrographer, whose observations were set out in Minutes of 26 August and 18 September 1915, entered on an Admiralty file (Annex No. 104). The Director of Intelligence, after reciting the territorial dispositions contained in Article 3 of the 1881 Treaty and the claims of each country, said: "The real question at issue between the two countries is as to the meaning of the term Beagle Channel in Article 3 of the Treaty of 1881". Addressing himself to this question, he later observed:

"The Chilean contention that no fresh hydrographical survey is required, and that the term Beagle Channel in the Treaty of 1881 is to be construed according to the common acceptance of the term at that date appears to be undoubtedly sound. It would be an impossible position if the meaning of a term like the Beagle Channel in a Treaty could alter if the Channel altered its course. Moreover, it would appear from the wording of Article 3 that the authors of the Treaty regarded the Beagle Channel as a definite ascertained Channel, and not as a Channel which required to be ascertained by any further survey, or expert examination and discussion. The term Beagle Channel is evidently used in Article 3 to denote a definite Channel, and the only difficulty that now arises is what the authors of the Treaty understood that definite Channel to be.

Prima facie it would seem to be the case that the Beagle Channel flows North of Picton Island, and that its Eastern extremity is Cape San Pio.

There is an Admiralty Chart based on an Argentine Survey made in 1899 and 1900, which is labelled "The Beagle Channel - Cape San Pio to Gable Island". It further appears from the most modern charts that the Channel flowing S.W. of Picton Island has been much less surveyed and charted than the Channel flowing N. of Picton Island: so far as the S.W. Channel has been surveyed and charted it appears to be distinctly more dangerous and less convenient than the Channel flowing to the North."

The Director next drew attention to some further points made in the Alvarez memorandum: the opinion of the Commander of the French ship "Romanche" that the Beagle Channel comes out south of Tierra del Fuego at Cape San Pio; the description of the Channel given by Captain Parker King in his lecture to the Royal Geographical Society in May 1831; Sheet 27 of the 1885 edition of the Atlas of the Argentine Republic, and Sheet 2 of the 1891 edition of the General Map of the Argentine Republic,

which both show the Channel as having its exit to the north of Picton; the replacement of these maps by a new map showing a different course in 1893; Chile's exercise of sovereignty over a good many years. He then advised that the Foreign Office should be informed that in the opinion of the Admiralty:

"The Argentine have no valid claim to Lennox Island, and that the question of the right to Picton Island and New Island depends upon the construction of the term Beagle Channel in Article 3 of the Treaty of 1881. If the Islands in question are South of the Beagle Channel, they are Chilean, if North they belong to the Argentine. There is no justification whatever in the Treaty for the view that a line drawn from the eastern extremity of Beagle Channel to Cape Horn has a bearing on the question which country the 3 Islands belong to. This appears to be a question of the meaning attached to the term Beagle Channel, at the date when the Treaty was signed, and not to depend upon the position of the eastern end of the Channel, or a line drawn from that point to Cape Horn, or to require an examination of the locality, or a new survey."

While emphasising that the Admiralty could not express a definite opinion without hearing the Argentine case, the Director advised that the Admiralty should add "it would appear prima facie as though the Beagle Channel flowed north of Picton Island and extended to Cape San Pio, and that Picton, New and Lennox belong to Chile". Since an immediate award was not asked for, the Director saw no objection to the arbitration's being accepted.

42. After expressing his general concurrence with the Minute of the Director of Intelligence, the Hydrographer said that he had been having difficulty in obtaining the previous papers in his Department on the question. The most relevant paper so far traced, he said, was one of 1892 which dealt with the despatch of 10 April 1892 from the British Charge d'Affaires in Buenos Aires enclosing a map of Tierra del Fuego just published, together with a previous map of 1885 published in Atlas form in 1886 by the "Instituto Geografico Argentino" (Annex 60 (a) and see para.6 of this Chapter). The despatch had pointed out that the 1885 map showed New Island and Picton as Chilean, whereas in the map of 1892 they were marked as belonging to Argentina. The Minute on this despatch recorded in 1892 by the Hydrographer's predecessor ran as follows:

"Noted. As this map is merely a private publication the inclusion within Argentine boundary of two islands which have always been considered Chilean, need not be considered seriously: no remarks to make for Foreign Office." (Underlining added)

The Hydrographer in his Minute of 18 September 1915 added that the earlier Argentine map, although not an official publication, is one of the strongest published evidences of Argentine opinion of that day on the Boundary question. He attached tracings of two Argentine maps found in the British Museum which he mentioned as again clearly showing "the general Argentine views of that period on the subject" and which clearly marked the three islands as Chilean (Plate 114). The Hydrographer concluded his Minute by saying that further investigation might possibly furnish other evidence but it was obviously impossible at that time for complete justice to be done in such an important and interesting question.

43. The Admiralty, as already stated, replied to the Foreign Office in a letter of 1 October 1915 on the lines proposed in the above Minutes (Annex No. 105); and, for present purposes, there the matter may be said to have rested until March 1918.

44. During 1917 Sr. Guillermo Guerra, Professor of International Law in the University of Chile, published his book "Chilean Sovereignty in the Islands to the South of the Beagle Channel", in which he made a close examination of the geographical as well as the legal aspects of the question of the disputed islands. Having received a copy of this book, the Hydrographer noted that

it contained "a long and minute examination of the British Admiralty publications bearing upon the question at issue" (Annex No. 107). In consequence, in a letter of 17 March 1918 (Annex No. 108), the Admiralty informed the Foreign Office that they were "anxious to obtain copies of all the discussions on the subject emanating from Argentine sources", and asked that the British Minister in Buenos Aires should be instructed to lend his assistance in the matter. The Foreign Office then forwarded the Admiralty's request to the British Ministers both in Buenos Aires and in Santiago (Annex No. 109). Despite the continuance of the war, the Hydrographer took up the study of the Beagle Channel question, and by September was in a position to state in a Departmental Minute (Annex No. 115):

"A most exhaustive examination has now been carried out in this Department which it is hoped will throw further light on this important question."

He added, however, that before submitting his results and conclusions it was desirable to ascertain if the question of arbitration had altered in any material point since 1915. The Admiralty then put this question to the Foreign Office in a letter of 9 September 1918 (Annex No. 116), explaining that the Hydrographer had accumulated further data on the subject which he could work up into a considered statement if there were any chance of the Arbitration's coming on at an early date.

45. The Foreign Office replied on 26 September 1918 (Annex No. 117) that the position had not altered in the sense that the British Government were not officially pledged to undertake the arbitration and would not in any case be asked to do so until after the war. It added that the 1915 Protocol had not in fact yet been passed by the Argentine Lower Chamber and that, judging from an enclosure to a despatch from Sir R. Tower in Buenos Aires, there was reason to think that the matter might never come to arbitration in the end. This enclosure was a Memorandum by the eminent Argentine boundaries Expert, Dr. Francisco P. Moreno, (Annex No. 113), which had been written by him in the previous July for the purpose of setting out the reasons why he considered that the Argentine case could not possibly succeed in the arbitration. Forwarding a copy of this memorandum to the Admiralty, the Foreign Office said that they would now act on the suggestion of the War Office in 1915 that Sir Thomas Holdich should be asked for his views: and that in the circumstances it hardly seemed worth while for the Admiralty to subordinate other important work to the preparation of a statement on the Beagle Channel dispute.

46. **Moreno View.** The Foreign Office duly obtained a written statement of his views by Sir T. Holdich. But before either Dr. Moreno's important memorandum or Sir Thomas Holdich's statement are examined it is necessary to give a brief explanation of the circumstances leading to the writing of the Memorandum.

47. Earlier in 1918 Dr. Moreno, it appears, had become preoccupied about what he suspected were German attempts to create difficulties between Argentina and Great Britain by encouraging Argentina to submit to British arbitration a dispute which Great Britain was, in his view, bound to decide against Argentina. Following his contacts with Sir Ernest Shackleton and Mr. James A. Cook, with whom he was then engaged in exchanging ideas for increasing British-Argentine friendship, he communicated these suspicions to Mr. Cook in a letter dated 2nd July 1918, which came to the notice of the British Foreign Office on 23 August 1918. How seriously he took the matter may be judged from the fact that, as appears from the letter, he had shortly before raised the question with the President of Argentina. His suspicions he explained as follows:

"As you know, I have had much to deal with the boundary between these two countries. I have no doubt that according with the Treaty of 1881 my country has no right at all to the Islands Picton, Lennox and New, situated to the South-East of Tierra del Fuego, which are undoubtedly Chilean by that Treaty. From 1881 to 1915, the Argentine

Government had never claimed those islands, but I suspect that Count Luxburg, ex-German Minister in this country has been the instigator of the revival of a boundary question between Chile and Argentina. It is in the convenience of the German Government to impede the natural growing of the mutual intimacy of your country and mine, and being by the Argentine-Chilean Agreement of 1902, the British Government the arbitrator in all the arbitrable differences that should arise between the two countries, and the British Government being undoubtedly obliged to give his award against Argentina, it was very important to German interest to make arise that new boundary question. It is very suggestive, that the first Argentine newspaper, which called public attention to the rights of Argentina to these three islands (insignificant) was "La Prensa" and the article wrote by Dr. Estanislao S. Zeballos, former its Director, and who has great influence in this news-paper. Dr. Zeballos has been several times, and during several years, from 1881 to 1908 Argentine Minister of Foreign Affairs, and never had called attention to the Argentine rights to Picton, Lennox and New Islands, before January 1915, when he wrote his first article in "La Prensa". This article made some sensation in the public opinion and attention was called to the Government. Dr. Murature former redactor in chief of "La Nacion" was then Minister of Foreign Affairs. Count Luxburg surely used of his influence and other means, and the Minister being influenced, proposed to the Chilean Government to submit to arbitration of the British Government their rights to the sovereignty of the South Fuegian Islands, and a protocol was signed the 28th of June 1915, in accordance with the wishes of the Argentine Government."

He then gave the gist of what had transpired at his meeting with the President:

"I wanted to explain to the President of the Argentine Republic what I think in the matter. The ridicule of our pretention, and the convenience to stop in the Chamber of Deputies the discussion of the Protocol which had been approved by the Argentine and Chilean Senates. The President was much impressed on the gravity of the affair, and I think that he is going to proceed in a convenient form to settle it without arbitration. Thus the British Government will not be put in the case to give an award against Argentina, as is wished by the Germans."

48. Sir R. Tower, as he states in his despatch of 23 July 1918 (Annex No. 114), asked Dr. Moreno to put his views on paper, who then wrote in Spanish the Memorandum which Tower forwarded to the Foreign Office with that despatch, in an English translation. The Memorandum, which is dated 17 July 1918 (Annex No. 113), is extremely significant, coming as it did from the hand of a former member of the Argentine-Chilean Boundary Commission and commonly regarded in Argentina as the most eminent of her Boundary Experts. Having emphasised that during the diplomatic negotiations leading up to the 1902 Award there was never any question of the frontier in Tierra del Fuego and having set out the terms of Article III of the 1881 Treaty, Dr. Moreno commented:

"According to this article, which is not a little obscure, the Argentine-Chilean boundary line in Tierra del Fuego, that is to say on the main island of Tierra del Fuego touches the Beagle Channel and gives to Chile all the islands situated "to the south of Beagle Channel" but gives no decision regarding the islands in the Beagle Channel itself; however when in 1884, the Argentine Government took possession of the Bay of Ushuaia and founded the first military station on that coast, they gave the word "tocar" (touch) the interpretation which was certainly intended in the Treaty of 1881. In 1886 I was able to obtain from the Government, for my worthy friend the Anglican missionary Thomas Bridges, who was then already an Argentine citizen and had resided in Ushuaia since 1868 civilising the wretched natives of those parts, a concession of 8 square leagues "on the Beagle Channel" in which "might be included Gable Island and the adjacent islets". This concession was not only a new "act of national jurisdiction" in the Beagle Channel but in itself determined the general boundary line with Chile as being along the main and deepest part of that Channel.

Mr. Bridges received the title deeds of this concession, after survey, which included "Gable Island and the adjacent islets", on the 17th of November 1893. Twelve years had passed since the Treaty of 1881, during which time the Argentine Government had committed

other jurisdictional acts in the Beagle Channel against which Chile had not protested. From this one may gather that the Chilean Government interpreted that part of the Treaty in the same manner as the Argentine Government namely that the dividing line should be along the main deep-water channel (las aguas profundas y regulares), or in other words the mid-channel line (la linea media) of the Beagle Channel. There was no need for tracing a line there, for common sense fixed it, viz: the north side of the channel to Argentina and the south side to Chile.

Had Chile and Argentina given any other interpretation to this Article III of the Treaty of 1881, their representatives would have discussed it when agreeing on the explanatory Protocol the 1st of May 1893...."

49. Thus, as early as 1886 Dr. Moreno was concerning himself with the question of Argentina's rights to islands in the Beagle Channel under the terms of the 1881 Treaty. The view which he took of those rights then and in 1918 he stated as follows:

"As for me, both as a private individual and as Argentine expert, I never doubted that the boundary in the far south might be any other. The mid-channel line of the waters of the Beagle Channel was that of the Treaty of 1881. The mere mention in the latter of the "Isla de los Estados and islets adjacent to it" indicated that all islands to the south of the Channel and to the south of Tierra del Fuego, which are fragments of the continent, are Chilean."

This view of Argentina's rights, it may be added, is the same as that reflected in Argentine Decrees of that period dealing with the Governmental district of Tierra del Fuego and in Argentine maps showing the distribution of land concessions. (Plate 120).

50. Dr. Moreno explained that there was no real discrepancy between the view he was expressing in 1918, and the one expressed the lecture he gave to the Royal Geographical Society in 1899 as shown by the map attached to the text when published (Plate 118). Dr. Moreno then referred to maps which bore his name and were thus attributed to him, which showed a boundary line different from the line which he believed to be the right one, and completely disavowed those maps in so far as they depicted the Beagle Channel boundary as turning south eastwards to pass between Picton and Lennox Islands. He wrote:

"As regards the maps included in the book of Senor L. Gallois "Los Andes de Patagonia", published in May 1901, and in the article of the same author entitled "La Frontiere Argentino-Chilienne", January 1903, which maps bear my name, the boundary line as there marked includes the islands of Picton and Nueva in Argentine territory, but I must here declare that this demarcation was made by the Argentine Legation in London contrary to my opinion. I had to consent to it so as not to increase further the many difficulties I experienced during the whole of my stay there in defending Argentine interests which were often misunderstood by our Government and their Representatives." (Underlining added)

In this connection it should be added that the line shown in the Gallois maps mentioned by Dr. Moreno in this passage is the same as was shown on Sheet No. XIV in the Argentine collection of maps submitted to the 1898-1902 Arbitration Tribunal (Plate 84 and see para 35, chapter VII). Accordingly Dr. Moreno's complete disavowal applies to that map as well.

51. Having recalled that it had never occurred either to him or to Sir Thomas Holdich during their visit to the area in 1903 that any difficulties might arise there and that the map in Holdich's book showed the boundary as passing between Tierra del Fuego and Picton and Nueva islands, Dr. Moreno continued:

"I am at a loss to explain why the Argentine Government now claim jurisdiction

over the islands of Picton, Nueva, Lennox etc. founding their claim on existing treaties, that is to say on the Treaty of 1881 and on the Protocol of 1893, seeing that the former excludes them from making such a claim, and the second has nothing to do with the delimitation of the Beagle Channel. I will go further and say that the mention in the Treaty of 1881 of the "Isla de los Estados", as an exception, would make them lose their flimsily founded case. In my opinion the right course would be for both countries to withdraw from their Chamber of Deputies the Protocol of the 28th of June 1915, and agree on the boundary being the mid-channel line in the waters of the Beagle Channel, that is to say from the north-westernmost point of Picton Island to the west. It must not be forgotten that the "Navigation Guide for the Argentine Coasts" ("Derrotero de las Costas Argentinas"), in its official edition of 1900, considers the islands of Nueva, Lennox and Picton as Chilean, and that the Head of the Argentine Delimitation Sub-Committee of 1894, I refer to the present Rear Admiral Juan A. Martin, said the following 'I think that the two islands, Picton and Nueva, belong to Chile both by Treaty and by Nature'." (Underlining added)

In short, he underlined that the view which he was expressing was not personal to himself but was the one held at the time by other Argentine authorities competent in the matter.

52. Before concluding Dr. Moreno also indicated his view of the Beagle Channel:

"As regards what exactly is to be understood as the "Beagle Channel", one must not forget also that the "South American Pilot" published by the British Admiralty in 1871 which is in fact the last edition previous to the Treaty of 1881, states as follows: 'BEAGLE CHANNEL. To the north of Lennox is the eastern opening of the Beagle Channel, which is a narrow passage running about W.S.W. for 120 miles in nearly a direct line, between ranges of mountains always covered with snow' and in the edition of 1886, which I have before me: 'BEAGLE CHANNEL. To the north of Lennox Island is the eastern opening of Tierra del Fuego', which is a narrow passage running about W.S.W. for 120 miles, in nearly a direct line, between ranges of snowcapped mountains'

As may be seen from the passages quoted above, the Beagle Channel is closely flanked on either side by the snow-capped mountains of the coast on the north side and of the big islands of the south, Navarino, Hoste and Gordon, on the other; while that part of the ocean to the north and east of Picton Island has not these characteristics and lies outside the Channel. Also I would repeat that the exception made in the Treaty of 1881 as regards the 'Isla de los Estados', which is recognised as Argentine, leaves no doubt that the lands lying to the south of the island of Tierra del Fuego as well as to the south of the Beagle Channel, belong to Chile." (Underlining added)

In this passage, as appears from the memorandum submitted by the Hydrographer of the Admiralty on 28th December 1918, although Dr. Moreno was not correct in his interpretation of the British view of the Beagle Channel, he was entirely correct in his conclusion as to ownership of the islands. The evidence, as the Hydrographer there pointed out, establishes that from the time of the voyages of the "Beagle" the Channel had been considered as extending eastwards beyond Picton Island as far as Cape San Pio. (See below para 58 et seq).

53. Finally, Dr. Moreno elaborated his suspicions of German influences behind the negotiation of the Protocol and then concluded:

".... during the last few days I have had long and confidential conversations with the President of the Republic, Dr. Irigoyen, whom I have apprised of all the circumstances affecting this new question. I believe an agreement will be come to by which the Protocol will be annulled and the only action taken will be to define the proper mid-channel line of the Beagle Channel, from the west of Picton Island to the longitude

¹ The reference to "Tierra del Fuego" is a copying mistake in Dr. Moreno's memorandum for "Beagle Channel". See "South American Pilot" 1886 p. 23.

already traced, keeping in mind the positions accepted from 1881 up till January 1915, when "La Prensa" and "La Nacion" by their groundless alarms brought about the above-mentioned Protocol."

Dr. Moreno, as the history of the matter traced in the present Chapter shows, may have overlooked the gradual germination of Argentina's claims during the two decades before 1915. But it remains significant that, for this eminent Argentine geographer and boundary expert, the accepted position up till 1915 was that the sovereignty of Picton, Nueva and Lennox was not in question.

54. **Holdich view.** The Foreign Office, as previously stated, after receiving a copy of Dr. Moreno's memorandum decided to ask Sir. Thomas Holdich for his view. This they did in a letter of 26 September 1918 (Annex No. 118), which made no mention of Dr. Moreno's memorandum. The letter, having set out the terms of the "compromis" in the 1915 Protocol and summarised the terms of Article III of the 1881 Treaty, simply stated:

"The Argentine Republic claims that the three islands of Picton, Lennox and Nueva are situated in the Atlantic and East of a line drawn from the Eastern end of the Beagle Channel to Cape Horn, while Chile maintains that the Beagle Channel continues East between the mainland and the Eastern extremity of Picton Island, and that therefore these islands lie South of the Beagle Channel and West of a line drawn from its Eastern extremity to Cape Horn.

The question therefore resolves itself virtually into the determination of the Eastern end of Beagle Channel.

Should Sir T. Holdich be able, from his personal knowledge of the region, to express a view of the position of the end of the channel and on the conflicting claims of the two Republics, Mr. Balfour will much appreciate his assistance in the matter."

Thus, as in their letters to the Admiralty and War Office, the Foreign Office unfortunately misstated the point to be determined; for the concept of a line drawn from the eastern end of the Beagle Channel to Cape Horn had no basis whatever in the 1881 Treaty or any other instrument applicable between the two countries.

55. Sir Thomas Holdich took only four days to send his reply, which he did in a letter of 30 September 1918 (Annex No. 119). He began by saying that the dispute had been informally discussed when he was navigating the Beagle Channel in the Argentine gun-boat "Patria" during the progress of the Chile-Argentine Boundary Commission in Patagonia; "consequently I took note of the position of the islands in question". On this point, therefore, his recollection seems to have been a little different from that of Dr. Moreno, who insisted that it had never occurred either to him or to Sir Thomas "that the day would come when the British Government would once more be requested to decide frontier questions in Tierra del Fuego". At any rate, he continued:

"The vague geographical definitions which are at the very root of the dispute must necessarily have an arbitrary meaning given to them in order to arrive at any conclusion whatever.

To the eastern 'end of the Beagle Channel' the eastern 'entrance' to that Channel must be assumed as the equivalent, and the point to determine is, which is the eastern 'entrance'. The geographical position of Picton Island divides the eastern approach to the Channel into two actual entrances. That to the west of the island is the one to which Darwin refers in his 'Voyage of a Naturalist round the World' as connecting the Goree roads (where the Beagle was anchored) with the Channel. That on the north-east side of the island is the one by which the Patria entered from Staten Island, and it is undoubtedly in my opinion the main or chief entrance. It was a grey and misty afternoon

but visibility was good enough to enable me to see the headlands both north (Cape Piu) and south of the entrance, and to note the shallowing of the water over the approach (there is no actual bar). This was certainly regarded as the 'entrance' by the commander of the *Patria* at that time. Whether it was so regarded when the treaty of 1881 between the Chilean and Argentine Governments was made is only to be decided by historical references, which can be readily made if necessary (they will be found in '*La Soberania Chilena en las islas al sur del Canal Beagle*', published at Santiago de Chile in 1917), but I am strongly of opinion that it is modern practices in navigation and not historical references which should weigh most in deciding a dispute of this nature. On the whole it is clear that the entrance which I noted between Cape Piu and the south-eastern extremity of Picton Island is the one which has been generally accepted and used by navigators."

56. In the above passage Sir Thomas Holdich was evidently addressing himself to the problem as it has been wrongly posed by the Foreign Office. Nevertheless, this led him to consider what should be regarded as the eastern 'entrance' to the Beagle Channel and to give it as his firm opinion that the channel to the north-east of Picton Island constituted the main or chief entrance. Moreover, he specified Cape San Pio as the northern headland of the entrance, adding that this entrance was certainly regarded as the 'entrance' by the Argentine commander of the "*Patria*". His strong opinion that it is modern practices in navigation and not historical references", had he known them, would have confirmed Cape San Pio as the northern headland of the entrance to the Beagle Channel, as has been shown in Chapter V. They would, however, have shewn him to be wrong as to its southern headland. Sir Thomas did not indicate on what he based his statement that "the entrance which I noted between Cape Piu and the southern-eastern extremity of Picton is the one which has been generally accepted and used by navigators". Possibly, approaching the Beagle Channel from the north-east on the "grey and misty afternoon" which he described, he failed to observe, or take in the significance of, the north-east end of Nueva Island as the natural southern headland to the entrance to the Channel from the Ocean. Or, as later passages in his letter suggest, he may have been over-eager to find a reason for assigning Nueva Island to Argentina, while leaving Picton and Lennox to Chile. At any rate, a glance at the Chart suffices to show that Sir Thomas's thesis that the Cape San Pio - Cape Maria (south-eastern point of Picton) line made neither geographical nor navigational sense; and it was not the view of the Hydrographer in the memorandum which he later submitted. Indeed, Sir Thomas's thesis was quite novel, not having formed part of any of the several theories previously advanced in support of Argentina's pretensions.

57. Having constructed this artificial version of the eastern end of Beagle Channel, Sir Thomas proceeded to deduce from it his answer to the Foreign Office's misconceived question about "a line drawn from the eastern end of the Beagle Channel to Cape Horn". This he did in a manner which can only be described as both bizarre and arbitrary:

"A line drawn from the eastern 'end' of Beagle Channel to Cape Horn must start from some fixed point. Again it must be assumed that the point in question is either at one end of the 'entrance' or in the middle of it. It is not a matter of great consequence which point is selected. Taking the middle point, this line would leave the islands of Picton and Lennox to the west and Nueva to the east of it. This would give the first two islands to Chile and the last to the Argentine. Only a line drawn from the centre of the entrance on the south-west of Picton Island to Cape Horn could leave all three islands to the east and consequently to the Argentine. Even then the question would arise whether these islands are south of the Beagle Channel. I think that clearly by 'south' is meant 'due south' and not south-east, and that consequently Nueva should be adjudged to the Argentine by the terms of the treaty and not to Chile."

The reasoning in the above passage, despite the belated lip-service to "the terms of the treaty", bears almost no relation to the territorial dispositions embodied in the 1881 Treaty. It therefore seems probable that Sir Thomas's choice of the middle point of the Cape San Pio - Cap Maria entrance from which to draw a line to Cape Horn so as to assign Nueva to Argentina was dictated by other considerations set out in his next paragraph:

"My opinion then is that the islands of Picton and Lennox should be adjudged as Chilean, and Nueva as Argentine under the terms of the treaty. Geographically no doubt all these islands belong to the same group but there are no ethnographical or political problems likely to arise from their possible separation, and the only question is one of naval strategy and security. Undoubtedly Argentine interests prevail in the Beagle Channel. Harberton and Ushuaia are important centres of sheep farming and timber industry, and the navigation of the Channel is (or was) almost entirely Argentine. That Chile should retain a preponderating control of the eastern entrance by the occupation of all three islands under modern conditions of naval warfare (which admits of submarine bases) appears to be most inadvisable, so that, in spite of the difficulties which may be expected to arise from the division of a geographical group, the award of Nueva to the Argentine appears more likely to lead to a satisfactory issue than any other. I may be permitted to add with reference to certain criticisms that have recently appeared that in my book 'The Countries of the King's Award' I purposely made no reference whatever to the dispute."

The above considerations, as was later pointed out by the Hydrographer, were wholly alien to the question of the interpretation of the 1881 Treaty. Furthermore, if Sir Thomas Holdich may have been correct in his recollection that in his book he had - purposely - made no reference to the dispute, he seems to have forgotten altogether that in this same book was a map, specially ordered by him showing the boundary entering the Ocean between Cape San Pio and Nueva Island and thus assigning this island also to Chile (Plate 92).

58. **Admiralty Hydrographer's memorandum.** On 9 October 1918, in view of the differences in the opinions of Sir Thomas Holdich and Dr. Moreno, the Foreign Office asked the Admiralty after all to provide it with "a considered statement on the merits of the respective claims of the two Governments" (Annex No. 120). Some ten weeks later - on 20 December 1918 - the Hydrographer, who had for some time past been collecting material on the subject, submitted to the Board of Admiralty for its approval a detailed memorandum on the claims of the two countries to Picton, Lennox and Nueva Islands (Annexes No. 121 and No. 122). In his Minute of that date (Annex No. 121) the Hydrographer drew attention to the fact that the conclusion in his memorandum differed from the views expressed by Sir Thomas Holdich, and made the following pointed criticisms of those views:

"(1) The geographical definitions which are alluded to as being vague in paragraph 3 are not considered so in this Department.

(2) It is not considered that any geographical definition found in the 'Voyage of a Naturalist round the World' can possibly be as authoritative as those given by the Explorers in their original reports.

(3) The statement that 'modern practices in navigation' can be considered in this connection appears quite inadmissible.

(4) It is not considered that this question is in any sense 'one of naval strategy and security'; for such considerations, which obviously may vary from time to time, cannot possibly be allowed to affect interpretation of established Treaties.

(5) It is to be observed that although this Department in its Memorandum has drawn attention to the existence of a legal problem arising out of acts of jurisdiction exercised by the Chilean Government over the three islands in question, this aspect

has not been dealt with by the President of the Royal Geographical Society, and it is suggested that it is of sufficient importance to be referred for legal opinion."

Having been duly approved by the Board of Admiralty, the Hydrographer's Memorandum was transmitted to the Foreign Office under cover of a letter which stated "This Memorandum treats the subject exclusively from a geographical and hydrographical point of view, and so far as that aspect of the matter is concerned Their Lordships have nothing to add."

59. The Hydrographer's Memorandum is reproduced in full in Annex No. 122 but it is pertinent to set out here the conclusions to be drawn from it in regard to the merits of the respective claims of the two countries in the present case. The Memorandum, which runs to some twenty pages in the original and also includes a number of illustrative Charts, began with a "brief review of the geographic and diplomatic history of the question". In this regard the Hydrographer explained that it was the opinion of his Department that the "controversy turns upon a geographical problem, which, by its importance entirely dominates all other aspects of the question." The true legal issue, as pointed out in Chapter V, is not the geographical concept of the Beagle Channel in general but the concept acted on by the Parties of the 1881 Treaty. Subject to this qualification, however, the opinion expressed by the Hydrographer was true enough for the purposes of his Memorandum.

60. Having referred briefly to the discovery and exploration of the southern regions of the American Continent, the Memorandum set out the terms of Article III of the 1881 Treaty and added:

"Chile interpreted this article of the Treaty in the sense that Picton, Lennox and New Islands lay to the south of the Beagle Channel, and therefore belonged to her; and acting under this conviction, performed various acts of jurisdiction and possession, the legitimacy of which does not appear to have been disputed for nearly twenty years."

Next, it turned to the 1893 Protocol, explaining that this "was intended to give precision to certain provisions of the earlier Treaty, since a correct interpretation of some of the articles of that agreement had been rendered difficult in the light of subsequent geographical exploration in the Andes." It then set out in full the terms of Article II of the 1893 Protocol.

61. After these preliminaries, the Memorandum summarised the arguments of the two contending Governments as follows:

"It is claimed by the Argentine Government that the form and limits of the Beagle Channel have never been defined so closely as to make it certain that the term 'islands to the South of the Beagle Channel' should be regarded as applicable to Picton, Lennox and New Islands; that the eastern mouth of that Channel may be considered to include all the islands in question, which cannot, therefore be assumed to lie to the South of it; or else, that the channel may be regarded as terminating to the West of Picton Island, which, together with Lennox and New Islands must be considered to lie in Moat Channel (see attached chart cutting); that the basic principle of the 1893 Protocol, to the effect that the Argentine Government should have exclusive possession of ports upon the Atlantic, and that Chile should exercise exclusive dominion over those situated upon the Pacific, cannot be reconciled with Chilean possession of Picton, New and Lennox Islands, all of which lie on the former ocean; and that these circumstances combine to render an arbitral decision upon the subject imperative.

It is argued by the Chilean Government that an inspection of the works in which the original explorers of the Beagle Channel recorded their discoveries, makes it evident that the form and limits of that channel were defined in such a way as to justify the manner in which the Chilean Government has interpreted the words "islands to the S. of the Beagle Channel"; that the claim of the Argentine Government, to the effect that the islands under discussion lie in Moat Channel, is inadmissible; since the definition of the Beagle Channel,

given to that waterway by its first explorers, invalidates the argument: that the acts of jurisdiction, performed by Chile over Picton, New and Lennox Islands, during the years following the 1881 Treaty, confirm the claim of that country to the undisturbed exercise of her sovereign rights over those islands; that the 1893 Protocol referred only to a certain portion of the continental boundary between the two republics, and that neither its basic principle nor particular provisions are applicable to the maritime frontiers of Argentine and Chile."

The Court will observe from this summary that the Hydrographer's Department had made a careful study of the cases of the two Governments and was fully seised of their essential elements. From them the Hydrographer concluded that the contentions of the Parties hinged primarily on two questions:

- (1) What is the form and what are the limits, of the Beagle Channel; and
- (2) What is the correct interpretation of that portion of the Boundary Treaty of 1881, which has occasioned the present controversy.

He added that the Argentine argument as to the degree to which the 1893 Protocol was applicable was a secondary one which could only be answered by international jurists.

62. Observing that the first question - the form and limits of the Beagle Channel - was by far the most important and that its correct solution would appear to settle the controversy, the Hydrographer first examined the evidence concerning the exploration of the Channel by H.M. ships Beagle and Adventure and the opinions of Captains Fitzroy and Parker King as to its course and extent. From this he drew the conclusion:

"The Beagle Channel alluded to in the Narrative, and described by Captain King in his letter of proceedings, his lecture, and his sailing directions, is the waterway which has been tinted in blue on the attached chart cutting, whilst its eastern entrance must be regarded as the stretch of water between the coast of Tierra del Fuego to the west of Cape San Pio, and the northern shores of the New and Picton islands. Any other conception of the channel would be at variance either with the straightness of its traject, upon which the first explorers insisted so frequently, or with the eastern and western limits which they defined with such precision."

The Court is invited to note the Hydrographer's positive conclusion that the Beagle Channel, in historical references is the channel tinted blue on the chart which accompanied his Memorandum (Plate 117) and that accordingly the eastern entrance "must be" between the coast of Tierra del Fuego and the northern shores of New and Picton Islands. On that chart the blue tinting marking the Beagle Channel extends unequivocally right up to the very line joining Cape San Pio and Nueva Island.

63. However, before stating his final definition of the Beagle Channel, the Hydrographer thought it right to make a similar investigation "with regard to Moat Bay, now known as Moat Channel". He conceded that this second investigation could not be as rigorous "because Moat Bay although shown on their original chart is not mentioned in any report or description of the locality made by King or by Fitzroy". He also pointed out that the name must have been given to that feature by Midshipman Stokes whose expedition had only been referred to in the briefest manner by Fitzroy. He then observed:

"The only document, which can be stated with certainty to express the ideas of Fitzroy and of Stokes on the point at issue is the fair chart of the locality, drawn in 1831,

at the conclusion of the first expedition, and the attached tracing of the eastern mouth of the Beagle Channel has been taken from that source.

An examination of the manner in which the name Moat Bay has been placed with respect to the neighbouring shore line, and to the central line of the channel, leads to the conclusion that, it was intended to designate as Moat Bay, the bend which occurs in the coast line between Cape San Pio and the Woodcock islands.

This opinion is strengthened by an examination of the first edition of Admiralty Chart No. 1373, where the name, although brought more towards the centre of the channel, is still drawn on a curve which is nearly parallel to the shape of the bay.

A less elaborate, but equally certain method of arriving at the same conclusion, is afforded by the reflection that FitzRoy can never have intended to give the name of Moat Bay to an open channel; and that the only feature in the locality corresponding to the accepted notion of a bay, is the one described."

The "attached tracing" referred to in the first paragraph quoted above is included in the Atlas (Plate 116, Sketch A) together with two of the other maps referred to in the Memorandum.

64. The Hydrographer was now in a position to state his definite conclusions, which he did as follows:

I. That the Beagle Channel as conceived by its first explorers is a narrow channel, about 120 miles in length, running between Capes Kekhlao, on the Eastern side of Cook bay, and Cape San Pio.

II. That the feature now shewn on the Charts as Moat Channel should really be termed Moat Bay, which should be regarded as lying between Moat Point, on the East, and a round, unnamed point 8 miles to the West of it.

These conclusions make it fairly certain, that, the words in Article 3 of the boundary treaty of 1881 'islands to the South of the Beagle Channel', include Picton, New, and Lennox islands, which in the opinion of this Department, belong to Chile." (Underlining added)

65. The Hydrographer ended with what he called "a few words in explanation of the arguments that might be brought forward to combat the view which has been taken". These few words throw a significant light on some aspects not only of the cartographical history of the Beagle Channel but also of Argentina's arguments:

"The statement in the Admiralty Sailing Directions for 1852, that the Eastern mouth of the Beagle Channel lies to the "North (magnetic) of Lennox island", is not wholly satisfactory, and it might be maintained that this definition does not preclude the possibility of including the passage between Picton and Navarino islands within the eastern opening.

"This argument is strengthened by the reflection that, in the 5th edition of the Sailing Directions, published in 1860, the editor, Mr. Hull (Master) certainly held that opinion. His description of the Eastern mouth has in fact been the basis of the claims of the Argentine Government, and was worded as follows: 'Its eastern entrance lies to the NW. of Lennox and New Islands on either side of Picton island'.

Whilst admitting the feasibility of such a standpoint, it must be added that it is seriously weakened by other considerations.

I. Mr. Hull was not an original explorer of the channel, and his alteration of the original description of the Eastern mouth, made by the discoverers of the Channel, cannot be regarded as authoritative.

II. The description given by him was abandoned in the next edition of the Sailing Directions and has not since been revived.

III. If the passage between Picton and Navarino islands be regarded as part of the Beagle Channel, that waterway no longer possesses the feature of straightness, so frequently alluded to by the first explorers.

IV. The inclusion of the above passage in the Beagle Channel gives it two eastern openings, or more properly, an eastern and a south-eastern one; whereas King and FitzRoy distinctly allude to only one, by referring to it in the singular.

V. The opinion of impartial geographers cannot be neglected, and the writers of the best-known geographical works of the 19th and 20th centuries appear unanimous in regarding the eastern opening of the Beagle Channel in the manner described in the general conclusions of this Memorandum. It must be admitted, however, frankly, that, at the present moment, the Admiralty Charts and Sailing Directions have, in some respects, departed from the definition originally given to the Beagle Channel by King and FitzRoy.

It has been stated, however, that these departures from the texts of the original authors are not geographically admissible; and, if no diplomatic question were involved, the mistakes could and would at once be admitted and rectified. But, as the present misstatements, or ambiguity, of the Admiralty publications lend some colour to the arguments now advanced by the Argentine Government, it would appear as though the British Government had already decided in favour of the Chilean republic, if the errors in question were now rectified; for such corrections could only be made upon the Admiralty Charts and Sailing Directions, and their appearance would mostly [sic] certainly be noticed by such technical experts as are at present advising the Argentine and Chilean Governments.

The Admiralty is therefore faced with the problem of whether it would be better to allow the existing ambiguities in its publications to stand, or to incur the charge of partiality by correcting them. The opinion of the Foreign Office upon this point would be of value.

66. The Foreign Office thanked the Hydrographer for his interesting Memorandum and stated their opinion that it would be undesirable to make "any change in the Charts and sailing directions at the present moment" (Annex Nb. 123). On the general question of the merits of the Parties in the arbitration, the Foreign Office considered it hardly worth while going into it fully at that stage. The Foreign Office Minutes, on the other hand, contain the shrewd observation: "Sir T. Holdich's opinion was a diplomatic one in part: the hydrographer's is purely technical".

67. The Hydrographer, as he himself indicated, regarded the purely geographical question as to what were geographically the true form and limits of the Beagle Channel as the crucial question in the case, the correct answer to which would necessarily settle the interpretation of the 1881 Treaty and the rights of the Parties. This view of the case, as already emphasised, was not in law exact. For the crucial question was the form and limits of the Beagle Channel as understood by the Parties to the 1881 Treaty when they concluded it, rather than its true form and limits purely and simply according to geography. What was the understanding of the Parties when they concluded the Treaty appears unmistakably from the evidence examined in Chapter V, which unequivocally shows that they considered the Beagle Channel to run eastwards to the north of Picton Island and to enter the ocean between Cape San Pio and Nueva Island. On the other hand, the Parties' understanding of the form and limits of the Beagle Channel was clearly not some inspiration of their own but derived from geographical antecedents; and these comprised, above all, the Charts compiled by Captains Fitzroy and Parker King of the Royal Navy. The interest of the Hydrographer's Memorandum is therefore that it constitutes the strongest possible testimony that the understanding of the Beagle Channel which the contemporary evidence shows was held by the Parties in 1881 was also in accord with the pertinent geographical antecedents.

68. **Diplomatic exchanges 1917-1920.** This account of Argentine efforts to revise the boundary in the Beagle Channel region may conveniently be taken as far as the year 1920, if only because there then follows a period of 8 years which appears to be unmarked by any diplomatic exchanges whatsoever between the Parties regarding this matter. On 21 December 1917, the Argentine Government protested to the Chilean Government about an incident when the Chilean flag was hoisted on Picton Island upon the arrival there of an Argentine tug. This, the Note suggested, amounted "to carrying out acts of sovereignty on that island under litigation, which the Argentine Government cannot recognise". The Note further suggested that, while the Beagle question remained unsolved, the situation on the island should in no way be modified by either country (Annex No. 106). To this Note there appears to have been no answer.

69. In May-June 1918, however, an Exchange of Notes took place regarding an Argentine decree of 14 May 1918, paragraph D of which ordered the buoying of the Beagle Channel. The Chilean Government, in a Note of 29 May recalled that

"the whole of the south shore and part of the north shore of the said Channel is of the exclusive Dominion of Chile, and therefore the Argentine Government cannot exercise there such acts of sovereignty as the one I refer to."

The Chilean Note expressed the assumption that the buoying would be restricted "to that part belonging to the Argentine Republic" (Annex No. 110). The Argentine Reply of 28 June 1918 stated that the buoys would be "erected on the coast of Tierra del Fuego or on the islands or islets of unquestionable Argentine sovereignty" (Annex No. 112). It is noteworthy that the only buoys or lights placed or established by Argentina at that period were the following:

in 1919: Remolino, Punta Parana, Direccion, two on Gable, and Cape San Pio
in 1920: Eclaireurs.

70. Three comments may be made upon these facts:

The first is that in so far as the placing of the buoys or lights can be treated as marking the extent of Argentine claims to sovereignty in 1919 and 1920 the lights were placed only on points either on the southern coast of the main island of Tierra del Fuego itself, over which after 1881 there had never been any Chilean claim to sovereignty, or on two islands on which Argentine activity had never been the subject of Chilean opposition. The second comment is that the Argentine action in 1919 and 1920 was specifically related to the Beagle Channel. Yet, amongst the places which were thus marked was Cap San Pio - notwithstanding the fact that Argentina has so often since contended that Cap San Pio lies east of the Beagle Channel. The third comment is this: One asks why the Argentine authorities placed lights and buoys where they did. The answer can only be: because they wished to provide navigational aids in the navigable channel, whether or not they were prepared to call it the Beagle Channel. One then asks: if the channel, whatever its name, needed navigational aids, why were these limited to the south coast of Tierra del Fuego? Would it not have been reasonable for the Argentine Government claiming as in effect it had in its protests of 8 March 1915 (Annex No. 88) and 21 December 1917 (Annex No. 106) that Picton, Lennox and Nueva were Argentinian - to have placed navigational aids on the "Argentine" islands in the very lanes which, so they now say, were the channels of navigation, the Paso Picton, the Paso Richmond and the Paso Goree? Instead, it was left to the Chilean authorities to match the Argentine action by the construction in 1929 on the other side of the channel actually used, the true Beagle Channel, of aids on Gardiner Island and at Punta Waller on Nueva.

71. Two years passed before the next exchange, which related to certain hydrographic work

carried out on the islands of Nueva and Reparo by a Chilean naval cruiser. It seems that this work had been the subject of oral representations by the Argentine Envoy in Santiago - see Annex no. 124, and the reply of the Chilean Foreign Minister (Annex no. 125), which stated:

"I now ratify the said statements according to which the ... task [was] simply to undertake soundings and cartographic studies, there being therefore no intention to innovate the antecedents of the arbitration pending in accordance with the agreement ..." (Annex No. 125).

It will be appreciated that at this date although the 1915 Protocol had received the approval of the Senates of both Argentina and Chile, it had not yet been brought before the Chamber of Deputies of either country, and was still thought of as an instrument to which effect might yet be given. (See paragraph 34 above).

72. Thus Argentina's efforts to revise the boundary in the Beagle Channel region left the respective positions of the two countries there by the end of 1920 as follows:

Certain circles in Argentina, apparently inspired by a Roumanian gold prospector's fanciful delimitation of the Beagle Channel boundary, had gradually and with an unsteady hand fashioned Argentine pretensions with respect to Picton, Nueva and Lennox Islands, and had ultimately sucured their espousal and assertion by the Argentine Government. The varying forms of these pretensions, sometimes based on a supposed continuance of the Beagle Channel to the south-west of Picton Island, sometimes on a supposed termination of the Channel to the north-west of Picton Island, sometimes based on a supposed application of the 1881 Treaty, sometimes on a supposed application of the 1893 Protocol, only served to underline their insubstantial character. Moreover, this period ended with the Argentine pretensions being completely disavowed by Argentina's own most eminent boundary Expert, who characterised them as "flimsily founded" and "ridiculous". Equally, this period ended with the Hydrographer of the British Admiralty, the authority most qualified to speak on the subject at that date, comprehensively rejecting all the various Argentine versions of the Beagle Channel and with them Argentina's pretensions in regard to the three islands.

73. Chile's position, on the other hand, had been clear and consistent. This position was based on her conviction that in 1881 both Parties had understood the Beagle Channel to continue eastwards north of Picton and Nueva Islands and enter the ocean between Cape San Pio and the latter; and that the 1881 Treaty assigned to her Picton, Nueva and Lennox Islands. This conviction, confirmed by contemporary and highly relevant maps, had been reinforced by the fact that no question had been raised by Argentina regarding the Beagle Channel boundary in the negotiations concerning the 1893 Protocol, although this Protocol had dealt with Tierra del Fuego, nor in the subsequent negotiations relating to the 1898-1902 Arbitration. So convinced and so interpreting the 1881 Treaty, Chile had peaceably and in good faith asserted and displayed her sovereignty with respect to the three islands for a number of years before being confronted by Argentina with her pretensions to the islands. On being confronted with those pretensions, Chile had consistently maintained her understanding of her rights under the 1881 Treaty and the irrelevance of the 1893 Protocol; and had continued to exercise her sovereignty peaceably with respect to the three islands as and when required. Furthermore, Argentina's most eminent boundary Expert had expressly and after full consideration stated to the British Minister in Argentina his opinion that, according to

the 1881 Treaty, Argentina had "no right at all to the islands of Picton, Lennox and Nueva", and that "these islands are undoubtedly Chilean". Finally, the Hydrographer of the British Admiralty, after full technical examination of the matter, had pronounced his highly expert professional opinion regarding the geographical concept of the Beagle Channel in a sense precisely the same as that maintained by Chile to be the meaning given by the Parties to that term in Article III of the 1881 Treaty; and had expressly stated that in his view, Picton, Nueva and Lennox Islands all belonged to Chile.

74. Such being the position established by the evidence, the Chilean Government submits that the conclusion is really irresistible that in 1920 the efforts made by Argentina to revise the boundary in the Beagle area had proved fruitless: the legal status of the territories south of Tierra del Fuego, determined by the 1881 Treaty, had not been altered.

CHAPTER IX

THE LAST PERIOD: 1920 TO THE COMMENCEMENT OF THE PRESENT ARBITRATION.

1. In the preceding chapters the Chilean Government has demonstrated by detailed historic analysis the correct interpretation of the Treaty of 1881 in the light both of the understanding of the Parties at the time and of their conduct thereafter until 1920. It now remains to examine the behaviour of the two Parties on a diplomatic level during the period of nearly half a century leading up to the commencement of the present arbitration proceedings. The purpose of this examination is to show that the legal position of the parties so well established before 1920 was in no significant way altered on the diplomatic plane by events thereafter.

2. The relevant diplomatic correspondence between the two Parties during this period fall into two categories: exchanges of protests and negotiations relating to arrangements for the settlement of the dispute. The protests themselves again may be sub-divided into two groups consisting, first, of those related to specific occurrences on the islands in the Beagle Channel region and, second, those related to claims over the area as reflected in the publication of maps and similar items.

3. In view of the close connection between the protests relating to specific occurrences on the islands in the Beagle Channel region and the general subject of "Acts of Jurisdiction" which is dealt with in the next chapter, it will be convenient to defer until then whatever consideration of this group of protests is required. Nonetheless, even at this point in the narrative, it is appropriate to draw attention to the intermittent and long delayed occurrence of Argentinian protests to Chile in respect of the display by the latter of sovereignty over the islands in the Beagle Channel region. During the whole of the period covered in Chapters VII and VIII above, the Argentine Government appears to have made only three protests in respect of acts of Chilean sovereignty in the Beagle Channel region. The first was on 8 March 1915 about a Chilean decree of 15 December 1914 (Annex No. 88 and see Chapter VIII paras 25 to 27). In it the Argentine Government suggested that the "litigious character" of the islands precluded any exercise by Chile of sovereignty over them. The Government of Chile answered this protest on 20 April 1915 (Annex No. 97). Second, on 21 December 1917, the Argentine Government protested against the hoisting at Picton Island of the Chilean flag upon the arrival of an Argentine vessel (Annex No. 106). Finally, on 30 July 1920, the Argentine Government protested against certain hydrographic work being carried out on the islands of Nueva and Reparo by a Chilean naval vessel (Annex No. 124).

4. These, so far as examination of the Chilean archives has to date revealed and apart from the discussions in 1904-5 referred to in Chapter VIII paras. 9 et seq. above, are all that the Argentine Government made in the way of diplomatic representations during a period of virtually 40 years following upon the 1881 Treaty. Another striking feature is that the next three decades, that is to say until 1951, remain scarcely touched by adverse Argentine reaction to Chilean activity in the islands. From 1920-1928 there is complete silence. On 22 October 1928 the Argentine Government referred to the fact that a Chilean naval tender had landed a cargo of coal on Picton Island (Annex No. 127). This was answered by the Chilean Government on 29 October 1928 by the statement that "the matter referred to - one of the many ordinary and periodic events of this nature - which amounts to the exercising of the rights which correspond to Chile under Article 3 of the Boundary Treaty of 1881..." (Annex No. 128). Thereafter, with the exception of an Argentinian Reply of 5 March 1931 (Annex No. 130) to a Chilean Note of 20 February 1931 (Annex No. 129) regarding the publication of an official Argentine map showing Picton, Lennox and Nueva Islands as Argentinian territory, the Argentine Government refrained from further protest until 22 November 1938, when protest was made against Chilean legislation providing for the

classification and allotment of lands in the province of Magallanes, including the islands of Lennox, Nueva and Picton (Annex No. 133).

5. It is not until 1951 that Argentine protests about Chilean activity in the islands begin to flow more frequently. This change of tempo is in marked contrast with the epistolary lassitude which characterizes the previous 70 years, and yet at the same time it suggests that the Argentine Government must have realised that protest has a role to play in counteracting the right-reflecting or right-creating effect of regular and persistent display of State activity in disputed territory. These protests will be mentioned in due course.

6. As regards the second category of protest, those relating to maps, it seems scarcely rewarding to devote much space to them. Reference has just been made to an exchange of notes in 1931 regarding publication of an official Argentine map showing Picton, Lennox and Nueva as Argentinian. Comparable protests were made by Chile in 1942 (Annex No. 143), 1944 (Annex No. 147), 1945 (Annex No. 149), 1947 (Annexes No. 151 and No. 153), 1949 (Annex No. 160), 1950 (Annex No. 164), 1953 (Annex No. 171) and 1954 (Annex No. 182). It is not until 24 November 1954 (Annex No. 186) that the Argentine Government makes a protest to Chile regarding the contents of a map published by the Chilean navy in that year. From that time onwards, there is a fairly regular exchange of Argentine and Chilean protests of this nature. They are, for the sake of completeness, included in the annexes, but do not call for further discussion at this juncture.

7. It is, however, appropriate to pursue in somewhat greater detail the course of negotiations between the two countries regarding arrangements for the settlement of the dispute in this region. In this connection, it will be recalled that, in Chapter VIII above, reference was made to the discussions which took place between 1904 and 1907 and to the 1915 Protocol. The 1915 Protocol, after recitals which recalled that the Beagle Channel controversy was the only one existing at the present time between the two countries, contained only one substantive article. This provided for the submission to the British Government as arbitrator of the question of sovereignty

"over Picton Nueva and Lennox Island, and adjacent islets, and islands lying within the Beagle Channel between Tierra del Fuego to the north and Dumas peninsula and Navarino island to the south".

Although the Protocol was approved by the Senates of both countries, it was never discussed in the Chamber of Deputies of either nor approved by them.

8. Nonetheless, as the Tribunal will observe, the Argentine Government on a number of occasions (21 December 1917 (Annex No. 106); 30 July 1920 (Annex No. 124) and 5 March 1931 (Annex No. 130)) suggested that the Protocol established a status quo and therefore precluded Chile from the performance of further acts of sovereignty over the disputed islands. However, as is readily apparent from a perusal of the text of the Protocol, it contains no express provision to this effect.

9. By 1933, however, it was evident that something further needed to be done. On 2 February 1933, the Ministers of Foreign Affairs of Chile and of Argentina adopted the so-called "Memorandum of Mendoza". This concluded:

"To find, at the earliest possible time, a solution for the Beagle Channel question, by a direct arrangement or, alternatively, by speeding up the ratification by the two Governments of the 1915 Protocol in order to arrive at the arbitration therein provided for, as this is the only question still pending between both countries." (Annex No. 131)

But again nothing was done by either side.

10. "The earliest possible time", as contemplated in the Mendoza Memorandum, proved to be 4 May 1938, when the Ministers of Foreign Affairs of Chile and Argentina signed a Protocol for the purpose of settling what they then described as "the only controversy that exists at the present time between both countries" (Annex No. 132). They agreed, therefore, to appoint Mr. Homer Cummings, Attorney-General of the United States of America, as arbitrator to determine

"in accordance with the treaties now in force, to which of the High Contracting Parties corresponds the sovereignty over Picton, Nueva and Lennox Islands, and adjacent islets and over islands lying within the Beagle Channel between Tierra del Fuego to the north, and Dumas peninsula and Navarino Island to the south".

The Protocol provided that it was to enter into force only after ratification.

11. Unfortunately, in April 1939, before the Protocol had been ratified by either Party, Mr. Cummings resigned as Attorney-General of the United States. A difference of opinion then manifested itself between the parties as to whether Mr. Cummings' appointment had been made in his personal capacity or by virtue of his office, with Chile taking the former and Argentina the latter view. In December 1939, Argentina proposed the appointment of a Judge of the United States Supreme Court to act as sole arbitrator (Annex No. 135), but Chile insisted on the reference of the dispute to Mr. Cummings (Annex No. 136). Further exchanges of correspondence in 1940 (Annexes No. 138 No. 139 and No. 140) failed to resolve the matter. Eventually, in 1942, the Argentine Foreign Minister indicated that it would be better to postpone further consideration of the problem until the end of the War (Annex No. 144).

12. Direct negotiations between the two Parties were not resumed until 1948 (Annex No. 154). In Notes dated 24 May and 31 May 1948 (Annexes No. 155 and No. 156), the two countries sought information from each other about their respective attitudes. On 12 July 1948, the Chilean Government in a Memorandum (Annex No. 157) indicated its wish to pursue the procedure agreed in the 1938 Protocol by designating a new arbitrator, and suggested the possibility of the appointment of a retired Justice of the United States Supreme Court. Enquiries at Washington, however, established that there would be some difficulty about the selection of a suitable American arbitrator (Annex No. 159). When talks were resumed in Buenos Aires in October 1948, (Annex No. 158), the Chilean representative was left with the clear impression that the Argentine Government preferred to dispose of the whole question by negotiation. These talks continued into January 1950, when once again they lapsed.

13. For four years, neither Party reverted to the question of settlement of the dispute, though the period was punctuated by a series of protests and counter-protests at various acts which one or the other Party thought contrary to the maintenance of its rights. Then on 7 April 1954 the Argentine Government proposed the establishment of a Joint Commission to proceed immediately with

"the studies which are necessary to advise both Governments on the procedure it [the Commission] considers most efficient and effective for the definitive fixation of the boundaries between both countries in the southern zone and for the solution of the common problems in Antarctica". (Annex No. 178).

To this suggestion the Chilean Government replied on 1 October 1954 (Annex No. 183). It agreed to the appointment of the Commission, but emphasised that, in its view, the Beagle Channel and the Antarctic questions were two distinct and separate items. The Chilean Government repeated

its view that the solution of the Beagle Channel problem should take the form of arbitration, and indicated its willingness to sign a supplementary agreement to the 1938 Protocol. It was quite prepared to settle the Antarctic question by negotiation. In the same month the Chilean Ambassador in Washington was instructed to renew the search for an American arbitrator, but an incident involving an Argentine training ship, the "Bahia Thetis", sailing in Chilean channels led to a brief interruption of this initiative. Talks were resumed between the two Governments in April 1955, and culminated in the publication by each of separate communiques on 2 and 3 May 1955 (Annex No. 189 and No. 190). These recorded the agreement of the two Governments to submit to arbitration the questions regarding sovereignty over Picton, Nueva and Lennox Islands and adjacent small islands. The Chilean communiqué mentioned that the arbitration agreement would in due course be submitted to Congress for approval.

14. On 14 June 1955, the Argentine Government in a formal reply to the Chilean Note of 1 October 1954 indicated its own willingness to accept submission of the dispute to arbitration (Annex No. 194). This Note contained a Draft Agreement, which is of interest for several reasons. First, it seeks in both the Preamble and Article 1 to treat the Beagle Channel as having an eastern terminus at 67° 15' west of Greenwich. Secondly, it introduces, again both in the Preamble and in Article 1, the idea of a mid-channel line extending east from a point opposite the meridional boundary at 68° 36' 38.5" W., to the proposed terminus mentioned above. Associated with that notion is the suggestion in the Preamble that this line should be a boundary "between the jurisdictional waters of the two countries". Third, the only issue submitted to arbitration is that of sovereignty over Picton, Nueva and Lennox Islands and the adjacent islets situated east of the meridian 67° 15' west of Greenwich. Fourth, the Draft Agreement expressly provides that, once it is signed, both Governments bind themselves not to modify the present status quo on Picton, Nueva and Lennox Islands and the adjacent islets, and not to carry out further acts of sovereignty, though without prejudice to measures of an administrative character which may be indispensable for reasons of public order. This is the first time that an express provision of this kind was included in any of the agreements proposed between the two countries. Shortly afterwards, in September 1955, a change of Government took place in Argentina, and this draft was not discussed in detail. In October 1955, in the course of conversation between the Chilean Ambassador in Argentina and the Argentine Foreign Minister, the latter enquired whether the Beagle Channel dispute might not be settled by negotiation. To this the Chilean Ambassador replied that, having regard to the failure of this proposal in 1941, it was best to proceed with the study of the Chilean proposal regarding the constitution of an Arbitral Tribunal (Annex No. 200).

15. Yet another period of nearly three years elapsed without further discussion of the machinery of settlement, though it was interspersed with further numerous protests and counter-protests regarding activities in the area. But in May 1958, an unprecedented situation arose in connection with Snipe Island, when an Argentine naval vessel destroyed a beacon which had been installed there by the Chilean Navy. After further incidents, feeling ran high in Chile and on 14 August, the Chilean Senate approved a resolution describing the Argentine action as "an armed aggression and a flagrant violation of the national sovereignty", calling for the restoration of Chilean rights on the island, if necessary by the exercise of legitimate measures of defence, and proposing that the Chilean Government should refer the matter to the Organization of American States. On the previous day, the Chilean Ambassador had been withdrawn from Buenos Aires (Annex No. 209).

16. On 17-18 August, 1958, the two Governments succeeded in reducing the tension by an Exchange of Notes between them, in which they declared that they would revert to the de facto and de jure situation on Snipe Islet, as it was on 12 January 1958. They agreed also to the withdrawal of Argentine armed forces which had been stationed on the islet. In addition, they confirmed:

"their intention of resorting to the means of peaceful solution of international controversies in order to arrive, as quickly as possible, at the settlement of the boundary problems pending in the aforementioned zone, agreeing to maintain the existing situation until such time as the definitive demarcation is reached. (Annexes No. 211 and No. 212).

The Chilean Ambassador resumed his post in Buenos Aires on 21 August 1958. A further exchange of notes took place in the following weeks, in which both countries indicated their wish to try and reach some formula for the settlement of the dispute (Annexes No. 217, No. 218, No. 219 and No. 221).

17. On 2 February 1959, the Presidents of Chile and of Argentina signed a joint statement known as the Declaration of Los Cerrillos (Annex No. 229). They affirmed their determination to enter forthwith into negotiations directed to finding an adequate arbitral formula for the resolution of their differences. Moreover, in order to create a suitable atmosphere for these negotiations, they concurred in "the need forthwith to smooth the course of the negotiations by eliminating anything which might give rise to clashes between their peoples".

18. On 31 March 1959 the Chilean Government conveyed to the Argentine Government a document, entitled "Bases for the initiation of the negotiation of the arbitration of the boundary questions between Chile and Argentina" (Annex No. 232). This once again stated Chile's belief that the Beagle Channel controversy should be resolved by arbitration. On 22 May 1959, the Argentine Government acknowledged the Chilean communication and stated that the proposals were under study. Then, on 5 September 1959, the Chilean Government proposed to the Argentine Government that the Beagle Channel dispute should be submitted to settlement by the International Court of Justice, the question to be framed in the same terms as contained in the 1938 Protocol. It was also proposed that this new agreement should be submitted simultaneously to the approval of both national Congresses (Annexes No. 241 and No. 242).

19. The Argentine reaction to these proposals was contained in a series of three Notes, all dated 30 October 1959. The first, no. 2189 (Annex No. 248) introduced an entirely novel element into the situation, namely a proposal concerning navigation in the region of Tierra del Fuego. This Note was withdrawn by another dated 1 March 1960 (Annex No. 259).

20. In the second Note, no. 2190, (Annex No. 249) the Argentine Government accepted the Chilean proposal for the commencement of negotiations. In this connection, it was proposed that the existing status quo in the Beagle Channel area should be respected as long as negotiations lasted and until respective agreements had been signed. Having regard to the absence from any of the disputed islands and islets of any Argentine forces, the elaboration of the proposal in the following terms can only be regarded as a trifle disingenuous:

"From that time [the signature of the relevant Arbitration Agreement] until the final result of the Arbitration agreed on, both countries will undertake to withdraw from this area all military and naval occupation forces stationed in the islands under arbitration, or if the Chilean Government finds it more convenient, installations of detachments in these islands could be balanced by naval or military forces of the two countries in equal or equivalent proportions, without this meaning the attributing or exercising of sovereign rights for either of the Parties, both Governments undertaking not to perpetrate or permit any act which could signify the exercise of sovereign right or could provoke friction or incidents."

The third Note, no. 2191 (Annex No. 250), contained the specific Argentine counter-proposals regarding the arbitration in the Beagle Channel region. This Note, like no. 2189, was also withdrawn by a Note of 1 March 1960 (Annex No. 260). Nonetheless, it stands as an extreme illustration of the variation and lack of consistency in the Argentine position regarding the correct interpretation of the Treaty of 1881, to which reference has already been made. (See

Chapter VIII para. 72 above.) The following were the principal items of the Argentine counter-proposals:

First, they proposed in terms virtually identical with those advanced in June 1955 (see above, para. 14) that there should be an agreed mid-channel boundary in the Beagle Channel running from a western origin opposite the last post of the meridional boundary to an arbitrary termination at the meridian 67° 15' west.

Second, the proposal suggested:

"To submit to the arbitration of the International Court of Justice the question of determining to which of the High Contracting Parties corresponds the sovereignty, to the east of meridian 67° 15' longitude west of Greenwich, over Picton, Nueva and Lennox Island and the adjacent islets: Terhalten, Sesambre, Barnevelt and Evout islets and the islands and parts of islands of Wollaston and L'Hermite archipelagos, which lie east of the meridian of Cape Horn. ..."

The Government of Chile naturally rejected in limine this unprecedented Argentine claim and demanded the withdrawal of the Note. The Argentine proposal was, subsequently, withdrawn. (See para.22).

21. The proposals had created such an adverse effect that the President of Chile himself wrote to the President of Argentina on 4 December 1959 saying:

"I refer to this in passing because it would not be correct for me at this time to write to Your Excellency without informing you of the distressing impression brought about in me by the counter-proposals formulated by Your Excellency's Government, concerning the negotiations for reaching a solution by arbitration to our pending questions." (Annex No. 253).

The Chilean President added that he hoped that the President of Argentina would intervene directly "so that the negotiations in progress will follow a course making it possible to reach agreements which would correspond to our true responsibility as Governors". Thereupon, the President of Argentina replied, in January 1960 (Annex No. 255), that he was sending Senor de Pablo Pardo to study with the Chilean Government formulae for agreement on the boundary question.

22. A few days earlier (28 December 1959), the Chilean Government had replied to the Argentine proposal in Note No. 2191. This reply (Annex No. 254) while welcoming the Argentine inclination to solve the Beagle Channel problem in a peaceful and friendly spirit, pointed out the "unusual extension of the magnitude of this difference existing between the two countries", drawing attention particularly to the fact that on so many previous occasions the dispute in its more limited form had been described as the "only" boundary dispute existing between the two States. Accordingly the Chilean Note placed on record the fact that the Chilean Government would "never consider it admissible that ... the sole existing difference could be converted into a new conflict of unforeseen proportions and consequences". The Chilean Government also indicated that it could not accept the joining to the question of sovereignty over the islands in the Beagle Channel region of any issue regarding navigation in the internal waters of Tierra del Fuego, as the "channels of Tierra del Fuego have in law the character of internal waters, or in any case, of Chilean territorial waters".

23. Between 18 and 21 January 1960, conversations took place in Santiago between the Chilean Foreign Minister and the Argentine Ambassador, the contents of which are recorded in a Memorandum (Annex No. 257). Amongst other matters, it was agreed informally that Argentina would withdraw

Note No. 2189 of 30 October 1959 (see above, para. 19) so as to make it clear that the question of free navigation in the channels of Tierra del Fuego had nothing to do with the settlement of the Beagle Channel boundary dispute. It was also agreed that Argentina would not insist upon extending the substance of the Beagle Channel controversy in the way suggested in the Argentine Note No. 2191 of 30 October 1959 (see above, para. 20). However, one point on which there was no agreement was the Argentine proposal in its Note of 30 October 1959 (No. 2191, Annex No. 250) that the two countries should reach agreement about a mid-channel boundary line in the sector of the Beagle Channel line between meridian $68^{\circ}36'38.5''$ and meridian $67^{\circ}15'$ west of Greenwich, since Chile insisted that the delimitation of the frontier on the whole of the Channel should be left to a decision of the Arbitral Tribunal.

24. Two months later, the Argentine Notes Nos. 2189 and 2191 having in the meantime been withdrawn, agreement was reached at Santiago, on the basis for submitting the Beagle Channel dispute to arbitration. This took the form of a Memorandum, signed on 19 March 1960 (Annex No. 263), which was to serve "as an immutable basis for preparing in conformity therewith the corresponding definitive instruments". These instruments were themselves to be signed, if possible, within a period of 120 days. The Memorandum dealt as follows with the Beagle Channel problem. It was to be submitted for decision to the International Court of Justice at The Hague. It was agreed that a boundary line should be marked along the Beagle Channel "in the part of the Beagle Channel comprised between the meridian west of Greenwich $68^{\circ}36'38.5''$ and the meridian line of Punta Navarro (meridian west of Greenwich $67^{\circ}13.5'$ approximately)". This form of words clearly excluded any implication that Chile might, by accepting a conventional line between these points, be admitting that the Beagle Channel ended at the eastern point. The Memorandum then set out the details of the line. On this point, it concluded thus:

"It is declared that there belong to the Argentine Republic the islands and islets situate to the north and to Chile the islands and islets situate to the south of the dividing line above indicated."

25. The Memorandum continued as follows:

- "(b) That there belong to Chile and are consequently excluded from the judicial proceedings, Lennox island and adjacent islets.
- (c) That there belong to the Argentine Republic and are consequently excluded from the judicial proceedings, the two Becasses islands ...
- (d) That the recognition which both countries make of their respective sovereignties as stated in paragraphs (b) and (c), will not in any way imply an intention to provide the Court with a fixed criterion for deciding the dispute which will be submitted to it for decision."

26. On the same day, the Argentine Ambassador informed the Chilean Foreign Minister that, with reference to (b) above, the Argentine understanding was that the islets adjacent to Lennox Island are: "Ormeno islet, Mamones islet, Luff island, Raquel islet, Annaque islet, Mafuil islet, Medio islet, and the islets in the immediate vicinity of the coast of Lennox island" (Annex No. 264).

27. The Memorandum itself then continued with a definition of the issue to be submitted to the International Court in the following terms:

"... to which of the Parties pertains the sovereignty to the east of meridian $67^{\circ}13.5'$ longitude west of Greenwich over Picton and Nueva islands and the Snipe-Solitario-Hermanos-Gardiner-Reparo-Packsaddle-Jorge-Augustus islets and the rocky islet to the south of the two Becasses islands".

The Agreement also prolonged the status quo then in force in the area. This Agreement was confirmed by a Joint Declaration by the Presidents of Chile and Argentina on 22 March 1960 (Annex No. 265). This Agreement was implemented on 12 June 1960 by the signature of four Protocols relating to arbitration in the Beagle Channel, in the Palena case, for possible Boundary Commission disagreements, and to navigation. Only the Protocol relating to the Beagle Channel Arbitration (Annex No. 269) need be referred to in further detail. This Protocol contained substantive provisions which were in most essentials identical with those agreed in March 1960 and set out above. There was, however, one important difference which was reflected in two places. Both the second preambular recital and operative Article V recalled that the dispute was "the only controversy in relation to the interpretation of the 1881 Boundary Treaty".

In full, these provisions read as follows:-

"(II) That the only controversy in relation to the interpretation of the 1881 Boundary Treaty is that of determining to which of the two countries corresponds sovereignty over certain islands and islets which are mentioned in Article V of this Protocol,

(V) As a consequence of what has been said above, the two Parties agree to submit to the judgment of the International Court of Justice of The Hague the sole question pending in relation to the interpretation of the Boundary Treaty of 1881, referred to in the second paragraph of the preamble, related to determining to which of the two Parties corresponds sovereignty east of the Meridian 67° 13.5' west of Greenwich, over Picton and Nueva islands and islets Snipe, Solitario, Hermanos, Gardiner, Reparo, Packsaddle, Jorge, Augustus and the rocky islet to the south of the two Becasses islands."

The Protocol was expressed to be subject to ratification. In fact, neither Party ever secured the necessary approval from their national Congresses, the Protocol being withdrawn from the consideration of the Chilean national Congress in 1965. However, this lack of ratification in no way diminishes the evidential value of the acknowledgements contained in the preamble and Article V that the dispute between the parties was one of interpretation of the 1881 Treaty, that it was the sole question outstanding between them in that connection, and that it did not extend to any islands south of Nueva Island.

28. The conclusion of the 1960 Protocol led to a four-year period of inactivity on the diplomatic front, with the exception of the exchange each year of a small number of protests by each side regarding acts of jurisdiction over, or other claims of sovereignty to, islands within the disputed region. Then, on 6 March 1964, the Foreign Ministers of Chile and Argentina took a further initiative to find a settlement of the Beagle question and agreed to seek the establishment of parliamentary committees in each country to collaborate with the Governments and give them advice (Annex No. 283). When the Parliamentary Commissions met together in Buenos Aires on 26-29 May 1964, they reiterated the need to solve the outstanding boundary disputes and exhorted both Governments to initiate without delay the negotiations which would allow an immediate solution of the problems (Annex No. 284).

29. In September 1964, the Chilean Government unilaterally submitted the Palena boundary problem to arbitration by the British Government. Shortly afterwards, on 30 October 1964, the Argentine Government stated that it was not opposed to this procedure and at the same time informed the Chilean Government of its decision to submit the Beagle Channel case to the International Court of Justice (Annex No. 285). On 6 November 1964, the Foreign Ministers of the two countries signed a Joint Statement in which they said, in relation to the Argentine intention to submit the Beagle Channel to the International Court of Justice, that "both Governments concur in carrying through the said judicial action". They concluded that:

"With this purpose in mind conversations will be initiated in order to reach the necessary understandings for submitting the said case to such tribunal, without prejudice to the direct arrangements at which both parties may arrive." (Annex No. 286).

30. Further conversations then took place between the Governments during the period 1965-67 but difficulties arose regarding the definition of the problem to be submitted to the Court, which could not be resolved. It is unnecessary to burden the Arbitral Tribunal with a detailed narrative of these exchanges. They are, however, fully summarized in the Chilean note to the British Government of 16 January 1968 (Annex No. 321).

31. The consequence of this impossibility of securing a negotiated reference to the International Court of Justice eventually led Chile unilaterally to seek recourse to the British Government for arbitration in accordance with the 1902 Treaty. Proceedings were instituted by a letter dated 11 December 1967 (Annex No. 316).

32. As regards the diplomatic correspondence subsequent to the institution of the proceedings it seems necessary only to refer specifically to the Chilean Government's note dated 19 July 1971 (Annex No. 329) and to the further correspondence in connection therewith. In that note the Chilean Minister for Foreign Affairs drew attention to a Decree dated 8 April 1970 made by the Argentine Governor of Tierra del Fuego which purported to affect Chilean sovereignty both within, and outside, the area defined in the Compromiso in the present case, by describing the extent of the Department of Ushuaia as, inter alia, including "the Beagle Channel Islands, the Islands of the States (Los Estados), Picton, Nueva, Lennox and those that extend to Cape Horn to the east of the meridian that crosses through there". The Chilean Minister made representations at this new extension of Argentina's claims, and reserved Chile's rights, but expressly refrained from comment in so far as the Decree concerned the region submitted to the present Arbitration. The reply to this note by the Argentine Minister for Foreign Affairs and Public Worship was dated 3 March 1973 (Annex No. 335) and, after stating that his Government had given careful consideration to the observations put forward by the Chilean Government but found no reason for modifying the Decree of the Governor of Tierra del Fuego, the Argentine Minister went on further to complain, and reserve his country's rights, in relation to the installation of a buoy on Evout island, "in an area closely linked to that of the present arbitration in course".

The Chilean Government, by a note dated 16 May 1973 (Annex No. 336), repeated its previous representations and reservation of rights and rejected what appeared to be an attempt to widen the controversy beyond the limits of the area defined in the Compromiso, pointing out that the installation of the buoy was a normal act of administration in an area outside the arbitration, and undoubtedly under Chilean sovereignty.

Conclusions

33. The main function of this account of the diplomatic exchanges between Chile and Argentina extending over virtually half a century has been, so to speak, to run a finger down the record of relations between the two countries with a view to demonstrating that nothing that has occurred during this half-century has in any respect whatsoever altered the position as it stood in law, not only in 1920, which was arbitrarily chosen as a convenient starting point, but even at the turn of the century. This narrative may also incidentally serve further to demonstrate the uncertainties and inconsistencies in the Argentinian approach to the interpretation of the Treaty of 1881.

CHAPTER X

ACTS OF JURISDICTION

SECTION 1. INTRODUCTION

1. In the preceding Chapters, the Government of Chile has placed before the Court of Arbitration its submissions regarding the proper interpretation of the 1881 Treaty. The Parties to that Treaty employed the expression "Beagle Channel" as indicative of a boundary whose course was well understood by them at that time. That course in the eastern sector of the Channel ran north of the islands of Picton and Nueva.

2. The Government of Chile puts forward this interpretation of the Treaty, not only as being what the Parties must have intended at the time, but also as being fully consistent with, and supported by, their conduct during this period after the Treaty.

3. There is, as will be apparent from the terms in which the Chilean request is stated in Article I (2) of the *Compromiso*, a broader approach to the question of interpretation which only becomes applicable if the essential elements of the Chilean argument as hereinbefore set out are not accepted in their entirety. In that event, the only reasonable alternative appears to be that the 1881 Treaty must be construed so as to acknowledge Chilean title to every island or islet south of Tierra del Fuego. This approach has been examined in Chapter VI above. The conduct of the Parties is relevant to both these approaches - as indeed it is to any interpretation of the 1881 Treaty. Accordingly, in this Chapter, the Government of Chile will develop its submission that both its own activity and corresponding Argentine inactivity in the disputed area support the interpretations of the 1881 Treaty set out above and, in particular, the contention that Picton, Nueva and Lennox are Chilean.

4. **Legal relevance of acts of jurisdiction.** Before proceeding to the details of Chilean activity in and in relation to the disputed area, it is right to indicate generally the relevance of this activity to the issues involved in the present case. It is, however, scarcely necessary to elaborate in any detail the reasons why the conduct of the parties on the ground and their acts of jurisdiction are relevant to the determination of a boundary question. Indeed, it is sufficient to quote the terms in which the Arbitral Tribunal in the *Palena* case spoke of the "process of interpretation" of "a Treaty which results from negotiation between two or more Parties". This, the Tribunal said.

"... may involve endeavouring to ascertain the common will of the 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". ¹ (Underlining added)

5. If further confirmation were required of the potential significance of acts of jurisdiction, it is provided by the approach pursued by the Argentine Government in connection with the formulation of the 1915 Protocol (Annex No. 102). It will be recalled that in 1915 the two Governments agreed upon a Protocol for the submission to arbitration of the dispute in the Beagle Channel area. The text of this Protocol followed closely a Chilean draft of 21 April 1915 (Annex No. 99). This was itself put forward as a counter-proposition to an Argentinian draft transmitted in March 1915 (Annex No. 92). There is a striking difference between these two drafts. The Argentine draft contained the following amongst its recitals:

¹ *Argentine-Chile Frontier Case*, 1966, Report of the Court of Arbitration p. 77; *International law Reports*, 38, p. 89.

“That the acts of jurisdiction exercised in the disputed territory do not constitute a type or precedent of dominion, as neither of the two countries has thereby pretended to subtract itself from the faithful performance of the undertakings assumed in the above-mentioned Pacts [of 1881 and 1893]”.

This recital appears not to have been acceptable to Chile, for it is not to be found in either the Chilean counter-proposal or the text of the Protocol as finally agreed. (For the Chilean view, see Chapter VIII para 33). What then does the episode suggest? It conveys a clear consciousness on the part of Argentina of the relevance of acts of jurisdiction in the area. It indicates too that, even in 1915, Argentina desired that such conduct should be excluded from the consideration of the Tribunal - presumably because Argentina could adduce no suitable acts of jurisdiction but feared that Chile could. Chile did not share the Argentine view regarding the exclusion of such evidence. So, as can be seen, the Argentine proposal was not implemented. It stands nonetheless as a significant recognition of the relevance of acts of jurisdiction.

6. **Ninety years of Chilean administration.** Neither the fact nor the relevance of close on ninety years of Chilean occupation can be disputed. The Court of Arbitration is here confronted by a situation in which the principal islands - Picton, Lennox and Nueva - are beyond a shadow of question to-day under open, peaceful and actual Chilean sovereignty. Whatever may be the nature and basis of the Argentine claim to sovereignty over these islands, there are on them to-day absolutely no indications of Argentine occupation, past or present.

7. **The position to-day** Of the many islands and islets which fall within the scope of the dispute as defined in the Compromiso, the only ones which are at the present time regularly inhabited are the three large islands of Picton, Lennox and Nueva. (For details, see Chapter II above.) In spite of their natural resources, at present the settlements there are small and economically of little significance - a few farmers make a bare subsistence living out of raising sheep and the essentials of human nourishment. It is a hard life, with little in the way of modern comforts. And yet for all its desolation and rigour, it is a life which has much to commend it: a life totally engulfed by scenic beauty and dense tranquillity; untroubled by ordinary worldly stress.

8. In such conditions, little is called for in the way of regular governmental presence or activity. But whatever there is, is Chilean.

- The Chilean flag flies in each settlement.
- Chilean law applies. On the rare occasions when civil or criminal litigation arises, it is disposed of in Chilean courts at Puerto Williams, Porvenir or Punta Arenas.
- Land is held by virtue of Chilean government grants issued in response to applications made to the Chilean authorities. Indeed, as will presently be seen, it is Chilean control over land use which is one of the longest-standing facets of Chilean governmental activity in the area.
- Taxes are paid to the Chilean Government on the basis of entries in the Chilean Land Tax Rolls.
- In each settlement a resident performs the functions of a postmaster within the Chilean postal system. Letters are stamped with Chilean stamps and the postmarks bear the inscription “Chile”. Correspondence is transmitted to Puerto Williams for onward dispatch by the Chilean postal service.

- Births, deaths, and marriages are registered by the Chilean authorities at Puerto Toro.
- Education is provided by teachers trained and paid for within the Chilean state system.
- If anyone falls ill, medical service is provided by the Chilean Navy from its base in Puerto Williams.
- On each island there is a small Chilean naval post supported by regular visits from Chilean naval craft, who keep a close watch over the adjacent waters and maintain regular radio contact with their base in Puerto Williams.
- Generally, the Chilean Navy is the arm of government which provides the most regular contact with the inhabitants, providing a ferry service for the small quantities of wool which constitute the only exportable product of these islands and bringing in such stocks of food, materials and fuel as the residents require.
- Lights, buoys and other navigational aids are installed and maintained by the Chilean Navy.

A visit to the principal islands to-day reveals no trace whatsoever of Argentine presence now or at any earlier date.

9. **Absence of Argentine activity in the islands.** There is nothing new in the present position. It is to-day as it has been for upwards of eighty years. At all material times since the 1881 Treaty these islands, and the smaller islands and islets associated with them, have been treated as Chilean and in so far as the circumstances required have been under effective Chilean control. At no material time has Argentina ever manifested a presence in these islands¹.

10. **Limited relevance of the "critical date".** In referring to the position to-day, the Chilean Government should not be seen as disregarding the concept of the "critical date". But in the submission of the Government of Chile, this concept does not affect the significance of the evidence which it now produces. All this material demonstrates the consistent, unbroken, open and peaceful character of Chilean activity at all times since the 1881 Treaty. This is true no matter what "critical date" one may choose. In the Minquiers and Ecrehos Case, the International Court of Justice in discussing the "critical date" used language which may suitably be transposed to the facts of the present case. After referring to the emergence of a dispute in the years 1886 and 1888, the Court continued:

"But in view of the special circumstances of the present case, subsequent acts should also be considered by the Court, unless the measure in question was taken with a view to improving the legal position of the Party concerned. In many respects activity in regard to these groups had developed gradually long before the dispute as to sovereignty arose, and it has since continued without interruption and in a similar manner. In such circumstances there would be no justification for ruling out all events which during this continued development occurred after the years 1886 and 1888 respectively."²

11. The conduct of the Chilean Government subsequent to any "critical date" is admissible as confirming or demonstrating in retrospect the existence, trend and effect of the facts prior to that date. This is the point which was made by Sir Gerald Fitzmaurice in his comment on the judgment of the International Court of Justice in the Minquiers case when he said:

¹ In 1958 Argentine naval forces landed for a short while on Snipe - and then withdrew. See above Chapters II and IX, para. 15.

² I.C.J. Reports 1953, p.47, at pp. 59-60.

"But although these acts [i.e. acts after the critical date] cannot create a new legal situation, they may well be evidence in retrospect of what the legal situation was at the critical date, and hence of what are the Parties' legal rights now."¹

12. **The routine flow of Chilean administration.** The second section of this chapter will contain a detailed analysis of Chilean administration over Picton, Nueva, Lennox and the islands and islets associated with them, particularly Snipe, Becasses, Hermanos, Gardiner and Reparo. This analysis is presented mainly on an island by island basis. Thus, it may perhaps convey a fragmented, patchy and uneven impression of Chilean activity. There is, therefore, some value in creating the right perspective by a brief historical introduction to the administration of the area.

13. In doing this it is convenient to start from an observation the content of which is already fairly plain: that the area with which the Court of Arbitration is here concerned is remote, and sparsely inhabited. It is, indeed, surprising how much material there is to show the relationship between the inhabitants of the islands and the Chilean Government during the past ninety years. For, with the exception of about two decades beginning in 1890 when gold was found on Lennox and a minor gold rush ensued, one is normally numbering the population not in hundreds, nor even in scores, but in tens of persons. Even at the peak of the gold digging, the numbers on the islands never passed the six hundred mark. Moreover, once the readily exploitable resources of gold were exhausted, the islands had little to offer in the way of trade and commerce - the export of a few bales of wood and some skins. For a while, the second decade of this century, Picton had a small coaling station.

14. There is nothing new in international tribunals having to consider the nature and effect of acts of government in remote places. In some, though not all, respects the present situation may be likened to that examined by the Permanent Court of International Justice in the Legal Status of Eastern Greenland.² True, in the present case the Government of Chile is inviting the Court of Arbitration to refer to the conduct of the parties as an element in the interpretation of a treaty rather than as a factor by itself determinative of sovereign title. But the standards applicable in the latter connection could not, in reason, be lower than those to be used in the former connection. It is, therefore, appropriate to recall the following words of the Court:

"It is impossible to read the records of the decisions in cases as to territorial sovereignty without observing that in many cases the tribunal has been satisfied with very little in the way of the actual exercise of sovereign rights, provided that the other State could not make out a superior claim. This is particularly true in the case of claims to sovereignty over areas in thinly populated or unsettled countries."³

15. The Government of Chile has collected into a separate volume the documents which are relevant to this chapter; and, apart from looking at such of the specific references given below as it may think appropriate, the Court of Arbitration is respectfully invited to turn the pages of these documents over in consecutive order. From such a general and chronological perusal a number of important points are bound to emerge.

16. In the first place, the Court will gain an impression of the essential unity of the Southern Islands. From the point of view of government, whether in Punta Arenas, the regional administrative centre on the western shore of the Straits of Magellan, or in Santiago, the islands to the west

¹ British Year Book of International Law, 32 (1955-56), p.23. See also, ibid., pp. 41-44.

² P.C.I.J. Reports, Series A/B, No. 53 (1933).

³ ibid., at p. 46.

and south of Tierra del Fuego have at all material times posed the same sort of problems and required the same sort of treatment. Scattered amongst the annexes are a few documents which do not relate specifically to the disputed islands. They serve to show, however, without entering into disproportionate detail, that the matters dealt with relative to Picton, Nueva and Lennox are common also to the other islands south of Tierra del Fuego. More than that, the material also shows that Picton, Lennox and Nueva, Snipe, Becasses, Solitario, Hermanos, Gardiner and Reparo have generally been treated as an administrative unit closely integrated with the north-eastern part of Navarino and Puerto Toro in particular.

17. Another point, closely associated with this, is to be gathered from the documents: having regard to the physical circumstances and the social needs of the area, the pattern of state activity in relation to Picton, Lennox and Nueva and the islands appurtenant to them evolves in a natural even and regular manner.

18. What is to be found as one turns over the pages of the documents? It is the sap of government rising into the growing tree of human activity in the Southern Islands; and sometimes falling too as the season changed. At first, there is neither administration, administrative organization or statutory control of the use of the fundamental asset of the region, the land. Then gradually the evidence accrues of the development of Punta Arenas, the reconstruction of its administrative building, the re-commencement of its archive. There is legislation, too, to organize the administration first of Magallanes as a whole and then, in the face of growing evidence of need, the Southern Isles, and ultimately and in particular the islands lying off the north-east coast of Navarino, namely, Picton, Nueva and Lennox and the islands appurtenant to them. Hence, the establishment in 1892 of Puerto Toro; the introduction there of a sub-delegate; the provision of police; and some sign of concern for health. The Government, conscious of the need to improve communications, encourages the establishment of regular shipping services, first by the 'Amadeo' later by Braun and Blanchard. The Chilean Navy recognizes the important role which it must play in serving the needs of both government and the settlers. Regular visits by the "Huemul", "Condor" and "Ministro Zenteno" then begin and there is mention of the construction of navigational aids.

19. At about this time, the two decades from 1889 to say 1910, the volumes are full of documents relating to land, grazing and mineral rights. First, there is recognition that the existing legal structure of land control is inadequate and that there is need for the encouragement of settlers by providing security of tenure. Legislation follows; applications are filed; investigations pursued; grants made; the collection of taxes attempted, and defaulters pursued. We find companies formed, money borrowed, rights bought and sold. Even Thomas Bridges, who held land under concession from the Argentine Government on the south coast of Tierra del Fuego, turned to the Chilean Government for grants over Picton, Nueva, Snipe and Becasses. All this happens too in relation to gold mining rights - applications for prospecting licences and the staking of claims - even by Argentinians. And the important thing is that although these matters relate to Picton, Lennox and Nueva and the islands associated with them, they are dealt with in Punta Arenas and not, so far as the Government of Chile is aware, in the relatively nearby Argentinian settlement of Ushuaia.

20. There is a role too for Chilean law. Crimes committed on the islands are investigated and, if necessary, prosecuted by the Chilean authorities. Judicial enquiries are held into sudden deaths - drownings and murders - and exceptional calamities such as fires. Civil litigation connected with causes of action arising in Picton, Nueva and Lennox is heard in the Chilean courts.

21. Then, as the gold deposits are worked out, fewer documents on that subject appear in the records. Their place is taken by more legislation about land, further naval visits, additional applications and grants, land tax rolls, certificates of birth and death, and the natural repetition of the categories of item already enumerated. The miners depart and the population dwindles; the rudimentary equipment on Lennox - troughs and sheds - is dismantled.

22. With one exception perhaps enough has been said to introduce the detail which follows. This exception is the need to draw attention to the publicity which attended Chilean government acts. Many were published in the Official Gazette; other items, such as mining claims,¹ appeared in the newspaper at Punta Arenas; the land tax rolls were separately printed and published there. Nothing was secret or covert. All was open for observation - especially by foreign consuls stationed at Punta Arenas.² There are even items showing the concern of the British Consul there at some weakness in Chilean administration in the Southern Isles. There was an Argentinian consul there too - and might the government of Picton, Nueva and Lennox not have attracted his attention or that of the Argentinian authorities so much closer to the scene at Ushuaia?

SECTION 2. CHILEAN ACTS OF JURISDICTION³

A. GENERAL

(1) Chilean Administrative Organisation in the Magallanes territory from 1881

23. It may be helpful to begin with a brief indication of Chilean administrative arrangements in the Magallanes area generally. While the matters set out below obviously must touch upon some of the islands specifically, detailed consideration of each island separately follows in sub-section B below.

(i) 1881-1892

24. The Boundary Treaty of 1881 did not immediately bring about any administrative changes to take account of the new territorial limits. For 11 years the only relevant Chilean law remained the decree of 8 July 1853 which stated simply

“Article 1. That there be founded in the Territory of Colonisation, the Settlement of Magallanes”.

The southern islands were treated as falling within the Territory of Magallanes.

¹ See e.g. the newspaper clipping recording the Stuen claim relating to Picton, 24 December 1903. (Doc. 113)

² In 1897 the following countries stationed consuls or viceconsuls at Punta Arenas: Argentina, Britain, France, Germany, Italy, Portugal, Spain, U.S.A. and Uruguay.

³ In the development of this part of the Memorial, reference will be made to numerous documents which for the sake of convenience have been printed and bound separately from the Annexes referred to in the Memorial and are printed in a Volume entitled “Volume III documents relating to acts of Jurisdiction”. Reference will be made to documents by number, but where a document runs over several pages and the reference is to a particular page this will be identified by the page number in the volume.

25. On 16 January 1892 the Ministry of Foreign Affairs, Worship and Colonization named three persons "to prepare a project for a law covering colonization and emigration to the southern provinces and Magallanes territory".¹

(ii) The Decree of 7 October 1892

26. In April 1892, Daniel Briceno, who had been Governor of the Territory of Magallanes, submitted a long report on the situation in the lands within his charge. He recommended, *inter alia*, the creation of a sub-delegation on Grande Island of Tierra del Fuego and a maritime sub-delegation on Navarino Island. He urged the purchase of a small steamer "more or less of the sloop type" for the latter sub-delegation.² On 7 July 1892 the Governor returned to the question, recommending that in view of the mining activities on the island of Lennox a sub-delegation should be created there.³

27. In September 1892, the new Governor, Admiral Manuel Senoret, also emphasised the need for a sub-delegation. He sought permission to leave for the southern islands in order to begin the foundation there of a new settlement. As sub-delegate, he recommended the appointment of Army Captain Ramiro Silva, with a force of one sergeant and four men from Punta Arenas.⁴ But the Government had acted, it seems, before receiving the Governor's note for, on 22 October 1892, the Ministry of Foreign Affairs which was also in charge of colonisation matters replied, regretting that it was unable to comply with his recommendation of Captain Silva, and stating that they had created the sub-delegation.⁵ The decree, no. 950 of 7 October 1892, recited the increase of population in the southern part of Tierra del Fuego caused by the discovery of gold deposits and stated that legislative approval had not yet been accorded to the proposed law whereby a department should be set up in Magallanes Territory. It then provided:

"Juan de Dios Olivares former Sgt. Major of the Army is appointed subdelegate of the Islands of Tierra del Fuego."

"The Governor of Magallanes, under whose orders shall come this new subdelegate will put at his disposal what police and other elements he may require to carry out his duties." ⁶

(iii) Creation of Rural Commissariats, 1902.

28. In 1902, by means of a decree of 6 March, the Governor of Magallanes, Carlos Bories created in the Territory twelve Rural Commissariats of which

¹ Decree No. 325, 16 January 1892, Official Gazette No. 4140, 30 January 1892, Doc. 4. Note respecting the "Official Gazette". This is the instrument employed by the Government of Chile for the formal publication of matters which are officially required to be published. It is published in Santiago on all official working days.

² Report of the Governor, 17 April 1892, Doc. 6, p.16

³ Note no. 134, 7 July 1892, Doc. 9.

⁴ Note no. 197, 27 September 1892 Doc. 15

⁵ Note no. 1465, 22 October 1892, Doc. 18.

⁶ Decree no. 950, in Despatch No. 1462, 1 October 1892, Doc. 16. Published in the Official Gazette. No. 4354, 22 October 1892.

"XII, Southern Islands, includes the archipelago south of the Beagle Channel and the part of the Great Island of Tierra del Fuego south of the Sarmiento Cordillera".

This decree was sent to the Ministry of Foreign Affairs by note 137, 2 March 1902.¹

29. Juan Depolo, an Austrian who was living at Santa Maria Point on Lennox, was appointed Commissioner of this District in 1902.² In 1903 he appeared, according to the Commander of the cutter "Condor" who had paid a visit there, to be discharging his duties as Commissioner for the Island. Depolo told him that "he was very willing to act as Commissioner, but until now he had not received any official communication appointing him to this post".³ Depolo was not only acting on Lennox, but also on Nueva, for it was he who reported to the judge at Punta Arenas that "during [his] recent tour of inspection in the southern regions under [his] jurisdiction", he learned of the deaths of one Martinovich on Nueva and one Pena on Lennox. These matters are dealt with below.⁴

30. The next appointment to the post of Commissioner of the 12th Rural Section, which was described to be due to the resignation of the former Commissioner, was of Don Carlos Stuenkel in 1904.⁵

31. Carlos Stuenkel was a member of a partnership with his brother, Juan, and Mariano Edwards, which had just bought out the rights of the occupants of Picton and Nueva Islands. He was appointed agent of the Postal Agency created by the Chilean Government on Picton in 1905.⁶

(iv) Creation of Rural Commissariats, 1916

32. In April 1915 the Government Agency at Magallanes referred to the decree of 1902, and suggested that the number of Commissariats should be increased and that greater legal force would be given to them if a Presidential decree was issued.⁷ In return, the Agency was asked to compile a list of Commissariats and persons to be responsible. The Ministry of the Interior issued a Decree on 29 February 1916, creating fifteen commissariats including "Islas Australes (Southern Islands)" and "Isla Navarino". The commissioner for the former was Mariano Edwards, the concessionaire of Picton and Nueva.⁸

(v) Creation of Navarino Subdelegation, 1918-19.

33. By Decree of the Ministry of the Interior of 19 August 1918, a subdelegation of Navarino was created in Magallanes Territory.⁹ By a further decree of 23 January 1919, this was to be known as No. 5 and was to have as territory...

¹ Report on Foreign Affairs, etc. submitted to the National Congress, 1902, Vol. II. Doc. 88a.

² *ibid.*

³ Report to the Commander in Chief, Magellan Naval Station, National Navy, Sec. 1a, Note No. 2575, 9 July 1902, Doc. 90, p. 133.

⁴ §§ 121, 167.

⁵ Decree no. 450, 20 May 1904, Doc. 115.

⁶ See §§ 95, 96 below.

⁷ Official despatch, 8 April 1915, Doc. 247.

⁸ Decree no. 686, Doc. 266. He had been suggested by the Agency, see note of 22 July 1915, Doc. 251.

⁹ Decree no. 3425, 19 August 1918, Official Gazette no. 12, 151 22 August 1918 p. 1821, Doc. 273.

"All island territory situated south of the Beagle Channel, that is to say principally the islands of Navarino, Picton, Nueva, Lennox, Wollaston, Herschel, Deceit, Cape Horn, L'Hermite, Hoste, Gordon and other islands and islets near to them¹

In 1923, Emiliano Gomez was appointed sub-delegate ad honorem.²

34. The boundaries of this subdelegation were not fixed until 1927.³ At the end of that year the administrative divisions of the Republic of Chile were reorganized.⁴ The Territory of Magallanes was to have the Departments of Natales, Magallanes and Tierra del Fuego. By a further decree⁵ of the same date, the Departments or Regions were defined; and the borders were to be defined by the intendente on the proposal of the Governor; by his decree no. 139 of 27 August 1928, the boundaries of subdelegations were defined. That of Navarino was merely stated to "follow the Chilean-Argentine border on Beagle Channel as far as the Atlantic Ocean."⁶

(2) Chilean Administrative Activity from 1891

(i) Visits to the Southern Islands by Governors and other officials.

35. The first high Chilean official to visit the area containing Navarino, Picton, Nueva and Lennox Islands was Governor Manuel Senoret. On 29 October 1892 he conveyed to the Minister for Foreign Affairs information as to the situation of the miners, of whom there were 600 on Lennox, 200 on Navarino, 200 on Nueva and 150 on False Cape Horn. This information had been given him by the captain of the steamer "Amadeo". He stated that he proposed to embark on the naval vessel "Magallanes" on 31 October 1892, taking Captain Ramiro Silva, until the appointed sub-delegate (Juan de Dios Olivares) and 6 policemen should arrive.⁷

36. Governor Senoret returned from this visit just over three weeks later, for on 26 November 1892 he sent the Minister a long account of his foundation of a settlement at Puerto Toro on Navarino Island.⁸ In his report he stated that during the previous two years each steamer had brought parties of 70 or more persons from "the shores of the Plata". The majority were of Austrian nationality (in fact, most of them were Croatians). These persons came to Punta Arenas, and thence were transported to the islands, particularly Lennox. The two ideas which had occurred to him were (i) to regulate the gold industry, and (ii) to develop commerce industry and agriculture, establishing colonies "to the south of the Beagle Channel". The report included a description of the appearance and size of the islands, including Picton, Nueva and Lennox and devoted considerable attention to the state of miners and of the gold industry.

¹ Decree no. 194, 23 January 1919, Official Gazette no. 12280, 25 January 1919, Doc. 278.

² Decree no. 43, 9 February 1923, Doc. 287.

³ Ministry of the Interior Decree No. 5875, 30 August 1927, Doc. 293.

⁴ Ministry of the Interior Decree No. 8582, 30 December 1927, Doc. 294.

⁵ Ministry of the Interior Decree No. 8583, 30 December 1927, Doc. 295.

⁶ Doc. 296.

⁷ Note no. 228, Doc. 19.

⁸ Official Gazette, no. 4,407, 26 December 1892, Doc. 28.

37. The Governor left Captain Ramiro Silva at Puerto Toro to await the arrival of the sub-delegate, and told him to communicate directly with the Administration at Punta Arenas.¹ He sent supplies via the "Amadeo", a steamship owned by a private Chilean citizen, Martinez,² and by the Chilean sloop "Huemul".³

38. Meanwhile, the new sub-delegate had left Punta Arenas on 20 November, on board the "Huemul" for Puerto Toro. He arrived at Puerto Toro on the 22nd, and then went on the 25th to Picton Island. On 26 November he anchored at Lennox Cove, and then returned to Puerto Toro. Once more he left for Lennox, where the sub-delegate landed on 1 December. The "Huemul" picked up some sick persons and returned to Puerto Toro and on the 4th arrived at Punta Arenas.⁴

39. In July 1893, Captain Silva (who is described as Assistant Commandant) was instructed to proceed on board the naval sloop "Condor" to the southern islands in order to ensure peaceful working conditions and fair conditions among the miners.⁵

(ii) Visits by the Chilean Navy 1902

40. Occasional visits of naval vessels⁶ had taken place even before the cutter "Huemul" sailed for the Southern Islands in March 1902. On that occasion, it voyaged in the area of Orange and Tekenika Bays, Navarino, Lennox, Nueva and Picton Islands; the commander described sailing "from Ushuaia up to our return to that port, passing south of Navarino and Lennox islands and entering through the eastern side of the Beagle Channel".⁷

41. Later in the year, the cutter "Condor" visited Tekenika, Packsaddle, Picton, Nueva and Lennox, among other places. The commander described the visit from 19 May to 5 July 1902. At Picton, they were unable to speak to the inhabitants since the two houses by the beach were empty, but they saw sheep grazing there. At Nueva, they talked with Milichich, the occupier⁸ who lived there with an Indian and had built three houses. There were 600 sheep.

42. At Lennox Island, the "Condor" visited Cape Caroline where there were about 26 persons engaged in gold mining. And at Santa Maria Point they talked with the Austrian Juan Depolo, who was then prospecting for gold, and was, as has been mentioned, acting as Commissioner at that time.⁹

¹ Note no. 390, 16 December 1892, Doc. 27

² Note no. 386, 12 December 1892, Doc. 26

³ Note no. 252, 19 December 1892, Doc. 21

⁴ Official Note no. 2 Commander General of the Navy to the Ministry of Marine, 2 January, 1893, Doc. 30. For the report by Olivares see Note no. 371, Doc. 23 and see § 127 below.

⁵ Note no. 331, 31 July 1893 to Captain Silva, Doc. 35; Note no. 330, 31 July 1893 to the Commander of the "Condor" Doc. 36. For the report of Pedro Gomez referred to in the former, see Doc. 29.

⁶ For example, in 1895, the "Huemul" sailed round the islands; she did not visit Lennox as her captain had heard that nothing in particular was happening there, see Doc. 52(a).

⁷ Report on the voyage of the "Huemul" to the Commander in Chief, Magellan Naval Station, National Navy, Sec. 1 No. 1653, 30 April 1902, Doc. 89, p. 131.

⁸ See §§ 103, 105 below.

⁹ Report to the Commander in Chief, Magellan Naval Station, National Navy, sec. 1a, Note no. 2575, 9 July 1902, Doc. 90. pp 132-3.

43. The "Condor" was at this period under orders to make regular visits to the southern part of Tierra del Fuego. Another visit was made at the beginning of 1903. The vessel called at, among other places, Picton and, Nueva¹.

(iii) **Visit by the Chilean Navy, 1905**

44. In 1905, the "Condor" was ordered on another visit. The vessel, according to its commander, R. Garay, visited Ushuaia on its way to Picton and Lennox. After calling at Picton, the vessel went on to Lennox, and Nueva. Having called once more at Puerto Piedra in Picton it visited Ushuaia to take on 8 tons of coal. It then returned to Punta Arenas.

45. The commander described Picton and Nueva as owned by Messrs. Stuvén. A Chilean family looked after the 2,000 sheep and 300 head of cattle on Picton; and there were 300 sheep under another Chilean on Nueva. There were several houses on Packsaddle occupied by three Chileans. As to Lennox Island, there were two inhabited places, Cutter and Oro Bays. There were then 22 men working in the island; 20 Austrians, 1 German and 1 Spaniard.²

(iv) **Visits by the Chilean Navy 1910-1911**

46. In June 1910, the tender "Aguila" sailed on a tour of inspection through the southern channels of Tierra del Fuego. It arrived at Cutter Bay (Lennox) on 1 July, where the officers spoke to the administrator of the Lennox Gold Mining Co. and visited Mr. Loncarich, who was farming at Oro Bay. Because of the weather they were obliged to omit visits to Nueva and Picton.³

47. At the end of that year, however, the commander of the tender "Condor" was able to visit the workings of the Lennox Gold Mining Co., and continued by sailing round Nueva, which he said was badly charted. He visited Picton and spoke to Mr Mariano Edwards, the concessionaire of that island and of Nueva, who told them there was no news to relate.⁴

48. In 1911, the same vessel, in the course of a voyage to the southern islands, made a census of the population, production and constructions on Navarino, Picton and Nueva Islands.⁵ On Picton there was Edwards, a Chilean, with a staff of four Chileans, one Austrian and two Belgians. There were no Argentine nationals. There was a staff of two persons of unstated nationality of Nueva.

(v) **Visit of a Chilean Commission, 1913.**

49. In February 1913, a Commission of five deputies, with three other persons, including the President of the Supreme Court, set out on a visit to the Magallanes region. The first place to be visited was "Tierra del Fuego, Beagle Channel and adjacent islands". The Commission does not appear to have set foot on Picton, Nueva or Lennox, though the vessel sailed through Picton Pass. Thus

¹ National Navy, Sec. 1a No. 412, 6 February 1903, Doc. 100.

² Report of Commander in Chief Magellan Naval Station to Minister of the Navy in National Navy, Sec. 2 No. 3404, 19 October, 1905, Doc. 151. General Boonen Rivera, who was then concerned with the demarcation of the boundary, had urged in a letter to the Ministry of Foreign Affairs in June 1905, that naval vessels should make a trip once every three months to the islands; Ministry of the Navy to Director-General, Note no.78, 19 June 1905, Doc. 132a.

³ Report of the Commander, No. 135, 7 July 1910, Doc. 221 (a).

⁴ Report of the Commander, No. 173, 3 December 1910, Doc. 222(a).

⁵ Report of the Commander, No. 568, 8 December 1911, Doc. 226 (a).

"The Parliamentary Commission was able to appreciate on this trip the value of the lands of Navarino, Picton, Nueva and south of Tierra del Fuego."¹

(vi) **Visits by the Chilean Navy 1913-15.**

50. In November 1913, the tender "Yelcho" visited the islands with the object of anchoring cylindrical buoys at Bevan Island and Herradura Bank. It also visited Picton, Nueva and Lennox, and reported on the farms of Edwards and Loncarich. Complaints were made about the shipping service provided by the house of Braun, Blanchard.²

51. In December 1915, the same ship paid a visit to the southern islands and prepared a statistical report on the farms therein, including those on Picton, Nueva and Lennox.³ On Picton and Nueva there were on Braun and Paravich's farm 19 Chileans and 1 Austrian. On Lennox there were 2 Chileans and 2 Austrians. The ship returned to Picton and Nueva in March 1916.⁴

(3) **Naval Investigation into deaths at sea**

52. In August 1893 the Commander of the tender "Condor" at Puerto Toro ordered the appointment of a tribunal of inquiry to investigate the death of a member of the crew of the "Condor" and the loss of a boat belonging to the sub-delegation for the Southern Islands. The boat was being towed from Puerto Toro to Lennox with two men in it, one of whom was Rain, when it overturned in a heavy wind. The inquiry sat to hear witnesses from the crew at Puerto Toro.⁵

(4) **Judicial Administration**

53. The Naval Commander at Punta Arenas informed the Court there on 17 January 1903 of the death of Manuel Pescetti, which occurred at Mafuil Island on 29 October 1902. He had been a passenger on a Chilean cutter on a trip from Punta Arenas to Lennox. The Court summoned witnesses. The court at Valparaiso noted that no evidence was forthcoming to suggest any crime in connection with this death.⁶

(5) **Transport and Navigation**

54. In 1901, the Commander in Chief of the Magellan Naval Station informed the Director-General of the Navy of the difficulties of communication with the area under his command. He said that for Punta Arenas and the southern colonies, including Nueva, Lennox, Navarino, Picton, Yellow and Gable Islands, the absence of a regular shipping service to the southern part of the Beagle Channel was a matter of great importance.⁷

¹ Report of the Commander of the Cruiser "Ministro Zenteno" No. 1859, 1 March 1913, Doc. 228(a).

² Report of the Commander, No. 632, 29 November, 1913, Doc. 228(b) see § 55 below.

³ Report of the Commander-in-chief, Magellan Naval Station No. 578 enclosing Report of the Commander, No. 775, 21 December, 1915. Doc. 264(a).

⁴ Report to Commander-in-chief Magellan Naval Station, No. 581 31 March 1916. Doc. 266(a).

⁵ Doc. 37.

⁶ Civil Court of Magallanes Archive no. 429, File no. 21, 9 January 1903, Doc. 97.

⁷ Official Note no. 4173 to the Ministry of the Navy, 18 December 1901, Doc. 88, p. 128.

55. In 1906, by a Decree (No. 1590) of 10 August, the Ministry of Foreign Affairs ordered that bids be opened on 1 October for a shipping concession between Punta Arenas and the southern islands on terms therein laid down, including a condition that

“a sailing shall be made monthly to the islands situated south of Tierra del Fuego, through the Beagle Channel, calling at Ushuaia, Navarino, Picton, and other places which the Magellan Government shall determine”.¹

The only bidders were Messrs. Braun and Blanchard. Their bid was accepted by Decree no. 5742, of 29 October 1906. Further Decrees nos. 5364² and 5447 of the Ministry of the Interior dated 30 November and 14 December 1908 stated the conditions. Messrs. Braun and Blanchard were by Decree no. 369 of the Ministry of the Interior of 12 February 1909 granted a concession by which they agreed to continue the service between Valparaiso and Punta Arenas, and to start immediately a service covering certain Atlantic ports and the Magallanes territory. The local service was to comprise five sailings including

“5. - Between Punta Arenas and the Islands south of Tierra del Fuego, Picton, Navarino Beagle Channel and others”³.

By a further decree of 28 December 1916, the Minister of the Interior gave authority to Braun and Blanchard, to raise certain fares and freight rates on their services.⁴

B. CHILEAN ADMINISTRATIVE AND JUDICIAL ACTIVITIES IN RELATION TO PICTON, NUEVA AND LENNOX ISLANDS

(1) (i) INTRODUCTION

56. The Government of Chile will set out in the present sub-section, in relation to each of the islands of Picton, Nueva and Lennox, the evidence of acts of an administrative and judicial nature from 1892 onwards, as demonstrating the continuous display of Chilean sovereignty over them. It will be seen that in relation to all three of these islands, many of the acts in question relate to permission given to persons to occupy the lands for agricultural or industrial purposes, and take the form of leases granted by the Chilean Government for such purposes. In respect of Nueva and Lennox Islands much evidence takes the form of applications to register mining holdings and the

¹ Doc. 191 from 1888-1924, the Ministry for Foreign Affairs was also in charge of colonisation matters.

² Doc. 205

³ Doc. 207. The Decree was published in Official Gazette no. 9361 of 14 April 1909. For powers of attorney relating to this matter see Deeds no. 435, 436, 24 March 1909, Docs. 212, 213 Decree no. 5395, 28 December 1916.

⁴ Decree no. 5495, 28 December 1916. Doc. 268.

sale and transfer of mining rights carried out in the Chilean court at Punta Arenas, and before notaries public¹ there and in Santiago.

57. As frequent reference will be made to the Chilean legislation relating to the use of public land it will perhaps be convenient that this should be described at this point.

(ii) **Legislation relating to occupation leases:**

58. While the position regarding legislation controlling the grant of lands in the Colony of Magallanes is not entirely clear, at any rate prior to 1892, there is evidence that from 1884 onwards with respect to leases of lands on Brunswick Peninsula, the mainland side of the Straits of Magellan, and on the Tierra del Fuego itself, leases of up to 20 years were granted as a result of public auctions. The Colony of Magallanes was expressly excluded from the operation of the Decree of 24 April 1885 governing the distribution and acquisition of State lands in the inhabited parts of colonization territories.² Matters were far from satisfactory, and in 1892 the then Governor of Magallanes Territory recommended that

"A law should be passed without delay covering the leasing of Government land in this territory and the Government empowered to put it into practice. These concessions should be submitted at once for the Supreme Government's approval."³

59. As will be seen, the next Governor of the Territory, Senoret, granted provisional permission to occupy land both in Picton and in Nueva Islands to various persons during the years 1892-1897. However, on 7 February 1893 the Chilean National Congress passed a law governing leases of state lands. This law was often referred to later when applications for leases on all three islands were refused, and was the one under whose provisions the auctions of leases of Lennox in 1911 and 1915 took place.⁴

Article I provided:

"... the President of the Republic is authorised to grant leases of lands owned by the State in the Magellan Territory, Tierra del Fuego and the southern islands of the Republic, leasing to be effected through public auction and in accordance with regulations decreed by the President of the Republic."

¹ Note on the function of the notary

Notaries public are civil servants who belong to the judicial branch of the State, appointed by the President of the Republic and called upon by law to attest documents executed before them, such as Deeds of Purchase and Sale of immovable property, solemnisation of wills, etc. They are lawyers. Certificates or Copies given by them in their official capacity constitute proof of the fact that a specific document was executed before them on a given date and by the persons mentioned in it, and that they formulated the declarations stated therein. Certain Notaries public should the provincial Department lack special officials assigned to such work, fulfil at the same time the function of Official Registrar of Land Titles, Mining Properties, commercial matters and others. Copies of the corresponding inscriptions or proceedings in those registers granted by them possess the quality of Public Instruments and have the same probative effect as is mentioned above.

² Decree no. 115, Article 7, 24 April 1885, published in the Official Gazette no. 2420, 19 May 1885, Doc. 1, p.2.

³ Report to the Minister of Foreign Affairs, 18 April, 1892, Doc. 6. p. 16

⁴ See §§ 134-6 below.

Article II provided:

"Leases may not exceed fifteen years ..."¹

60. In 1895, in accordance with Article 3 of this law, which gave power to the President of the Republic to designate those parts of the Magallanes territory open to national and foreign colonisation, a further decree was enacted by the President, allowing the Governor to make a grant of provisional possession of state land. Within a given time limit the occupant could, upon showing compliance with the conditions, request a definitive title from the Governor, who after considering a report of a commission might send the report to the Ministry of Colonization with a view to the issue of a definitive title of ownership.²

61. A further law for encouraging the setting up of industrial establishments was promulgated in 1897.³ This allowed the President to grant concessions not exceeding 25 hectares, which would become void if within three years the industries for the setting up of which the grant was made were not operating.

62. In 1905, a Government Decree ordered the suspension of any further administrative concessions on lands for colonisation and any occupation permit imposing an incumbrance on the state, until the conditions for them had been laid down by a law. Occupation permits not included in this prohibition could only be granted for periods not exceeding 15 years.⁴

63. In 1924 the Ministry of Foreign Affairs issued a decree approving plans for the division of fiscal lands in Magellan and for an auction of leases to be held in April.⁵ A further decree stipulated that leases should be for 15 years.⁶

64. In June 1929, pursuant to a law of 28 January 1929,⁷ another Decree of the Ministry of Development laid down regulations concerning leasing, sales and colonisation. A classification of lands was prescribed and Picton, Lennox and Nueva were included in Class (b) - lands intended for leasing without promise of sale, in lots not exceeding 10,000 hectares.⁸

65. As regards fiscal lands not subject to some form of occupation lease, the Office of Superintendency of the Province used to appoint fiscal guards, but by a decree of 17 February 1937 of the Minister of Lands and Colonisation this power of appointment was vested in the President of the Republic. The guard, who was required to look after the lands personally, received no remuneration, but was allowed to use the land for pasturage. No time limit for a guardianship was laid down, but it was terminable on 15 days' notice.⁹

¹ Official Gazette no. 4447, 11 February, 1893, Doc. 31

² Decree dated 8 October 1895, Recopilacion de Leyes, Decretos & Co., Vol. II (1900) p.388, Doc. 59.

³ Law no. 985, 30 December 1897, Recopilacion de Leyes por Orden Numerico, Tom I, (2 ed.) 1908, p. 308, Doc. 80.

⁴ Decree of Ministry of Foreign Affairs No. 1322, 13 July 1905, Doc. 134(a)

⁵ Decree no. 167 of 25 February 1924, Doc. 287(a).

⁶ Decree no. 326. of 3 April 1924, Doc. 288.

⁷ The definitive text of this law, No. 4547, was approved by the Ministry of Southern Property in Decree no. 2781, 30 April 1931, Doc. 297 (c).

⁸ Decree no. 3208, 14 June 1929, Doc. 297(a).

⁹ Decree no. 220, 17 February 1937, Official Gazette no. 17714, 10 March 1937, p.766, Doc. 330(b) For the Regulations made thereunder see Decree no. 225, 23 February, 1937, *ibid.*

66. A law of 31 December 1937¹ created new rules for the leasing of fiscal lands, and under this law regulations classifying them into lots were promulgated on 28 September 1938.² Among the lots was one for Lennox of 13,000 hectares, one of 17,200 hectares for Nueva, Picton, Augusto, Garden and Reparo.

(2) Picton Island

(i) Occupation permits; Government leases.

(a) Conditional permission to Pedro Guyon, 1892

67. The first official concession of lands on Picton was made by the Governor of Magallanes, Briceno, to Pedro Guyon by a decree no. 209 of 30 July 1892.³ This conditional permission was to occupy 25,000 hectares (clearly an error, since the area of the whole island is only about 10,000 hectares) on the south part of the island. It appears that Guyon did not make use of the period since by a further Decree no 316 of 23 November, Decree no. 209 was annulled.⁴

(b) Conditional Lease to Eustaquio Provoste Flores 1892

68. The second concessionaire of Picton was Eustaquio Provoste Flores, who applied for a lease of 20 years. On 5 December 1892 a contract for a lease was entered into between Flores and the Governor of Magallanes for 20 years from 1 July 1893.⁵ Meanwhile, in order to carry out his obligations to introduce livestock thereon immediately, the concessionaire was allowed immediate possession of the land. If the concessionaire could not prove that by 1 July 1893 he had erected the necessary buildings and introduced the livestock, the contract was to be rescinded. The Governor, Senoret, forwarded the contract to the Ministry of Foreign Affairs, Worship and Colonization on 6 December.⁶ Provoste Flores did not fulfil the conditions of the contract, and once again the island had no occupant.

(c) Conditional Permission to Messrs. Heede and Glimann, 1893

69. On 28 September 1893, the Governor granted permission, conditional on the approval of the Government, to Messrs. Heede and Glimann, partners in a business at Punta Arenas, to occupy Picton in order to establish a livestock-breeding station.⁷ But the concessionaires did not take up the permit.

(d) Government proposals to auction the lease of Picton, 1894-5

70. On 19 March 1894, an application was forwarded to the Ministry in Santiago from Juan Stuen Gonzalez, in which he asked for possession of the island pending any public auction of it.⁸ However, on 30 March, the Governor was informed by the Ministry that the President of the

¹ Law no. 6152, 31 December 1937. The text was laid down by Decree no. 80 of 7 January 1938, Official Gazette no.18096, 21 June 1938, p. 1785, Doc. 303(a).

² Decree no. 2315, Doc. 301, Published in Official Gazette no. 18198, 24 October 1938.

³ Doc. 13

⁴ Decree no. 316, 23 November 1892, Doc. 22.

⁵ Note no. 374, 6 December 1892, Doc. 24

⁶ Note no. 375, 6 December 1892, Doc. 25

⁷ Decree no. 285, 28 September 1893, Doc. 38

⁸ Doc. 43.

Republic favoured a public auction of the lease of Picton, as well as of Nueva, Lennox and Navarino, as soon as possible and his suggestions were requested as to how best this could be carried out.¹ On 8 May the Governor suggested that the auction of Navarino be delayed. His reason for opposing auctions was that they tended to interest mainly large purchasers who acquired the land for speculative purposes. In his view, greater progress would be made if the land were distributed to small proprietors prepared to make a lesser, but immediate, investment.² He later added that the same considerations applied to the other islands.³ The Governor was nonetheless asked to make arrangements for the public auction of the leases of Picton, Nueva and Lennox;⁴ none took place. He was again requested to hold such an auction in 1895, with no apparent result.⁵

(e) **Conditional Permission to Thomas Bridges, 1895-1903**

71. In January 1895, Governor Senoret wrote that he was still trying to find somebody to occupy the islands, that he had given conditional permission to three persons to do so, none of whom had actually occupied it, and that he could now find no one.⁶ Later in that year, however he found Thomas Bridges, who, or whose successor, was active on Picton until 1903.

72. Bridges was at one time an English missionary in the southern islands who became an Argentine national. In 1886, the Argentine Congress enacted a law granting a lease to Bridges "of an area of 8 square leagues in the Tierra del Fuego Administrative region, on the Beagle Channel, situated between 66° 49' and 67° 30' west of Greenwich, Gable Islands and the surrounding islets being included in this area."⁷ (Underlining added)

This lease was executed later on in 1893 when the Argentine Government granted to Bridges a property of 20,000 hectares of land between 67° 11' 22" and 67° 33' 42" longitude west of Greenwich including therein Gable Island and adjoining islets.⁸

73. At the end of 1895 he applied to the Acting Governor of Magallanes for title to 40 hectares of land at Picton Bay for the purpose of establishing a sawmill there. He enclosed a receipt for a deposit of 1,000 pesos which he had paid into the Treasury on making the application.⁹ The Governor consulted the Ministry of Foreign Affairs, noting that though Bridges had complied with the Governmental Decree of 8 October 1895 concerning concessions of land for industrial purposes, he felt that reference was needed to the Ministry because of the proximity of Picton to Argentine Tierra del Fuego.¹⁰

74. The Ministry thereupon consulted the Chilean representative on the Boundaries Commission, Senor Barros Arana, as to whether it would be proper to make such concessions in the Southern Islands. Senor Barros Arana replied on 15 February 1896 that Picton Island "like the others situated to the south of Beagle Channel, unquestionably belongs to Chile" under the Boundary

¹ Ministry of Foreign Affairs, Note no. 1191, Doc. 44

² Note no. 232, 8 May, 1894, Doc. 46.

³ Note no. 251, 14 May, 1894, Doc. 47.

⁴ Ministry of Foreign Affairs, Note no. 1849, 20 June, 1894, Doc. 48.

⁵ Ministry of Foreign Affairs, Note no. 612, 11 March, 1895, Doc. 52

⁶ Note no. 2, 18 January, 1895, Doc. 51.

⁷ Doc. 1A.

⁸ Award by the National Government, 17 November, 1893, Doc. 39.

⁹ Doc. 61

¹⁰ Note of 18 December, 1895, Doc. 64.

Treaty of 1881. "However", he continued, "to date and as I believe, our Government has not made any effective act of sovereignty in those islands". Granting a concession would be an act of sovereignty, so long as the person to whom it is granted lets it be seen that Chile has the legal right, which in fact he does in making his petition. A minute on this reply states "request the Governor ... to make the concession asked for if he thinks fit".¹

75. On 4 May 1896 the Governor stated that he was in favour of granting the concession,² and by a Note no. 631 of 16 May he was informed that the Ministry had no objection to a grant of conditional title to the 40 hectares in conformity with the Supreme Decree of 8 October 1895.³ The grant was made by the Governor's Decree no. 866 of 26 November.⁴

76. At the end of 1896 Bridges applied to the Governor of Magallanes, Guerrero, for the cession of the whole island,⁵ but this was refused upon the basis of the law of 7 February 1893.⁶

77. In May 1899, the son of Thomas Bridges (who had died in 1898), requested that the concession with respect to the 40 hectares should be made permanent. He sought the appointment of a commission to inspect and report upon the industry he had established there.⁷ On 24 May 1899 Governor Bories commissioned an engineer to survey the territory and installations.⁸ This engineer was unable to fulfil his commission until the end of 1902, by which time Bridges had cleared the island of workable wood and had removed the sawmill to his property in Tierra del Fuego. However, he thought that the work done on the island was worth more than the Island itself.⁹ The Governor thereupon recommended to the Ministry on 22 January 1903 that the permanent title should be granted.¹⁰ The matter was referred to the Inspectorship General of Land and Colonisation, whose lawyer raised legal objections to the proposal,¹¹ and the Inspector General himself pointed out that as Bridges had withdrawn his industry he had no longer any right to the land.¹² The Minister of Foreign Affairs in the light of these reports, issued Decree no. 1818 of 9 December 1903 rejecting the application.¹³

(f) Petition of Edmundo Arestizabal, 1897.

78. Soon after the rejection of Thomas Bridges' application for permission to occupy the island, Edmundo Arestizabal made a similar application. Upon information from the Governor of Magallanes and in view of the Law of 7 February 1893, the Ministry of Foreign Affairs, Worship and Colonisation rejected the application by Decree no. 88 of 3 February 1897.¹⁴

¹ Doc. 67

² Note no. 7, Doc. 68.

³ Note no. 631, Doc. 69

⁴ Doc. 71

⁵ Doc. 73

⁶ Decree no. 24, 14 January, 1897, Doc. 74.

⁷ 24 May, 1899, Doc. 83

⁸ Decree no. 493, Doc. 84

⁹ Report, 15 January 1903, Doc. 98

¹⁰ Note no. 2, 22 January 1903, Doc. 99

¹¹ Note no. 100, 25 November, 1903, Doc. 105.

¹² Note no. 1778, 25 November, 1903, Doc. 106; and see Note no. 1809, 5 December, 1903, Doc. 107.

¹³ Decree no. 1818, 9 December 1903, Doc. 108.

¹⁴ Official Gazette, no. 5627, 10 February 1897, p. 313, Doc. 75.

(g) **Transfer of Bridges' rights and concession to Messrs. Stuvén and Edwards, 1903-1907, together with concession over Nueva Island.**

79. On 24 November 1903, the Bridges Brothers sold their rights and possessions on Picton to Messrs. Juan and Carlos Stuvén and Mariano Edwards.¹ The contract was registered before the Notary at Punta Arenas on 5 May 1904. At the same period, as will be seen,² the same purchasers also bought the rights of the occupant of Nueva, and from then on the histories of the occupation for agricultural purposes of the two islands are the same and will be dealt with at the same time. The sixth clause of the contract of 24 November 1903 provided that

"occupiers rights sold by the present contract are those belonging to Bridges Brothers as occupiers of Picton Island since 1895."

However, about two weeks after the sale the Decree No. 1818 - previously referred to - was issued, denying the Bridges' application for permanent title to their holding. This had the effect of nullifying clause 6 of the contract. Accordingly, in 1906, a further agreement was entered into before the Notary cancelling the payment of the further instalments of the purchase price.³

80. Meanwhile the partnership of the Stuvéns and Edwards needed to regularise their legal position as regards both Picton and Nueva, where they had only acquired title from Milicich, who did not himself have any permanent rights. Therefore, in January 1904 they presented an application to the Governor of Magallanes in which they recited their purchases and their actual occupation of Picton and Nueva and the surrounding islets: Snipe, Solitario, Becasses, Hermanos, Garden, Reparo, Augusto and two others unnamed. They asked for approval, which was granted by Decree no. 71 bis, 30 January 1904, provided the total area was not more than 30,000 hectares and with a reservation of the right of the State to revoke their right to occupy at any time.⁴ The Governor on 23 September 1904 forwarded an application from the Stuvéns and Edwards requesting that they be remembered when the Government decided upon the transfer of Picton and Nueva. On 23 January 1905 the Ministry replied that the rights of the present occupants would be borne in mind.⁵

81. In 1905, an application dated 31 December 1904, forwarded in note 1471 from the Governor,⁶ by Guillermo Acuna for the concession of Picton, Nueva and Lennox was rejected by the Minister by Decree No. 269 of 4 March.⁷ The same fate met an application of the same kind from one Cruz Daniel Ramirez, after a report from the Inspector General of Lands and Colonization.⁸ The reason given was that the law of 7 February 1893 did not permit direct leasing of Fiscal Lands but required that leases be put up for public auction.

¹ Contract dated 24 November, 1903, Doc. 104; The receipt of the purchase price was acknowledged by Deed No. 623, Doc. 103.

² § 106 below.

³ Deed no. 1075, 4 April 1906, Doc. 184

⁴ Guerra, *La Soberanía Chilena en las Islas al sur del Canal Beagle*, pp 335-6, Doc. 114.

⁵ Official Note no. 265, 23 January, 1965, Doc. 119.

⁶ Doc. 118.

⁷ Decree no. 269 4 March 1905, Doc. 120, Published in the Official Gazette, no. 8164, 21 March 1905.

⁸ Decree no. 1565, 28 August 1905, Doc. 142, Official Gazette no. 8307, 13 September 1905, p. 3021.

82. However, by Decree no. 2078 of 31 October 1905 the transfer to Juan and Carlos Stuen by Bridges and Milicich of their rights over Picton and Nueva was accepted. Juan and Carlos Stuen were granted use of the islets of Augusto, Hermanos, Snipe, Garden, Becasses and Reparo for a period of fifteen years, the Government retaining the right to end the permission in case of sale or for public purposes. The Decree was registered before the Notary at Punta Arenas on 5 January 1906.¹

(h) Transfer of the Rights of Messrs. Stuen to Edwards 1907

83. By an agreement entered into before the Notary in Santiago on 8 February 1907 the livestock company of Messrs. Stuen and Edwards was amicably dissolved and the assets, liabilities and rights of the association on Picton and Nueva, together with certain rights of Juan Stuen on Navarino Island, were transferred to Edwards alone.² That Edwards was sole owner in 1908 is evidenced by a report of the Inspectorate of Magellanic Lands dated 30 April 1908.³

(i) Renewal of Concession in favour of Edwards, 1914

84. On 15 December 1914, the Chilean Foreign Ministry acceded to an application from Mariano Edwards for a further renewal of the concession for fifteen years from 31 October 1920, the date at which his preceding concession was due to end. One of the terms of the new grant was that Edwards should build, at a point designated by the Chief of the Magellan Naval station, a store for Navy coal-ships and a house for its caretaker.⁴ The renewal of the concession appears to have been by way of indemnity from the Government to compensate him for the loss of a law suit in relation to the concession on Navarino; the history of this matter is related in the documents attached to the text of the Decree.⁵ It was Decree No. 2008 which occasioned the official Argentine protest of 9 March 1915. (The significance of the failure by Argentina to react to any of the earlier Chilean decrees is mentioned in paragraphs 194, 195 below.)

(j) History of the concession subsequent to 1914

85. On 9 August 1915, by a contract entered into before the notary at Punta Arenas, Edwards agreed to sell his rights to Messrs. Braun and Paravich, the former a company director and the latter a bank manager of Punta Arenas. There was a clause for repayments should the islands pass to Argentina by reason of the decision of the Arbitral Tribunal then being agreed upon.⁶

¹ Decree no. 2078, 31 October 1905, Doc. 152. The decree was published in the Official Gazette no 8392, 29 December 1905, p. 4065, Registered by Deed no. 69.

² Deed no. 285, 8 February 1907, Doc. 195.

³ Report, 30 April 1908, Doc. 202. However, in a plan dated 27 March 1911 for the distribution of lands approving boundaries of concessions, Decree no. 2078 of 31 October 1905 is referred to and the Stuens are still mentioned in connection with Picton, Nueva. Published in the Official Gazette, No. 9961, 22 April 1911, p. 175, Doc. 226-

⁴ Decree no. 2008, 15 December 1914, published in Official Gazette no. 11078, 26 January 1915, p. 382, Doc. 243 at p. 368. For a power of attorney given by Edwards to Bernstein and for the guarantee of performance of Edwards obligations see Deed dated 20 August 1914. Doc. 238 and request dated 4 February 1915, Doc. 244.

⁵ See Doc. 243 and see Deed no. 647, 16 September, 1905, Doc. 144, for Juan Stuen's concession on Navarino.

⁶ Deed no. 299, 9 August 1915, especially clause 6, Doc. 252. For a power of attorney see Deed no. 300, 9 August 1915, Doc. 253.

On 25 September, however, that contract was annulled¹ and replaced by a revised agreement². The transfer was approved by Government Decree No. 1331 of 14 October 1915.³ The new owners appear in the Land Tax Roll for 1917.⁴ By a deed drawn up before the Notary at Punta Arenas on 22 November 1918,⁵ Messrs. Braun and Paravich formed a company for the exploitation of the farming of the islands.

86. In February 1923 this partnership contracted at Punta Arenas to transfer the occupation of the islands to Emiliano Gomez Diaz.⁶ On 11 March 1925, Gomez and Luis Gonzalez formed a company to be known as Gonzalez and Co., with the declared objects of developing ranches on Picton and Nueva islands and adjacent islets. The company was registered at Punta Arenas⁷ Gomez had agreed in January to transfer the occupation to Gonzalez, and the company's main object was the ownership of the concession. Gomez ratified the transfer in August, 1925.⁸

87. Approval by the Chilean Government of the transfer to Gomez, by the Braun, Paravich partnership was granted on 30 March 1926, the decree of approval being registered at Punta Arenas on 7 May.⁹ Gomez's transfer to Gonzalez and Co. was approved on 6 January 1927, and this was recorded before the Notary on 14 May 1927.¹⁰

88. Gomez later sold out his half-share in the company to one Alonso, who by a notarial contract signed at Punta Arenas in August 1929 sold half of his share to Faustino Velasco, a Spaniard.¹¹ Velasco became naturalised as a Chilean subject in 1934.¹² He was then the only one out of four members of the company who was a Chilean, the rest being Spaniards.

89. The lease expired on 31 October 1935, and Luis Gonzalez applied for the lease on behalf of the company. This plea was not then acceded to, but the Intendant of the Province named them as guardians of the property in 1937¹³. The reason for the non-renewal of the lease was that a new law dealing with leases of Magellanic lands was then awaited. This law (No. 6152)¹⁴ was promulgated on 31 December 1937. Under its provisions and regulations made thereunder, Picton, Nueva, Lennox, Augusto, Garden and Reparo¹⁵ were classified as lands of type "C", which entailed that a lease could be granted for not more than 20 years. There were three applicants

¹ Deed no. 555, 25 September, 1915, Doc. 257.

² Deed no. 556, Doc. 257(a). On 27 September, Edwards granted power of Attorney to Don Julio Vicuna S., to negotiate with the Chilean Government for the transfer of the occupancy permit. See Deed no. 561., Doc. 258.

³ Decree no. 1331, 14 October, 1915, Doc. 261, for an earlier recommendation that the transfer be permitted see Note no. 386 from the Governor of Magallanes, 6 September 1915, Doc. 255.

⁴ Land Tax Roll 1917-22, Punta Arenas, 1917., Doc. 270.

⁵ Deed no. 773, 22 November 1918, Doc. 277

⁶ Deed no 133, 6 February 1923, Doc. 286.

⁷ Civil Court of Magallanes, Judicial File no. 283, 17 March 1925, Doc. 290. The statutes were published in the Official Gazette no. 14128, 16 March 1925, p. 613.

⁸ Deed no. 359, 20 August 1925, Doc. 291.

⁹ Decree no. 180, 30 March 1926, registered by Deed no. 28, 7 May 1926, Doc. 291.

¹⁰ Decree no. 5, 6 January 1927, Doc. 292.

¹¹ Deed no. 140, 19 August 1929, Doc. 297(b).

¹² Doc. 300(a). His wife was a Chilean. A daughter, named Fresia Argentina, was born at Ushuaia in 1935. Her birth was registered in Santiago in 1949, reg.no. 512 (1949), Doc. 303(c)

¹³ Decree no. 426, 12 March 1937, Doc.300(c); noted and published in the Official Gazette no.17756 30 April 1937, p. 1253, Doc. 300(d). Gonzalez & Co. are mentioned as "keepers" in a Report from the Naval Station, Magallanes, to the Naval Chief of Staff, 7 November 1938, Doc. 303, and on the Land Tax Roll for 1938, Doc. 300(f).

¹⁴ § 66 above.

¹⁵ Decree no. 2315 of the Ministry of Lands and Colonization, 28 September 1938 Doc. 301, Published in the Official Gazette, No. 18198, 24 October 1938, p. 2885.

for the lease, the Gonzalez company; A. Miranda Vera; and Faustino Velasco Iglesias himself who was still a member of the Gonzalez company. The last named was for a time the preferred applicant, for he was a Chilean and he himself had lived and worked on Picton since 1929 where he acted as the administrator for the Company and had private interests; the others lived in Punta Arenas and were not Chilean. Eventually, the concession was granted to Gonzalez & Co. by a Decree of 6 December 1943 for a period of 20 years dating from 1 April 1937.¹

90. The duration of the company being about to expire in 1956, and its subsisting lease due to expire in 1957², various persons applied in 1955 to the President of the Republic for the right to lease Picton and Nueva and the adjacent islands of Augusto, Reparo, Garden, Snipe, Becasses and Hermanos.³ A compilation of details of the lease by the Naval Commander at Punta Arenas shows that there were then four persons, three of them Spanish and one, Velasco's widow, a Chilean, who were members of the company. On Picton there were said to be an administrator of Chilean nationality with his family, and another Chilean worker; Velasco's widow, together with her brother, the administrator and one other man and his family, all Chilean, were on Nueva.⁴ The applicants were Sgombich, a Chilean, Urzua, a retired officer of the Chilean Navy, Vitelle, and Jose Gallardo, also Chileans, together with Ester Gallardo, Velasco's widow.⁵ On 24 October 1956 the Special Committee of Lands of Magellan having recommended that the last-named be awarded the lease for 20 years from 1 April 1957 and the Department of National Properties concurring,⁶ a Decree of the Ministry of Lands awarded the lease to her.⁷

(ii) Mining Rights

91. Although it appears that no gold existed on Picton Island, some persons seem to have made gold mining claims there. On 13 January 1906, one Fabian Martinez of Punta Arenas conferred a power of attorney upon Nemecio Pacheco to permit him to contract about, to transfer or sell, "ninety-three holdings of gold-bearing sands, situated on Picton Island". The power of attorney was conferred by Notarial Act before the Notary at Punta Arenas.⁸

92. Before the same official, on 29 January 1906, Ramon L. Yavar gave a receipt for 5,000 pesos, the price of certain rights in gold-bearing holdings owned by him on Picton and sold by

¹ This decree no. 3232, Doc. 303(b) is accompanied by its "antecedents", the many documents, including petitions and reports, which contain at length the information summarised in this paragraph. One reason which finally told in favour of Gonzalez was that by the terms of the Company's Constitution any lease in Picton etc. acquired by an individual member accrued to the Company. Thus a lease to Velasco would have had that effect. His widow was able to acquire the lease beneficially in 1957 because by that time the Company's existence had terminated. These antecedents are not reproduced in the volume of Documents.

² See the application of Blanca Ester Gallardo Andrade, 30 May 1955 ~~Doc.~~ (2) Doc. 306.

³ Described as a "plot or lot type 'C', Roll no. 158, comprising 17200 hectares, marked on Plan No. 7."

⁴ Doc. 308. Ester Gallardo, Velasco's widow is, however certified by others as having resided on Picton for 21 years; Certificate of the Provincial Veterinary Surgeon, 4 June 1955, Doc. 307; Certificate of the Registrar, Punta Arenas, 10 June 1955, Doc. 309.

⁵ For some of these applications see Docs. 305, 310, 311.

⁶ Department of National Properties, No. 4962, 8 October 1956, Doc. 315. See also Report of the special Committee of Lands, 1 August 1956, Doc. 312; Certificate of Department of Inland Taxes, no. 110, 14 August 1956, Doc. 313; Report of Inspector of Lands, no. 729, August 31, 1956, Doc. 314.

⁷ Decree no. 1462, 24 October 1956, Doc. 316. This was registered with the Notary on 18 January 1957, Doc. 317.

⁸ Deed no. 30, 13 January 1906, Doc. 163.

his father and representative, Ramon Yavar, to Juan Stuen, one of the concessionaires of the Island.¹

(iii) **Judicial Administration**

93. A striking instance of Argentinian acknowledgment of Chilean jurisdiction over Picton Island is to be found in the complaint by the Captain of the Argentine steamer "Piedrabuena" regarding a slanderous statement made about his crew. The Argentine captain complained on 1 April 1914 to the Maritime Governor of Magallanes which transmitted it to the Civil Court sitting in Punta Arenas, that he had heard from Mariano Edwards, in Picton Island, that a slanderous statement had been made in Picton by a sailor Romero regarding an alleged theft of cattle by the crew of the "Piedrabuena" during its last visit to Picton. The Captain concluded his complaint by saying that he believed that his request came within the jurisdiction of the Chilean court.²

94. The importance of the episode is clear: here is an Argentinian captain, apparently a naval officer, for he is described as "Captain of Frigate", clearly knowledgeable about the area, freely choosing to complain to a Chilean court regarding a wrong alleged to have been done on Picton Island.

(iv) **Establishment of Postal Agency, 1905**

95. In 1904, Mariano Edwards and Juan and Carlos Stuen, the occupiers of Picton and Nueva Islands requested the Governor of Magallanes to obtain authorisation for opening at Puerto Piedra, a harbour in Picton, of an agency for the postal service to the southern islands, which till then had had to use the postal service at Ushuaia. Mail would be collected at Picton and distributed from the agency through the islands.

96. The Governor having forwarded the application to the General Post Office in Santiago, by letter no. 752 of 23 September 1905, that department recommended to the Chilean Ministry of the Interior that the agency should be created with Mr. Carlos Stuen as Agent at a salary of 360 pesos a year. This was effected by a decree of the Minister of the Interior, countersigned by the President of the Republic, No. 1348 of 29 March 1905 and the salary was to be charged on the budget of the Ministry.³

(v) **Acts connected with the Chilean Navy**

(a) Investigation of fire on board the "Elena" 1906.

97. In 1906, according to a statement by its crew dated 25 April, the Chilean Steamer "Elena" was lost by fire while at anchor at Wagner Cove, on Picton Island. On 4 May, the assistant naval

¹ Deed no. 422, 29 January 1906, Doc. 164

² Judicial file no. 670, 1 April 1914, Doc. 230.

³ Doc. 121

officer in charge at Punta Arenas was appointed by the Naval Commander there as secretary of the official inquiry into the incident. The crew were heard as witnesses. The inquiry absolved the captain of the "Elena" of responsibility and the summary of the proceedings was sent to the Judge of the Territory, and a copy to the Director of the Maritime Territory of Magallanes.¹

(b) The establishment of a naval coal store

98. In February 1914, the Commander of the Tender "Yelcho" proceeded, in accordance with his instructions, to Piedra Cove to construct a pier for a coal store. Mr. Mariano Edwards undertook to complete it.² As has previously been mentioned, article 3 of Decree 2008 of 15 December 1914, by which the occupation concession was renewed in favour of Mariano Edwards, provided that "the concessionary was obliged to construct at a point designated by the Chief of the Magellan Naval Station a store for coal bunkers for the Navy and a house for the store caretaker."³ The obligations under this concession were transferred with it to the purchasers Messrs. Braun and Paravich on 25 September 1915.⁴

99. In April 1915, the Commander of the "Yelcho" reported on the further work undertaken on the pier, and completion of the coal store house, and the partial construction of a residence for the caretaker.⁵ The Ministry of Foreign Affairs and the Navy noted these measures taken in pursuance of Chilean sovereignty in the islands.⁶ The coal depot was opened in September 1915.⁷ According to the commander of the tender "Meteoro", who in October took 500 sacks of coal thither, a Sergeant Armijo was in charge.⁸ A report to the Navy Ministry in December transmitted a photograph of the installations.⁹ By Decree No. 1462 of 27 August 1918, effect was given to a contract whereby the concessionaires, Braun and Paravich were to take over the operation of the coal store. The contract was registered by the Commander in Chief of the Magallanes Naval Station before the notary at Punta Arenas on 4 October of the same year.¹⁰

(vi) Police establishments

100. The nominal roll of the Inspection of the Commissariat of Police of the Province of Magallanes for 13 December 1904 shows that one Constable 2nd class, Pedro N. Coluna was on duty at Picton.¹¹ Santiago Vilches appears in the roll for 14 April 1905 as being there;¹² and Carlos Amaro in that for 14 September 1906.¹³ Luciano Bahamondes Barria and Daniel Andrade Diaz appear in the review of 28 June 1909,¹⁴ as being on the island, and Juan B. Paredes Morales in that of 27 November 1909.¹⁵

¹ Judicial File, 25 April 1906, Doc. 186.

² Official Despatch, no. 653, 24 February 1914, Doc. 229.

³ See § 84, Doc. 243

⁴ Doc. no. 556, 25 September 1915, Doc. 257(a)

⁵ Official Despatch no. 740, 24 April 1915, Doc. 248.

⁶ Official Despatch no. 272, 18 June 1915, Doc. 249.

⁷ Official Despatch, 16 September 1915, Doc. 256

⁸ Official Despatch, 17 October, 1915, Doc. 262

⁹ Official Despatch, 23 December, 1915, Doc. 265

¹⁰ Deed no. 524, Doc. 276. For the text of the Decree approving the contract, see Doc. 274. The coal store was still operating in 1927, Report of the Commander of the "Porvenir" 12 December, 1927, Doc. 293(a).

¹¹ Nominal Roll December 1904, Doc. 117

¹² Nominal Roll 14 April 1905, Doc. 122

¹³ Nominal Roll, 14 September 1906, Doc. 193

¹⁴ Review of Police Force Personnel, 28 June 1909, Doc. 218

¹⁵ Review of Police Force Personnel, 27 November 1909, Doc. 219.

On 28 January 1910 Bahamondes is again reported as being on duty there, with Manuel Mancilla Alvarez.¹

(vii) **Other applications of Chilean law**

101. A document dated 11 November 1914 issued by the Treasury of the Magallanes Municipality records the failure of Mariano Edwards to comply with the provisions of the Law of Statistics of 6 December 1911.² The same occurred in 1915.³ The same is true of the purchasers from Edwards, Messrs. Braun and Paravich, in 1918.⁴

(3) **Nueva Island**

(i) **Occupation permits, Government leases**

(a) **Proposals for auction of the Leases, 1894-5**

102. The proposals for auctioning leases already mentioned in relation to Picton Island also referred to Nueva Island.

(b) **Occupation by Antonio Milicich 1895-7**

103. Some time in 1895, Antonio Milicich, an Austrian⁵ of Punta Arenas, was given oral permission by Governor Senoret of Magallanes to set up a livestock breeding station. This fact is recited by him in an application made to the Governor in 1899⁶. In 1897 he requested the Governor to inform the Supreme Government that he was continuing to transport animals to Nueva, so that provisional title might be granted him as soon as possible.⁷

(c) **Application by Santiago Sabatier, 1897**

104. On 1 August 1897 Santiago Sabatier asked for a grant of provisional title for sheep-breeding purposes.⁸ This was forwarded by Governor Bascunan of Magallanes to the Ministry for Foreign Affairs, Worship and Colonization in Santiago saying that he felt that Governor's authority to grant leases in Magellan and the southern islands had been superseded by the law of 7 February 1893.⁹ On 27 August 1898 the Ministry replied that orders had been given under a Decree of 5 May 1898 to divide into lots all lands, both occupied under provisional title and unoccupied, preparatory to a public auction. At this the applicant could bid. Meanwhile any concession would be contrary to the provisions of the Law of 7 February, 1893.¹⁰

¹ Review of Police Force Personnel, 28 January, 1910, Doc. 220 (All these six documents are taken from Volumes 1, 8 and 10 of the Files of the State Police Inspections, Punta Arenas Police; Archives of the Directorate-General of Carabineros, Santiago).

² Judicial File no. 814, 2 July 1915, Doc. 250.

³ Judicial File no. 874, 22 October 1915, Doc. 263.

⁴ Judicial File no. 430, 3 March 1915, Doc. 279.

⁵ See National Navy, Sec.1a. No. 2575, 9 July 1902, Doc. 90 p. 132.

⁶ See § 105 below.

⁷ Doc. 78.

⁸ Doc. 77.

⁹ Note, 26 October 1897, Doc. 79.

¹⁰ Note no. 245, 27 August 1898, Doc. 82.

(d) Application by Antonio Milicich, 1899

105. Meanwhile, Milicich continued his occupation and operations on Nueva. In 1899 he again recited the history thereof and asked the Governor to take notice of these circumstances in order to protect his interests. He asked for an authorized copy of his petition with its outcome. On 15 November 1899, the Governor minuted: "That this be noted and the copy request be given".¹

(e) Sale of his rights by Milicich to Messrs. Stuvén and Edwards, 1903.

106. Milicich's rights were acknowledged by Juan Stuvén who, by a contract executed before the Notary at Punta Arenas, dated 16 July 1903, agreed to purchase those rights and other property on Nueva free of charges.² On 23 December 1903 before the same notary, Stuvén declared that the sale must be understood to be also in favour of his brother Carlos and Mariano Edwards, with whom he was a partner.³ From that time on the concession for Nueva passed into the same hands as that for Picton, and has already been dealt with.⁴

(ii) Mining Rights

107. The search for gold on Nueva began in the early 1890s. As with the gold mining on Lennox Island, at various times claims were registered with, and permission was sought from, the Chilean authorities. The following may be noted among such transactions:

(a) Applications by Juan Stuvén, 1903

108. On 23 December 1903 four applications for mining claims and their registration and publication were made to the Court of First Instance of the Magellan Territory by Juan Stuvén (who was by then one of the occupiers of Nueva, having recently bought the rights of Antonio Milicich). These concerned two holdings of five hectares each at Francesa Bay;⁵ two of five hectares at Punta Orejas de Burro;⁶ two of five hectares at Senoret Bay;⁷ and in respect of ten holdings of five hectares, on Ensenada Beach, between Punta Jorge and Punta Waller. The applications were made on behalf of himself and his partner Mariano Edwards, later sole concessionaire of the island, to have five holdings each.⁸ The Court ordered the registration and publication of these claims.

109. On 22 September 1904, the three hundred days allowed under law for the setting up of installations for the exploitation of the holdings having expired, Stuvén requested an extension of one hundred days for this purpose, which request was granted. On 25 February 1905, having completed this work, Stuvén requested the Court to authorise the commencement of exploitation, and to that end to nominate an expert to examine the sites. The court did this, but the appointed expert being absent, another appointment was requested and granted on 3 March.

¹ Doc. 86, this is also recited in the contract of sale to Stuvén, see next note.

² Deed no. 53, Doc. 102.

³ Deed no. 750, Doc. 109

⁴ §§ 82-90 above.

⁵ Judicial File no. 32, Doc. 110

⁶ File no. 301, Doc. 113.

⁷ File no. 137, Doc. 111

⁸ File No. 300, Doc. 112

(b) Applications by Jorge Boonen Rivera and others, 1905

110. On 15 April 1905, Jorge Boonen Rivera, who was the moving spirit behind the Lennox Gold-Mining Company,¹ registered with the Court at Punta Arenas several applications respecting mining claims on Nueva and Lennox Islands on behalf of himself and a considerable number of partners. Three of these concerned Nueva. One was in respect of claims numbered G 1-35 at the Bay of Orejas de Burro; a second in respect of claims numbered K 1-35 at a beach between George headland in the north and Fifty headland in the south; and a third dealing with claims numbered H 1-35 at a beach extending from Waller headland in the East to George headland at the west. The claims were registered under numbers 732-734 on sheets 496 and 497 of the Registry of Mining Claims for the year. The registration was notified by a deed executed before the Notary at Punta Arenas on 30 May 1905.²

(c) Application by Eduardo Bernstein and Sale to Juan Stuvén, 1906.

111. On 20 February 1906, Eduardo Bernstein, a lawyer of Punta Arenas applied on his own behalf and that of eleven others for registration of three claims. The first, in respect of a claim situated at the beach running west from Point George, concerned thirty-six holdings of 5 hectares each numbered Riqueza 1-36; the second was in respect of a claim situated at the beach running from Point George in the north to Point Fifty in the south. (This is the same beach as that upon which Jorge Boonen's claims K 1-35 were situated.) The claims were numbered Suerte 1-36. The third was at "Orejas de Burro" and numbered Fortuna 1-36.

112. The registration of these claims was effected in the Registry of Mining Claims Nos. 595, 593; and 594 at pp.410 and 409. This registration was recorded by public deed before the notary at Punta Arenas on 7 March 1906.³ On 9 March these claimants all sold their registered claims to Juan Stuvén, one of the occupiers of Nueva, by a contract executed before the notary at Punta Arenas.⁴

(d) Application made by Ramon L. Yavar, 1905-07

113. In August 1905, Ramon L. Yavar, a lawyer of Punta Arenas, acting under power of attorney granted by Ernesto Vigneaux and others, petitioned the Court at Punta Arenas for the registration of claims named Burro No. 1 to No. 159 sited between Waller Point and the Bay of Orejas de Burro. On 14 August the application was registered as no. 1470 on page 97 of the Register of Claims. It was recorded by a deed before the notary on 31 August. At the end of the month the other parties transferred their rights to Yavar.⁵ A request by Yavar to the Court on 5 June 1906, for an extension of the three hundred day period by one hundred days was granted and later Mariano Edwards requested on behalf of Yavar the appointment of an expert to examine the installations. The request having been granted, Yavar was in October 1906 given permission by the Court to exploit the holdings.⁶

¹ See §§ 150-155 below.

² Deeds No. 687-9, 15 April 1905, Docs. 124, 124(a), 125

³ Deed no. 730, Doc. 165, Deed no. 731, Doc. 166; Deed no. 732, Doc. 167.

⁴ Deed no. 786, Doc. 169.

⁵ See Deed no. 462, Doc. 143 and inclosure.

⁶ Judicial File no. 9, 5 June 1906, Doc. 187.

114. In July 1907 Burro 1-159 were auctioned by the Court to Santiago Edwards. The following day, 6 July, Edwards and Eduardo Bernstein declared before the notary that Edwards had bid on behalf of Bernstein and transferred the rights to the latter. Edwards was to be granted as commission 10% of the shares in a company, which it was proposed should be formed in order to exploit the claims and claims called Vieja 1-15 already claimed by Bernstein but not, apparently, then registered by him. The subsequent history of this project will be given later.¹

(e) **Transfer of claims by Santiago Whalley and others to Mariano Edwards, 1906.**

115. On 29 September 1906, one Santiago (or James) Whalley appeared with Mariano Edwards before the notary at Punta Arenas, in order to transfer certain claims named Fortuna 1-99 which are stated to have been registered on 8 June 1906. A copy of the notarial instrument was ordered to be entered in the Register of Mining Claims.²

(f) **Transactions in relation to Claims "Vieja 1-15", 1907-1909.**

116. On 24 April 1907, Eduardo Bernstein, on his own behalf and for four others requested registration and publication of claims named Vieja 1-15 to be found at the beach west of Point Waller; three holdings to be owned by each of the five persons. The claims were registered as no. 149 on page 112 of the Mining Applications Register, and the fact was recorded by notarial act effected at Punta Arenas on 27 April 1907.³

117. Meanwhile, on 25 April, the four persons appeared before the notary to register the sale of their holdings to Bernstein. But the deed was declared null and void since one party refused to sign.⁴ On 2 May, however, the sale did take place, the price having increased from 10 pesos to 50 pesos for each seller. This transaction was carried out before the notary.⁵

118. Thereafter, Bernstein requested the court to allow him to take over the holdings, since he had already installed the necessary equipment. An expert reported to the court. Since Bernstein wished to make a claim to permanent, in place of temporary, ownership he asked for an engineer to take the measurements of the holdings and paid the necessary fee to the Municipal Treasury of Magellan. On 1 June 1907, he was given permission to begin exploitation of the holdings. As to his request for permanent title, the neighbouring owners were to be asked if they objected to a survey, Mariano Edwards being appointed as engineer to conduct the survey of the property. When no objections had been received, it was ordered that the survey should start on 10 July. The survey was conducted and a certificate given. In November 1907 following representation by Bernstein that the certificate was inaccurate in its description of the boundaries of the site in question, the Court ordered the necessary rectification.⁶ This was registered with the notary on 8 November.⁷

119. Reference has already been made to the commission paid to Santiago Edwards consisting of shares in the company to be formed to exploit inter alia Claim "Vieja 1-15" and "Burro 1-159".

¹ Deed no. 65, 6 July 1907, Doc. 199, See §§ 116-120 below.

² Deed no. 654, 27 September 1906, Doc. 194.

³ Deed no. 188, Doc 195(a)

⁴ Deed no. 1032, Doc. 196.

⁵ Deed no. 1100, Doc. 197.

⁶ Judicial File no. 2294; 22 May 1907, Doc. 198

⁷ Deed no. 71, 8 November 1901, Doc. 201

On 5 September 1907 Edwards and Juan Blanchard appeared before the Notary at Punta Arenas to effect a sale of three hundred shares; the sale to be conditional upon the formation of the Company in question.¹ The company does not appear to have come into existence, however, for on 27 April 1909, Bernstein transferred the holdings themselves (which are stated to have been registered under No. 67 of the Record of Mining Properties, 1907 and entered on page 529) to Mariano Edwards, the sole occupant of Nueva, for £100.²

120. The last record of "Vieja 1-15" is a power of attorney given to Juan D. Roberts by Edwards empowering him to negotiate their sale. This power of attorney was registered before the notary, who was authorised to receive the purchase price on 18 May 1909; and was made subject to certain instructions contained in a letter to Roberts formalised on the following day.³

(iii) Judicial Administration

(a) Death of Mateo Martinovich, 1903.

121. In 1903, Juan Depolo, who was then acting as commissioner of the southern islands, reported to the Judge at Punta Arenas that on 15 or 16 March 1903, one Mateo Martinovich, an Austrian subject, whose mental faculties had been disturbed, disappeared into a forest on Nueva and could not be found. He must be presumed dead. The judge thereupon requested the police to summon Antonio Milicich, the occupier of Nueva, and anyone conversant with the circumstances. The court heard Depolo himself and one other witness, but the police reported that Milicich and the other persons who worked with Martinovich had gone to Argentina. At the request of the Prosecutor, the Court suspended further investigation and no more appears to have been heard of the matter.⁴

(b) Case against Aniceto Lemas for the wounding of Juan Yagan, 1904.

122. On 18 October 1904 the Governor of Magallanes Territory forwarded to the judge at Punta Arenas a report from the officer administering the XIIth Section (Rural) of the Territory, Carlos Stuvén (who was also a concessionaire of Nueva), together with statements of witnesses, upon an incident on Nueva in which one Aniceto Lemas had knifed an Indian worker Juan Yagan during a quarrel. The Court thereupon ordered the committal of Lemas to prison. On 4 January 1905 it ordered the issue of a warrant for his arrest, as the court was taking proceedings against him for assault; and on 26 January it issued a proclamation that judgement would be passed upon Lemas in his absence. He appeared to have gone to Argentina. The court heard witnesses and a report from the District Attorney, and on 4 October 1905 Lemas was sentenced to one year's imprisonment.⁵

(iv) Notarial act: Salvage of the "Schulan", 1918.

123. On 23 September 1918, the Diaz, Contardi Company of Punta Arenas granted a power of attorney before the notary at that town to Alberto Fuentes, of Santiago, to obtain from the relevant authorities permission for them to salvage the foreign vessel "Schulan" wrecked on the east coast of Nueva Island in 1910.⁶

¹ Deed no. 571, Doc. 200

² Deed no. 654, Doc. 214

³ Deed no. 795, Doc. 215, Deed No. 800, Doc. 216.

⁴ Judicial File No. 479, 12 December 1903, Doc. 101.

⁵ Judicial File No. 105, 19 October 1904, Official Note no. 795. Doc. 116.

⁶ Deed no. 446, Doc. 275.

(4) **Lennox**

(i) **General Administration 1892-3**

124. The original acts of jurisdiction by the Chilean authorities over the island of Lennox were caused by the influx of prospectors and the state of lawlessness consequent thereon. Reports made by Governors of the Magallanes Territory and by the District Magistrate continually refer during the years 1892 and 1893 to this state of affairs.

125. On 23 July 1892¹ the then Governor, Briceno, reported to the Ministry for Foreign Affairs, Worship and Colonization in Santiago that 41 passengers, all miners from Lennox, had arrived at Punta Arenas on board the Argentine vessel "Golondrina". He drew attention to the serious disturbances among the low persons on Lennox, without any force there to restrain their excesses and drunkenness. He remarked that, as he had already stated,² he had already decreed the prohibition of exploitation of the gold pannings by other than existing prospectors before the ruling about the matter from the Government. In the meantime he would send the sloop "Huemul" to give notice to evacuate Lennox and to stop the arrival there of such vessels as were destined for it by way of Ushuaia.

126. However, the threat was not carried out, mainly because of the arrival as Governor of Manuel Senoret, who was keen on the exploitation and colonization of the islands. In August, the Minister was informed by the Maritime Governor of the arrival at Punta Arenas of the schooner "Express" via Ushuaia with twelve passengers having 17 kilogrammes of gold. The captain said that there were many workmen on the island and that all was in order.³

127. Governor Senoret reported on 17 October 1892 on the miners and the prospecting industry in Lennox and Navarino, partly to put right what he regarded as misconceptions prevalent in the capital and in Valparaiso. He stated, however, that the information he was retailing came from persons from those islands and that he proposed to go there.⁴ His visit was undertaken in combination with his journey to Navarino to establish the settlement at Puerto Toro already referred to.⁵ He gained the impression that affairs were rather better on Lennox than he had been led to believe and that exploitation of the gold bearing sands, which he had previously thought were in danger of soon being worked out, had a promising future.⁶ He further supported these views by forwarding a report of 30 November from the sub-delegate of the Southern Islands, Juan de Dios Olivares, who had inspected works at "General Holley" and "Manuel Senoret" Bays. Although Olivares had recommended the creation of a hospital on Lennox, the Governor disagreed with this, on the grounds that Government assistance in the islands should be centralised at Puerto Toro.⁷

128. In February 1893, the pilot of the Chilean vessel "Amadeo" protested to the Maritime Office at Punta Arenas that he had been arrested and fined by someone claiming to act as "maritime authority of the port of Lennox". The Governor of Magallanes, to whom the complaint was referred,

¹ Note no. 153, 23 July, 1892, Doc. 10.

² Note no. 134, 7 July 1892, Doc. 9.

³ Note no. 75, 13 August, 1892, Doc. 14.

⁴ Note no. 215, Official Gazette No. 4359, 28 October 1892, Doc. 17.

⁵ §§ 35 - 36 above.

⁶ Note no. 250, 16 November 1892, Doc. 20.

⁷ In note no. 371, 5 December 1892, Doc. 23.

regarded the action as "a serious and regrettable error" and ordered the remission of the fine.¹

129. At about this time, Pablo Gomez was acting sub-delegate of the southern Islands. In May 1893 he seems to have been based at Holley Bay, on Lennox Island, whence he transmitted a series of reports to the Governor about the state of lawlessness there. He was clearly less optimistic about the gold production itself, although his views tended to change, and very pessimistic about the disorder among the workers, particularly at Point Santa Maria as a result of drink. He asked for the appointment of a policeman to help him but was informed by the Governor that, as it was not possible to appoint a police agent for the Island, he might instead form a police force from the civilian population. Gomez considered that since his own authority was consistently ignored, such appointment had best be made by the Governor, who should put the men under the authority of the District Magistrate.² On 31 July 1893 the Governor ordered Captain Ramiro Silva to take one man and one police officer for the purpose of restoring order in Lennox.³

(ii) Occupation permits and Government leases

(a) Provisional possession to Carlos Williams 1891

130. The first grant of any right to the island of Lennox appears to have been made by a Decree dated 30 March 1891 of the Governor of Magallanes, Valdivieso, whereby an application by Carlos Williams was accepted on condition that he establish on the island at least two families, and subject to the right of the Government of Chile to decree otherwise.⁴

(b) Application by Alejandro Varela and others, 1892

131. It does not seem that Williams made much of his concession for, on 11 June 1892, Governor Briceno forwarded to the Ministry of Foreign Affairs, Worship and Colonization an application by Alejandro Silva Varela, Federico Welfin, Felix Cordiva and Alberto Barra to be granted for a period of twenty years a concession for the islands of Lennox and Navarino, on which they promised to "introduce within two years a given number of heads of cattle or to set up an industry on them".⁵

(c) Application by Maupas and Balmaceda, 1899

132. At the beginning of 1899, two Argentine citizens Alfredo Maupas and Laureano A. Balmaceda applied to the President of the Republic for a lease of approximately 10,000 hectares of land from Cape Caroline to the west to Cape Sta. Maria and ending opposite Point Yawl on Navarino. In a covering note, the Governor of Magallanes drew attention to the Law of 7 February 1893 regarding leases of public lands, and to the need to survey land in the southern islands with a view to leasing it by public auction. The Minister for Foreign Affairs decreed on 11 September 1899 that, by reason of the Law of 1893, the application must be denied.⁶

¹ Notes no. 24, 23 February 1893, Doc. 32; no. 114, 3 March, 1893, Doc. 33.

² Note no. 20, 27 June 1893, Doc. 29.

³ Note no. 331, 31 July 1893, Doc. 35

⁴ Decree no. 87, Memoire of Governor Bascunan, Vol. II, Doc. 2

⁵ Note no. 33, Doc. 7

⁶ Decree no. 1397, with note no. 855, 12 July 1899 from Governor Bories, enclosing application dated 28 February, 1899, and further note no. 27, 12 July 1899 from Governor Bories, Doc. 85.

(d) Applications of Acuna and Ramirez, 1905

133. These applications, already referred to in connection with Picton and Nueva Islands, were also made in respect of Lennox. They were refused.¹ The reason was based on the terms of the Law of 1893.

(e) Auction of the lease to L. Bourgade, 1911

134. No grant of possession appears to have been made after 1905, but on 31 December 1910 it was decreed by the Minister that an auction should take place of a large number of vacant lots of public lands in the southern islands. One of these was Lennox, described as of 95 square kilometres, the reserve price for which was 500 pesos. The contract of lease would be for nine years, and rent would be paid in advance each six months. Any successful bidder who did not pay three consecutive instalments would forfeit the lease.²

135. The auction took place on 28 February 1911. The successful bidder was Leopoldo Bourgade. The Assistant Government Finance Officer for the Territory entered the lease before the notary at Punta Arenas on 27 March 1911.³ Leopoldo Bourgade took up the lease, and a year later executed at Punta Arenas a power of attorney to Octavio Ossandon to represent him in commercial dealings, in connection with the lands he had leased, including Lennox.⁴

(f) Auction and Lease to the Lennox Estates Company, 1915

136. However, soon afterwards, it appears that Bourgade forfeited the lease. In 1915 the island was once more put up to public auction and was bought by the Lennox Estates Company ("Sociedad Estancia Lennox").⁵

137. This company had its origin in a transaction before the Punta Arenas notary of 15 May 1914 whereby one Esteban Loncharich of Lennox Island, residing temporarily at the Punta Arenas, sold four-fifths of his rights of occupation at Lennox, together with the stock and chattels, to four others, each taking one fifth.⁶ It is not clear how he had obtained his rights for he did not acquire them at an auction. In any event it seems that they only covered one field, for the purchasers then had to buy the lease of the island the following year.⁷ However, on the same day the five men executed another document containing the articles of a copartnership, to be called the Lennox Estates Company. Its object was to raise cattle on Lennox.⁸

¹ § 81 above. Decree no. 269, 4 March 1905, in Despatch of 4 March, Doc 120, (Published in the Official Gazette, no. 8164, 21 March 1905). Decree no. 1565, 28 August 1905, Doc. 142 (Published in the Official Gazette no. 8307, 13 September 1905, p. 3021).

² Decree no. 2,122. Published in the Official Gazette No. 9876, 9 January 1911, Doc. 223.

³ Deed No. 494, 27 March, Doc. 224

⁴ Deed No. 444, 15 March, 1912, Doc. 228.

⁵ Decree no. 1726, 7 October 1914, Doc. 240; decree no. 1726, published in Official Gazette no. 11025, 20 November, 1914 p. 4301 Doc. 241.

⁶ Deed no. 1000, Doc. 231

⁷ In 1908 he was apparently already occupying the north-western part of the island where he kept 500 sheep and a shepherd; see Report to Land Inspection Office, 30 May 1908: Doc. 202.

⁸ Deed no. 1001, Doc. 232

138. There immediately began various changes in membership: Domich was brought in on 18 May¹. Bonacich sold out to Piovceovich on 18 July.² Piovceovich had already mortgaged his share to Loncharich, a loan which was redeemed, it seems, by a later member, Violich in 1916³. On 20 July Piovceovich sold the share he had obtained on 18 July to Violich and on 23 July Loncharich sold out altogether to Domic.⁴ For some reason, though, Loncharich gave a power of attorney on 14 December 1914 to Felix Blanco Lecaros to obtain "the antecedents or certificates relating to the occupancy of a field situated in Lennox Island".⁵ The last recorded change of membership before the Company acquired the lease of the island was on 27 February 1915 when Doberti was brought in by Domic.⁶ The membership then was Martinich, Fodich, Piovceovich, Domic and Doberti with 16% and Violich with 20% shares. All these except Doberti were Croatians who had been resident in Chile for many years.⁷ Doberti was an Italian. As recorded in the publication of the lease by the Governor of Magallanes at the notary's office in Punta Arenas on 24 November 1915, the Minister for Foreign Affairs Lands and Colonisation decreed (by decree no. 726) on 7 October 1914 that an auction should take place of fifteen year leases on vacant Government lands. This took place on 1 March 1915 and Lennox Island was sold to the Lennox Estates Company for 1,500 pesos. By Decree 1299 of 30 September, the Minister approved the lease.⁸

(g) **Transfer of the lease to Domic and the New Company, 1919**

139. Subsequently, further changes took place in the membership of the company. At some time Doberti must have sold his share to Juan Sapmar, and Violich swore an inventory of the estate of his deceased wife Maria on 19 January 1918, in which she is said to have owned 1/6th (rather, 16%) of the shares.⁹ But Violich was the owner again in 1919. The other partners all sold out to Esteban Domic by a contract recorded before the notary at Punta Arenas on 3 April 1919.¹⁰ The price was 65,000 pesos; all the leasing rights being assigned to Domic. Domic did not, however, carry on alone, for he then formed a new partnership also named "Lennox Estates". Jordan was to be the manager. The agreement was recorded before the notary at Punta Arenas on 1 May 1919.¹¹

140. On 3 May, a cutter named "Sokol" was purchased by a contract at Punta Arenas.¹² In 1921 proceedings were begun in the Court of First Instance at Punta Arenas against "Domich and others" for non-payment of rent.¹³ Furthermore, in 1921 an action was brought in the same court for violation of the Law of Statistics.¹⁴ Finally, by a Decree of 26 January 1923, the lease was annulled,¹⁵ and although Jorge Jordan on behalf of the Company offered at the end of 1924 to pay the rent due, the Ministry of Foreign Affairs declined his petition.¹⁶

¹ Deed no. 1017, Doc. 233

² Deed no. 128, Doc. 235

³ Deed no. 115, 16 July 1914, Doc. 234, Deed no. 912, 18 May, 1916, Doc. 267.

⁴ Deed no. 132, Doc. 236, Deed no. 153, Doc. 237

⁵ Deed no. 697, Doc. 242.

⁶ Deed no. 318, Doc. 245

⁷ See a Report, no. 372, 24 August 1915 from the Governor to the Minister; he does not mention Martinich. Doc. 254-

⁸ Doc. 259, p.405 Registered at Punta Arenas, Deed. no. 897, 24 November 1915, Doc. 264. For an account of the auction, see Doc. 246.

⁹ Deed no. 117, Doc. 271.

¹⁰ Deed no. 635, Doc. 280. He and others are shown in the Land Tax Roll for 1917, Doc. 270.

¹¹ Deed no. 829, Doc. 281

¹² Deed no. 839, Doc. 282

¹³ File no. 7087; 13 April 1921, Doc. 284

¹⁴ File no. 2025; 12 April 1921, Doc. 283

¹⁵ Decree no. 56, Doc. 285.

¹⁶ Decree no. 1643, 28 November 1924, Doc. 289 and enclosures.

141. In 1929 Marcos Pechar Laus, a Yugoslav, asked for provisional permission to occupy Lennox, but the Ministry of Development refused this.¹

142. In February 1932 the Ministry for Land and Colonization decreed an auction of vacant lands in Magellan under the authority of a law of 30 April 1931. Of these lands, Lennox was one.² In June 1932 two Chileans asked to be appointed caretakers of the island which was now plagued by rabbits.³ In 1937, Enrique Saldina Munoz was appointed caretaker of Lennox⁴ and in 1938, the Chilean Navy reported that he was occupying Lennox in that capacity.⁵

(iii) Mining Rights

(a) Transfer of mining rights from Carlos and Santiago Diaz to Carlos Williams:

143. On 12 June 1891, by a notarial act at Punta Arenas, Carlos Diaz Vial and Santiago Diaz transferred to Carlos Williams, the occupier of Lennox Island, their rights in the mining claims known as "Beatriz" and "Elena".⁶

(b) Applications for registration of mining claims 1895

144. In July 1894, Oreste Grandi, a resident of Punta Arenas, applied for title to three mining sites to be named "Minas Antipodas". This application was refused by the Court, in view of Article 163 of the Mining Code.⁷

145. In August 1895, Grandi again applied for registration and publication under the provisions of the Law of 5 July 1895 of mining claims on a piece of land of 15 hectares, and on three other properties to be known as "Amor" at General Holley or Oro Bay; "Esperanza" 500 metres from Cape Caroline, and "Trabajo" on the long beach of the island. He asked for the maximum period in which to be allowed to install the necessary machinery.⁸ Soon afterwards, Grandi and four others, Oltmer, Bettega, Haldgkins and Creger, all of Punta Arenas, registered with the notary at Punta Arenas the formation of a company or partnership to exploit the gold-mining sites requested by Grandi on Lennox. The company, whose name was to be "Grandi and Company" with its head office at Punta Arenas, would have a life of three years in the first instance.⁹

146. Other prospectors also applied to the court at Punta Arenas for registration and publication of their claims. On 13 November 1895, an application by Roberto Petzold in respect of an area of 5 hectares on the north coast in the bay known as "Cutters" was accepted,¹⁰ as were applications by Esteban Longarich on 14 December in respect of a holding named "Porfia" in General Holley Bay, on 15 December 1895 by Treforo Popich, in respect of 5 hectares at Oro Bay named "Maria

¹ Decree no. 2685, 7 May 1929, Doc. 297.

² Decree no. 1412 dated 23 February 1932, Doc. 298.

³ Application of Enrique Aguila Ampuero and Pedro Maldonado Barria, Doc. 299.

⁴ Decree no. 777, 28 April 1937, see note no.556 from the Ministry of Lands, 6 July 1937, Doc. 300(e).

⁵ Despatch no. 260, 7 November 1938, Doc. 303. This is confirmed by the Land Tax Roll for 1938-9, Doc. 300(f).

⁶ Deed no. 99, 12 June 1891, Doc. 3

⁷ Regd. copy no. 7, 23 July 1894, Doc. 49.

⁸ Regd. copy no. 9, 5 August 1895, Doc. 56.

⁹ Deed no. 437, 1 October 1895, Doc. 58.

¹⁰ Regd. copy no. 22, 13 November 1895, Doc. 60

¹¹ Regd. copy no. 27, 16 December 1895, Doc. 62

Luisa''¹, by Rafael Suilanorich in respect of ''Miraflor''², five hectares between Senorita and Oro Bays,² and Antonio Grandi, for five hectares next to Oreste Grandi's ''Trabajo'' called ''Tirolesa''.³

(c) **Applications for registration of mining claims 1896-97.**

147. On 28 November 1896, Andres Rauzeaud and Silvano Picard executed at Punta Arenas a power of attorney in favour of Edmundo Arestizabal to represent them in taking steps connected with their application for exploitation of gold mining rights in Lennox.⁴ They made a request for registration and publication on 24 November.⁵

148. J.C. Brandt on behalf of himself and his partner made a request dated 22 May 1897 to the court at Punta Arenas for registration and publication in respect of a submerged sandbank between Lennox and Navarino, between Point Santa Maria on the former and ''Punta Guanaco'' on the latter island. This request was granted.⁶

(d) **Applications for registration made by Jose Daza on behalf of others, 1902.**

149. On 12 July 1902 Jose Daza applied for mining holdings on behalf of different prospectors, six of which were on Lennox Island. These were:

- (1) For Carlos H. Walker MacKenney, on the west coast, for 50 hectares, to be known as ''Birmingham''.⁷
 - (2) For Tomas Pedolar, on the west coast, north of (1) above, to be known as ''Paris'' (also 50 hectares).⁸
 - (3) For Tomas Arestizabal, on the west coast north of Paris, 50 hectares to be known as ''Madrid''.⁹
 - (4) One holding of 50 hectares to the north of (3) above, to be known as ''Liverpool'', in the name of Edwin Rowse.¹⁰
 - (5) Another of 50 hectares south of ''Birmingham'' known as ''Barcelona'', for the same Jose Daza.¹¹
 - (6) 50 hectares called ''Almeria'', to the South of ''Barcelona'', on behalf of Antonio Medina.¹²
- The requests were agreed to and the court ordered registration and publication.

¹ Regd. copy no. 25, 16 December 1895, Doc. 63

² Regd. copy no. 30, 21 December 1895, Doc. 65

³ Regd. copy no. 31, 30 December 1895, Doc. 66.

⁴ Deed no. 803, Doc. 72.

⁵ Regd. copy no. 511, 24 November 1896, Doc. 70.

⁶ Judicial File no. 511, 22 May 1897, Doc. 76

⁷ Doc. 91.

⁸ Doc. 92.

⁹ Doc. 93

¹⁰ Doc. 94

¹¹ Doc. 95

¹² Doc. 96

(e) Applications on behalf of the Lennox Gold-Mining Co. 1905-6 and the formation of that Company.

150. The Lennox Gold Mining Company (Compania Aurifera de Lennox) was formed towards the end of 1905 to exploit gold mine holdings on Lennox, Nueva and Navarino Islands. Its forerunner was a partnership, formed on 20 March¹ in whom the leading person was Jorge Boonen Rivera, a Chilean Army General resident at Santiago.²

151. Together with a large number of partners, Boonen applied in April and 15 May 1905 for a number of claims on Lennox Island to be registered and published. At the same time, as has been mentioned,³ he made similar requests in respect of claims on Nueva. The request was for 5 hectares for himself and five for each of his partners. The holdings were in various parts of Lennox Island.⁴ The claims were registered in the Mining Applications register for 1905 and published on 30 May 1905. Boonen also registered two claims on 9 September 1905.⁵

152. The person actually entrusted with the formation of the company was Juan de Dios Olivares, who on 19 May 1905 granted in favour of Oreste Grandi one per cent of what he himself would receive from the company, for work done for him by Grandi.⁶ A similar deed in favour of O. Grandi and one Antonio Freire, amounting to two per cent, was void because Freire did not sign it. Both these transactions took place before the notary at Punta Arenas.⁷ On 21 June, one Enrique Evans appeared before the notary to execute a power of attorney in favour of Boonen in respect of shares held by the applicant in the company.⁸ In August Boonen offered Grandi fifteen per cent of the rights the Company might acquire.⁹

153. The affairs of Boonen and his partners were disturbed from August 1905 onwards when Juan Stuvén began a court action alleging that the registration of the claims of Boonen and his partners claims was unlawful and asking that the claims be declared void. The litigation continued until December, when it was settled by agreement.¹⁰

154. On 24 October 1905, the notary at Santiago recorded the statutes of the Lennox Gold Mining Company, whose head office was to have been at Santiago. There were 55 members of the Company, which had as its object the exploitation of the gold pannings on Lennox, Nueva and Navarino Islands and others, and the taking over of a concession on Lennox and Navarino being negotiated by Carlos Cousino, one of the members.¹¹ The statutes, which were agreed upon on 21 September 1905, were published in accordance with a decree of the Magistrate of the Civil Court of

¹ See Doc. 145

² See doc. 133.

³ § 110 above.

⁴ Regd. copy no. 690 15 April 1905, Doc. 126, Regd. copy no. 691, 15 April, 1905, Doc. 123; Regd. copy no. 680, 15 May, 1905, Doc. 127; Regd. copy no. 681, 15 May 1905, Doc. 128; Regd. copy no. 682, 15 May 1905, Doc. 129, Regd. copy no. 683, 15 May 1905, Doc. 130.

⁵ Claims no. 1777, 1812, Doc. 319

⁶ Deed no. 1006, 19 May 1905, Doc. 132

⁷ Deed no. 986, 17 May 1905, Doc. 131

⁸ Deed no. 1272, 21 June 1905, Doc. 134

⁹ Protocolised letter, 15 August 1905, Doc. 141

¹⁰ See further § 164 below

¹¹ Cousino was purchasing mining sites in many of the Southern Islands, see Doc. 157.

15 January 1906.¹ In December 1905, the Ministry of Finance agreed to prolong for two months the two months period laid down in the Decree of 11 October, to allow the Company to prove that it was officially inscribed in the gold mining register.²

155. The deed of 21 September 1905, by which the Company bought holdings from its members was recorded before the notary at Punta Arenas on 24 March 1906. All these were in respect of the applications made by Jorge Boonen on 15 April 1905, and concern the Lennox holdings and some on Navarino.³

(f) **Other applications 1905-1906**

156. Among other applications for registration and publication of mining claims on Lennox Island in 1905-6 made to the Court the following may be mentioned. ⁴

(i) Application of 7 August 1905 by Luis A. Crisostomos, warden of the prison at Punta Arenas, and others for a number of holdings. The claim was registered in the Register of Mining Applications p. 822 no. 1189. It was recorded before the notary on 22 August.⁵

(ii) Application of 25 July 1905 by Mateo Perich, merchant of Punta Arenas for three holdings, Seguridad 13, 14, 15. The claim was registered in the Register of Mining Applications, p. 741 no. 1067, and recorded before the notary on 19 August.⁶

(iii) Application of 25 July 1905 from Pedro Lanandart, of Punta Arenas, for Seguridad 1, 2 and 3. The claim was registered in the Register at p. 737, no. 1059, and recorded on 19 August 1905.⁷

(iv) Application of 25 July 1905 from Manuel Pita, merchants of Punta Arenas, for Seguridad 4, 5 and 6. The claim was registered in the Register of Mining Applications p. 738, no. 1061, and recorded on 19 August 1905.⁸

(v) Application of 25 July 1905 from Cipriano Fojo, merchant of Punta Arenas, for Seguridad, 10, 11 and 12. The claim was registered in the Register p. 738 no. 1062, and recorded on 21 August 1905.⁹

(vi) Application of 25 July 1905 from Vicente Pisano, merchant of Punta Arenas, for Seguridad 7, 8 and 9. The claim was registered in the Register at p. 737 no. 1060 and recorded on 21 August 1905.¹⁰

¹ Deed no. 1, 25 January 1906, Doc. 145. The statutes were authorised by a Decree no. 3913, 11 October; Official Gazette no. 8336, 20 October 1905, Doc. 150(a).

² Decree no. 4714, Official Gazette no. 8380, 14 December 1905, p. 3932, Doc. 156.

³ Further accounts of the Company and its transactions appear below §§ 157, 159-162.

⁴ For sales by various persons to Juan Stuen on 31 May, 20 July see Judicial file No. 1692, 12 December 1905, Doc. 155.

⁵ Regd. copy no. 1260, Doc. 140.

⁶ Deed no. 1236, Doc. 136

⁷ Deed no. 1220, Doc. 135

⁸ Deed no. 1221, Doc. 137

⁹ Deed no. 1240, Doc. 138

¹⁰ Deed no. 1246, Doc. 139

(vii) Application of 28 November by Camilo Feliu holding power of attorney for 15 persons at a stream without a name running into Lennox Cove on the east of the island to be named by a name given to the stream and numbered 1-42. The claim was registered in the Register at p.2616 no. 4086 on 20 November and recorded before the notary on 20 December 1905¹.

(viii) Application of 2 January 1906 by Juan B. Contardi, merchant of Punta Arenas on behalf of himself and 25 others in respect of 3 holdings of 5 hectares each, to be named Penitente 1-75 on the west coast of Lennox. This claim was registered in the Register p. 39 no. 67 on 3 January and recorded before the notary on 12 January 1906. At the same time, he registered Yungay 1-75, Bulnes 1-75, Fausto 1-75; 76-150.²

(g) Transfers by Oreste Grandi and others to Francisco Gonzalez G. and by Gonzalez to the Lennox Gold Mining Co. 1906.

157. On 28 September 1905, a lawyer Francisco Gonzalez G. secured on behalf of Oreste Grandi and a number of others, certain holdings on Lennox.³ By a notarial agreement at Punta Arenas on 12 March 1906, these persons ratified their agreement to accept those holdings and to sell them to Gonzalez. These were at various places around Santa Maria Point and General Holley Bay.⁴ On 26 March 1906, as certified by the notary on 31 March, Gonzalez sold these holdings to the Lennox Gold Mining Company.⁵ On the same date, Octavio Senoret conferred authority on Marcial Astaburuaga to accept a transfer of the shares in the Lennox Gold Mining Company from Gonzalez.⁶ On 4 April 1906 Gonzalez sold his own holdings of those applied for in October 1905, and C. Feliu sold his holdings, both to the company.⁷ At the same time, the representative of the Company registered transfers to the Company by Juan Stuvén, presumably in pursuance of his agreement for settling the dispute with the Company.⁸ On 16 April Enrique Evans sold the rights he had acquired under the original application by Gonzalez to the Company.⁹

(h) Transfers to O. Picot, 1906

158. On 14 August 1906 one German Jaeger, on behalf of himself and many others, sold to Octavio Picot a large number of holdings, some of them on Lennox - Lerina 1-114 allegedly claimed on 28 November 1905; Puntada 1-60, 161-90, 26 October 1905; and Extra 1-42, 28 November 1905.¹⁰

¹ Deed no. 3522, Doc. 154

² Deed no. 195, Doc. 158; no. 196, Doc. 159; no. 197, Doc. 160; no. 199, Doc. 162; no. 198, Doc. 161 respectively.

³ For example, Deeds no. 1695 (holdings F1-30), Doc. 146; Deed no. 1696 (G.1-30), Doc. 147; Deed no. 1697 (H1-30), Doc. 148; Deed 1698 (K1-30), Doc. 149; Deed no. 1699 (L1-30), Doc. 150.

⁴ Deed no. 810 (J2-30), Doc. 170; Deed no. 811 (G 2-30), Doc. 171; Deed no. 812 (H2-30), Doc. 172; Deed no. 813 (K2-30), Doc. 173; Deed no. 814 (L2-30), Doc. 174; Deed no. 815 (D2-30), Doc. 175; Deed no. 816 (F2-30), Doc. 176; Deed no. 817 (E 2-30), Doc. 177; Deed no. 818 (C2-30), Doc. 178; Deed no. 819, (F2-30), Doc. 179 (There were two claims F2-30).

⁵ Deed no. 975, 26 March 1906, Doc. 180

⁶ Deed no. 970, 26 March 1906, Doc. 181

⁷ Deed no. 1066, 4 April, 1906, Doc. 182

⁸ Deed no. 1067, 4 April, 1906, Doc. 183, see § 164 below.

⁹ Deed no. 1176, 16 April 1906, Doc. 185.

¹⁰ Deed no. 383, 14 August 1906, Doc. 192.

(i) **Lennox Gold-Mining Company, 1908-10**

159. After 1906, no further registrations of mining applications or transfers thereof appear to have been recorded. By then, it is clear that the Lennox Gold Mining Co. was the leading owner of claims on the island. On 16 March 1908 an alteration was made in the statutes of the Company at a general meeting held in Santiago, which was recorded at the notary's office in Santiago on 19 March and was approved by Government Decree no. 936 of 28 April issued by the Treasury and published in the Official Gazette on 18 May 1908.¹ A meeting of the Accounts Tribunal on 24 December 1908, held to assess the value of securities in limited companies, valued those of the Company at 3.15 pesos, for the purpose of the municipal tax.² In a report filed in the Lands Inspection Office at Santiago in 1908, the Company was said to employ 50 men to exploit 2,000 hectares on the beaches of the south and east of the island.³

160. The Company, however, does not appear to have been enjoying the best of financial or commercial success. On 24 February 1909, Moreno appeared before the notary in Punta Arenas to confer power of attorney on Messrs. Pena and Reyes, so that they might in his name receive cheques of the Company drawn in the names of Messrs. Richardson and Duncan.⁴ The reason for this was no doubt because on 26 February the company leased for three years its holdings and apparatus on Lennox to Arthur Richardson, who was manager of the Company. It appears that he had agreed on 18 July 1906 to construct installations in order to work the deposits in the Company's holdings. The sums he had spent in carrying out the work were to represent the rent for the three years' lease.⁵

161. Certain creditors and shareholders appeared at Punta Arenas in order to confer powers of attorney for the collection of their debts from the Company. Among these were:

(i) R.L. Yavar and A. Bouvalot as shareholders on 17 October 1908, upon Juan Rozas Pinto. This is stated to be for him "to be present at the liquidation of the Auriferous Company".⁶

(ii) R. Rios, A. Avendano, J. Velazquez, F. Retamales on 16 March 1909, upon L. Lopez, for work done.⁷

(iii) Ian Russell on 14 June 1909, upon A. Scott from "Cia Aurifera Lennox, from Messrs Richardson and Duncan". The matter is said to be judicially in the hands of Carlos Gonzalez.⁸

(iv) On 31 October 1910, Santiago Edwards, the lawyer acting for a shipping firm "Vapor Orestes" made a demand to the court at Punta Arenas against the Cia Aurifera Lennox for the

¹ Official Gazette No. 9100, 18 May 1908, p. 1850, Doc. 203

² Official Gazette No. 9288, 9 January 1909, p. 149, Doc. 206.

³ Annex 25, 30 April 1908, Doc. 202

⁴ Deed no. 276, 24 February 1909, Doc. 208

⁵ Deed no. 291, 26 February 1909, Doc. 209. The inventory of equipment is contained in Deed no. 358, Doc. 210. Richardson was in Lennox in 1910, see Reports of Commanders of Naval Vessels, no. 135, 7 July 1910, Doc. 221(a), No. 173, 3 December 1910, Doc. 222(a). He was said to have considered the business a failure.

⁶ Deed no. 740, 17 October, 1908, Doc. 204

⁷ Deed no. 391, 16 March 1909, Doc. 211

⁸ Deed no. 973, 14 June 1909, Doc. 217

sum of £790.7s.0d. plus interest, as a debt owing for freight and passage fares to and from Lennox. He asked that, as the Cia Aurifera Lennox had no representative in the Magallanes Territory and was negotiating with a foreign company for the sale of its mining claims and machinery, it should be prohibited from selling or alienating such claims and machinery.¹

162. In April 1910, the Public Treasury took proceedings in the Court at Punta Arenas to obtain judicial authority to auction publicly gold mining claims for which dues had not been paid. Among these are some claims of the Lennox Gold Mining Company. However, before the auction was due to take place on 20 June, the Company paid up the fees and their holdings were excluded from the sale.²

(j) **Registration of mining claims, 1910-1914**

163. The Register of Mining Claims contains the following entries for Lennox.

- In 1910, 17 claims of five hectares to "Arsenico 1 to 17" between Playa Larga and Cabo Carolina; 37 claims "Mercurio 1 to 37" at Rio Keller; 37 claims "Hata 1 to 37" between North Point and Playa Larga; all in the name of Augusto Elten; and 6 claims of 5 hectares, Domingo 1 to 6, in the name of Antonio Bosch.³

- In January 1912 Esteban Loncharich, the founder of the Lennox Estates Company, registered a claim of 2 hectares at Cutter Bay, named 'Jose Ana'.⁴

- In October 1914, Loncharich applied on behalf of Juan Jurich for a claim of 5 hectares east of Lennox Cove, to be known as 'Ana'. The claim was recorded with the notary public at Punta Arenas. The Court appointed Mariano Edwards as expert assessor, who reported favourably. The Ministry was of the opinion that permission to exploit could be granted, but this was not finally confirmed by the Court until 31 March 1919.⁵

(iv) **Judicial Administration**

(a) **Civil Cases: Stuvén v Boonen and others, 1905.**

164. The principal example of a civil action in respect of activities on Lennox is the case of Juan Stuvén v Jorge Boonen Rivera and partners, commenced on 17 August 1905 before the Court of First Instance of Magallanes Territory at Punta Arenas. The plaintiff sought to annul the mining claims made in respect of Lennox⁶ and to establish his own better rights as set out in a contract between him and F. Kaiser and many others, on 20 July 1905, under which he acquired their claims. After a defence had been filed and an extension of time for evidence granted, the case was withdrawn from the court's files on 12 December 1905, the matter having been settled.⁷ Under

¹ Judicial File no. 2093, Doc. 222

² Judicial File no. 2015, 3 April 1910, Doc. 221

³ Claims no. 76, 78, 79, 17 December 1910 (Augusto Elten), and claim no. 77, 17 December 1910 (Antonio Bosch), Doc. 318(a)

⁴ Claims no. 3, Doc. 227, See also Doc. 318(a)

⁵ Judicial File no. 3722, Doc. 260, esp. p. 43

⁶ See § 153 above.

⁷ Judicial File no. 696, 12 December, 1905, Doc. 155.

the agreement between the parties made before the notary at Santiago on 3 November 1905, Stuvén ceded to the Lennox Gold Mining Company into which the Boonen partnership had been converted¹ all of his claims in Lennox in an exchange for a cession by the Company of all its claims in Nueva. Stuvén agreed to make no future claims in Lennox, and the Company agreed to abstain from similar claims in Nueva. The Agreement was registered before the notary in Punta Arenas on 11 December 1905.²

(b) Criminal Case. Case against Espanachevich, 1895

165. On 22 July 1895, the Maritime Governor of Magallanes Territory informed the judge of the Criminal Court at Punta Arenas that the Captain of the sloop "Toro" had stated that "at the request of the Governor of Ushuaia" he had, near Domtze Island, taken from the schooner "Henrietta" **Demetrio Espanachevich**, who was accused of having fled from Lennox taking funds of his partner, **Don Juan Muzzo**, and of the Mutual Aid Society, and that Espanachevich was being handed over to the gunboat "Magallanes". He was imprisoned by order of the Court, which heard the evidence of **Don Juan Muzzo**, who lived at Ushuaia, and of Espanachevich who pleaded that he had merely left Lennox in order to get supplies for the business. The prosecutor asked that, on the evidence, the court withdraw the case, which it did.³

(c) Investigation of the death of F. Piasich, 1894.

166. On 24 October 1894, the District Judge at Lennox reported to the Governor of Magallanes the death of an Austrian, **Francesco Piasich**, on the island. He had disappeared when drunk. The Court at Punta Arenas attempted to secure the attendance of witnesses. By October 1896 none had been found and the prosecutor asked the Court of Appeal at Valparaíso, on 28 November 1896, to approve of the suspension of the case.⁴

(d) Investigation of the death of Pena, 1903.

167. In 1903, **Juan Depolo**, then acting as Commissioner in the Southern Islands, reported to the magistrate the death by drowning at Santa Maria point on Lennox of **Juan Pena**, a Spaniard, on 4 April. The court ordered the attendance of witnesses, but other than Depolo, there were none. As suggested by the prosecutor, the Court suspended the matter.⁵ In 1918, an application for a certificate of his death was made on behalf of his widow, but since his death had not been registered, the request was refused.⁶

(e) Other application of Chilean Law

168. In 1918 **Domic** and others appear in a document issued by the Treasury of Magallanes showing them as having infringed the Statistical Law of 6 December 1911.⁷

¹ § 154 above.

² Deed dated 3 November 1905 (Santiago), Doc. 153

³ Judicial File no. 78, 23 July 1895, Doc. 55

⁴ Judicial File no. 46, 15 November, 1894, Doc. 50.

⁵ Judicial File No. 479, 12 December 1903, Doc. 101

⁶ Request dated 2 May, 1918, Doc. 272, wherein the date of his death is wrongly referred to as 1898.

⁷ Judicial File No. 1430, 30 June, 1914, Doc. 279.

(v) **Notarial acts effected at Punta Arenas in connection with matters on Lennox Island.**

169. In addition to notarial acts carried out at Punta Arenas in relation to occupation and mining rights on Lennox, the following examples of such acts in connection with other matters may be mentioned.

(a) **Statement of Simon Borrich, 1892**

170. On 12 February 1892, Simon Borrich swore a statement as to a fire which consumed a small house of his on Lennox on 26 December 1891, and inter alia the personal documents of his brother Juan, including his Austrian army registration.¹

(b) **Power of Attorney by Florencio Chacon 1893**

171. On 29 June 1893, Florencio Chacon C, of Valparaiso granted a power of attorney to Luis Alberto Diaz Munoz to deal with his property and business on Lennox and annulled a written authorisation previously given to Honore Gardes.²

(c) **Power of Attorney by A. Sgombich, 1894**

172. On 31 March 1894 Antonio Sgombich gave power of attorney to George Loncar to arrange a deal in connection with a cutter "Feresima B" bought by him and three others at Lennox island.³

(vi) **Naval matters**

(a) **Loss of the whaler "Lennox", 1892**

173. On 5 July 1892 the Naval Commander reported to the Governor of Magallanes that the members of the crew and passengers of the vessel "Luisa" had reported to him upon the unsuccessful efforts made by that vessel to save the whaler "Lennox" at a point some $\frac{3}{4}$ of a mile from the bay on the south east of the island. The "Lennox" had foundered with all hands.⁴

(b) **Visit of the "Condor" to rescue Chilean citizens, 1894**

174. On 26 February 1894 the Chilean Ministry of Foreign Affairs informed the Ministry of the Navy of the plight of destitute Chilean citizens on Lennox Island, who could not return to Punta Arenas. It was suggested that the sloop "Condor" should put into Cutter Bay to effect their rescue.⁵ The second section of the Ministry of Marine gave the necessary orders on 1 March.⁶

¹ Deed no. 33, 12 February, 1892, Doc. 5

² Deed no. 207, 20 June, 1893, Doc. 34

³ Deed no. 94, 31 March, 1894, Doc. 45

⁴ Naval Commander Magallanes to Governor of Magallanes 5 July 1892, Doc. 8. For a further account see also Chief Naval Officer to Minister of the Navy, 26 July 1892, Doc. 11

⁵ Ministry of Foreign Affairs to Ministry of the Navy, note no. 368, 26 February 1894, Doc. 40. The First section of the latter Ministry passed on this request to the relevant section; sec. 1, note no. 211, 8 March, 1894, Doc. 41.

⁶ Ministry of the Navy sec. 2, Note no. 212, 1 May 1894, Doc. 42

(5) **The appurtenant islands: Snipe, Becasses, Solitario, Hermanos, Gardiner, Reparo and Augusto**

175. The islands of Solitario, Snipe, Becasses, Hermanos, Gardiner, Reparo and Augusto are all very small and are rarely the subject of items exclusively related to anyone of them alone. Usually they are referred to in connection with one of more of the three larger islands, Picton, Nueva and Lennox, or sometimes in connection with Navarino. They can properly be regarded as appurtenances, adjuncts or dependencies of the larger islands. Thus, in January 1904, as indicated in paragraph 80 above, when the Stuvens and Edwards applied for approval of their occupation of Picton and Nueva, they referred also to the fact that they occupied the small islands listed above. Approval was given and henceforth the islands were all treated as forming a single group for purposes of land grants.

176. Thus, by Decree no. 2078 of 31 October 1905 the transfer of the rights of Bridges over Picton and of Milicich over Nueva was accepted. The Stuvens were granted the use of those islands together with "Augustus, Hermanos, Snipe, Garden, Becasses and Reparo Islets" for fifteen years.¹ They are referred to as concessionaires thereof in a Ministerial Decree of 1911.² The same islets are referred to in Decree no. 2008 of 15 December 1914, renewing the concession in favour of Mariano Edwards.³ The same is true of the documents relating to subsequent transfers from Edwards to Braun and Paravich,⁴ from their partnership to Emiliano Gomez Diaz⁵ from Gomez to Gonzalez and Co.⁶

177 On 23 May 1933 the Intendencia of the Territory of Magallanes decreed inter alia that the depositary or caretaker of Plot no. 9 of the plan of Navarino Island, should be Felipe Garay Gallardo. The territory is expressly stated to include Snipe Island.⁷ By a decree of 12 March 1937, Gonzalez and Co. were appointed caretakers of Picton Nueva and the named islets.⁸ On 28 September 1938 the Ministry of Lands and Colonization issued a decree approving the classification of inter alia, Lennox, Nueva, Picton, Augusto, Garden, and Reparo in Plan no. 7 for Magellan.⁹ On 19 December 1938 Gonzalez and Co. Ltd. applied to the Director General for Lands and Colonization for a lease over Picton, Nueva, Garden Reparo, Augusto, Snipe, Becasses and Hermanos.¹⁰ They were eventually granted this in December 1943, for 20 years from April 1937.¹¹ On 30 May 1955 applications for a lease of Picton and Nueva and the "adjacent islets of Augusto, Reparo, Garden, Snipe, Becasses and Dos Hermanos" were filed with the President.¹² On 24 October 1956 a decree was issued for the lease of these islands to Blanca Ester Gallardo Andrade.¹³

¹ Decree no. 2078, 31 October 1905, Doc. 152, published in the Official Gazette no. 8392, 29 December 1905.

² Decree no. 384, 27 March 1911, Official Gazette, no 9961, 22 April 1911, p. 175, Doc. 226, (As a matter of fact, they had sold out to Edwards in 1907)

³ Decree no. 2008, 15 December, 1914, Official Gazette, no. 11078, 26 January, 1915, Doc. 243.

⁴ Decree no. 1331, 14 October, 1915, Doc. 261

⁵ Approved by Decree no. 180, 30 March 1926, Doc. 291

⁶ Decree no. 5 of 6 January 1927, Doc. 292

⁷ Decree no. 33, 23 May, 1933, Doc. 300

⁸ Decree no. 426, 12 March 1937, Doc. 300 (c) noted and published, Official Gazette, no. 17756, 30 April 1937, p. 1253, Doc. 300(d)

⁹ Decree no. 2315, 28 September 1938, Official Gazette no. 18198, 24 October 1938, p. 2885, Doc. 301

¹⁰ See Doc. 303(b)

¹¹ Decree no. 3232, 6 December 1943, Doc. 303(b)

¹² See, for example, Doc. 306

¹³ Decree no. 1462, 24 October 1956, Doc. 316

Items related to specific islands

179. **Beacons.** On 29 February 1904 the Chilean Hydrographic Office published Hydrographic Notice No. 9 of 1904 entitled "Chile and Argentine, Beacons of the Beagle Channel". It included sub-heading: "On the South coast of the Beagle Channel, that is to say the Chilean coast, and in the western part of the channel, the following markers exist". There then appeared references to, inter alia, markers "at the north east point of Garden Island, in Banner Cove, off Picton Island" and "on the centre of the West Becasses Islet".¹

180. Early in 1958 the Chilean Navy placed an unlighted beacon on Snipe, which was then removed by the Argentine Navy and replaced by one of their own. The Chilean Navy reasserted its authority by removing the Argentine beacon, whereupon (on 9 August 1957) Argentine forces landed on the island. Eight days later, on 17 and 18 August 1958, the two Governments made a Joint Declaration in which they declared:

"that they agree to restore the situation completely on Snipe Island to that which existed before the 12 January last, and consistent with their desire for peace and harmony they agree to the removal of the Argentine forces occupying the same...."

Argentine forces withdrew on 19 August 1958.

Judicial investigation into a death

181. In 1914, Oreste Grandi, then captain of the Argentine schooner "Antartica", a pilot boat declared that on 23 July a crewman Santos Oyarzun, a Chilean, was lost as a result of an accident which took place about ¼ of a mile east of Snipe Island, "whilst sailing in the Beagle Channel". The vessel was sailing to the Argentine port of Rio Gallegos, where the local authorities, at the request of the Chilean Consul certified the authentication at the sub-prefecture of an inventory of the deceased's property. Grandi swore a statement at the Chilean Consulate. The matter was referred to the Court at Punta Arenas, who summoned the crew members, who in turn swore a declaration as to the loss of Oyarzun; following upon this the Court, holding the event to have been an accident, dismissed the case at the request of the Public Prosecutor.²

SECTION 3. THE ARGENTINE POSITION AND CONCLUSION

The Argentinian position

182. It is unnecessary in the light of the historical summary which introduces the preceding section (see paragraphs 12 to 22 above) to attempt any further succinct repetition of the significance of Chilean administrative conduct in and in relation to the area - though the present section will end with certain conclusions on this matter.

¹ Doc. 114(a)

² Court of First Instance (Criminal), Judicial File No. 714, 12 September 1914, Doc. 239

183. At this point, however, it is appropriate to enquire what position, if any, the Argentine authorities have adopted in relation to the activities set out above. It is reasonably clear to the Government of Chile that the Government of Argentina has not exercised, or even purported to exercise, sovereignty over the disputed islands in any clear, systematic or protracted way. This statement of a negative proposition the Government of Chile cannot, of course, prove positively and it will be necessary to see what if any evidence is produced in the Argentine pleadings.

184. It is pertinent, however, to note a number of situations which may be described as ones of acknowledgment, by Argentina or Argentine nationals, of Chilean sovereignty over the islands in question.

185. (i) In April 1885 the Argentine Governor of Tierra del Fuego reported to his government on the territory under his care. He concluded with a recommendation regarding the boundaries of the department of Ushuaia. This included the suggestion that the boundary on the south should be defined as the Beagle Channel. No mention was made of any islands - an omission to be contrasted with the express reference to Staten Island in the proposed definition of the boundaries of the Buen Suceso Department.¹

186. (ii) On 27 September 1892, the Governor of Magallanes reported to the Minister of Foreign Affairs regarding the "gold rush" towards the south. In stressing the need to set up a sub-delegation in the islands south of Tierra del Fuego he recalled the proximity of the Argentine settlement at Ushuaia and continued:

"At this place the authorities, as I suppose they should be called, for various reasons attempt to show their authority amongst the miners and settlers, in connection with shipwreckers and other disasters, in a place where are gathered people beyond the pale, unbridled and only interested in money, and this they attempt to control, there being no other authority."²

187. Although no details of the Argentine activity are provided, the principal interest of this document in the present context is that it is not followed by any others of similar content. The reference to Argentine activity in the southern islands is isolated. It comes at an early moment in a period of increasing activity in the region. Thereafter, as Chilean administration develops, no more is heard of significant Argentinian pretension.

188. (iii) The episode which provides perhaps the most telling acknowledgment of the operation and acceptance of the absence of Argentine activity in the islands, in this case Picton, is that of the application by Thomas Bridges to the Chilean authorities for title to 40 hectares of land in Picton Bay. The item is significant because Bridges, though an English missionary by origin, had become an Argentinian national and had in 1893 already obtained from the Argentine Government a grant of 20,000 hectares of land on Tierra del Fuego and adjacent islets.³ The details of Bridges' application to the Chilean authorities have already been set out.⁴ Here, then, is an application made by an Argentinian, possessing detailed local knowledge of the area, in reasonably close touch with Argentinian officials on the mainland of Tierra del Fuego, who - when it comes to the acquisition of land on Picton - applies not to the Argentinian but to the Chilean authorities.

¹ See the Report cited in 'Beagle Channel according to the Cartography', pt. IV, p. 40

² Note no. 197 of 27 September 1892, Doc. 15

³ Doc. 39

⁴ §§ 71-77 above.

Now Bridges was not a casual man. He was accustomed to dealings with government. As the Deed¹ relating to his possessions in that region shows, he had been in touch with the Argentinian authorities over that area since 1886. So it is improbable in the extreme that he would have mistaken the authority to which he should turn for a grant in Picton. Nothing could have been more fully consistent with a generally accepted view that Picton was Chilean territory, than this application to the Chilean Government by Thomas Bridges.

189. It may be added, too, that the openness of Bridges' application and of the Chilean grant to him must surely have been known to the Argentine authorities, yet they made no protest.

190. (iv) The report in 1905 of the Chilean General Boonen Rivera, who was put in charge of a commission to study the boundary along the Beagle Channel, contains three interesting items in this connection.

191. First he reported that on several occasions when Argentine naval vessels visited the coasts to Picton, Lennox and Nueva they hoisted the Chilean flag at their masthead, as in customary when entering a foreign harbour; and he gave the names of eye-witnesses.

192. Second, he mentioned that during the gold rush, between 1891-94, an Argentinian, Sr. Aravena, together with four companions, all of Argentine nationality, applied to the Chilean authorities for mining concessions on Nueva, Lennox and Navarin Islands. He noted too that before taking these steps the applicants had been in Ushuaia.

193. Thirdly, the report referred to the exercise of authority by the Chilean sub-delegate over Picton, Nueva and Lennox Islands without objection by the Argentine authorities in Ushuaia.²

194. However, in addition to these specific acts, it is appropriate to remark upon the absence of formal Argentinian protest to the Chilean Government against repeated and significant incursions upon what, if the Argentinian point of view is correct, should have been regarded as Argentinian territory. There can, as already stated, be no plea by the Argentine Government of ignorance of this situation. Everything done by Chile was open and above-board. Many important matters were officially publicized in the Official Gazette and others were reported in local newspapers. If the Argentine Government was exercising over the islands in question a degree of authority commensurate with its claims to title over them, then it could not have failed to know of the Chilean activity and its long-term character.

195. What then did the Argentine Government do? The answer is, virtually nothing. For twenty three years, from 1881 to 1904, no question whatsoever was raised regarding Chilean sovereignty over the islands - and those were years, as the Argentine authorities must well have known, when the presence of an administration - theirs if the territory was theirs - was called for in all the islands. Only in 1904 did the Argentine Government even begin to identify the existence of a disagreement with the Chilean Government on the interpretation of the 1881 Treaty in the area.

196. The rest of the history of the protests is summarily stated in paragraphs 3-6 of Chapter VIII above, and need not be repeated here. It is in a negative, though real, way a story of missed

¹ Doc. 39, and see Doc. 1(a)

² Ministry of Foreign Affairs to Governor of Magal lenes, 20 June 1905, Doc. 133.

opportunities. There is set out below a list, with dates, of some of the principal items demonstrating Chilean acts of jurisdiction over or in relation to specifically named disputed islands and which have been published in the Chilean Official Gazette:

- 28 October 1892, Official Gazette (O.G.) No. 4359, containing a report of the Governor of the Magallanes to the Chilean Minister for Foreign Affairs dated 17 October 1892, referring to Lennox.
- 11 November 1892, O.G., No. 4370, containing a note from the Governor of Magallanes to the Minister for Foreign Affairs dated 29 October 1892, referring to Lennox and Nueva.
- 26 December 1892, O.G., No. 4407, containing a report by the Governor of Magallanes dated 26 November 1892 on the founding of Puerto Toro. This refers to Picton, Nueva and Lennox.
- 11 February 1893, O.G., No. 4447, containing a law on the leasing of State lands in Magallanes, Tierra del Fuego and the southern islands.
- 10 February 1897, O.G., No. 5627, containing Decree no. 88 rejecting an application for permission to occupy Picton.
- 21 March 1905, O.G., No. 8164, containing Decree No. 269 of 4 March 1905 rejecting an application for a concession for Picton, Nueva and Lennox.
- 13 September 1905, O.G., No. 8307, containing Decree no. 1565 of 28 August 1905, rejecting an application for a concession for Picton, Nueva and Lennox.
- 20 October 1905, O.G., No. 8336, containing Decree no. 3913 of 11 October 1905, publishing the Statutes of the Lennox Gold Mining Co.
- 14 December 1905, O.G., No. 8380, containing Decree no. 4714 of 13 December 1905, referring to the Lennox Gold Mining Company.
- 29 December 1905, O.G., No. 8392, containing Decree No. 2078 of 31 October 1905, referring to Picton, Nueva, Augusto, Hermanos, Snipe, Garden, Becasses and Reparo.
- 18 May 1908, O.G., No. 9100, containing Decree No. 936 of 28 April 1908 approving a change in the statutes of the Lennox Gold Mining Company.
- 9 January 1909, O.G., No. 9288, containing a notice of 24 December 1908 regarding the payment of municipal tax by inter alia the Lennox Gold Mining Company.
- 14 April 1909, O.G., No. 9361, containing Decree No. 369 of 12 February 1909, laying down conditions for a shipping service in the southern isles and referring expressly to Picton.
- 9 January 1911, O.G., No. 9876, containing Decree No. 2122 of 31 December 1910 relating to the auction of certain named areas including Lennox.
- 22 April, 1911, O.G., No. 9961, containing Decree no. 384 of 27 March 1911, referring to Picton, Nueva, Augusto, Dos Hermanos, Snipe, Garden, Becasses and Reparo.
- 20 November 1914, O.G., No. 11025, containing Decree no. 1726 of 7 October 1914 relating to the auction of certain named areas including Lennox.
- 26 January 1915, O.G., No. 11078, containing Decree No. 2008 of 15 December 1914, referring to Picton and Nueva.
- 25 January 1919, O.G., No. 12280, containing Decree No. 194 of 23 January 1919, creating a sub-delegation of Navarino and referring inter alia to Picton, Nueva and Lennox.

16 March 1925, O.G., No. 14128, publishing the notice relating to the formation of Gonzalez and Co. Ltd., and containing a reference to Picton and Nueva islands and adjacent islets.

30 April 1937, O.G., No. 17756, containing Decree no. 426 of 12 March 1937 awarding the guardianship of Picton, Nueva, Augusto, Garden, Snipe, Becasses, Dos Hermanos.

24 October 1938, O.G., No. 18198, containing Decree No. 2315 of 28 September 1938 issued by the Ministry of Lands referring to Lennox, Nueva, Picton, Augusto, Garden and Reparo.

197. The first of these decrees to occasion a protest was No. 2008 of 15 December 1914. Yet there had been at least twelve decrees in the preceding thirteen years referring to Picton, Nueva and Lennox and indicating quite clearly that these islands were being treated as Chilean territory. Yet none of them elicited any protest.

Conclusion

198. If a formal conclusion of this Chapter is necessary, it is that there is here a clear and striking demonstration of Chilean activity in the disputed islands throughout the period since 1881. This activity reflects the Chilean understanding that the islands assigned to Chile by the 1881 Treaty all were and are Chilean territory and have been constantly treated as subject to the legal regime of Chile. The corresponding inactivity of the Argentinian authorities in the same area must be regarded as the counterpart to the Chilean position and as reflecting Argentinian acceptance at all significant times that the islands in question were not subject to Argentinian sovereignty.

CHAPTER XI

THE PRINCIPAL CONTENTIONS AND REQUEST OF THE GOVERNMENT OF CHILE

Principal Contentions

1. In its Introduction to this Memorial, the Government of Chile expressed the view that this is a simple case. Although the material in support of Chile's case has been set out at some length in order to give as much assistance as possible to the Court of Arbitration at the present stage, the Government of Chile ventures the hope that this detail has not obscured the essentials of its position, which remain straightforward and uncomplicated.

2. To re-state that position, even in summary form, would involve the repetition of the introduction provided in Chapter I and is, therefore, unnecessary. The Government of Chile will, therefore, limit itself at this point to the formulation of its principal contentions as follows:

(i) The 1881 Treaty was an attempt by the Parties to settle comprehensively the line of the boundary between them. There are, therefore, no lacunae in the Treaty.

(ii) Under Article II of the 1881 Treaty Chile was given all the territory lying south of the Point Dungeness - Mount Dinero - Mount Aymond - 52nd parallel line, though without prejudice to the provisions of Article III.

(iii) Article III of the 1881 Treaty specified the areas which were to be Argentinian, namely, the part of Tierra del Fuego to the east of the Espiritu Santo-Beagle Channel line, the island of Los Estados, its adjacent island and islets and other islands and islets in the Atlantic to the East of Tierra del Fuego and Patagonia. Article III also specified that the islands to the south of the Beagle Channel were to be Chilean.

(iv) The Beagle Channel, in the sector to the east of the meridional line, is the west-east waterway, having as its north shore the southern coast of Tierra del Fuego as far as Cape San Pio and as its southern shore the northern coasts of the islands of Navarino, Picton and Nueva. ~~Nueva.~~

(v) This definition of the Beagle Channel corresponds exactly with the understanding and intention of the Parties both before and after the conclusion of the 1881 Treaty. This understanding and intention are evidenced by a series of maps prepared by, or under the auspices of, the Parties, and indicating the course of the Beagle Channel in the sense set out above. Furthermore, this was the generally understood and accepted geographical sense of the term at that time.

(vi) The islands of Picton, Nueva and Lennox lie south of the Beagle Channel as thus understood and accordingly are Chilean; so are the islands which appertain to them.

(vii) The conduct of the Parties, as manifested, in particular, in the exercise by Chile of administrative control and jurisdiction over Picton, Nueva and Lennox for a period of some ninety years, confirms and supports the interpretation set out above.

(viii) The islands and islets within the Beagle Channel are, in accordance with the intentions of the Parties to the 1881 Treaty, subject to the sovereignty of the Party to whose territory they appertain. This interpretation is supported and confirmed by the administrative control and exercise of jurisdiction over these islands and islets since 1881.

(ix) In the alternative, the effect of the 1881 Treaty is that all the islands and islets within the Beagle Channel belong to Chile.

(x) There have been no agreements, acts or events subsequent to 1881 which in any way affect the legal position as set out above.

Request

3. Reserving its right to supplement or amend its request, should the need arise in the light of the Argentine pleadings, the Government of Chile accordingly request the Court of Arbitration to decide in favour of Chile the questions referred to in paragraph (2) of Article 1 of the Agreement for Arbitration (Compromiso) dated 22 July 1971 and to make the declaration therein set out.

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