

In the matter of

# THE BEAGLE CHANNEL ARBITRATION

VOLUME 1

COUNTER MEMORIAL  
of the  
GOVERNMENT of CHILE  
1974

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## COUNTER MEMORIAL of the GOVERNMENT of CHILE 1974

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| Agent for the<br>Government of Chile : | H.E. Señor Don José Miguel Barros,<br>Ambassador Extraordinary and Plenipotentiary<br>of Chile on Special Mission.  |
| Counsel :                              | Mr. Elihu Lauterpacht, Q.C., Fellow of Trinity<br>College, Cambridge, and Lecturer in Law,<br>University of Cambridge.<br><br>Monsieur Prosper Weil, Professeur à l'Université<br>de Droit, d' Economie et de Sciences Sociales<br>de Paris.<br><br>Dr. Ian Brownlie, Fellow of Wadham College,<br>Oxford, and Lecturer in Law, University of<br>Oxford.<br><br>Señor Don Julio Philippi, Profesor de Filosofía<br>del Derecho y ex Profesor de Derecho Civil,<br>Universidad Católica de Santiago. |
| Solicitors :                           | Bischoff & Co., City Wall House, 79/83 Chiswell<br>Street, London, E.C.1  |

## NOTE

In the case of those documents which are translations from an original in a foreign language, the English texts reproduced herein should be regarded as working texts and as submitted for the purposes of the present Arbitration only. The Government of Chile reserves the right should any issue arise at any time as to the proper translation of any words or phrases to refer to the original.

**IN THE MATTER OF THE BEAGLE CHANNEL ARBITRATION  
COUNTER MEMORIAL OF THE GOVERNMENT OF CHILE**

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## NOTES

1. In this Volume.

"Ch. Mem." denotes a reference to the Chilean Memorial, Volume I, 1973.

"Ch. Ann." followed by a number from 1 to 336 (inclusive) denotes a reference to an item in Volume II to the Chilean Memorial, 1973.

"Ch. Ann." followed by number 337 or above denotes a reference to an item in Volume II to the Chilean Counter-Memorial, 1974.

"Ch. Doc." denotes a reference to a document in Volume III to the Chilean Memorial, 1973.

"Ch. Cart. Rem." or "Cart. Rem." denotes a reference to "Some Remarks concerning the Cartographical Evidence," 1973.

"Further Cart. Rem." or "Further Remarks" denotes a reference to "Further Remarks concerning the Cartographical Evidence," 1974.

"Ch. Plate" followed by a number from 1 to 125 (inclusive) denotes a reference to the Chilean Atlas, 1973.

"Ch. Plate" followed by number 126 or above denotes a reference to the second Chilean Atlas, 1974.

"Arg. Mem." denotes a reference to the Argentine Memorial Volume I, 1973.

"Arg. Ann." denotes a reference to an item in Volume II to the Argentine Memorial, 1973.

"Arg. Map." denotes a reference to a map in the file called Volume III to the Argentine Memorial, 1973.

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.
3. As this Counter-Memorial had been drafted and had reached an advanced state of printing in readiness for delivery to the Court of Arbitration on 2nd July, 1974, in accordance with the Order dated 7th December, 1973, it does not take into account any documents which may have been received from the Government of Argentina after 4th June, 1974.

## INTRODUCTION

1. The present Counter-Memorial is submitted by the Government of Chile pursuant to an Order of the Court of Arbitration and in reply to the Memorial filed by the Government of Argentina on 2 July 1973.

2. The general plan of this Counter-Memorial is briefly described in paragraph 32 of this Introduction. It consists principally of a comment upon and answer to the Argentine Memorial; it does not, therefore, contain a complete restatement of the Chilean case. It must be read together with the Chilean Memorial which contains the basic Chilean position.

3. However, before turning to the substance of this Counter-Memorial there are two matters largely of preliminary character which call for attention. The first is the inadequacy of the documentation produced by the Argentine Government. The second relates to the geographical scope of the present dispute.

### **Inadequacy of Argentine documentation.**

4. In approaching the preparation of this Counter-Memorial the Chilean Government has found itself at some disadvantage by reason of the inadequacy of the production of evidence in support of the Argentine Memorial. Although the conduct of the Argentine Government has been the subject of correspondence with both the Court of Arbitration and the Agent for the Argentine Government, the need to place on record the views of the Chilean Government on this matter in an accessible form is only one of the reasons for returning to the question now.

5. The Court of Arbitration will recall that Article V of the General Treaty of Arbitration between Chile and Argentina of 1902 contains in its last paragraph an undertaking by the Parties "to place all the information in their power at the disposal of the Arbitrator". This provision is no more than a restatement of a generally accepted obligation of good faith in the production of evidence in international proceedings.

6. The terms of this Article were reflected in Section III (i) of the Order made by the Court of Arbitration on 10 June 1972 in which, in ordering the deposit of written Memorials by 1 January 1973, the Court required that they should be "accompanied by the necessary explanatory and supporting documents". The Government of Chile understood by this that whenever a statement of fact in its Memorial could be established or supported by a document, an English translation of such document should be annexed to the Memorial. Accordingly, as the Court is aware, 354 documents, amounting to 583 closely printed pages, were annexed as Volume II of the Chilean Memorial. In addition, hundreds of further documents, amounting to 572 pages, were included in Volume III of the Memorial in support of Chapter X of the Memorial entitled "Acts of Jurisdiction". All these documents were printed in the English language, being in most cases translations from originals in Spanish. Subsequently, in reply to requests, the Spanish texts of many of these documents have been supplied to the Agent for the Argentine Republic. In addition, the Government of Chile produced an Atlas containing 125 Plates.

7. The contrast between the fullness of the Chilean response to the directions of the Court of Arbitration and the paucity of the production of documents by the Argentine Government is marked. Volume II of the Argentine Memorial entitled "Documents" consists of 225 pages comprising 33 annexes. Of these, one item (no 1) is entitled "Short description of the Fuegian archipelago and the Beagle Channel area" covering 22 pages. Four items (nos. 2, 3, 4 and 5) consist of extracts from published and readily accessible works. They amount to 47 pages. Another four items (nos. 30A, 30B, 31 and 32), covering 14 pages, consist of lists or tables. There thus remains a balance of only 142 pages of documentary texts which can be regarded as of evidential relevance. These are to be compared with the total of 1155 much more densely printed pages in volumes II and III of the Chilean Memorial. In short, the Argentine evidence amounts to barely one-tenth, if that, of the evidence supplied with the Chilean Memorial. As for the cartographic evidence submitted by Argentina, see Further Remarks, section A.

8. One explanation of this extraordinary contrast is especially evident. The substantive scope of the Argentine Memorial falls short of that of the Chilean Memorial in a major and highly significant respect. Whereas the Chilean Memorial adduces in support of its title in the disputed area the manifold 'acts of jurisdiction' which are described in Chapter X of the Memorial and are evidenced by the contents of Volume III, the Argentine Memorial contains nothing of a comparable character. It remains to be seen how, if at all, the Argentine Counter-Memorial will deal with the whole problem of 'acts of jurisdiction'. If it fails to produce any cogent evidence to counter-balance the statements appearing in the Chilean Memorial, a clear conclusion can easily be drawn therefrom. If, on the other hand, the Argentine Government now seeks in its Counter-Memorial to adduce material intended to off-set the demonstration of Chilean sovereignty in the disputed area, the Argentine Government will no doubt offer some justification for its failure to mention such material in the Memorial as part of the basic presentation of the Argentine case.

9. Another factor which makes the poverty of the Argentinian annexes so striking is that the Argentine Memorial contains many statements of fact referring to or relying upon documents which are not annexed thereto.

10. While the Chilean Government makes no complaint about the weakness of the Argentine Memorial in neglecting the topic of acts of jurisdiction (and will only need to complain if the Argentine Government does in its Counter-Memorial what it should have done in its Memorial), the Chilean Government cannot pass so lightly over the failure of the Argentine Memorial to produce the bulk of the documents to which it referred or upon which it relied. The considerable disadvantage at which the Chilean Government has thus been placed hardly needs elaboration. It was not possible, until many months after the delivery of the Argentinian Memorial, for the Chilean Government to examine those statements by the Argentinian Government which depend upon the content of documents cited or alluded to but not produced. And this behaviour of the Argentine Government is the more open to criticism because of the scrupulous way in which the Chilean Government has discharged its

obligation under the Order made by the Court on 10 June 1972 to provide in English, documentary proof for all that it has alleged — thus enabling the Argentine Government immediately and readily to assess for itself the correctness of the Chilean contentions.

11. Nor has the Argentine Government really been cooperative in remedying the defects in its production of evidence. From time to time the Chilean Government has sent to the Argentine Government lists of documents cited or relied upon in the Argentine Memorial and which the Chilean Government desired to examine. Of the 163 documents thus requested 133 have been delivered. Of these, 87 were in Spanish, and 52 were in manuscript, some completely illegible. The Court of Arbitration will thus be able to see for itself the slowness and general unhelpfulness of the Argentine behaviour in this connection, which falls far short of the standards which are appropriate in international litigation. In particular the use which counsel to the Chilean Government have been able to make of such documents as have been produced has been limited by the need for the Chilean Agent to arrange for them to be translated into English. This is something which the Government of Chile should not have had to do if the Argentine Government had also complied with its obligations in due time. The Court of Arbitration will understand that the production by the Argentine Government on 2 May 1974, some ten months after the delivery of the Memorial and a mere two months before the date set for the Counter-Memorial, of translations of 47 documents comes so late that it is useless and can in no way remedy the Argentine Government's earlier failure.

12. The attention of the Court of Arbitration has been drawn particularly to the episode relating to the diary of Thomas Bridges. (See the letter dated 21 March 1974 addressed by the Agent of the Government of Chile to the Registrar of the Court.)

13. The cumulative consequence of the behaviour of the Argentine Government in connection with the production of documents is that the position of equality of the parties to access to materials which should have prevailed during the period of the preparation of the Counter-Memorial has been denied to the Government of Chile. It is, therefore, bound to reserve all its rights in this regard.

14. At the same time, the Chilean Government is obliged to note the fact that the Argentine Government has in recent months been assiduous in requests for the original Spanish texts of documents printed in the Chilean Memorial — items which could have little, if any, part to play in the preparation of the Argentine Counter-Memorial. Nonetheless, whenever possible these texts or copies thereof have been provided. In addition, there have been many requests by the Argentine Government for copies of published works to which references have been made in the Chilean Memorial, as well as for copies of works which though not referred to in the Memorial are themselves cited in the documents produced by the Chilean Government. When the Chilean Agency has had in its possession a copy of the work a text requested, it has been happy to oblige the Argentine Government with a loan thereof without raising any issue as to the extent of its obligation to assist the Argentine Government in this

respect. However, the Chilean Government has thought it correct to take the position that, as a matter of principle, it is under no obligation to produce copies of published works to which the Argentine Government has access in libraries.

#### **The Geographical scope of the dispute**

15. The second preliminary matter which requires mention is the geographical scope of the dispute which forms the subject matter of the present arbitration.

As the Court will recall, the two Parties have each formulated their requests to the Arbitrator in terms of their own choosing. Both, however have located the subject matter of the dispute within a region which was defined in paragraph (4) of Article I of the "Compromiso" signed on 22 July 1971. This region was defined by reference to six points with stated geographical co-ordinates forming a rectilinear area colloquially described as "the hammer". Within the eastern part of the hammer there lie the islands of Picton, Lennox and Nueva, sovereignty over which is the principal matter in dispute between the Parties. The southern limit of the hammer in its eastern section lies along the line of 55° 24' latitude S. To the south of and outside the hammer there lie a number of other islands, Terhalten, Sesambre, Evout, Barnevelt, and the Wollaston and L'Hermite Groups.

By virtue of their location these islands are outside the scope of the present dispute and, as will presently be shown, should be regarded as outside the scope of any controversy between the Parties hereto.

16. Nonetheless, there are certain indications both in the Argentine Memorial and in diplomatic correspondence closely associated with it which create some uncertainty as to the attitude of the Argentine Government regarding the scope of the matters now under consideration by the Court of Arbitration.

17. More specifically, these indications are to be found first in the following aspects of the Argentine Memorial.

(i) The Argentine Memorial ends its consideration of Article 3 of the 1881 Treaty with the following words: "The overriding criterion of Atlantic jurisdiction to Argentina and Pacific jurisdiction to Chile inspired the attribution of islands east and west and it inspired the maritime dividing line in the extreme south of the American continent. This line continues from the eastern mouth of the Beagle Channel, passes through Paso Goree between Navarino and Lennox, continuing southwards, passing on the east the southernmost Atlantic islands under Argentine sovereignty, and on the west the southern most Pacific islands under Chilean sovereignty". (Arg. Mem. p. 404, para. 41; cf. p 407, para 43.) (Underlining added)

As the Government of Chile reads this passage, it amounts to a clear contention by the Argentine Government that Article III of the 1881 Treaty, properly interpreted, confers upon Argentina sovereignty over certain "southernmost Atlantic islands" lying south of Navarino and Lennox. These could only be the islands listed above and lying south of the hammer.

(ii) The point is made again, in the chapter setting out the history of the dispute, when the Argentine Government mentions the categorical rejection in 1959 by the Chilean Government of the attempt by the Argentine Government to submit to the International Court of Justice not only the case of Picton, Nueva, and Lennox, but also that of Terhalten, Sesambre, Barnevelt and Evout, as well as the islands and fragments of islands in the Wollaston and L'Hermite Groups, situate east of the meridian of Cape Horn. In referring to this episode the Argentine Memorial adds, by way of commentary, that the Chilean Government was in effect "ignoring the fact that Terhalten and other southern islands of Tierra del Fuego, by their location, fell within the same question of interpretation of the Treaty of 1881" (Arg. Mem. p. 276, para. 106). A little later the Argentine Memorial recalls, with a similar comment that "an Argentine proposal in 1959 sought, with unassailable logic, to include within the area of the dispositif Atlantic islands such as Terhalten, Sesambre, Evout and Barnevelt" (Arg. Mem. p. 343, para. 2).

(iii) A less precise, but possibly significant, reference to the southern islands outside the hammer is to be found in the description of the boundary line which, so the Argentine Memorial submits, was established by the 1881 Treaty. After indicating that this line reaches the high seas midway between Punta Guanaco (on Navarino Island) and Punta Maria (on Lennox Island) the Memorial adds that "from there it continues in a generally southerly direction". (See Arg. Mem. p. 445).

18. The uncertainty created by these words is evident, for no indication is given as to how far in the understanding of the Argentine Government this line extends towards the south — whether it be to the limits of the area defined in the Compromiso or whether much further, for example as far as Cape Horn.

19. The second element introducing uncertainty as to what precisely the Government of Argentina sees as the exact scope of the dispute between the Parties consists of two diplomatic notes addressed by the Argentine Government to the Chilean Government in 1973.

20. (i) The first of these notes is dated 3 March 1973 (Ch. Ann. No.335, p. 582), that is just a few weeks before the date fixed by the Court for the filing of the Memorial of the two Parties. It took the form of a reply by the Argentine Government to a Chilean Note of 19 July 1971 (Ch. Ann. No.329, p. 575) — that is a date before the signature of the Compromiso in which the Chilean Government protested against a decree of 8 April 1970 made by the Argentine Governor of Tierra del Fuego (Ch. Ann. No.379) including within the limits of his jurisdiction, beyond the islands of Los Estados, Picton, Nueva and Lennox, "those extending to Cape Horn to the east of the meridian crossing it."

The Chilean Note stated that the Argentine measure "would lead to a new situation: the increase in Argentinian claims regarding territories which belong to the Republic of Chile". The Note added:

"Decree No.149 will constitute . . . a new step in Argentinian claims . . . As far as the Government of Chile knows, this is the first time that an Argentine authority has officially claimed to place under its jurisdiction Chilean territory which extends between Lennox Island and Cape Horn".

Accordingly, the Chilean Government declared that it was "not in a position to determine the measure whereby the action of the Governor . . . might reflect the will of the Argentine Government" and indicated that, in order to reserve its rights, it must draw the attention of the Argentine Government to the measures taken by the Governor and must reaffirm "that the territory which extends between Lennox Island and Cape Horn is not nor has ever been under dispute between Chile and Argentina". The Note concluded with these words:

"Neither in the Treaties in force, nor in the said Protocols which were intended to put an end to the said controversy, nor in the extensive diplomatic correspondence exchanged between both Governments to the present date, does the possibility of Argentina having claimed or claiming rights over this part of Chilean territory appear to be even suggested.."

In its reply of 3 March 1973, the Argentine Government referred for the first time to a new concept, one not hitherto mentioned in communications between the Parties, of an "area closely linked to that of the present arbitration in course". In the same Note, the Argentine Government protested against the installation by the Chilean Navy of a buoy on the islet of Evout, which is situate in this area, and which had up till then been considered as belonging indisputably to Chile.

21. The Chilean Government replied by a Note of 16 May 1973 (Ch. Ann. No.336, p. 583)<sup>1</sup> protesting against this "pretension to widen the controversy at present submitted to arbitration, a controversy which concerns a perfectly defined area", by means of recourse to the unexpected notion of an "area closely linked to that of the present arbitration in course". The Chilean Note reaffirmed the rights of Chile in these southern regions which had never before that date been the subject of dispute between the two countries.

22. (ii) The second Argentine Note, of 2 July 1973 (Ch. Ann. No.381), states the position of the Argentine Government more fully. It must be recalled that it was dated on the same day as the Memorial and perhaps was intended to be read as one with the Memorial, for it refers at a number of points to the present arbitration.<sup>2</sup>

This Note consists of two parts. First, as regards the decree No.149 of 8 April 1970 of the Governor of Tierra del Fuego, the Argentine Government accepted full responsibility, notwithstanding the fact that the decree had been made by the Governor of a territory. It expressed surprise that the Chilean Government had waited fifteen months to protest against the adoption of the decree. From this the Argentine Note deduced that the Chilean Government knew perfectly well of the Argentine claims over the islands situate south of the disputed area submitted to arbitration, and lying east of the Cape Horn meridian. The Note concluded that the Compromiso of 22 July 1971 could not be interpreted as a renunciation on the part of the Argentine Government of its rights over these islands. The relevant passage

<sup>1</sup> N.B. In Ch. Ann. No. 336 there is a printing error; the date 1971 in the penultimate paragraph should read 1969.

<sup>2</sup> For the background to this Note, as obtained by the Chilean Ambassador in Buenos Aires from the Argentine Foreign Minister, and officers of the Argentine Chancery, see Ch. Ann. No. 380

in the Note calls for full citation:

"... it seems strange to my Government that that of Your Excellency has not stated, in the course of the said negotiations, its point of view on the Decree quoted, allowing the long gap of fifteen months to pass before formulating your observations.

"From this it must be inferred, therefore, that the Government of Your Excellency knew perfectly the position of my country with reference to the islands situated on the Atlantic Ocean, to the east of the meridian which passes through Cape Horn and south of the region of controversy....

"... (It) could hardly be interpreted that the Compromiso subscribed to by the Governments of Chile and Argentina involves a renunciation by my country of native territory ('territorio patrio') situated to the south of the zone fixed in the said arbitral Compromiso."

Secondly, as regards the installation of the buoy on Evout by the Chilean Navy, the Argentine Note contended (contrary to the true facts — see Ch. Ann. No. 378A) that this construction had not taken place in 1969 as alleged by the Chilean Government, but later, without doubt in 1972, in such a way as to amount to an attempt by the Chilean Government "to create situations in order to extract arguments which may favour it in the arbitration".

The Note concluded by "reaffirming once again the unquestionable Argentine rights over the territories included in Decree No.149 of 8 April 1970 of the Governor of the National Territory of Tierra del Fuego, Antarctica and Islands of the South Atlantic".

23. Thus, following as it did the Note of 3 March 1973, that of 2 July 1973 stated unmistakably what the Memorial left expressed incompletely. The Argentine Government claimed not only the territories included in the hammer, but also all the "islands situated on the Atlantic Ocean, to the east of the meridian which passes through Cape Horn and south of the region of controversy".

24. To the Argentine Note of 2 July 1973 the Government of Chile has not yet replied - principally because, as will presently be seen, it had every reason to believe that the question of title to the southern islands south of the hammer had long since been removed from the area of controversy between the Parties. The Government of Chile can see no reason why this question should be reopened either now or, indeed, at any other time.

At the risk of troubling the Court overmuch on this point, the Government of Chile believes it important to recall the very exact way in which the Parties have considered the Argentine pretensions to the existence of a dispute regarding the southern islands and have quite specifically established that no such dispute exists.

25. From the moment when the difference of interpretation of the 1881 Treaty first arose between the two countries in relation to the islands in the Beagle Channel area — that is to say approximately since the beginning of this century — the two Governments have always considered that this was the last remaining territorial difference between them in the southern part of the continent. (See Ch. Ann. No.369)

As the Court knows, several attempts have already been made to secure arbitration of the present dispute, particularly in 1915, 1938 and 1960. On each of these occasions, after long

negotiations, the two Governments signed arbitration agreements; and on each occasion, it may be noted, the two Parties took care to emphasise that the Beagle Channel dispute was both the only and the last outstanding difference between them in the southern region.

26. The Protocol of 28 June 1915 (Ch. Ann. No.102, p. 269) noted that "the only controversy existing at present between the two countries is the question of deciding to which of them corresponds sovereignty over the islands Picton, Nueva, Lennox and adjacent islets and islands lying in the Beagle Channel between Tierra del Fuego and Dumas Peninsula and Navarino Island" (Arg. Mem. p. 250, para. 70, indeed refers to this point.) The signature of the Protocol was preceded by an Argentine draft (Ch. Ann. No.92, p. 254) and by the Chilean Counter-Draft (Ch. Ann. No.99, p. 266) which both mention that this was the only dispute existing between the two countries in the southern part of the continent. (See also Ch. Ann. No.372)

27. The Protocol of 4 May 1938 (Ch. Ann. No.132, p. 317) also recalls that it was concerned with submitting to arbitration "the only controversy at present pending between the two countries" and it defined this dispute in the same terms as did the 1915 Protocol. In this case, as in the earlier one, none of the islands situate between Lennox and Cape Horn was mentioned amongst those to which the dispute related. The 1938 Protocol had been preceded some years previously by a joint declaration of the Ministers of Foreign Affairs of the two countries known as the "Act of Mendoza" of 1933 (Ch. Ann. No.131, p. 316; cf. Ch. Mem. p. 119, para. 9). The two Ministers sought "to find, at the earliest possible time, a solution for the Beagle Channel question . . . as this is the only question still pending between both countries".

28. The Protocol of 12 June 1960 (Ch. Ann. No.269, p. 488) mentions in its Article 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", and Article V (as well as listing these islands and islets, which all fall within the hammer) specifically states that there is to be submitted to the International Court of Justice "the sole question pending in relation to the interpretation of the Boundary Treaty of 1881" (Ch. Ann. No.269, pp. 488 and 489) — a point equally noted in the Argentine Memorial (p. 280, para. 111).

29. In submitting to arbitration only those islands situate in the region of the Beagle Channel, to the exclusion of Terhalten and the other islands situate between Lennox and Cape Horn, the 1971 Compromiso is thus in the direct line of descent from the Protocols of 1915, 1938 and 1960. No more in 1971 than in 1915, 1938 or 1960 was Chilean sovereignty over the southern islands considered as having been put in question on the occasion of the commencement of the present arbitral proceedings.

30. The solution adopted in 1960 calls for further consideration, since it was preceded by resistance to an Argentine endeavour to include in the arbitration then contemplated islands other than those in the Beagle Channel region.

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If the Court will refer to the history of the negotiations of 1959-1960 (Ch. Mem. pp. 122-125, paras. 17-27; cf. Arg. Mem. pp. 271-282, paras. 49-114), it will observe that, in reply to a Chilean suggestion to submit the Beagle Channel question to arbitration, the Argentine Government proposed, in a Note No.2191 of 30 October 1959, that the International Court of Justice should be asked to decide not only on the case of the islands in the Beagle Channel region, but also on the question of "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" (Ch. Ann. No.250, p. 463). This proposal, it may be noted, was quite novel, for in contrast with the situations in 1915 and 1938, this was the first time since the 1881 settlement that the Government of Argentina had specifically enumerated as falling within the scope of its claims any islands lying south of Lennox. To this proposal, which purported to put in issue Chile's hitherto uncontested sovereignty over the southern islands, the Chilean Government replied by a Note of 28 December 1959 (Ch. Ann. No.254, p. 467) reacting firmly against what it called "an unusual extension of the magnitude of this difference existing between the two countries". The Note recalled that the dispute over the Beagle Channel region had always been considered as the only one remaining between the two countries in this area, and it protested against the attempt by the Argentine Government to profit from the peaceful settlement of this dispute by enlarging its claims in "adding territorial and maritime areas situated many miles further to the south, which have never been the subject of controversy. . .". As a result of this Argentine attempt, the Chilean Note added, "the sole existing difference could be converted into a new conflict, of unforeseen proportions and consequences". Faced by this reaction, the Argentine Government agreed wholly and unconditionally to withdraw its request for the extension of the dispute. The Memorandum signed on 23 June 1960 by the two Governments mentioned that "insistence would not be made upon the extension of the arbitral matter concerning the difference in the Beagle Channel, suggested in the Argentine Note No.2191, dated 30 October 1959, relating to the definition made of it in the Arbitration Protocols which both Governments signed in 1915 and 1938" (Ch. Ann. No.257, p. 473). Note No.2191 was officially withdrawn on 1 March 1960 (Ch. Ann. No. 260, p.476), thus making possible the signature of the Memorandum on Bases of Arbitration of 19 March 1960 (Ch. Ann. No. 263, p. 479) and of the Arbitration Protocol of 12 June 1960 (Ch. Ann. No. 269, p. 488).

31. In the light of this examination of earlier suggestions by the Argentine Government regarding the islands south of the hammer and of the clear identification of the agreement of the Parties that no dispute relating to those islands exists, the Government of Chile is at a loss to understand why the Government of Argentina should now wish to give the impression of re-opening a matter that is well and truly closed. If the reason is simply that the Government of Argentina sees its contentions regarding the "Atlantic - Pacific principle" (as to which see below, chapter II) as possibly strengthened by pressing to the extreme the application of this "principle", then the Government of Argentina only has to say so to allay the anxiety of the Chilean Government. For, viewed in that perspective, the extension of the Argentine claim in truth does no more than further weaken an already crumbling structure. If, however, there is some other reason why the Government of Argentina is introducing into this case these

references to Argentine claims to the southern islands, the Government of Chile is bound to make its position absolutely clear: title to the islands south of the hammer is not only not in dispute in the present case; it has for long been completely and irrevocably excluded from the sphere of any controversy between the Parties. Terhalten, Sesambre, Evout, Barneveldt, Wollaston, L'Hermite and Cape Horn have repeatedly been accepted as being under undisputed Chilean sovereignty.

### 32. Plan of the Counter-Memorial

The dispute submitted to the Court relates exclusively, in the opinion of the two Governments, to the interpretation of the Boundary Treaty of 1881. It is, therefore, natural that the present Counter-Memorial should concentrate on the question of interpretation.

In Chapter I there is a general assessment of the Argentine Memorial, identifying the points on which the two Parties agree, and containing a general criticism of various aspects of the Argentine position.

Although the two Governments are agreed in reading the 1881 Treaty as a single territorial settlement based upon a compromise, they differ as regards the meaning and scope of this settlement. It is to this problem that Chapter II will be devoted. This will enable the Chilean Government to restate the true position, taking into account particularly the preparatory work and the circumstances in which the Treaty was concluded, as well as its object and purpose.

Chapter III will be devoted to an analysis of the language of the Treaty, read in its context in the light of the object and purposes of the Treaty, as identified in the previous chapter.

In Chapter IV, consideration will be given to events subsequent to the Treaty, which shed light on its interpretation. These events, as the Chilean Government will show, fully confirm the interpretation of the Treaty established in the two previous chapters.

Finally in Chapter V there is a brief recapitulation of the Chilean case.

It goes without saying that the Chilean Government will limit itself on each of these points to such observations as are necessitated by the approach contained in the Argentine Memorial, and will not repeat in detail the statement and justification of its own interpretation.

Following the end of Chapter V there are two appendices, Appendix A which deals with the historical position between 1534 and 1881, in order to answer certain references in the Argentine Memorial to the 1810 *uti possidetis* situation, and to the situation between 1810 and the signature of the Treaty. Appendix B refers in detail to H.M.S. Beagle's surveys in the disputed area and the conclusions which may correctly be drawn from them.

Accompanying this Counter-Memorial is a further volume of annexes, among which are a number of the documents which have been produced by the Argentine Government in response to requests by the Chilean Government. There is also a second Atlas and a volume of Further Remarks concerning the Cartographical Evidence<sup>1</sup>. Both the annexes, and the Maps, are numbered consecutively from the last numbers in the previous volumes.

<sup>1</sup>In addition, for the purpose of giving geographical and navigational information relating to the Straits of Magellan/Cape Horn area, two Chilean nautical charts, identified as Maps D and E, are also delivered with this Counter-Memorial.

33. While the present Counter-Memorial is directed at the Argentine Memorial as a whole and, therefore, deals of course with a large number of the points therein it is neither necessary nor possible within the limits of this Counter-Memorial to discuss every allegation made in the Argentine Memorial. Consequently, the Government of Chile should not be taken as admitting any statement of fact or contention of law in the Argentine Memorial merely because that matter is not covered in this Counter-Memorial; and should any such points subsequently in the course of these proceedings acquire any significance, the Government of Chile reserves its rights to deal with them.

## CHAPTER 1

### GENERAL ASSESSMENT OF THE ARGENTINE MEMORIAL

1. As stated above, the present Counter-Memorial is submitted by the Government of Chile in reply to the Memorial filed by the Government of Argentina on 2 July 1973. In this Counter-Memorial, the Chilean Government will limit itself to the formulation of such observations as are demanded of it by the Argentine Memorial without entering once again into a full statement of its own position. The Chilean position remains as set out in its Memorial, to which the Court is respectfully referred.

2. The present chapter to the Chilean Counter-Memorial contains two series of observations called for by the Argentine Memorial.

First, The Chilean Government notes with satisfaction that on a certain number of points the positions of the two Parties have come closer together.

Secondly, the Chilean Government cannot accept the manner in which the Argentine Government on the basis of principles recognised today by both Parties has substantially distorted certain fundamental aspects of the dispute.

The Chilean Government considers that by first indicating the points of agreement between the Parties and then going on to present a general criticism of the Argentine Memorial it will be able to define more precisely the differences between the positions of the two Governments and accordingly be the better able to indicate the precise limits of the dispute which the Court is called upon to decide.

#### A. — The points on which the Parties are fundamentally agreed

3. The Chilean Government regards it as a matter of satisfaction that the Argentine Government has now accepted certain principles which for decades past the Chilean Government has insisted are fundamental to the solution of the present dispute.

4. (a) The first of these principles is that the dispute is exclusively one of the interpretation of the Boundary Treaty of 23 July 1881. On this point the Argentine Memorial states:

"The dispute as one of Interpretation of the Treaty of 1881

"... the Boundary Treaty signed in Buenos Aires on the 23rd July 1881 is without doubt the fundamental text to which reference must be made in looking for a solution of the dispute. . .

"... The heart of the question — the question behind the questions — has always been . . . none

other than the proper interpretation of those words of Article 3 of the Treaty of 1881 which delimit the boundary after the line reaches the Beagle Channel" (Arg. Mem. pp. 347-348, para. 5). para. 5).

"... the dispute ... is a dispute on the interpretation of the Boundary Treaty of 23rd July, 1881" (Arg. Mem. p. 444, para 4).

5. (b) The second principle accepted in the Argentine Memorial is that the 1881 Treaty must be interpreted exclusively in conformity with the intention of the Parties, and that consequently it is proper to give to the geographical terms which appear in the Treaty the meaning given to them by the negotiators of the Treaty without taking into account theories subsequently elaborated for reasons of a geographical, political or other character. On this point the Argentine Memorial says:

"... It must be borne in mind that in the present case Article 3 of the Treaty in particular uses many expressions which refer to geographical features. Therefore it is essential to establish the content of such expressions and, as it is a question of finding the true intent of the Parties, it is clearly imperative to refer to the notions which were accepted at the time of the negotiation and not to notions which have subsequently appeared or been developed". (Arg. Mem., p. 355, para. 11).

"Having in mind that the attribution of jurisdictions is based mainly upon geographical terms, to discover the true intention of the drafters of the Treaty of 1881 one must first look at the meaning these terms bore at the time of the negotiations....." (Arg. Mem., p. 362, para. 16).

"But the most important question that arises is what was the course of the Beagle Channel? For the text of the Treaty is silent on that essential point. What then was the understanding of the Treaty draftsmen on this question? The most important problem in the Argentine-Chilean dispute, the problem which one comes up against whenever any attempt is made to resolve the dispute, may be reduced to the following: What was, for the Treaty of 1881, the eastern opening of the Beagle Channel? ... the question put in this way, could only be solved on the basis of opinion at the time and, more specifically, of the ideas which have been held by the negotiators of the Treaty ... It is well-known that after the birth of the dispute over interpretation between Argentina and Chile not only geographers but also sailors, politicians and journalists - from both camps - have suggested different theories as to the eastern course of the Beagle Channel ... However, it is not necessary to assess how far it might be possible to sustain this or that abstract thesis, because none of this has any relevance to the problem which is to be resolved in the present case. It is not a question ... whether the conception held by the negotiators of the 1881 Treaty of the course of the Beagle Channel was really sufficiently precise or whether a different notion could have been more specific. The task is to study what was in the mind of the negotiators on both sides ... " (Arg. Mem. pp. 382-383, para. 27-28).

"Every attempt to achieve a settlement that was made after negotiations to solve it began in 1904 identified the problem as one of interpretation, and nothing else" (Arg. Mem. p. 430, para. 55).

6. (c) The third principle common to the Parties is that the 1881 Treaty has the character of a compromise between the claims of the two Parties, by which the two Governments intended to put an end in the most complete and definitive manner to the territorial dispute which has existed between them for so many years. From this it follows that the 1881 Treaty

established a fresh legal basis for the respective rights of the Parties in the areas which it covered. Consequently, neither Party may today invoke in these areas any territorial right whatsoever which does not find its exclusive source in the terms of the Treaty. On this point the Argentine Memorial states:

"It was inevitable that the final result of this tortuous era of Argentine-Chilean relations, that is the Treaty of 1881, would be a compromise solution". (Arg. Mem. p. 142, para. 27. Cf., with reference to the 1876 Bases of Agreement p. 166, para. 52.)

"Neither Party has ever suggested that it might have acquired a territorial title in this region which did not have its root, in its view, in the relevant dispositions of the Treaty of 1881". (Arg. Mem. p. 351, para. 8.)

7. (d) The fourth principle which appears to be common to the two Parties is that regard must be paid in the interpretation of the Treaty to the principles now reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties. These include, amongst others, the two following:

The first is that the provisions of the Treaty must be interpreted in accordance with their ordinary meaning, in their context and in the light of the object and purpose of the Treaty. The Chilean Government has already noted the concurrence of the Argentine Government in the necessity of defining the geographical terms employed in the Treaty in the sense given to them by the Parties at the time of the negotiation and signature of the Treaty. The Chilean Government also notes with satisfaction that the Argentine Government agrees on the proposition that "the examination of the context must also involve taking into account the whole instrument and its overall intention". (Arg. Mem., p. 356, para. 12).

The second relevant principle on which the Parties appear agreed is that recourse may be had to supplementary means of interpretation including the preparatory work of the Treaty and the circumstances of its conclusion in order to confirm the interpretation of the Treaty arrived at by the application of such methods as those referred to in Article 31 of the Vienna Convention. The Argentine Government acknowledges in this connection the importance which has to be given, to "documents and materials upon which the text of the Treaty is clearly based" (p. 415, para. 46).

Of special importance in this connection for the interpretation of the provisions of the Treaty of 1881 is the proposal made in 1876 by the Argentine Minister Sr. Irigoyen to the Chilean negotiator Sr. Barros Arana. The particular significance of the Irigoyen proposal in respect of the territory concerned in the present dispute lies in the fact that the Treaty of 1881 does nothing more than faithfully reproduce the compromise formula suggested in 1876. The Argentine Memorial expresses the matter with complete exactitude when it states that the Treaty of 1881 has been "so far as we are here concerned, virtually a repetition in treaty form of the Bases of Compromise agreed between the Parties in 1876" (Arg. Mem. p. 359, para. 14;

cf p. 198, para. 76, and p. 425, para. 53). In order to appreciate the meaning of the territorial settlement of 1881 it is therefore imperative to take into account the meaning of the compromise proposed by Argentina in 1876. As a logical consequence of this, the negotiations leading up to the establishment of the formula of 1876, as well as the negotiations which preceded the definitive settlement of 1881, are relevant to the interpretation of the Treaty. The Chilean Government can round off the point by merely quoting the words of the Argentine Memorial:-

"It is possible . . . to identify documents and materials upon which the text of the Treaty is clearly based . . . The Treaty of 1881, and in particular Articles 2 and 3 thereof, closely follows both in concept and language the Bases of 1876. However, to appreciate what each Party was seeking to achieve in the Bases of 1876, and later in the Treaty of 1881, it is instructive to refer to the historical background against which the negotiations took place and the course of the negotiations themselves from about 1872 up to 1881 as well as the preparatory work directly preceding the subsequent formulations contained in the Bases of 1876 and in the Treaty" (Arg. Mem. p. 415, para. 46).

8. (e) While the Parties interpret the concept of "Beagle Channel" employed in the Treaty in different ways, they are completely at one in taking the view that, in the meaning given to the concept by the negotiators of the Treaty, it was to be a channel having in its eastern section a single mouth (Arg. Mem. p. 390, para. 29; Ch. Mem. p. 9, para 7, and p. 15, para. 25). At the beginning of the century certain Argentine authors, notably Saenz Valiente and Groussac, gave voice to the idea that the Beagle Channel could be conceived of as dividing into two arms to the east of Navarino Island, of which one arm stretched to the north and the other to the south of Picton Island (cp. Guerra, La Soberania Chilena en las islas al sur del Canal de Beagle, Santiago, 1917. p.244). Such a thesis does not seem to have ever been adopted by the Argentine Government (see below, Chap. III, paras. 36 and 47) and has certainly not by the Chilean Government. The Memorials of the Parties in the present case reveal that to-day both agree to reject categorically such a view as one of the theories manufactured by the "geographers, sailors, politicians and journalists—from both camps", of which the Argentine Memorial with justification remarks that they have "no relevance to the problem which is to be resolved in the present case" (Arg. Mem. p.383, para.27). In relation to the definition of the Beagle Channel, the present dispute is therefore confined to the question of discovering whether, in the understanding of the negotiators of the Treaty of 1881, the Channel referred to in Article III of the latter was, as the Argentine Government contends, the stretch of water which, after separating Navarino and Tierra del Fuego, turns southeastward between Navarino and Picton and debouches into Oglander Bay; or as the Chilean Government considers to be the case, the Channel is in truth the stretch of water which hugs the southern coast of Tierra del Fuego, reaching the open sea at Cape San Pio, and thus dividing Tierra del Fuego to the north, from Picton and Nueva to the south.

9. The dispute which the Court of Arbitration is called upon to decide is thus specifically limited to the interpretation of the 1881 Boundary Treaty. The issue before the Court is, therefore, that of deciding, in the light of the intention of the Parties in 1881, to which of the two states the disputed territories belong in accordance with the 1881 Treaty.

For this reason the Chilean Government attaches particular importance to the negotiations which led directly to the 1876 Irigoyen-Barros Arana formula and to the subsequent conclusion of the 1881 Treaty, and more particularly to the maps which so clearly evidence the intention of the Parties.

For this reason, too, the Chilean Government, in accordance with the rulings in the Palena case, places considerable emphasis upon the relevance of the subsequent conduct of the Parties. It does this not on the basis that such conduct constitutes a fresh and distinct basis of Chilean right - though the Argentine Memorial conveys that impression - but as a direct confirmation of the interpretation of the 1881 Treaty as otherwise established. (Cf. Ch. Mem., p. 126, para 2-6)

Lastly, it is for this reason that the Chilean Government must at the outset reject as totally irrelevant those arguments in the Argentine Memorial which - contradicting at the same time the positions of principle which it has itself adopted - so readily draw upon facts and matters entirely foreign to the interpretation of the 1881 Treaty, such as certain events prior to the negotiation and conclusion of the 1881 Treaty (including the situation said to prevail at the beginning of the 19th century in relation to the principle of uti possidetis) or, on the other hand, more modern facts which have no conceivable bearing upon the search for the intention of the Parties in 1881 (including, for example, the recent claims to the continental shelf, or considerations of maritime power and of access to the port and naval base of Ushuaia, a town which did not even exist at the moment when the relevant Treaty was negotiated and signed).

Even if the Argentine Government has correctly defined the present dispute as one bearing exclusively on the interpretation of the 1881 Treaty, it has nonetheless not hesitated on more than one occasion to abandon this fundamental principle. As a result the whole of the Argentine Memorial is riddled by obvious internal contradictions. These will presently be demonstrated more precisely by the Chilean Government in the framework of a general comment upon the Argentine Memorial.

#### **B. — General criticism of the Argentine Memorial**

10. The Chilean Government will, of course, take the opportunity at a number of points in the present Counter-Memorial to refute the erroneous interpretations of the 1881 Treaty advanced by the Argentine Government on various points relevant to the dispute submitted to the Court of Arbitration. However, this refutation, point by point, of the Argentine arguments does not by itself dispose of them, for the Argentine Government has based the whole of its approach to the case on a number of fundamental and unsubstantiated assumptions. This explains the fact that nearly every page returns in the manner of a leitmotiv to the same unproved assumptions, the object of which is undoubtedly to confer an appearance of coherence and credibility upon interpretations which are themselves pretty fragile. These

assumptions so dominate the argument that even the search for the intention of the Parties is distorted into a fictitious and ad hoc reconstruction of the history of the case. The exposure of these false assumptions will be the first point to be considered in this general criticism of the Argentine Memorial.

However, it is not only the intention of the Parties which is distorted by the Argentine Memorial. No less affected is the definition of the present dispute.

In order to give an appearance of verisimilitude to this deformation of the intention of the Parties the Argentine Memorial is obliged to abandon the development of its arguments with the rigour and consistency required for proof of its case. The Chilean Government regards it as its duty to draw the attention of the Court to some examples of this approach.

Accordingly, the general comments to be made upon the Argentine Memorial - and which will be developed at greater length in due course - will relate in turn to each of the points just mentioned.

**(i) The fictitious reconstruction of the intention of the Parties**

11. The thesis of the Chilean Government is as the Court will have observed, "straightforward and uncomplicated" (Ch. Mem. p. 175, para. 1). It is essentially that Picton, Lennox and Nueva are not islands which the Treaty allocates to Argentina, but that they are on the contrary, principally by reason of their position "to the south of the Beagle Channel", amongst those assigned to Chile. Any doubts as to the meaning of the term "the Beagle Channel", may immediately be dispelled by the documents and maps which show that the Parties intended that this must be, and could be nothing other than, the west-east waterway having as its northern 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. The allocation to Chile of Picton, Lennox and Nueva, which thus follows clearly from the very terms of the 1881 Treaty, is confirmed by the preparatory work leading up to the Treaty and the circumstances in which it was concluded, as well as by its purpose and object, and notably by the general economy of the territorial settlement which it incorporated, and finally by the subsequent practice of the Parties in applying it.

12. The Argentine Government, on the other hand, can hardly hope to find any support in the ordinary meaning given to the words of the Treaty in their context and in the light of its object and purpose. To adhere to this method of interpretation, which is indeed the only correct one, leads inevitably to the failure of its claim. The Argentine Memorial constructs a complex argument resting on two separate propositions.

13. The first, and simpler, consists in interpreting the expression "Beagle Channel" as it appears in Article III of the Treaty, in such a way that Picton, Nueva and Lennox can no longer be regarded as lying "to the south of the Beagle Channel". Thus, being unable actually to displace the islands, the Argentine Government seeks in some way to shift the Channel.

There have, over the years, been a number of similar attempts, (cf. Ch. Mem. pp 85 and following) and the Chilean Government waited with interest to see which amongst the many lines proposed in the past by the Argentine Government, or by various more or less official Argentine personalities, would be selected by the Argentine Memorial as being that intended by the Parties in 1881. In the end, it was the line between Navarino and Picton, through Picton Pass, which was chosen. The Government of Chile will examine this line in detail when it discusses the interpretation of the 1881 Treaty in Chapter III of the present Counter-Memorial.

14. It is to the second limb of the Argentine argument that the Chilean Government particularly wishes, within the framework of the present Chapter, to draw the attention of the Court. This is in effect the most original and the most remarkable part of the Argentine Memorial.

15. (A) The point of departure is, of course, the "Atlantic-Pacific principle". This is the "overriding principle" (Arg. Mem. p. 374, para. 19) which, according to the Argentine Government, provides the key to the 19th century negotiations and to the settlement finally adopted in 1881, and in the light of which each and every one of the provisions of the Treaty must be read and interpreted. The privileged position accorded to this "principle" in the Argentine Memorial may, it seems, be explained in the following way.

16. The Argentine Government was no doubt fully aware of the fragility of its contention that the expression "Beagle Channel" referred to a waterway which, after passing between Tierra del Fuego and Navarino, turns sharply towards the south-east in order to pass between Navarino and Picton. It sought, therefore, another way of escaping from the clear terms of the Treaty; and refuge was sought in the fact that Picton, Nueva and Lennox are east of the meridian of Cape Horn. It was then sufficient for Argentina to maintain that the Treaty did not intend to allocate to Chile any territory east of this meridian, and that therefore these three islands could only belong to Argentina.

The difficulty lay, however, in showing that the Treaty did not intend to allocate to Chile any territory east of the Cape Horn meridian, for read or re-read the Treaty as one will, no such idea can be found there. The Court can hardly be asked to read the words: "to Chile shall belong all the islands to the south of Beagle Channel up to Cape Horn" ("hasta el Cabo de Hornos") as if they were: "to Chile shall belong all the islands to the south of Beagle Channel to the west of the Cape Horn meridian".<sup>1</sup> Nor would it be easy to persuade the Court that the Treaty established a boundary which turns towards Picton Pass and then continues towards the

<sup>1</sup> It is this that Argentina asks the Court to do: "It has to be accepted that by the words 'hasta el Cabo de Hornos' the Parties intended to mark an eastern limit: a limit whose rationale is that to the east of Cape Horn is the Atlantic" (Arg. Mem. p. 403, para 40).

south along the meridian of Cape Horn, when all the maps capable of shedding light on the intention of the Parties depict a line which passes to the north of Picton and Nueva. Consequently, the Argentine Government was led to contend that the allocation of territory south of the Beagle Channel was no more than a special application of an alleged general principle controlling the whole of the 1881 Treaty, the so-called "Atlantic-Pacific principle".

17. Thus the general strategy of the Argentine Memorial was revealed. The first priority was to establish that the 1881 Treaty rested entirely on the "Atlantic-Pacific principle". This was the key stone of the whole structure. Once this "principle" was established, there was no reason for not applying it south of the Beagle Channel, thus making the Cape Horn meridian the boundary line "chosen" by the two Governments in 1881. The conclusion followed inexorably: as Picton, Nueva and Lennox lie east of the meridian of Cape Horn they can only belong to Argentina.

18. In order to submit that Picton, Nueva and Lennox belong to Argentina because they are situate east of the meridian of Cape Horn, the Government of Argentina had to show that the 1881 settlement was effectively dominated by an "Atlantic-Pacific principle", applicable south of the Beagle Channel. That, of course, is where Argentina's difficulties began.

One will seek in vain to discover either in the Treaty or in the documents connected with the negotiations the slightest indication of the intention of the Parties to rest the compromise worked out between them between 1876 and 1881 on any such "principle". Yet it is scarcely conceivable that if a basis of agreement of such width had been in the minds of the negotiators they would not have expressed it in black and white, either in 1876 or in 1881.

19. One finds no trace of any alleged "oceanic" principle either in the negotiations of 1876 or in those of 1881. Nor is there any trace of it in the arbitration treaties drafted in 1878 (that of 18 January 1878: Ch. Ann. No. 27, p. 58; that of 6 December 1878: Ch. Ann. No. 31, p. 68). It was a question there of applying the principle of *uti possidetis* of 1810, but not a word was said of any "principle of oceanic division". In the 1881 Treaty itself, not only is no principle of this kind stated, but it even contains contrary considerations. The word "Atlantic" only appears once (in connection with the "other islands there may be on the Atlantic to the east of Tierra del Fuego . . ."). As for the word "Pacific", it is not there at all. Far from incorporating any such "principle", the Treaty demonstrably avoids it. How is the Argentine Government to explain in the light of the "Atlantic-Pacific principle" that it recognises as Chilean an island which in its view gives so incontestably on to the Atlantic as Navarino? (Ch. Ann. No. 330, p. 577; see also Chapter II, para. 52, below.) No more is any mention made of an "oceanic principle" in the Arbitration Agreement of 1896, or in the Protocols of arbitration of

1915, 1938 or 1960. It is a strange overriding "principle" which one never finds mentioned anywhere, and of which the Argentine Government itself was completely unaware twenty years after the conclusion of the Treaty when an opportunity was given to it by the 1898-1902 Arbitration to comment in detail on the Treaty and its antecedents! (cf. Ch. II para. 51)

20. As for the maps illustrating the intention of the Parties, the Argentine Government would be hard put to find amongst them a single one which includes the "stepped line" with which it makes such great play (Arg. Mem. p. 407, para. 43, and p. 419, para. 48): from north to south, as far as the 52nd parallel; then from west to east north of the Straits of Magellan; then once more from north to south across Tierra del Fuego; after which again from west to east in the Beagle Channel along the whole north shore of Navarino; finally once more from north to south through Picton Pass, Goree Pass and along the meridian of Cape Horn. The idea is perhaps attractive on the geometrical or the aesthetic plane. Its only weakness is that it lacks all foundation. One has only to look at the map illustrating the Irigoyen proposal of 1876 (Ch. Plate No. 8), at the Elizalde map of 1878 (Ch. Plate No. 9), at the Chilean Authoritative Map of 1881. (Ch. Plate Nos. 11 to 19), at the map annexed by Barros Arana to his report of 1890 (Ch. Plate No. 49) or at many other Chilean or Argentine maps, to observe that "the last rung of the ladder" runs the length of the Beagle Channel straight into the ocean well east of Nueva and does not turn again to the south. The north-south line which, according to the Argentine Memorial, ends the "staircase" east of Navarino is quite simply a figment of the imagination.

21. Indeed, the very idea of a single "principle" controlling all the sections of the long Chilean-Argentine frontier is scarcely tenable. As will be seen, each of these sectors involved different problems which the Parties solved in different ways. From the moment when they reached agreement, as the Argentine Memorial itself acknowledges, to make the Beagle Channel the frontier south of Tierra del Fuego<sup>1</sup>, it was evident that Argentine emphasis on continuity of its territories from Patagonia as far as Staten Island, with an uninterrupted coastline curving in an arc of a circle towards the south-east, was spent and inapplicable beyond Staten Island. It was precisely for this reason that the Argentine Government now finds itself obliged to invent the "oceanic principle" as a "general principle" controlling the interpretation of the Treaty. Only in this way can the Argentine Government even begin to justify the proposition that the boundary must follow the Cape Horn meridian.

22. The Chilean Government hopes that the considerations just set out will enable the Court to assess the place occupied by the "Atlantic-Pacific principle" in the structure of the Argentine Memorial. The thesis according to which Picton, Nueva and Lennox are not to the south of the Beagle Channel because, so they say, the Channel runs along the eastern coast of

1. "... the Channel itself was then employed as a natural seaway boundary" (Arg. Mem. p. 361, para. 16); "They (the authors of the Treaty) wanted to use the Beagle Channel itself as the frontier" (Arg. Mem. p. 381, para. 25).

Navarino being evidently weak, the Argentine Government has thought it necessary to invent a subsidiary or fall-back position to support its contention that the islands do not belong to Chile. These islands are Argentinian, they say, because they lie east of the meridian of Cape Horn. To justify a criterion so lacking in support within the Treaty and the preparatory work, the Argentine Government was compelled to conjure up a "general principle of oceanic division", of which the criterion of the Cape Horn meridian constitutes the specific application south of the Beagle Channel.

23. To establish the existence of the so called "general principle", the Argentine Government has thought that it can avoid difficulty by the constant affirmation and re-affirmation of the "principle", doubtless hoping that repetition will ultimately be accepted as effective demonstration. Step by step, it is thus led to a position which goes too far. Its enthusiasm for the "oceanic principle" concludes in elevating it to an all-controlling rule. The "principle" is presented in turn as having already controlled the situation in fact and in law before 1810, as a constant claim by the Argentine Government from the time of independence and throughout the 19th century, as the "terms of reference" prescribed for the negotiators of the two Parties by their respective Governments and as the spirit of the compromise worked out between 1876 and 1881. These diverse assertions are difficult to reconcile one with another. Why were long years of negotiations necessary to confirm a principle of territorial division if it had already existed from the 18th century, and if the two Governments had already been in agreement on it from the opening of the negotiations? Why was it necessary for the Argentine Government to persevere so strongly in claiming respect for a principle on which the Chilean Government, so the Argentine Government alleges, was in full agreement, and which the existing situation had already implemented. Thus, by seeking to make the "principle" into an "overriding" one (Arg. Mem. p. 374, para. 19), the Argentine Government is led into a position in which it presents the "Atlantic-Pacific principle" in contradictory terms. No matter what the Argentine Government says, it is impossible for this alleged "principle" to have been, at one and the same time, an historical fact, a constant Argentine Claim, a basis of negotiations and, finally, the result of all these.

24. While the "Atlantic-Pacific principle" thus constitutes the imaginary postulate on which rests the whole subsidiary argument of the Argentine Government, its function nonetheless does not stop there. This "principle", in the shape of the theory of the meridian of Cape Horn, enables the Argentine Government at the same time to assert a claim to the islands and maritime zones situate south of the region defined in the 1971 Compromiso. No longer is it simply Picton, Nueva and Lennox which the Argentine Government claims in the name of the theory of the Cape Horn meridian as an illustration of the Atlantic-Pacific principle, but now also Terhalten, Sesambre, Evout and others. This aspect of the matter has been mentioned in the Introduction.

25. (B) Furthermore, the explanation of the general economy of the 1881 settlement invented by the Argentine Government in the hope of bolstering up the postulate of the meridian of

Cape Horn entirely lacks support in the documents of the negotiations and in the Treaty itself. The Chilean Government was somewhat surprised to read in the Argentine Memorial that the 1881 settlement consisted essentially in the abandonment to Chile of predominance in the region of the Straits of Magellan in exchange for the acknowledgement of Argentine predominance in the Beagle Channel region. Chile needed, so it is said, to exercise exclusive control over the Straits in order to assure its communications with Europe, while Argentina sought to see safeguarded its communications towards the south and "wished accordingly to ensure its possession of a port sufficiently large and sheltered to be the base of its sea communications to the south, its logical future area of development" (Arg. Mem. p. 406-7, para. 42). According to the Argentine Memorial, the Treaty of 1881 had as its object the protection of these fundamental interests:

"... after recognition of Chile's right to the whole of the seaway of the Strait of Magellan, there follows recognition of the overriding Argentine interest in the Beagle Channel, ensuring to that country the possession of Ushuaia, . . ." (Arg. Mem., p. 408, para. 43)

26. It is sufficient, however, to look back at the documents of the negotiations to be convinced beyond any possibility of doubt that the idea of Argentine predominance in the Beagle Channel, granted in exchange for the recognition of the rights of Chile in the region of the Straits of Magellan, never for a moment crossed the mind of the negotiators. As will presently be seen in greater detail, the discussion centred on the Straits of Magellan and Patagonia, but not on the southern territories. Argentina had merely sought continuity in its sovereignty over the eastern coasts of Patagonia "to the extreme end of the continent, that is to the island of Los Estados" (Note of 30 June 1875, Ch. Ann. No. 17, p. 32). When the Argentine Minister Irigoyen proposed to Sr Barros Arana in 1876 to divide Tierra del Fuego by a line running from the north to the south as far as the Beagle Channel, all the islands to the south belonging to Chile, there was no question of "an overriding Argentine interest" in the region of the Channel, and even less so of an Argentine sphere of influence. It was, it should be noted, the first time that the Beagle Channel had been mentioned in the course of the negotiation: if the grant of such an Argentine predominance was to be the quid pro quo of the recognition of the Chilean predominance in the area of the Straits of Magellan, can one really believe that the Argentine negotiator would not have spoken of it, and that, if he had, both the Chilean and the Argentine negotiators would have passed over it in silence in the record which each of them made for their Governments (Ch. Ann. No. 22; see Ch. Mem., pp. 27-29, paras. 25-29, Arg. Ann. No. 14, p. 133)? The mere asking of the question is sufficient to dispose of the Argentine thesis regarding the partition of spheres of influence.

27. (C) To bolster up its presentation of the general structure of the Treaty of 1881 — to Chile the region of the Straits of Magellan, to Argentina that of the Channel — the Argentine Memorial develops another theory according to which the possession of Ushuaia, as well as the protection of access to it, constituted one of the major preoccupations of the Argentine negotiators and correspondingly an important concession on the part of the Chilean Government.

In truth, the Argentine thesis of its predominance in the Beagle Channel region is entirely constructed around Ushuaia as is the Argentine interpretation of the terms of Article III of the 1881 Treaty. The protection of access to this port, so it is suggested, required that Argentina should possess the islands on the Atlantic, and especially the three disputed islands. In particular, Argentina maintains, the island of Lennox, which is "the key to the entry to the Channel", cannot be regarded as having been allotted to Chile, since such a conclusion would risk totally neutralizing the advantage of possession of Ushuaia (Arg. Mem., p. 411, para. 44). Hence, in particular, the choice of a "jagged" or a "stepped" line to describe the boundary. (Arg. Mem., pp. 407-408, para. 43). Even more, Argentina says, it was the wish of the Parties to assure to Argentina the possession of Ushuaia — "this all-important base for maritime and mercantile commerce in this southern region" — which led them to fix the north-south dividing line in Tierra del Fuego on the meridian of Cape Espiritu Santo (Arg. Mem. pp. 380-1, para. 24, cf. p. 408, para. 43). For this reason, the Argentine Memorial persistently asks the Court to prevent Chile from exercising "effective control and dominion over all the sea approaches to an Argentine city, a port and a naval base, the only major settlement of any size in the entire Beagle Channel area". (Arg. Mem., p. 443, para. 65).

28. This thesis of the importance of Ushuaia in the economy of the 1881 Treaty is — and the Chilean Government asks to be excused for saying it with some bluntness — an invention pure and simple. If the Court would be good enough to look once more at the documents relating to the negotiations, it would observe the extent to which there figured in these the alleged importance of Ushuaia: the name of this town does not appear once! The explanation is simple: the town of Ushuaia was not founded (as the Argentine Government itself has stated) until three years after the conclusion of the Treaty. (Arg. Mem., p. 285, para. 1). It is true that the Argentine Memorial refers to the 1879 edition of the British Admiralty Chart No. 1373, on which there appears an inset showing the region of Ushuaia which, according to the Argentine Government, establishes the importance attributed at this time to this town and port. (Arg. Mem. p. 380, para. 24, and p. 439, para. 63). One need do no more than look at this chart (Arg. Map. No. 12; cf. Ch. Plate No. 105) to observe that there is no question here of either a town or a port (they were not established until 1884) but simply of a "Mission Station which may be used as a place of refuge for ship-wrecked mariners", and it was only because the scale of the chart did not permit the reproduction of the access routes to this "refuge" that the Admiralty added this "inset". (See also below Chapter II, para 48, Chapter IV, paras. 96-99, and Further Remarks, with reference to Arg. Map. No. 12)

29. As for the suggestion that the dividing line of the meridian of Cape Espiritu Santo was chosen in 1876 and in 1881 because it left to Argentina the town of Ushuaia, this again is nothing more than an entirely fictitious reconstruction of the intention of the Parties. It is sufficient to read the Argentine Memorial itself to perceive that the choice of this line was dictated by considerations quite foreign to any Argentine character of Ushuaia. As will be shown below in Chapter II, in principle all of the territories south of the Dungeness-Andes line were to be placed under Chilean sovereignty: if a division of Tierra del Fuego was sought by Argentina in 1876 and finally accepted in 1881 by Chile, it was in order to assure to

Argentina an uninterrupted coastline from Patagonia as far as Staten Island. Once the principle of the division of Tierra del Fuego was accepted, it became necessary to establish a dividing line. At this point Chile's major preoccupation came to the fore, namely to retain absolute control over the Straits of Magellan. For Chile this was, as the Argentine Memorial recognises, a "non-negotiable element" on which Chile appeared "adamant" (Arg. Mem. p. 172, para. 59). To meet this insistence, it was necessary to have the boundary line start at the eastern extremity of the Straits, in such a way as to ensure for Chile sovereignty over the whole of the south bank of the Straits, just as the choice of the Dungeness-Andes line gave it sovereignty over the whole of the north shore of the Straits.<sup>1</sup>

The choice of the meridian of Cape Espiritu Santo was directed specifically to meeting this object. The Chilean Government can do no better than quote the Argentine Memorial on this point:

"It was essential that the point of departure of the boundary line should ensure to Chile absolute possession of the southern, or 'Fuegian', shores of the Strait of Magellan, as far as the point where the Atlantic coasts begin . . . The Parties were satisfied that the correct point on the southern shore was Cabo Espiritu Santo. The choice in question was thus above all inspired by the intention to recognise an important Chilean interest" (Arg. Mem. p.378, para. 23).

(Underlining added)

This then was the reason why, once the principle of the division of Tierra del Fuego had been accepted by the Parties, they then chose Cape Espiritu Santo as the point of departure for the north-south dividing line. In his report of 1890 the Chilean negotiator of the Treaty, Sr Barros Arana, fully confirmed this analysis (Ch. Ann. No. 58, p. 178; see the passage reproduced below, Chapter II, para. 28.) The explanation of the choice of this line by a concern to leave Ushuaia to Argentina and to assure to the latter "the overriding interests in the Beagle Channel" (Arg. Mem. p. 381, para. 24) is yet another manifestation, as one cannot help but see, of the fertility of Argentina's imagination.

30. (D) The thesis of the recognition by the 1881 Treaty of the Argentine predominance in the region of the Beagle Channel by reason of protection of access to Ushuaia has led the Argentine Government to develop another theory according to which the 1881 Treaty had as its object in the area south of the Beagle Channel the delimitation of "maritime jurisdictions". The Argentine position is that Article III of the 1881 Treaty only defined the land frontier to the point at which the dividing line of Tierra del Fuego touched the Beagle Channel. At this exact point, there was a "switch in the frontier philosophy". From then on, the Treaty proceeded to the allocation of the islands "in terms of a maritime boundary", in such a way that the interpretation of Article III would from that point bear not upon the question of frontiers but upon a problem of delimitation of "maritime jurisdictions". (Arg. Mem., p. 346, p. 4). This analysis of the 1881 Treaty as passing at the point of the Beagle Channel to the definition of a "maritime dividing line" or of an "international sea boundary" is taken up a number of times with much insistence in the Argentine Memorial. (In addition to the passage

<sup>1</sup>The intention of the Parties to place under Chilean sovereignty the south shore of the Straits over the whole of its length is mentioned in several places in the Argentine Memorial (p.360, para. 15; p.371, para. 19; p. 374, para. 20).

just cited, see p. 404, para. 41; p. 407, para. 43; p. 411, para. 44; p. 441, para. 64.) Developing this idea to unexpected lengths the Argentine Government does not hesitate to present the territorial facts prior to 1881 as themselves leading to a problem of maritime sovereignty. Moreover, it is not only to the south of the Beagle Channel that the question would be of a maritime order, but from the north to the south of the two countries. After all, is it not contended that Argentina "received in succession to the Spanish Crown a maritime jurisdiction over the whole of the littoral of the Atlantic Ocean from Rio de la Plata as far as Cape Horn" (Arg. Mem., p. 119, para. 4), Chile limiting itself on its side "to fixing a maritime jurisdiction over the Pacific coastline as far as Cape Horn, where it met the Argentine jurisdiction". (Arg. Mem., p. 132, para. 15)?

31. To present Articles I and II and the first half of Article III as drawing a land frontier, and the second half of Article III — which follows the first half without the least separation — as turning to a delimitation of maritime jurisdictions is not to interpret the 1881 Treaty but to rewrite it for the needs of the cause. It involves passing suddenly in the middle of Article III, as the Argentine Memorial does not hesitate to say, to a "quite new problem of interpretation". (Arg. Mem., p. 346, para. 4).

The purely imaginary character of such a thesis appears very clearly if one does no more than refer to the very terms of this second part of Article III: "as for the islands . . ." says the Treaty, which proceeds to the division between the two countries of islands, that is to say of dry land — of which one at least, namely that of Los Estados was expressly named — and not of maritime jurisdictions or even less of spheres of influence. The Argentine Government would find it difficult to identify any document referring to a change in the nature of the territorial settlement from the Beagle Channel onwards. To what source can the Argentine Government point in support of the proposition that the Treaty "established a sea boundary . . . the destiny of the islands following from the location of the sea boundary" (Arg. Mem., p. 441, para. 64)? Does not the Treaty of 1881 present itself as wishing to give "effect to Article XXXIX of the Treaty of April 1856"? The latter speaks of "boundaries of their respective territories" (Ch. Ann. No. 9, p. 12), and it is equally of territories, and not of maritime jurisdictions that Article III of the 1881 Treaty speaks, when allocating first Tierra del Fuego and then the "islands".

Examination of the relevant maps leaves no room for doubt. If the Court will look, for example, at the maps in the Chilean Atlas, it will observe that on those maps which depict a boundary line the method of marking remains the same both before and after it touches the Beagle Channel — which is unlikely to have been the case if the Channel truly represented "a switch in the frontier philosophy". This is so with maps nos. 8, 9, 10, 11, 12, 13 to 19. As for those maps which represent the situation by means of a differentiation of colours, this difference is expressed exclusively in relation to the islands and there is no covering of maritime areas. This is the case with maps 13-19 (which include both a boundary line and colours), and the Argentine map no. 21 sent by Sr Irigoyen to the British Minister in Buenos Aires.

32. In these circumstances, the Chilean Government cannot see how it can be seriously contended that from the Beagle Channel onwards and as far as Cape Horn, the negotiators and the 1881 Treaty itself intended to draw a line between maritime jurisdictions while further to the north they were concerned with land frontiers. The considerations which the Argentine Government seeks to adduce in favour of this thesis from the importance attributed today to Ushuaia and to access to it by comparison with the feeble interests which attach to "a few hundred acres of sheep grazing" (Arg. Mem. p. 442, para. 65) are of no relevance at all to the determination of the intention of the Parties in 1881. (See also para. 48 below and Ch. IV)

**(ii) The distortion of the nature of the dispute**

33. Having drawn attention to one major criticism of the Argentine Memorial, namely, the way in which it has totally reconstructed the intention of the Parties to the 1881 Treaty, the Government of Chile now turns to the second major criticism, namely, the way in which the Government of Argentina has sought to alter the nature of the present dispute.

At the beginning of its Memorial, the Chilean Government, after recalling that the questions put to the Court respectively by the Governments of Argentina and of Chile were not expressed in the same terms in Article 1 of the Compromiso, reserved its comments upon the Argentine formulation of its questions until it had seen an elaboration of the Argentine thesis in a form lending itself to reply. (Ch. Mem., p. 2, para. 5). It is to such comments that the paragraphs which follow are devoted.

34. The Chilean Government must at the outset state that it shares the opinion of the Argentine Government that the two questions, as set out in paragraphs 1 and 2 of Article 1 of the Compromiso, do not really differ in substance. As the Argentine Memorial states:

"The aspect of the dispute which relates to maritime jurisdictions and that which concerns sovereignty over certain islands are no more than different ways of looking at the same dispute . . . In spite of the different formulations, one perceives that the Parties are not in truth in disagreement about the identity of the dispute which divides them". (Arg. Mem., p. 341, para 1)

It is, in fact, sufficient to refer to the terms of paragraphs 1 and 2 of Article 1 of the Compromiso to note that the final objective of each of the two Governments, in submitting the case to arbitration, was to obtain a declaration from the Court recognising the sovereignty of one or the other over the islands in dispute. The Argentine Government asked the Court:

"... in consequence to declare that Picton, Nueva and Lennox Islands and adjacent islands and islets belong to the Argentine Republic",

while the Chilean Government asked the Court:

"... to declare that Picton, Lennox and Nueva Islands, the adjacent islands and islets whose

entire land surface is situated within the region referred to in paragraph (4) of this Article, belong to the Republic of Chile".

It is thus recognition of its sovereignty over certain islands and islets, that is to say over non-submerged territories, that each of the two Governments contemplated in accepting the 1971 Compromiso, and it is this question which the Court is asked definitively to decide.

35. It is, of course, quite possible to observe a certain difference in the formulation of the questions by the two parties. The Argentine question seems to make the determination of sovereignty over the islands a "consequence" of the delimitation of maritime jurisdiction, in such a way that the Court appears called upon to decide, in the first place, on delimitation of maritime jurisdictions in order to decide, in the second place, upon the determination of sovereignty over the islands. The Chilean question, on the other hand, relates directly and immediately to the sovereignty over the islands. The Chilean question does not raise the problem of the delimitation of maritime jurisdictions, since the notes of 11 December 1967 to which paragraph 2 of Article 1 of the Compromiso refers state the problem directly in terms of "sovereignty over certain islands and islets situated in the region of the Beagle Channel". (Ch. Ann. No. 315 and 316, pp. 543 and 546). The Chilean Government was, in fact, of the opinion — and it has not changed its view on this point — that normally it is sovereignty over the islands which determines the division of the surrounding sea, and that it would be impossible in law, and contrary to all logic, to seek to divide the maritime areas before deciding on title to the islands.

The Chilean Government is happy to note that the Argentine Government shares this point of view:

"Every island or islet that is the subject of sovereignty generates a territorial sea. . . . It may be asked why it (the question submitted to the Court by Argentina) proceeds from the question of a sea boundary to the question of sovereignty over the disputed islands and islets in the 'disputed zone' of the Compromiso, when it is more usual to think of territorial sea as being generated by the land. In the normal case, as the International Court of Justice said of both the contiguous zone and the continental shelf, 'the principle is applied that the land dominates the sea'." (Arg. Mem., pp. 345-6, para. 3) (emphasis supplied).

Ultimately the problem submitted by the two Governments to the Court is the same. It is that of knowing to whom belong the islands of Picton, Nueva and Lennox, as well as the other islands and islets situate in the area defined in Article 1 (4) of the Compromiso. As for the division of the maritime jurisdictions, this can only be envisaged as a consequence of the determination of sovereignty over the islands.

36. At this point one is bound to ask, as the Argentine Memorial itself does, why, since the Argentine Government acknowledges that it is necessary to determine title to the islands before dividing the waters, is it necessary to reverse the order? Why does the Argentine Government

insist so much upon a difference which it sees as being a difference of emphasis rather than a difference of substance? (Arg. Mem., p. 345, para. 3)

To this question, the Argentine Memorial gives an apparently simple reply. It is that in the eyes of the Argentine Government the maritime aspects of the dispute which are at stake are more important than the possession of the islands. What matters for the Argentine Government, so it says, is access to Ushuaia, an Argentine naval base, and the point of departure for its explorations in Antarctica (Arg. Mem., p. 11, para. 21; pp. 439-440, para. 63; p. 441, para. 64; p. 443, para. 65). Argentina is also concerned that Chile should not be able to use the islands as a basis for extending its claim to rights over the continental shelf. (Arg. Mem., p. 442, para. 64). It seeks thereby to avoid "a major penetration by Chile of the Atlantic system" (Arg. Mem., p. 442, para. 65). The Argentine Government declares that these aspects of the dispute are of greater concern to it than the problem of deciding who is sovereign over these "small and remote . . . islands" (Arg. Mem., p. 441, para. 64), which have "virtually no importance whatever as land" (p. 347, para. 4), and which represent nothing more than "a few hundred acres of sheep grazing" (p. 442, para. 65).

37. This is not much of an answer. No doubt in an international dispute each State is entitled to attach particular importance to one or another aspect of the case. The Chilean Government would not dream of contesting the right of the Argentine Government to interest itself especially in Ushuaia and maritime access to it, rather than to worry itself about possession of the islands. But it cannot accept the right of Argentina to rely upon its maritime interests as a justification for changing the whole object and nature of the dispute. The fact that the Argentine Government is more interested in the maritime consequences of sovereignty over the islands than in that sovereignty itself cannot make the dispute something other than it has always been, namely, one relating to the sovereignty over the islands. It cannot make the dispute into one regarding delimitation of maritime zones.

38. The Argentine Government is certainly not unaware of this, which explains why, throughout its Memorial, it seeks to give the impression that the problem has always existed in maritime rather than territorial terms.

It seeks to suggest that this was so even at the time of the negotiations preceding the conclusion of the 1881 Treaty, and in the Treaty itself. The Argentine Memorial thus states that: "The Treaty itself . . . established a sea boundary . . . the destiny of the islands following from the location of the sea boundary" (Arg. Mem., p. 441, para. 64). It has already been shown — and it is unnecessary to do more than re-read the Treaty to establish this — that the Argentine suggestion is far from the truth, historically or legally (*supra*, para. 19).

Furthermore, according to the Argentine Memorial, it is also the maritime aspect of the matter that has been debated since the beginning of this century, that is to say throughout the period of the development of the dispute now submitted to the Court. This point calls for

further comment.

39. Perhaps the Chilean Government may be permitted to refer the Court to the various stages in the evolution of this dispute. The Court will note immediately that there has never been any question of a dispute over the delimitation of maritime jurisdiction. This has always been a question uniquely and exclusively of a difference relating to the sovereignty over the islands.

A few examples of the many that may be cited will suffice to establish the position.

40. Reference may be made first to the "draft agreement for arbitration" prepared by the Argentine Government in 1905 as part of negotiations opened during the preceding year. This states that "a difference of opinion has arisen between the contracting Parties . . . as to which of these the Picton, Nueva and adjacent small islands belong". In Article 1 of the draft agreement, it is declared that ". . . the islands and small islands" belong to one or other of the two countries according to their situation by reference to a line which the draft defines (Ch. Ann. No. 78, p. 221; Ch. Mem. p. 93, para. 17).

41. Secondly, within the framework of the negotiations of 1914-1915, the Argentine note of 8 March 1915 recalled that "there has always existed a difference in opinion concerning the islands" and mentioned the "litigious character always recognised by both Governments as regards the Southern Islands under discussion" (Ch. Ann. No. 88, pp. 249-250; Ch. Mem. p. 96, para. 26). The Chilean Minister at Buenos Aires reported to his Government on the Argentine point of view regarding "the question of the Southern islands" (Ch. Ann. No. 91, p. 253; Ch. Mem. p. 97, para. 28). The draft protocol prepared by the Argentine Government in 1915 stated, in point 1, that "It is hereby declared that to the Argentine Republic belong all the islands and islets situated to the north, and to Chile all the islands and islets situated to the south, of an imaginary line . . ." (Ch. Ann. No. 92, p. 254; Ch. Mem. p. 97, para. 29, etc.). The counter-draft prepared by the Chilean Government contained proposals to submit to the arbitration of the British Crown the question "to which of the High Contracting Parties belongs sovereignty over Picton, Nueva and Lennox islands and adjacent small islands, and over islands located in the Beagle Channel . . ." (Ch. Ann. No. 99, p. 266; Ch. Mem. p. 98, para. 33), and these terms were repeated in the arbitration protocol signed by the two Governments on 28 June 1915 (Ch. Ann. No. 102, p. 269; Ch. Mem. p. 100, para. 34).

42. Third, the British Government, which was charged with the task of Arbitrator under the Protocol of 1915, understood the position in the same way. This appears from the dispatches of the British Minister in Buenos Aires in 1915 (Ch. Ann. No. 87 and 89, pp. 247 and 251; Ch. Mem. pp. 100-101, para. 36-37), from the dispatches of the British Minister at Santiago (Ch. Ann. No. 96, p. 259; Ch. Mem. p. 101, para. 38), from the report of the British Director of Intelligence in 1915 (Ch. Ann. No. 104, p. 274; Ch. Mem. p. 102, para. 41), from a request for a study of the dispute sent by the Foreign Office to the Admiralty in 1918 (Ch. Ann.

No. 120, p. 297; Ch. Mem. p. 110, para. 58) and from the important Memorandum of the Admiralty Hydrographer of 1918 (Ch. Ann. No. 122, p. 299; Ch. Mem. p. 110, para. 58). In none of these documents is there the slightest doubt regarding the nature and object of the dispute: it is one regarding sovereignty over the islands, and is not concerned with the delimitation of maritime jurisdiction.

43. Fourth, in his Memorandum of 1918, Dr Francisco Moreno, in analysing and criticising the position of his Government, said: "I am at a loss to explain why the Argentine Government now claim jurisdiction over the islands of Picton, Nueva, Lennox, etc. . ." (Ch. Ann. No. 113, p. 287; Ch. Mem. p. 107, para. 51).

44. Fifth, the Protocol of 1938, as did the Protocol of 1915, confers upon the Arbitrator the task of "determining to which of the High Contracting Parties corresponds the sovereignty over Picton, Nueva and Lennox islands and adjacent islets, and over the islands lying within the Beagle Channel . . ." (Ch. Ann. No. 132, p. 317; Ch. Mem. p. 120, para. 10).

45. Sixth, the negotiations which were begun in 1959 after the declaration of Los Cerrillos (Ch. Mem. p. 122, para. 17 and following) were also concerned with sovereignty over the islands. Thus the third of the Argentine notes of 30 October 1959, which proposed negotiations "to solve the difference on boundaries between both countries in the Beagle Channel zone", suggested submitting to the decision of the International Court of Justice "the question of determining to which of the High Contracting Parties corresponds the sovereignty" of the listed islands (Ch. Ann. No. 250, p. 463; Ch. Mem. p. 123, para. 20). Likewise, the "Memorandum on bases for Arbitration" signed between the two Parties on 19 March 1960 envisages an arbitration on "the question relating to determining to which of the Parties pertains the sovereignty over" the enumerated islands (Ch. Ann. No. 263, p. 481; Ch. Mem. p. 124, para. 24, etc.). The arbitration Protocol of 12 June 1960 emphasised 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 5 of the Protocol". Article 5 submitted, in consequence, to the International Court of Justice "the sole question pending . . . related to determining to which of the two Parties corresponds sovereignty . . . over Picton and Nueva islands and islets Snipe, etc.". (Ch. Ann. No. 269, pp. 488 and 489; Ch. Mem. p. 125, para. 27).

46. Seventh, the Chilean notes of 11 December 1967, which instituted the present proceedings and to which Article 1 (2) of the Compromiso refers, left no doubt on the subject of the dispute. The note addressed to the Argentine Government spoke of the "question . . . concerning Chile's title to those islands and islets" (Ch. Ann. No. 315, p. 543). The note addressed to the British Government requesting the Arbitration mentioned that "the Argentine Republic has been questioning the sovereignty of Chile over certain islands and islets in the region of the Beagle Channel, thus giving rise to the present dispute" (Ch. Ann. No. 316, p. 546). As for the Argentine Government, while attempting to reject the British arbitration, it proposed to continue "the conversations"

on the matter raised by Chile "concerning the islands and islets of the Fuego archipelago in the Atlantic." (Ch. Ann. No. 319, p. 551).

47. Thus, it is submitted, the dispute which the Argentine Government is seeking to impose upon the Court is erroneous. Never has the dispute between the Parties been conceived as other than a divergence of views relating to sovereignty over certain islands, whether it be in the various phases of the negotiations or in the three Protocols 1915, 1938 and 1960, or in the Chilean and Argentine notes of 1967, defining the present dispute. Never has there been any question of anything other than sovereignty over the islands. Never has there been a question of maritime zones. To assert, as does the Argentine Memorial, that "the dispute has always focussed upon the seaway boundary" (p. 344, para. 3), is to ignore the facts of the case. No doubt it is permissible for the Argentine Government, as has already been said, to interest itself today more in the maritime aspects of the affair than in sovereignty over the islands themselves. But it cannot deny the evidence to the effect that the dispute between the two countries has always related exclusively to a problem of sovereignty over the islands.

48. The efforts of the Argentine Government to minimise the territorial aspect of the case have, it would appear, two objects.

The first seems to be of a procedural character. It is connected with the attempt of the Argentine Government to justify, thanks to the accent placed upon the maritime aspects of the case, the appeal to "modern developments in the law of the sea" in the framework of Chapter VI, which is devoted to "Legal Aspects of the Dispute" (Arg. Mem., pp. 439-443). One may note, in passing, that under this heading the Argentine Memorial refers less to considerations of maritime law than to preoccupations of a geo-political order, not to say purely political ones — the protection of the maritime communications of the naval base at Ushuaia, the extension of the continental shelf, protection against an "intrusion of Chilean sovereign rights into the Atlantic Ocean" and a "penetration by Chile of the Atlantic system". More than with "considerations of maritime law", it is concerned here with pure and simple "considerations of sea power" (Arg. Mem. p. 442, para. 64 and 65). Whether these considerations are legal or political matters little. The important point is that they are concerned with modern preoccupations, totally foreign to the interpretation of the Treaty of 1881. In invoking these considerations, the Argentine Government contradicts its own arguments, since it repeatedly affirms that the 1881 Treaty must be interpreted in accordance with the intention of the Parties and in the light of the conditions prevailing at the time of its conclusion (cf. Arg. Mem. pp. 435-6, para. 59).

49. The second and more important objective sought by the Argentine Government in thus minimising the territorial aspect of the case, appears more distant. In presenting the dispute — as it presents the Treaty itself — as relating above all to problems of a maritime character, the

Argentine Government may hope to lead the Court more easily to accept the "Atlantic-Pacific principle" and its corollary, the "principle of the Cape Horn meridian", as criteria for the interpretation of the 1881 Treaty and, in consequence, as criteria for the solution of the present dispute. The adoption of such criteria by the Court could lead to the enlargement of the dispute to zones hitherto uncontested and, consequently, the opening of a new territorial conflict between the two countries.

50. The somewhat ambiguous and contradictory position adopted by the Argentine Government on the subject of "the definition of the dispute" (Arg. Mem. p. 341) may thus be explained without difficulty. On the one hand, the Argentine Government cannot deny that it is sovereignty over the islands which is the root of claims to maritime jurisdiction, and that ultimately there is scarcely any difference between the way in which the problem is posed by the Chilean Government and the way in which it is posed by the Argentine Government. This is undoubtedly true on the plane of arbitral procedure, the Court having been requested by the two Governments to proceed essentially to a finding of sovereignty over the islands. On the other hand, the Argentine Government continually emphasises the maritime aspects of the case, in conjunction with the "Atlantic-Pacific principle" and the thesis of "the meridian of Cape Horn," in the apparent hope that the Court will pronounce on the basis of considerations which may at some future date justify the enlargement of the dispute.

#### **C. — Weakness of the Argentine approach — some examples.**

51. The Chilean Government has already noted (para. 3 and following) that both Parties are agreed that the present dispute relates exclusively to the interpretation of the 1881 Treaty. Nor is there any difference between them regarding the principles which should be applied to the interpretation of this Treaty. However, on reading the Argentine Memorial, it seems to the Chilean Government that the approach of the Argentine Government on a number of occasions runs contrary to the controlling principles which it has itself invoked. The Chilean Government will examine these approaches in some detail at appropriate places in the present Counter-Memorial. Here it will limit itself to a brief mention of some conspicuous examples.

52. The Court will observe, in the first place, that the Argentine Government notably neglects certain essential elements in the determination of that very intention of the Parties which, quite rightly, it places in the centre of the whole case.

53. Thus, in particular, the Argentine Memorial reveals a quite astonishing reticence regarding the maps capable of shedding light on the intention of the Parties in the course of the negotiations which led to the conclusion of the 1881 Treaty, or which could establish the way

in which the Parties interpreted it after its conclusion. The Argentine Memorial cites a number of maps prior to 1881 in its Chapter II, headed: "Discovery and Exploration of the Beagle Channel" (pp. 108-111), but the latest such map is dated 1875. Cartography is once again mentioned in Chapter IV, headed: "Origin and Evolution of the Beagle Channel Dispute" (pp. 219-226), but that only refers to the maps after the conclusion of the Treaty; the Memorial emphasises at that point the fact that "the Treaty of 1881 was not accompanied by an official map showing the boundary line determined in the text and no such map was subsequently agreed, expressly or impliedly, by the Parties" (p. 220, para. 25); a little later it criticizes, in a general way, "the confusion" and "the inconsistency in maps" (pp. 222 and 223, paras. 27 and 28).

54. But the remarkable omission is that there is no mention whatsoever of any map in the narrative of Chapter III (devoted to the origin and negotiation of the 1881 Treaty). For instance, not a word is said about the map published in El Mercurio in December 1878 (Ch. Plate No. 11) or the sketch made by the Baron d'Avril in 1877 (Ch. Plate No. 12) — both of which show the current understanding of the 1876 proposals.

55. Nor is there a word regarding the important map sent to the Chilean negotiator on 30 March 1878 by the Argentine Minister Elizalde as an annex to his proposals of the same date. This map shows clearly that, for the Argentine Government, the Beagle Channel passed well to the north of Picton and Nueva (Ch. Plate No. 9; see Ch. Mem. pp. 29-30, paras. 32-33, and Ch. Cart. Rem. p. 15). And what need one say about the heavy silence of the Argentine Memorial regarding the map published by "La Ilustración Argentina" some days after the ratification of the Treaty, and sent by the Argentine Minister Irigoyen to the British Minister in Buenos Aires to give him a clear picture of the delimitation achieved by the Treaty? (Ch. Plate No. 21; see Ch. Mem. p. 42, paras. 25-26, and Ch. Cart. Rem. pp. 24-25).

56. Nor is any mention made of the British Admiralty map depicting the line of the 1881 Treaty on the basis of the information provided by the Argentine minister in London in October 1881 (Ch. Plate No. 20; see Ch. Mem. pp. 42-43, paras. 27-27b, and Ch. Cart. Rem. p. 23).

57. What the Argentine Memorial does mention is the map issued by the Chilean Hydrographic Office in August 1881, that is to say, immediately after the signature of the Treaty and before its ratification, and shortly afterwards published in the Chilean press and circulated by diplomatic channels throughout the world (Ch. Plates Nos. 13-19; see Ch. Mem. pp. 40-41, paras. 21-22, and Ch. Cart. Rem. pp. 18-20). But if the Court will be good enough to re-examine the few lines which the Argentine Memorial devotes to this map (pp. 220-221, para. 25), it will observe how the Argentine Government plays down a document which is so relevant to the interpretation of the Treaty and of which it became aware very soon after the signature of the Treaty — as is shown by the account given in Dr Moreno's article of 31 January 1895 (Ch. Ann. No. 364 and see also Chapter IV, paras. 17 and 67 below).

58. It is not only the maps shedding light on the intention of the Parties which the Argentine Memorial fails to note. The Chilean Government has already observed (see above, para. 9) that it cannot accept the Argentine attempt to exclude as irrelevant all acts subsequent to the conclusion of the Treaty, and which shed light on the interpretation given to it by the Parties. Fuller consideration will be given to this in Chapter IV below.

59. Yet, while neglecting these obviously important materials, the Argentine Memorial, on the other hand, makes great play, in connection with the intention of the Parties in 1881, with some entirely irrelevant material. To give but one example here, could the Argentine Government really have believed for a moment that the negotiators in the period 1876-1881 had had in mind the considerations of modern maritime law, or the elements of a geo-political character, upon which it relies so heavily (see above, para 48), and which the Memorandum of the Admiralty Hydrographer stated, even as early as 1918, were entirely without relevance to the interpretation of the Treaty? (Ch. Mem. p. 110, para. 58). It is unnecessary to do more than ask the question.

60. Many other objections can be raised to the approach pursued in the Argentine Memorial.

For example, the astonishing way in which the Argentine Memorial analyses the provisions of Article III of the Treaty will be examined in detail in Chapter III below. The words "Tierra del Fuego" change their meaning every time they are used; the words "al oriente" and "al occidente" are interpreted in an entirely illogical manner; the words "sobre el Atlantico" are interpreted in two different senses; the words "al sur del Canal Beagle hasta el Cabo de Hornos" are represented as if they read "to the south of the Beagle Channel to the west of Cape Horn".

61. What is one to say of such flagrant historical fictions as the alleged bearing of Ushuaia on the choice of the meridian of Cape Espiritu Santo and in the whole of the 1881 settlement? Or of the alleged lack of interest of Chile in the area of the Beagle Channel? Or of the so-called "terms of reference" involving the "Atlantic-Pacific principle" said to have been given to the negotiators of the Treaty by their respective Governments?

62. The Court will no doubt have observed the off-hand way in which the Argentine Memorial brushes aside those documents and facts which do not suit its book. What of the observations of Captain King on the course of the Channel? They are said to be contained in documents which have no scientific value (Arg. Mem. pp. 54-57, paras. 45-46). What of the absence of any Argentine protest against Chilean acts of sovereignty from 1892? "The Argentine Government, declining to be provoked, acted cautiously and calmly" (Arg. Mem. p. 203, para. 2; cf. p. 216, para. 18). What of the Argentine Derrotero of 1900 showing the three islands as Chilean? "It must be remembered that thinking on the boundary at this time in Buenos Aires was at its most confused" (Arg. Mem. pp. 229-230, para. 35). What of the Memorandum of the British Admiralty in 1918? A copy of the work by Guerra, systematically biased in favour of Chile (Arg. Mem. p. 80, para. 60, and p. 254, para. 75). And these are no more than random examples.

63. As for contradictions, these are too numerous even to be numbered here. But one, particularly striking, must be mentioned. On several occasions the Argentine Memorial lays stress upon Argentine uncertainty regarding the interpretation of the Treaty after 1881. In 1894 the Argentine Government decided to seek information in London and to commission research "which alone could throw light on the true course of the Beagle Channel" (Arg. Mem. pp. 216-219, paras. 20-23). In 1900, as has already been seen, "thinking on the boundary . . . in Buenos Aires was at its most confused" (Arg. Mem. pp. 229-230, para. 35). If the Argentine Government waited until 1904, that is to say more than 20 years after the Treaty, to raise the problem of the boundary in the Beagle Channel region, was it because only at that moment it secured "possession of a better geographical picture of the area" (Arg. Mem. p. 235, para. 46)? Yet the whole thesis of the Memorial rests in other respects on the idea that, during the negotiation of the Treaty, as in the Treaty itself, all was always perfectly clear to the two Governments — the fact that the Beagle Channel passed between Navarino and Picton; the fact that Picton, Nueva and Lennox were Atlantic islands; the fact that they could not ever be recognised as Chilean, lest this imperil Argentine predominance in the region of the Channel, etc. If all this were so constantly and so perfectly clear in 1881 and from even before 1881, how then could there arise such hesitations over the course of the Channel and the sovereignty over the three islands twenty years afterwards?

## CHAPTER II

### THE TERRITORIAL SETTLEMENT OF 1881

1. The interpretation of the terms of the 1881 Treaty given in the Argentine Memorial can only be understood in the light of the general conceptions which the Argentine Government advances in relation to the meaning and scope of the territorial settlement of 1881 as a whole. In other words, the interpretations put by the Argentine Memorial upon the various expressions appearing in Article III of the Treaty are there advanced because the Argentine Government is asking the Court to read them in the light of certain preordained principles which are presented as controlling the whole of the settlement reached by the Parties in 1881.<sup>1</sup> The Government of Chile has already identified these postulates in Chapter I of this Memorial. Nonetheless, even before approaching the heart of the present case, that is to say the interpretation of the very language of the Treaty (to which Chapter III will be devoted), the Chilean Government is bound to make a number of observations on the true meaning and scope of the territorial settlement of 1881.

2. The best way of showing how unreal are the conceptions which the Argentine Government today draws from the meaning and scope of the territorial settlement of 1881 would be simply to re-examine one by one the stages in the negotiations which led to the conclusion of the Treaty, together with the accompanying exchanges of proposals and counter-proposals, and to study also the maps which illustrate them and enable them better to be understood.<sup>2</sup>

Better than any reasoning, this purely documentary survey would show the Court how completely without foundation is the interpretation advanced by the Argentine Memorial. Upon re-reading these proposals and counter-proposals and re-examining the maps, it would immediately become apparent that the essence of the 1881 settlement consisted in according to each of the two States the irreducible minimum of their claims. To Argentina was granted Patagonia, less a strip of territory carved out along the north bank of the Straits, and the eastern part of Tierra del Fuego; the effect of this was to assure to Argentina an uninterrupted sea coast as far as Staten Island. Chile obtained the whole of the Straits of Magellan and its two coasts, as well as all the territory south of the Straits apart from the portion of Tierra del Fuego which it was necessary to cede to Argentina in order to ensure the continuity of the Argentinian seaboard as far as to Staten Island. The Court would see, too, that there was never any question during the negotiations, any more than there was to be in the Treaty itself, of

<sup>1</sup> The provisions of Article III concerning the islands must, it is said in the Argentine Memorial, be read "without ever losing sight of the fundamental criterion of oceanic distribution which constantly formed the basis of the Treaty". (Arg. Mem. p. 372, para 19)

<sup>2</sup> On the relevance of negotiations, see the judgment of the Court in the Fisheries Jurisdiction Case, I.C.J. Reports 1973 at pp. 9 — 14 and in particular at p. 14.

any "over-riding principle" of the oceanic type or even of any general principle whatsoever. Nor was any mention ever made of Argentine predominance in the Beagle Channel area, or of the importance to Argentina of Ushuaia. Again, no one ever mentioned the change in the character of the frontier from a land to a maritime one when it reached the Beagle Channel, just as no one ever envisaged that the meridian of Cape Horn would serve as the frontier south of the Beagle Channel. If these had in fact been the intentions of the Parties, it would be quite astonishing that they had never at any stage of their negotiations, or in the Treaty itself, given expression to them.

However, the Chilean Government does not propose to follow this method of considering point by point each document and each map. This has already been done in Chapters III and IV of its Memorial, to which the Government of Chile respectfully asks the Court to refer again. Instead, the Chilean Government will limit itself at this point to a number of comments upon specific questions.

#### A. The situation in 1810

3. The Argentine Memorial devotes many pages to showing that the "Atlantic-Pacific principle" already dominated the situation in law and in fact as early as 1810. (pp. 117 – 127):

"Applying the principle of uti possidetis of 1810, the Argentine Republic has maintained, as it still maintains, that in fact and in law it received in succession to the Spanish Crown a maritime jurisdiction over the whole of the littoral of the Atlantic Ocean from Rio de la Plata as far as Cape Horn". (Arg. Mem. pp. 118 – 119, para. 4).

"The whole coast of Patagonia and Tierra del Fuego as far as Cape Horn was the object of constant concern, reconnaissance and exploration on the part of the competent authorities of the viceroyalty of the Rio de la Plata to whose jurisdiction that area pertained". (Arg. Mem. p. 126, para 9; cf. p. 135, para. 17; pp. 142 – 143, para. 27; p. 148, para. 33; p. 415 – 416, para 47).

4. The Chilean Government will not spend time in rebutting such an argument. One reason is that titles prior to 1810 were the subject of interminable discussion during the nineteenth century, and that Article XXXIX of the 1855 Treaty was accordingly limited to recalling the principle of uti possidetis of 1810 without defining it. On this latter point the Parties were content "to defer the questions that have arisen or may arise regarding this matter in order to discuss them later peacefully . . ." (Ch. Ann. No. 9, p. 12); and the 1881 Treaty purported nearly 30 years later to be the implementation of the 1855 Agreement. A further reason is that the 1881 Treaty explicitly rendered obsolete – in relation to the area covered by it – all titles prior to its conclusion in such a way that neither of the Parties can today invoke against the other any territorial right whatsoever which is not founded upon that Treaty. This is the effect of Article VI of the Treaty and is expressly acknowledged by both Governments (Ch. Mem. p. 21, para. 2; Arg. Mem. p. 351, para. 8, cf. *supra*, Chapter I, para. 6). Thus, the question of knowing whether the alleged "Atlantic-Pacific principle" already controlled the situation in 1810 is entirely without interest.<sup>1</sup>

<sup>1</sup> However, in order to clarify the position, the Chilean Government has set out in Appendix A some information of historical character.

**B. The alleged "oceanic principle" and the attitude of the Parties during the negotiations**

**(i) The two versions of the Argentine thesis**

5. According to the Argentine Memorial, it was not only the situation in 1810 which was controlled by the "oceanic principle", but the whole period between that date and the conclusion of the 1881 Treaty. It is this continuous presence of the "Atlantic-Pacific principle" throughout the negotiations preceding the conclusion of the Treaty which, according to the Argentine Memorial, explains the role accorded it in the interpretation of the latter.

However, when one examines the Argentine Memorial more closely, one may observe that it is characterized by a profound ambiguity regarding the exact place occupied by the "oceanic principle" during the great debate of the nineteenth century. Indeed, the Argentine Memorial presents two different and totally contradictory versions of the "principle" during this period.

6. The first version of the Argentine thesis runs as follows: throughout the period leading to the settlement of 1881 Argentina struggled to safeguard the "oceanic principle" in force in 1810 against Chilean attempts to put it in question by a Chilean drive towards the Atlantic. During the first years of their independence, the two Governments were agreed in considering the "Atlantic-Pacific principle" as controlling the definition of their frontiers; the Chilean Constitution of 1833 in particular showed that "Chile limited . . . itself to fixing a maritime jurisdiction over the Pacific coastline as far as Cape Horn, where it met the Argentine jurisdiction" (Arg. Mem. p. 132, para. 15). It was only in 1843 that Chile, by the foundation of Fort Bulnes on the north shore of the Straits of Magellan, violated this principle by making its "first attempt to advance eastwards towards the Atlantic, an attempt which could only encroach upon the jurisdiction that Argentina and its predecessor had been exercising since independence and before, as far as the southern extremity of the Atlantic littoral, that is to say as far as Cape Horn". (Arg. Mem. p. 315, para. 17). From that time on, it is said, the constant preoccupation of the Argentine Government was to safeguard Argentina's exclusive jurisdiction on the Atlantic coasts as far as Cape Horn—the jurisdiction which it had inherited from the Spanish Crown—against Chilean attempts to advance towards the Atlantic (cf. Arg. Mem. p. 148, para. 33; pp. 415–416, para. 47).

Thus, all the negotiations which took place from the conclusion of the 1855 Treaty consecrating the principle of *uti possidetis* until the final negotiations leading up to the signature of the 1881 Treaty (a period which included notably the 1876 proposals from which Article III of the 1881 Treaty is directly derived), are presented by the Argentine Memorial as directed towards preserving, and as having succeeded in preserving, for Argentina "in its entirety the colonial heritage which assigned to Buenos Aires jurisdiction over the whole of the Atlantic coast as far as Cape Horn" (Arg. Mem. p. 143, para. 27; cf. p. 148, para. 33). Only on two occasions did the Argentine Government contemplate abandoning its traditional position, but it immediately retracted its error (Arg. Mem. pp. 422–423, para 51).

This is the first version of the story developed by the Argentine Memorial: the Argentine Government acting throughout the nineteenth century as the champion of oceanic orthodoxy against an attack mounted by the Chilean Government.

7. In the second version of the Argentine thesis, it is argued that the two Parties were in complete agreement throughout their long negotiations to maintain the "oceanic principle". This was, writes the Argentine Government, "the basic principle underlying the detailed proposals put forward by the Parties" (Arg. Mem. p. 415, para. 47). The negotiators had received instructions from their respective Governments to base the settlement on this "principle". They had "only limited freedom of action" and "had to work strictly within the limits of a twofold criterion". The latter comprised, first, the choice of the Andes as the land boundary and, second, the "absolute respect for the exclusive maritime jurisdiction of each of the two countries over their territorial waters in the Atlantic and Pacific oceans respectively, which jurisdictions obtained in each case up to the place where the waters of the two oceans merge, at the Cape Horn meridian". It was in these conditions that, "acting within the terms of reference which had thus been allotted to them", the negotiators of the two Governments effectively consecrated the "oceanic principle" in the Treaty (Arg. Mem. p. 405, para. 42).

This then is the second version of the story advanced in the Argentine Memorial: . complete agreement between the Parties on the "oceanic principle"; "terms of reference allotted to the negotiators of the Treaty" on this basis; the Treaty consecrating the agreement of the Parties on this "principle".

**(ii) The absence of any mention of the "oceanic principle" in the documents relating to the negotiations.**

8. The Chilean Government will not dwell on the flagrant contradiction between these two ways of presenting the origin and meaning of the 1881 settlement; the "oceanic principle" could not have been at one and the same time both an Argentine claim against conflicting Chilean pretensions and the basis of agreement between the Parties throughout the negotiation of the Treaty (cf. above, Chapter I, para. 23).

The truth is that neither the one nor the other of the two versions of the Argentine thesis is correct. It is not true that the Argentine Government sought to protect an "oceanic principle" against Chilean attempts to penetrate towards the Atlantic. Nor is it true that the two Governments were in agreement to rest a settlement on the foundation of this "principle". The truth is that neither of the two Governments, no more the Argentine than the Chilean, ever invoked any such "principle" of oceanic division; that such a "principle" was never at stake in their discussions nor the object of their agreement; that they were preoccupied with other matters; and that this "principle" had nothing, but absolutely nothing, to do with the intention of the Parties as it appears in the documents relating to the negotiations.

Thus, if the Court would be good enough to look back, for example, to the Argentine protest of 1847 against the foundation of Fort Bulnes (Ch. Ann. No. 5, p. 7), the exchange of notes of 1848 (Ch. Ann. Nos. 6 and 7, pp. 9 and 10), the documents relating to the 1865 negotiations (Ch. Mem. pp. 23 — 24, paras. 11 — 16), the correspondence of 1872 — 1873 (Ch. Mem. pp. 24 — 25, paras. 17 — 20 and Ch. Ann. Nos. 338 and 339) or that of 1875 (Ch. Mem. p. 26, paras. 22 — 23); if the Court were to read once more the instructions given by the Chilean Government to Senor Barros Arana in 1876 and the proposals of Senor Irigoyen (Ch. Mem. pp. 26 — 28, para. 24 — 26) from which there emerged the 1881 arrangement; if the Court were to peruse also the negotiations of 1878 — 79 (Ch. Mem. pp. 29 — 31, paras. 31 — 36, see also Ch. Ann. Nos. 33, 344, 345, 346, 347 and 349) and the final negotiations of 1881, including the "six bases of agreement" of 3 June 1881 (Ch. Mem. pp. 33 — 38, paras. 1 — 16) — in all these places it would seek in vain for the least allusion, even on the Argentine side, to any "principle" of oceanic division.

9. This simple process of verification should by itself be sufficient entirely to dispose of the version of the intention of the Parties as constructed by the Argentine Memorial. Nonetheless, the Chilean Government believes that it may be helpful to go further and to draw the attention of the Court to certain specific aspects of the negotiations.

**(iii) The attitude of the Parties contradicts the existence of the alleged "oceanic principle"**

10. The attitude of the Parties runs strongly counter to the assertion, so many times repeated in the Argentine Memorial, that the two Governments — or at any rate the Argentine Government — had constantly in mind the "oceanic principle" as "the fundamental criterion" of the final settlement of 1881.

11. In the first place, the Chilean Government, throughout the years prior to the 1881 Treaty, continuously claimed what the Argentine Memorial now calls "Atlantic" territories — in particular, Patagonia and all the territories situate to the south of the Straits of Magellan.<sup>1</sup> Already in 1843 the occupation of Fort Bulnes had been justified by the idea that, as the Cordillera ended north of the Straits of Magellan, these Straits belonged to Chile, as did all the territories further down as far as Cape Horn, including "the whole of Tierra del Fuego" (Ch. Ann. No. 2, p.4). Thirty years later the instructions given by the Chilean Government to its negotiator in 1876 required him expressly to claim for Chile part of Patagonia and all the territories south of the Straits (Ch. Ann. No. 20, p. 41). This instruction contradicts categorically the Argentine assertion that the negotiators of the 1881 Treaty had received "terms of reference" calling for absolute respect of the "oceanic principle" (Arg. Mem. p. 405, para. 42).

12. Nor is there any evidence that the Argentine Government adhered during the nineteenth century to the "Atlantic-Pacific line" which the Argentine Memorial today attempts to present

<sup>1</sup> Señor Irigoyen in his 1881 speech placed the northern limit of the Chilean claims "as far as the Negro and Diamante Rivers" (Ch. Ann. No. 42, p. 118), that is to say, at either 40° or 35° of latitude (cf. the extract from this speech quoted in Arg. Mem. p. 376, footnote 25; see also Chilean Plate no. 21).

as the guiding thread of its territorial policy towards Chile throughout the XIXth Century. The Argentine Government was perfectly aware of the constant claims made by Chile to the islands situate to the south of the Straits of Magellan, and confronted by such a contradiction of its supposed position, it might reasonably be expected to have seized the opportunity in presenting its own proposals of 1876 in such a way as to eliminate any doubt concerning the islands east of the Cape Horn meridian. Yet the very manner in which Foreign Minister Irigoyen drafted his 1876 proposals shows that this question played no part in the thinking of the Argentine Government, and that, apart from the eastern half of Tierra del Fuego, Staten Island and the other islands east of the coast of Tierra del Fuego and Patagonia, the Argentine Government was quite disposed to recognise the remaining islands as Chilean. Moreover, the Argentine Government was, by 1878 at the latest, aware of the way in which the Chilean Government understood the 1876 proposals<sup>1</sup>, and if the Argentine Government did not share this understanding, it could, and presumably would, have so stated in the course of the 1881 negotiations. It did not do this, and it agreed to adhere precisely to the text which it had proposed five years earlier.

No more did the Argentine Government react when, shortly after the conclusion of the 1881 Treaty, the Chilean Government formally declared that the Treaty left to Chile all the territory south of the Straits of Magellan, with the exception of the eastern part of Tierra del Fuego and Staten Island. Again there was no Argentinian reaction to the publication and wide distribution of Chile's authoritative map of 1881 upon which there was depicted both the 1881 settlement and the 1876 proposals (Ch. Plate No. 16; Arg. Map No. 17). Nothing could have been done more clearly: the 1876 line was specifically drawn; the 1881 distribution of territory was indicated by colours; and the notes printed on the map stated that the 1876 line and the 1881 settlement were identical in the area of the Beagle Channel. (On the significance of this map, see also Chapter IV, para. 66 below). Argentinian silence thus confirmed once more the Chilean understanding of the Irigoyen proposal (Ch. Mem. p. 45, para. 32). All of this shows that the "oceanic principle" and the so-called "criterion" of the Cape Horn meridian played no part whatsoever in the elaboration of the territorial settlement.

13. Nor is this all. On several occasions in the course of the nineteenth century, the Argentine Government asserted rights to territories on the Pacific and proposed arrangements involving the allocation to Chile of territory on the Atlantic.

As to the first, a number of examples may be mentioned:

— In 1847, in its note protesting against the foundation of Fort Bulnes, the Argentine Government invoked "the indisputable rights of the Argentine Government to the Straits of Magellan and lands surrounding it" and claimed responsibility for "the adjacent islands and Tierra del Fuego" (Ch. Ann. No. 5, p. 7). This Argentine claim thus stretched, as the Court will observe, to the very coasts of the Pacific. It was confirmed shortly afterwards, in a note of 16 May 1848, in which the Argentine Government recorded "its own rights of sovereignty over the straits and adjacent lands, including Tierra del Fuego" (Ch. Ann. No. 7, p. 10).

<sup>1</sup> See Report from the Argentine Minister for Foreign Affairs to Argentine Congress on Argentine Chile Boundary Question, Buenos Aires, 1878, from which it is clear that the Argentine Government knew of the 1878 Report by the Chilean Foreign Minister, which contained Ch. Ann. No. 343, q.v.

— The map published in 1875 by Seelstrang and Tourmente on behalf of the Central Argentine Committee for the Philadelphia Exhibition includes a boundary line which follows the Straits of Magelland and treats as Argentinian all territories south of the Straits as far as Cape Horn, thus attributing sovereignty to Argentina over indisputably "Pacific" territories (Ch. Plate No. 8; this map is mentioned in Arg. Mem. p. 111, para. 88, and the map is also published as Annex 16 to the Argentine Memorial).

— The map attached to the Argentine note of 30 March 1878 illustrating the proposals of Argentine Minister Elizalde and his "true boundary line" in 1878 (Ch. Plates Nos. 9 and 10) shows (a) that the Argentine Government proposed as a compromise a line which would have given Argentina, in the Straits of Magellan and to the north thereof, direct access to the Pacific, and (b) that the Argentine Government claimed rights over territories which provided access to the Pacific; the Argentine Memorial recognises this expressly (p. 173, para. 60 and p. 423, para. 51).

— Even better, soon after the conclusion of the 1881 treaty, it is the Argentine Minister of Foreign Affairs and principal negotiator of the Treaty, Sr Bernardo de Irigoyen himself, who maintained that the line of the frontier in the Andes resulting from Article I of the Treaty perhaps authorised Argentina to reach the Pacific coast (Arg. Mem. p. 202, para. 81; the whole passage, reproduced in Ch. Ann. No. 42, pp. 138 — 139, concludes thus: "This is the information which leads me to believe that we will have ports on waters adjoining the Pacific Ocean").<sup>1</sup>

**14. Argentine proposals for Chilean territory on "the Atlantic".** Just as Argentina did not hesitate sometimes to claim points on the Pacific, so every compromise proposal which she put before Chile involved what the Argentine Memorial now calls an "intrusion of Chilean sovereign rights into the Atlantic Ocean" (Arg. Mem. p. 442, para. 64).

— In 1876, Irigoyen's proposal allocated to Chile all the area South of Tierra del Fuego up to Cape Horn and east of Cape Horn meridian (See Ch. Plate 8).

— The proposal which Sr Elizalde made to Sr Barros Arana on 30 March 1878 gave to Chile what the Argentine Memorial calls "a short extent of Atlantic seaboard" (Arg. Mem. p. 173, para. 59). In fact, as the maps illustrating this proposal show, all the islands to the south of Tierra del Fuego, as far as Cape Horn and including Picton, Nueva, Lennox, Terhalten, Sesambre, Barnevelt, Wollaston and L'Hermite were allocated to Chile by this proposal (Ch. Plates Nos. 9 and 10; see Ch. Mem. pp. 29 — 30, paras. 32 — 33).

<sup>1</sup> See also Argentine Evidence, 1900 pp. 260 — 261, which stated:—

"The negotiator of the Treaty of 1881, when defending its clauses before the Argentine Congress, stated, as his belief, that the Republic would be entitled to territory washed by the Pacific, and quoted in support of his opinion that of Senor Moreno, who had expressed it in the following terms:—

"The Treaty which specifies the 52° for the southern boundary of Argentine territory, and the Cordillera de los Andes for the western, allows of our having ports in the waters of the Pacific".

In this hypothesis, the Convention was approved . . . . ."

— A year later another Argentine Minister of Foreign Affairs, Sr Montes de Oca, submitted another proposal, according to which Chile would once more occupy "a small stretch of Atlantic frontage north-east of Cape Horn" (Ch. Ann. No. 33, Arg. Mem. p. 176, para. 61, and p. 423, para. 51). The Argentine Foreign Minister, Montes de Oca, made several further proposals and in every one of them, Chile was left as sovereign of Picton, Lennox and Nueva and all the other islands south to Cape Horn. In none of them was there any such conception as the "non-negotiable" element of the "Atlantic frontage". (See Ch. Ann. Nos. 344, 345, 346, 347 and 349).

The Argentine Government evidently feels some embarrassment at Argentine proposals of this kind so clearly contemplating the possibility of Chilean access to the Atlantic. The explanation which it offers is not very convincing: the suggestion is that it was the consequence of errors to which the return of Sr Irigoyen to the head of the Argentine Foreign Ministry had rapidly put an end (Arg. Mem. p. 423, para. 51). It would seem that those who drafted the Argentine Memorial were unaware that Sr. Elizalde himself declared that he had framed his proposal after consultation not only with the Government and the President, but also with ex-Minister Irigoyen; and that the map attached to it had been approved by them also. (See Ch. Mem. p. 30, para. 33). The Argentine Memorial adds, in connection with this proposal, that "the daring formula was ultimately found too heterodox to appeal to either Government" (Arg. Mem. p. 173, para. 59). Is this to suggest that the Chilean Government was too attached to the "oceanic principle" to accept that the Argentine Government should treat Picton, Nueva, Lennox, Terhalten, etc. as Chilean?

15. In the light of the above, the Chilean Government has shown that during the nineteenth century neither of the two Governments acted as if inspired by the "principle" of oceanic division. This is true in respect of the Chilean Government, which always claimed a part of Patagonia and all the territories south of the Straits without any distinction according to whether they were to the east or the west of the meridian of Cape Horn. And the same is true too for the Argentine Government, which asserted rights to territories on the Pacific and proposed to Chile that the latter should hold territory on the Atlantic. The Court cannot but be struck by the unreality of the Argentine representation of the policy of both countries as being a constant effort to respect and safeguard an "oceanic principle" allegedly inherited from the period of Spanish colonial rule.

#### **C. The significance and scope of the Argentine claim to the "Atlantic coast"**

16. The Argentine Government will no doubt reply to the comments just made that the many references to the notion of the "Atlantic coast" in the documents connected with the negotiations, are, whether the Government of Chile wishes it or not, an undeniable fact. And it will probably accuse the Chilean Government of seeking to spirit away those proofs which are capable of embarrassing it.

The Chilean Government does not for a moment contemplate treating as non-existent the quite numerous references to an Argentine claim to the "Atlantic" which are to be found in the diplomatic documents of the negotiations. No doubt in those documents, as well

as in the 1893 interpretative Protocol, there are references to the Atlantic and Pacific Oceans. Yet, they are exclusively made with the purpose of defining the hydrographic basins and the respective littorals of the Parties in that part of the continent where the boundary line is the Andean range: north of the Straits of Magellan. That such was the case was recognised by the Argentine Government in the 1902 Arbitration. After quoting the first part of the 1893 Protocol which ends with the prohibition for Chile to claim "any point towards the Atlantic" and for Argentina to claim "any point towards the Pacific", the Argentine Evidence stated:

"in the part referred to in this clause there is no fresh stipulation, it contains a mere explanatory declaration of a previous stipulation. It is limited to asserting with the concurrence of the two contracting parties, which is the spirit of the Treaty of 1881, and it recognises that each of the nations retains, that is to say, continues to possess, the territories on the east or the west of the Andes divided by its main chain." (Argentine Evidence 1900, p. 277, underlining added).

17. It is sufficient to refer to the relevant documents — the diplomatic notes and the maps — to appreciate that what Argentina sought was continuity for its seaboard on the Atlantic from Patagonia to the eastern extremity of Tierra del Fuego, together with its natural prolongation, Staten Island. The object which Argentina pursued was not the exercise of a maritime jurisdiction on the Atlantic Ocean, but the possession of a coherent territory which would not be interrupted by stretches of coast belonging to another State.

This Argentine policy can readily be explained. To the north of the Straits of Magellan Argentina had for some time past claimed sovereignty over Patagonia, on the coasts of which it had carried out a number of acts of jurisdiction. One can understand that Argentina wished to avoid any interruption of its possession of this Patagonian coast. To the south of the Straits of Magellan, Argentina had carried out a number of acts of sovereignty in Staten Island (Arg. Mem. pp. 145 — 6, para. 31; cf. the Chilean protests of 29 October 1872, 25 June 1873 and 16 June 1875: Ch. Ann. No. 15, p. 28, and No. 16, p. 30; Ch. Mem. p. 25, paras. 19 — 20, and p. 26, para. 22<sup>1</sup>). One can understand that it sought, in the later stages of the negotiation, equally to secure recognition of the sovereignty over that island — an island which presented the additional advantage that it could be considered as an appurtenance of Malvinas (Falkland Islands); the Argentine Government thus hoped to be able to reinforce its diplomatic position in relation to the latter.<sup>2</sup> The Argentine claim to Staten Island was henceforth to be affirmed at the same time as its claim over Patagonia. The importance that the Argentine Government attached to preserving these territories, on which it had carried out acts of sovereignty, appears from the declaration made by Sr Irigoyen in his speech before the Chamber of Deputies immediately after the conclusion of the Treaty:

<sup>1</sup> The Argentine Memorial is thus in error in indicating that the Chilean Government had not protested against the acts of the Argentine Government (Arg. Mem. p. 146, para. 31).

<sup>2</sup> cf. Vernet, *Reclamacion al Congreso*, Buenos Aires, 1879, p. 11. The importance attached by the Argentine Government to Staten Island appears also from one of Montes de Oca's proposals in 1879, in which he proposed that should Chile win the arbitration, Argentina would still retain Staten Island (See Ch. Ann. No. 345).

"... We will not abandon a settlement founded under the protection of national jurisdiction. The faint remains of the small buildings raised during the past century by the Spanish Government on the coasts of Patagonia remain under national jurisdiction. The flimsy constructions raised by a foreigner, a man worthy of our esteem, on the banks of the Santa Cruz River also remain under Argentine jurisdiction. And in remote Staten Island, where one day an intrepid, courageous seaman of the Republic set foot, the flag of our Nation will fly freely always" (Ch. Ann. No. 42, p. 140). (underlining added)

The claim to Patagonia, on the one part, and to Staten Island on the other, once fulfilled, the Argentine Government was naturally led to seek the establishment of a geographical link between these two territories. That is the reason why, at the same time as it claimed Staten Island, it also claimed some part of Tierra del Fuego<sup>1</sup>, over which, however — Minister Irigoyen made no mystery of it — Argentine rights were "questionable" (Ch. Ann. No. 42, p. 139). A solution of this kind enabled it to obtain a continuous seaboard running uninterruptedly from north to south. It is in this perspective that an explanation may be found of the basic claim formulated by the Argentine Government in its note of 30 June 1875, i.e. Argentine sovereignty "to the extreme end of the continent, that is to the Island of Estados" (Ch. Ann. No. 17, p. 32). The Court will not have failed to note the point: it was not a maritime jurisdiction over the Atlantic Ocean to which the Argentine Government laid claim but a jurisdiction over the continent, that is to say, land jurisdiction, and this land jurisdiction was sought to the south-eastern extremity of Tierra del Fuego prolonged by its natural appendix, Staten Island. The fundamental character of the Argentine preoccupation thus appears clearly: a territory conceived in such a way that its coast forms an uninterrupted line from Patagonia to Staten Island.

18. It was this claim, incorporated in the Irigoyen proposal of 1876, that the 1881 Treaty eventually implemented. The Chilean Government did not willingly subscribe to this proposal, and it was only in May 1881 that Chile agreed to give Staten Island to Argentina: it regarded this concession as an exception to the principle that everything south of the Straits of Magellan belonged to Chile, but at first refused to extend this exception to the eastern part of Tierra del Fuego. All this appears clearly from the telegrams of the United States Minister to Santiago of 9 and 18 May 1881 (Ch. Ann. No. 36 (C) and (E), pp. 80 — 81; Ch. Mem. p. 34, para. 6, and p. 35, para. 8). This first concession, however, rapidly led to a second. The Argentine Government, having made known on 20 May its firm refusal to abandon the proposal of 1876 (Ch. Ann. No. 36 (F), p. 82; Ch. Mem. pp. 35 — 36, para. 9), the Chilean Government eventually accepted the division of Tierra del Fuego on 28 May (Ch. Ann. No. 36 (I) p. 84); and on 3 June it sent to the Argentine Government the "six bases of agreement" as a consequence of which Argentina secured for herself an unbroken coastline from Patagonia to Staten Island.

<sup>1</sup> It could not hope to obtain the whole of Tierra del Fuego because, as the Argentine Memorial has emphasised on a number of occasions, it was absolutely essential that the southern coast of the Straits of Magellan should belong to Chile. (Arg. Mem. p. 360, para. 15; p. 371, para. 19; p. 378, para. 23). This is the reason why the meridian of Cape Espiritu Santo was chosen to divide Tierra del Fuego (cf. Chapter I, para. 29).

A glance at a map of South America enables one to observe that the Argentine claim was not entirely unreasonable. The eastern coast of the extremity of the South American continent forms a continuous line which runs first north to south, and then, from the Straits of Magellan, veers towards the south-east, and ends with Staten Island. The south-eastern extremity of Tierra del Fuego, prolonged by Staten Island, thus forms a limit which must have appealed to the negotiators. South of Tierra del Fuego, that is to say, below the Beagle Channel, the idea of the continuity of the coastline no longer made sense.

19. Thus it can be seen that the expression "Atlantic coast" used in the course of the negotiations had nothing to do with a maritime jurisdiction over the Atlantic waters. By its insistence on the "Atlantic coast" Argentina was seeking nothing more than a continuous littoral to the end of the arc of a circle formed by the Patagonian coast, the east coast of Tierra del Fuego, and Staten Island. To the south of Tierra del Fuego this conception did not operate. The islands to the south of Tierra del Fuego were thus not in the least affected by the notion of "Atlantic coast", and they were recognised without difficulty as Chilean, without there being any question of distinguishing between them according to their location by reference to the Cape Horn meridian.

To this conception of the "Atlantic coast" as running "to the extreme end of the continent, that is to the island of Estados" and as in no way touching the islands south of Tierra del Fuego, the documents connected with the negotiations furnish much support. The Chilean Government will mention a few:

20. (a) When, by his dispatches of 5 and 10 July 1876 (Ch. Ann. Nos. 21 and 22, pp. 42 and 43; Ch. Mem. pp. 27 — 28, paras. 25 — 26), Sr Barros Arana reported to his Government on the Argentine proposals, he mentioned that the Argentine Minister "informed me that he could not accept that Chile's dominion should extend to any point of the Atlantic coast". The Argentine Memorial, for its part, confirmed that Sr Irigoyen strongly insisted on the refusal of his country to leave to Chile the least point on the "Atlantic coast" (Arg. Mem. p. 163, para. 49; cf. Arg. Ann. No. 14, p. 140). This did not prevent the Chilean negotiator from depicting the proposal which had just been made to him as leaving to his country all the islands south of the Beagle Channel, including those lying east of the Cape Horn meridian: Argentine sovereignty over the "Atlantic coast" thus appeared to him perfectly compatible with Chilean sovereignty over all the islands situate south of Tierra del Fuego. This consideration establishes that the Argentine claim over the "Atlantic coast" referred only to the coast of Patagonia and Tierra del Fuego as far as Staten Island, and was in no way in contradiction of Chilean sovereignty over Picton, Nueva and Lennox, as well as the other islands further south. The map accompanying the dispatch of 10 July 1876 leaves no doubt whatsoever on this point (Ch. Plate No. 8).

21. (b) When the Chilean Government rejected the Irigoyen proposal in July 1876, the reason given was exclusively that this proposition "does not ensure for Chile the full and

complete possession of all the Straits" (Ch. Ann. No. 23, p. 47; Ch. Mem. p. 29, para. 30)<sup>1</sup>. It can hardly be doubted that if the traditional claim of Chile over the southern islands formally and explicitly repeated in the instructions given some months previously to Barros Arana, had not been satisfied, the Chilean Government would not have failed equally to invoke this failure as a reason for rejecting the Argentine proposal.

22. (c) The Fierro-Sarratea Treaty of 6 December 1878 is also of great interest for an understanding of the concept of the "Atlantic coast" (Ch. Ann. No. 31, p. 68; Ch. Mem. pp. 30 – 31, paras. 34 – 35). Article VI of this Treaty contemplated that, while awaiting the outcome of the arbitral process to which it gave rise, "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". The map illustrating the Treaty (Ch. Plate No. 11) – which the French Minister at Santiago, Baron d'Avril, sent to his Government on 30 December 1878 as showing the line of the status quo (Ch. Ann. No. 32, pp. 70 – 71) – leaves no doubt as to what the Parties intended by the concepts of Article VI: Picton, Nueva and Lennox, as well as the other islands of the south, were not considered as included in the expression "sea and coasts of the Atlantic Ocean and the adjacent islands" (cf. Ch. Cart. Rem. Plate No. 11, pp. 16 – 17).

23. (d) In his dispatch of 2 July 1881 reporting to the French Government about the agreement reached a short time before, and which the Treaty was to incorporate three weeks later, the same Baron d'Avril emphasised the inclination towards conciliation which the Chilean side had shown, and he mentioned in support of this assertion "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" (Ch. Ann. No. 38, p. 99); Ch. Mem. pp. 39 – 40, paras. 19 – 20). The map accompanying this dispatch shows that for this French diplomat, as for the two interested Governments, the "Atlantic coast" extended "to the extreme end of the continent, that is to the island of Estados" and that the attribution to Argentina of the "Atlantic coast" did not imply Argentine sovereignty over Picton, Nueva, Lennox and the other islands further south (Ch. Plate No. 12).

24. (e) The Chilean Authoritative map of 1881 (Ch. Plate Nos. 13 – 19) and the Chilean Hydrographic Notice of 10 November 1881 (Ch. Ann. No. 46 (c), p. 148 (d); Ch. Mem. p. 41, paras. 23 – 24) show that the Chilean Government considered that the Treaty had assigned to Argentina south of the Straits of Magellan only the eastern part of Tierra del Fuego and Staten Island.

25. (f) Of absolutely decisive importance is the dispatch addressed to the Foreign Office on 20 December 1881 by George Petre, the British Minister at Buenos Aires, conveying

<sup>1</sup> On this point see below para. 39.

to the British Government the map which had been given to him by Sr Irigoyen himself for the purpose of illustrating the frontiers established by the Treaty (Ch. Ann. No. 47, p. 149); (Ch. Mem. p. 42, paras. 25 – 26). In this note, the English diplomat said: "The Argentine Republic . . . . is left in full possession of the Atlantic seaboard" – something which did not prevent him from writing a few lines earlier that the Straits of Magellan, half of Tierra del Fuego "and all the southern islands" had been assigned to Chile. The map annexed to this dispatch (Ch. Plate No. 21) shows clearly that the "Atlantic seaboard" allocated to Argentina terminated at the extreme south-east of Tierra del Fuego and at Staten Island, and did not include any territory to the south of Tierra del Fuego.

26. (g) The same conception of the limits of Argentine territory on the Atlantic coast is to be found in the reports by the United States representatives to the two capitals, as the Chilean Government has shown in its Memorial (p. 44, para. 30).

27. (h) The Argentine Memorial notes, it is true, a passage in the speech of Minister Irigoyen before the Chamber of Deputies in 1881, in which he indicated that:

"... We bore in mind the political consideration of maintaining our jurisdiction over the Atlantic coasts, and we have achieved this. These coasts extend for approximately 1,500 miles . . . and they will all remain under exclusive jurisdiction of this Republic, whose flag will be the only one flying as a symbol of sovereignty from Rio Negro down to the Strait and Cape Horn" (Arg. Mem. p. 199, para. 77, and p. 418, para. 48; Arg. Ann. No. 12, p. 115).

Some light is shed upon this quotation by another passage, more developed and more precise, of the same speech, where the Argentine Minister indicated that the sovereignty of his country had been recognised by the Treaty over the coast of Patagonia and Staten Island (Ch. Ann. No. 42, p. 140; see the text of this passage, above para. 17). The map, given by Sr Irigoyen himself to the British Minister (Ch. Plate No. 21), disposes effectively of the somewhat rhetorical phrase used by him in his speech.<sup>1</sup>

28. (i) The principal Chilean negotiator of the Treaty, Sr Barros Arana, took the opportunity on a number of occasions after the conclusion of the Treaty to confirm how the Parties had understood between 1876 and 1881 the allocation to Argentina of the "Atlantic coast".

In 1892, for example, after the publication in a Santiago newspaper of an item to the effect that Julio Popper had asked the Argentine Government for a fishing concession around the islands situate to the east of the meridian of Cape Horn as far as the 60° parallel, Sr Barros Arana thought it necessary to draw the attention of the Chilean Minister of Foreign Affairs to the violation of the Treaty which this request involved: "It is beyond discussion that all islands situated south of Tierra del Fuego, whether east or west of Cape Horn's meridian, are

<sup>1</sup> See also that the Argentine Memorial suggests that in his speech to the Chamber of Deputies, Minister Irigoyen may on purpose have used somewhat ambiguous expressions, "because he had to defend the Treaty against the critics of the opposition". (Arg. Mem. p. 376, footnote 25).

the property of Chile . . ." (Ch. Ann. No. 61 (a), p. 188 (a); Ch. Mem. p. 88, para. 6). For Sr Barros Arana, as one can see, the allocation to Argentina of the "Atlantic coast" involved no limitation upon Chilean sovereignty over the islands south of Tierra del Fuego. Sr Barros Arana's reaction is the more significant because, two years earlier, he had insisted to his Government on the importance that Argentina had attached to the continuity of its coast in the course of the 1876 negotiations.

In his report of 25 October 1890, the Chilean expert had already explained the choice of the dividing line of the meridian of Cape Espiritu Santo by the desire of the Parties to leave the south shore of the Straits to Chile, while leaving "under the sovereignty of Argentina all the littoral of Patagonia and Tierra del Fuego on the Atlantic side" (Ch. Ann. No. 58, p. 178), and he had added that the selection of the point of departure of this line at longitude 68° 34' involved the risk of making the frontier line pass across a marshy zone, covered at high tide, which was at the innermost part of the Bay of San Sebastian, "making it very difficult, if not impossible, to reach land". He had also proposed that this technical error should be corrected by selecting a meridian which would produce a frontier more in conformity with the intention of the Parties. The notion which Sr Barros Arana had of the Atlantic littoral appears upon the examination of the map annexed to his report (Ch. Plate No. 49): the continuous coastline attributed to Argentina by the Treaty consists clearly, in conformity with previous documents, of the coasts of Patagonia and of Tierra del Fuego, as far as Staten Island; the islands to the south of Tierra del Fuego and particularly Picton, Nueva and Lennox are quite foreign to the concept of the "Atlantic coast".

29. The Chilean Government thus hopes that it has restored its true meaning to the Argentine claim to the "Atlantic coast". From the Argentine note of 30 June 1875 to the report of Sr Barros Arana of 1890 all the documents are unequivocal: the Argentine Government was in no way concerned with a maritime jurisdiction over the Atlantic waters, but only with the possession of an uninterrupted coastline. For this reason it sought to obtain, beyond those territories which it already partly occupied (namely Patagonia and Staten Island), a part of Tierra del Fuego, which would ensure that Staten Island was not isolated from the rest of Argentine territory. After long hesitation, the Chilean Government agreed to this in exchange for recognition of its own sovereignty over both shores of the Straits of Magellan and over all the other territories situate to the south of the Straits.

This concession to Argentina of uninterrupted coastline had nothing to do with any "oceanic principle". It was simply a specific solution for a particular region, a solution which the Argentine negotiators of the Treaty never dreamt would extend south of Tierra del Fuego. From 1875 onwards, as has been seen, Argentina did not press any claim to the south of Tierra del Fuego, and in July 1876, according to the very words of Sr Irigoyen himself, "the dispute was finally reduced to the narrow strip between the 52° and the Straits of Magellan, and in addition, to the island of Tierra del Fuego."<sup>1</sup> Thus the Argentine claim to the "Atlantic"

<sup>1</sup> Arturo Carranza, Articulos del Doctor Irigoyen, Buenos Aires, 1895, p. 7.

went no further south than Tierra del Fuego and Staten Island. If it had been otherwise, one could not understand how Sr Irigoyen could have mentioned, in the speech which has already several times before been referred to, only the division of Isla Grande ("We have divided the large island . . . into two equal parts": Ch. Ann. No. 42. p. 135) without speaking of some division of the other territories south of the Straits;—he would not have failed to do it if the assignment to his own country of the "Atlantic coast" had had the effect of also giving to Argentina some of the islands situated to the south of Tierra del Fuego. One could hardly find more telling proof of the way in which the Parties— and principally the Argentine Government—understood the notion of the "Atlantic coast".

30. To conclude the consideration of this idea of the "Atlantic coast", the Chilean Government wishes to stress that the preoccupation of the Argentine Government with securing the assignment to itself not only of Patagonia but also of Staten Island, and, because of Staten Island, of the eastern part of Tierra del Fuego, explains two characteristic features of the settlement proposed by Argentina in 1876, and eventually accepted by Chile in 1881.

The first is that the "bases of agreement" proposed in June 1881 by the Chilean Government and accepted by the Argentine Government, as well as the Treaty itself, present the provisions relating to Tierra del Fuego and the adjacent islands as a derogation from a general principle according to which all the territories south of the line from Point Dungeness to the Andes belong to Chile. It was essentially in exchange for the two shores of the Straits of Magellan and for all the territories further south that Chile abandoned its claims to an important part of Patagonia. By way of exception to this principle, and with a view to giving Argentina possession of Staten Island where it had carried out various acts of sovereignty, and to assuring at the same time the continuity of the coastline from Patagonia to Staten Island, the "bases of agreement" and the Treaty gave to Argentina certain territories south of the Straits, that is to say, in particular, Staten Island and the eastern part of Tierra del Fuego.<sup>1</sup>

The second aspect of the 1881 settlement which the preceding analysis brings out into the open is that the choice of the Beagle Channel as the boundary between the two countries was somewhat inevitable. In principle, it is necessary to repeat, it was the line Dungeness / Andes which was to constitute the only east-west boundary. However, from the moment when Argentina saw itself given certain areas south of this line with a view to securing a continuous coastline as far as Staten Island, the establishment of a further sector of boundary south of the Straits became necessary. This boundary could be nothing other than the waterway bordering the southern coast of Tierra del Fuego, in other words, the Beagle Channel, since the requirement of the continuity of the Atlantic coastline could have no further relevance from that point on. This, as the Court will note in passing, confirms what can be gathered from other sources, namely that the Channel which the Parties had in mind could have been none other than the stretch of water skirting Tierra del Fuego. Any other interpretation would involve a misunderstanding as to the role of this border in the general economy of the 1881 compromise. (cf. Ch. Mem. p. 50 and 51, paras. 9 — 11 and below Ch. III, para. 61).

<sup>1</sup> The exceptional character of the grant to Argentina of Staten Island and of half of Tierra del Fuego in the general compromise is emphasised by the French geographer Maunoir (See Ch. Mem. p. 40, para. 20A), as well as by the Argentine Expert Sr Moreno (see Ch. Mem. p. 107, para. 51).

#### D. The significance of the 1881 settlement

##### (i) The points at issue

31. The explanations given above may assist the Court in understanding what was the true territorial debate between the two countries in the nineteenth century, as well as the significance of the settlement achieved in 1881.

In the documents of the controversy from the 1840s onwards, three features constantly reappear: Patagonia, (the territory situated to the east of the Cordillera of the Andes, between the River Diamante (approximately 35° of latitude) or the River Negro (approximately 40° of latitude) and the Straits of Magellan); the Straits of Magellan; the islands to the south of the Straits. As has been seen, each of the two countries claimed the ensemble of these three territories – a fact which, it is worthwhile repeating, demonstrates clearly that neither of the two Governments was inspired by any idea of an oceanic division. Very soon it appeared that for Chile the fundamental issue was the Straits of Magellan (cf. the letter of Sr Barros Arana to the Chilean Minister of Foreign Affairs, 4 July 1876, quoted in the Arg. Mem. p. 163, para. 50), while for Argentina it was Patagonia. It is these issues that the Argentine Memorial very precisely reflected when it spoke of "the 'non-negotiable' elements of the dispute" (Arg. Mem. p. 172, para. 59).

##### (ii) The meaning of the territorial settlement in the light of the negotiations of 1876 – 1881

###### (a) The Barros Arana—Irigoyen negotiations of 1876

32. When Sr Barros Arana began discussions with the Argentine Minister Irigoyen, he was under instructions requiring him to seek for Chile all territories south of the River Santa Cruz (approximately 50° of latitude) or, failing that, River Gallegos and the territories to the south of it (approximately 52° of latitude). The Chilean Government thus showed that it was prepared to abandon, if this appeared necessary, the major parts of its claim to Patagonia on condition of retaining along the north coasts of the Straits a strip of Patagonian territory sufficient to assure its control of the Straits. The territories to the south of the latter were of course to be assigned to it at the same time as the Straits themselves.

33. This was the basis on which the discussions opened, the course of which was described by Sr Barros Arana in his dispatch of 10 July 1876 (Ch. Ann. No. 22, p. 43) as well as by Sr Irigoyen in his report of 15 April 1877 (Arg. Ann. No. 14, p. 133).

The Chilean negotiator described the first phase of the negotiations in the following terms:

"I resolutely and insistently defended Chile's right to all the strait of Magellan, claiming as an acceptable transaction a part of the continental territory so that the colony of Punta Arenas

and others which our Government may found later in the region of the Strait may extend northwards and be self-sufficient. In this connection, my requirements were up to the southern bank of the River Santa Cruz, or at least up to the banks of the River Gallegos . . . . The Minister (Sr Irigoyen) informed me that he could not accept that Chile's dominion should extend to any point of the Atlantic coast. . ." (Ch. Ann. No. 22 p. 43).

As for Sr Irigoyen, he described the first phase of the discussions in the following language:

"In Sr Barros' opinion, the outstanding discussions referred to the strait of Magellan and the territories forming Patagonia. . .

. . . The Chilean Minister said he thought that a prudent and equitable compromise solution would be to divide the disputed territory, leaving the Rio Santa Cruz as the boundary between both Republics in the disputed sector. I resisted this proposal, informing the Chilean Minister that any suggestion which involved the giving up by Argentina of any point whatsoever on the Atlantic coast was inadmissible" (Arg. Ann. pp. 135 - 6).

". . . After a lengthy discussion, I realised that the Chilean Minister was disposed to accept the Rio Gallegos as a definitive boundary line, by way of a compromise solution" (Arg. Ann. p. 139).

34. Sr Irigoyen then explained in detail why, even when reduced to the Rio Gallegos line, the Chilean proposal could not be accepted by him. This explanation is bound to attract the attention of the Court:

"It would leave the Strait under the absolute sovereignty of Chile . . . It would abolish the natural boundary between the two Republics . . . And finally, by extending Chilean jurisdiction to the Atlantic, it would place possible difficulties in the way of relations between the two Republics . . . I objected on these grounds to the proposal suggested by the Chilean Minister, and again informed him of my inability to accept an agreement whereby Argentina was deprived of its rights in the Strait and of any part of the Atlantic coasts, however small it might be" (Arg. Ann. p. 140).

The objections raised by the Argentine Minister related exclusively to the contingency of Chilean sovereignty over the part of the Atlantic coast stretching to the north of the Straits between their entrance and Rio Gallegos. It was in relation to that stretch that the Argentine negotiator declined to contemplate any derogation from the Cordillera boundary line or any Chilean presence on the Atlantic coast. Neither of these objections related to the islands south of Tierra del Fuego, which had nothing to do with the Andes. Thus, one may observe in passing, it was once again confirmed that the Argentine claim to the "Atlantic coast" had no bearing on the region south of Tierra del Fuego.

At this stage, Sr Irigoyen noted:

"The discussion appeared to have reached stalemate at that moment, departing from the topics it had been considering to turn about to the various islands which constitute the large group which bears the geographical name of Tierra del Fuego" (Arg. Mem. p. 140). (Underlining added)

Thus, for the Argentine Minister the debate on the islands south of the Straits was something quite distinct from that relating to the Atlantic coast and the Straits themselves, which confirms his conception of the Argentine claim to the "Atlantic coast". This question did not, however, long delay the two negotiators, since Sr Irigoyen himself noted later that "the dispute was finally reduced to the narrow strip between the 52nd parallel and the Magellan Strait, and also Tierra del Fuego Island". (quoted above, para. 29).

35. The two negotiators, having restated their positions, undertook "to discuss the matter of a compromise solution (and) . . . succeeded in fact in laying down the terms of a direct agreement" (Arg. Ann. p. 141). This took the form of what the Argentine Memorial calls the 'Bases of 1876' (Arg. Mem. p. 166, para. 51) which the two Governments eventually adopted in 1881, as regards the territories south of the Straits.

Sr Barros Arana reported this last phase of the negotiations in the following terms:

"As this resolution was firm and irrevocable, as the Minister informed me that he could not accept that Chilean dominion should extend to any point of the Atlantic coast, I was forced to listen to his proposals, increasing in the discussion as far as I was able the limits of the dividing line which he proposed to me. The discussion on this point was most lengthy, but finally the proposed dividing line was established in the following manner" (Ch. Ann. No. 22, p. 43).

There then followed the well-known formula with its three headings: Point of division on the Strait; Tierra del Fuego; islands — a formula which shows clearly that the problem of the islands was seen as quite distinct from the problem of "Tierra del Fuego".

**(b) The negotiations between 1877 and 1881**

36. It is not necessary once more to go over the negotiations between 1877 and 1881 (Ch. Mem. pp. 29 — 31, paras. 31 — 36), save to recall that they did not include the faintest allusion to a "principle" of the division of the islands by reference to their location on the Atlantic or the Pacific. Indeed, as has been seen, during this period the Argentine Government itself made proposals disregarding quite blatantly any such "principle" (see above para. 14). As in the previous period, the negotiators were content to develop pragmatic formulae capable of satisfying both Parties: hence the multiplicity of lines proposed from one side or the other, without any regard to any assertion of a general principle.

**(c) The final negotiations of 1881**

37. The final negotiations of 1881 served only to confirm the bases of agreement established in 1876 between Sr Irigoyen and Sr Barros Arana (Ch. Mem. pp. 33 — 38, paras. 1 — 16). No more than in 1876 was it a question of a general principle or of a division of the islands south of Tierra del Fuego by reference to their location on one or the other side of the meridian of

Cape Horn. As regards the territories lying south of the Straits of Magellan, the negotiators referred purely and simply to the 1876 arrangement in such a way that it is in the analysis of this arrangement that one can find the definitive key to the territorial settlement incorporated in the Treaty itself.

38. Two more points must be noted. The first is that, as already indicated, the Chilean Government only accepted reluctantly the idea that there should be an encroachment upon its exclusive sovereignty south of the Straits of Magellan. It was not until May 1881 that it agreed that Staten Island should be assigned to Argentina, and some days later that Tierra del Fuego should be divided in such a way as to assure to Argentina the continuity of the coastline which it claimed as far as Staten Island (see above para. 18). It is apparent, though, that this concession was limited to the specific case with which it was concerned, and that it did not involve the abandonment by the Parties of the principle that all the territories south of the Straits belonged to Chile. When Minister Irigoyen dealt with this question before the Chamber of Deputies in 1881, he said " . . . We have divided the large island which is situated east of Brunswick Peninsula and generally called Tierra del Fuego into two equal parts" (Ch. Ann. No. 42, p. 135) ; of the division of the other territories south of the Straits there was of course no question.<sup>1</sup>

39. The second point to note is the change in the boundary north of the Straits of Magellan, as introduced in 1881.

The Irigoyen proposal of 1876 provided that this line would start from Mount Dinero; from there it would run in the direction of Mount Aymond at latitude 52° 10'; then it would follow this latitude westwards to the Cordillera. This solution left to Argentina a certain amount of the north shore of the Straits of Magellan east of Mount Dinero. Sr Barros Arana was aware of the inconvenience of this to Chile. He mentioned it to his Government, though adding that it was not a very serious matter in practice, since at this point the Straits were very broad (see his dispatch of 10 July 1876, Ch. Ann. No. 22, p. 45). This grant to Argentina of some miles of the north shore of the Straits — as is clearly shown by the map which Sr Barros Arana attached to his dispatch (Ch. Plate No. 8) — was sufficient, however, to lead to the rejection of the arrangement by the Chilean Government, which was unable to accept "any settlement which does not ensure to Chile the full and complete possession of all the Straits" (Dispatch of the Chilean Minister of Foreign Affairs to Sr Barros Arana of 1 August 1876: Ch. Ann. No. 23, p. 47). The Argentine Memorial does not conceal the fact that it was this establishment of the point of departure of the frontier at Mount Dinero which provoked the refusal of the Chilean Government to accept the Irigoyen proposal:

"So, the non-acceptance by Chile of the Bases of 1876 was, almost exclusively, for the reason that the terms of those Bases left with Argentina a very small part of the Strait . . . (Arg. Mem. p. 169, para. 54) (Underlining added).

<sup>1</sup> In 1895, Senor Irigoyen himself stated, as mentioned above, that once Patagonia, down to 52° was recognised as Argentinian, "the dispute was finally reduced to the narrow strip between the 52° and the Straits of Magellan, and in addition, to the island of Tierra del Fuego (a la isla de la Tierra del Fuego)." Articulos del Doctor Irigoyen, Buenos Aires, 1895.

One can understand that in these conditions the Chilean Government took advantage of the resumption of negotiations in 1881, through the intervention of the two United States diplomats, to obtain a change in the point of departure of the line, and thus to assure to Chile sovereignty over the whole of the north shore of the Straits. In his telegram of 9 May 1881, the United States Minister in Santiago communicated the Chilean proposal to fix this point of departure at Cape Virgenes, the frontier line then to follow the 52nd parallel, that is to say 10' further north than the line contemplated in 1876 (Ch. Ann. No. 36 (C), p. 80; Ch. Mem. p. 34, para. 6). Though there were no difficulties about the displacement 10' towards the north of the contemplated boundary line, it was to be otherwise with the point of departure of the line: while the solution of Mount Dinero was unacceptable for the Government of Chile because it left to Argentina a part of the north shore of the Straits, the solution of Cape Virgenes was rejected by Argentina because it left to Chile a fraction of the Atlantic coast between Cape Virgenes and Point Dungeness<sup>1</sup>.

This is why the Argentine counter-proposal transmitted by the United States Minister in Buenos Aires on 11 May shifted the point of departure of the frontier from Cape Virgenes to Point Dungeness (Ch. Ann. No. 36 (D), p. 80; Ch. Mem. p. 35, para. 7). After some hesitation because the proposed line looked as if it might cross water, the Chilean Government accepted the Point Dungeness solution. In his telegram of 28 May, the American Minister at Santiago conveyed the acceptance by the Chilean Government of this formula (Ch. Ann. No. 36 (J), p. 84; Ch. Mem. p. 36, para. 12).<sup>2</sup> It was under these conditions that the second of the "six bases of agreement" proposed by Chile on 3 June 1881 — and ultimately Article II of the Treaty — fixed the point of departure for the boundary line at Point Dungeness.

Chile thus obtained in 1881 what the Irigoyen proposal of 1876 had not given it: control over the whole of the north shore of the Straits. The difference between this and the 1876 formula appears clearly from a comparison of the 1876 map (Ch. Plate No. 8) with those of 1881 (for example, the Chilean Authoritative Map; Ch. Plates Nos. 13 — 19, or the Irigoyen map; Ch. Plate No. 21).

As has been seen, the Argentine Government raised no objection of principle to the movement eastward of the point of departure which it envisaged in 1876. This can easily be understood within the framework of the settlement that was being worked out. Once the two Parties agreed to leave to Chile the whole of both shores of the Straits, it was natural that Chilean control over the north shore would not stop at Mount Dinero. It was sufficient for Argentina to have a continuous coastline and, while she had not agreed that the frontier should start from Cape Virgenes, she had no reason to object to its starting from Point Dungeness.

<sup>1</sup> The Court will recall that it was in this note that the Chilean Government also proposed to leave Staten Island to Argentina without, however, ceding to it the eastern part of Tierra del Fuego (*supra* para. 18).

<sup>2</sup> The Chilean Government also accepted the division of Tierra del Fuego, that is to say, the large island,

- (d) The conclusions which may be drawn from the 1876 — 1881 negotiations in relation to the meaning of the territorial settlement of 1881.

40. (a) The negotiators sought practical solutions, adapted to each of the three main contentious regions. As Sr Barros Arana wrote, "without wishing to enter into historic questions . . . we sought above all a practical solution to the matter of frontiers" (Ch. Ann. No. 22, p. 43). It was in no way a question of general principles inherited from the Spanish period and controlling the three regions, but only of the methods appropriate to each of them.

41. (b) The Chilean negotiator, wishing above all to secure for his own country absolute control over the Straits of Magellan, sought, in addition to the Straits themselves and all the territories to the south of the Straits, a part of Patagonia, namely the strip of territory to the north of the Straits stretching at least as far as the River Gallegos at about 52° latitude. It was to this that the Argentine negotiator was opposed. He was unable to acknowledge that the Argentine coast, which in his eyes should be prolonged over the whole of Tierra del Fuego as far as Staten Island, should be interrupted over a distance of several kilometres. Consequently, the first point in his proposal consisted of an attempt to reconcile these two requirements by fixing the east-west boundary in this region a little bit more to the south, that is to say, along the 52nd parallel, then in a south-easterly direction towards Mount Dinero. In this way, he thought, Chile would have the strip of territory which it wanted north of the Straits, without Argentina's control of the Atlantic coast being interrupted. However, the Chilean Government did not agree to leave the eastern entry to the Straits under Argentine control, and it succeeded in securing in 1881 that the point of departure of the frontier line should be pushed back from Mount Dinero towards the east: it would have wished to have it fixed at Cape Virgenes, but to this the Argentine Government could not agree, any more than it could have agreed to fixing the line at River Gallegos. The only point of departure acceptable to the two Parties was therefore Point Dungeness.

42. (c) To the south of the Straits of Magellan, it was necessary once more to reconcile two conflicting requirements: Chile's requirement of keeping sole control over the Straits, as well as the territories even further south; and the Argentine claim to Staten Island and to an uninterrupted coastline as far as the end of the continent, that is to say, as far as the south-east point of Tierra del Fuego and Staten Island. As has already been shown, Cape Espiritu Santo thus appeared since 1876 as the only point of departure for the boundary which was capable of satisfying this double requirement. This is the meaning of the second point in the Irigoyen proposal.

43. (d) As for the other territories situate south of the Straits of Magellan, there was after 1875 little difficulty in securing their attribution to Chile. To reconcile this solution with the assignment to Argentina of the Patagonian and Tierra del Fuego coasts foreseen in the first and second points of his proposal, Minister Irigoyen specified in a third point that the islands off the coast assigned to Argentina, that is to say, the islands to the east of Patagonia and of Tierra del Fuego as well as Staten Island, should belong to Argentina but that all the other islands, that is to say, those situate south of the Beagle Channel and west of Tierra del Fuego, should belong to Chile.

44. (e) The Argentine claim to a continuous Atlantic coastline as far as Staten Island never meant in the eyes of the negotiators that south of Tierra del Fuego the islands should be divided by reference to the "oceanic principle" or according to their location by reference to the meridian of Cape Horn.
45. (f) Neither of the two negotiators of the 1876 arrangement took any account of an "oceanic principle" now said to have dominated the whole of the formula which they adopted. On the contrary, Sr Barros Arana, in his telegram of 5 July 1876, stated that "the other islands located south of the Beagle Channel down to Cape Horn would be Chilean" and he added: "thus all other islands to the south of the Strait would be Chilean" (Ch. Ann. No. 21, p. 42). Nor was any division of the islands according to their location by reference to the meridian of Cape Horn mentioned by Sr Irigoyen either in his report to the President of the Republic of 15 April 1877 (Arg. Ann. No. 14, p. 133), or in his speech of 1881 before the Chamber of Deputies (Ch. Ann. No. 42, p. 116; Arg. Ann. No. 12, p. 93). Moreover, the expression "meridian of Cape Horn" is not to be found in any of the documents of the long negotiations. In any case, if a principle of such width as the "Atlantic-Pacific principle" had controlled the spirit of the agreement, it is difficult to understand how it is that neither of the two negotiators ever said a single word about it.
46. (g) The general meaning of the compromise contemplated in the course of the 1876 discussion between Sr Barros Arana and Sr Irigoyen is clear and simple. Argentina and Chile were each to receive what was most important to it: Argentina, Patagonia; Chile, the Straits of Magellan and the southern territories attached thereto. But each of the two countries yielded something of its principal claim: Argentina abandoned a strip of Patagonia to the north of the Straits in such a way as to give Chile complete control of the northern shore of the latter; Chile ceded Staten Island and the eastern part of Tierra del Fuego, in such a way that Argentina should have an uninterrupted coastline from Patagonia "as far as the extremity of the continent, that is to say, as far as Staten Island". The points of departure of these two lines, that to the north as well as that to the south of the Straits, were chosen in such a way as to satisfy these differing requirements. On that basis, south of the Straits, Cape Espiritu Santo appeared as early as 1876 as an acceptable starting point. To the north of the Straits, the choice was more difficult: the 1876 proposal suggested Mount Dinero, which Chile could not accept, and it was only in the negotiations in 1881 that a final solution, namely the choice of Point Dungeness, was reached. In the same way as the grant to Chile of a strip of territory north of the Straits was an exception to the allocation to Argentina of the whole of Patagonia, so the grant to Argentina of a part of Tierra del Fuego and of the islands which prolonged it to the east amounted to an exception to the attribution to Chile of all the territories south of the Straits. It was precisely this last exception which necessitated the choice of the Beagle Channel as the second horizontal line in order to delimit properly the scope of the exception thus conceded to Argentina (on this point see above para. 29; see also Chapter III, para. 61, below.)
47. (h) The Argentine Memorial is unable completely to deny that this was in truth the general economy of the settlement established in 1876 — 1881:

"It was to be a compromise involving, in the case of Chile, the abandonment of its claims to the major part of Patagonia east of the Cordillera; and, in the case of Argentina, the surrender of its rights to any part of the Strait of Magellan" (Arg. Mem. p. 142, para. 27; cf. p. 166, para. 52).

But other more numerous passages of the Argentine Memorial suggest a completely different reading of the compromise, to which reference has already been made in Chapter I of the present Counter-Memorial, and according to which, in consideration of its control over the zone of the Straits of Magellan, Chile consented to Argentine control over the Beagle Channel region. Thus, it is said, Chile would have seen its communications with Europe assured, while Argentina would have been assured of its communications with the south, "its logical future area of development" (Arg. Mem. p. 406/7, para. 42):

"... after recognition of Chile's rights to the whole of the seaway of the Strait of Magellan, there follows recognition of the overriding Argentine interest in the Beagle Channel, ensuring to that country possession of Ushuaia, lying to the west of Cape Horn meridian — an eminently useful base in the south for the maintenance of Argentina's jurisdiction" (Arg. Mem. p. 408, para. 43).

The Court will see how unreal this interpretation of the settlement is. Mention of the Beagle Channel — introduced as one knows for the first time in the Irigoyen proposal of 1876 — never occasioned the least comment by either of the two negotiators. If the 1876 — 1881 compromise had genuinely had as its object the assurance to Argentina, as a counterpoise to Chilean predominance in the Straits, "the manifest recognition of Argentine predominance in the Beagle Channel" (Arg. Mem. p. 411, para. 44), how can one explain that no trace of such a division of the spheres of influence can be found in either the report made by Sr Barros Arana to his Government on 10 July 1876 (Ch. Ann. No. 22, p. 43), or in the report sent by Sr Irigoyen to the Argentine President on 15 April 1877 (Arg. Ann. No. 14, p. 133), or in the report presented to the Chilean Congress by the Minister of Foreign Affairs of Chile immediately after the conclusion of the Treaty (Ch. Ann. No. 41, p. 107), or in the speech of Sr Irigoyen before the Argentine Chamber of Deputies in 1881 (Ch. Ann. No. 42, p. 116; Arg. Ann. No. 12, p. 93), or in the report of Sr Barros Arana of 1890 (Ch. Ann. No. 58, p. 169)? How is one to explain also the fact that the Argentine Government failed to speak of the matter in its analysis of the 1881 settlement during the 1902 arbitration? The description then given of the compromise was perfectly clear:

"The Treaty of 1881, outcome of these previous negotiations, was a compromise between the extreme claims of each country. Chile acknowledged as her eastern frontier the Cordillera de los Andes, in the whole extent, from north to south as far as parallel 52°, relinquishing her alleged rights to the whole or to any part of Patagonia. The Argentine Republic, in return, acknowledged, on her part, as Chilean territory, the neighbourhood of the Straits of Magellan (while the Straits themselves were declared neutral), the greater part of the Tierra del Fuego, and the islands to the south." (Argentine Evidence 1900 p. 157). (Underlining added)

Of any Argentine predominance in the Beagle Channel by way of exchange for Chilean predominance in the Straits of Magellan, the Argentine Government still gave absolutely no indication even in 1902. This idea appeared in the Argentine Memorial of 1973 for the first time.

48. (i) No more, as has already been said, did the territorial settlement of 1876 — 1881 seek to protect the Argentine character of Ushuaia, which was only established some years after the conclusion of the Treaty, and the name of which appears nowhere in the reports of Sr Barros Arana, or in the reports and speech of Sr Irigoyen (see Chapter I, paras. 28 and 29).

49. (j) Finally, and here again one can do no more than repeat oneself, there was never any question at any point in the negotiations of dividing the maritime jurisdictions of the two countries between the Atlantic and the Pacific. When the Argentine Memorial states that the negotiators of the two countries received instructions to ensure "the absolute respect for the exclusive maritime jurisdiction of each of the two countries over their territorial waters in the Atlantic and Pacific oceans respectively, which jurisdictions obtained in each case up to the place where the waters of the two oceans merge, at the Cape Horn meridian" (Arg. Mem. p. 405, para. 42), one can only believe that at the very least the negotiators forgot their instructions on the way!

### (iii) The territorial settlement in the Treaty of 23 July 1881

50. The boundary treaty signed on 23 July 1881 was the direct consequence of the Irigoyen-Barros Arana agreement of July 1876 and of the "six bases of agreement" of June 1881; a comparison of the three texts can leave no doubt upon this point. As correctly stated in the Argentine Memorial (p. 198) "... Articles 2 and 3 of the Treaty reproduced substantially the terms of the bases of 1876, the sole difference being that Chile acquired under the Treaty slightly more land to the north of the Strait than had been proposed five years earlier".<sup>1</sup>

51. No more than the agreement of July 1876 or the bases of June 1881 was the compromise of 23 July 1881 controlled by any "overriding principle", other than the wish of the Parties of "terminating ... the boundary controversy ... and giving effect to Article XXXIX of the Treaty of April 1856" (preamble of the Treaty), so that "the boundary specified in the present Agreement will remain as the immovable one between the two countries" (Article VI of the Treaty). A suitable solution was adopted for each of the three contested regions, and the "oceanic principle" appeared nowhere.

In this connection, the Court may wish to note that in the 1902 arbitration, when the Argentine Government was opposing the Chilean claim to the Andean divortium aquarum, that is to say, to the criterion of hydrographic basins, it insisted strongly on the fact that the terms of Article I of the Treaty incorporated a purely orographic criterion and "utterly

<sup>1</sup> As the Argentine Memorial shows, there are two drafting differences between the text of Article III of the Treaty and that of the Irigoyen proposal of 1876 (Arg. Mem. pp. 426 — 7, para. 53). Where the Irigoyen proposal of 1876 terminated the north-south dividing line in Tierra del Fuego "hasta el Canal Beagle", the Treaty provided that this line would extend "hasta tocar en el Canal Beagle". The latter formulation also appears in the "bases of agreement" of 3 June 1881. The origin of this version appears in the letter of 23 October 1876 sent by the Chilean Minister of Foreign Affairs to Sr Barros Arana (Ch. Ann. No. 24, p. 48), in which the Minister, summarizing the Argentine proposal, spoke of a line cutting Tierra del Fuego "hasta tocar en el Canal de Beagle". The Minister probably wanted to emphasize that the Cape Espiritu Santo line did not continue southwards beyond the Beagle Channel, and thus did not allocate to Argentina any territory south of the large island of Tierra del Fuego. As for the transformation of "todas las otras islas" into "todas las islas", the Chilean Government will examine its significance in Chapter III, para. 10).

condemns the interoceanic divide" (Argentine Evidence, 1900, p. 466). The Argentine position at that time was that, in the absence of an express term providing that "the limit would be formed by the line which separates the rivers flowing to the Atlantic on one side, and to the Pacific on the other", the hydrographic criterion must be rejected (*ibid.*), for "there has never been any intention of taking into account the separation of waters between the two oceans" (p. 470). This was true, said the Argentine document, not only north of the 52nd parallel, but also in Tierra del Fuego, where moreover there exists no orographic limit. That is why a mathematical line was chosen:

"In Tierra del Fuego, which belongs to the two nations, there was no sufficient information to affirm with entire knowledge whether that Cordillera extended thereto . . . The orographical limit, therefore, was not agreed upon, but neither was the hydrographical one resorted to. A mathematical line was agreed upon . . ." (*ibid.*, p. 476 - 7).

Thus, in 1902, the Argentine Government utterly discarded any interpretation of the Treaty involving reference to an "oceanic principle": for the Argentine Government such a "principle" did not govern the Treaty either south or north of the Straits of Magellan.

52. Just as no other principle was mentioned anywhere in the Treaty, so the "oceanic principle" was not. But it is necessary to observe that though the word "Atlantic" is mentioned once, the corresponding word "Pacific" never appears at all, just as the expression "meridian of Cape Horn" does not. The islands are divided according to their location by reference to the coasts of Patagonia and of Tierra del Fuego, and by reference to the Beagle Channel, and not according to their position east or west of the meridian of Cape Horn. The attribution of islands to Chile is made without any reference to the Pacific. The attribution of islands to Argentina is not of all islands situate in the Atlantic, but only of those which may be "to the east of Tierra del Fuego and of the eastern coast of Patagonia". If Argentina asserts that Navarino is an island "sobre el Atlantico", how is it that the Argentine Government recognises it as Chilean? (see Argentine notes of 15 November 1972: Ch. Ann. No. 330, p. 577, and of 19 March 1900, Ch. Ann. No. 366).<sup>1</sup>

53. Those authors and diplomats who commented on the Treaty in the years following its conclusion all interpreted the territorial settlement of 1881 in the same way as the Chilean Government does on the basis of the documents relating to the negotiation. None of them saw in the Treaty an arrangement based upon an "oceanic principle" or on Argentine predominance in the Beagle Channel region as a balance to Chilean predominance in the area of the Straits of Magellan. Without wanting to overburden the Court on this point, reference may be made to some examples:

— The Chilean Government has already mentioned in its Memorial the study by the French geographer Maunoir, according to which Argentina received besides Patagonia "only Staten Island and a third of Tierra del Fuego", and Chile obtained, besides the strip of land north of the Straits of Magellan and two-thirds of Tierra del Fuego, "all the islands of the west

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<sup>1</sup> See footnote 1 to Chapter IV, para. 51 below for the view of Argentine Admiral Basilico in 1963.

and the south". (Ch. Ann. No. 47(b), pp. 149(e) — (f); Ch. Mem. p. 40 para. 20A). Also worthy of mention is the report in the Bulletin of the Geographical Society of Madrid for 1882 (Ch. Ann. No. 352). Further evidence of the general repute of the settlement can be found in encyclopaedias, reference books etc. and the attention of the Court is also drawn to Ch. Ann. No. 382 which contains a number of examples.

— It is not necessary for the Chilean Government once again to go over the analyses of the 1881 territorial settlement made by the French Minister in Santiago, Baron d'Avril (see his dispatches of 17 November 1877, Ch. Ann. No. 25, p. 50; 2 July 1881, Ch. Ann. No. 38, p. 99; 24 October 1881, Ch. Ann. No. 43, p. 142(a); see also the maps annexed to these dispatches: Ch. Plates Nos. 12 and 13), nor over the declarations made immediately after the conclusion of the Treaty by the representatives of the United States in the two capitals (see Ch. Mem. p. 44, paras. 29 — 30) and by the Ministers of Foreign Affairs of the two countries (Ch. Mem. p. 45, paras. 31 — 32). It would be difficult to find in any of these analyses the slightest sign of any interpretation of the 1881 settlement which even faintly resembles the one now advanced by the Argentine Government.

— The German Minister in Buenos Aires, Herr Holleben, sent two reports on the 1881 settlement to Chancellor Bismarck. The first was dated 19 July 1881, that is before the actual signature of the Treaty. The German diplomat said that, according to the information available to him, the arrangements in course of completion included a line which ran from Point Dungeness towards the south across Tierra del Fuego and the southern islands. He appended a map illustrating this information (Ch. Plate No. 126). However, in a second report dated 29 July 1881, that is to say after the signature of the Treaty, Herr Holleben corrected this erroneous information by stating that, in the Treaty as signed, the dividing line in Tierra del Fuego stopped at the Beagle Channel, for, he said, the prolongation of this line beyond the Beagle Channel would have led to the allocation to Argentina of Cape Horn, something which would have been in contradiction to the Chilean Constitution. (Ch. Ann. Nos. 350 and 351).

— In a work published in 1881, the Argentine Under Secretary for Foreign Affairs, Mariano Pelliza, wrote:

"Irigoyen's proposition of 1876 is exactly the same as that of 1881 which was accepted by Chile. The Argentine Republic is left by virtue of this Treaty, as sole mistress of all the Atlantic coasts in Patagonia and Tierra del Fuego . . ."<sup>1</sup> (Underlining added)

— The views of E. Zeballos merit particular attention. Already in the course of the debate in the Argentine Chamber of Deputies in 1881, Zeballos criticized the Treaty which had just been concluded because, in his eyes, "it did not state with sufficient clarity that the waters of the Pacific would be Chilean and those of the Atlantic Argentinian".<sup>2</sup> But even more, in his well-known article of 1903, published in the Revista de Derecho, Historia y Letras of Buenos Aires, he expressed regret that the Treaty had set the seal on the loss for Argentina

<sup>1</sup> M. Pelliza, La cuestion del Estrecho de Magallanes, Buenos Aires, 1881 (reprinted 1969), p. 299.

<sup>2</sup> Gonzalo Bulnes, Chile y Argentina, Santiago, 1898, p. 151.

"of the Strait and the Magellanic territories to the South of the 52nd parallel, from the Atlantic to the Pacific, of the greater part of Tierra del Fuego, and of all the islands east of Cape Horn and below Beagle Channel".<sup>1</sup> For this former Argentine Foreign Minister there was no room for doubt: the Treaty had not established the criterion of the meridian of Cape Horn, and this Zeballos regretted. It was only later that Zeballos, anxious to convert his wishes into reality, changed his interpretation of the Treaty (cf. Ch. Mem. p. 95, para. 23).

— Neither the Argentine Minister Montes de Oca in his work on the Limites avec le Chili (published in French at Buenos Aires in 1898), nor the Argentinian jurist and statesman Luis Varela, in his book entitled La Republique Argentine et le Chili: Histoire de la demarcation de leurs Frontieres, (published in French also at Buenos Aires in 1899) made the least allusion, even for the part lying north of the 52nd parallel, to any "principle" of oceanic division.

— In his report to the Argentine Foreign Minister in 1898 the former Argentine Foreign Minister and Expert V. Virasoro wrote: "it should be noticed that nowhere does the Treaty mention a continental or interoceanic divortia aquarum, or any line dividing the hydrographic basins of the Atlantic or the Pacific". (p. 7, Buenos Aires 1898).

— It may also be recalled that neither the arbitration agreement of 1896 nor the arbitration protocols of 1915, 1938 or 1960 referred to any "oceanic principle" as a fundamental principle of the territorial settlement between the two countries. Indeed, in the course of the 1902 arbitration, the Argentine Government contested vigorously any suggestion that such a principle had been in any way whatsoever the basis of the settlement (see above, para. 51).

54. As for the maps which can shed light on the intention of the Parties regarding the meaning and general economy of the settlement, the Chilean Government has already shown that these absolutely contradict the thesis of the "stepped line", and do not contemplate the last "step of the staircase" — the one which is the most important to the Argentine Government, that is to say, the north-south line to the south of the Beagle Channel along the Cape Horn meridian (see Chapter I, paras. 18 — 20).

55. In conclusion, the Chilean Government submits that the territorial settlement established by the 1881 Treaty was inspired by the same considerations of compromise and mutual concession as the arrangement of 1876 and "the bases of agreement" proposed by the Chilean Government in June 1881 and accepted without change by the Argentine Government. Consequently, the terms of the Treaty must be interpreted in the light of the true purpose and object of the Treaty as they have been set out by the Chilean Government above and not, as the Argentine Government asked the Court to do, "without ever losing sight of the fundamental criterion of oceanic distribution" (Arg. Mem. p. 372, para. 19).

<sup>1</sup> Vol. XV, 1903, p. 430 (underlining added); Cf. Vol. XIV, 1902, p. 293, where Zeballos regretted that the assignment to Chile of all the islands south of the Beagle Channel had permitted Chile to be "converted into a power which is advancing progressively over the two oceans".

See also in the same volume of the *Revista* (p. 461) the opinion of Victorino de la Plaza, according to which, the Treaty had given to Chile "the islands and coasts of the Straits, a part of Tierra del Fuego and western and southern islands".

It is to a revision of the Treaty that the Argentine Memorial is inviting the Court to proceed. To this problem of the interpretation of the terms of the Treaty Chapter III of this Counter-Memorial will be devoted.

## CHAPTER III

### THE 1881 TREATY

#### A. — Analysis of the relevant provisions of the 1881 Treaty

##### (i) The absence of a single interpretative direction common to all the regions covered by the Treaty.

1. Although the two Parties agree that the solution of the present dispute is to be found in the interpretation of the relevant provisions of the 1881 Treaty (see above Chapter I, para. 4), they differ in their approach to the process of interpretation. In the view of the Argentine Government, the Treaty contains no more than a number of summary indications necessarily incomplete (cf. Arg. Mem. p. 355, para. 11: "Three brief Articles for a frontier which stretches over several thousands of kilometres can hardly do more than indicate the main criteria") and its provisions must, therefore, be interpreted in the light and the framework of certain general principles, such as, in particular, the "Atlantic-Pacific principle".
2. The Chilean Government, for its part, cannot accept such an approach to interpretation, which is open to a number of decisive objections.
3. There is no basis for the proposition that the Parties intended to limit themselves to an indication of the "main criteria" of the settlement in such a way as to have left themselves the trouble later of making good the gaps in the Treaty by a process of interpretation founded upon general principles not expressed in the Treaty. It is difficult to imagine that such long years of difficult and minute negotiations could have ended in the production of an instrument containing no more than some summary notes, a kind of *Stichwörter*, in such a way that the essence of the settlement should have been passed over in silence and remained simply a matter for implication. It is difficult to conceive of such a way of approaching a Treaty in which the Parties expressly declared that they were "desirous of terminating . . . the boundary dispute . . . and giving effect to Article XXXIX of the Treaty of April 1856", and which the two Governments are agreed in recognising as the sole source of the territorial rights of the two countries in the areas to which it related (cf. *supra*, Chapter I, para. 6). One may remember in this connection that the jurisprudence of the Permanent Court, like that of the International Court of Justice, runs counter to any interpretation of a boundary treaty in a sense which prevents it from fulfilling its principle function, which is "to achieve stability and finality" (Temple of Preah-Vihear Case, ICJ Reports 1962, p. 34; cf. Ch. Mem. p. 57, para. 8). The exhaustive and definitive character attributed to the Treaty of 1881 by the two Parties (see Ch. Mem. pp. 56 — 57, paras. 4 — 7) thus excludes the possibility of seeing in the relevant provisions of the agreement summary and incomplete indications, the interpretation of which would require recourse to principles unexpressed in the Treaty, such as the "oceanic principle".

4. As the Chilean Government has demonstrated at length in the previous chapter, the principles upon which the Argentine Government seeks to rely for the interpretation of the relevant provisions of the Treaty are quite foreign to its purpose and object. Not only did such principles never guide or inspire the negotiators of the Treaty, but also it is sufficient to reread the Treaty itself to observe that it is not governed by any general principle. The solution of the territorial conflict was sought and found on the basis of pragmatic criteria differing for each of the areas covered by the Treaty: Patagonia, the area of the Straits of Magellan, and the territories situate south of the Straits (see Ch. Mem. pp. 48 – 51, paras. 3 – 11). The Argentine Memorial put it very properly when it said that the definition of the frontier between the two countries “is done in stages”, in the sense that “the task of the negotiators was to fix the line of this boundary in three neighbouring sectors of the southern part of the South American Continent, the frontier being described from North to South” (Arg. Mem. p. 359, para. 15). The frontier to the north of the 52nd parallel is defined according to the criterion of “highest summits which divide the waters”. The frontier in the region of the Straits of Magellan is fixed in such a way as to leave the whole of the two shores of the Straits under Chilean sovereignty. The frontier south of the Straits of Magellan is drawn in such a way as to ensure for Argentina the continuity of its coast as far as Staten Island, while leaving to Chile the rest of the territory south of the Straits. Three different areas, three different criteria. To seek, as does the Argentine Memorial, a general interpretative direction common to all the provisions of the Treaty is, in short, to misunderstand demonstrably the object and purpose of the Treaty. The Government of Chile ventures to refer to what it has already said on this point in Chapter II above (in particular, paras. 39, 43 – 44, 48 and above all 49 – 50 (B) ).

5. Thus, the relevant provisions of the Treaty must be read and interpreted in the light of considerations which specifically inspired the territorial settlement in the relevant region – that is to say the territories south of the Straits of Magellan – and not in the light of any “overriding principle” or “fundamental criterion”.

**(ii) The relevant provisions of the Treaty: Articles II and III<sup>1</sup>**

6. At first sight, it is Article III of the Treaty which constitutes the heart of the matter, since it is in this Article that the position of the islands is expressly covered. In this sense, therefore, the Argentine Government is not wrong in stating that “the essential object of the arbitration consists of completing above all, by interpretation, the terms of Article III of the Treaty of 1881” (Arg. Mem. p. 348, para. 5).

7. However, the Argentine Government goes further. For it, Article III is not merely one, or even the principal, relevant provision, but the sole provision applicable to the solution of the dispute. Although Article II also includes a mention of “islands”, this in the Argentine view is no more than a simple reference to the terms of Article III which – they say – alone deals

<sup>1</sup> For the convenience of the Court, the full text of the Treaty, in the original Spanish and translated into English alongside, has been reproduced on separate pages and inserted in the cover of this Volume.

with the substantive problem. The Argentine Government considers Articles II and III as fundamentally distinct, and were it not for the fact that "Tierra del Fuego and adjacent islands" are mentioned at the end of Article II, the problem of the relationship between these two Articles would not arise. In the Argentine view, Article II disposes of the territories to the north of the Straits and "reserves to Article III the establishing of the boundary in the sector which is referred to as a whole by the phrase "Tierra del Fuego e islas adyacentes" (Arg. Mem. p. 363, para. 17). So, they continue, Article III controls the fate of the territories south of the Straits, and there is no need whatsoever, for the purposes of solving the present dispute, to consider any words other than those in that Article:

"The heart of the matter — the question behind the questions — has always been none other than the proper interpretation of those words of Article III of the Treaty of 1881 which define the boundary after the line reaches the Beagle Channel" (Arg. Mem. p. 348, para. 5).

"The territories dealt with in Article II stop at the northern shore of the Strait . . . Thus it is Article III which was to decide the destiny of the southern or Fuegian shores of the Strait of Magellan" (Arg. Mem. pp. 360-1, para. 15).

" . . . This final part of Article II was . . . not a substantive provision. It was a proviso . . . " (Arg. Mem. p. 320, para. 79). (underlinings added)

For this reason the consideration in the Argentine Memorial of "the relevant clauses of the text" is limited to an analysis of the words of Article III of the Treaty (Arg. Mem. pp. 359-404, paras. 15-41).

8. The Chilean Government considers that this Argentine attempt to reduce the last sentence of Article II of the Treaty to a simple connecting factor without any substantive significance of its own, fails to give full weight to the clear and unequivocal wording of the Treaty, as well as to the meaning of the territorial settlement decided by the Parties in 1881.

As is known, the solution worked out between 1876 and 1881 consisted essentially in guaranteeing to Argentina sovereignty over Patagonia and to Chile control over the Straits of Magellan and the territories south of the latter. Each element in the solution was marked by an exception. Argentine sovereignty over Patagonia was not to be exercised in the area situated between the Straits of Magellan and the Dungeness-Andes line, while Chilean sovereignty over the territories south of the Straits was not to be exercised over the eastern part of Tierra del Fuego (i.e. the Grand Island), and the islands east of it.

It was this settlement which Articles II and III of the Treaty reflected. Having defined the Dungeness-Andes line, Article II then allocated to Argentina the territory north of this line and to Chile the territory south of it. But as this last rule included an exception, Article II referred, for the purposes of implementing it, to the terms of Article III. The text of the final sentence of Article II is as follows:

"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".

(In Spanish:

"Los territorios que quedan al norte de dicha línea perteneceran a la Republica Argentina; y a Chile los que se extiendan al sur, sin perjuicio de lo que dispone respecto de la Tierra del Fuego e islas adyacentes el artículo 3º").

The position of the territories situate south of the Dungeness-Andes line is thus controlled at the same time by Article II and by Article III, and the respective sovereignties of Argentina and of Chile over these territories have their legal source and basis at one and the same time in both articles. This is true for Argentine sovereignty, which rests not only on the terms of Article III, but also on the proviso ("without prejudice") of Article II. This is also true for Chilean sovereignty, which rests not only on the provisions of Article III but also on the general formula of Article II, according to which there belong to Chile the territories south of the line without prejudice to what is provided in Article III in relation to Tierra del Fuego and the adjacent islands.

9. Thus, the structure of Articles II and III appears clearly. Article II states the principle of the settlement, not only north of the Straits, but also south of them. While Article II can only be understood when taking into consideration the explanation given in Article III, the reverse is equally true. Article III cannot be understood save in the light of the effects attributed to the Dungeness-Andes line by Article III. The first part of Article III refers to the "Tierra del Fuego" of which Article II speaks; its second part, to "islands" ("En cuanto a las islas . . ."). Thus, when Article III defines which parts of Tierra del Fuego and which islands belong to each of the two Parties, it does so not in an autonomous manner, but within the framework and in the application of the allocation established in principle by Article II. To the extent that it allocates certain territories south of the Straits to Argentina, Article III implements the "without prejudice" clause; to the extent that it allocates certain territories south of the Straits to Chile, it implements the clause: "y a Chile los (territorios) que se extiendan al Sur (de dicha línea)". Articles II and III of the Treaty thus constitute, in the words of the Permanent Court, "a complete whole, the different provisions of which cannot be dissociated from the others and considered apart by themselves" (Case concerning the Waters of the Meuse, PCIJ Ser. A/B, No. 70, p. 21).

One can thus see how wrong the Argentine Memorial is to regard Article II as a text exclusively applicable north of the line, and to consider that the territories south of the line are covered exclusively by Article III.<sup>1</sup> It is not only as an introduction to Article III that the final provision of Article II must be read; even less should one read it only as a reference provision without any substantive content of its own. On the contrary, if one may borrow an excellent formula from the Argentine Memorial, it has "as its direct and immediate subject matter the questions which are to be settled in this case" (Arg. Mem. p. 356, para. 12). In

<sup>1</sup> It may be added that, just as Article II regulates territory south of the line, so Article III deals with territory north of this line. The provision allocating to Argentina the islands "there may be on the Atlantic to the East of Tierra del Fuego and of the eastern coast of Patagonia" refers evidently not only to the islands which may be found east of Tierra del Fuego, but also to those which may be found off the coast of Patagonia and so north of the Straits. This implementation by Article III of the allocation in principle to Argentina set out in Article II of territories north of the line confirms, if it is still necessary so to do, the inseparable character of the two Articles.

(In Spanish:

"Los territorios que quedan al norte de dicha linea pertenecieran a la Republica Argentina; y a Chile los que se extiendan al sur, sin perjuicio de lo que dispone respecto de la Tierra del Fuego e islas adyacentes el articulo 3<sup>o</sup>").

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truth, Article II constitutes the fundamental provision for the division of the territories south of the Straits, and it may only be disregarded at the risk of completely distorting the interpretation of the Treaty in the present case.

### (iii) The final provision of Article II

10. As has been seen, the final provision of Article II states the principle that, without prejudice to what is said in Article III, all the territories to the south of the Dungeness-Andes line belong to Chile. When Article III allocates to Chile a part of Tierra del Fuego and the islands to the south of the Channel and to the west of Tierra del Fuego, it thus does no more than confirm and make precise an allocation already established in principle by Article II.<sup>1</sup>

Thus, while Article III allocates to Argentina certain specifically defined islands, it then confirms the allocation of islands to Chile in a form which the Chilean Government has thought it proper to describe as "comprehensive" and "all inclusive" (Ch. Mem. p. 50, para. 8).

This global character of the allocation of islands to Chile was emphasized even more in the text of the Irigoyen proposal of 1876. This recognized as Chilean "todas las otras islas al Sur del Canal de Beagle hasta el Cabo de Hornos, y las que se hallan al occidente de la Tierra del Fuego". What the Argentine Minister proposed was that, apart from the islands allocated by way of exception to Argentina by the preceding expression, all the other islands to the south of the line would belong to Chile. This is what Señor Barros Arana understood when he reported to his Government that "thus all other islands to the South of the Strait would be Chilean" ("Serían, pues, chilenas todas las demás islas al Sur del Estrecho" (Ch. Ann. No. 21, p. 42) ).

In grammatical terms, however, this formula was tautologous, and it was corrected on 3rd June 1881, at the time of the submission by the Chilean Government of the "bases of Agreement", without this purely formal correction having then attracted the least comment by either Party. Moreover, both Parties are agreed that the 1876 formula for the area south of the Straits is identical with that of the 1881 Treaty (Arg. Mem. p. 198, para. 76).

### (iv) Provisions of Article III

11. Article III deals with the two categories of territories mentioned in the final subparagraph of Article II. Its first two sentences control the position of Tierra del Fuego ("En la Tierra del Fuego se trazará una línea . . . La Tierra del Fuego, dividida de esta manera . . ."), while the third sentence regulates the position of the islands ("En cuanto a las islas . . ."). One finds, even in the structure of Article III, the two geographic concepts which form the subject of the "without prejudice" clause of the final provision of Article II. Thus there can be no doubt about their meaning.

<sup>1</sup> Likewise, of course, when Article III allocates to Argentina a part of Tierra del Fuego and certain islands, it does no more than confirm and make precise, as we have seen, either the expression "sin perjuicio" (for Tierra del Fuego, Staten Island and the islands east of Tierra del Fuego) or the provision allocating to Argentina the territories north of the line (for islands off Patagonia).

The Tierra del Fuego, of which Article III speaks, cannot in any way relate to the whole of the archipelagoes sometimes comprehensively described as "Tierra del Fuego". This expression can and does refer to nothing other than the principal island of the region, the Isla Grande, (which has come to be called simply "Tierra del Fuego"), since, as the Argentine Memorial itself emphasises, it is the only island to have been divided (Arg. Mem. p 371, para 19). By contrast to "Tierra del Fuego" thus conceived, the other islands of the southern archipelagoes are described by the expression "islas adyacentes": in Article II and included in "las islas" at the beginning of the third sentence of Article III. This sentence thus governs, as the Argentine Memorial states, "that part of the archipelago remaining to be attributed after the division of Isla Grande de Tierra del Fuego which had already been dealt with in the same Article" (Arg. Mem. p. 397, para 35).

12. The third sentence of Article III is thus directly concerned with the islands which are the object of the present dispute. It consists of two parts, separated by a semicolon. The first defines those islands which belong to Argentina; the second, those which belong to Chile.

If one gives the words which have been used their ordinary sense in their context and in the light of the object and purpose of the Treaty, only one conclusion can emerge: Picton, Lennox and Nueva<sup>1</sup> cannot be considered as Argentinian by virtue of the first part of the sentence, for they are manifestly not islands "on the Atlantic to the east of Tierra del Fuego and of the eastern coast of Patagonia"; Picton, Lennox and Nueva can only be considered as Chilean, for they are manifestly islands "to the south of Beagle Channel up to Cape Horn".

13. To avoid so decisive a conclusion, the Argentine Government enters into a laborious and artificial interpretation of the third sentence of Article III. For it is only on this basis that it can hope to maintain that the first part of this sentence allocates these islands to Argentina and that the second does not allocate them to Chile. With this purpose in mind the Argentine Memorial proceeds to a long analysis of each of the geographic terms used in this provision, and gives to each of these expressions a sense which it does not naturally possess. No doubt, as has already been shown, the Argentine Government is in agreement with the Chilean Government in acknowledging that geographical expressions used in the Treaty must be understood in the sense given to them by the Parties at the moment of the conclusion of the Treaty without taking into account theories which may have been subsequently worked out for reasons of a geographical, political or other kind (see above, Chapter I, para, 5). But this does not prevent the Argentine Government from completely distorting the sense of these terms in reading each of them in the light of postulates which the Chilean Government has thought it necessary to negate from the very beginning of the present Counter-Memorial, particularly the so-called "oceanic principle".

The long passages devoted by the Argentine Memorial to this analysis of the expressions

<sup>1</sup> The argument which follows will refer exclusively to these three islands and to the islands and islets adjacent to them (which for convenience will be called simply "the islands"). The problem of the islands within the Beagle Channel will be examined separately in paragraphs 70 et seq. below.

used in the third sentence of Article III (Arg. Mem. pp. 363-399, paras. 17-37) rest in fact upon a petitio principii of gigantic proportions. It runs thus: the first part of the sentence cannot be interpreted other than as having intended to give the islands to Argentina, since these are Atlantic islands; the second part of the sentence cannot be interpreted other than as having intended to deny these islands to Chile, since they are situate east of the meridian of Cape Horn, are in an Argentine sphere of influence and control maritime access to Ushuaia. In other words, it is not the analysis of the Treaty which leads the Argentine Government to conclude that Picton, Lennox and Nueva belong to Argentina. The Argentine Government claims that there is a pre-1881 premise: the islands are Argentine because of their "Atlantic" position. On that wrong basis it maintains that the Treaty cannot be interpreted otherwise than as confirming that fallacious postulate.<sup>1</sup> It would be no exaggeration for the Chilean Government to say that the long effort made by the Argentine Memorial to interpret Article III leads to no more than the proposition that every interpretation of this text which fails to give Picton, Lennox and Nueva to Argentina must be discarded as a priori absurd and unreasonable. Since these islands are Argentinian because they are on the Atlantic and control access to Ushuaia in a maritime zone of Argentine influence, it would be inconceivable — they say — that the Treaty should be interpreted as having intended to allocate them to Chile.

Thus the Argentine Memorial contends that the third sentence of Article III should be read as if it were written 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 or facing it<sup>2</sup> in the eastern part of the archipelago of Tierra del Fuego<sup>3</sup> and of the Atlantic section of the southern part of the South American Continent as far as Cape Horn<sup>4</sup>; and to Chile shall belong all the islands to the South of the Beagle Channel (that is the Channel running eastwards, later curving in an arc round Navarino and finally opening southwards into Bahia Oglander)<sup>5</sup> and to the west of Cape Horn<sup>6</sup>, and those there may be in the western part of the archipelago of Tierra del Fuego<sup>7</sup>.

If Article III were drafted in this manner, there could be no doubt that the three islands belong indisputably to Argentina. The only flaw in the argument is that the Article is not worded in this way, and that what it does say is not what the Argentine Government seeks to make it say.

14. At this point the Chilean Government might well end its refutation of the imaginative interpretation which the Argentine Memorial proposes for the last sentence of Article III.

<sup>1</sup> Thus, for example, the Argentine Memorial states that the Treaty cannot have allocated Lennox to Chile because it is "unthinkable" that Argentina would have accepted that Chile should possess "the key to the entry to the Channel" (Arg. Mem. pp. 410-1, para 44). One may observe in this connection that, at the end of the 19th century and the beginning of the 20th, the Argentine authorities, as well as various individuals of high standing in Argentina, nevertheless considered Lennox as a Chilean island (see Arg. Mem. p. 272, para. 27; pp. 224-5, para 30; p. 233, para 41). Even the Argentine Government shared this opinion in 1901, as is shown by map XIV annexed to the Argentine Evidence in the 1898-1902 arbitration (Arg. Map No. 34; see Arg. Mem. pp. 234-5, para 45, and p. 429, para. 55).

<sup>2</sup> Cf. Arg. Mem. p. 377, para 21, cf. p. 403, para 40.

<sup>3</sup> Cf. Arg. Mem. pp. 373-4, para 19.

<sup>4</sup> Cf. Arg. Mem. pp. 375-377, para 21.

<sup>5</sup> Cf. Arg. Mem. p. 396, para 33.

<sup>6</sup> Cf. Arg. Mem. p. 403, para 40.

<sup>7</sup> Cf. Arg. Mem. pp. 373-4, para 19.

Nevertheless, the Chilean Government believes that it is necessary to indicate its own positive analysis of this provision, so distorted by the Argentine Government, and to show that, contrary to the assertions of the Argentine Memorial:

- the first part of the sentence does not attribute the contested islands to Argentina;
- the second part of the sentence confirms the allocation of the contested islands to Chile.

(a) The first part of the sentence:

"... pertenecerán a la República Argentina la isla de los Estados, los islotes próximamente inmediatos a ésta y las demas islas que haya sobre el Atlántico al oriente de la Tierra del Fuego y costas orientales de la Patagonia . . ."

15. This first part of the third sentence of Article III establishes two conditions for the allocation of islands to Argentina. First, it is necessary that they should be situate "sobre el Atlántico"; secondly, they must be situate "al oriente de la Tierra del Fuego y costas orientales de la Patagonia". The Argentine Government does not hesitate to maintain that these conditions are satisfied by Picton, Lennox and Nueva (Arg. Mem. pp. 399-400, para. 38), for, according to it, the text must be interpreted as referring to "all the islands on the Atlantic or facing that ocean, as far as the tip of the continent" (Arg. Mem. p. 377, para. 21). To arrive at so unexpected a result, the Argentine Government is led to distort the sense of both "sobre el Atlántico" and of "al oriente de la Tierra del Fuego y costas orientales de la Patagonia".

16. (a) The Argentine Government contends that the first condition, that of location "sobre el Atlántico", would be satisfied because this expression does not refer simply to the islands in the Atlantic, but also to those giving on to the Atlantic or, to borrow a phrase from the Argentine Memorial, "fronting the Atlantic" or possessing a "facade on the Atlantic" (Arg. Mem. pp. 399-401, paras. 37-39; p. 403, para. 40; p. 410, para. 44). Besides, the Argentine Government does not appear entirely convinced of the interpretation which it advances because it then states:

"It might well be that the preposition 'sobre' is used purposely. Because 'sobre' was used, it might have been with the intention of designating by it not just islands situated in the Atlantic (i.e. not just 'en el Atlántico'), but also those coastal islands fronting the Atlantic, a concept which the word 'sobre' imports" (Arg. Mem. p. 399, para. 37).

If the Argentine Government has taken so much pains to enlarge the meaning of "sobre" and to read not "on the Atlantic", but "on the Atlantic or fronting it" (Arg. Mem. p. 377, para. 21; cf. p. 403, para. 40), it is because Picton cannot be presented as situate on the Atlantic once one seeks to maintain that this island "forms the northern and therefore Argentine coast of the Beagle Channel" (Arg. Mem. p. 14, para. 24; p. 400, para. 38). It is then necessary to consider the condition "sobre el Atlántico" as being satisfied in relation to Picton by the fact that "for the remaining part of its coast, it (Picton) faces the Atlantic and is thus an island "sobre el Atlántico" " (ibid). For Lennox and Nueva, the Argentine Government is content to assert that they are "surrounded by the waters of the Ocean, standing out at sea" (ibid) p. 14, para 24); but, hesitating doubtlessly over the entrance of the Beagle Channel, it nevertheless states, in contradiction with the passage just cited, that if Nueva and Lennox

were allocated to Chile, the latter would have "with the south and east coasts of those islands, an extensive facade on the Atlantic" (Arg. Mem. p. 410, para. 44). The ideas of the Argentine Government on this point are manifestly somewhat fluid.

17. For the purpose of disposing of the Argentine interpretation of the term "sobre" two brief comments will suffice.

The first is that for anyone in the least familiar with the Spanish language the expression "islas sobre el Atlántico" can only apply to the islands which are in the Atlantic, that is to say, surrounded by the waters of the Atlantic.

The second is that in the translation into English of the Treaty which the Argentine Government presented in the course of the Arbitration of 1898–1902, the expression "islas sobre el Atlántico" was translated by the words "islands lying in the Atlantic" (Argentine Evidence, 1900. p. 1117)<sup>1</sup>. The Court will also note that the Argentine statesman and lawyer Luis Varela in his work La République Argentine et le Chili: Histoire de la démarcation de leurs frontières, translated the same expression into French by the words "îles qui se trouvent dans l'Atlantique" (Buenos Aires, 1899, V.I, p. 105). The same translation is used by Señor Montes de Oca, the former Argentine Minister of Foreign Affairs in his work Le divortium aquarum continental devant le Traité de 1893 (Buenos-Aires, 1901, p. 79). Similarly, one may observe that in the French translation of the Treaty communicated by the Baron d'Avril, the French Minister in Santiago, to his Government as an annex to his dispatch No. 232 of 24 October 1881 (Ch. Ann. No. 43 (a), p. 142 (a)), the Baron d'Avril translated the expression "islas sobre el Atlántico" by "îles qui se trouvent sur l'Atlantique" and not, as the interpretation now proposed by the Argentine Memorial would have demanded, by "îles donnant sur l'Atlantique" or even by "îles sur l'Atlantique".

18(b) In the contention of the Argentine Memorial, Picton, Nueva and Lennox also fill the second condition required for the attribution of these islands to Argentina, namely of being situate "al oriente de la Tierra del Fuego y costas orientales de la Patagonia". To arrive at this conclusion, the Argentine Government is obliged to interpret the expression "al oriente de la Tierra del Fuego" in the sense of "in the eastern part of the archipelago of Tierra del Fuego" and to suggest that the idea of "costas de la Patagonia" covers the whole of the Atlantic coast as far as Cape Horn. In the two cases it is, so the Argentine Memorial maintains, the "Atlantic-Pacific principle" which demands and justifies such an interpretation.

The Argentine Government contends that the expressions "al oriente" and "al occidente de la Tierra del Fuego" which appear in the last sentence of Article III do not refer to the islands situate to the east (or to the west) of the large island of Tierra del Fuego dealt with in Article II and in the two preceding sentences of Article III, but to the islands situate in the eastern (or western) part of the whole archipelago of Tierra del Fuego. The Argentine Memorial writes on this subject:

<sup>1</sup> The same words were used by Argentina in the translation of the Treaty submitted by her in the "Argentine–Chile Frontier Case", in 1965 (Arg. Ann. 3).

"... the expressions 'al oriente' or 'al occidente' of Tierra del Fuego ought not to be understood as 'to the east' or 'to the west' of the coasts of Isla Grande previously referred to as 'Tierra del Fuego' ... It must be admitted therefore that, by the expressions 'al oriente' or 'al occidente' of Tierra del Fuego, the final sentence of Article III of the Treaty, just as in the third of the Bases of 1876, was intended simply to underline the fact that the islands referred to were situated in the eastern part or in the western part of the 'conjunto de islas', which forms the tip of the American continent. This attribution of islands ... was a necessary application of the overriding "Atlantic-Pacific principle" so starkly confirmed in 1893" (Arg. Mem. pp. 373-4, para. 19). (Underlining added)

Picton, Nueva and Lennox would thus belong to Argentina because they are situate not only "sobre el Atlántico" but also "in the eastern part of the archipelago of Tierra del Fuego" (Arg. Mem. pp. 399-400, para. 38).

The Argentine Government also insinuates that it is necessary to understand the expression "costas orientales de la Patagonia" as meaning "all the Atlantic section of the southern part of the South American continent, even as far as Cape Horn" (Arg. Mem. p. 375, para. 21)<sup>1</sup>; the Argentine Memorial alleges that "the coasts of Patagonia are referred to here in connection with the Atlantic" and that this reference was probably inserted "in order to make it clear beyond any doubt that Argentina was not ceding to Chile any Atlantic Patagonian territory" (Arg. Mem. p. 377, paras. 21-22). On this count also, therefore, Picton, Nueva and Lennox were Argentinian.

19. The Court will observe the justification advanced by the Argentine Government in support of its interpretation; the distribution of the islands between Argentina and Chile according to whether they were in the eastern or the western part of the archipelago "was a necessary application of the overriding "Atlantic-Pacific principle" ". Likewise it is by reference to the "oceanic principle" that the extensive interpretation of "costas orientales de la Patagonia" is supported. In other words, since it must be admitted once and for all that the Treaty is dominated by the "oceanic principle", the expressions "al oriente" (and "al occidente") of Tierra del Fuego and "costas orientales de la Patagonia" must a priori be interpreted as an illustration and implementation of this "principle". Once the fallacy of this approach is exposed—and the Chilean Government has shown its weakness—the proposed interpretation falls to pieces.

20. Once again, and leaving aside the absence of any basis for the "oceanic principle", it becomes unnecessary to enter into long explanations to appreciate the worthlessness of the interpretation advanced by the Argentine Memorial.

First, the Chilean Government fails to see how the expression "al oriente (or al occidente) de" can be interpreted as "in the eastern (or western) part of". In the English translation of the Treaty provided in its Memorial, the Argentine Government itself translates—very precisely — "to the East (or the West) of Tierra del Fuego". No more in English than in Spanish

<sup>1</sup> Contrary to this Argentine suggestion, the cartography, the diplomatic correspondence and the common understanding of the negotiators of the 1881 Treaty (including Sr Irigoyen himself) consistently reflected the view that "Patagonia" ends at the north shore of the Straits of Magellan. On this point see "Further Remarks concerning the Cartographical Evidence".

can such an expression be understood as referring to the eastern (or western) part of Tierra del Fuego.<sup>1</sup>

21. Even more difficult to accept is the interpretation of the expression "Tierra del Fuego", as used in the third sentence of Article III, as referring to all of the islands situate south of the Straits of Magellan. The Argentine Government is so well aware of this difficulty that it devotes more than ten pages to this linguistic demonstration (Arg. Mem. pp. 363–374, paras. 17–20). It takes great pains to show that the islands and islets south of the Straits of Magellan form "a compact of territory composed of islands but which was once united with the rest of the continent, and later separated by a formation of a network of channels of glacial origin, but still forming a continuation of the continent as far as the southernmost extremity" (Arg. Mem. p. 364–365, para. 17). The Argentine Memorial speaks in this connection of an "agglomeration of islands (forming) . . . a single compact to which the term 'Tierra' is not inappropriate" (Arg. Mem. p. 365–366, para. 17) and of "conjunto de islas" (Arg. Mem. p. 369, para. 18; p. 374, para. 19). The Argentine Government also takes pains to show that the first explorers of the region thought that all these islands formed a "single land mass described compactly as 'Tierra del Fuego'" (Arg. Mem. p. 366, para. 17) and that even after these explorations several 19th century maps showed the whole of the archipelago under the name of Tierra del Fuego (Arg. Mem. p. 367, para. 17). The Argentine Government is also at pains to show, principally by reference to the speech of Irigoyen in 1881, that the expression "Tierra del Fuego" can be used, and was used in the 19th century, as it is still today, either in the wide sense (the whole archipelago) or in the narrow sense (Isla Grande alone) (Arg. Mem. pp. 364–365, para 17).

22. The Chilean Government fails to see the purport of these remarks. The geological origin of the archipelago can be of little importance. Similarly, early maps showing Tierra del Fuego as "a single land mass" can be of no more importance. The negotiators were looking not at those maps but had available more modern maps, which showed clearly to the south of the Straits a large island and a number of adjacent islands and islets. Finally, it matters little that one can use the expression "Tierra del Fuego" in two different ways. What matters, and matters alone, is not the meaning which one could ascribe to the expression "Tierra del Fuego", but the meaning which the authors of the Treaty effectively did attribute to it. Now on this point there can exist no doubt whatsoever.

As the Irigoyen proposal of 1876 had already done, Articles II and III of the Treaty placed the expressions "Tierra del Fuego" and the "islands" in clear opposition to each other. The Argentine Government cannot help but recognize that by "Tierra del Fuego", as this expression is used in Article II and in the two first sentences of Article III, there was meant only the "main island", i.e. Isla Grande, in contrast with "the other islands of the entire Fuegian archipelago" (Arg. Mem. pp. 370–1, para. 19). In these circumstances, how is one to imagine that after having used the expression "Tierra del Fuego" three times in its narrow sense, the Parties should have abruptly passed in the same article to the broad meaning of the expression? Even a liberal dash of imagination cannot bring such an interpretation into line with the intention of the Parties.

<sup>1</sup> The French translations already mentioned by Varela, Montes de Oca and Baron d'Avril also use the expressions: "à l'est (or "à l'ouest") de la Terre de Feu"; "à l'orient (or "à l'occident") de la Terre de Feu".

23. This interpretation corresponds so little with the intention of the Parties that, as the Chilean Government has already emphasised in its Memorial (p. 49, para. 6), all the maps illustrating the Irigoyen proposal of 1876 and the 1881 Treaty attach the name of Tierra del Fuego only to the Isla Grande<sup>1</sup>. Foreign Minister Irigoyen himself in his 1881 speech, while mentioning the double meaning of the word, added that the broader meaning was the less correct one (see passage quoted in the Argentine Memorial p. 201, para. 80) and spoke of the division of "the large island . . . generally called Tierra del Fuego" (Ch. Ann. No. 42, p. 135; this passage is quoted also in the Argentine Memorial p. 201, para. 80, and p. 371, para. 19; cf. Ch. Mem. p. 45, para. 31).

The intention of the Parties, as it appears from the very structure of the text as well as from the documents and maps connected with the negotiations, leaves no room for doubt. As in Article II and in the first two sentences of Article III, the expression "Tierra del Fuego" in the third sentence of this Article refers only to the Isla Grande.

24. The Argentine Government invokes, it is true, another consideration in support of its interpretation. In its view, the interpretation of the formula "al oriente de la Tierra del Fuego" would, according to the natural meaning of the words used, lead to an absurd result for the very simple reason that, apart from Staten Island, "there are absolutely no 'islas sobre el Atlántico' situated to the east of the coasts of Isla Grande de Tierra del Fuego" (Arg. Mem. p. 373, para. 19). The same argument is advanced to support the view that the "costas orientales de la Patagonia" cannot be the coasts of Patagonia but are the Atlantic coasts as far as Cape Horn (Arg. Mem. p. 375, para. 21: "there are no islands to speak of in the Atlantic, off the Argentine coast north of the Strait"). Likewise it is also maintained that, if the last part of the third sentence refers to the islands situate to the west of the Isla Grande, certain of the southern islands cannot be allocated to either of the two States (Arg. Mem. p. 373, para. 19).

25. It is not difficult to dispose of such an argument. The Court will have observed that the Treaty uses the subjunctive expression "islas que haya", and this conditional nuance is as well rendered by the Argentine Memorial which translates it as "such islands as are" as by the Osborn translation which rendered it as the "islands there may be". In other words, the draftsmen of the Treaty proceeded, as much for Argentina as for Chile, to an abstract definition without concerning themselves over the question of ascertaining if this definition corresponded with the concrete existence of numerous or important islands or islets. It is perfectly easy to understand this way of proceeding. For Argentina it was a matter of allocating the islands and islets which could be found off the arc of a circle formed by the coasts of Patagonia and of Tierra del Fuego as far as the extension formed by Staten Island. For Chile, it was a question of allocating the ensemble of islands south of the Straits, which had not been allocated to Argentina by the preceding sentence. In giving to Argentina the islands "que haya sobre el Atlántico al oriente de la Tierra del Fuego y costas orientales de la Patagonia" and to Chile the islands south of the Beagle Channel and those "que haya

<sup>1</sup> The same is true of the map annexed by the Chilean negotiator and Expert Barros Arana to his report of 1890 (Ch. Plate No. 49).

al occidente de la Tierra del Fuego”, the draftsmen of the Treaty were right to think that they had adequately covered the whole collection of situations which were capable of arising in fact.

26. As for the proposition that there are no islands which satisfy this condition, the Chilean Government recalls that it referred in its Memorial to several islands which can be found “sobre el Atlántico al oriente de la Tierra del Fuego y costas orientales de la Patagonia” (Ch. Mem. p. 20, para. 50).

With reference to the proposition that there are unattributed islands which are neither west of Tierra del Fuego nor south of the Beagle Channel (Arg. Mem. p. 373), it is to be recalled that Article II of the Treaty approaches the whole question in terms of Chilean sovereignty south of the Andes-Dungeness line. Consequently, unless there are territories specifically allocated to Argentina in accordance with the “without prejudice” clause, such territory would be indisputably Chilean.

In any case Gordon Island and other islands in its vicinity, as perusal of the map will show, are islands in substantial part to the west of Tierra del Fuego (which reaches south to approximately lat. 55° 3' S., at Cape San Pio.). The above consideration would of its own force dispose of the Argentine essay in reductio ad absurdum. Moreover, it is equally the case that in relation to the latitudinal conception of the Channel adopted in the negotiations of the Treaty and indicated on the associated maps (Ch. Plates 8, 9, 10, 11, 12, 16, and 21), Gordon and the islands in its vicinity are south of the Channel.

27. The Chilean Government hopes that it has thus succeeded in showing that the first part of the third sentence of Article III cannot be interpreted as allocating to Argentina the islands lying in the Atlantic or facing it in the eastern part of the archipelagoes as far as Cape Horn. If the Argentine interpretation were the correct one, Navarino would also belong to Argentina, for according to her, its eastern coast has an “Atlantic frontage”. Nonetheless, as the Court knows, the Argentine Government itself recognises the “unquestionably Chilean” character of this island. (Ch. Ann. No. 330, p. 577 and Ch. Ann. No. 366.)<sup>1</sup>

The truth is that the first part of the third sentence of Article III has no other function than to allocate to Argentina the islands which may lie off the coasts of Patagonia and to the east of the Argentine coast of Tierra del Fuego. This provision thus constitutes the complement, as much of the provision of Article II giving to Argentina the whole of the Patagonian coast north of the Straits of Magellan, as of the disposition of Article III giving to Argentina the eastern part of Tierra del Fuego. From the time when the Parties reached agreement to place under Argentine sovereignty a continuous Atlantic seaboard in the form of the arc of a circle stretching from Patagonia as far as the south-eastern extremity of Tierra del Fuego and Staten Island, it followed that they should also allocate to Argentina all those islands which might lie off this continuous coastline. That and nothing else is what is meant by the first part of the third sentence of Article III. To wish to make it say something else in such a way as to

<sup>1</sup> The Argentine Government also, in 1960, recognised Lennox Island and its adjacent islets as belonging to Chile. Moreover it may be recalled that, at the same time, Argentina did not regard the question of sovereignty over Lennox Island as being part of “the sole question pending in relation to the interpretation of the Boundary Treaty of 1881.” (Ch. Ann. No. 269, p.488).

bring within its scope those islands which are manifestly not situated to the east of Tierra del Fuego and the Patagonian coasts, but much further south, is to run directly contrary to the intention of the Parties and to read into the text something quite different from what is there.

(b) The second part of the last sentence of Article III:

**“ . . . y pertenecerán a Chile todas las islas al Sur del Canal de Beagle hasta el Cabo de Hornos y las que haya al occidente de la Tierra del Fuego.”**

28. This second part of the third sentence of Article III has as its object, as the Chilean Government has shown, the confirmation of the allocation to Chile of the islands situate south of the Straits of Magellan other than those which the first part of the same sentence assigns to Argentina. It thus constitutes the implementation of the provision of Article II allocating to Chile all the territories south of the Dungeness-Andes line; at the same time as it takes into account the allocation to Argentina, as a result of the previous provisions, of the eastern part of Tierra del Fuego and the islands east of its coast. The islands east of Tierra del Fuego having been assigned to Argentina, the draftsmen of the Treaty needed to do no more, in accordance with the method already followed by Señor Irigoyen in 1876, than assign to Chile the other islands, that is to say on the one hand those situate south of Tierra del Fuego and, on the other hand, those situate to the west of Tierra del Fuego. This was very precisely the object and purpose of this last provision of Article III.

29. The Argentine Government, which has already had difficulty in including Picton, Nueva and Lennox in the category of islands “on the Atlantic to the east of Tierra del Fuego and of the eastern coast of Patagonia”, has run into even greater difficulty in excluding these islands from the category, of which they clearly form part, of “islands to the south of Beagle Channel up to Cape Horn”. It is to this point that the Argentine Government directed most of its effort.

In an attempt to escape from the very evident consequences of the last provision of Article III, the Argentine Government, as already shown in Chapter I above (paras. 11 et seq.,) has advanced a double-barrelled argument.

First, it sought to define the concept of “Beagle Channel” in such a way that the disputed islands could not be regarded as situate “to the south of the Beagle Channel”.

The Argentine Government, however, knew that this displacement of the Channel would be extremely difficult, not to say impossible, to justify in the face of documents and maps which show in an irrefutable manner that the Channel which the draftsmen of the Treaty intended to use as the boundary south of Tierra del Fuego, was the Channel running along the south coast of Tierra del Fuego and entering the ocean between Cap San Pio and Nueva.

That is why the Argentine Government introduced a second basis for its case, namely, that of the “Atlantic-Pacific principle”. In this way it was able to maintain that, whatever might otherwise be the course of the Channel, Picton, Nueva and Lennox could not in any

event be regarded as Chilean, since they were situate east of the meridian of Cape Horn, that is to say, in the Atlantic. However, it was not easy to relate this thesis to the terms of the Treaty. If the last sentence of Article III speaks of the Atlantic in connection with the islands allocated to Argentina, it does not use this word in connection with the islands allocated to Chile (and as for the word "Pacific", it does not appear anywhere in the Treaty). How was the Argentine Government to be able in these conditions to limit to the islands situate west of the meridian of Cape Horn the allocation made to Chile of "all the islands to the south of Beagle Channel up to Cape Horn"? The Argentine Government had no alternative but to attach this limitation to the expression "hasta el Cabo de Hornos" thus interpreting this part of the boundary as an eastern limit.

So then it is the interpretation of the expressions "al Sur del Canal de Beagle" and "hasta el Cabo de Hornos" which is at the heart of the problem raised by the scope of the last provision of Article III.

(I) " . . . al Sur del Canal de Beagle . . . "

(i) **Statement of the problem: the search for the intention of the Parties.**

30. No one will dispute that from the time when there first arose more than 20 years after the conclusion of the 1881 Treaty an Argentine claim to Picton, Nueva and Lennox, the fundamental question was that of determining what exactly is the body of water indicated by Article III of the Treaty under the name of "the Beagle Channel".<sup>1</sup> Now, if the Parties are agreed on the identification of the Channel from the neighbourhood of Punta Navarro to the west, it is a quite different situation east of that point. Ultimately, the essence of the problem is that of identifying the eastern part and, more particularly, the eastern opening of the Beagle Channel.

Here, indeed, is one, if not the, principal key to the dispute, and the Chilean Government can do no more than indicate its agreement with what has been written on this subject in the Argentine Memorial:

" . . . The most important question that arises is what was the course of the Beagle Channel? For the text of the Treaty is silent on that essential point. What then was the understanding of the Treaty draftsmen on this question? The most important problem in the Argentine-Chilean dispute, the problem which one comes up against whenever any attempt is made to resolve the dispute, may be reduced to the following: what was, for the Treaty of 1881, the eastern opening of the Beagle Channel?" (Arg. Mem. p. 382, para. 27).

This way of defining the problem involved in the present dispute is rigorously precise. The Argentine Government, however, doubtless aware of the almost unsurmountable difficulty involved in establishing that the disputed islands are not situate south of the Beagle Channel, has thought it wise to develop what has earlier been called a subsidiary or fall back

<sup>1</sup> See Ch. Mem. p. 93, para 17. Also Arg. Mem p. 242, para 56.

argument (Chapter I, para. 13 — 6) based, not on the situation of the islands by reference to the Beagle Channel, but on their "Atlantic" character. In doing this, the Argentine Government has obscured and complicated a dispute which related essentially to the question to which the extract just quoted from the Argentine Memorial gives so striking and precise a formulation.

31. As for the appropriate way of resolving this question, the Chilean Government can also rely upon the criteria mentioned in the Argentine Memorial:

"... the question, put in this way, could only be solved on the basis of opinion at the time and, more specifically, of the ideas which may have been held by the negotiators of the Treaty ... What is pertinent is to establish what they saw as the course of the Beagle Channel, above all in its final section, as far as the point when this seaway debouches into the Atlantic ... The task is to study what was in the mind of the negotiators on both sides, and what was, in their view, the course and the eastern opening of the seaway called the Beagle Channel, and nothing more" (Arg. Mem. pp. 382 — 383, para. 27 and 28).

This is in truth the question: not what was written or thought about the course of the Channel "after the birth of the dispute ... not only (by) geographers, but sailors, politicians and journalists—from both camps—" (ibid), but exclusively what the Parties to the Treaty intended by the expression "Beagle Channel" at the moment and in the context in which it was used.

In order to understand what elements presented themselves to the eyes of the negotiators of 1876 — 1881 and the role these elements must have played in the general economy of the territorial settlement, it must not be forgotten that, unlike modern diplomatists, the negotiators did not work with detailed maps of the region and still less with the assistance of aerial surveys and personal knowledge of the area. Clearly they knew of the British Admiralty charts, but, for the purpose of graphic representation of the various formulae for a settlement, the negotiators made use of ordinary small scale maps of the extremity of the continent. On such maps the Beagle Channel appeared as a narrow and more or less straight line cutting across the southern part of the continent and consequently as a line impressing itself upon the negotiators as a "natural seaway boundary" (Arg. Mem. p. 361, para. 16): in particular, this is to be seen on the maps reproduced in the Chilean Atlas, Plates Nos. 8, 9, 10, 16, 17, 21. The negotiators probably also knew of various English, French and Argentine maps of the middle of the nineteenth century, on which the Channel would have appeared in the same way, that is to say, as a straight line which could be readily adopted as a line of territorial division (on the maps, see below, para. 59). The investigation of the intention of the Parties in relation to the concept of the Beagle Channel obviously must be based upon the considerations which operated at the time of negotiation of the Treaty. The cartographic and photographic information available today, whatever its scientific significance might be, has no direct relevance to the determination of the intention of the Parties and, accordingly, no direct relevance to the interpretation of the Treaty as a legal instrument. On this point the Parties would appear to be entirely in agreement.

(ii) The Argentine attempt to displace the Channel: one version after another of the "intention" of the Parties.

32. The intention which the Argentine Government attributes to the draftsmen of the Treaty is wholly imaginary. It is an intention which is belied in a decisive way by the documents and maps associated with the negotiations, as well as by the declarations of the two Governments and their attitudes after the conclusion of the Treaty. In an attempt to justify its unjustifiable claim to sovereignty over the islands, whose situation by reference to the Channel amounts to a fact which reasoning can hardly deny, the Argentine Government has chosen to pursue the course which it has followed for three-quarters of a century, namely, the constantly renewed attempt to see the Channel in places where it is not. The Chilean Government is at least glad to note that, amongst the numerous lines of the eastern section of the Beagle Channel invented by the Argentine authorities since the beginning of the century, they now appear at last to have made their choice. The Beagle Channel, to which the authors of the 1881 Treaty intended to refer, was, they now say, the waterway which, after separating Tierra del Fuego from Navarino, turns towards the south-east to pass between Navarino and Picton and terminates eventually in Oglander Bay. The Argentine Memorial is explicit on this point:

"For the negotiators of the Treaty of 1881, the Beagle Channel presented no problem of identification. From its central part, it passed eastwards, turning towards the south-east at Isla Snipe until it met the waters of 'Oglander Bay' to the south of Isla Picton" (Arg. Mem. p. 116, para. 94).

"The course of the Beagle Channel . . . could not, in the mind of the negotiators of the Treaty, have been other than that which runs eastwards, later curving in an arc round the coast of Navarino and finally opening southwards into Bahia Oglander" (Arg. Mem. p. 396, para. 33). (Underlinings added.)

33. Before approaching the heart of the problem, the Chilean Government ventures to draw the attention of the Court to one important point. The definition of the Beagle Channel which the Argentine Memorial advances as a self-evident truth observed by all — ranging from those who explored the Channel and made the first descriptions of it to the Governments which applied it in the Treaty and including the ministers and diplomats who concluded it — is a fact which appears to have been only recently discovered. If not, how is one to explain that fifteen years after the conclusion of the Treaty the Argentine Government believed it necessary to seek the views of the British Admiralty regarding the line of the Channel in the hope of obtaining an acknowledgment that after all it might perhaps pass south of Picton? (Arg. Mem. pp. 216 — 219, paras. 20 — 23). And if the intention of the Parties as to the definition of the Beagle Channel had at all times been as clear as the Argentine Government today pretends that it is, why then did this Government itself publish in 1900 a "Derrotero" showing the three islands as Chilean? The Argentine Government attempts to explain this fact as follows:

" . . . thinking on the boundary at this time in Buenos Aires was at its most confused and was not resolved until Saenz Valiente reported late in the year on the discoveries made during the 'Almirante Brown' surveys". (Arg. Mem. pp. 229 — 230, para. 35).

Thus it was necessary to await the work of Saenz Valiente in 1899 — 1900 in order that, thanks to the invention of a "Moat Channel" to be placed in the new Argentine charts near the "Moat Bay" of King and Fitzroy, (which was naturally placed close inshore in appropriate relation to an indentation), the Beagle Channel should be conceived as turning sharply to the south-east to pass south of Snipe, Solitario, Hermanos and Picton (on the "discoveries" of Saenz Valiente, see Arg. Mem. pp. 231 — 233, paras. 37 — 41; Ch. Mem. pp. 91 — 93, paras 13 — 16, and Chapter IV below, para. 81 et seq.).(On the invention of "Moat Channel", compare below, para. 45).

34. On its own admission, it was not until a score of years after the conclusion of the Treaty, and "once in possession of a better geographical picture of the area as a result of the 'Almirante Brown' expedition" (Arg. Mem. p. 235, para. 46), that the Argentine Government thought it right formally to challenge the line of the boundary on which, as the Chilean Government has abundantly shown in its Memorial, the Parties had not the least doubt or hesitation, neither in 1876 (at the moment when they laid down the basis of their agreement) nor in 1881 (when they signed the boundary treaty) nor in 1893 (when they concluded a Protocol to remove "the difficulties with which the experts have met or may meet in the fulfillment of their commission and to establish between both countries a complete and sincere accord") nor in 1896 (when they submitted to the arbitration of the British Government certain territorial problems). It is hardly necessary to recall in this connection that, when reporting to his Government in 1915 on the difficulties recently arisen between the two countries regarding their boundary in the south, the British Minister in Buenos Aires, Sir R. Tower, observed that if this question had not been included in the 1896 Arbitration, it was precisely because

"no question has apparently been raised by Argentina as to the interpretation of the said Article (III). and . . . maps, issued either by Argentina or Chile, appear to have marked the Beagle Channel as running to the north of Picton and Nueva Islands" (quoted in Ch. Mem. p. 100, para. 36).

35. The truth is that, at the moment when it negotiated and concluded the 1881 Treaty, the Argentine Government—no more than the Chilean Government,—had the least hesitation over the track of the Beagle Channel in its eastern section. For the one Government as for the other, as moreover for all those who had studied or described this area since its discovery, the Beagle Channel skirted the southern coast of Tierra del Fuego as far as Cap San Pio, its southern shore being formed by the northern coast of Navarino, of Picton and of Nueva,

So, for instance, at the moment of the final negotiations which reached their culmination in the 1881 Treaty, the Argentine Government knew perfectly well that the Irigoyen proposal of 1876 had been interpreted by both the Chilean negotiator and the Chilean Government as contemplating a Channel running the length of the southern coast of Tierra del Fuego, that is to say, to the north of the three islands. The Argentine Government undoubtedly knew of the map published towards the end of 1878 by the Chilean newspaper "El Mercurio" and which indicated amongst others the line proposed by Sr Irigoyen two years earlier (Ch. Plate No. 11). (See E. Quesada "La Política chilena en el Plata" Buenos Aires, 1895, p. 76). Besides, on this

map (which the Baron d'Avril had communicated to the French Government as an annex to his dispatch No. 68 of 30 December 1878: Ch. Ann. No. 32, p. 70), the Beagle Channel ran in a straight line towards the east along the south coast of Tierra del Fuego. The Argentine Government knew also — because it had been published in the Memoria de Relaciones Exteriores of 1878 (pp. 42 — 43) — the telegram which the Chilean negotiator had sent to his Government on 5 July 1876 in order to inform it of the proposals of Sr Irigoyen, and in which the Chilean negotiator interpreted these propositions as giving to Chile "all other islands to the South of the Strait" (Ch. Ann. No. 21, p. 42). Can one imagine for a moment that, if the Argentine Government had not shared the opinion of the Chilean Government on this important point, it would have failed to take advantage of the 1881 negotiations in order to introduce a formula other than that "al Sur del Canal de Beagle"? The very fact that the 1881 negotiators used the same concept as employed in 1876 shows clearly that they intended to retain the meaning which it had earlier been given. Indeed, the Argentine Government had all the less reason to seek any change in the draft because it had itself some time before suggested a formula in which the border would follow the Beagle Channel "parallel to 55° South latitude until the Atlantic Ocean" — a proposal which was illustrated by a map signed by Sr Elizalde, the Argentine Minister of Foreign Affairs on which the Beagle Channel appeared exactly where the Chilean Government has always seen it. (Ch. Ann. No. 29, p. 65; Ch. Plate No. 9; Ch. Mem. pp. 29 — 30, paras. 32 — 33).

36. It was necessary to wait a score of years until certain Argentine political and scientific circles began to pursue the gigantic attempt to shift the Beagle Channel, of which the Argentine Memorial in the present case constitutes the most recent illustration, and of which the purpose was to modify the definition of the Beagle Channel in such a way as to remove the three islands from the position which in fact they hold south of the Channel. Since then, these more or less official versions can hardly be counted. In 1917, the Chilean international lawyer J. Guillermo Guerra reckoned that there were no less than ten different Argentine versions of the definition and track of the Beagle Channel in its eastern section (La soberanía chilena en las islas al Sur del Canal Beagle, pp. 243 — 246), and this list was taken up again in 1931 by the distinguished Argentine Foreign Minister and lawyer, Carlos Saavedra Lamas, in his work La crise de la codification et la doctrine argentine de droit international (Paris, 1931, pp. 285 — 286). The Chilean Government has noted the most important of these theories in its Memorial (see Ch. Mem. pp. 85 — 87, paras. 1 — 5; p. 95, para. 23; pp. 97 — 98, paras. 30 — 31; p. 101, para. 37).

37. It must be acknowledged that not all these theories bore a governmental seal, but a number of them were advanced very formally by the Argentine authorities.

In 1905, for example, the Argentine Hydrographic Service appears to have suggested a formula which comes very close to the version now adopted in the Argentine Memorial (see Guerra, op. cit., pp. 230 — 1 and 243 — 244). This formula itself appears to have been descended from a theory elaborated by Saenz Valiente after the surveys by the Argentine warship "Almirante Brown" in 1899 — 1900 (see on this subject Ch. Mem. pp. 91 — 93, paras. 13 — 16; Arg. Mem. pp. 231 — 233, paras. 37 — 41). But while for Saenz Valiente the Channel

had two branches, one to the north and the other one to the south of Picton, with the southern branch in any event forming "the axis" of the Channel by reason of its greater depth (whence originated the name "Moat Channel" he gave to the true mouth)<sup>1</sup>, for the Argentine Hydrographic Service the Channel had only one branch, between Navarino and Picton, and this ended with a line joining Cape Maria on Picton to Point Yawl on Navarino (see the sketch by Guerra, op. cit., p. 244).

Ten years later, in 1915, the Argentine Government seemed to maintain that the Channel ended at the meridian of 67° 15', that is to say, before Picton (cf. Ch. Mem. p. 98, para. 31).<sup>2</sup>

In 1917, Argentina added a branch to its 1915 "Beagle Channel". In her "Sailing Directions" of that year, one reads: "Beagle Channel which extends between the Lennox and Nueva Islands, between Picton and Navarino . . ." (Republica Argentina — "Derrotero Argentino" — 2nd edition, Buenos Aires 1917, p. 357) (Underlining added). She returned to her "Short Channel" version in 1955 when her "Sailing Directions" described the "Eastern limit" of the Beagle as "the line which joins Navarro Point (i.e. 67° 15') with the Eugenia islets". ("Derrotero Argentino", Buenos Aires 1955, p. 155). This position was confirmed by Argentina in a statement made on 12 August 1958 to the Press on the occasion of the incident concerning Snipe (on this incident see Ch. Mem. p. 121, para. 16, and Arg. Mem. pp. 268 — 271, paras. 96 — 98) and reproduced in the Buenos Aires newspapers (particularly by La Nación) on the following day. The Argentine Minister did not hesitate to say that "the interpretation of the Argentine Republic is that the Beagle Channel does not continue eastwards beyond Navarino Island" (Ch. Ann. No. 378).

With reference to the area south of the Beagle Channel, the 1955 Argentine "Derrotero" included a version more in line with the truth, and the abandonment of which in the Memorial one can only regret. In that "Derrotero" as well as in the one of 1962, Picton Island is described as being situate

"two miles to the east of Navarino Island, from which it is separated by Paso Picton" (3rd edition, vol. I, p. 131),

while as regards Paso Picton the document stated:

"This is the passage which runs between the Picton and Navarino Islands. To enter Paso Picton coming from the Beagle Channel, ships are advised . . ." (ibid. p. 139). (Underlinings added).

The significance of these statements will not be lost upon the Court.

38. The Argentine Government, having at last chosen definitively, so one hopes, between the

<sup>1</sup> This appears from the manuscript report to the Argentine Minister of the Navy submitted by Saenz Valiente, p.4 (document included as Ch. Ann. No. 367 supplied to the Chilean Government at its request). See also Chapter IV, para 81 et seq. below.

<sup>2</sup> On the Argentine position in 1915, cf. the dispatch of the British Minister in Buenos Aires of March 1915 (Ch. Ann. No. 89 p. 251).

numerous formulas which have appealed to it at one or another moment, the task of the Chilean Government, and no doubt that of the Court also, is much eased. The Chilean Government is bound in any case to emphasise how little justified is the impression of established truth which the Argentine Government seeks to attach to the theory that it has finally just adopted, when as long ago as 1931 the former Argentine Minister for Foreign Affairs, Sr Saavedra Lamas, did not hesitate to write that, in the light of the many definitions proposed from the Argentine side for the concept of the Beagle Channel, "the problem of its determination, already hard, becomes almost insoluble" (op. cit., p. 286). From a question originally quite simple, the Argentine Government has succeeded in making, from the beginning of this century, a virtually inextricable problem. That it chooses today, for the purpose of the arbitration now in hand, a clear and simple solution is not a matter for complaint. But that it presents this as being valid for all time and as corresponding to the intention of the Parties to the Treaty of 1881, represents an attitude on which the Chilean Government thought it necessary to dwell before dealing with the substance of the problem.

**(iii) A search for the intention of the Parties or a search for the intention of Fitzroy?**

39. As was to be expected, the Argentine Memorial devotes many pages to the definition of the Beagle Channel. If one puts on one side the description of it given in Chapter I, devoted to a geographical study of the region referred to in the Compromiso (Arg. Mem. p. 13, para. 23), one may observe that the Memorial makes the question the object of three series of observations.

The first time that the Memorial speaks of the Beagle Channel at length is in Chapter II: "Discovery and Exploration of the Beagle Channel". There one finds "The Story of the Discovery of the Beagle Channel"; a study of "Reports and Charts resulting from the Discovery" and an "Analysis of the Documentary Evidence" (Arg. Mem. pp. 24 — 75, paras. 12 — 57); an examination of "Later Explorations", of "Admiralty Sailing Directions and Charts" and of the "Cartography up to 1881" — all followed by general conclusions drawn from this study (Arg. Mem. pp. 81 — 116, paras. 61 — 94). In these conclusions, the Memorial poses the question: "What was the Beagle Channel discovered and described by Robert Fitzroy and understood by those who followed him up to the conclusion of the Treaty of 1881?" (pp. 111 — 2, para. 89). A categorical reply is given: "For the negotiators of the Treaty, the Beagle Channel presented no problem of identification. From its central part it passed eastwards, turning towards the south-east at Isla Snipe until it met the waters of Oglander Bay to the south of Isla Picton" (p. 116, para. 94).

The second time that the problem of the course of the Channel was examined was in Chapter IV: "Origin and Evolution of the Beagle Channel Dispute", in connection with documents (cartographic and others) and events subsequent to the conclusion of the 1881 Treaty.

Finally, in Chapter VI: "Legal Aspects of the Dispute", there appears an analysis of the concept of the "Beagle Channel" in conjunction with that of the other geographic terms appearing in Article III of the Treaty (Arg. Mem. pp. 381 — 396, paras. 25 — 33).

40. Wearisome though it may be, a consideration of the passages devoted by the Argentine Memorial to the definition of the Beagle Channel is of considerable interest for the assessment of the Argentine thesis.

The Court will observe that, while paying lip service to the principle of the ascertainment of the intention of the Parties, the Argentine Government is in fact uninterested in the elements which would have enabled it to ascertain this intention. Is it not significant that the problem is raised only in Chapter II relating to the discovery and exploration of the Channel and in Chapter IV relating to the development of the dispute, but that not a word is said about it in Chapter III describing negotiations which led to the conclusion of the Treaty? One might have expected that at least in Chapter VI the Argentine Government would have made an attempt to show that the negotiators had truly thought of the Channel as passing through Paso Picton. But one finds in that Chapter nothing more than a résumé of the statements already made in Chapter II on the discovery and exploration of the Channel in the years 1830–1840. No more in Chapter VI than in Chapter II is there the least mention of the documents and maps relating directly and immediately to the negotiation of the Treaty. It is as if the intention of the Parties were frozen at the date of the discovery of the Channel: "All the knowledge of the Beagle Channel available to the negotiators was summarized in the works of Fitzroy, who acted at the same time as a cartographer, narrator, and draftsman of sailing directions" (Arg. Mem. p. 835 para. 28).

What did Fitzroy think? That is the question to which the Argentine Government ultimately reduces the problem of the conception of the Beagle Channel in the intention of the negotiators of the Treaty. That is why the Argentine Government is satisfied, as much in Chapter II as in Chapter VI of the Memorial, to seek Fitzroy's understanding of the Beagle Channel, in order to derive directly and immediately therefrom that this was also the Channel in the understanding of the negotiators of the Treaty. The absolute identification of the intention of the negotiators with that of Fitzroy to which the Argentine Memorial is so totally wedded, cannot fail to have been noted by the Court (see particularly pp. 111 – 112, para. 89 and p. 116, para. 94, for Chapter II; pp. 395 – 6, para. 33, for Chapter VI).

41. The Chilean Government cannot look at the matter in this way at all. Since the two Parties are agreed that the question is one of identifying what the Parties to the 1881 Treaty intended by the term "Beagle Channel" (see above, paras. 30 – 31), the determination of this intention cannot be limited a priori to an examination of Fitzroy's understanding of the matter some thirty or forty years earlier. To suggest, as does the Argentine Memorial, that

"... the Court of Arbitration is being asked to confirm the true course of the Beagle Channel identified by its explorer, Fitzroy, in accordance with the geographical factors he found there in 1830" (Arg. Mem. p. 438, para. 61),

is an inadmissible narrowing of the function of the Court. No doubt Fitzroy's views possess a certain interest. But to go on from there and maintain that the problem of the determination of the intention of the Parties must be identified exclusively with that of identifying the intention of Fitzroy – as if Fitzroy had been one of the negotiators of the Treaty – is a step

which the Chilean Government is entitled to say that the Argentine Government has taken without the least justification.

42. It is hardly necessary to emphasise that the comments just made do not have as their object a restriction of discussion regarding facts which may be troublesome for the Chilean Government. The latter itself has provided in its own Memorial (pp. 9 – 15, paras. 7 – 25) and in its Some Remarks Concerning the Cartographical Evidence (pp. 2 – 11) much detail regarding the discovery and exploration of the Channel, and the Chilean Government has shown the background interest of the maps which emanated from these expeditions and some of which were available to the negotiators of the Treaty. Indeed, the Chilean Government has printed the principal ones in its Atlas (Ch. Plates Nos. 1 – 4; Ch. Cart. Rem. pp. 10 – 13). The analysis of the documents and maps relating to the discovery of the Channel can leave no doubt on the understanding which Fitzroy and King had of it. It is absolutely certain that they considered as the Beagle Channel the Channel separating Tierra del Fuego from the islands farther south by a virtually straight line ending in the ocean abreast of Cap San Pio. It is not to exclude the facts relating to the discovery of the Channel that the Chilean Government criticizes the Argentine position, but because the latter is uniquely tied to these facts and accordingly entirely neglects all the other facts relevant to the determination of the intention of the Parties at the time of the conclusion of the Treaty.

**(iv) The considerations drawn from the work of Fitzroy and King**

43. The Argentine Government makes a vain endeavour to rest its contention about the course of the Beagle Channel, which it to-day asks the Court to consider as having been that intended by the Parties to the 1881 Treaty, upon the works relating to the discovery of the Channel. The facts upon which it relies are wrong or badly interpreted, and as for those which too clearly contradict its thesis, the Argentine Government neglects them without more ado. A few comments on each of these points will suffice.

44. The Court will have noticed the argument which the Argentine Memorial seeks to rest upon the fact that the maps of the discovery of the Beagle Channel do not give any name to the passage between Navarino and Picton. For the Argentine Government, this suggests that to Fitzroy and King this nameless "stretch of water" could not have been anything other than the Beagle Channel itself. The argument is repeated several times in the Memorial (see for example p. 38, para. 29; p. 62, para. 50; p. 112, para. 90; p. 385, para. 28; p. 387, para. 28). The name "Paso Picton", so the Argentine Government suggests, was a somewhat tardy Chilean invention—dating only from 1911—introduced with a view to changing the definition of the Channel in a way favourable to the Chilean claims. This accusation is so unexpected that its very words deserve direct quotation:

"It was not until 1911, thirty years after the Treaty of 1881 . . . , that the Beagle Channel was re-defined in a new edition of the Chilean 'Derrotero'. According to this, the Channel's eastern entrance was located between Cabo San Pio and Punta Waller on Isla Nueva.<sup>1</sup> Furthermore,

<sup>1</sup> The Argentine Government appears to have been a little careless in suggesting that it was only in 1911 that the Chilean Government had for the first time thought that the eastern end of the Channel lay between Cape San Pio and Nueva, since all the documents, both before and after the Treaty, show the very contrary!

for the first time the name 'Paso Picton' was given to the stretch of water between Picton and the east coast of Navarino, which had previously never been named distinctly for the simple reason that it was, and was always intended by Fitzroy to be, the 'eastern opening' of the Beagle Channel" (Arg. Mem. p. 230, para. 36). (Underlining added)

Just because at the beginning of the century the Argentine authorities deliberately derived from the name "Moat Bay" the until then unknown "Moat Channel", the Argentine Government is hardly justified today in accusing the Chilean authorities of having had recourse to an analogous procedure for Paso Picton.

As early as 1905 the Director of the Chilean Hydrographic Office had written to his Argentine colleague on the subject of certain "novelties and changes" suggested by the Argentine authorities and had criticized the attempt to treat as Beagle Channel "the Channel which doubles at a right angle to the South along Navarino Island, which we have always called Picton Pass" (Ch. Ann. No. 74(a), p. 211) (Underlining added). Accordingly, by 1905 the name Paso Picton was in current use.

Nor is that all. In a letter from the British Hydrographic Department in 1938 (which the Argentine Memorial quotes at p. 63, para. 51, in connection with "Moat Channel" and of which the text was provided to the Chilean Government, as a result of its request, on 21 January 1974) this body, replying to a request for information from the Argentine Hydrographic Service, wrote as follows:

"PICTON PASS. Derived from what is now Argentine Chart No. 86 in about 1900. As the name Picton was given by Captain Fitzroy to the island on the North-East side of the pass, it is assumed that the name of the pass has been taken by you (i.e. the Argentine Hydrographic Office) from that of the island."

So it is not the Chilean authorities who "invented" the Picton Pass in 1911 to show that the Beagle Channel did not flow that way. It was the Argentine authorities who gave that name in about 1900, that is to say, about eleven years earlier, to the stretch of water between Navarino and Picton. The Court will appreciate the relevance of the argument advanced so often from one end to the other of the Argentine Memorial.<sup>1</sup>

45. The Argentine Memorial also attaches importance to the fact that the "stretch of water" to the north of Picton, where the maps associated with the discovery of Beagle Channel placed "Moat Bay" and to which the Argentine Government has, since the beginning of the century, given the name "Moat Channel", is "obstructed" — or "closed" — at its western end by Bécasses (or Woodcock) Islands, which "form a barrier between the interior of this Channel and this Bay" (Arg. Mem. p. 13, para. 23; pp. 385 — 6; and 387, para. 28).

The function of this argument is not clear to the Chilean Government. The Becasses are a group of islands and rocks situate in the Beagle Channel between the south coast of Tierra del Fuego and the north coast of Picton. They do not "obstruct" or "close" the Channel any more

<sup>1</sup> The Court should also observe that the name "Paso Picton" appears on both Maps Nos. 1 and 27 presented with the Argentine Memorial. See also Further Remarks with reference to Arg. Map No.8.

than do Gable or Martillo. Neither examination of the maps nor a visit to the place gives any impression that the Bécasses form a "barrier" between the rest of the Channel and Moat Bay. For the traveller who approaches from the west, the Channel runs straight on past Bécasses towards Cape San Pio. It is in fact the passage towards Paso Picton which is largely obstructed by Snipe and a series of shoals, rocks and islets which, according to the very description contained in the Argentine Sailing Directions of 1905, "prolong Picton Island towards the eastern mouth of the Mackinlay Pass". As the Chilean Government has said in its Memorial, these shoals, rocks and islets "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 . . . (and) render the wide Channel to the north of Picton Island 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" (Ch. Mem. p. 93, para. 16). This was also the opinion of the British Admiralty's Hydrographer in 1915 (Ch. Mem. p. 102, para. 41; Ch. Ann. No. 104, p. 274).

Perhaps the Argentine Government is trying in this way to justify what in fact it recognised as an Argentine invention made in 1900 as a consequence of suggestions put forward by Saenz Valiente, that is to say, the change from "Moat Bay" to "Moat Channel" (Arg. Mem. pp. 62 – 65, para. 51; p. 232, para. 38; cf. Ch. Mem. pp. 91 – 92, paras. 13 – 14). Once the "stretch of water" north of Picton is "obstructed" by the Bécasses and is called "Moat Channel", the Argentine Government considers that it has, at any rate to its satisfaction, demonstrated that the Beagle Channel does not run that way.<sup>1</sup> It is to overlook – or at least to be compelled to minimize – the particulars provided on this point by the British authorities in 1918 and 1938. The Chilean Memorial has already mentioned the Memorandum of the Admiralty Hydrographer of 28 December 1918 seeking the restoration of the original expression of "Moat Bay" (Ch. Ann. No. 122, pp. 306 – 307; Ch. Mem. pp. 112 – 113, paras. 63 – 64). The Argentine Memorial shows that the preparation of this Memorandum had been preceded on 6 July 1918 by a study of the problem of the Beagle Channel made by a member of the Hydrographer's staff, a certain Mr Bell (Arg. Mem. p. 77, para. 59). This study (Ch. Ann. No. 373) the text of which has been provided by the Argentine Government at the request of the Chilean Government, contains the same criticisms of the idea of "Moat Channel"<sup>2</sup>. Twenty years later, replying to a letter from the Argentine Hydrographic Service, the British Hydrographic Department, in its note of 9 May 1938 (Ch. Ann. No. 377) (see above para. 44), confirmed expressly that the name of Moat Bay would appear to refer to the bight in the northern shore of Beagle Channel between Cape San Pio and Cape Rowley, north-east of the Woodcock Islands".

The thesis of the obstruction of the Beagle Channel by the Bécasses, in such a way that another channel begins east of the Bécasses under the name of Moat Channel, thus disintegrates completely.

46. Another element from which the Argentine Memorial attempts to draw conclusions which are favourable to its thesis consists of the information contained in the Sailing Directions of the

<sup>1</sup> One may note in passing that the somewhat scrupulous respect manifested by the Argentine Memorial for Fitzroy and King is here rather forgotten.

<sup>2</sup> Unaware of Bell's report, and in response to an invitation in 1918 from the British Hydrographer regarding the question "Moat Channel" vs. Moat Bay, the Naval Attaché of the Chilean Legation in London, Commander F. E. Merino wrote to the Hydrographer a long letter. After stating the background of the subject, Merino wrote:—

"All the facts above mentioned lead me to request you if it would be possible to discontinue the use of the altered names and descriptions and to return to the use of the original ones when the time comes for the new editions of Chart No. 1373 and "South America Pilots" to be issued."

The British Hydrographer replied that it had been decided "that no alterations in this respect are to be made while arbitration proceedings are pending." (See Ch. Ann. No. 374a)

British Admiralty of 1832, prepared under the direction of Captain King. According to these: "to the north of Lennox Island is the eastern entrance of the Beagle Channel". This argument reappears a number of times in the Memorial (see, for example, Arg. Mem. p. 41, para. 32; pp. 57 – 60, para. 48; pp. 390 – 395, paras. 30 – 32).

The Chilean Government can do no better than refer to the explanations which it gave on this subject in its Memorial (Ch. Mem. p. 14, para. 21). Here again, the Argentine thesis founders upon the explanations given by the British Admiralty itself of the phrase appearing in its 1832 Sailing Directions. Following upon the Memorandum of Mr Bell, of 6 July 1918, mentioned above, the Admiralty Hydrographer's Memorandum of 28 December 1918 disposes of all ambiguity regarding the meaning of this expression, from which the Argentine Memorial seeks to draw so many consequences. The Hydrographer's Memorandum says:

"So rigorous a construction of the phrase hardly commends itself . . . ; firstly, because the eastern mouth so described could never have been visible, or even partially visible, from Gable Island, as it was stated to be in the Narrative for April 4th, 1830; and secondly, because, if the eastern mouth ran in a southerly direction between Picton and Navarino Island, it could not be reconciled with the straight, east and west course, of the waterway, so clearly described in the earlier statements of Fitzroy. It is therefore preferable to infer that the words 'to the north of Lennox Island' mean no more than a general northerly direction . . ." (Ch. Ann. No. 122, p. 305; cf. Ch. Mem. p. 113, para. 65).

The arguments to the contrary are refuted with some vigour in a later passage in the same document (ibid., p. 307).

It may also be recalled that the Argentine Derrotero of 1962 advises ships how to "enter Picton Pass from the Beagle Channel", which indicated that for the authors of this document Paso Picton is not a part of the Channel, but is outside it.

There is no support to be found for the Argentine Government in the above quoted phrase of the 1832 "Sailing Directions". If the Channel opens to the north of Lennox, it is Lennox which is to the south of the Channel—and thus belongs to Chile. The argument thus turns, at least as regards Lennox, against the Argentine thesis. On the other hand, one must not forget that it is the same Captain King, author of those "Sailing Directions", who, in his Report to the Admiralty in 1830 and in his lecture to the Royal Geographical Society in 1831, expressly described the Beagle Channel as running in a straight line as far as Cape San Pio (Ch. Mem. p. 12, paras. 14–15; Arg. Mem. p. 35, para 28; p. 39, para. 30; pp. 53–56 paras. 44–46; p. 115, para. 93).

47. By way of ending this examination of the arguments which the Argentine Government has used in support of its identification of the Beagle Channel, one may mention the passage in which the Argentine Memorial says:

"... it is important to note that its authors (of the Narrative) never envisaged, in their reports, the existence of two eastern arms of the Beagle Channel. The eastern course of the Channel was always described by them as being single, whereas they specifically put in evidence the two distinct arms of the Channel to the western side". (Arg. Mem. p. 390, para. 29).

The wording of this passage (see also Arg. Mem. p. 386, para. 28) could give the impression that the Argentine Government is here opposing a thesis of the Chilean Government which would attribute to the Channel two eastern branches. No such thesis has ever formed part of the Chilean case, since for Chile the Beagle Channel was never anything else than the waterway running in a straight line from west to east and joining the ocean between Cape San Pio and Nueva Island. (Ch. Mem. p. 9, para. 7; p. 15, para. 25). The Chilean Government is happy to note that to-day the Argentine Government also rejects this strange thesis. (See above Chapter I, para. 8).

48. These then are the elements<sup>1</sup> on which the Argentine Government bases its thesis of a Channel which, according to the ideas of Fitzroy and King (so they say), shared by the negotiators of the 1881 Treaty, passed between the coast of Navarino to the south, and those of Snipe, Solitario, Hermanos and Picton on the north, to end finally in Oglander Bay: — the absence from the maps of the discovery of a name in the passage now known as Picton Pass, though it means nothing; the alleged obstruction, which does not exist, of the waterway north of Picton by the Becasses; the indication of King that the eastern entrance of the Channel is north of Lennox, which is quite true when correctly understood; the comment, somewhat fantastic, regarding the passages in Fitzroy and Darwin relating to some cove.<sup>2</sup> The Argentine Memorial accuses the Chilean thesis of being, at a certain point, "artificial to the point of naivety" (Arg. Mem. p. 394, para. 32). This is a comment perhaps better not indulged in by the party which, to the question it itself recognises as critical for the solution of the present case—namely, what is the course of the Beagle Channel—provides a reply resting only on such trifling and inconsistent facts as those which have just been mentioned.

49. The poverty of the arguments advanced in the Argentine Memorial in support of its thesis on the course of the Channel is hardly surprising, since Fitzroy and King gave the clearest possible expression to their way of seeing the Channel. Their descriptions and definitions are totally opposed to the views which the Argentine Memorial to-day seeks to attribute to them. The Chilean Government has developed this point in its Memorial (Ch. Mem. pp. 9 — 15, paras. 8 — 25) and it will not at this point present the Court with a fresh analysis of the surveys carried out from 1826 on the orders of the British Admiralty. (See, however, Appendix B.)

50. How can the Argentine Government assert that the Channel, after flowing first from east to west, then turns almost at right angles towards the south-east, when those who discovered it, and on whose opinion the Argentine Government now leans, expressly described the Channel as running in a straight line from Gable to the open sea? On two occasions Captain King went even further in his definition of the Channel and, instead of limiting himself to the description of the Channel as one running in an almost straight line for 120 miles, placed it very exactly by reference to the geographical features of the region. In a report which he addressed to the British Admiralty upon his return to England in 1830, Captain King stated expressly with reference to Beagle Channel:

"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

<sup>1</sup>The Government of Chile will not refer here to the argument based on the name "Beagle Channel" which Fitzroy would have intended to give to his Chart No. 27 of 1834 (Arg. Mem. p. 42, para 35; p. 74, para, 57; p. 386, para. 28). The Chart does not bear the name "Beagle Channel" but is called "Part of Tierra del Fuego" (Arg. Map No. 8). See Further Cart. Rem. with reference to Arg. Map No. 8.

<sup>2</sup>On this last point, see Appendix B below.

bottom of the Admiralty Sound" (Ch. Ann. No. 1(a) pp. 1(e) — 1(f)). (Underlining added)

A few months later, in April and May 1831, Captain King, at a lecture which he gave to the Royal Geographical Society in London, 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 . . ." (Arg. Mem. p. 39, para. 30).

Moreover, the way in which the name "Beagle Channel" is marked on the maps illustrating its discovery can leave no further doubt about the identification of the Channel as understood by Fitzroy and King (Ch. Mem. pp. 14 — 15, paras. 22-25; Ch. Plates Nos. 1-4).

In these circumstances, how can the Argentine Government even begin to suggest that the Beagle Channel runs through the Paso Picton?

51. Although the Argentine Memorial does not go so far as to deny the very precise indications which Captain King gave of the course of the Channel as far as Cape San Pio (Arg. Mem. p. 35, para. 28, and pp. 38 — 39, para. 30), its second Chapter (Arg. Mem. pp. 54 — 57, paras. 45 — 46) makes great efforts to show that these indications "were not strictly accurate and did not need to be". (Arg. Mem. p. 115, para. 93). It is significant there is no mention whatsoever of these indications in Chapter VI (pp. 381 — 396) where, however, a number of elements of the discovery which were for the first time stated in Chapter II are again examined in detail.

To rebut the report sent by Captain King to the Admiralty in 1830, the Argentine Memorial did not not hesitate to write:

"It was not intended as a scientific paper; and it was not available outside official British archives until long after this dispute had arisen" (Arg. Mem. pp. 54 — 55, para. 45).

It would seem that a study can only be regarded as scientific if it conforms to the Argentine thesis. As for the fact that the report remained in the British archives, this does not in any way prevent it shedding light on the ideas of those who discovered the Channel. In any case, the Argentine Government does not hesitate to invoke on more than one occasion documents which have for long remained unpublished (see for example p. 66, para. 52; p. 385, para. 28).

The Argentine Memorial adds that if Captain King spoke of Cape San Pio as the eastern extremity of the Channel, it is because his readers knew this name but would not have understood that of "Portrait Cove". For the same reason King described the western end of the Channel as being at Christmas Sound rather than as at Cook Bay:

"For King to have written in his report that, for example, the Channel led 'in almost a direct line between Cook Bay and Portrait Cove' would have meant nothing to his readers without further definition of the locations of both those places. This was unwarranted in such a document". (Arg. Mem. p. 55, para. 45).

The trouble with this explanation is that, while Christmas Sound is adjacent to Cook Bay, of which it forms a part in such a way that there is nothing inexact in speaking of the Channel starting from Christmas Sound, Cape San Pio on the other hand lies quite some way from the southern end of the passage between Navarino and Picton. It must be recognised that King would have had difficulty of speaking of "Portrait Cove" in 1830, since this name was not given to that place until 1834 (Arg. Mem. pp. 49 — 50, para. 40; pp. 72 — 74, para. 56; pp. 388 — 389, para. 29), but he would not in any case have spoken of a straight line between Christmas Sound and Cape San Pio if he had thought of the Channel as turning towards the south after Navarino.

The Argentine Memorial adds finally that one can hardly attach any importance to a "paragraph of two sentences" (p. 55, para. 45). If these two sentences had been favourable to the Argentine thesis, their importance would undoubtedly have been much greater . . .

No more convincing are the efforts made in the Argentine Memorial to neutralize the description given by Captain King at his lecture in 1831 (pp. 55 — 57, para. 46). There again, they say, "the reference to the Beagle Channel is very brief . . . (and) was hardly conspicuous". Similarly, mention of Christmas Sound and of Cape San Pio is explained as a "loose, though convenient, use of language" and "it would be equally erroneous to understand the statement as if it had been intended to fix Cape San Pio as the eastern terminal of the Channel. Both were merely named points of reference". As to the distance mentioned by Captain King of 120 miles between Christmas Sound and Cape San Pio, the Argentine Government, though not denying its precision, attempts to minimize its significance by suggesting that it refers to a "straight line measurement", and not to the "sailing distance" between these two points, which would be several miles longer. The Chilean Government merely notes that, if this argument had any force, it would operate equally against the Argentine thesis, for the "sailing distance" between the western end of the Channel and Cabo María also exceeds 120 miles.

52. At this point, the Chilean Government could end its examination of the concept of the Beagle Channel in the spirit of those who discovered and described the Channel for the first time. It has been conclusively shown that, for them, the eastern entrance of the Beagle Channel lay not between Picton and Navarino, but between Cape San Pio and Nueva. However, the Chilean Government is minded to recall how often the opinions of the Argentine Government have been contradicted, and those of the Chilean Government confirmed, by the British Admiralty itself, better placed than either to draw suitable conclusions from the work of Fitzroy and King, since until recently the British Admiralty alone had access to all the necessary papers and charts.

53. Thus, in 1915, the British Admiralty, replying to a request from the Foreign Office, informed the latter that, in its opinion, the three islands belonged to Chile (Ch. Ann. No. 105, p. 277). This opinion was based upon a Memorandum of the Director of Intelligence and of the Hydrographer (Ch. Ann. No. 104, p. 274), which, after summarising the main facts, concluded that the Beagle Channel referred to in Article III of the 1881 Treaty lies north of Picton and that its eastern end is Cape San Pio<sup>1</sup> (see also Ch. Mem. pp. 102 — 103, paras.

<sup>1</sup> Two years, it may be noted, before the publication of Guerra's book.

41 — 43). But as this document refers only briefly to the work of Fitzroy and King, there is no need to spend more time on it.

54. In 1918 the British Admiralty, at the request of the Foreign Office, examined closely the documents of Fitzroy and King (see Ch. Mem. pp. 110 — 114, paras. 58 — 67; Arg. Mem. pp. 75 — 81, paras. 58 — 60). The Bell Memorandum (the text of which the Argentine Government produced at the request of the Chilean Government) is not without interest by reason of the stated object of the study:

“... the enquiry will be limited to discovering what geographical definition was given to the Beagle Channel by its first explorers”.

Bell's document went in some detail over the data which can be found in the works of Fitzroy and King on the subject of the Channel, and it reached the following conclusion:

“The extracts made from the Narrative show generally that the discoverers were impressed by the straightness and by the narrowness of the Channel; whilst the Narrative for April 4th, 1839, shews in addition, that they regarded the eastern opening at the Channel as being partially visible from Gable Island”.

Quoting the passage from King's report in 1830, Bell added:

“This sentence describes the form and limits of the Beagle Channel, and would be decisive even though no other evidence should have existed”.

Bell then examined the other data which may be extracted from the works relating to the discovery. He showed that if King's description — “to the north of Lennox Island is the eastern opening of the Beagle Channel” — is “read in conjunction with those made previously”, “it becomes evident that the word ‘north’ means no more than a general northerly direction” (cf. *supra*, para. 46). He brushed aside the novelty of “Moat Channel”.

Bell's conclusion is clear:

“... it must be concluded that 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<sup>1</sup>; whilst its eastern entrance must be regarded as the stretch of water between the coasts of Tierra del Fuego to the west of Cape San Pio and the northern shores of 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. ....

“Beagle Channel is the narrow channel about 120 miles in length, running between Cape Kekhlao on the eastern side of Cook Bay and Cape San Pio. ....

<sup>1</sup> Ch. Plate No. 117 reproduces the cutting attached to the 1918 Admiralty Report, which is a copy of Bell's chart cutting mentioned here.

"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". (Ch. Ann. No. 373) (Underlining added).

These were the conclusions which Bell drew from a study of the works relating to the discovery. Their effect upon the conception of the Channel which the Argentine Memorial attempts to attribute to Fitzroy and King is crushing. For this reason the Argentine Government is obliged to brush them aside in a rather backhand way by suggesting that Bell was satisfied to reproduce the conclusions of Guerra. While it is true that Bell does quote this work, he is by no means a straightforward copier of Guerra. Bell analysed for himself and in great detail the works relating to the discovery. This accusation against Bell's study — which the Argentine Memorial does not hesitate to describe as "an internal Memorandum on Guerra's book" (Arg. Mem. pp. 79 — 80, para. 60) — is as gratuitous as it is offensive.

55. The Memorandum prepared by the Hydrographer of the British Admiralty on 20 December 1918, (Ch. Ann. Nos. 121 and 122, pp. 298 and 299), adhered to the conclusions of the Bell Memorandum. The Chilean Government has analysed that document in its Memorial, to which it respectfully refers the Court (Ch. Mem. pp. 110 — 114, paras. 58 — 67, especially the extracts quoted at paras. 62 — 65). Reference should also be made to the map on which the Admiralty marked in blue the Beagle Channel "alluded to in the Narrative, and described by Captain King in his letter of proceedings, his lecture and his sailing directions" (Ch. Plate No. 117; Ch. Ann. No. 122, p. 306). The Argentine Government shows nothing but contempt for "this misleading document, prejudicial to Argentine rights", which, "far from being a new, exhaustive study", followed the Bell Memorandum "repeating the same incorrect assertions on the same grounds as Guerra" (Arg. Mem. pp. 79 — 80, para. 60) and in which the British Admiralty "adopted too uncritically" the erroneous opinions of the Chilean commentators (Arg. Mem. p. 115, para. 93) and, especially, "the geographical acrobatics of the Chilean Professor Guerra" (Arg. Mem. p. 395, para. 32).

56. The suggestion that the 1918 Admiralty Report was prepared "on hearing the arguments of one Party only" (Arg. Mem. p. 80, para. 60) must be rejected. The Report itself shows that it was prepared after consideration of "the arguments advanced by the contending Governments" (Ch. Ann. No. 122, p. 301).

57. The Chilean Government asks to be excused for the long arguments which it has just devoted to the conception of the Beagle Channel, as seen by those who first discovered and described it. These remarks were made necessary by the insistence placed by the Argentine Memorial on the works of these discoverers for the purpose of extracting the conclusion that for Fitzroy, King and Darwin, the Beagle Channel was the waterway hugging the coast of Navarino and turning to follow Picton Pass as far as Oglander Bay. The Chilean Government hopes that it has shown that this thesis collapses in the face of the clear and decisive views as much of the discoverers themselves as of the British Admiralty which gave close study to their work.

(v) The other controlling elements in the identification of the intention of the Parties to the 1881 Treaty.

58. In the opinion of the Chilean Government, the intention of the Parties is to be found compellingly demonstrated by other elements which the Argentine Memorial has preferred to pass over in complete silence (compare above, paras. 40 — 41).

59. The Argentine Memorial states that "the representatives of the Parties had available to them almost everything which existed at the time in the way of charts, geographical and navigational studies, reports of explorations, etc." (Arg. Mem. p. 384, para. 28). Thus one might assume that besides Chart No. 1373 of the British Admiralty in its various editions and the other documents relating to the discovery, the negotiators knew of the English and French maps of 1842, 1850, 1854 and 1856 (Ch. Plates Nos. 5 and 7, Ch. Mem. pp. 15 — 16, para. 26) showing the Beagle Channel north of Picton and Nueva, that is to say, flowing in a straight line from the west towards Cape San Pio. Undoubtedly, they were also aware of the map prepared in 1875 by Seelstrang and Tourmente on the instructions of the Argentine Central Committee for the Philadelphia Exhibition, on which the straight line character of the Channel immediately strikes the observer (Arg. Map No. 16; Ch. Plate No. 8; Ch. Mem. p. 16, para. 27; Arg. Mem. p. 111, para. 88).

60. Although the scientific documents available to the negotiators are of some interest for the purpose of determining their intention, of much greater and more decisive importance are the documents, and particularly the maps, which they themselves prepared in the course of the negotiations in order to illustrate the function of the Channel as a boundary between the two countries.

61. As the Court will appreciate, the Parties are in accord in taking the view that, within the framework of the compromise proposed by Argentina in 1876 and adopted by the two Governments in 1881, the Beagle Channel must have assumed the role of a frontier between the two States (Ch. Mem. p. 50, para. 9; Arg. Mem. p. 361, para. 16, and p. 381, para. 25). After having drawn a frontier line east-west to the north of the Straits of Magellan and also a frontier line north-south across Tierra del Fuego, it only remained for the Parties to establish a west-east line for the purpose of separating the sector of Tierra del Fuego which had been attributed to Argentina from the remainder of the islands which would necessarily belong to Chile. Instead of selecting a geometrical element, for example, a parallel, it seemed more appropriate to the negotiators, in the light of the maps on which Tierra del Fuego would have appeared naturally separated from the territories further south by a more or less rectilinear stretch of water, to make this stretch of water serve as a frontier. It is thus possible to appreciate, as the Chilean Government has already had occasion to demonstrate (above Chapter II, para. 29), that the conception of the Beagle Channel as a stretch of water washing the shore of Tierra del Fuego from west to east follows ineluctably from the actual philosophy of the territorial settlement of 1876 — 1881. A boundary which, after running from west to east, would have turned almost at a right angle towards the south, could not serve the purpose for which it was intended. After the allocation to Argentina of Tierra del Fuego, of Staten

Island and of the islands to the east of Tierra del Fuego, only a frontier giving to Chile all the islands south of the Straits of Magellan, that is to say, a west-east boundary following upon the north-south boundary within the mainland of Tierra del Fuego, was compatible with the territorial settlement adopted by the Parties. If the last "step" towards the south imagined by the Argentine Government (Arg. Mem. pp. 407 — 408, para. 43, and p. 419, para. 48) had existed in the minds of the Parties, it was not "all the islands to the south of Beagle Channel" but "all the islands to the south and to the west of Beagle Channel" which they would have specified. To ask the Court, as does the Argentine Government, to read the description "to the south of Beagle Channel" as referring to a situation involving a boundary itself having a north-south direction, involves asking the Court to give the clear language of the Treaty an absurd and unreasonable interpretation. Once again one must ask how one can imagine that the Parties would have been able to allocate to one of them islands situate south of a "natural seaway boundary" which they themselves, so it is suggested, understood to run in a north-south direction?

Equally it can be understood that the use in the Treaty of the words "Beagle Channel" is more a reference to a latitudinal concept than to an actual stretch of water, (cf. the proposal of the Argentine Minister Elizalde of 1878, suggesting a line "following the Beagle Channel parallel to 55°S. latitude until the Atlantic Ocean": Ch. Ann. No. 29, p. 65): thus the sequence appeared and upon the north-south line of the meridian of Cape Espiritu Santo, there followed the west-east line of the Beagle Channel.

Finally, it is possible to appreciate why, on the general maps of the region on which their proposals were indicated graphically, the negotiators and the two Governments so commonly gave substance to the frontier line along the Channel by means of a line extending beyond Staten Island: it was necessary for the negotiators to show emphatically that the vertical line of division in the large island of Tierra del Fuego had, as a continuation, a horizontal dividing line which corresponded to the natural separation of Tierra del Fuego and Staten Island, on the one hand, from the territories further to the south, on the other hand.

62. It cannot be emphasised too much that the maps are of major significance as evidence of the intention of the Parties relating to the concept of the Beagle Channel and of the role assigned to it in the general economy of the territorial settlement. The Chilean Government in its Memorial has examined these various documents and maps in considerable detail (see particularly Ch. Mem. pp. 4 — 5, paras. 20 — 26; pp. 16 — 17, paras. 30 — 31; p. 28, para. 27; p. 30, para. 33; p. 39, para. 19; pp. 40 — 46, paras. 21 — 34). In addition, the Chilean Government has printed in its Atlas the various relevant maps (see particularly Ch. Plates Nos. 8—21). To all of these, the Court is respectfully referred. (See also Further Remarks).

One is bound to ask how the Argentine Government can contend that for the negotiators of the Treaty the Beagle Channel turned through Picton Pass when the Chilean Envoy, Sr. Barros Arana, to whom the Argentine negotiator, Sr. Bernardo Irigoyen, had just submitted proposals mentioning for the first time as the frontier between the two countries

the waterway called Beagle Channel, graphically illustrated these proposals by a due East line which followed the south coast of Tierra del Fuego? (Ch. Plate No. 8; Ch. Mem. p. 16, para. 29 and p. 28, para. 27). Again, one asks, how can the Argentine Government attribute to the negotiators the understanding which it does when, in 1878, the Argentine Minister of Foreign Affairs, Sr. Elizalde, who had just proposed to the Chilean negotiator a solution which included a line "following it (the Beagle Channel) parallel to 55° S. latitude until the Atlantic Ocean" (Ch. Ann. No. 29, p. 65), illustrated this proposition with a map on which a line has been drawn running into the ocean north of Picton, between Cape San Pio and Nueva (Ch. Plate No. 9, Ch. Mem. p. 30, para. 33. cf. Ch. Plate No. 10 and Ch. Ann. No. 30)? Or further, one may ask, what remains of the Argentine thesis when confronted by the sketch prepared by the French Minister in Santiago on 2 July 1881, that is to say, after the acceptance by the Argentine Government of the "bases of agreement" proposed by the Chilean Government, for the purpose of illustrating the "draft of the delimitation" between the two countries, bearing in mind that this sketch also drew the frontier—that is to say—the Channel—north of Picton (Ch. Plate No. 12 Sketch B; Ch. Mem. p. 39, para. 19)? Can the Argentine Government really adhere to its presentation of the intention of the Parties when not only the Chilean Authoritative Map of August 1881 distributed throughout the world by diplomats stationed in Santiago (Ch. Plates Nos. 13–19; Ch. Mem. p. 5, para. 24, and pp. 40–41, paras. 21–22), but also the Argentine map sent by Foreign Minister Irigoyen to the British Minister Petre shortly after the conclusion of the Treaty (Ch. Plate No. 21; Ch. Mem. p. 5, para 25, and p. 42, paras. 25–26) reflected exactly the same understanding of the course of the Beagle Channel as the Barros Arana map of 1876 or the Elizalde map of 1878? How can the Argentine thesis stand for a moment before the map prepared by the British Admiralty in 1881 on the basis of information provided by the Argentine Minister in London (Ch. Plate No. 20; Ch. Mem. p. 17, para. 30, and pp. 42–43, paras. 27–27 (a) )? And finally, what is one to say of the more recent official maps, and in particular of the Argentine official maps of 1882, 1885 and 1888 reproduced in the Chilean Atlas (Ch. Plates Nos. 25, 34 and 38) which show, beyond all doubt, that for the Argentine Government the waterway called by the 1881 Treaty the "Beagle Channel" passed north of Picton, Nueva and Lennox (Ch. Mem. p. 69, para. 2)?

Of all these maps not a word is said in the Argentine Memorial, with the exception of a brief reference to the Chilean Authoritative Map of 1881. Of this the Argentine Government can find nothing else to say than that:

"The map . . . is evidently not copied from Fitzroy's charts or even from the latest versions of the British Admiralty's Chart 1373 available at the time. It would probably have been copied from one of the many other maps or charts based on these, the reliability of which cannot be determined" (Arg. Mem. p. 221, para. 25).

Faced by these materials, the Chilean Government fails to see how the Argentine Memorial can contend for a single moment, even on the basis of the misinterpreted works relating to the discovery, that for the negotiators of the 1881 Treaty the Beagle Channel passed anywhere else than north of Picton and Nueva.

63. The conclusion to be drawn from this examination of the concept of the "Beagle

Channel" as used in the 1881 Treaty is clear and compelling. In order to interpret this concept, the Argentine Government relies exclusively upon the work of discoverers and especially the activities of Fitzroy. The Chilean Government has two objections to this method. On the one hand, the Argentine Government construes the work of discovery in a completely mistaken way and draws conclusions which lack all justification. On the other hand — and this is the crux of the matter — it is entirely inappropriate to substitute for an investigation of the intention of the negotiators of 1876 — 1881 a search for the intention of Fitzroy, since there are many other elements, much more concrete and decisive, available to determine what the Parties understood by the concept of the Beagle Channel. The Chilean Government is firm in its view that both for Fitzroy and for the negotiators of the Treaty the Beagle Channel was the stretch of water fringing upon the southern coast of Tierra del Fuego as far as Cape San Pio<sup>1</sup>. However, it is not that element upon which the Chilean Government relies to determine the intention of the Parties, since in its view that intention is to be derived independently from certain precise and reliable considerations which relate directly to the negotiations and territorial settlement themselves. From the philosophy of the settlement which the negotiators of the Treaty worked out, from the documents available to them, from those which they themselves prepared in the course of the negotiation, as from the way in which the two Governments themselves understood and interpreted the Treaty, it appears that in allocating to Chile "todas las islas al Sur del Canal de Beagle" the Parties could not have intended anything other than the assignment to Chile of all the islands situate south of the Channel, which runs in a virtually straight line from west to east along the south coast of Tierra del Fuego north of Navarino, Picton and Nueva and enters the ocean between Cape San Pio and Nueva.

Confronted by so simple a demonstration, the Argentine claim to Picton, Nueva and Lennox disintegrates. These islands are situate "al Sur del Canal de Beagle". They thus belong to Chile.

(2) " . . . hasta el Cabo de Hornos . . . "

64. One can understand that the Argentine Government has sought to escape the consequences of this conclusion — which is sufficient itself to dispose of the dispute—by having recourse to the "oceanic principle". Even if the three islands are situate south of the Beagle Channel, so the argument runs, they cannot belong to Chile because they lie east of the meridian of Cape Horn, that is to say, in the Atlantic. As already stated (above, para. 30), it was by no means easy for the Argentine Government to extract this condition from the second part of the third sentence of Article III, since neither the word "Atlantic" nor the word "Pacific" appear there. That is why, starting from the pre-established postulate that as a matter of principle no provision of the Treaty can be interpreted in such a way as to give to Chile any territory lying on the Atlantic, the Argentine Government has sought to interpret the words "hasta el Cabo de Hornos" as meaning "to the west of the meridian of Cape Horn".

<sup>1</sup>This was also the view of the British Admiralty in 1918. (see Ch. Plate No. 117).

65. Examination of the Argentine Memorial shows that this novelty has only been introduced in order to enable the argument to slip to the "oceanic" thesis which arises as a consequence, and constitutes the true basis of the Argentinian interpretation. The Argentine Memorial states:

"In order that the attribution to Chile of the islands to the south of the Beagle Channel should make sense in the text of this further qualification, it has to be accepted that by the words 'hasta el Cabo de Hornos' the Parties intended to mark an eastern limit: a limit whose rationale is that to the east of Cape Horn is the Atlantic.

"To go beyond the limit, by attributing to Chile the islands situated to the east of it, and thus standing out in the Atlantic or fronting it, would have been a transgression of that fundamental criterion for the division of the maritime jurisdictions between the two countries, a violation of the principle of the Atlantic to Argentina and the Pacific to Chile . . . The solution was to divide between the neighbouring States the group of islands straddling the line between the two oceans" (Arg. Mem. p. 403, para. 40). (Underlining added).

66. The Chilean Government has shown in Chapters I and II above that the so-called "oceanic principle" occupied no place whatsoever in the territorial settlement worked out by the Governments between 1876 and 1881, and that the same is equally true of the 1881 Treaty itself. Even the concern of Argentina to ensure for herself a continuous Atlantic coastline operated only in relation to Patagonia and Tierra del Fuego, and not at all south of Tierra del Fuego. It is necessary to recall that it is not all the islands on the Atlantic that the Treaty grants to Argentina, but only those which satisfy the conditions of lying "to the east of Tierra del Fuego". South of Tierra del Fuego the Treaty does not speak at all of islands "on the Atlantic". As a result, all the islands south of Tierra del Fuego, even granting them to be on the Atlantic, belong to Chile. While the Treaty grants to Argentina certain islands "to the east of Tierra del Fuego", that is to say, north of the Beagle Channel, it does not give to Argentina any south of the Channel, since they are south of Tierra del Fuego (cf. Ch. Mem. p. 6, para. 29; p. 49, para. 7; p. 51, para 11; p. 54, para 18). Conversely, the Treaty granted to Chile "all the islands to the south of the Beagle Channel". How can the Argentine Government read this sentence as if it gave to Chile only "those of the islands to the south of Beagle Channel which are to the west of the meridian of Cape Horn"? The Argentine Memorial itself notes that the only object of the division south of the Straits of Magellan was Tierra del Fuego (Arg. Mem. p. 371, para. 19). How then can it speak of a division of "the group of islands straddling the line between the two oceans"? And how can it avoid the necessary conclusion that Navarino should also have been divided on this "principle"? Does it mean also that for Argentina Gable, Bridges and Eclaireurs, lying west of the Cape Horn meridian are Chilean?

#### (v) Conclusion

67. The Argentine Government summarizes its analysis of the third sentence of Article III of the Treaty in the following terms:

"The overriding criterion of Atlantic jurisdiction to Argentina and Pacific jurisdiction to Chile inspired the attribution of islands east and west and it inspired the maritime dividing line in the extreme south of the American Continent. This line continues from the eastern mouth of

the Beagle Channel, passes through Paso Goree between Navarino and Lennox, continuing southwards, passing on the east the southernmost Atlantic islands under Argentine sovereignty, and on the west the southernmost Pacific islands under Chilean sovereignty". (Arg. Mem. p. 404, para. 41).

It would have been difficult for the Argentine Government to propose to the Court an interpretation of the relevant terms of the 1881 Treaty which departed further from the ordinary meaning of the words read in their context and in the light of the object and purpose of the Treaty. Not only is the final provision of Article II disregarded, but also the last sentence of Article III ("En cuanto a las islas . . .") is itself read differently from the way in which it is written. It is read as if, in its first part, it accorded to Argentina the "Atlantic islands" and, in its second part, to Chile the "Pacific islands"; as if it provided south of the Beagle Channel, not for allocation of territory, but for division of "maritime jurisdictions"; as if the Parties had intended to allocate the islands south of the Beagle Channel not by reference to a west-east waterway, but by a boundary which followed a north-south direction from the northern extremity of Paso Picton as far as Cape Horn following first the Paso Goree and then the meridian of Cape Horn; as if Chile were assigned not "todas las islas al Sur del Canal de Beagle" but only those amongst them which happened to lie wholly within the Pacific Ocean.

The Chilean Government cannot avoid the impression, which it has already had an opportunity to express, that under cover of a process of interpretation of the Treaty intended to identify the intention of the Parties, the Argentine Government has in reality reshaped the Treaty with a view to making it fit into a prefabricated mould. What the Argentine Government seeks of the Court is less the interpretation of the 1881 Treaty than the application of an entirely new Treaty tailored to suit the needs of Argentina's territorial claims. The Chilean Government respectfully begs the Court to put a check to this attempt.

#### **B.— Sovereignty over the islands according to the 1881 Treaty**

##### **(i) Picton, Nueva and Lennox and the adjacent islands and islets**

68. As has been seen, the Argentine Government bases its claim to Picton, Nueva and Lennox and the adjacent islands and islets on two series of considerations (Arg. Mem. pp. 399 – 404, paras. 38 – 40):

(1) They are said to be included amongst the islands allocated to Argentina because they are situate:

a. "sobre el Atlántico": Picton, because, for the part of its coast which is not on the Beagle Channel (as conceived by the Argentine Government), "it faces the Atlantic" and is thus an island "sobre el Atlántico"; Nueva and Lennox, because, according to certain passages in the Argentine Memorial, "they are . . . surrounded by the waters of the Ocean – standing out to sea" (p. 14, para. 24, and p. 400, para. 38), and according to another passage, because they possess, as regards their southern and eastern shores, "an extensive façade on the Atlantic" (p. 410, para. 44).

b. "al oriente de la Tierra del Fuego": Because all three islands are situate in the eastern part of the archipelago.

(2) They are said not to be included amongst the islands allocated to Chile because they did not satisfy the condition of being situate "al Sur del Canal de Beagle hasta el Cabo de Hornos":

a. First, it is said they are not situate "al Sur del Canal de Beagle":

— Picton is said to be "to the north-east of the last section of the Channel";

— Nueva, according to the Argentine Government, "has little to do with the Channel . . . it lies entirely to the east of it. On no possible view can it be an island to the south of the Channel. It is an island well seaward of the Channel . . .";

— As for Lennox, the explanation — if one can really so regard it — advanced by the Argentine Memorial is worth exact quotation:

"Lennox remains, lying not to the south of the Beagle Channel, but exactly to the south of its eastern mouth. The words 'to the south of the Beagle Channel' suggest a situation described by reference to the course of the Channel, not to its mouth. An island, which lies centrally in front of the entrance of the channel — as indeed an island lying inside a channel and right in the middle of it — can be described neither as an island to the north nor as an island to the south of the Channel". (Arg. Mem. p. 401, para. 39) (Underlining added).

Any comment on this would be quite superfluous.

In any case, the Argentine Memorial adds, "the only islands truly to the south of the course of the Beagle Channel are Navarino and Hoste, together with some islands and islets which are south of them" (cf. supra, para. 61).

b. Secondly, it is said, the three islands do not satisfy the condition of being situate "hasta el Cabo de Hornos", because they lie east of the meridian of Cape Horn, that is to say, east of the eastern limit reflected, according to the Argentine thesis, in the provision of the Treaty.

69. As for the Chilean Government, its position is simple and clear. Avoiding the interpretative acrobatics of the Argentine Memorial, it adheres to the ordinary meaning of the language of the 1881 Treaty read in its context and in the light of the object and purpose of the Treaty.

(1) Picton, Nueva and Lennox belong to Chile because Article II allocates to Chile in principle all the territory South of the Dungeness — Andes line, without prejudice to what is provided in Article III, and because also the second part of the third sentence of this article acknowledges as Chilean "todas las islas al Sur del Canal Beagle hasta el Cabo de Hornos": the three islands satisfy this requirement as they are located south of the Beagle Channel, between the Channel and Cape Horn.

(2) Picton, Nueva and Lennox do not form part of those islands which the first sentence of Article III allocates to Argentina, because even if they may be considered as being "sobre el Atlántico" they are not in any event situated "al oriente de la Tierra del Fuego", but rather south of the latter; and the Treaty does not allocate to Argentina any island — even one "sobre el Atlántico" — which does not lie "al oriente de la Tierra del Fuego".

(ii) **The islands within the Beagle Channel**

70. The Argentine thesis can be summarized as follows:

(1) As Article III of the 1881 Treaty did not expressly define the boundary line within the Beagle Channel, it may be assumed that the Parties intended to rely for this definition on the general rules of international law. (Arg. Mem. p. 362, para. 16; p. 435, para. 58).

The Argentine Memorial speaks in this connection sometimes in a general way of "the relevant rules of general international law" (Arg. Mem. p. 382, para. 26), sometimes in a more precise way of "the relevant principles of international law which apply where one coast of a seaway belongs to one State and the opposite coast to another" (Arg. Mem. p. 362, para. 16), or of "international law relating to maritime waterways" (Arg. Mem. p. 435, para. 58), or of the rules applicable "with respect to the delimitation of maritime jurisdictions inside "channels and straits" " (Arg. Mem. p. 358, para. 14).

(2) The rules which it is necessary to take into consideration, according to the Argentine Memorial, are

"those general rules which would in 1881 have enabled delimitation in the Beagle Channel of the respective jurisdictions of Argentina and Chile; . . . " (Arg. Mem. pp. 435 — 6, para. 59).

Although it is beyond doubt that in 1881 there did not exist any true codification of the law governing this matter, it is possible to extract from a pattern of bilateral treaties and from the opinions of authors of the time — it is said — some "consistent and authoritative guide-lines" which the Argentine Memorial states in the following terms:

"(a) Division of maritime jurisdictions (territorial waters) is achieved normally by means of the median line, equidistant from two opposite coasts. This solution simply expresses an incontestable general principle: the equality of States.

(b) The rule governing the use of waters for navigation also arises from the same general principle. Thus where the rigorous application of a median line would deprive one or other of the two States of the use of waters necessary for navigation, there must be a deviation from the median line rule" (Arg. Mem. pp. 435 — 436, para. 59). (Underlining added).

(3) The division of maritime jurisdictions within the Channel may also be derived, according to the Argentine Memorial, from the subsequent conduct of the Parties, which accords fully with the relevant principles of international law (Arg. Mem. pp. 431 — 434, paras. 56 — 57; p. 437, para. 60), that is to say: "the median line of the Channel subject to whatever

modifications of this principle were necessary to ensure that each country would be able to navigate the Channel through waters of its own" (Arg. Mem. p. 431, para. 56), or, according to a more concise formulation, "the median line with deviations imposed by the requirements of navigation" (Arg. Mem. p. 437, para. 60).

(4) This agreement of the Parties on the application of general principles of international law — the Argentine Memorial says — has related hitherto only to the section of the Beagle Channel lying between the meridian of Cape Espiritu Santo and the meridian 67° 15', that is to say, approximately the meridian of Punta Navarro (Arg. Mem. p. 357, para. 14; p. 431, para. 56; p. 437, para. 60). The Argentine Government proposes that the Court should apply the same rules "along the remaining length of the frontier in the disputed area" (Arg. Mem. p. 437, para. 61), which covers, in the first place, the rest of what the Argentine Government considers as being the Beagle Channel, that is to say, the waterway lying between the coast of Navarino and the coasts of Snipe, Solitario, Hermanos and Picton as far as Oglander Bay; and, in the second place, the waterway separating the Chilean island of Navarino and the allegedly Argentine island of Lennox, as far as the limits of the zone defined in the "Compromiso" (Arg. Mem. pp. 437 — 438, para. 61).

(5) In the "formal submissions" with which its Memorial ends, the Argentine Government draws the following conclusion:

" . . . the boundary line between the respective maritime jurisdictions of the Argentine Republic and of the Republic of Chile from meridian 63° 36' 38.5" W. of Greenwich runs along the median line of the Beagle Channel, deviating from that line only where inflexions are necessary so that each country may always navigate in waters of its own ; . . . " (Underlining added)

The Argentine Government proposes that these rules should apply not only over the whole length of the Beagle Channel as it understands it, but also as far as the limits of the zone defined in the "Compromiso". It adds, moreover, as has been seen above, (see Chapter I, paras. 17 et seq.) that "from there it continues in a generally southerly direction". The line suggested by the Argentine Government, in conformity with these criteria, is traced in green on map No. 27 annexed to the Argentine Memorial. This map also shows, by a dotted line, "the strict median line".

71. The Chilean Government cannot agree that the solution of the problem posed by the islands within the eastern section of the Beagle Channel should be sought in the application of those rules of international law which, towards the end of the nineteenth century, controlled the "division of maritime jurisdictions (territorial waters)" and "the use of waters for navigation" (Arg. Mem. p. 436, para. 59). Two kinds of consideration run contrary to this way of expressing the problem.

72. In the first place, the Chilean Government is bound to note that the determination of sovereignty over the islands situate in the Beagle Channel depends directly upon the intention of the Parties as it appears from the terms of the Treaty, the associated maps, and from the subsequent conduct of the two Governments. The Chilean Government has already shown

that there is no gap in the 1881 Treaty in relation to the islands in the Channel, and that the problem must be settled in the same way as that of the three large islands, by means of the interpretation of the Treaty (Ch. Mem. pp. 55 — 59, paras. 2 — 10). The Chilean Memorial has also demonstrated that this interpretation indicates that the Parties intended to allocate to each of the coastal States the islands appurtenant to its own coast or, alternatively, to Chile all the islands within the Channel (Ch. Mem. pp. 59 — 68, paras. 11 — 33, and particularly p. 65, para. 23, and p. 68, para. 33).

73. Secondly, the Chilean Government must recall:

(a) That the 1881 Treaty, the interpretation of which is, so both Parties have agreed, the sole subject of the present dispute, allocates territory and not maritime jurisdiction (see above Chapter I, paras. 30 — 32). In addition

(b) that the dispute between the two countries in the Beagle Channel area has never related to anything else but territories (see above, Chapter I, para. 38 et seq.). Finally

(c) that it is this problem and no other which the Court has been asked to decide in the 1971 "Compromiso" (see Chapter I, para. 34) — "the drawing of the boundary-line on a chart" foreseen by article XII of the "Compromiso" being, in effect, nothing other than a graphic depiction of the decision of the Court regarding the allocation of territories<sup>1</sup>.

74. The Chilean Government must add that, no matter how one looks at it, the way in which the Argentine Government has traced on the map No. 27 annexed to its Memorial what it calls a "strict median line" and a "boundary line" is quite arbitrary.<sup>2</sup>

a) the "strict median line".

If, as indicated by the Argentine Memorial, the map intends to depict the median line of Beagle Channel, it would have been necessary for that line to be drawn between the Argentine coast of Tierra del Fuego on the north and, on the south, the Chilean coasts of Navarino, Picton and Nueva which are the true shores of the Channel.<sup>3</sup>

Even though one may understand that map No. 27 could not draw such a line as far as Cape San Pio, because of the version adopted by the Argentine Government in 1973 for the "Beagle Channel, it is difficult to understand on what basis the so-called "strict median line" has been drawn in that part of the waterway which both Parties are agreed is Beagle Channel: the part between Tierra del Fuego (on the North) and Hoste-Navarino (on the south).

A glance at map No. 27 will enable the Court to see that while the map takes as southern reference the coast of Navarino, the northern reference is, at a number of points,

<sup>1</sup> Compare the remark of Whittemore Boggs, "Delimitation of Seaward Areas Under National Jurisdiction", American Journal of International Law, Vol. 45 (1951) p. 240, note 2: "Most of lines in water areas which are defined in treaties are not boundaries between waters under the jurisdiction of the contracting Parties, but a cartographic device to simplify description of the land areas involved".

<sup>2</sup> For other observations concerning this map No. 27 see "Further Remarks concerning the Cartographical Evidence".

<sup>3</sup> See Beagle Channel as depicted by the Admiralty in 1918 (Ch. Plate No. 117) "to represent the Beagle Channel alluded to in the Narrative, and described by Captain King in his letter of proceedings, his lecture and his sailing directions" (Ch. Ann. No. 122, p. 306).

formed by islands within the Channel and not by the Tierra del Fuego shore line. This has happened, to take no more than three examples, where the map draws the line between Navarino and Bridges; between Navarino and Gable; and between Navarino and the islands of Martillo and Yunque.

Considering that up to now the Argentine Government has not suggested that Bridges, Eclaireurs, Gable, Martillo and Yunque Islands form the north shore of the Beagle Channel (see Arg. Mem. Annex No. 1, p. 1 et seq) one must conclude that the alleged "strict median line" is neither "median" nor "strict".

**b) the "boundary line"**

The solid green line purporting to represent the "boundary" appears to be based on the "median line" above described. Therefore, it is open to comparable criticism, on that ground alone.

But, when one comes to consider it as a "boundary line", four further points should be noticed:

- i) the line cannot in any event be considered, even in its west-east part, as reflecting the intention of the Parties to the 1881 Treaty as regards sovereignty over the islands in the Beagle Channel region;
- ii) the line departs abruptly away from the south shore of Tierra del Fuego at an unspecified point taking, in the Chilean view, the wrong course, and using as reference a purported "shore" formed by Snipe, Solitario, Hermanos and Picton.
- iii) once the "1973 Argentine Beagle Channel" ends, the "boundary line" goes through Goree Road, a geographical feature known at least since 1624<sup>1</sup> which apparently the 1881 Parties forgot to mention in the Treaty.
- iv) The somewhat timid prolongation of the line by two green dashes beyond the line D—E on the map is, it is assumed, intended to indicate the "generally southerly direction" which the Argentine Memorial mentions, although according to the legend on the map it purports to be a "strict median line". The points of reference are unspecified and it is hardly necessary for the Government of Chile to mention that it utterly rejects it, either as an indication of boundary in that area, or as a "median line", whether "strict" or not, between the Chilean island of Navarino and the Chilean islands of Terhalten and Sesambre.

75. The questions of the use of waters for navigation and of the grant to each of the two countries bordering on the Channel of the possibility "to navigate in waters of its own" have absolutely nothing to do with the present case. The navigation rights of the two countries in the Beagle Channel are determined not by the 1881 Treaty but by general international law. Nothing in the documents relating to the negotiations, or in the very terms of the Treaty or in

<sup>1</sup> See Arg. Mem. p. 19, para. 5.

the associated maps, allows one to think that the navigation problems within the Channel played any part at all in the working out of the territorial settlement of 1881.<sup>1</sup>

The Argentine Government is, of course, free to regret that such problems were not taken into consideration by the negotiators of the Treaty, and to suggest that any allocation of the islands which fails to take account of these considerations might lead to unsatisfactory results. But in the opinion of both Governments, the function of the Court is to decide the question of sovereignty over the islands — those within the Channel, as well as the three large ones — exclusively on the basis of the Treaty. That is to say, according to legal criteria, and not according to convenient consideration of a geographical or technical character quite beyond the contemplation of the Parties at the moment when they concluded the Treaty. It is a problem of deciding what the Parties did, not what they might or ought to have done. The International Court, in its judgement relating to the Rights of Nationals of the United States of America in Morocco, refused to set aside the correct interpretation of the Act of Algeciras simply because this "in some instances, leads to results which may not appear to be entirely satisfactory" (ICJ Reports 1952, p. 199). In this connection the Court, (*ibid.* p. 196) recalled the principle which it had stated in its advisory opinion of the Interpretation of Peace Treaties (second phase): "It is the duty of the Court to interpret the treaties, not to revise them" (ICJ Reports 1950, p. 229). There can be no question here of asking the Court, under the pretext of interpreting the 1881 Treaty, to revise it with a view to producing results which the Court may consider more satisfactory in practice. Only a new agreement between the Parties would be capable of modifying the result reached by a correct interpretation of the Treaty concluded between them in 1881. The various drafts and proposals presented by the Argentine Government were directed towards an amendment of this kind, and are now wrongly invoked by it as reflecting the subsequent interpretation of the 1881 Treaty by the Parties, even when the drafts specifically sought to amend the 1881 Treaty by a new agreement between the Parties (Arg. Mem. pp. 432 — 434, para. 57 — see the report of the Director of the Chilean Boundary Demarcation Office of 1904: Ch. Ann. No. 72, p. 206, and No. 73, p. 209; various draft agreements of 1905 and 1907, Ch. Ann. No. 78, p. 221; No. 80, p. 225; No. 83, p. 243; the draft agreement proposed by Argentina in 1955, Ch. Ann. No. 194, p. 393; the draft agreement proposed by Argentina in 1959, Ch. Ann. No. 250, p. 463; and particularly the 1960 Protocol, Ch. Ann. No. 269, p. 488). As none of these drafts was ever accepted, it is the determination of sovereignty over the islands, as settled by the 1881 Treaty, which remains the sole criterion applicable to the solution of the problem of the islands within the Channel.

<sup>1</sup> One may add that while it is true that in the nineteenth century the median line concept controlled the delimitation of territorial waters in waterways separating two States in the absence of any contrary treaty stipulation, neither case law nor state practice, nor the writers of the period appear to have contemplated that it was necessary to adjust this line to ensure that each of the two littoral States should possess "navigable waters of its own" (see for example Phillimore, 2nd ed. I (1871), pp. 224 — 5; Hall 2nd ed. (1884) p. 139; Merignhac, II (1907), p. 588; Nys, I (1912), p. 472; Fauchille, 8th ed. I (1912), p. 249. In Gidel's Le droit international public de la mer (volume III, pp. 748 — 751) one may find numerous nineteenth century diplomatic, judicial and doctrinal precedents, according to which the median line was applied without any question arising of a deviation for navigation purposes. Compare also the Resolution of the Institut du droit international of 1894, art. 10 — 1 (Annuaire de l'Institut, ed. nouvelle abregée, 1928, p. 519).

76. Finally, with regard to the islands within the Channel, the Chilean Government can do no better than refer to the arguments which it has devoted to this problem in Chapter VI of its Memorial, of which the conclusions are recalled above (para. 72).

THE INTERPRETATION OF THE 1881 TREATY CONFIRMED  
BY SUBSEQUENT EVENTS

A. Introduction

1. It is now appropriate to turn to a consideration, in the light of the Argentine Memorial, of events subsequent to the Treaty of 1881. As was stated by Judge Sir Gerald Fitzmaurice in his separate opinion in the case of the Temple of Preah Vihear :

"It is a general principle of law, which has been applied in many contexts, that a party's attitude, state of mind or intentions at a later date can be regarded as good evidence—in relation to the same or a closely connected matter—of his attitude, state of mind or intentions at an earlier date also; provided of course that there is no direct evidence rebutting the presumption thus raised."  
(I.C.J. Reports, 1962, p. 6 at p. 61)..

It is the application of this general principle to the present case which will form the subject of this chapter. In this case as in the Temple case the Court is concerned with the interpretation of a boundary treaty. In this case, as in that, the process of interpretation involves consideration of the conduct, both positive and negative, of the parties in the period subsequent to the conclusion of the treaty. Again, as Sir Gerald Fitzmaurice said :

"... negative conduct—failure to act, react or speak, in circumstances where failure so to do must imply acquiescence or acceptance—is, in my opinion, quite sufficient for this purpose, if the facts are clear." (*ibid.*, p. 55)

2. The Government of Chile has already at some length in its Memorial set out facts subsequent to the 1881 Treaty which are material to its interpretation and which, in particular demonstrate positively that the Chilean "attitude, state of mind or intention" in the period after the 1881 Treaty is consistent with, reflects and confirms the Chilean "attitude, state of mind or intention" at the time of the negotiation of the Treaty. The latter was to the effect that the attribution to Chile of sovereignty over Picton, Nueva and Lennox and their appurtenant islands and islets, as well as other islands and islets in the Beagle Channel was expressed by the reference to "Beagle Channel" as a means of dividing Chilean from Argentinian territory. The evidence of the Chilean attitude is to be found in the actual conduct of the Chilean authorities in and in relation to the disputed area during the relevant period.

3. Corresponding to this activity of the Chilean authorities there is inactivity on the part of the Argentinian authorities which is, in its turn, evidence that the Chilean view of the position was shared by the Argentine authorities. In these matching positions—Chilean activity slotting into Argentine inactivity—the Court has the evidence of a concordance of position to which, as will be seen, the Argentine Memorial attaches much importance (see

e.g. Arg. Mem. p. 357, para. 14) and with which the Government of Chile need not quarrel, not because it accepts the test as formulated by the Argentine Government (which it does not), but because it satisfies the test. Moreover, as will be seen, when the Argentine Government began, after more than twenty years, to change its attitude to the 1881 Treaty, it adopted not one but a series of interpretations, not consistent one with another and thus quite incapable of evidencing a supposed Argentine intention in 1881 differing from that reflected in its previous own conduct.

4. There is no need in this Counter-Memorial to repeat the content of the Chilean Memorial. The Court will recall that the Chilean Government there dealt at length with matters subsequent to the 1881 Treaty for the purpose of showing the consistency of the Chilean position, both on the diplomatic plane and in terms of its governmental activity in and in relation to the disputed area. The Chilean Memorial showed, moreover, how that interpretation was shared by holders of office in the Argentine Government as well as by Argentine cartographers and geographers including the Argentine Expert, Dr Moreno. It was also shared by the British Government experts. The relevant chapters of the Chilean Memorial are VII to X inclusive.

5. This Chapter of the Chilean Counter-Memorial will, therefore, be mainly concerned with a detailed examination of those parts of the Argentine Memorial which contain material subsequent to the 1881 Treaty and which call for a reply or comment.

6. The Argentine Memorial deals with this material primarily in two chapters: Chapter IV entitled "Origin and Evolution of the Beagle Channel Dispute" (Arg. Mem. pp. 203-284) and Chapter V entitled "Argentine Predominance in the Beagle Channel Zone" (Arg. Mem. pp. 285-340). In addition some reference to the legal significance of the conduct of the parties is made in Chapter VI, "Legal Aspects of the Dispute", under two headings: "The problem of the critical date and its consequences" and "Conduct of the Parties: its limited relevance". The material and arguments there presented will, within the limits of convenience, be dealt with seriatim, with the exception of the two legal questions which ought properly to be dealt with by way of introduction, namely, (1) the critical date and (2) the relevance of practice in the interpretation of boundary treaties.

## **B. Preliminary Questions**

### **(i) The critical date**

7. Chapter VI of the Argentine Memorial contains a section on "the problem of the critical date and its consequences" (pp. 349-353). It concludes (p. 353, para. 10) that "the critical date is 1881 and any subsequent acts of either Party can make no difference to that position". The absoluteness of this exclusion of subsequent acts is almost immediately qualified to the point of effective negation, in the section next following (at p. 357, para. 14), by the acknowledgement of the relevance (albeit, so the Argentine Memorial contends, only when it is concordant) of subsequent practice "when it evidences the agreement of both Parties with respect to such interpretation."

8. However, the very fact that the Argentine Memorial has raised the question of the critical date compels the Chilean Government to say something on the subject. But little can be added to the observations in the Chilean Memorial, p. 129, para. 10, where the stress was laid upon the admissibility of evidence after the critical date "as confirming or demonstrating in retrospect the existence, trend and effect of the facts prior to that date". It is in any event clear that both parties share a willingness to rely upon the analysis of the problem by Sir Gerald Fitzmaurice in the British Year Book of International Law, vol. 32 (see Arg. Mem. p. 350, n.6 and Ch. Mem. p. 130, n.1.)

9. While the Chilean Government agrees with the Argentine Government that the issue before the Court is essentially one of interpretation of the 1881 Treaty, it cannot accept that the Court is therefore bound to exclude evidence subsequent to 1881 in so far as it is material to the identification of the intention of the parties at that date. Nor is 1881 a controlling date when it comes to the question of the effect of Argentinian abstention, until more than twenty years after the Treaty, from asserting an interpretation contrary to the one adopted and acted upon by Chile.

10. The Court will, of course recall that in the Palena case, the Court of Arbitration (Award, p. 69; International Law Reports, 38, p. 80) said:

"It is agreed by both Parties that the notion of the critical date is not a rigid one and that a good deal is left to the appreciation of the Court, and moreover that the critical date is not necessarily the same for all purposes."

11. The Government of Chile observes, moreover, that the Argentine Government has not forbore to devote 138 pages of its Memorial to events subsequent to 1881—an exercise which presumably the Argentine Government does not regard as legally irrelevant to the issues before the Court. The Argentine Government has, moreover, introduced a section entitled "the dispute in the light of modern developments in the Law of the Sea" which, in addition to being demonstrably irrelevant to the interpretation of the 1881 Treaty is also totally inconsistent with the Argentine contention regarding the critical date.

**(ii) The relevance of practice in the interpretation of boundary treaties**

12. For reasons comparable to those just mentioned in connection with the "critical date", it is also possible to abbreviate the discussion regarding the relevance of practice in relation to the interpretation of the 1881 Treaty. The Argentine Memorial is, to say the least, a trifle ambivalent on this matter. It seeks to exclude the relevance of practice when the end result is the acknowledgement of Chilean sovereignty over Picton, Lennox, Nueva and their associated island and islets; but at the same time is quite willing to introduce references to, and rely upon, such practice with a view to establishing a median-line boundary in the section of the Beagle Channel which lies immediately to the north of Navarin Island (see pp. 431-434). The fact that the "practice" relied upon is inadmissible for another and elementary reason—namely, the "without prejudice" character of negotiations (as to which, see para. 90 below)—does not alter

the fact that the Argentine Government seeks to rely upon it. And the Argentine Memorial goes even further—in effect all the way in agreeing with the Chilean view of the admissibility of practice—when, at p. 434, after ending its use of inadmissible negotiating drafts, it concludes the section on practice with the following paragraph:

“The division of the jurisdictions in that part of the Channel, following the line described above, was also observed de facto by both parties for many decades. Their activities there, particularly in relation to the setting up and maintenance of navigational aids (lighthouses, beacons, buoys, and other signalling devices), as well as in the exercise of jurisdiction over the islands and islets lying respectively north and south of that line, were in accordance with that division. Diplomatic correspondence recorded this common practice.”

If the area to which this process of attribution of jurisdiction was applied were moved east of 67° 15'W the passage could have appeared in the Chilean Memorial!

13. Another way of concluding this discussion is to recall the brief passage from the Award in the Palena case quoted in the Chilean Memorial, p. 127, para. 4, where the Tribunal said that the process of interpretation

“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”.  
(Report of the Court of Arbitration, p. 77; International Law Reports, 38, p. 89.)

14. This being so, the Government of Chile does not feel that it is here necessary to burden the Court with further argument under this head. If it should appear from the Argentine Counter-Memorial that the semblance of substantial identity of view on this point between the parties is illusory, the Chilean Government reserves the right to revert to the matter at a later stage in the case.

**(iii) The significance of Argentinian silence in the face of Chilean activity to 1904**

15. In assessing the significance of the subsequent conduct of the parties as an element in the interpretation of the 1881 Treaty, it is appropriate to point especially to Chilean activity and Argentine inactivity in and in relation to the islands of Picton, Lennox and Nueva, and the appurtenant islands and islets.

16. The Chilean Memorial devotes a substantial chapter (Chapter X) of 47 pages, over one quarter of its whole Memorial, to a statement of its “Acts of Jurisdiction in the disputed area”. It is unnecessary to repeat here the details of that activity. But it is to be recalled that the activity was quite open and that much of it was reflected in decrees published in the Chilean Official Gazette (see Ch. Mem. p. 172, para. 196).

17. The Chilean Memorial showed that this activity was not made the subject of protest by Argentina until 1915. There may, perhaps, be some inclination to suggest that such absence of protest was understandable at any rate during the earlier part of the period. However, any such inclination must be met by the recollection that Dr Moreno, the much respected and influential Argentine Expert, provides evidence in an article which he published in 1895 that Chile's 1881 Authoritative map, in the form in which it was published in El Mercurio (see Ch. Plate No. 15), and upon which the boundary line in the Beagle Channel was clearly marked as running north of Picton, Lennox and Nueva, was known to the Government of Argentina shortly after the Treaty was signed. Commenting upon Moreno's article, the Chilean Expert Bertrand stated in a published work that this map was "clear proof of the official interpretation in good faith of the Treaty" and indicated that the Chilean interpretation was accepted in Argentina.<sup>1</sup> In any event, the absence of official Argentine reaction cannot be overlooked.<sup>2</sup>

18. The way in which the Argentine Memorial deals with the silence of the Argentine Government calls for special note. Thus on p. 203 (para. 2) the Argentine Memorial, after stating that news of the concessions granted by the Chilean authorities had come to the attention of the Argentine local authorities, who reported it to the central Argentine Government, the latter "declining to be provoked, acted cautiously and calmly". Again, on the following page, the Argentine Memorial stated that in 1892 the Argentine Government "chose to refrain at the time from any action of its own which might widen the rift between the two countries". The same apprehension is invoked at p. 216 (paragraphs 18 and 19) as an explanation for inaction in 1898.

19. The Government of Chile need only make three comments upon this lack of protest during a crucial period—the thirteen years when active Chilean governmental concern with the disputed area was first openly demonstrated.

(i) 20. The first comment is that the Argentine Memorial clearly recognizes that both the local Argentinian authorities and the central government were fully aware of Chilean activity. Indeed, even if the Argentine Memorial had not admitted that the central government had received the necessary information, it would be evident from the list of decrees published in the Chilean Official Gazette (see Ch. Mem. pp. 172–4) that sufficient material was publicly available to the Argentine mission in Santiago for it to make its own assessment of the extent of Chilean activity in the area. The propriety of the attribution to the central government of knowledge possessed by its organs is acknowledged by the International Court

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<sup>1</sup> See the text of the article entitled "La Cordillera de los Andes i la division de las aguas", which originally appeared in La Nacion, Buenos Aires, 3 February 1895, reprinted in A. Bertrand, Estudio Tecnico acerca de la aplicacion de las reglas para la Demarcacion de Limites (Santiago, 1895), esp. at pp. 276–277. The relevant paragraphs of the article were quoted in the Chilean Statement presented in the arbitration leading to the 1902 Award, (see pp. 1547–1548) and attracted no answer in the Argentine Short Reply, 1902. (see Ch. Ann. No. 364)

<sup>2</sup> It has thus been shown that neither the official knowledge of the map, nor the advice by the Argentine Government's chief geographical Expert Moreno, nor the published articles of Bertrand, nor the Chilean pleadings in the 1902 proceedings, provoked the slightest official (or unofficial) Argentine reaction.

of Justice in the case of the Temple of Preah Vihear (I.C.J. Reports, 1962, p. 6) where (at p. 24) the Court referred to certain knowledge of the Siamese members of the Mixed Commission and observed, in a manner which clearly reflected the obviousness of the conclusion, that "through them the Siamese Government must have known" certain facts. Some pages later the Court makes the same point, though in a slightly different context, even more emphatically: "... the Court finds it difficult to regard such local acts as overriding and negating the consistent and undeviating attitude of the central Siamese authorities to the frontier line as mapped" (at p. 30).

(ii) 21. The second comment is that, in law, no matter how one classifies the situation, silence of this kind on the part of the Argentine Government can only serve to confirm the validity of the Chilean assertion of title over the disputed islands.

22. The justification in law of this proposition requires some reference to the law relating to protest. There is general agreement that, in questions affecting title to territory, conduct which a State regards as an encroachment upon its rights calls for protest. And this is so whether the encroachment be upon a title derived from customary international law or whether it relates to a title which has its root in a treaty. The case is the same, moreover, whether the effect of the treaty be plain and the legal quality of the encroachment as adverse tenure correspondingly clear; or whether the effect of the treaty is controversial and the legal quality of the "encroachment" is that it merely sheds light on the understanding of the parties regarding the correct interpretation of the treaty.

23. The same conclusion is demanded by an alternative approach which is no less consistent with the facts of the present case—an approach based upon the concept of estoppel. For this purpose it is at this stage of the case unnecessary to look further for a statement of the relevant law than Professor Jennings' work on The Acquisition of Territory in International Law (1963) where, in Chapter III, he discusses the concepts of recognition, acquiescence and estoppel. Although at points Professor Jennings sounds a proper note of caution, the general tenor of his views, and their relevance in the present context, is clear.

24. Thus at p. 42 he says:

"Now it is of course true that the precise limits of estoppel in international law are and must remain a question of some doubt until at least there has developed a much more considerable jurisprudence on the subject; but this fact merely emphasizes the importance of proceeding cautiously, especially in questions of title. It is doubtful whether estoppel or preclusion can ever be itself a root of title to sovereignty. It may assist in the determination of a title based on some other ground but there probably is no such thing as a title by estoppel."

25. The significance of this passage is twofold. First, it involves, subject to certain conditions an acknowledgment of the relevance of estoppel in "the determination of a title based on some other ground", for example, a treaty, as in this case. Secondly, the passage follows upon the citation at length and with approval of an important passage from the

separate opinion of Sir Gerald Fitzmaurice in the Temple case (I.C.J. Reports, 1962, at p. 63). In this passage Sir Gerald concludes:—

“The real field of operation, therefore, of the rule of preclusion or estoppel stricto sensu, in the present context, is where it is possible that the party concerned did not give the undertaking or accept the obligation in question (or there is room for doubt whether it did), but where that party’s conduct has been such, and has had such consequences, that it cannot be allowed to deny the existence of an undertaking, or that it is bound.”

26. It is, as Sir Gerald Fitzmaurice went on to say, an essential condition of the operation of the rule of preclusion or estoppel that the party invoking the rule must have relied upon the statements or conduct of the other party, either to its own detriment or to the other’s advantage (ibid., p. 63). But as the learned Judge was at pains to develop in the pages following, in a case involving the interpretation of a boundary treaty, this condition is satisfied if the conduct or inactivity in question leads the party relying upon the preclusion to maintain its activity in the disputed area at a less intense level than it would have had the other claimant adopted a more forthright position.

27. There is one passage in particular in Sir Gerald’s opinion which is specially apt for quotation at this point:

“Similarly, it was only on the basis of a justifiable assumption of Thailand’s acceptance of the frontier line as mapped that a comparatively low level of administrative activity on the part of France and Cambodia at Preah Vihear would have been compatible with the upkeep of sovereignty. It is an established principle of international law that, especially in wild or remote regions, comparatively few acts are necessary for that purpose where the title does not primarily depend on the character or number of those acts themselves, but derives from a known and independent source, such as a treaty settlement. On the basis therefore of the acceptance of the map line by Thailand, as part of the treaty settlement, there would, in the upkeep of the Cambodian title, have been no need (in respect of such a locality as that of the Temple area) to perform any but the most minimal and routine acts of administration. Clearly if Thailand could now be heard to deny this acceptance, the whole legal foundation on which the relative inactivity of France and Cambodia in this region was fully explicable would be destroyed.” (ibid., p. 64)

28. These ideas are directly applicable in the present situation. Here there is a treaty settlement in relation to a wild and remote region. Chile has over the years done whatever has been required to administer the disputed area. This has always been on the basis that sovereignty over Picton, Lennox and Nueva had been allocated to Chile. Especially during the first two decades after 1881 Argentina was quite inactive in relation to the disputed islands. The only things which she did in the whole region were the establishment of a prefecture in Ushuaia and the construction of a lighthouse on Staten Island. Argentine conduct, both in its inactivity in and in relation to the disputed islands and in limiting its activity to Ushuaia and Staten Island, confirmed Chile in its understanding of the Treaty and thus led Chile to rely upon the clear implications of Argentine behaviour. Argentina’s failure to react to consistent

Chilean state activity in a situation of this nature gives rise, to use the language of the International Court in the Temple case, to an inference that the Argentine Government accepted the Chilean conduct as a reflection of the true interpretation of the 1881 Treaty. (See Temple case, ibid., at p. 28 and p. 29).

29. The same point was even more strongly made by the Court in relation to another event invoked in the same case. A prince from Thailand had visited the disputed site and had there been received by the French resident for the adjoining Cambodian province, with the French flag flying. As the Court said:

"A clearer affirmation of title on the French Indo-Chinese side can scarcely be imagined. It demanded a reaction." (at p. 30)

As Thailand did nothing the Court said:

"Looking at the incident as a whole, it appears to have amounted to a tacit recognition by Siam of the Sovereignty of Cambodia (under French Protectorate) over Preah Vihear, through a failure to react in any way, on an occasion that called for a reaction in order to affirm or preserve title in the face of an obvious rival claim. What seems clear is that either Siam did not in fact believe she had any title . . . or else she decided not to assert it, which again means that she accepted the frontier at Preah Vihear as it was drawn on the map." (ibid., at pp. 30–31)

(iii) 30. The third comment is that the Argentine explanations offered for the absence of protest or reaction on its part are as inadequate in law as they are in fact.

31. Considerations internal to a government—a lack of knowledge or interest on the part of the central authorities or a disinclination to react for reasons of a transient political character—cannot reduce the need for protest if the situation is one in which the absence of protest would otherwise have a bearing upon the respective legal rights of parties. The International Court had occasion in the Temple case to consider this type of point in connection with a claim by Thailand that its failure to react to certain maps was due to the fact that they had been seen "only . . . by minor officials who had no expertise in cartography". In rejecting this contention both on the facts and in law the Court said:

"If the Siamese authorities did show these maps only to minor officials, they clearly acted at their own risk, and the claim of Thailand could not, on the international plane, derive any assistance from that fact." (ibid., p. 25)

Likewise, Judge Sir Gerald Fitzmaurice, in the course of his separate opinion in the same case, when reaching the conclusion that certain conduct of Thailand constituted a tacit recognition of Cambodian sovereignty over Preah Vihear, observed that "the existence of possible reasons why Siam did not protest cannot, in law, alter the fact." (I.C.J. Reports, 1962 p. 6, at p. 60).

32. The plain fact is that the assessment of whether to protest against the conduct of another State is a highly discretionary task involving the careful weighing of a variety of considerations, some of them of a very subjective character. If a State could be protected from the consequences of a decision not to protest by invoking its own assessment of the "delicacy" or "tension" of its relations with the other State concerned, the function of protest and the correlative significance of acquiescence would be entirely negated. The Government of Chile is, therefore, bound to emphasize that even if the facts upon which the Argentine explanation of non-protest at pp. 203-204 of the Memorial were actually substantiated, they would not relieve Argentina from the legal consequences of its failure to protest.

33. Further, as already suggested, the facts invoked by Argentina scarcely warrant the assertion that the period was one of "tension" or even "rift" between the two countries. True, the work of demarcation was in hand, but there was nothing in the situation which would have precluded the possibility of protest. Certainly, the Argentine Memorial does nothing to bolster its assertion with any evidence. It is appropriate to recall that at the very period of "tension" or "rift" when, so the Argentine Memorial asserts, protest was inappropriate, at least two agreements concerning the boundary were concluded, one of 6 September 1895 and another of 17 April 1896. The preamble to the latter treaty stated:

"Whereas the Governments of the Republics of Chile and Argentina are desirous to facilitate the loyal execution of the existing treaties, which fix the immovable boundary of both countries, re-establish confidence in peace and avoid conflicts of any kind, with the purpose always in view of procuring solutions by direct agreements without prejudice to the use of other conciliatory means stipulated in said Treaties." (For text, see Ch. Mem. Ann. No. 67, p. 199).

34. Again, on 9 October 1895 the Chilean and Argentine Demarcation Experts met to minute their approval of the work of demarcation of Tierra del Fuego (Ch. Ann. No. 66, p. 198).

35. Is the contention that relations between the two countries were too strained for protest really credible at a period when they could negotiate and conclude such treaties and agree the demarcation in the very area in dispute?

36. The true explanation of Argentine silence during this period is that those Argentine statesmen and experts, who were concerned with these matters (Irigoyen, Moreno, Quirno Costa and others) knew as a result of their contact with the negotiations, and the documents and maps relating thereto, that the concept of the "Beagle Channel" as used in the 1881 Treaty left Picton, Lennox and Nueva and appurtenant islands and islets to Chile. The immediate Argentine reaction to the allocation of territory in the disputed region was to develop Ushuaia and equip Staten Island with a lighthouse; it was not to populate, control or provide facilities on Picton, Lennox or Nueva. There was, in fact, for more than a score of years after the 1881 Treaty, an exact concordance between Argentinian and Chilean understanding of the division of sovereignty in the area; and it is only when the men who dominated the scene in 1881 leave it soon after the turn of the century that a change in the official attitude of Argentina becomes evident.

(iv) Further evidence of Argentine acquiescence and admissions against interest.

36A. The Chilean activity referred to in para. 16 above should be contrasted with certain Argentine administrative measures in the years subsequent to the Treaty of 1881. These measures did not extend to Picton, Lennox and Nueva. Thus Argentine Law No. 1532 of 16 October, 1884 (Ch. Ann. No. 48) refers in Article I, paragraph 6, to the following administrative division: 'Governorship of Tierra del Fuego with its natural boundaries, according to the Treaty of 1881 and, besides, the Island of Estados.' It will be noted that only the latter receives special mention. Previously, in an Argentine Presidential Decree of 24 September, 1883 (Arg. Mem. P. 289), maritime sub-prefectures were set up on Staten Island and on Tierra del Fuego. This decree makes no reference to other islands. Related to the Law of 16 October, 1884, is the Decree of 27 June, 1885 (Arg. Mem. p. 294) dividing the Territory of Tierra del Fuego into three Departments. The Department of Ushuaia is stated to have as its southern boundary the Beagle Channel. The only island referred to (apart from Tierra del Fuego) is Staten Island. (See also para. 105 below).

36B. There is other evidence of the Argentine understanding of the position in the years following the Treaty of 1881 which reinforces the view that the ambit of Argentine administration, both in intention and in fact, was restricted to Tierra del Fuego and Staten Island. Chile's 1881 Authoritative map clearly had general currency (see para. 17 above).

In addition to that significant item (Ch. Plates Nos. 13-19) the map evidence includes other items which establish that from 1881 onwards, Argentine official sources consistently regarded Picton, Lennox and Nueva as under Chilean sovereignty. These items are (in the Chilean Atlas) Plate 20 (Ch. Cart. Rem. p. 23), Plate 21 (Ch. Cart. Rem. p. 24), Plate 25 (Ch. Cart. Rem. p. 27), Plate 34 (Ch. Cart. Rem. p. 33), and plate 38 (Ch. Cart. Rem. p. 36, which points out the significance of the change in the later of the two maps.) In spite of Popper's cartographic novelty (Ch. Plate No. 55) and its influence as reflected in Ch. Plate No. 63, (see Ch. Cart. Rem. pp 46 and 50-51), a substantial and significant sample of Argentine official and semi-official maps unequivocally represent Picton, Lennox and Nueva as Chilean: see Plate 72 (Ch. Cart. Rem. p. 54), Plate 78 (Ch. Cart. Rem. p. 56), Plate 93 (Ch. Cart. Rem. p. 66), Plate 110 (Ch. Cart. Rem. p. 76), and Plate 124 (Ch. Cart. Rem. p. 82).

C. Matters arising in connection with Chapter IV of the Argentine Memorial.

37. Chapter IV of the Argentine Memorial is entitled "Origin and Evolution of the Beagle Channel Dispute". It is largely, but not exclusively, concerned with relations between the Parties from 1881 to 1967. Accordingly, it contains a number of points on which the Government of Chile is bound to comment in some detail in the furtherance of its basic proposition that the conduct of the parties since 1881 fully reflects their understanding and intention at that time that allocation of sovereignty to Chile over Picton, Lennox, Nueva and the appurtenant islands and islets was effectively achieved by the use of the expression "Beagle Channel".

(i) The demarcation of the boundary

38. Pages 204–213 of the Argentine Memorial deal with the process of demarcation of the boundary and with the Protocol of 1893 as seeking to resolve a problem which arose in that connection.

39. In commenting on these pages it is as well to refer first to the manner in which the Argentine Memorial disposes of the process of demarcation before 1893. This is mentioned briefly (see pp. 205–206) as if its sole relevance was that of throwing up the question of the location of Cape Espiritu Santo. The Argentine Memorial passes over in silence certain significant documents and maps associated with this stage of the demarcation process which shed direct light on the understanding of the parties regarding the concept of “Beagle Channel” as used in the 1881 Treaty. These documents and maps are described at pp. 70–72 of the Chilean Memorial— and it is important that they should not be skated over in the manner contemplated in the Argentine Memorial.

40. Particularly relevant in this connection is the Report of the Chilean Expert to the Minister for Foreign Affairs of Chile, 25 October 1890 (Ch. Ann. No. 58, p. 169). There, in describing the problem of locating Cape Espiritu Santo the Chilean Expert, Sr Barros Arana, refers to “the enclosed map” (*ibid.*, at p. 178). That map is Ch. Plate No. 49. On it there is marked the line of the 1881 boundary running eastwards along the course of the Beagle Channel and passing north of Picton and Nueva and extending even as far as the south of Staten Island.

41. It seems to the Chilean Government that any understanding of the boundary by the Chilean Expert is a material and significant reflection of the understanding not merely of one party but of both—at any rate when that understanding relates to an aspect of the matter which was not then one of controversy between the parties. As Sr Barros Arana pointed out in his letter to the Argentine Expert of 18 January 1892 (Ch. Ann. No. 59):

“You know that when I held the post of Minister Plenipotentiary of Chile in the Argentine Republic in 1876, I had the honour to take a direct part in the drafting of the boundary treaty; and that in 1881, as the confidential agent of the Government of Chile, I had the satisfaction of seeing it concluded and sanctioned.” (*ibid.*, at p. 182)

42. When the whole of Part III of the Barros Arana report, called “Fixing the Limits in Tierra del Fuego and in the Austral Archipelagos” (Ch. Ann. No. 58, pp. 177–178) is read, one observes that mention was made of only two doubts. One was “the line that is to divide Tierra del Fuego from North to South”; the other is “the extension of the boundary line in the Beagle Channel”. The important point to note is that Sr Barros Arana, in defining these difficulties, did not include as part of them any question regarding the identification of the eastward course of the Beagle Channel. The only problem was that “of several small islands in the area where the Beagle Channel separates Tierra del Fuego from the islands due South” (Ch. Ann. No. 58, at p. 178). But the course of the Channel itself and the 1881 line of division appear to have been beyond doubt and clearly marked on the map. (Ch. Plate No. 49).

43. There is no reason to believe that at that time the Argentine Government saw the situation at all differently from the Chilean Government. Thus Sr Octavio Pico, the Argentine Expert and opposite number of Sr Barros Arana, when reporting to his government on 1 May 1890, identified the meridian line in Tierra del Fuego as the only source of difficulty in the demarcation in that region. What does perhaps require special attention and further investigation is the fact that Sr Pico sent with his report a "sketch map" showing the Tierra del Fuego dividing line. Although the Argentine Memorial mentions Sr Pico's report in footnote 2 of p. 205, the text of the report was not annexed to the Memorial. A copy of the report<sup>1</sup> has since been produced at the request of the Chilean Government, but a copy of the sketch map for which a request was also made, has not been produced.

44. A comparable reflection of the absence of demarcation difficulties in southern Tierra del Fuego is to be found in the report of the Argentine Minister in Santiago, Sr Uriburu. On 20 January 1892, after a discussion with Sr Barros Arana, Sr Uriburu reported:

"The southern part of our territories offers a long and heavy task for its demarcation; but in the extremity of those territories, this operation does not involve difficulties which may affect national conveniences or give rise to more or less serious controversies between the interested Parties."

The full text of Sr Uriburu's report appears never to have been published. Part of it appears in the chapter on "Chile" in an Extract from a Report of the Argentine Minister for Foreign Affairs to Congress in 1892.<sup>2</sup> Strangely enough the Argentine Memorial contains no reference to this report—even though examination of the whole text might shed some light on the present problem.

45. Again, there is no mention of any difficulties about demarcation in Tierra del Fuego in the report of the Argentine Foreign Minister made to Congress in 1892:

"the difference between the experts had arisen only when dealing with the instructions for the demarcation of the continental boundary line. Tracing the dividing line in Tierra del Fuego was an operation independent of the first one and presented no difficulty at all". (emphasis supplied. The quotation is taken from p. 66 of the 1892 Report referred to in the preceding paragraph).

46. To conclude these paragraphs on the process of demarcation, it is appropriate to recall that when the Experts met in Santiago in October 1895 to draw up a formal Minute of Approval of the Work of Demarcation of Tierra del Fuego, they expressly noted that the work of demarcation in Tierra del Fuego was terminated (see Ch. Ann. No. 66 and Ch. Mem. p. 77 para. 22). No doubts or hesitations were recorded regarding the Chilean status of Picton,

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<sup>1</sup> Ch. Annex No. 357

<sup>2</sup> Demarcacion de Limites entre la Republica Argentina y Chile. Extracto de la Memoria presentada al Congreso de la Nacion por Estanislao S. Zeballos—Ministro de Relaciones Exteriores. Buenos Aires, Empresa "La Nueva Universidad", Calle Moreno 477. 1892., p. 53-54.

(ii) **The 1893 Protocol**

47. At this point some reference may be made to a section of the Argentine Memorial devoted to the Protocol of 1 May 1893. (Arg. Mem. pp. 207—11). The main emphasis in these pages, as in pp. 411—414 where the subject is once again taken up, is upon the alleged restatement in the Protocol of the so-called "Atlantic—Pacific principle".

48. It is noteworthy that the Argentine Memorial does not seek to rate that purported "basic criterion" as more than a confirmation of the intention of the 1881 Treaty itself (see Arg. Mem. p. 210. para. (b)). Moreover, the Argentine Memorial (p. 209. para. 10 (a)) admits that the 1893 Protocol was intended primarily to settle the differences of interpretation which had arisen in the area of the Cordillera. However, this same passage continues with the demonstrably absurd assertion that "(the Protocol's) reaffirmation of the principle that each country had absolute sovereignty over its respective coastline is of general application".

49. There is no evidence of any kind to support the thesis that islands south of the Beagle Channel or, indeed, any islands were in issue when the Protocol of 1893 was negotiated. The text of the instrument reveals two exclusive concerns: (a) the boundary north of the 52nd parallel in the Andes Cordillera; and (b) the starting point of the boundary at Cape Espiritu Santo. There is no reference to the islands. Article II is concerned with the "absolute" sovereignty over the territories and respective littorals north of the Straits of Magellan, by reference to the "main range of the Andes". This Article, which the Argentine Memorial considers to be a confirmation of the "Atlantic—Pacific principle", is not concerned with Tierra del Fuego at all. Article IV, which is concerned with Tierra del Fuego, deals exclusively with the starting point of the meridian boundary at Cape Espiritu Santo, and makes no mention of coasts or islands.

50. The antecedents of the Protocol contain no indication of any dispute concerning islands (Ch. Mem. pp. 73-74, paras. 13—15). The events immediately subsequent to the 1893 Protocol include problems arising in the area of the Cordillera de los Andes but no issue relating to islands arose (Ch. Mem. pp. 77—79, paras. 21—25). There is no reference to the disputed islands in the official reports of the Experts concerned with the demarcation within Tierra del Fuego. However in an internal report, the Assistant to the Argentine Expert, in the year before the completion of the demarcation, reported his belief that "the two islands (Picton and Nueva,) belong to Chile by virtue of treaty and of nature".<sup>1</sup> (Ch. Ann. No. 362).

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<sup>1</sup> This report although quoted in the Argentine Memorial, was not annexed, and has now been produced at the request of the Chilean Government. It appears as Ch. Ann. No. 362 and is dealt with further at para. 61 below.

51. In short, all the available evidence shows that the terms of Article II of the Protocol were totally inapplicable to the islands south of the Straits of Magellan. As the Argentine Expert Sr Moreno put it in 1918—"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".<sup>1</sup> This conclusion is reinforced by the compelling fact that both Argentina and Chile were at the time of the 1902 Arbitration completely at one in reading the Protocol in this way (see especially Ch. Mem. p. 83, para 34). It is to be emphasized that the Parties are in accord with the view that the function of the 1893 Protocol was exclusively that of interpreting the 1881 Treaty. The 1893 Protocol was concerned with the process of demarcation on the ground and was not concerned with the allocation of territory. This allocation had already been effected by the Treaty of 1881.

#### Reports of Argentine Governors of Tierra del Fuego (1892-1898)

52. It is on turning to the material under the heading "Reports of Argentine Governors of Tierra del Fuego (1892-1898)" that the Court is first confronted by a striking illustration of the paucity of Argentine activity in the disputed area during the particularly important period 1892-1904—a period when Chilean administration in the zone developed noticeably and during which some Argentine balancing activity, reaction or counter-measure might have been expected.

53. Before commenting on the documents which are specifically referred to in the Argentine Memorial, the Chilean Government must mention two possibly significant items which find no place in the Argentine Memorial. The first is the report of Sr Cornero, Argentine Governor of Tierra del Fuego, dated 15 April 1891 (Ch. Ann. No. 358). This report (successors of which in 1892 and 1893 are reproduced as Argentine Annexes Nos. 16 and 17), after mentioning the need for the delimitation of Tierra del Fuego, speaks of a survey of the territory of Tierra del Fuego carried out by an Argentinian official surveyor Julio V. Diaz. This survey, which might well be helpful in indicating Argentinian understanding of the extent of its territory at that time, is not mentioned in the Argentine Memorial. These are two items which might reasonably have been produced by Argentina in order to shed light on the problem, but which for one or another reason, have been passed over. Once again, the Government of Chile must invite the Court to place upon the absence of these documents a construction unfavourable to the Argentine case.

54. At pp. 213-219, the Argentine Memorial refers to five occasions (February 1892, March 1893, February 1894, March 1896 and March 1898) when the Argentine Governor of Tierra del Fuego reported to the Minister of the Interior on "Chilean interest in the islands at the mouth of the Beagle Channel" (p. 213, para. 15).

<sup>1</sup> The view that Article II of the 1893 Protocol has no application whatsoever south of the Straits of Magellan is shared by the Argentine Admiral Ernesto Basilio who wrote: "The stipulation in Article II of the Protocol of 1893 which states 'Chile cannot claim any point towards the Atlantic, nor can the Argentine Republic claim any point towards the Pacific' refers to the territory which lies to the north of the Straits of Magellan. The fact that in the compromise which led to the 1881 Treaty, Chile was allocated the islands lying to the south of the Beagle Channel proves that that principle contained in the Protocol of 1893 never embraced, nor pretended to refer to, the archipelago of Tierra del Fuego". Admiral Basilio continued: "The islands, Deceit, Barnevelt, Evout, Sesambre, Terhalten, Lennox, Luff and Raquel which lie south of the Beagle Channel belong to Chile, yet it is clear that being east of the meridian of Cape Horn, they are wholly in the waters of the Atlantic. This is beyond discussion. Likewise, no one discusses the question after verifying that Ushuaia, Gable Island and Port Harberton, which belong to our country, are west of the meridian of Cape Horn, and lie therefore in the waters of the Pacific." La Controversia sobre el Canal Beagle, Buenos Aires, 1963 p. 179. (Underlining added) (This is the book which is referred to with praise in the Argentine Memorial.)

55. These references call for a number of comments:

56. First, none of them involves any mention of Lennox. Thus, in so far as the items shed any light on the "disputed" islands, they treat only Picton and Nueva as falling into this category. Lennox is assumed to be Chilean beyond a doubt.

57. Second, they themselves constitute the clearest evidence of Chilean activity in the disputed islands. Thus the dispatch of 6 March 1893 referred to the grant of a concession on Picton, the report of 15 February 1894 also mentioned Chilean-authorized activity on Picton, the letter of 4 March 1896 spoke of Chilean agreement to the assignment of the rights of Thomas Bridges on Picton and the letter of 26 March 1898 mentioned a Chilean grant of a concession on Nueva. While these four items by no means exhaust the catalogue of Chilean activity in and in relation to the disputed area (for which see the Chilean Memorial, pp. 132-170), like the tip of an iceberg, they provide a useful confirmation by Argentina of the facts mentioned in the Chilean Memorial.

58. Third, the references show that Argentina was far from certain about its title to the disputed islands. Why else should it have been necessary, by way of reaction to the letter of 10 February 1892, for the Argentine Ministry of Foreign Relations to leave in abeyance pending a decision by the Demarcation Commission a question to which, as the Argentine Memorial suggests elsewhere, the answer was already abundantly clear to the Argentine and Chilean Governments? The same question may be asked regarding the reply to the report of 15 February 1894.

59. Fourth, the references provide silent, though eloquent, confirmation of the depth of Argentine inactivity in the disputed islands. Not a word do they contain to suggest the existence of conflict or overlap between the reported Chilean activity and any measures taken by the Argentine authorities.

60. Fifth, and most important, the explanation given of these episodes in the Argentine Memorial amounts to an express admission of the total absence of Argentine diplomatic reaction to the news of the repeated demonstration of Chile's understanding of the effect of the 1881 Treaty. This lack of reaction cannot be regarded as anything other than acquiescence in the Chilean action; and the suggestion that Argentine silence stemmed from "difficult" and "delicate" circumstances provides, as already stated, no answer in law to the consequences of Argentine silence.

#### (iv) Opinion of Lieutenant Martin

61. In addition, it is impossible to ignore the support given to these comments by Lieutenant Martin's reply to the questions put to him in March 1894. He thought that Picton and Nueva belonged to Chile (see Ch. Ann. No. 362, c.f. the translation at Arg. Mem. p. 217, para. 21). The significant paragraph in which he stated the position regarding Nueva is omitted from the extract quoted in the Argentine Memorial:

"Nueva Island is quite further to the South than the direction of the Beagle Channel, and Picton Island is in the very mouth of the channel. The first of these islands, because of its importance, is among those which, if one should wish to make an exception, are mentioned especially; thus I am of the opinion that when the Treaty does not say that it is Argentine, when it says and states that Staten Island and those which lie to the East of Tierra del Fuego are so (i.e. Argentine), it means that Nueva is joined to the group including Navarino and others, placing it among those which lie to the South of the Beagle Channel and therefore considering it as Chilean" (Ch. Ann. No. 362)

62. Apart from the direct expression of opinion on the question of sovereignty over Nueva and Picton, the passage quoted above is important because of its express and unhesitating identification of Nueva as "quite further to the south than the direction of the Beagle Channel"—a statement which is totally incompatible with any conception of the Beagle Channel turning in a south-easterly direction between Navarino and Picton.

63. Nonetheless, since this was "a question of territories which may belong to the Nation" Lieutenant Martin thought it right that further enquiries should be made. Thus only thirteen years after a settlement which, according to the Argentine Memorial, was based on a clear understanding by the parties and while those able to shed light on the matter in Argentina were still alive, the Argentine Ministry of Foreign Affairs caused enquiries to be made in London. And what answer was forthcoming? In fact, as now appears from a document just produced at the request of the Chilean Government, Sr Dominguez, the Argentine Minister in London, by a note dated 4 July 1894, told his government that there existed two documents showing the islands as Chilean: one was "a chart containing twenty-seven ports . . . of different islands of Tierra del Fuego, and amongst them, those of Ushuaia, Lapataia, Ensenada Banner in Picton Island. In this last chart, the Beagle Channel is drawn north of Picton Island"; secondly, he said, "it does not seem unnecessary to recall that in the Atlas of the Republic published by the Argentine Geographical Institute under the direction of a Commission presided over by General Mitre, the dividing line in the Beagle Channel runs north of Picton and Nueva Islands, Plate No. XXVII of the Atlas". (Ch. Ann. No. 363).

64. The comment in the Argentine Memorial that the answer of the Foreign Office to further enquiries in 1896 placed the Argentine Government "in a difficult position" will no doubt be recorded as one of the understatements of the present proceedings. Indeed, the Argentine Government was in a difficult position—for it had just been told that Fitzroy's papers gave no ground for the view that Beagle Channel passed between Navarino and Picton. (See Ch. Ann. No. 365). So, not surprisingly after these two rebuffs, the Argentine Government put the question aside. The Argentine Memorial explains this decision by saying that the Argentine Government "felt it would be unwise to raise the issue officially with Chile" (Arg. Mem. p. 219, para. 23). That, however, cannot in any way alter the legal consequences of Argentina's continuing silence. If the Argentine Government had at that time truly felt that, notwithstanding the replies received from London, Picton, Nueva and Lennox were Argentinian and that something must be done to preserve their Argentinian status, the

situation was precisely one in which a clear and specific assertion of the Argentine position was required. The very fact that none was made contributes to the preclusion of Argentina from subsequently raising the question and, at the same time, provides compelling evidence that the Argentine Government did not have any basis for a claim to press.

### Cartography

65. The Argentine Memorial contains a brief section (pp. 219–226) on “cartography” as an element in the “Origin and evolution of the Beagle Channel dispute”. The principal theme of this section is that the cartography of the period 1881 to 1901 is uncertain and inconsistent and that neither country attached importance to the cartographic interpretations of the boundary line. Such an approach is understandable in view of both the lack of support which the cartography provides for the Argentine case and the massive support which it contributes to the Chilean position.

66. It is not necessary to repeat here all that has been said in the Chilean Memorial and in the Chilean Remarks concerning Cartographical Evidence on the subject of maps. (See Ch. Mem. pp. 40–43). Nonetheless, it is necessary to observe, in relation to the Argentine comments upon the map published by the Chilean Hydrographic Office in 1881 (Ch. Plate No. 16; Arg. Map No. 17), that while, of course, “it was by no means universally adopted” (Arg. Mem. p. 221, para. 26)—what map ever is?!—it nonetheless attained a remarkable circulation.

(i) The Italian Charge d’Affaires in Santiago sent it to the Italian Minister for Foreign Affairs on 23 October 1881 (Ch. Ann. No. 42 (a)).

(ii) The German Consul General in Santiago sent it to the German Ministry for Foreign Affairs on 24 October 1881 (See Ch. Plate No. 14 and Ch. Ann. No. 44).

(iii) The Swiss Consul in Valparaiso sent it to the Swiss Federal Council on 24 October 1881. (See Ch. Plate No. 15 and Ch. Ann. No. 45).

(iv) The British Minister in Santiago sent it to the Foreign Office on 27 October 1881 (see Ch. Plate No. 16 and Ch. Ann. No. 46). In his covering note the British Minister suggested that the map “may be looked on as authentic for all practical purposes”.

(v) The Chilean Hydrographic Office sent it to the British Hydrographic Department on 10 November 1881 (see Ch. Plate No. 17) accompanying Chilean Hydrographic Notice No. 35 of 10 November 1881 (Ch. Ann. No. 46 (c)). This notice, in summarizing the effect of the Beagle Channel reference, said: “Thus the south-eastern point of Tierra del Fuego and the island of Los Estados remain in the possession of the Argentine Republic”.

(vi) The Belgian Consul in Santiago sent it to the Belgian Ministry for Foreign Affairs on 15 March 1882 (see Ch. Plate No. 18 and Ch. Ann. No. 47 (a), p. 149 (c)).

(vii) Also, the map was received by the Royal Geographical Society in London on 24 January 1882 (Ch. Plate No. 19), and referred to in the Proceedings of the Society in Vol IV 1882.

67. At this point, reference should once again be made to the knowledge which the Argentinian Government had of this map and the comments which Dr. Moreno made about it in his article of 1895. In particular, his recognition of the official character of the map and of Argentinian acceptance of it must be recalled. (See above, para. 17).

68. The significance of this map lies in various elements:

(i) Its production was contemporaneous with the signature of the 1881 Treaty, at a time before there was any glimmer of a dispute about the Beagle Channel. It could hardly, therefore, have been prepared by Chile as an interest-serving document.

(ii) Its provenance was official. The map was prepared by the Chilean Hydrographic Office and was widely circulated. It was published in El Ferrocarril, by order of the Chilean Government, and was also given to a number of foreign diplomatic missions in Santiago. In addition it was distributed to the Members of the Chilean National Congress.

(iii) It is in all material respects identical with the maps illustrating the travaux préparatoires of the 1881 Treaty, as well as with other illustrations of the treaty line prepared at about the same time. (C.f. the absolute concordance between Barros Arana's Map of 1876 (Ch Plate No. 8), the map illustrating the territories comprised in the Chilean-Argentine question (Ch Plate No. 11) and the Irigoyen Map (Ch. Plate No. 21)).

69. It is perhaps important to emphasize this point yet again, notwithstanding the clarity with which it is made in the Chilean Memorial (pp. 40-43). The Argentine Memorial, whether unconcerned with or in ignorance of the cartographic evidence available from the immediately post-1881 Treaty period, skips lightly from Chile's 1881 Authoritative Map (referred to in paragraph 66 above) to a variety of maps dated between 1885 and 1891 which are said to illustrate "the uncertainties and inconsistencies in the cartography of this period" (Arg. Mem. p. 226). But it makes no reference to the maps prepared immediately after the 1881 Treaty which shed so much light on the intention of its authors.

70. Without forgetting the critical importance of the Barros Arana maps of 1876 and 1878 (Ch. Maps Nos. 8 and 10), of the Argentine Foreign Ministry's map of 1878 (Ch. Plate No. 9) and of the Baron D'Avril maps and sketches of 1877, 1878 and two of 1881 (Ch. Plates Nos. 12, 11, 12 and 13 respectively), it is important to recall the following maps:

(i) On 27 October 1881, the Argentine Minister in London, Sr Manuel R. Garcia visited the Foreign Office (Ch. Ann. No. 46(a)) and presented Lord Tenterden with "the plan of the southern regions which includes the new boundary" (*ibid.*, at p. 148 (b)). This

plan cannot now be found (see Ch. Cart. Mem. Pl. 20, p. 23) but there exists and is now reproduced as Ch. Plate No. 20 a map found in the Foreign Office archives bearing the endorsement "as communicated by Senor Garcia Oct. 27, 1881 and procured from the Admiralty by the Librarian". Marked on this map very clearly is a line of dots representing the boundary and following, in the disputed area, the southern shore of the main island of Tierra del Fuego eastwards beyond Cape San Pio as far as Slogett Bay.

(ii) Of even more telling significance is the map sent by Dr Irigoyen, the Argentine Foreign Minister who negotiated and signed the 1881 Treaty, to the British Minister in Buenos Aires in December 1881 and sent on by the latter to the Foreign Office on 20 December 1881 (See Ch. Ann. No. 47, p. 149; Ch. Plate No. 21 and Ch. Cart. Rem. Pl. 21, p. 24). On this map "the part which is coloured with a deeper shade of crimson . . . represents what has been ceded to Chile by the recent Treaty". Here, then, is a totally compelling piece of evidence—a map from the Argentine Foreign Minister—showing Picton, Nueva and Lennox coloured as Chilean and thus reflecting the Beagle Channel as having its course to the north of these islands. The same map, in colour, was included in the magazine "La Ilustracion Argentina", and received favourable comments in the Argentine Press. (See Ch. Cart. Rem. p. 25.)

71. The precision of these maps is such that those to which the Argentine Memorial refers can have no value whatsoever in establishing what was the intention of the parties to the 1881 Treaty at the time of its conclusion. No useful purpose would, therefore, be served by any further consideration here of the Argentine presentation of cartography, (but see Further Remarks concerning the Cartographical Evidence.)

72. Nonetheless, it is desirable to refer, first, to the passages at pp. 69–70 of the Chilean Memorial in which attention is drawn to the Argentine maps, of official or quasi-official origin, which in the decade and more following the 1881 Treaty depict the disputed area in a manner both supporting the Chilean view and contradicting the Argentine case.

73. Secondly, mention should also be made of the full consideration given in the Chilean Cartographic Remarks, Plate 84, pp. 59–61, to the Argentine map XIV submitted in the 1902 Arbitration and mentioned at pp. 234–235 of the Argentine Memorial.

#### (vi) Sailing Directions

74. The Argentine Memorial next introduces a reference to the sailing directions published by the Chilean, British and Argentine Hydrographic Departments in the years following the 1881 Treaty and observes that "they are of little relevance to the present arbitration". The explanation given is "because the definition of the Beagle Channel to be applied in interpreting Article 3 of the Treaty is the one known to the negotiators when they drafted Article 3 of the Treaty of 1881". (Arg. Mem. p. 227, para. 32).

75. The Chilean Government sees no reason to dissent from this view. Accordingly, in the wish to keep matters simple, it does not propose to pursue any extended comment on this subject.

76. As already stated the only relevant sailing directions in existence at the time of the preparation of the 1881 Treaty were British. They are inconclusive in their content, even in determining the geographical sense of the expression "Beagle Channel". Moreover, whatever their content it cannot effectively contradict specific evidence of the exact understanding of the parties to the 1881 Treaty as to the sense in which they used the expression "Beagle Channel".

77. Significance could only be attributed to sailing directions subsequent to the 1881 Treaty if they reflected either a further agreement between the parties or demonstrated acknowledgment by one or the other of the interpretation of the 1881 Treaty adopted by the other side. That the Chilean and Argentine sailing directions do not reflect any agreement additional to the 1881 Treaty regarding its interpretation is so evident as hardly to require statement; and in any case no such agreement is suggested in the Argentine Memorial.

78. But that the Argentine Derrotero of 1900 reflects the Chilean understanding of the position is acknowledged in the Argentine Memorial (see pp. 229-230). The only explanation offered is that "thinking on the boundary at this time in Buenos Aires was at its most confused". The explanation is not very convincing when it is seen as a reflection of consistent Argentine acceptance for two decades of the course of the Beagle Channel, in the sense of the 1881 Treaty, as running to the north of Picton and Nueva.

79. Reference is also made in the Argentine Memorial to the alterations in the Chilean Derrotero giving a more precise location for the eastern entrance of the Beagle Channel and to insertion of the name "paso Picton" between Picton and the east coast of Navarino (see Arg. Mem. p. 230, para. 36). It is perhaps worth noting here the device which the Argentine Memorial uses to criticize this nomenclature. Paso Picton, it said, "had never previously been named distinctly for the simple reason that it was, and was always intended by Fitzroy to be, the 'eastern opening' of the Beagle Channel". One needs only to ask two questions: How does the Argentine Government know what Fitzroy's intention was? It is to be recalled that on 7 May 1896 the Foreign Office informed the Argentine Government that "the Lords Commissioners [of the Admiralty] do not find that Captain Fitzroy ever strictly defined the course and limits of Beagle Channel nor is there anything to show which of the arms passing by Picton Island he considered to be the principal one" (as quoted in Arg. Mem. p. 218, para. 23).<sup>1</sup> In any case, how does Fitzroy's intention, even if it could be identified with precision in a manner which would have been known to the draftsmen of the 1881 Treaty, control or override the clearly evidenced understanding of the parties to the Treaty at the time of and immediately after its conclusion?

80. Furthermore, as just indicated, the Memorial criticizes the introduction of the name 'Paso Picton' by Chile. But, as mentioned in Chapter III above, in truth it was introduced by Argentina. At p. 63 of its Memorial, the Argentine Government refers to a letter of 9 May 1938 from the British Admiralty Hydrographer to the head of the Argentine Hydrographic Service. The text of this letter has now been produced by the Argentine Government, at the specific request of the Chilean Government. (See Ch. Ann. No. 377).

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<sup>1</sup> As to the later view of the Admiralty on this question, see Ch. Ann. No. 122 and Ch. Plate No. 117. See also Appendix B.

In the light of the statement in that letter, it would appear that the proper construction to put upon the change of nomenclature introduced by Argentina itself is that at that time, in 1900, the Argentine Hydrographic Service itself regarded the water between Picton and Navarino not as the Beagle Channel but as a passage leading to the Channel. This accords with the statement at the same time in the Argentine Derrotero that "Nueva, Lennox, Picton Island and Banner Cove are Chilean positions." (Ch. Mem. p 89 para. 7. c.f. Arg. Mem p. 229 para. 35).

#### Survey of the Argentine Warship "Almirante Brown" (1899-1900)

81. The Argentine Memorial refers (at pp. 231-233), in support of a distinction between "Canal Moat" and "the Beagle Channel properly so-called" to the survey of the Beagle Channel "area" carried out by the warship 'Almirante Brown'. It is, of course, a fact that Captain Saenz Valiente carried out the survey referred to in the Argentine Memorial and his report is a matter of public record—though, it may be added, it did not become so till published by the Argentine Ministry of Marine in 1912, more than a decade after it had been prepared. There are, however, four important points to be noted about it and about Captain Saenz Valiente's manuscript report of 28 April 1904, also cited in the Argentine Memorial (p. 233, para 41).<sup>1</sup>

82. The first point arises out of an Argentine note, sent by the Legation in Santiago to the Chilean Foreign Minister on 19 March 1900. (Ch. Ann. No. 366). This note was not referred to in the Argentine Memorial. Its first paragraph reads as follows:

"To facilitate the commission which has been given to the Argentine warship 'Almirante Brown' in the ports of the Beagle Channel from Lapataia to Cape San Pio (Tierra del Fuego), it would be necessary for the better execution of that work to erect some buoys or provisional markers on Navarino Island under Chilean jurisdiction." (Underlining added)

Here, in the context of the survey about to be carried out by the 'Almirante Brown', is the clearest possible indication given by Argentina to Chile at the diplomatic level that in Argentina's understanding the Beagle Channel ran to Cape San Pio. What could be less consistent with any theory that the Channel turned south-east and passed between Navarino and Picton?

83. The second point, which appears more clearly in the manuscript than in the printed report, is Captain Saenz Valiente's belief that the terms of the 1881 Treaty prescribed the axis of the Beagle Channel ("el eje del Canal") as the boundary; and by the axis of the Channel he understood the line of its greatest depth. Inherent in this belief are two factors contradictory of Argentinian positions on other aspects of the case. First, it is clear that when a name was attributed to the Beagle Channel by Captain Fitzroy it was not dependent upon the identification

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<sup>1</sup> The manuscript report is now reproduced in Ch. Annex No. 367, and relevant extracts from the published report in Ch. Annex No. 371

of one arm as deeper than another. Second, there could have been no deliberate intention in 1876–1881 to select the south-eastern passage as the channel on account of its greater depth, since no such depth was known. Indeed, if depth was a relevant factor, the information available in 1881 would have led to the selection of the passage north of Picton and Nueva.

84. Third, Captain Saenz Valiente was clearly conscious that he was proposing a change of nomenclature: the name "Moat" given by Fitzroy to a bay was assigned to the eastern part of the Beagle Channel.<sup>1</sup>

#### Relations between the Parties, 1899–1967

85. The Argentine Memorial devotes some 50 pages (pp. 233–284) to a narrative of diplomatic relations between the Argentine and Chilean Governments in the period from approximately 1900 onwards. The Chilean Memorial deals with much the same period in Chapters VIII and IX (pp. 85–126). Obviously there are differences of emphasis between the presentations of the two parties. But these will readily be apparent when the two Memorials are perused in parallel and it does not seem necessary to pass all this material in review at the present time. Nonetheless, certain comments must be made.

86 (i) The Argentine narrative is essentially historical in character. The Chilean Government does not criticize the Argentine Government for placing before the Court a series of facts which provide some background to the dispute under arbitration. But the Chilean Government is bound to note that, in the main, the Argentine narrative is not focussed upon the establishment of any specific legal proposition. By contrast, the comparable part of the Chilean narrative is related to the establishment of certain significant features in the case.

87. First, Chapter VIII of the Chilean Memorial, as its title indicates, is directed towards demonstrating the major alteration which took place in the Argentine position in 1904. Prior to that year Argentina's official position in relation to the Beagle Channel and, in particular, to sovereignty over Picton, Lennox and Nueva was marked on the jurisdictional or administrative plane by virtually total inactivity and on the diplomatic plane by behaviour tantamount to acknowledgment both that the Beagle Channel ran north of Picton and Nueva and that these two islands, as well as Lennox, were Chilean. Thereafter the consistency of its conduct was deformed by the development of interest in the possibility that by adopting the line suggested by some of its naval officers it might put in doubt Chilean sovereignty over those islands. The Argentine Government appears to have become aware that if its conduct continued as theretofore, there would be no turning back from an interpretation of the 1881 Treaty resolutely

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<sup>1</sup> "On the chart of the Beagle surveyed by the officers of the "Almirante Brown" the designation of Moat Bay has been replaced by Moat Channel, purely for the purpose of greater clarity for references to that arm of the Beagle, and because in no way does it alter the technical hydrography of the channel since on its axis goes its proper name." (Capt. Saenz Valiente's Manuscript Report 1904 (Ch. Ann. No. 367)).

and consistently reflected in the facts of the situation. The Chilean Government contends, of course, that in any event there is no turning back from what was agreed in 1881 and that Argentina must continue to accept what was then settled as effectively it did during the period to 1904.

88. Second, the Chilean Memorial is directed towards showing "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" (Ch. Mem. p. 118, § 3). For twenty-three years after the 1881 Treaty, no concern was shown by Argentina with the position of the islands. The first diplomatic reference to the matter was in 1904-5. Ten years passed before the protest of 1915, followed by those of 1917 and 1920. Then there were eight years of complete silence. In the decade from 1928 to 1938 the only Argentine representation was in 1931. From 1938 to 1951 Argentina was once more inactive.

89. Third, Chapter IX of the Chilean Memorial is concerned to demonstrate that nothing in the diplomatic conduct of the two Parties from 1920 onwards can have served to alter the position so well established by their behaviour prior to 1904.

90. (ii) The one major endeavour on the part of the Argentine Memorial to make use of the material in these pages comes in Chapter VI, "Legal Aspects of the Dispute", where it seeks (at pp. 431-434) to show that "a clear understanding and practice developed between the two countries as to the proper line of demarcation within the Beagle Channel from the Cape Espiritu Santo meridian eastwards to Latitude 67° 15' W". As already stated (above para. 12), the Government of Chile does not deny the legitimacy of an attempt by the Argentine Government to interpret the 1881 Treaty in the light of the subsequent conduct of the parties, no matter how ineffectual that attempt may prove to be. But one thing must be clear: that the introduction of references to the unsuccessful negotiations of 1904-1905 and of 1960 is quite inconsistent with any Argentinian adherence to 1881 as the critical date.

91. (iii) It may be observed, in the third place, that the Argentine narrative contains nothing which contradicts and much which confirms the statements in the Chilean Memorial. There is no mention of diplomatic activity other than that set out and assessed in the Chilean Memorial. Equally there is nothing which runs counter to the Chilean description of Chilean presence and Argentinian absence from the disputed islands.

**D. Matters arising in connection with Chapter V of the Argentine Memorial**

92. It is now possible to turn to Chapter V of the Argentine Memorial which is entitled "Argentine predominance in the Beagle Channel zone". (Arg. Mem., pp. 285-340).

93. Before examining this material more closely, one is bound to ask: what is the relevance of the so-called Argentine predominance in the Beagle Channel zone? This is not a case about the Beagle Channel zone in general terms. It is a case about sovereignty over certain specific islands—principally Picton, Lennox and Nueva, the islands and islets associated with them, and the islands and islets lying in the Beagle Channel east of the point at which the north-south meridian boundary touches the Beagle Channel. Consequently, unless the Argentine Government can identify measures which specifically reflect Argentine sovereignty over the disputed islands its case is in no way strengthened. The introduction of the more general reference to "predominance in the Beagle Channel zone" serves as a sort of smoke screen with which the Argentine Government seeks to offset the specific evidence of Chilean activity by the creation of some general impression of an Argentine presence.

94. It thus becomes necessary to perform the somewhat tedious task of identifying the various facets of this Argentine exposition and of showing their irrelevance to the real issues before the Court of Arbitration.

**(i) Early activity in Tierra del Fuego**

95. The four opening paragraphs of the chapter (pp. 285-287) mention activities before 1881 which may be intrinsically interesting but which appear to have no relevance to any specific issue in the case. They call for no further comment.

**The Bove reports**

96. The Argentine Memorial then introduces a reference to the reports of Lieutenant Bove (pp. 288-289), now produced at the request of the Chilean Government and included in Ch. Ann. No. 353. Within a few months of the signature of the 1881 Treaty Lieutenant Bove had been commissioned by the Argentine Government to sail in and around the region of Tierra del Fuego. Within one year of the signature of the 1881 Treaty Lieutenant Bove had penned a report to the Argentine Minister of the Interior and Marine referring to his activities in the Beagle Channel in terms which could not have left a moment's doubt in the mind of his official readers that the Beagle Channel extended eastwards at least as far as Slogett Bay and certainly passed north of Picton and Nueva.

97. It is worth looking at the Report in some detail. For it is of value in at least two respects additional to the light it casts upon contemporary understanding of the meaning of the Beagle Channel.

98. First, it demonstrates how little the Argentine authorities knew about the disputed area at the time. The report contains basic information regarding, for example, population and the characteristics of the land, of a kind which Lieutenant Bove could hardly have thought it necessary to include if he had been under the slightest impression that the authorities in Buenos Aires had any close contact with the area.

99. Secondly, the report exposes in a page the whole fiction of the existence and significance of Ushuaia as fabricated in the Argentine Memorial. Ushuaia is mentioned only as the residence of the English mission (see p. 123 of the Report). Its five buildings are listed (at p. 125). Four are inhabited by English families. The fifth is the church. The loneliness and desolation of the area is emphasized. (See also Chapter I, para. 28, above).

100. But, third, and most important, Lieutenant Bove reports (at p. 126) how Mr. Bridges offered to take him in his boat "to Slogett Bay, a bay situate at the end of the Beagle Channel a little to the east of New Year [sic] island". Some lines later Lieutenant Bove speaks of the terrain "which one encounters in all that part of the Beagle Channel which belongs to the Argentine Republic, from Yandagaia Bay to Lloget [sic] Bay for a distance of about seventy miles".<sup>1</sup> A glance at the map will serve to show how totally inconsistent these statements are with the position asserted by the Argentine Memorial in this case and, correspondingly, how fully they accord with the Chilean assessment of the course of the Beagle Channel.

101. The consistency of Lieutenant Bove's understanding of the course of the Beagle Channel is shown when one looks at his second report, dated 4 August 1882 (p. 130). This was written at Banner Cove which, it will be recalled, is on the north coast of Picton — thus giving on to the Beagle Channel in the Chilean understanding, but not, at any rate as stated in the Argentine Memorial of 1973, in the Argentine understanding. Yet at p. 131 Bove referred to "a persistent east wind which blew me back once again to the Beagle Channel". And again at p. 133 he says, writing from Banner Cove, that "since four days I am once again in the Beagle Channel, en route for the Bay of Good Success". Nor is this all. A few lines later in words which could not be more explicit, Bove spoke of "the coast of the Beagle Channel between Victorica Bay [which he had already equated with Yendagaia Bay] and Moat Bay".

102. Bove's report was published in 1884, in the Argentine 'Memoria del Ministro de Marina'. Although referred to in the Argentine Memorial it was not printed as an annex and it has become available to the Government of Chile only in response to a request for its production. But nowhere in the Argentine Memorial is there any indication of official dissent from what Bove said. Indeed, at p. 289 of the Argentine Memorial, there appears this passage, which can be read as an endorsement of Bove's analysis:

"The reports of all these explorers were not only of special value to scientists and sailors of all nations but also of great use to the central government in Buenos Aires."

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<sup>1</sup> Bove's concept of Beagle Channel appears to have been shared by Dr. J. Gunnar Andersson, a member of Dr. Nordenskjöld's expedition to Tierra del Fuego, who in 1902 referred to an isolated occurrence of Tertiary formation "in Sloggett Bay (eastern entrance of the Beagle Channel)" *The Geographical Journal*, London, 1903, Page 161.

(iii) Argentine Memorial, pp. 289-293

103. Three pages from p. 289 to p. 293 are devoted to the formal establishment of Ushuaia—a fact which has no legal bearing on title to the disputed islands.

104. One page, 292-293, mentions Chilean activity in the Department of Magellanes before 1881. Again, it is irrelevant.

(iv) "Argentine activity in Tierra del Fuego up to 1893"

105. The next nine pages (pp. 293-302) are headed "Activity in Tierra del Fuego up to 1893: Argentina". Once again, it is necessary to observe the widening and generalization of the question. What, if anything, is there under this heading that directly bears upon title to the specific disputed islands? The Court of Arbitration is told about administrative organization in the region generally—but the nearest that the account gets to the disputed islands is Ushuaia (pp. 293-294). Yet even in these apparently dry references to Argentinian legislation there is material which when eventually produced by the Argentinian Government and more clearly examined, shows very clearly how in 1884 the Argentine Government never considered Picton, Lennox and Nueva as being Argentinian. The Argentine Memorial refers at p. 293 to Law No. 1532 of 16 October 1884, for the not incorrect purpose of demonstrating the division of Patagonia into five governorships. What the Argentine Memorial did not quote were the terms in which the relevant governorship, that of Tierra del Fuego, was defined.

"6. Governorship of Tierra del Fuego with its natural boundaries, according to the Treaty of 23 July 1881 and, besides, the Island of Los Estados".

Surely this must be read as a reference to the Grand Island of Tierra del Fuego—for otherwise it would not have been necessary to refer separately to Staten Island. And if the reference to the main island is in terms of its "natural boundaries", it must presumably be to the Grand Island without any substantial islands south of it, such as Picton, Lennox and Nueva.

106. The reference to the legislation is followed by a mention (at p. 294) of the appointment of Felix Paz as the first governor of Argentine Tierra del Fuego. Not a word is said, however, about his first report to the Argentine Minister of the Interior dated April 1885 (Ch. Ann. No. 49). This was published in the Argentine Geographical Magazine in the same year and its contents, therefore, soon came to be known to the Chilean Government. While there are other aspects of the Report which will be mentioned elsewhere, at the present point it is sufficient to draw attention to his understanding of the limits of Argentinian territory. He described his voyage from Ushuaia to Punta Arenas via the Straits of Le Maire and said: "I spent the night in Banner Cove, a Chilean port" (Ch. Ann. No. 49, at p. 155). He appears to have considered Picton to be in the Atlantic, yet he regarded it as a Chilean island.

107. The Argentine Memorial then mentions (at p. 294) the voyages of supply ships connecting Ushuaia with Isla de los Estados and Buenos Aires (p. 294). Again this has no relevance to the disputed islands. And even more interesting, no indication is given of the route followed by these vessels. As shown by Popper's map (Ch. Plate No. 55) they followed the natural route directly eastwards from Ushuaia, passing between the main island and Picton and Nueva. Obviously, out of concern to maintain the fiction of a south-eastern version of the Beagle Channel, they did not lengthen their route by passing between Picton and Lennox or even perhaps between Lennox and Navarino before turning north towards Staten Island.

108. Of course it is possible that the Argentine Memorial sees the relevance of this reference of the voyages of supply ships etc. as supporting the general thesis implicit in the heading of the chapter in question—"Argentine Predominance in the Beagle Channel Zone". But if this is what is intended, the available material indicates a somewhat different picture. Consider, first, the Report of Colonel Lasserre to the Minister of War and Marine, dated 15 November 1884 (Ch. Ann. No. 354) — a text significantly more informative regarding the foundation of Ushuaia than the Act of Foundation printed as Annex No. 29 to the Argentine Memorial. In his Report, Colonel Lasserre, after describing the inauguration of Ushuaia, spoke of his voyage to Punta Arenas:

"At Punta Arenas, Minister, it was necessary, indeed indispensable, for me to give an interim commission to the commercial house of Messrs. Wehrhahn & Co., Agents for the Pacific Company, pending the decision of higher authority in the matter, for the conveyance of such cargoes which the Government may send to the sub-prefectures by steamship, when it is unable to send a warship, together with the correspondence, etc. until the periodic arrival there of the 'Comodoro Py'. A service by the latter to this effect between Punta Arenas, Staten Island and the Beagle Channel has been established as Your Excellency will see in Appendix T"

What is one to make of "Argentine predominance in the Beagle Channel zone" when the Argentine officer charged with the establishment of Ushuaia felt it necessary and indispensable to make arrangements with a commercial house in the nearest Chilean port to convey official Argentine cargoes intended for its new sub-prefecture? Nor was his conduct frowned upon by the government in Buenos Aires. On 18 January 1885 the President of the Argentine Republic "having seen the reports relating to . . . the definitive setting-up of the Sub-Prefectures of Tierra del Fuego . . ." resolved "to approve in general the conduct of the Head of the Expedition to the Southern Atlantic, Colonel Augusto Lasserre" (Ch. Ann. No. 355).

109. Perhaps it may be said on behalf of the Argentine Government that it is not fair to judge its predominance in the zone by statements made, after all, in the very first year its interest was displayed there. In that case since, it may be recalled, the section from pp. 293 to 302 was concerned with the period up to 1893, it would seem reasonable to test the situation by reference to the report of the Argentine Governor Cornero in April 1891. But here again the language employed is hardly consistent with any recognizable position of "predominance".

The Governor adjures the Minister to bear in mind that "if protection is not greater and if progress is just at its very beginnings", this is because the Government of Argentina has only exercised dominion in the area for six years.

110. At p. 295 mention is made of an expedition to Tierra del Fuego in 1886. Apparently, the only connection of this expedition with the disputed islands was an alleged momentary rendez-vous with an Argentinian cutter in Banner Cove on Picton Island. However, examination of the report of Captain Spurr dated 21 December 1886 (Ch. Ann. No. 356) does not support even this somewhat pointless claim. If there is support for it in other documents, then the Argentine Government has neither identified nor produced them — a circumstance which suggests that perhaps they may contain statements which do not entirely serve the Argentinian case. Indeed, a published report in 1891 approved by an Argentine Government decree in the same year, by the Captain of an Argentine Navy instruction ship, refers to a "voyage from Slogget Bay "to the West in search of the Beagle Channel. We could see already the islands Nueva, Lennox, Navarino and Picton, as well as a peculiar white islet near Cape San Pio . . . . . we entered Moat Bay, that is to say, already in Beagle Channel." (Report of the Instruction Campaign of Corvette La Argentina, Buenos Aires 1891. Presidential Decree of 6 April 1891.) It is also appropriate to mention at this point the letter from Captain Lang, R.N. to the British Admiralty dated 13 April, 1892 (Ch. Ann. No. 359). In that letter he says he is sending soundings "obtained when steaming through the Beagle Channel" and these soundings were reproduced on a sketch (Ch. Plate No. 130). They were subsequently added to the Admiralty Chart No. 1373, to the north of Nueva, Picton and Navarino, with the comment "soundings placed in Beagle Channel", as can be seen from the Hydrographic Memoranda (Ch. Ann. No. 360). (See Further Remarks).

111. Then there follows a page of reference (p. 296, para. 19) to the activities of Thomas Bridges—who, it is there stated, had been granted a concession on the main island of Tierra del Fuego and over certain adjacent named islands and islets.<sup>1</sup> The names of these islands do not, however, include Snipe, Becasses, Picton, Nueva and Lennox. Bridges is described in this paragraph as "a man of vision" — and indeed he was. For he saw with a clarity not vouchsafed to the Argentine authorities what was the true allocation of sovereignty in the area. At the very time when it may be assumed that the Argentinian authorities in Ushuaia might have been most conscious of the territorial scope of their responsibilities, this "man of vision" applied to the Chilean Acting Governor of Magallanes for title to land at Picton Bay (see Ch. Mem. p. 143, para. 73 and Ch. Doc. 61, p. 99) and a year later sought a grant of the whole island (Ch. Mem. p. 144, para. 76 and Ch. Doc. 73, p. 111). Could Bridges have been twice mistaken, in 1895 and 1896, in thinking that his new official neighbours in the "predominant" town of Ushuaia were not the appropriate grantors of rights over Picton? And was his error shared by his son who in 1899 applied to the Chilean authorities for a further concession (Ch. Mem. p. 144, para. 77 and Ch. Doc. 83, p. 121)? Another son wrote

<sup>1</sup> Incidentally it should be recalled that in Argentine Law No. 1838 of 1886 the reference to the Beagle Channel as extending to Moat Bay also belies the description of the Channel given by Argentina in these proceedings (Ch. Mem. para. 72, p. 143; Ch. Doc. No. 39)

in an absolutely matter of fact way about his father's acquisitions in Picton from the Chilean Government (See E. Lucas Bridges, Uttermost Part of the Earth (1948), p. 189).

112. The activities of Julio Popper are the subject of the next four pages (pp. 296-300) of the Argentine Memorial. But for all his vigour the most that can be said about him in relation to the disputed area is that he is reported (at second hand) to have explored Picton and Nueva (and on the Chilean ship "Julieta" at that!), that in 1891 he presented a map showing the boundary line to run between Isla Lennox and Isla Nueva (see Ch. Cart. Mem. pp. 46-7) and that in 1893 he sought and obtained from the Argentine Government — for reasons which are not apparent or explained — permission to extend his explorations south of "the said territory", which in an earlier sentence he had spoken of "as the Argentine part of Tierra del Fuego".

113. The reference to Popper is followed by another two pages (pp. 301-302) on the development of Ushuaia and of Argentine administration of the main island of Tierra del Fuego — again without any mention of anything relevant to the disputed islands — and concluding with a mention of the opening of the first post offices in Tierra del Fuego in 1890 and of the fact, said to be "worth noting" (though why not said) that the facilities of the Universal Postal Union had been extended to the area almost six years earlier. But what did Governor Cornero have to say of the position in 1890/91? In his report he said:—

"There also did not exist in Tierra del Fuego a direct postal communication with Buenos Aires. We were tax-payers of Chile, for the letters went and arrived to Punta Arenas where they were franked with stamps of that Republic, foreign employees acting in all of the postal operations". (Ch. Ann. No. 358).

This is also confirmed by the Report of the Captain of 'La Argentina' referred to above, who wrote that having been unable to send correspondence from Ushuaia, he accepted the generous offer of the Captain of another Argentine vessel to take it to Punta Arenas "so as to continue from there in the packet boats."

(v) "Chilean activity in Tierra del Fuego till 1893"

114. After this there are three pages mentioning Chilean activity in Tierra del Fuego till 1893. As a description of what Chile did in the whole of Tierra del Fuego and the southern islands during that period it is manifestly inadequate. However, since Chilean activity in that area generally is as little relevant as Argentinian activity to the question of title to the disputed islands, there is no point in seeking to remedy the defects in this part of the Argentine Memorial. And as a description of what happened in and in relation to the disputed area specifically it is more than adequately met by the material set out in Chapter X of the Chilean Memorial ("Acts of Jurisdiction"). Nonetheless, perusal of pages 302-305 of the Argentine Memorial prompts the passing observation that, if concepts of "general predominance" should be held to have any relevance in this case, which the Government of Chile does not admit,

the place which is demonstrably predominant in the region of Tierra del Fuego is not the missionary settlement of Ushuaia but the Chilean town of Punta Arenas. This is clearly the "jumping off" point for all activity in the area. To Punta Arenas, for example, came the European miners in search of Fuegian gold (see Arg. Mem. p. 303); to and from Punta Arenas plied the bulk of the shipping passing through the Beagle Channel. No better evidence of this can be found than even the incomplete text of the Bridges Diary (as to which see further, para. 118, below) for this contains something like 50 entries of ships travelling to and from Punta Arenas. In addition, reference has already been made to the role of Punta Arenas in communications as evidenced by the reports of Colonel Lasserre and Governor Cornero. This may be supplemented by drawing attention once more to the 1885 Report of Argentine Governor Paz (Ch. Ann. No. 49) from which it appears clearly that Punta Arenas was the port through which he both approached and left Ushuaia. On his return journey he had to wait there ten days for the arrival of the packet boat (*ibid.*, p. 157).

115. In view of the fact that the Argentine Memorial returns to the point at p. 313, it is necessary before moving from the section on Chilean activity to reject the Argentine suggestion (at p. 305) — whatever may be its relevance or effect—that the Chilean Government in Santiago took fright at the concessions granted by Governor Senoret in the disputed islands. There is no evidence for the suggestion.

(vi) "Colonization 1893—1898"

116. On passing to the heading "Colonization from 1893—1898" at pp. 305-307 of the Argentine Memorial one finds not a single reference to Argentine activity in or in relation to the disputed islands. For the purposes of the specific issues in this case, these pages are irrelevant. To the statement on p. 307, para. 37, that "settlement in the Chilean territories of Tierra del Fuego did not develop as steadily as in those of Argentina" it is necessary only to reply with a reference to the material set out in Chapter VI of the Chilean Memorial and bearing specifically on the disputed islands.

(vii) "Movement of ships 1890 to 1898"

117. No more relevant is the section headed "Movement of Ships 1890 to 1898" (Arg. Mem. pp. 307-310, para. 38). This material is introduced as "an indication of the considerable increase in activity in the area". The Chilean Government would not dispute this. If anything, the Chilean Government would wish to place emphasis upon this acknowledgment by the Argentine Government of the fact that there was activity in the area and, especially, as is stated in line 2 of p. 308, on the islands of Lennox and Nueva. If there was such an intensification of activity in the disputed islands, why is there no corresponding evidence of Argentine governmental concern with the islands? Where are the decrees applicable to Picton, Lennox and Nueva? Where are the grants of concessions, the records of criminal proceedings, the notes of investigations of shipwrecks and drowning and all the other details of day to day Argentine administration?

118. The passages on movement of ships end with the statement (at p. 310) that "the islands thus had a certain commercial unity with Ushuaia and Harberton". No doubt they had—as Ushuaia and Harberton in their turn, had an equally demonstrable and certainly greater commercial unity with Punta Arenas.<sup>1</sup> But "commercial unity" is not the equivalent of sovereignty and was manifestly not so in the eyes of the very person upon whom this section of the Argentine Memorial relies so heavily. The details of shipping activity are taken from the diaries of Thomas Bridges—evidently the dominating personality in the disputed area during this vital period. But, as already stated, Bridges had no doubts about the effect of the 1881 Treaty. True, perusal of those pages of his diary produced by the Argentine Government shows that in connection with his own activities on the main island of Tierra del Fuego he dealt with the Argentine authorities—but with what delays and frustrations! On 18 October 1893 he recorded during a visit to Buenos Aires:

"We next returned to the Ministries, where Godoy and Cornero, who both went into the office where my business has been so long asleep, and did what they could to urge it on, but I fear with little success. Godoy was very angry because of the delay, and with the Secretary of the Minister."

However, on 2 December 1893 he was able to note:

"I left Buenos Aires on Thursday Nov. 30, having that very afternoon effected the registration of my Title Deeds, having met delays and difficulties in every department."

119. However, while treating Argentina as the sovereign authority over the eastern part of Tierra del Fuego, he identified Chile as the sovereign to whom he should turn for the grant of rights over Picton. (See above, para. 111). Moreover, he did this in an open and public manner of which the Argentine authorities must have been aware. The newspaper El Magallanes published in Punta Arenas reported, on 30 July 1896, that the schooner 'San Pedro' was carrying materials from Bridges' farm in Ushuaia to Picton, where (as is shown by Ch. Doc. 71) he had been granted a concession by the Governor of Magallanes. (Ch. Doc. 61, p. 99; Doc 64, p 102; Doc 67, p. 105; Doc 68, p. 106; Doc 69, p. 107; Doc 71, p. 109.)

120. Nor was the view held by Bridges in 1895 anything other than fully consistent with views which he had held for some years and had expressed privately. Thus in his list of visits by ships he records under 9 September 1892: "The 'Rippling Wave' came from Lennox with our cargo

<sup>1</sup>See Ch. Ann. No. 384 for the traffic of vessels between Punta Arenas and the Southern islands area.

from Sandy Point". The Government of Chile has now found a letter from Bridges to Maurice Brown of Messrs. Nogueira & Co. of Punta Arenas dated 8 [sic] September 1892 (Ch. Ann. No. 361) which states that:

"The R. W. arrived from Lennox Id. on the evening of the 9th inst. having had a hard beat to windward all day from Lennox."

He concluded the letter as follows:

"I am very much afraid there will be great distress among the host of miners now so crowded in the small gold district in these parts, the best of which has been exhausted. But we must hope for the best. I seriously think however the Chilean Government should forbid for the present the further inflow of miners to these Chilean gold districts and should send a commission of investigation and relief without loss of time before the distress becomes serious among the more than 500 miners now crowded on Lennox Id. and other Chilean territories. Please acquaint the Governor of Sandy Point with my thoughts on this subject . . . . . " (underlining added)

(viii) "Argentine activity at the turn of the century"

121. Pursuing its policy of employing general narrative in the place of specific demonstration of acts of Argentinian sovereignty in the disputed area, the Argentine Memorial next contains a section entitled "Activity at the turn of the Century: Argentina" (Arg. Mem. pp. 310-313). This consists first of a reference to a visit in 1899 by the Argentine President to Ushuaia—an occasion which though "marked by a full review of the Argentine Fleet assembled in Bahia Ushuaia" (to use the words of the Argentine Memorial) was, so it seems, unaccompanied by any manifestation of Presidential interest in the disputed islands.

122. The section then reverts once more (at p. 310, para. 40) to the expedition of the 'Almirante Brown', previously invoked in the chapter on the origin of the dispute (Arg. Mem. pp. 231-233). The significance of that survey has already been considered at para. 81 *et seq.* above; and the Chilean Government fails to see how the additional reference to it in the Argentine Memorial advances the Argentine case.<sup>1</sup> But to say, as the Argentine Memorial does at p. 311, end of para. 40, that "this work was so important that it even won the official admiration of the Chilean authorities" is to accord to Captain Saenz Valiente's accolade a greater significance than it merits. The Argentine Memorial refers to the remarks of the Chilean expert, Senor Bertrand. But he did little more than say that the map prepared by Captain Saenz Valiente could be used for the purpose of identifying the islands in the Beagle Channel (see Ch. Ann. No. 72, p. 207).

<sup>1</sup> The lack of importance shown by Captain Saenz Valiente to Picton Pass is illustrated by the fact that his survey contains triangulation of the area between Tierra del Fuego and Picton and Nueva Islands, but none in Picton Pass.

123. The next item in the section on Argentine activity at the turn of the century is a reference to an article by a Chilean naval captain who allegedly contrasts Argentinian naval activity "with his own Navy's inactivity there" (Arg. Mem. p. 311, para. 41). Of Chilean naval inactivity there is in fact no mention in the passage quoted in the Argentine Memorial—but this is beside the point. The interesting thing is that all the Argentine activity mentioned in the passage relates to the channels in those parts of the southern islands over which Chilean sovereignty has never been questioned.<sup>1</sup> Such activity can have no bearing on title to the disputed islands and is but another example of the constant "padding" of which almost the whole of this part of the Argentine Memorial consists.

124. The same basic irrelevance marks the last two paragraphs of this section—paragraphs 42 and 43 on pp. 312-313. The fact that Ushuaia was developing adds nothing to Argentina's claim to sovereignty over Picton, Lennox and Nueva; nor does the statement that "it was at about this time that the town began to assume a more important role in the administration of justice in the area". Such a statement might have been relevant if it had been accompanied by evidence of administration of justice in the disputed islands. But it is not. And the very silence of the statement on this score is itself significant.

125. It seems as if each item with which the Argentine Memorial seeks to fill the emptiness of its claim to sovereignty over the disputed islands turns out, upon close scrutiny, to bear a construction which is the reverse of the one which the Argentine Memorial endeavours to put upon it. Thus, to provide a further example, paragraph 43 (p. 312) mentions a decree of 1904 dealing with administrative organization and touching in Part IX "Tierra del Fuego" — but the statement of the content of the decree is misleadingly incomplete. (See Ch. Ann. No. 368). As cited in paragraph 43 on pp. 312-313 of the Argentine Memorial, the first article of the decree describes Tierra del Fuego, divides it into four parts and declares that "to this territory belong the islands of the Atlantic Ocean which there are under the rightful dominion of the Argentine Republic". Again as stated in the Argentine Memorial (at p. 313), Article 15 of the decree provides for the sub-division of Tierra del Fuego into four departments. But the Argentine Memorial omits the definition of "Hushuaia" which follows:

"Tierra del Fuego into four departments, with the following numbers and limits:

I San Sebastian

.....

II Hushuaia

Capital:	Ushuaia, which will also be the capital of the territory;
North —	Parallel 54 <sup>0</sup> which divides it from the department of San Sebastian
East —	Meridian 9 <sup>0</sup> of Buenos Aires
South —	Beagle Channel, boundary with Chile
West —	Boundary with Chile.

<sup>1</sup>(For Chilean Naval activities in the area see Ch. Ann. No. 383)

III Bahia Tethys

.....

IV Staten Island

Including the islands of the same name and all the others in the Atlantic which are under the legal sovereignty of the Argentine Republic."

126. One must ask what is the purpose of the whole reference? Is it to suggest by indirection that the islands included in the department of Staten Island include the disputed islands and were thus overtly claimed by Argentina? If so, the Court of Arbitration will no doubt be surprised to learn that these islands, which the Argentine Memorial so strongly subjects to the "dominance" of Ushuaia, are now said to have been, by a Decree of 1904, administratively removed to the much more distant control of Staten Island.

127. But the true intention of the reference contained in the Decree is made clear by the well known Argentine geographer Latzina. In the "Supplement" to his "Argentine Geographical Dictionary", published in 1908, he states:

"Los Estados Island. IV Department of the Tierra del Fuego Governorship. It includes the islands of the same name and all the others situate in the Atlantic Ocean under the legal sovereignty of the Argentine Republic, which refers undoubtedly to the Falkland Islands, at present usurped by England" (Suppl., p. 372- underlining added)

And speaking generally about the jurisdiction of Argentine Tierra del Fuego, Latzina affirmed:

"Tierra del Fuego. There belong to this territory the Atlantic Ocean islands which are under the legal ownership of the Argentine Republic, that is to say, the Falklands, illegally possessed by England." (Ibid. p. 700)

Thus the meaning of the Decree is clear, and the disputed islands of Picton, Lennox and Nueva were not included in any of the departments of Argentine Tierra del Fuego.

128. Moreover, if the Decree is read together with official Argentine maps of the same period, the omission of any reference to the disputed islands will not appear surprising.

129. Thus Ch. Plate No. 93 in the Chilean Atlas is a map of Argentina dated 1904 to be found in a volume published by the Argentine Ministry of Agriculture. It treats the disputed islands as Chilean.

130. The same is true of Ch. Plate No. 110, a map taken from the Official Yearbook of the Argentine Republic published by the Ministries of Agriculture, of Foreign Affairs and of the Interior for the first time in 1912.

(ix) "Chilean activity at the turn of the century"

131. At p.313 of its Memorial, the Argentine Government once more proffers its own account of Chilean activity—this time "at the turn of the century". The assertion is repeated, again without evidence, that "the land grants made by Senoret were strongly disapproved of by the central government, and that this attitude continued". However, as the point is not developed and no attempt is made to inject significance into it, no more need be said of it; nor, for similar reasons, is it necessary to discuss the next paragraph (Arg. Mem. para. 45) referring to the proposals of Governor Bories for administrative changes in the Department of Magallanes.

132. This section continues with a paragraph (para. 46, p.314) introduced by the sentence: "In marked contrast to the Argentine Navy's considerable interest in the area at this time, the Chilean Navy's involvement in the area was very limited". It concludes with a quotation from a Chilean naval officer: "... unless I am mistaken no ship from our navy has been seen in those parts since 1895". The Chilean officer was very much mistaken—as is the Argentine Government now in placing reliance upon him. In Ch. Annex No. 383 to this Counter-Memorial there will be found a list of voyages by Chilean naval vessels in the Beagle Channel region and the southern islands from 1888 to 1920. In the three year period 1895-1897 twelve naval voyages are noted. In the four years 1900-1903 twenty four more voyages are recorded. Statements of fact of this kind, based upon examination of original and contemporaneous records, provide a complete answer to this part of the Argentine Memorial.

133. The citation of the log of Lieutenant Gajardo's voyage in the "Huemul" in 1902 (Arg. Mem. para. 47, p.315) and of his Report (para. 48, p.316) if it proves anything, proves too much. Presumably the reason for quoting it is the statement that he was surprised to find areas visited by him inhabited by Europeans or Argentinians. It is unnecessary to debate the accuracy of his statement. What must be marked is that he was speaking of Navarino and Tekenika as well as Lennox and that Chilean sovereignty over the former two had never been questioned. The quotation thus serves to show that population and sovereignty in the southern islands were quite independent of each other and that there is no more reason to believe that Lennox was not Chilean by virtue of its population than Navarino or Tekenika were not by virtue of theirs. The same is equally true of his remarks regarding "the inhabited coves in the Southern islands of Chile" (Arg. Mem. para. 48, p.316).

134. The culmination of the truncated Argentine version of Chilean activity in the area is the reference to the Bridges' application in 1899 for confirmation of their Picton concession. No doubt, the Argentine Memorial is adroit in attempting to turn the effect of this most damaging admission of Chilean sovereignty over Picton by emphasizing the delays affecting that matter. But delay or no delay (and the story is told in Ch. Mem. p.144, para. 77), what cannot be ignored is the basic fact that for a concession on Picton the Bridges family turned to Chile. And if the experience of the Bridges family in respect of governmental delay is to operate as negative evidence of sovereignty, then the passages in Thomas Bridges' diary referred to in

paragraph 118 above must by the same token serve to shed doubt on Argentine title even to Ushuaia and Harberton!

(x) "Development of Tierra del Fuego to the end of World War I"

135. The alternation in the Argentine Memorial between the narrative of so-called Argentine activity and that of Chile's inactivity is interrupted next with a section on "The Development of Tierra del Fuego to the end of World War I" which in five pages (pp. 319-323) contains no item of relevance to sovereignty over the disputed islands except the statement (at p.319, para. 52) that "the Argentine authorities granted a number of concessions to search for and extract minerals on Picton and Nueva in 1905 and on Gable in 1906 and 1907".

136. However, this one specific claim to have performed an act of administration relating to the disputed islands is not supported by any evidence—though a pretence is made at giving authority for the statement in the form of footnote 60 on p.319. This mentions, first, a note of 8 August 1905 from the Argentine Governor at Ushuaia to the Argentine Ministry of the Interior. (Ch. Ann. No. 370). But this note says nothing at all about any Argentinian grant on Picton or Nueva. All that it does say is related to a Chilean grant on Picton:

"I have the honour to inform your Excellency that I have just finished visiting the saw mills and farms of the Beagle Channel, as well as the islands in dispute, Picton and Nueva occupied by Messrs. Stuvén from Punta Arenas by concession of the Government of Chile . . . ."

137. The footnote refers, secondly, to a map said to have been "published" in 1908 (Arg. Map No.26) which, it is suggested, shows concessions and applications for concessions in the Argentine territories of Tierra del Fuego. This map is not easy to read because the shading of the coastline cannot readily be distinguished from the few portions of shading which appear to represent concessions. Whatever the situation may be, it is interesting to observe that, according to documents recently received from the Government of Argentina, at the request of the Government of Chile, the petition dated 29 March 1905 referred to "the coasts of Isla Nueva, which is situate at the entrance of Beagle Channel". The Government of Chile has also requested from the Argentine Government a copy of the "plan" attached to a petition, made to the Head of the Mines and Geology Division of Argentina in 1905, by E. Minivielle. The "plan" has not yet been produced by the Government of Argentina and, therefore, the Chilean Government is unable to determine the exact position of the territory included in the petition. (See Further Remarks).

138. Here then is a further and particularly glaring illustration of the failure by the Argentine Memorial to substantiate by reference to any professionally acceptable standard of evidence Argentine claims on points which are central to this case.

(xi) "Between the World Wars: Argentina"

139. With breathtaking speed the Argentine Memorial then covers Argentine activity in the area between 1918 and 1939 in just over two pages (pp. 323-326, paras. 63-66). However, the first item dealt with in this connection is eloquent not in supporting the grandiloquent and irrelevant claim that "the responsibility for the safety of shipping in the Beagle Channel now rested almost exclusively with the Argentine naval squadrons based at Ushuaia" (bottom of p. 323), but as showing in the clearest way what in fact Argentina considered were the navigable passages requiring the installation and maintenance of aids. If the Argentine contention as to the course of the Beagle Channel is correct, then it would be reasonable to expect that the Argentine naval authorities in discharge of the "responsibility" proclaimed on p. 323 of the Argentine Memorial would have been at pains to provide navigational aids in the appropriate passages. Yet, the provision of Argentine navigational aids in the disputed zone has been limited to the south shore of the main island of Tierra del Fuego. There has been no attempt at all to provide aids in Picton Pass, between Picton and Navarino, in Goree Pass between Lennox and Navarino or in Richmond Pass, between Lennox and Nueva.

140. This picture is confirmed by a study of the reports of Lieutenant Stewart in 1919 (Ch. Ann. No. 374) or of the voyage of the 'Alferez Mackinley' in 1928, (Ch. Ann. No. 376). Even the items from each document selected as worthy of specific mention in paragraphs 63 and 64 of pp. 324 and 325 of the Argentine Memorial have nothing to do with the islands now in dispute. In addition, when one looks at the 1928 Report of the activities of the 'Alferez Mackinley' as a whole it is patent that in the eyes of the officer who prepared it, the investigations under heading (1) "Soundings and survey of the coasts between the islands of Picton, Lennox, Navarino, Nueva, Tierra del Fuego" were very much less important than the soundings in Moat anchorage (p.52), between Cape Buen Suceso and Picton Island (p.58), and between Punta Moat and Cape San Pio (p.59). Moreover, the actual soundings taken and observations made in relation to Nueva were limited to its north coast (see p.62).

(xii) Between the World Wars: Chile

141. At pp. 326-329, three pages are devoted, under the heading "Between the wars: Chile" to the development of the proposition that "Chilean activity in the region during this period was sporadic and, as will be seen, lacked a cohesive plan". Some comment must be made on each of the episodes there mentioned.

142. First, the exchange of notes regarding the activities of the 'Ministro Zenteno' is mentioned in Ch. Mem. p. 118, para. 3, and the notes are themselves reproduced as Ch. Ann. Nos. 124 and 125. These show the episode in its correct context—namely concern of both Governments that the outcome of the arbitration agreed in June 1915 but not yet ratified nor yet abandoned should not be prejudiced.

143. Second, the quotation from the Annual Report of the Navy to the Chilean Congress in 1921 (Arg. Mem. p. 327, para. 69) is important not so much for its urging that a sub-delegation be created to cover Picton, Lennox and Nueva, but because of the clear assumption upon which the suggestion is based—that Picton, Lennox and Nueva are Chilean. The same comment may be made upon the report of the British Consul of 22 March 1926 (Ch. Ann. No. 126)—for again it is obvious that he shares the local opinion that Picton, Lennox and Nueva are Chilean.

144. Third, the letter dated 31 March 1926 from the British Legation in Santiago is remarkable for the extraordinary and extreme version of the Argentine claim there reported: a southward extension of the agreed north-south meridional line "as far as there is any land at all". As to the passage quoted in the Argentine Memorial, it should be completed as follows: "Of course matters might become more serious if for any unforeseen reason any of these islands acquired value in the future, but at present it looks as though both parties were content to let this issue lie dormant". (Ch. Ann. No. 375)

(xiii) "Post-War Development"

145. As the Argentine narrative nears the present day, its lack of relation to the question of sovereignty over the islands of Picton, Lennox and Nueva and the appurtenant islands and islets becomes more extreme and more evident. For this reason comment upon it need be less detailed. The emphasis on "Argentine predominance" could, if it had any legal relevance, apply as much to Navarino as to the disputed islands. The point that is inescapable is that from pages 329-336, covering post-war development in the area by Chile and Argentina, there is not a single assertion of Argentine sovereign activity over the disputed islands or any denial of Chilean activity in relation to them. At p.333 a reference is introduced to a table, appearing as Arg. Mem. Annex 30, purporting to list the navigational aids placed in the Beagle Channel and neighbouring area by Argentina between 1900 and 1920. In this list, the bulk of which has nothing to do with this case, there is not one reference to a navigational aid placed by Argentina on Picton, Lennox or Nueva.

(xiv) "The present situation: Chile"

146. The peak of unreality is achieved when the Argentine Memorial reaches the present situation. The reader of paragraphs 85 and 86 on pages 336 and 337 would have to be forgiven if he were to conclude that at the present time there is no Chilean presence on the disputed islands of Picton, Lennox and Nueva. Yet such a conclusion is quite untrue. The main features of the position to-day are set out on pp. 128 and 129 of the Chilean Memorial. And as the Court will have observed, there are many documents printed towards the end of Volume III of the Chilean Memorial, (Documents relating to Acts of Jurisdiction,) which evidence the presence on the islands of Chilean settlers, application by them to the Chilean authorities for concessions, and their inclusion in census rolls. These are not novel developments. While the latest documents there printed are dated October 1971 (see Ch. Doc. 320), the Court will also find these documents, moving backwards, from 1967, 1965, 1957, 1956, 1955 and so on.

147. The Government of Chile ventures to recall that in paragraph 9 on p. 129 of the Chilean Memorial it is expressly stated that "at no material time has Argentina ever manifested a presence in these islands". And in the statement of Argentina's position to-day (Arg. Mem. pp. 338-339) there is not one word to contradict this—only more about Ushuaia.

148. Nor should it be forgotten that a letter posted on Picton will be franked with a Chilean stamp, postmarked with a Chilean postmark and carried through the Chilean system, just as a letter addressed to Picton will be carried there by the Chilean posts and will not pass through Buenos Aires or Ushuaia. It is open to anyone at any time to see how the postal system works. As an example, there appears as Ch. Ann. No. 385 a photograph of an envelope addressed from Buenos Aires to Nueva on 28 July 1970. It bears the postmark of Punta Arenas as an indication of its transit through that place on its way, within the Chilean postal system, to Nueva.

149. The Government of Chile expresses the hope that the Court of Arbitration will take the opportunity during the next Fuegian summer (December 1974-March 1975) to visit the area and see for itself what is happening on the islands of Picton, Lennox and Nueva today. Such a visit would convert the bare statistics of population which appear in Ch. Docs. 319 and 320 into something comprehensible in human terms.

#### E. Conclusion

150. Both Parties have included in their Memorials a considerable amount of material relating to the post-1881 period. The Government of Chile has done so, in part, expressly by reference to the principle that it is permissible to seek confirmation of the intention of the parties to the 1881 Treaty by examination of their subsequent conduct. In addition, it has pointed out that the legal effect of the subsequent conduct of the Parties may also be assessed by reference to the concept of estoppel. The Argentine Government, on the other hand, has not specifically related its narrative of post-1881 activity to any legal argument.

151. Nonetheless, the fact that virtually half of the Argentine Memorial deals with post-1881 matters means that the Chilean Government is obliged to provide the Court with some assessment of the effect, if any, on its case of that part of the Argentine argument. Hence the present Chapter.

152. The conclusion which emerges is strikingly clear. A significant phase, but by no means the only one, ends in 1904. That is the date when the Argentine Government raised the question of the "axis" of the Channel. Prior to that date Chile acted consistently and publicly on the basis that the disputed islands belonged to it; and in so doing manifested its own clear understanding of the effect of the Treaty and of the intention of the parties. Argentina did nothing to contest the position so openly adopted by Chile; and in so doing manifested its own concordant understanding of the Treaty.

The effective period of this identity of approach to the subject was twenty-three years—from 1881, the date of the Treaty, to 1904, when, as stated, Argentina disputed Chile's title. There is the highest judicial authority for attributing to a period of even only ten years efficacy in the establishment of title by conduct. Though the situation is not identical with the present one, it is sufficiently analogous to warrant reference. It is the dispute between Denmark and Norway regarding the Legal Status of Eastern Greenland. There, in assessing the significance of Danish conduct the Permanent Court said:

“Even if the period from 1921 to July 10th, 1931, is taken by itself and without reference to the preceding periods, the conclusion reached by the Court is that during this time Denmark regarded herself as possessing sovereignty over all Greenland and displayed and exercised her sovereign rights to an extent sufficient to constitute a valid title to sovereignty.” (P.C.I.J., Series A/B, No.53, p.22, at p.63)

153. The fact that after 1904 Argentina intermittently opposed Chile's title does not change the legal position—especially when it is recalled: first, that Chile continued to exercise sovereignty over the disputed islands in a manner entirely unaffected by Argentina's attitude; second, that Argentina's diplomatic reaction to Chile's conduct was sparse and very intermittent; and, third, that Argentina itself never performed any acts of administration on the disputed islands.

154. Moreover, since, at any rate from the Argentine point of view, the significance of practice subsequent to a Treaty can never be more than a reflection of a state of mind existing prior to the treaty, note must be taken of the fact that its own interpretation of the 1881 treaty has varied in the period since 1904. On some occasions it has claimed Picton and Nueva recognising Lennox and all the others down to Cape Horn as Chilean; on others Lennox has been included; and recently “the Cape Horn meridian line” has appeared. A variation of approach such as this can hardly be seen as a reflection of a known intention of the negotiators of 1881. (See Chapter III paras. 33-38 above.)

155. Against this background of solid fact directly and specifically related to the disputed islands, it is easy to recognize the irrelevance of virtually the whole of Chapters IV and V of the Argentine Memorial. This irrelevance, demonstrated in detail in the present chapter, can be set against Chapter X of the Chilean Memorial — “Acts of Jurisdiction” — read in conjunction with Chapters VII, VIII and IX, setting out the diplomatic history of the situation.

RECAPITULATION OF THE CHILEAN CASE

1. It may at this point be helpful to recall in barest summary some of the principal features of the Chilean case; though clearly such a resumé cannot replace the comprehensive statements of the arguments of the Chilean Government which are to be found both in the Chilean Memorial and in Chapters I to IV above.
2. The basic Chilean position is that this is a dispute about sovereignty over two groups of islands: principally, Picton, Nueva and Lennox, and associated and appurtenant islands and islets; secondarily, the islands and islets which lie in the Beagle Channel eastwards of the point where it is touched by the Cape Espiritu Santo meridian line.
3. This is not a dispute about islands or islets lying outside the zone defined in the Compromiso. In fact it is not; and in law it cannot be. The Government of Chile is emphatically opposed to any extension of the scope of the dispute.
4. Contrary to the contention in the Argentine Memorial, the case is only incidentally about maritime boundaries. There is nothing said in the 1881 Treaty about a maritime boundary and there has never been a dispute between the two Governments on this point or in the terms now suggested.
5. This dispute is about the interpretation of the 1881 Treaty. On this both Parties are agreed.

They are agreed also that the process of interpretation is one of determining the intention of the Parties at the time of the conclusion of 1881 Treaty. But at this point their approaches to the problem diverge.

6. The Argentine Memorial is marked in its approach to the identification of the intention of the parties by at least two elements which the Government of Chile believes to be quite wrong.
  - (i) The first is the promotion of a so-called "Atlantic-Pacific principle" which, in its application to the present case, is said to dictate an intention of the Parties to allocate to Argentina islands which, on this view of the matter, are said to be "Atlantic" islands. However, it is not possible to identify any such specific principle either in the history of the period prior to the 1881 Treaty, or in the travaux préparatoires of the Treaty, or in the terms of the Treaty itself.
  - (ii) The Argentine argument also errs in seeking to identify the intention of the Parties at the time of the conclusion of the 1881 Treaty with the understanding and intention of the

discoverers of and early writers upon the Beagle Channel, principally Fitzroy. Were it not for the existence of a surer indication of what the Parties had in mind in the period 1876-1881 the views of those who discovered the Channel virtually half a century earlier might have had greater relevance, though the Argentine assessment of it would still have been wrong, as is shown in Appendix B. But the critical and central consideration in this case remains the fact that there exists evidence of the actual intention of the negotiators of the 1881 Treaty which completely contradicts the position of the Argentine Government. Of this cogent evidence no mention whatsoever appears in the Argentine Memorial.

7. It will be recalled that in 1876 exchanges took place between Sr. Barros Arana (for Chile) and Sr. Irigoyen (for Argentina) which concluded with a formula for the boundary in the disputed area which was identical with that employed in the 1881 Treaty itself. Indeed, this is one of the points on which both the Chilean and Argentine Memorials in this case are agreed.

8. The material upon which the Government of Chile now relies relates to the negotiations of 1876 and the understanding that both parties had then, in 1881 and thereafter of the true effect of the arrangements then made. It is not necessary to repeat here the description of this material, especially the maps, which appears in the Memorial (see pp 26-46) and in this Counter-Memorial (see above, pp 51-63(a)). But the end result is inescapable. It demonstrates beyond the shadow of a doubt the common understanding of the Parties that the "Beagle Channel" to which they were referring was a latitudinal concept taking the form of a line running north of Picton and Nueva into the ocean.

9. This is not simply a Chilean construction of the evidence: it was the view taken by the Argentine Foreign Minister who negotiated and signed the Treaty as well as by other responsible Argentine officials; it was the sense of the settlement communicated by Argentina to third States; and it was the understanding of the Treaty had by the distinguished Argentine geographer, adviser and participant in the negotiations, Sr. Moreno.

10. However, this material — specific and compelling though it is — does not stand alone. It illuminates and makes even more explicit a text which in itself already fully supports the Chilean position. Although a summary restatement of the elements of the interpretation of the 1881 Treaty cannot do full justice to the many points involved, emphasis may be placed upon the following:

- (i) The allocation of territory south of the Straits of Magellan was part of a comprehensive compromise between the Parties covering their claims to Patagonia and all the region south thereof as far as Cape Horn. This compromise is contained in the first three Articles of the 1881 Treaty, which must be read together. The principal factors governing this compromise were that while both Parties claimed Patagonia, Argentina insisted on uninterrupted control of the Atlantic seaboard up to and including Staten Island, and Chile insisted on control over the Straits of Magellan and the territories south to Cape Horn.

The compromise reached was that Chile gave up her extensive claims to Patagonia and received all the territory south of the Andes — Point Dungeness line with the exception of the eastern part of Tierra del Fuego and Staten Island, which were allocated to Argentina.

(ii) The maps on which the main features of this comprehensive territorial division were worked out and illustrated were small scale general maps. On these there appears at approximately latitude 55°S a waterway which effectively separates Tierra del Fuego and Staten Island from all the islands lying to the south. The waterway touched by the Cape Espiritu Santo meridian boundary line was the Beagle Channel; and this was the name used to refer to the whole of the stretch of water extending straight into the sea.

(iii) The allocation to Chile of all the islands south of this division was no doubt made on the basis that the Channel was conceived as a feature running from west to east. If the boundary had been thought of as turning towards the south-east and even towards the south and extending in those directions for many miles, it is extraordinary and improbable that the Parties would have described the areas allocated to Chile as lying "south" of the Beagle Channel had they meant "south-west" or even "west" of it.

(iv) Indeed, as already indicated, this is all clearly illustrated on the relevant maps where the illustration of the boundary line in this area runs north of Picton and Nueva due eastwards into the ocean.

(v) This is the interpretation of the words actually used which accords with the whole philosophy of the settlement in the area south of the 52nd. parallel.

11. The invocation by Argentina of the so called "Atlantic-Pacific principle" does not change the situation. As stated, no such specific principle ever existed. Moreover, it is self-evident that there are portions of indisputably Chilean territory which, in the Argentine view, are washed by the Atlantic: — parts of Navarino, Terhalten, Sesambre, Evout, Barnevelt and the Wollaston Islands. Chilean sovereignty over these areas cannot now be brought into question.

12. However, the matter does not end there. It is impossible to disregard the significance of what happened after 1881. The Chilean Government sees the concept of the critical date as having virtually no effect on the positions of the Parties in this case. For whatever date is chosen, the conduct of the Parties thereafter cannot be overlooked since it is, particularly in the case of Chile, a continuation and confirmation of conduct before that date. Chile has consistently acted in accordance with the view that the Beagle Channel runs north of Picton and Nueva. This Chilean conduct is massively demonstrated in the account of diplomatic relations in Chapters VII to IX of the Chilean Memorial and in the statement of acts of jurisdiction in Chapter X. And for over twenty years after the 1881 Treaty Argentina has also acted on the same basis.

13. The concordant conduct of the two States may be seen as simply confirmation of the understanding and intention which existed in 1881. Or, as an alternative, it can be seen as creating a situation in which Argentina is stopped or precluded from advancing an interpretation of the Treaty inconsistent with the position reflected in her conduct for a prolonged period.

14. Against this, the introduction in the Argentine Memorial of such concepts as "Argentine predominance in the area" and the special role of Ushuaia are as much beside the point as they are demonstrably inaccurate. The very facts cited as the basis of these concepts date from after the 1881 Treaty and manifestly could have played no role in the negotiations. The Court cannot help but observe how virtually every piece of evidence invoked by Argentina in this connection turns out, upon closer scrutiny, to confirm the Chilean position.

15. It is also to be observed that even after Argentina began to contest the Chilean interpretation of the 1881 Treaty, the Argentine propositions varied significantly one from another. This shows that the interpretation which the Argentine Memorial presents today as having been self-evident at all times to all persons in fact savours strongly of the ad hoc.

16. Moreover, the Chilean interpretation of the Treaty has been shared by the governments of third States, by individuals closely connected with the area — none more so than Thomas Bridges. Accepted as it is by geographers, explorers and the authors of scientific studies of the area it has become a matter of general repute and tradition.

17. As regards the islands and islets lying within the eastern part of the Beagle Channel, they belong to that Party to the coast of which they are appurtenant. Alternatively, all the islands and islets within the Beagle Channel belong to Chile.

18. Finally, it must be remarked that the introduction into the Argentine Memorial of a section entitled "the dispute in the light of modern developments in the Law of the Sea" is open to criticism on at least two grounds. The first is that it clearly runs counter to the acknowledgement by Argentina of the controlling force of the intention of the Parties as an element in the interpretation of the 1881 Treaty. Considerations which became operative only in the years immediately preceding 1973 clearly could not have affected intentions which existed in 1881.

19. But, secondly, and more important, mention of those ideas implies the introduction into the case of elements de lege ferenda or of decision ex aequo et bono. The Government of Chile is bound, therefore, to make its position in this connection absolutely clear. The present case is submitted to arbitration under the General Treaty of Arbitration of 1902. Article VIII expressly provides that "The Arbiter shall decide in accordance with the principles of international law, . . ." There is no reference here to anything except existing international law and the Arbitrator has not been asked by the Parties jointly to formulate an award based on anything other than the principles of international law. Should this point require any further emphasis two things should be recalled. One is that this self-same Article VIII contemplates the possibility, if the Agreement (Compromiso) so provides, for the application of special rules or the authorization of the

Arbiter to decide in the character of a friendly mediator. The second is that the Compromiso in the present case clearly excludes these alternatives by providing in mandatory terms in Article I. (7) that "the Court of Arbitration shall reach its conclusions in accordance with the principles of international law." Thus any reference made by the Government of Argentina to political, geo-political, economic or strategic factors which have developed since 1881 is quite inadmissible. The Government of Chile refrains from discussion of such factors because the sole task of the Court of Arbitration is to interpret the 1881 Treaty. Revision of the Treaty is no part of that task.

### Submissions

20. For the reasons set out at length in the Chilean Memorial and this Counter-Memorial, and reserving the right to amend or supplement its request, the Government of Chile formally

- (i) renews the request made in paragraph 3 at p. 176 of the Chilean Memorial and
- (ii) requests the Court of Arbitration to reject the requests made by the Government of Argentina at p. 446 of its Memorial.

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JOSÉ MIGUEL BARROS  
Agent for the Government  
of Chile

## APPENDIX A

### SUPPLEMENTARY NOTES UPON THE CHILE-ARGENTINE BOUNDARY QUESTION BEFORE THE 1881 TREATY

A comparison of the Memorials submitted to the Court of Arbitration by the Governments of Chile and Argentina on 2 July 1973 shows, among other things, a different attitude of the Parties with respect to the development of the controversy. While the Chilean Memorial restricted itself to the historical facts which led to the 1881 compromise, insofar as they were necessary to understand the points in issue, the Argentine Memorial in several places indulges in references which, beside being irrelevant, are often presented in a way which does not always agree with the evidence.

Some of these Argentine references are connected with points dealt with by the Chilean Memorial; others concern aspects which, from the legal point of view, lost their pertinence after the 1881 compromise.

To include in the main body of the Chilean Counter-Memorial all the details necessary to answer to these references might have risked obscuring the Chilean case which is simple and straightforward. Yet, both historical accuracy and the need to provide the Court with all the true facts oblige the Chilean Government not to pass over those Argentine references in silence.

Therefore, reluctantly, and regretting the additional burden this places upon the Court, the Government of Chile has decided to supplement its Counter-Memorial with the present "Appendix A" which is mainly based on the Statement submitted by Chile to the British Arbitrator in 1901.\*

This Appendix is divided into three sections: I: The situation before the creation of the Buenos-Aires Viceroyalty; II: The period from 1776 to 1810 (the year for the determination of the uti possidetis); and III: The situation between 1810 and 1881.

#### I. The situation before the creation of the Buenos Aires Viceroyalty in 1776

The Argentine Memorial asserts that the first Capitulación granted to Pedro de Mendoza in 1534 went "as far as the Strait of Magellan" and that Mendoza's successors were given similar grants. It adds that, in 1617, the territory which had originally been governed by Mendoza and his successors was divided into two governorships: that of Buenos Aires or Rio de la Plata, and that of Paraguay, both of them coming under the political surveillance of the Viceroy of Peru. It goes on: "The province of Cuyo (which included the districts of the cities of Mendoza, San Juan and San Luis, and which corresponded approximately to the present Argentine provinces of these names) was part of the Governorship of Chile". It also states that these jurisdictions were not altered until 1776 when the Viceroyalty of Buenos Aires was created as a political and administrative area "which embraced the Governorships of Buenos Aires (or Rio de la Plata), Tucuman, Paraguay, Potosi, Charcas and Santa Cruz de la Sierra . . . and into which was incorporated the province of Cuyo (which was detached from the

\* Statement presented on behalf of Chile in reply to the Argentine Report submitted to the Tribunal constituted by Her Britannic Majesty's Government acting as Arbitrator in pursuance of the Agreement dated April 17, 1896. (London, 1901). (This document will be referred to hereafter as "Chilean Statement").

Governorship of Chile)" (Argentine Memorial, pp 119--120, para 5).

Even accepting as correct these statements concerning Pedro de Mendoza's Capitulación, the Viceroyalty of Buenos Aires could not have extended south of the Straits of Magellan, as this is the limit assigned to it by the Argentine Memorial (page 119, para 5). This would mean that Tierra del Fuego and the territories to the South would avowedly not have belonged to the Buenos Aires Viceroyalty.

This is, indeed, the truth; but in the reference to the segregation of territory which belonged to the Captaincy General of Chile until 1776, the Argentine Memorial is in a slight error: it was not "the province of Cuyo" which was detached from the Governorship of Chile in 1776: The Royal Order of August 1776 mentioned in this respect "the territories of Mendoza and San Juan del Pico, which are to-day dependent on the Governorship of Chile".

It is necessary to make this point because of the conclusions which some Argentine authors have drawn, from time to time, on the basis of the purported transfer of "Cuyo" to the Viceroyalty's territory.

Indeed, as the Government of Chile put it in 1901: "In reality, the only Andean boundary established by Charles III was that corresponding on the west to the territories of San Juan and Mendoza, which were especially mentioned in the Royal Order as the only parts of the Gobernación de Chile that were to be segregated from it. All the remaining regions belonging to Chile on both sides of the Cordilleras, by virtue of the resolutions of the Crown already alluded to, continued unchanged." (1)

In the Argentine Memorial, it is left unexplained how the territories south of the Straits of Magellan are supposed to have become a part of the Buenos Aires Viceroyalty although the Memorial does refer to certain tasks in the Southern regions which were entrusted to La Plata authorities before and after 1776. It is a theme which is constantly repeated in statements, such as: "... the whole coast of Patagonia and Tierra del Fuego as far as Cape Horn was the object of constant concern, reconnaissance and exploration on the part of the competent authorities of the Viceroyalty of Rio de la Plata to whose jurisdiction that area pertained" ... (2)

The Government of Chile cannot accept those statements which are contrary to the facts and which make it impossible to understand adequately the background of the boundary dispute between Chile and Argentina. Although accepting that some of the documents concerning the Spanish colonial era are "confusing and sometimes inconsistent", as the Argentine Memorial acknowledges, the Government of Chile will attempt to restate in this Appendix some of the facts in their correct context, so that the complete background of the dispute and its settlement may be before the Court of Arbitration.

In 1534, Emperor Charles V issued four Orders (Reales Cédulas) which purported to distribute the South American territories south of the Equator. These Orders defined four adjacent zones, parallel to each other from north to south. Each zone was to form a separate Gobernación (Governorship.) The third Gobernación, afterwards called Rio de la Plata (from north to south, 200 leagues from the Southern border of Almagro's Gobernación) was granted to Don Pedro de Mendoza, who was authorized to discover and conquer those territories, entering by the River of La Plata, with powers to reach the Pacific Ocean by this route. Simply by measuring on a map the boundaries of these four adjacent Gobernaciones, one sees that the one granted to Mendoza did not extend south of the 36° 57' 9" Lat. S. In spite of this very simple operation, the Argentine authors who studied the question in the last century interpreted Mendoza's Capitulación in somewhat different ways. Señor Trelles (1865) asserted

(1) "Chilean Statement," Vol. I, p.122.

(2) Arg. Mem. p.126 para 9.

that the Gobernación included "not only all Patagonia but also the whole of the Straits of Magellan and Tierra del Fuego"; Frias, in a Report dated at Santiago, while acting as Argentine Minister to the Government of Chile, and Señor Quezada, a well known Argentine scholar, also claimed that Mendoza's Capitulación embraced all the Southern extremity of South America. Señor Quezada stated, for instance:

"Clear and well defined is the territory which the King grants as the Gobernación del Rio de la Plata; all the coast of the North Sea, that is to say Patagonia, the Straits of Magellan inclusive, and 200 leagues of coast in the South Sea... consequently including Tierra del Fuego. So that the first authentic document emanating from the only sovereign of those territories, demarcates and defines them in a manner as precise as it is conclusive. It may therefore be said that the southern boundary of the Gobernación del Rio de la Plata in 1534 included the coasts of both seas, the Atlantic and the Pacific, or, as they then were called, North and South Seas, down to the Straits of Magellan, which is equivalent to including them in the territory assigned to the Gobernacion with which we are dealing."(3) (Underlining added)

It was the Government of Argentina which, once the 1881 Treaty had been signed, itself contradicted such extensive claims. In the Argentine pleading in the Misiones arbitration in 1894, the Argentine Government annexed a map entitled "South America in the sixteenth century" which the then Agent for Argentina, Señor Estanislao Zeballos explained as follows:

"The Emperor Charles V being resolved to hasten the settlement of Rio de la Plata, and to oppose his forces to those of the Portuguese Government of Brazil, entered into an agreement with Don Pedro de Mendoza on the 21st. of May, 1534, appointing him Adelantado and Captain General of Rio de la Plata and charged him with the discovery of new lands and the establishment of colonies in this temperate region of South America from the coast of the Atlantic to the Pacific Ocean or South Sea as it was then called. The boundaries given in this contract have been traced in red by The Hakluyt Society upon its map, which is universally accepted as authoritative." (4) (Underlining added)

In that map (Ch.Plata.No.162) the Southern boundary of the Province of Rio de la Plata is shown at 36° 57' 9" Lat. S., i.e., a few miles south of that river. Patagonia is not shown as a part of the Province.

So much, therefore, for the assertion contained in the 1973 Argentine Memorial that Mendoza's Capitulación extended "as far as the Strait of Magellan". (Arg. Mem. p.119).

But the Argentine Memorial also tries to give an overall impression of the existence of a certain "maritime jurisdiction" before the creation of the Viceroyalty of Buenos Aires. Alluding to an Order issued by the Governor of Buenos Aires in 1745, the Memorial states:

"The importance of this text is self-evident for it is clear that, so far as the Spanish Crown was concerned, the jurisdiction attributed to the Authorities in Chile and Peru would begin as soon as the British ships 'rounded the Cape', they having until that point been moving through waters within the jurisdiction of the Governorship of Rio de la Plata." (Arg. Mem. p.121) (Underlining added).

Perhaps, this statement is meant to provide some historical basis to the "Atlantic-Pacific principle" which pervades the whole of the Argentine Memorial; but, once again, it is contradicted by the Government of Argentina which, as just shown, was claiming in 1894 that the Rio de la Plata Province extended from the coast of the Atlantic to the Pacific Ocean.

Unfortunately for Argentina, the story is not so simple as she tries to present it in her Memorial. There are other acts of the Spanish Crown which have to be taken into consideration

(3) V. Quezada "La Patagonia y las tierras australes del Continente americano" (Buenos Aires, 1875) p.55.

(4) "Argument of the Argentine Republic" (Washington D.C. 1894) p.24.

in order to understand the matter.

To begin with, simultaneously with the above mentioned Mendoza's Capitulación, the Emperor had created a fourth Governorship, also 200 leagues in length, entrusted to the Portuguese gentleman Simon de Alcazaba. This Gobernación was to be measured from the Southern border of Mendoza's grant. Therefore, Alcazaba's territory reached down to 48° 22' 52" Lat. S; that is, still north of the Straits of Magellan. The Order referred to the lands assigned to him as beginning "precisely at the boundaries of the Gobernación which We have entrusted to Don Pedro de Mendoza towards the Straits of Magellan."

Alcazaba was killed, and as the Capitulación had been given to him personally, the Spanish Sovereign signed at Valladolid a Royal Order in favour of Francisco de Camargo. The words used in that Order prove that the King intended to form a separate Gobernación of all the territory which extended south of the Gobernación of Pedro de Mendoza; in favour of Camargo, the King granted the territory previously given to Alcazaba plus all the territory which still remained unallotted down to the Straits.

In 1539, the Emperor made a concession to Pedro Sancho de Hoz, promising him that "when the discovery is made of the other part of the said Straits (of Magellan) or of some island not situated within extraneous boundaries, We shall reward your services; and until We are informed of what you shall thus discover, you shall be Our Governor thereof."

"In this manner the Sovereign completed the distribution of his dominions in the southern extremity of the Continent, granting to Sancho de Hoz the Gobernación of Tierra del Fuego and the adjacent islands.

Such is the first and fundamental territorial division of the southern countries of South America in which, as may be seen, the King of Spain did not take into account any geographical feature which might serve as an 'arcifinious' boundary in order to separate from each other the extensive Gobernaciones created by Royal decree." (5)

Later on, the situation became more complicated. Don Pedro de Mendoza died, having previously authorized his lieutenant Juan de Ayolas "to cross in a straight line to the other sea" and, eventually, to cede to Diego de Almagro, a Spanish conquistador who lived near Los Reyes (i.e. Lima), the 200 leagues on the Southern Sea which belonged to him.

After Mendoza's death, the Emperor made on 18 March 1540 a new Capitulación in favour of Alvar Nuñez Cabeza de Vaca, granting him the Gobernación previously entrusted to Mendoza. Cabeza de Vaca was deposed by his subalterns in 1544 and in his stead they elected Martinez de Irala.

Martinez de Irala tried to be confirmed in his post, but La Gasca, President of Lima's Royal Audience, had decided to form a new Gobernación in favour of Diego de Centeno. Shortly after that, Martinez de Irala learned that the Sovereign had made a Capitulación in favour of another Captain (Juan de Sanabria) who had offered to conquer and settle the Province of Rio de la Plata. This new Capitulación gave to the Rio de la Plata Governorship boundaries which differed from those established in the Mendoza and Cabeza de Vaca's grants; the southern boundary of it was fixed at parallel 31°, which represented a diminution of almost six degrees of latitude; but a stretch of land situated on the north side of the mouth of Rio de la Plata was added. However, Sanabria's Capitulación had another interesting clause:

"... thus the said two hundred leagues are to extend in breadth to the South Sea; which discovery and settlement you may make, provided that in case you meet with other Governors or Captains who may have already discovered or settled the said land and reside there at the time of your arrival you do nothing to the injury of whatever you may find in

(5) "Chilean Statement," 1901, Vol. I, p. 14.

the same land, nor interfere with nor enter into anything which may have been discovered or settled, even though you find it within the boundaries of your Gobernacion, thus avoiding such difficulties as have already occurred in similar circumstances . . . " (6)

(Underlining added)

Such a clause was most opportune, since there was a Captain who, with legal title granted by the Governor of Peru, had begun in 1541 the conquest and settlement of territories which fell partly within the Gobernación of Sanabria. This Captain was Pedro de Valdivia in whose favour there had been established for the first time and in a formal manner a "Gobernación de Chile".

Valdivia had been sent by the Marquis Don Francisco Pizarro to conquer and settle the "Gobernación de Nueva Toledo y Provincia de Chile", an act which Pizarro was legally empowered to do by a Royal Order given at Monzon in 1537. In 1550, writing to the Emperor, Valdivia recalled the facts:

" . . . I started from Cuzco in the month of January, 1540; I marched passing the great desert of Atacama, up to the valley of Copiapó, which is the commencement of this land, and onwards for 100 leagues to the valley called Chile, which Almagro reached and where he turned back — wherefore this land bore such a bad reputation; and on this account, and in order that this name should be forgotten, I called the land which I had discovered, and the one which I might discover down to the Straits of Magellan, Nueva Extremadura." (7)

There is no doubt that Valdivia wished to extend his jurisdiction south as far as the Straits of Magellan and on the east up to the Northern Sea or Atlantic Ocean. In 1545 he wrote to his Sovereign:

" . . . And as I saw that it would be a service to Your Majesty to extol, settle and uphold it, exploring it down to the Straits of Magellan and the Northern Sea, I took great pains . . . " (8)

Valdivia, appointed by the Cabildo of Santiago as Governor and Captain-General in the name of the Spanish Sovereign, assumed the independent Government of the territory and began applying to the Crown for the confirmation of his new title.

In 1547, having helped La Gasca to defeat Gonzalo Pizarro's rebellion, Valdivia obtained the confirmation of his commission as Governor of Chile or of "Nueva Extremadura". The Decree, dated at Cuzco on 18 April 1548, read in the relevant part:

"I hereby give and assign as your Gobernación, and empower you to conquer from Copiapó, situated on the 27th. degree of latitude from the Equator southwards, to the 41st. degree on the same side, running from the sea inland; that is, from west to east 100 leagues; and in the said Gobernación and stretch of land I nominate and constitute you Governor and Captain-General of His Majesty . . . " (9)

In a report from La Gasca to the Council of the Indies, under date 7 May 1548, it is stated that the Gobernacion had been given to Valdivia by virtue of the power that La Gasca had from the Sovereign. This act by La Gasca was approved by the Spanish King in a Royal Order dated in Madrid on 31 May 1552, where it was declared that Valdivia was to hold the Governorship of the Province of Chile within the boundaries assigned by La Gasca who, by then, had become Bishop of Palencia. (10)

As already mentioned, La Gasca's decree and the 1552 Royal Order delimited the primitive Gobernacion de Chile to the south at parallel 41°. But Valdivia had never felt himself handicapped by this and he appointed at least two navigators to explore the coast of

(6) Ibid. p.21

(7) C. Gay. "Historia Fisica y Politica de Chile" (Paris 1846). Documentos Vol. I. p.129

(8) Ibid. p.49.

(9) "Chilean Statement", Appendix, Doc. 2.

(10) Diego de Rosales. "Historia General del Reyno de Chile." Vol. III, Ch. 18.

the South Sea as far as the Strait of Magellan and to take possession of it. In 1544, he had commissioned under Pastene, a Genoese navigator, a voyage of discovery to that coast; in 1553, he ordered another maritime expedition to sail under the command of Francisco de Ulloa with the object of "reconnoitring the Straits of Magellan as far as the Northern Sea, as well as all that might be explored of the archipelago and southernmost extremity of the coast of Chile". Ulloa is said to have reached the Straits and to have entered into them for over thirty miles. (11)

In 1553, Valdivia sent to Spain one of his men, Jerónimo de Alderete, to give an account of his deeds and to request the extension of the Gobernacion de Chile as far as the Straits of Magellan. Alderete succeeded in that mission but, in the meantime, Valdivia had been assassinated by the Araucanians. The King, shortly afterwards, conferred the titles of the deceased Valdivia, together with the extension as far as the Straits, upon Alderete himself, whom he appointed to succeed Valdivia in the Government of the colony:

"And We hereby are pleased to extend and amplify the said Gobernación de Chile as held by the said Pedro de Valdivia for another one hundred and seventy leagues more or less, which runs from the confines of the Gobernacion held by the said Pedro de Valdivia as far as the Straits of Magellan, provided it does not prejudice the boundaries of any other Gobernación . . . that you may perform the duties of Our Governor and Captain-General in the said lands and provinces of Chile held in government by said Pedro de Valdivia which We now give you to govern as far as the Straits of Magellan, and by this our letter We confer on you power to exercise and administer Our justice . . ." (12) (Underlining added)

There is another document evidencing the geographical scope of Alderete's grant and the intention of the King to attach the Magellanic region to the Gobernación de Chile. This document was not mentioned in the exchange of correspondence in the last century on the historical titles.

Having received from the King a letter concerning Alderete's grant, the Council of the Indies sent on 15 December 1554 a Consulta to the King with several points. Among them, the Council stated:

"Even though His Majesty has granted to Jerónimo de Alderete the discovery of lands on the other side of the Straits, the Council advises, because of the experience obtained from other discoveries and conquests, about the great inconveniences which follow, and that His Majesty should not allow these discoveries for the present." (Underlining added)

The King answered:

" . . . extending the Governorship of Chile to the Straits was done for good respect and that there should be observed what has been ordered." (13) (Underlining added)

Assessing the extension of Alderete's grant, the Chilean Government stated in 1901, that there was included

" . . . in the Gobernación de Chile all the Patagonian plateau with the exception of a narrow strip which extends in its north-eastern part along the littoral of the Atlantic. What is commonly called the 'Reyno de Chile' . . . comprised, therefore from the year 1555, the region of Chile proper, which was then inhabited by Spaniards and corresponded to the central provinces of the present Republic; and the wide zone of the present Argentine provinces and Gobernaciones which stretches along the Cordilleras from Tucuman down to the River Negro and almost all Patagonia as far as the Straits of Magellan." (14)

(11) C. Gay. Op. cit. Documentos, Vol I. p. 176; Anuario Hidrográfico de la Marina de Chile VI, 188 p.435 (as quoted in "Chilean Statement," 1901)

(12) "Chilean Statement," Appendix, Doc 3.

(13) Antonia Heredia Herrera. "Catálogo de las Consultas del Consejo de Indias" Madrid 1972, p.73.

(14) "Chilean Statement," Vol. I. p.39.

After Alderete's death, Garcia Hurtado de Mendoza was appointed Governor of Chile. In his appointment, the Order reproduced the words of the Royal Cédula containing the appointment of Alderete; that is, extending the Gobernacion of Chile to the Straits of Magellan. The new Governor soon fitted out a maritime expedition under the command of Juan Ladrillero with the object of surveying and of taking possession of the Straits of Magellan and neighbouring lands. Ladrillero and his men explored the channels of western Patagonia, penetrated the Straits of Magellan, and sailed up to their entrance on the Atlantic Ocean, taking possession of all the land in the customary formalities, in the name of the Spanish King and of the Governor of Chile. The Notary of the Royal Squadron, Luis Mora, attested that:

"on the ninth day of the month of August 1558 Captain Juan Ladrillero, Commander of said Squadron, having anchored off Pession Point, the said Commander went ashore, and drawing his sword cut some branches of the trees and said that he took possession of the said land within sight of the Northern Sea in the name of His Majesty and of His Excellency (the Viceroy of Peru) and of his very beloved and dear son Don Garcia Hurtado de Mendoza, Governor and Captain-General of His Majesty in the Provinces of Chile . . "  
(15) (Underlining added)

Five years later, Tucuman was separated from the Governorship of Chile. This was the first time that the 100 leagues of breadth assigned to the Kingdom of Chile by the Crown were in any manner restricted. The territories so separated from the ancient Gobernación, which became subordinate to the Charcas Audience, comprised the Argentine provinces of Jujuy, Salta, Catamarca, a part of La Rioja, Tucuman, Santiago del Estero, the greater part of Cordova, and of the Chaco Governorship; but the Royal Orders delimiting the Gobernaciones of Chile and Rio de la Plata remained unchanged in relation to the rest of the Southern part of the continent. (16)

Four years after the Royal Order appointing Juan Ortiz de Zarate as Governor of Rio de la Plata (See "Chilean Statement", Vol. 1., p.54), the Spanish Sovereign appointed a new Governor for Chile: Rodrigo de Quiroga. The boundaries of his Gobernacion were those established in the appointments of Hurtado de Mendoza and Villagrán. The appointments of Don Alonso de Sotomayor (1581) and Martin Garcia de Loyola, ten years later, were made in similar terms.

In none of the subsequent documents emanating from the Spanish Sovereign, or from the Viceroys of Peru who acted on behalf of the monarch, was there any modification of the Southern boundaries of the Gobernacion de Chile as fixed in 1548 and 1555. Furthermore, when in 1609 the Audience of Chile was re-established with a seat at the capital, Santiago, the King ordered that the President of the Audience should be the Governor and Captain-General of Chile, and declared:

"And We further wish, and it is Our will, that the said Audience should have for its districts all the cities, villages, hamlets, and land included within the jurisdiction of the said Provinces of Chile, all the district which is now pacified and settled, as well as that which may hereafter be subdued, pacified and settled." (17)

It should be added that in 1681 the "Recopilacion de Leyes de las Indias" sanctioned by King Charles II ordered that the Royal Audience and Chancery of Santiago de Chile "should have for its district the whole of the Kingdom of Chile, with the cities, villages, hamlets and lands included in the jurisdiction of the said Provinces (of Chile), all of what is now pacified both inside and outside the Straits of Magellan and 'inland', until and including the Province of Cuyo." (18) Contemporaneous authors and the Spanish authorities understood that this

(15) Ibid. p. 49

(16) The geographical names mentioned correspond to the Argentine provinces as existing in 1901. (See "Chilean Statement", Vol. I, p.53).

(17) The text is reproduced in Amunategui "Cuestion de Limites" Santiago, 1879, Vol II, p. 278/9.

(18) "Chilean Statement," Vol. I, p.76.

meant including in the boundaries of Chile the whole of the Southern part of the Continent. For instance, Alonso de Ovalle in his "Histórica Relación del Reyno de Chile" published in Rome in 1646, described the Kingdom as "extending itself for 500 leagues as far as the Straits of Magellan, which is in 54 degrees, and the land which is called Tierra del Fuego, which is the Southern part of the same Straits, extending to 59 degrees."

Before proceeding further, a distinction needs to be drawn between "Chile" often mentioned with reference to the part of the Gobernación which was already settled by the Spaniards on the one hand, and on the other, the whole of the territory which, according to the Royal Orders (and, therefore, according to the rules applicable to the uti possidetis juris) was included in the boundaries of the Gobernación. It is beyond doubt that such a distinction was very much in the mind of the writers; Alonso de Ovalle, already quoted, said:

"Its jurisdiction (that of the Kingdom of Chile) extends over a breadth of 150 leagues from east to west, although the broadest part of what is properly called 'Chile' does not exceed the 20 to 30 leagues, which exist between the sea and the famous snowy Cordillera, of which we shall speak in the proper place; yet in establishing the limits and jurisdiction of the government of the western Indies, the King included in it (the Kingdom) the extensive Provinces of Cuyo, which, though similar in length to those of Chile, are double their width

.....  
This is the site and place of the Kingdom of Chile, whose neighbours to the north are the Provinces of Atacama, and the rich silver mines of Potosi, where the Kingdom of Peru begins, and to the South, the seas falling under the Pole and the islands discovered therein." (19)

The words of Ovalle are illustrated by his well known 1646 map which was used by famous cartographers of the XVIIth Century such as Sanson d'Abbeville and others: the TABULA GEOGRAPHICA REGNI CHILE, published in his "Histórica Relación." The same depiction of Chile appears in the remarkable map drawn by Ovalle in the same year, dedicated to Pope Innocent X. (Ch. Plate No. 140).

It is unnecessary in this Appendix to repeat the many quotations showing that for geographers and writers of the XVIIth and XVIIIth Centuries, Chile extended at least to the Straits of Magellan and from the Pacific to the Atlantic Ocean. The "Chilean Statement", in 1901, quoted, among others, Solorzano, Jorge Juan and Antonio de Ulloa, M. de Olivares, Juan Ignacio Molina, M. de Olavarria, among Spanish-speaking authors. Among those of world repute, Mercator, Hondius, Laet, Pierre d'Avity, Sieur de Mont-Martin, and Bruzen la Martinière were also mentioned. (20)

All these authorities were in agreement and, at the same time, their views coincided with the description of the jurisdiction of the Royal Audience of Chile, as confirmed by Law XII, Title 15, Book II of the "Recopilación de Leyes de las Indias", above mentioned.

The same view was also shared by many learned men in the XIXth Century. Because of his importance, and to quote only one, mention is made of Domingo F. Sarmiento, the famous Argentine Statesman who was President of Argentina in the period when the boundary question was being debated. With reference to the above mentioned Law XII, Sarmiento wrote:

"That is, thus, a title which constitutes as Chilean everything that may be subdued, settled and pacified inside and outside the Straits of Magellan. Let it be understood that when the Law was issued, compiled in 1685, the Cuyo Provinces were Chilean, and the Straits of Magellan had a century before that and for a brief spell been occupied by (Pedro) Sarmiento's expedition; so that the law established and completed the territory then known as Chilean. The later segregation of the Cuyo Provinces to add them to the Viceroyalty

(19) Alonso de Ovalle "Histórica Relación del Reyno de Chile", Rome, 1646, Ch. I.

(20) For the quotations see "Chilean Statement", Vol I, Ch. II.

of Buenos Aires did not amount to ceding the Straits, the possession of which interested Chile but not Buenos Aires, since such a cession would have required expressly to include the clause dealing with the inside and outside the Straits which is the written title of Chile. It would still need to be known whether the title for creating the Viceroyalty of Buenos Aires states that the lands the south of Mendoza (Patagonia) were included in the demarcation of the Viceroyalty. If it did not, Chile might also claim all the territory lying between Magallanes and the Cuyo provinces ..." (21) (Underlining added)

All this would seem to dispose of the assertion too lightly made in the Argentine Memorial that Cape Horn marked a point of division of the jurisdictions of the Captaincy General of Chile and the Buenos Aires Governorship. Neither the Andes nor Cape Horn were elements taken into consideration by the Sovereign when dividing the territories of the Crown. In the beginning, the Mendoza Capitulación and those that followed it immediately extended to the Pacific Ocean. (22) Later on, the Royal decisions placed under the jurisdiction of the Governorship of Chile vast areas east of the Andes and on the Northern Sea: Patagonia, the Straits of Magellan, Tierra del Fuego. Certainly they were never inside the limits of the territories granted to any of the Buenos Aires Governors.

In spite of that, in her Memorial, Argentina has mentioned an order issued by the Sovereign on 29 December 1766, (i.e. before the creation of the Viceroyalty) on account of reports concerning two English frigates. The translation submitted by Argentina departs, in some extent, from the original Spanish text, as may be noticed on comparison of the two texts:

#### Spanish original

"Repetidamente confirmadas las noticias que habrá V.E. recibido al arribo a Montevideo de las fragatas Liebre y Esmeralda, del intentado establecimiento (ya formado) por los Ingleses en algunas islas de esos mares o los del Sud, y acaso en sus costas y no habiendo podido saberse el preciso paraje, urge cada día mas el encargado descubrimiento de él y por consecuencia el avisar las providencias para este logro, que por lo respectivo a esa costa hasta el Estrecho de Magallanes, inclusive éste, y sucesivamente hasta Cabo de Hornos, ha de ser de la inspección de V.E. auxiliandose con el Gobernador de Malvinas Don Felipe Ruiz Puente; disponga V.E., por los medios que su conocimiento le dicte, que se reconozca costa a costa, con embarcaciones a propósito, la distancia que media desde el Rio al Estrecho de Magallanes, y la parte que puedan de éste; y que en lo restante, hasta el Cabo de Hornos, se practique igual diligencia....."

#### 1973 Argentine translation (23)

"With the repeated confirmation of the information received by Your Excellency on the arrival of the frigates 'Liebre' and 'Esmeralda' in Montevideo, of the settlement attempted (and indeed established) by the British on certain islands in those seas or those of the South, and possibly on the coasts; and because it has not been possible to identify its exact location, the urgency of your (?) instructions to find that settlement increases with every day, insofar as Your Excellency is responsible for that coast up to and including the Strait of Magellan, and thence as far as Cape Horn, with the assistance of the Governor of Islas Malvinas, Felipe Ruiz Puente. Your Excellency is to give orders (?) in accordance with your knowledge of the situation, for a coast-to-coast reconnaissance by suitable vessels, or the area between the River (Rio de la Plata) and the Strait of Magellan, and such part of the latter as they can, and for similar measures to be taken in the remaining areas as far as Cape Horn ....."

(21) "Obras de D.F.Sarmiento" Vol XXXV, Buenos Aires 1900, p.18-19. (Quoted by A. Rizzo Romano, "La cuestion de límites con Chile en el Canal de Beagle", Buenos Aires, 1968, p.28 et seq).

(22) See note from Minister Frías, dated 12 December 1872. (Ch. Ann.No. 338)

(23) Arg. Mem. Vol. II, p.71

The Argentine version does not make it clear, as the Spanish original does, that this document refers only to an "inspección" of the coast. It is evident that the command of the King's Minister only refers to a temporary commission entrusted to Bucareli to make a careful inspection of the coast. The reason underlying this order was the news received by the Spanish Crown that an English settlement had been established in the Falkland Islands and, thus, Bucareli received the commission, the seat of Government of La Plata being the nearest, and having the ships required. Referring precisely to this document (which was invoked by Argentina as well in the 1902 arbitration) the Government of Chile had this to say:

"It is impossible to deduce from a special and incidental commission to inspect part of the coast, islands, and the Straits, a title of sovereignty over all the corresponding country; more particularly when all the territory has already been included by the will of the same sovereign, as expressed in documents drawn up with special reference to boundaries, in another of his American colonies." (24)

But there is further (though indirect) evidence that these instructions to Bucareli did not really amount to an extension of the Buenos Aires jurisdiction, although it is not quoted in the Argentine Memorial. It is an Order from D. Julian Arriaga, on behalf of the Spanish Sovereign, in which Bucareli is informed that the English may have settled on the "island Madre de Dios, which is in the Southern Sea", and is advised that this shall guide him in taking the measures for the fulfilment of what His Majesty had decided, as shown in the Order dated 29 December 1766. (25)

The Argentine Memorial did not mention this document, which showed that Bucareli had also been instructed to take measures with reference to English settlements in Madre de Dios, an island which is situated north of the western mouth of the Straits of Magellan, in the Pacific Ocean. Perhaps it was omitted because it would further reveal the weakness of the alleged "Atlantic/ Pacific principle" which is said to have already existed in the XVIIIth Century.

It is evident that the Spanish Sovereign used his navy and armies in any area, according to the needs of the Crown and without feeling himself embarrassed by territorial divisions which he himself had made and which he was entitled to change at any moment. To draw territorial consequences from a temporary commission which contradicted the formal documents defining boundaries would appear to be invalid. Not without irony, the Chilean Minister for Foreign Affairs wrote to the Argentine Minister in Santiago, answering arguments of this kind:

"... The King of Spain commissioned the Buenos Aires Viceroy to administer the islands of Annobon and Fernando Pó, off the African coast, as may be read in the following parts of the Report from Viceroy Don Pedro de Ceballos, dated 12 June 1778 .....

.....  
These orders from the King of Spain to the Buenos Aires Viceroy for taking possession of the islands of Annobon and Fernando Pó, for appointing the Governor and other employees, to provide money, food and other things necessary for the good order and government of those islands, did they mean, perhaps, the adscription of the same to the Buenos Aires Viceroyalty?" (26)

The Argentine Memorial also refers to the "continuous attempts to convert to the Catholic religion the Indians living in the Southern parts of the Continent", made after the creation of the Governorship of Buenos Aires (Arg. Mem. p. 120).

The Government of Chile will limit itself, in this respect, to a reference to the "Chilean

(24) "Chilean Statement" Vol I p.89.

(25) Royal Order to Bucareli dated 7 February, 1767. (Argentine Memoria de Relaciones Exteriores, Buenos Aires, 1877, Vol. 3 p. 292).

(26) Note from Chilean Minister Ibáñez to Argentine Minister Frías dated 28 January 1874 (Report of Chilean Ministry for Foreign Affairs for 1874, p.98)

Statement" of 1901 (Vol. I, pp.74 et seq.) where there is a long list of the activities of missionaries who, starting mainly from the Chilean island of Chiloé, were engaged in spiritual activities in the territory of Chile, with the support of the Governors or the Captains-General of Chile: the names of Rosales, Mascardi, Lopez de Zuñiga, Laguna, Guillermo, Elguea and others are well known to those who have studied the activities of the Church in the Southern extremity of South America.

Furthermore, when a French priest, Julien Macé, proposed to carry out a mission from Cape Horn to the interiors of Tierra del Fuego, of the Straits of Magellan, and of the continent, by the eastern side of the Andes, the point was extensively debated in the Council of the Indies. In the Official records, the region alluded to is called "lands of the Kingdom of Chile to one and the other side of the Cordilleras from Coquimbo, the beginning of the populated part of Chile, down to Cape Horn, the furthest point discovered in those provinces." This occurred in 1718. (27)

That the Kingdom of Chile did extend until the Atlantic Ocean and included Patagonia, the Straits of Magellan and Tierra del Fuego is a fact which is proven not only by the Spanish Royal Orders. In addition, Spanish and foreign geographers alike expressed that view in most works of repute published all over Europe. According to research made in London in 1874, by Gaspar del Rio, no less than forty-two authors included Patagonia or the "Magellanic lands" inside the boundaries of the Kingdom of Chile. Those authors included Mercator, de Bry, Blaeu, Hondius, Speed, Janson, Ogilby, Moll, Sennex, Falkner: in other words, the undisputed experts of the XVIth to XVIIIth Centuries.

The same view found graphic expression in maps. In its Second Atlas, the Government of Chile has made a selection of no less than thirteen maps which contain it. References to those maps can be found in the "Further Remarks Concerning the Cartographic Evidence" accompanying this Counter-Memorial. Those maps by Ovalle, Guillaume De L'Isle, de Fer, Visscher, Moll, Homman, Bowen, and others leave no doubt about jurisdiction of Chile over the Southern regions of the South American Continent (Ch. Plates 144 to 152). The map sent in 1671 by the Spanish Ambassador in London to the Queen of Spain (Ch. Plate No. 142) is a striking example of an official map of the same kind.

On the other hand, not one single map has been found showing Patagonia, the Straits of Magellan or Tierra del Fuego, either, together or separately, as belonging to Buenos Aires.

The Argentine Government was right in 1894: the La Plata Governorship did not extend beyond 36° 57' 9" Latitude S., as mentioned above.

## II. From 1776 to 1810, the year for the uti possidetis.

Having reviewed the situation as it was before the creation of the Viceroyalty of Buenos Aires in 1776, it is now necessary to turn to the period from that date until 1810, the date generally accepted as the starting point of South American independence which has been chosen as the year for the uti possidetis.

It is believed that one of the reasons which made the Spanish King decide upon the creation of the Viceroyalty of Buenos Aires was the wish to concentrate in one hand the forces that might be needed to face the Portuguese forces from Brazil.

This is certainly not the place, however, to enter into a study of those reasons. For the purposes of answering the Argentine Memorial on this subject it is only necessary to recall that the Royal Order of 1 August 1776, which created the Viceroyalty, did not affect the

(27) "Chilean Statement" Vol. I, p.85

status of the territories south of Mendoza and San Juan. "All the remaining regions belonging to Chile on both sides of the Cordilleras, by virtue of the resolutions of the Crown . . . continued unchanged." (28)

That this was so is proved not only by the very words of that Royal Order but by an official map of the Spanish Crown: the map drawn by Juan de la Cruz Cano y Olmedilla, generally called "Cano y Olmedilla's map". (Ch. Plate No. 153.)

To understand the importance of this map (on which more can be found in the "Further Remarks Concerning the Cartographic Evidence") it should be mentioned that before the newly appointed Viceroy, Don Pedro de Ceballos, sailed for Buenos Aires, he presided in Madrid over a committee of experts to whom were handed, by order of the King, five copies of that map, in order that the question of boundaries pending then with the Portuguese Crown might be discussed with the map in front of them. Years later, when Ceballos left Buenos Aires, he left to his successor, Don Juan Jose Veritz, a Report in which, inter alia, he said:

"And in order that it may serve you as guide in the tracing of the boundary line, I leave to Your Excellency in an office or chamber of the fortress a map executed by Don Juan de la Cruz, Geographer of His Majesty, printed by order of the Court and containing South America." (29)

Cano y Olmedilla's map, drawn a short time before the actual creation of the Viceroyalty, shows very clearly the boundary between the Kingdom of Chile and the Gobernacion del Rio de la Plata. The latter ends at approximately 37° S. Lat., and from there, southwards, the rest of the South American Continent appears as Chilean, in full accordance with the Royal Orders above mentioned and with the opinions of the most distinguished geographers and cartographers of the time.

During the debate on the boundary question, the Argentine Government tried to discredit this map, by suggesting that after the map was printed, the Viceroyalty of Buenos Aires had been created and that this would have brought a change in the territorial distribution. But, in this respect, two points should be made:

(a) the only territories of the Kingdom of Chile which were detached and added to the Viceroyalty of Buenos Aires in 1776, as above indicated, were "the territories of Mendoza and San Juan del Pico" and the boundaries of those territories are clearly shown on the map north of the valley of River Diamante: 35° 50' Lat S.

As the Government of Chile stated in 1901:

"At this point ended the jurisdiction of Mendoza, the most southerly of the three which formed the 'Province of Cuyo', and here, therefore, ran the southern boundary of the Viceroyalty of Buenos Aires established by the Royal Order of the 1st August 1776". (30)

(b) even though the map bears "1775" as its date, there were later versions corrected under instruction from the Crown, after the creation of the Buenos Aires Viceroyalty. As may be seen (Ch. Plate No. 153) these new versions bear the words "NVO. VIRREYNTO" (New Viceroyalty) before "Pcia. o Gno. DE BUENOS AYRES", which appeared in the first proof. Nevertheless the Southern boundary of the Viceroyalty is not shown in a different way to that of the la Plata Provinces. South of the Viceroyalty, still stand the words "RNO. DE CHILE" (Kingdom of Chile) and "Chile Moderno". The fact that the new editions of the map include several other changes in the depiction of the boundaries and in the name-placing shows, also, the careful examination to which the first proof of the map was submitted before its circulation was authorized by the Spanish Crown.

(28) Ibid p. 121

(29) Ibid p. 134

(30) Ibid p. 126

That this was not an isolated case is evidenced by other maps, drawn by no less distinguished Spanish experts. One of those maps is the "Mapa General de América o Hemisferio Occidental" drawn about the end of the XVIIIth Century by Tomás López, Geographer of the Spanish King. Attention is drawn to the word "CHILE" which appears written over Patagonia. (Ch. Plate No. 154)

Another map, drawn around 1800 by A. Ibañez, a distinguished Spanish Army Engineer, also shows the words "Reyno de Chile" (Kingdom of Chile) across the Andes, around 38° Lat. S., facing the middle stretch of River Diamante; further south on Eastern Patagonia itself, there reads "Chile Moderno" (Ch. Plate No. 156)

Other maps, such as those by John Cary (London, 1807) and R. Brookes (London, 1819) give information which coincides with that shown in the above-mentioned Spanish maps, (Ch. Plates Nos. 157 and 158) and depict the situation around the period when Chile and Argentina became independent.

All these documentary elements are necessary to understand the situation of the boundaries in the beginning of the XIXth Century. They are indispensable to anyone who wishes to assess the scope of the uti possidetis rule which Chile and Argentina had agreed in 1855 was to be the ratio decidendi of their boundary dispute.

### III The situation between 1810 and 1881

The Argentine Memorial (at p.128) refers to a Decree of 1829 which states inter alia, ". . . that Spain held the material possession of Islas Malvinas and of all the other islands that surround Cape Horn, including the island which is known by the name of Tierra del Fuego. . ." and that "the Government of the (Argentine) Republic having succeeded to all the rights which the old mother country possessed over those provinces and which were enjoyed by her Viceroy, it has continued to exercise acts of dominion in the said islands and their harbours and coasts . . ."

The former sovereignty of Spain over the territories mentioned in the decree is not in issue in the present arbitration, but on what basis could Argentina, in 1829, validly claim to have succeeded Spain in all her rights? Was Argentina the only inheritor of those rights? Did not Chile, also, succeed Spain in her rights?

No answer is given to these questions in the Argentine Memorial. But even in the said Decree of 1829 there is a contradiction with Argentina's present claims.

A most revealing part of Chapter III of the Argentine Memorial is the reference (at p. 130—131) to the activities of the schooner "Sarandi", under José María Pinedo who was despatched to the colony in the Falkland Islands. Particular reference is made there to Article 8 of the instructions received by Pinedo ordering him to sail along the coast "from Isla Soledad as far as Isla Nueva". The Memorial adds:

"So, those instructions not only reiterated the exercise of Argentine sovereignty as far as Cape Horn but also expressly mentioned Isla Nueva, one of the islands which are within the area of the present arbitration". (Underling added)

Even taking this at face value, one would wonder what its importance could be, considering that Pinedo's commission was granted nearly half a century before the compromise treaty of 1881 which settled the boundary dispute. But the whole of the Argentine argument falls to the ground when one realizes that there is an Isla Nueva in the Falkland group, and that the instruction received by Pinedo was to sail along the coast from north-east to south-west. (In the Spanish original: "Correrá la costa". The instruction included two clauses which ordered him to provide help to the commander of Malvinas (Art.7) and "not to withdraw

from the Malvinas islands" until he was ordered to do so. Is it likely that the "Sarandi" was instructed to sail to the Beagle region, so far away from the Falkland Islands when she was supposed to defend those islands?

The conclusion which must be drawn (unless disproved by documentary evidence) is that the "Sarandi" was not instructed to sail to Isla Nueva south of the Beagle Channel, and that the "Isla Nueva" mentioned in her instructions is the island of the same name which is situated on the south-west of the Falklands group, near the islands Beaver and Swan. (See excerpt from "Nouveau Dictionnaire de Geographie Universelle" by Vivien de Saint-Martin, in Ch. Ann. No.382. Also Ch. Plate No.34).

Pinedo was supposed, according to Art. 6 of his instructions to submit "his navigation log" for forwarding to the relevant Ministry. Accordingly, if the above conclusion is wrong, the Argentine Government should be able to prove that Pinedo did sail to the Beagle Channel region, merely by exhibiting the "Sarandi" log. Otherwise, Pinedo's mission should be taken in its real context, to assess its complete lack of importance in the present case.

The Argentine Memorial refers, in another part, to an argument which its Government continuously used in the historical debate on the respective sovereignty titles which preceded the 1881 compromise: an argument based on part of the Chilean Constitution which mentioned the limits of the territory. (Arg. Mem. p.132)

The argument has been answered again and again by the Government of Chile, recalling that if the rule to be applied for the decision of the boundary question was the uti possidetis of 1810, there was no direct relevance in constitutional clauses written after 1810 and before the 1855 Treaty.

But, when mentioning this point, the Argentine Memorial does not explain how, if the Chilean territory extended "as far as Cape Horn" according to the Constitution, the Argentine Government could claim, until 1881, that the whole of the archipelago south of the Straits of Magellan belonged to Argentina. Is it suggested perhaps that, according to Argentina, Chile's sovereignty at a certain point jumped over Argentine territory to a pinpoint on Cape Horn?

Argentina also now omits an important document, which she used in the debate in 1872. In a note from the Argentine Minister Frias to the Chilean Chancellor, dated 12 December 1872 the diplomatic representative of Argentina in Santiago quoted, in defence of Argentina's claims, a letter from Bernardo O'Higgins, the Chilean founding father, written in 1842, in which O'Higgins had written:

"I therefore would consider myself the most unfortunate person, if I were not fully satisfied that only the authors of the Revolution of 28 January 1823 were responsible for the shameful discredit which fell on the nation as a consequence of the total neglect shown for the morals, for the religion and physical condition of the unfortunate, ill-clothed and ignorant inhabitants of western Patagonia and of Tierra del Fuego, from the year 1822, in which they became Chilean citizens by virtue of the law which declared their soil an integral part of the Republic." (31)

One hundred years ago, the Argentine diplomatic representative took no objection but quoted with praise these words of O'Higgins which show that the Chilean statesman, when promulgating the 1822 Constitution, had understood that Tierra del Fuego was territory of Chile.

The Argentine Memorial states at p.139 that "... a dozen years after the establishment of Fuerte Bulnes, Chile was preparing the ground for a claim to the whole of Patagonia, including Tierra del Fuego." In the light of the facts described above, it should be clear to

(31) Quoted in Argentine Note of 12 December, 1872 (Ch. Ann. No. 338).

the Court that Chile's claims to Patagonia, the Straits of Magellan and all territories to the south of the Straits, were not new founded but based on a long and detailed history, as Argentina is well aware in 1973, and as she has known certainly for upwards of one hundred years.

One hardly needs to pause at the reference to such a mythical element as Piedrabuena having carved on the rock of Cape Horn, by 1863, a statement leaving permanent evidence "of Argentine exclusive jurisdiction on the Atlantic". (Arg. Mem. p.146).

Much is made by the Argentine Memorial of a Law granting to Piedrabuena the ownership of Isla de los Estados "located on Cape Horn" (Arg. Mem. p.146). It adds that Chile did not protest against this act of Argentina. Even leaving aside the absurd reference to the Island being on the Cape, had not both countries agreed to abide by the 1810 uti possidetis?

Several maps could be invoked by Chile to show that even in the 1870's geographers did not consider Patagonia and the other Southern territories as included in the territory of the La Plata Provinces. Among those contained in the Chilean Atlas the attention of the Court is drawn to the maps by Johnston (1861 and 1878) and by the eminent French geographer Malte-Brun (1871) (Ch. Plates Nos. 159, 160 and 161).

In the farrago of historical references contained in the Argentine Memorial, there is one interesting acknowledgement that "Tierra del Fuego and adjacent islands to the south" had not until then (1871) been within any of the Provinces of Argentine (p.146). But the attention of the Court is drawn to the fact that the 1871 draft Law which had been intended to put those territories under Argentine administration "was never approved by the Argentine Congress", as is admitted in footnote (80) on p.177 of the Memorial.

The Argentine Memorial refers at p.147 to a Chilean note of 1872, sent by the Chilean Ministry for Foreign Affairs to the Argentine Minister in Santiago. "This note" — it says — "made the first official Chilean claim to the major part of Patagonia". (Arg.Mem.p.147)

The Memorial adds, (at p.148):

"This changed the dimension of the territorial controversy. Until then the dispute had turned upon the comparatively narrow issue of the legality of the establishment of the Chilean colony of Fuerte Bulnes, later Punta Arenas. Now, by reference to a novel concept of 'adjacency' the disputed territory came to include the whole of the Strait of Magellan, all of Tierra del Fuego, and all Patagonia."

This suggestion must be an error; even the map sent to the British Minister in Buenos Aires by the Argentine Chancellor who negotiated the 1881 Treaty and who was well aware of the facts, shows the whole of Patagonia, South of Rio Negro, as territory "disputed by Chile since 1865". (Ch.Plate No.21)

Further on, the Argentine Memorial refers to a proposal from Frias, made apparently by word of mouth, as there is no relevant Argentine document given for it; the Memorial relies on an internal note from the Chilean Foreign Minister to the Chilean Legation in Buenos Aires (Arg. Mem.p.149). The Memorial reads:

"Unlike the Lastarria proposal, it introduced a boundary on Tierra del Fuego (meridian of Bahia Gregorio) which would leave Isla Grande and the islands to the south of it almost entirely to Argentina."

Can it be that the Argentine archives contain relevant documents not exhibited or mentioned, because there appears to be an error in the above-quoted description of this Frias proposal? According to the source mentioned by Argentina (note from the Chilean Ministry of Foreign Affairs dated 28 February 1872) Frias had proposed that Argentina would be left with "half of Tierra del Fuego". There is no mention in the Chilean note of the "meridian" of Gregorio Bay or of "the islands to the south".

Furthermore, it should be noted that the Argentine Memorial does not mention that by the same note, the Chilean representative in Buenos Aires was instructed to try to reach a settlement by which Argentina would recognize the Chilean sovereignty "over the Straits of Magellan, Tierra del Fuego and adjacent islands", showing that the reference to "Tierra del Fuego" in the note only could apply to the Isla Grande.

When alluding to a second Frias proposal, of October 1872, the Argentine Memorial states that therein "once again, Argentina maintained the uninterrupted continuity of its sovereignty over the Atlantic seaboard". (p. 151)

This second proposal from Frias was mentioned in the Chilean Memorial (Chapter III, para. 18, p.25) and the whole text of his note is in Vol.II of the Memorial (Ch.Ann.No.14, p.20). It is therefore easy to verify that, according to the proposal, there was left for the future "the division of the opposite coast of the Straits (i.e. the Southern shore) and of Tierra del Fuego." The statement in the Argentine Memorial is therefore true only in respect of the Atlantic seaboard down to the northern shore of the Straits.

How, then, can Argentina maintain as she now tries to do, that in that proposal, "the uninterrupted continuity of its sovereignty over the Atlantic seaboard", has any relation to Tierra del Fuego which was not mentioned at all as having been assigned totally or partially to Argentina, and which was expressly left out of account?

It would be too laborious for the Court if this Counter Memorial were to refer to every one of the assertions made by Argentina in her Memorial, in relation to the diplomatic correspondence which preceded the 1881 Treaty. Some of them, however, must be considered:

A) The Argentine Memorial states (para 40, p.155) that the Argentine Government had emphasised on more than one occasion that it had been informed by the Chilean Government, that the latter had no intention "to oppose the jurisdiction exercised by the Argentine Republic on the coasts of the Atlantic Ocean". And, in a rather discreet footnote (same page) it states that a notice published by the Chilean Government in "The Times" of London in March 1872 "drew the attention of British ship-owners and Captains to the area of Chilean jurisdiction in the islands or groups of islands adjoining the Straits of Magellan and the Tierra del Fuego, or near that part of the Patagonian coast."

A quick reading of that notice will show that the Chilean Government not only "drew the attention" to the area under Chilean jurisdiction, but stated in most emphatic terms the rights of sovereignty which Chile had over the Southern regions and the consequences that any trespassing in them would entail. The notice read:

"STRAITS OF MAGELLAN AND TIERRA DEL FUEGO.— Whereas the Chilean Government and its Legation in the United Kingdom, have been informed that some British merchants, shipowners, or captains of British merchant vessels propose sending, or have already sent out vessels to the islands or sea coast of Patagonia, near either to the Straits of Magellan or the Tierra del Fuego, with a view of extracting and loading guano or other substances or ingredients to be found in the islands or sea coasts aforesaid, now I, the Minister from Chile, in the United Kingdom, acting by order and on behalf of the said Government, make it known to all whom it may concern, and especially to whosoever now intends or may in future intend freighting ships with the purpose of sending out expeditions of any kind to the aforesaid islands or groups of islands adjoining the Straits of Magellan and the Tierra del Fuego, or near that part of the Patagonian coast that the Republic of Chile has exercised from time immemorial and now exercised its jurisdiction and domination over the aforementioned islands and coasts, and this more especially since the month of September of the year 1843 when my Government established and settled a colony in the Straits of Magellan, the seat of which colony is at present in Punta Arenas, on the coast of Patagonia, and has maintained the said colony from that

date and without any interruption, at the cost of great sacrifice and expenses to the Chilean Treasury.

In consequence thereof, and so that no one may plead ignorance thereto, I now inform and notify to all to whom it may concern, that it is forbidden to any vessel or vessels, to whatever nationality such vessel or vessels may belong, under penalty of being forfeited, together with their cargo, to approach or anchor at or near said islands and coasts; all this in conformity with the laws and regulations existing and in force throughout the territory belonging to the Chilean Republic, including the islands aforementioned and the annexed possessions.

Chilean Legation in Great Britain, this thirteenth day of March, 1872." (32)

In his note of 15 March 1873, the Chilean Foreign Minister answered to this point, raised by Frias, stating that "the incident relative to the notice published in 'The Times' of London had caused several rectifications which appeared in the diplomatic correspondence exchanged on that account". Minister Ibañez added:

"The explanations I then gave you concerned only that incident and in no way generally the boundary question as a whole, the opportunity for which has not arrived. Anyway and to avoid in the future any hesitations and whimsical interpretations of words, I peremptorily state to Y.E. that the Government of Chile believes to be entitled to the whole of Patagonia . . ." (33) (Underlining added)

But in that paragraph 40 of the Argentine Memorial, as in Argentine Notes, there is a reference to the "jurisdiction exercised" (jurisdiction ejercida, in the original Spanish) which requires some comment.

What was the jurisdiction "exercised" by Argentina on the coasts of the Atlantic Ocean, in the period in which the diplomatic correspondence took place?

There is no need to speculate on the answer. Señor Irigoyen, the Argentine Foreign Minister himself, wrote to the Chilean Chargé d'Affaires in Buenos Aires, on 24th August 1875, and with reference to the same notice on "The Times" stated:

"I hope that you, attaching to the words of your Government the due importance, shall recognize without violence (sic) that the jurisdiction of the Argentine Republic over all the Southern coasts, as far and including the Straits has been from the colonial times a fact recognized by your Government . . . . .

You pretend that the Government of Argentina abandons the position it had in 1856 and 1872. You wish also that it abdicates the jurisdiction always exercised by it over the coasts of the Atlantic until River Santa Cruz and as far as the Straits." (34)

And later on, at the very same time as he was negotiating with Barros Arana, Irigoyen wrote to the President of Argentina, Avellaneda, a letter which gives a striking description of the jurisdiction really "exercised" by Argentina in the Southern region of the Continent:

". . . We claim our right to Tierra del Fuego and the islands of Cape Horn; and we have not tried to expand the population on the coast to the South of Patagones. We defend our dominion of the Strait but we have no buoys on the rivers that cross the Provinces, nor lighthouses on the shoals that are at a distance of five or six leagues from this port (Buenos Aires).

". . . Meanwhile, the Government of Chile has constantly worked, for thirty years, to ensure the navigation of the Southern seas and to place inhabitants on the coasts of the Strait". (35) (Underlining added)

(32) The Times, London, 16 March 1872

(33) Report of Chilean Foreign Minister to Congress 1873, p.111

(34) Note from Argentine Foreign Minister Irigoyen to Chilean Charge d'Affaires dated 24 August, 1875.

(35) Ch. Ann. No. 340.

This was the "jurisdicción ejercida" which Argentina wishes to extend down to Cape Horn.

B) Both Parties agree that the 1876 proposals, made by Irigoyen to Barros Arana and transmitted by the latter to the Government of Chile, are the direct antecedent of the 1881 Treaty. As the Argentine Memorial puts it: "Articles 2 and 3 of the Treaty reproduced substantially the terms of the Bases of 1876, the sole difference being that Chile acquired under the Treaty slightly more land to the north of the Strait than had been proposed five years earlier." (Arg. Mem. p.198)

But with reference to this particular point, there are omissions in the Argentine Memorial, to which attention must be drawn.

The first one is that, three years before the 1881 Treaty was signed, a map was published in Chile and circulated abroad, showing the line proposed by Argentina in 1876 and showing it as leaving for Chile, Nueva, Picton, Lennox, and all the other islands down to Cape Horn. (See Ch. Plate No.11). The map was known in Buenos Aires (36) but no objection or comment was raised. Certainly, fore-warned by that map, if the line had been wrong Argentina would have made it plain in the later negotiations when the 1876 proposals were renewed.

But, besides this, there is another point that must be recalled: the Irigoyen proposals of 1876 and the correspondence from Barros Arana referring to them were published for the first time in Chile in 1878, in the Report presented to Congress by the Chilean Minister for Foreign Affairs (37). Among the diplomatic documents then published was the telegram sent by Minister Barros Arana to his Government in which he said that the Irigoyen proposal meant that "all other islands to the south of the Strait would be Chilean". (Chilean Memorial, Chapter III, para. 25; Ch. Ann. No. 21)

When this Report was known in Buenos Aires, the Argentine Minister for Foreign Affairs, Señor Montes de Oca, thought it necessary to react and, accordingly, he presented a long report to the Congress of Argentina on the boundary question: "Cuestión Límites con Chile". In that document Señor Montes de Oca referred to the different stages of the negotiations with Chile and specifically to the 1876 Irigoyen proposal but he did not utter one word upon the interpretation given to it two years earlier by the Chilean Minister in Buenos Aires.

The conclusion that may be drawn from these facts is that in 1878 the Argentine Government understood the 1876 proposals in exactly the same way as Barros Arana understood them.

It only needs to be added, on this point, that when in 1881 the Government of Chile ordered that a map be drawn by its Hydrographic Office showing the different proposals which preceded the Treaty of 23 July 1881, again the proposal of 1876 was represented as leaving for Chile Picton, Nueva, Lennox and the rest of Cape Horn archipelago (see Ch. Plate No.16). Furthermore, the same map stated that the 1881 formula "coincided with that of 1876 from Mount Aymon to Mount Dinero, and throughout its course over Tierra del Fuego and through Beagle Channel."

It is known that this 1881 Authoritative Map was in the hands of the Argentine authorities and that their attention was drawn to it shortly after the Treaty was signed (Ch. Ann.No. 364). Did none of them realize that the boundary line as shown in that map left to Chile the whole of the Cape Horn archipelago? Would not someone — Señor Irigoyen himself — have protested against this depiction if it had been wrong?

(36) See E. Quesada, "La política chilena en el Plata", Buenos Aires 1895, p.76.

(37) pp. 42 et seq.

All these elements point to the same conclusion. No document has been exhibited or invoked by Argentina to show that in 1876 or later the proposals of that year were understood as she claims in the present proceedings. No evidence appears to exist in support of her claim that, under this formula, she secured for herself the disputed islands, or the extravagant "Cape Horn meridian line" that, according to her, was agreed in 1881 (and, therefore, in 1876).

On the other hand, all the official documents known to the Government of Chile (and apparently to the Government of Argentina) prove that in the 1876 proposals, the disputed islands were left to Chile: Barros Arana telegram of 5 July 1876 (known by the Argentine Government in 1878); the map diffused by the Chilean press in 1878 (sent abroad by some diplomatists and also known in Argentina) (38); Chile's Authoritative Map of 1881 circulated all over the world and which, as stated, was known by the Argentine authorities shortly after the signature of the Treaty.

Even if there was no other evidence, the above alone would prove the scope and joint understanding of the 1876 proposals and, therefore, of the 1881 compromise. The map sent by Barros Arana to his Government immediately after he received these proposals (Ch. Plate No. 8) need not have existed; the meaning of the proposals would be no less evident.

When, added to all these documents, Irigoyen's map of 1881 (Ch. Plate No. 21) is seen and there, also, Picton, Lennox, Nueva, and all the other Southern islands are shown as Chilean, one cannot but reflect that all these coincidences cannot be merely a "coincidence".

C) The compromise proposals de Rufino de Elizalde, Foreign Minister of Argentina, made on March 30 1878 to Barros Arana, are briefly considered in paras. 58 and 59 of the Argentine Memorial, (p. 171-173). Argentina acknowledges that in them her Government departed from that "inflexible element", that "axiom," of "the exclusive dominion of the Atlantic seaboard" which she is now invoking as the rationale of the Treaty.

It has already been shown that, indeed, in all the proposals that preceded that of Elizalde, there never was such a "non-negotiable" element: Frias' 1872 formula did not contain it and, as shown, Irigoyen's 1876 proposals left to Chile all the territory South of the Straits, with specific exceptions precisely defined.

Therefore, to assert that Argentina in 1878 departed "for the first time" from the so-called "non-negotiable" element of the exclusive dominion of the Atlantic coast down to Cape Horn is a negation of all the facts as proven by the documents. The existence of "the Atlantic frontage to Cape Horn" is a most striking example of a petitio principii.

That this is so is avowedly shown by Elizalde's map. It is reproduced as Plate No. 9 of the Chilean Atlas and the concept of Beagle Channel which underlines that map has been mentioned in the Chilean Memorial (Chapter III, paras. 32 and 33; also, Ch. Cart. Rem. p. 15).

The transcription of Elizalde's proposals in the Argentine Memorial (p. 172) does not contain any reference to the map. Nor is the map referred to in the Memorial.

D) The Argentine Memorial refers (p. 174-176, para. 61) to the negotiations which took place in 1879, between the Argentine Foreign Minister, Montes de Oca, and the newly appointed Chilean Envoy, José Manuel Balmaceda.

The proposals of 17 April 1879, made to Balmaceda by the Argentine Foreign Minister, are very clear and raise no problem of interpretation. Argentina recognizes that, according to them, "Argentina would have renounced the small stretch of Atlantic frontage north-east of Cape Horn". So, again in 1879, the "non-negotiable element" was negotiable.

But the statements of the Argentina Memorial concerning the purported "principle" and "axiom" of the Cape Horn meridian oblige the Chilean Government to enter into details of the

(38) Despatch from Baron D'Avril dated 30 December 1878 (Ch. Ann. No. 32) See Ch. Plate No. 11.

Balmaceda-Montes de Oca negotiations of 1879 which had been left out of the Chilean Memorial. Their study now becomes necessary, in the light of the exorbitant claims of the Argentine Memorial.

In 1879 there was not only one proposal from Montes de Oca. The Argentine Foreign Minister made other proposals, after the first had not been accepted by the Chilean representative.

The records of the meeting of both diplomats, signed after each conference by the negotiators, are now published. (Ch. Ann. Nos. No. 33, 344, 345, 346, 347 and 349).

It is not necessary to study these proposals one by one, but it should be stressed that they were based on the principle either of "restricted arbitration" or, in furtherance of previously agreed "post-Award mutual concessions". In all the new Argentine proposals Chile was to be left as sovereign of all the islands presently disputed. In none of them, was there such a thing as the "non-negotiable" element of "the Atlantic frontage".

Even in the hypothetical case that Argentina had won the arbitration then envisaged, Argentina offered to resign in favour of Chile the islands South of Beagle Channel; the drawing of the proposed boundary lines (determined by latitude and longitude coordinates, and therefore not lending themselves to an "interpretation") always left to Chile the islands of Nueva, Picton, Lennox and all the others which extend to the South.

This throws further light on the Montes de Oca-Balmaceda 1879 negotiations. Also, and of more importance, these proposals from the Argentine Foreign Minister make a sham of the claim to the "Atlantic/Pacific principle", so fervently invoked by the Argentine Memorial.

E) Reference should be made to the difficult times which Chile was passing through during the 1879 negotiations and, indeed, during the final stages of 1881 Treaty. The Argentine Memorial has alluded indirectly to the matter, by quoting rather out of context a Chilean historian who stated that it could not be suggested "that the 1881 Treaty was imposed on us by force and by the pressure of circumstances" (Arg. Mem. p.181. footnote).

The point only needs to be mentioned because of the light which it sheds on the decisions taken in 1881 by Argentina and by Chile (even the Argentine Memorial suggests so, though in a rather oblique way. See p.181). What then was the situation?

At the beginning of 1879, Chile was at war with her two Northern neighbours, Bolivia and Perú. There was a danger of Argentina joining them and, certainly, moves were made to bring her into an anti-Chilean coalition. Indeed, a few years earlier, in 1874 a secret treaty establishing such an alliance had been sent for approval to the Argentine Congress by the Argentine President.

In such a framework, when the war broke out, Balmaceda was sent to Argentina, as ad hoc Chilean representative, entrusted with the mission of securing Argentina's neutrality and, if possible, of reaching a solution to the boundary question.

It was therefore in a tense international climate that Balmaceda conducted his conversations with Montes de Oca, and right at the outset of the negotiations, "the conquest of the desert" (Patagonia) was launched by Argentina. A modern Argentine writer has described it as follows:

"One of the last acts of Avellaneda's Government was entrusting his War Minister, General Julio Argentino Roca, with the occupation of more than seventy five thousand kilometres of fertile land, known nevertheless as "desert" .....

Five columns started from Mendoza, Córdoba, and Buenos Aires, by mid-April 1879, under the command of Colonels Villegas, Racedo, Lavalle, Ortega, Winter, Rudecindo Roca and others, . . . . through those non-inhabited regions, to be reunited on the banks of River Negro, fixing as a final goal the date 24 May 1879" (39)

And in the prologue of the same book, Ricardo Caillet-Bois, a well-known Argentine publicist, states:

"Years since, I have been maintaining that Roca's expedition of 1879, rather than being directed against the demoralizing (sic) and savage host, was a genial manoeuvre of the great statesman which put Patagonia out of danger". (40)

The "Center for Social Research in Argentina", composed among others by Senor Moreno Quintana, former Argentine Judge of the International Court of Justice, had this to say about the subject in 1966:

"In 1881, and as a consequence that the war with Peru went on and Argentina was strongly decided not to cede more of her territory, Chile saw herself obliged to conclude a treaty to settle the boundary between the two countries. That treaty, indeed, was to be the definitive treaty." (41) (Underlining added)

These facts are not mentioned merely with the intention of illuminating the scene of the diplomatic démarches which preceded the 1881 Treaty. The renunciation by Chile of her claims to the vast regions of Patagonia, can only be understood in its historical context, which explains the great sacrifice of territory which Chile made in 1881.

F) Reference must be made, finally, to the French diplomatic note quoted by Argentina, apparently for the purpose of illustrating Chile's attitude to the 1881 negotiations (Arg.Mem. p.180). The document is a despatch from the French Legation in Buenos Aires to the Minister for Foreign Affairs in Paris, dated 24 October, 1880. The part quoted by Argentina reads:

"As Your Excellency knows, the Argentine Republic claims possession of Patagonia, Tierra del Fuego and, furthermore, that part of the Strait of Magellan lying to the east of the Cordillera of the Andes, or of an imaginary line which would prolong it. This line would reach (voudrait aboutir, in the original) Cape Horn in dividing Tierra del Fuego. . . The Cabinet in Santiago is disposed to accept Argentine sovereignty over all the Atlantic coast inclusive as far as Cape Horn."

All the available evidence, both Chilean and Argentine completely contradicts the statement of the alleged Chilean intention to abandon sovereignty rights as far as Cape Horn and it is impossible to identify the source on which the French diplomatist was relying.

As it has been shown above, even in the first few months of the war, Chile rejected proposals made by Montes de Oca which secured for Chile all the islands South of Tierra del Fuego and a part of this island. (See above, D).

But, while attention is to be paid to contemporary diplomatic reports as evidence which is valuable, the pre-Treaty note quoted by Argentina must be considered together with other diplomatic dispatches not quoted by her; see for instance, the dispatches of Baron d'Avril, the distinguished and experienced Envoy who represented France in Santiago. His reports, both before and after the 1881 Treaty, are in agreement with the rest of the evidence and with the reports of his diplomatic colleagues, and leave no doubt about the boundary line agreed by the Parties in that Treaty. (See Chilean Memorial, Chapter III, p.3, para.35, and Ch. IV, p.39-41, paras 19, 20 and 22. Also Ch. Plates Nos. 12 and 13; also Ch. Cart Rem. pp 17 et seq.)

Moreover, while the Argentine Memorial quotes a piece of a despatch written nine months before the signing of the Treaty it fails to mention any of the diplomatic despatches written after the Treaty was signed. (See Chilean Memorial, Ch. IV passim; Chilean plates 14, 15, 16 and 18). All of them, including those of the Osborns who had such important roles

(40) Ibid. p.12.

(41) Quoted in Argentine Chile Frontier Case. (London 1966. Transcript Oral Hearings, Vol.II, p.4)

in the negotiation of the Treaty, without any exception, belie the interpretation given by Argentina in 1973 to the clauses of the Treaty.

Those reports, indeed, illuminate the diplomatic negotiations. And lastly, if one wished to have further confirmation of what Irigoyen had in mind at the very moment when the Treaty was being negotiated, another diplomatic dispatch ought to be mentioned; it was the one sent to the Secretary of State of the United States by the U.S. Minister Thomas O. Osborn, who was closely in touch with the Argentine Foreign Minister during all the negotiations. (Ch. Ann.35). According to that dispatch, by the end of March 1881, Irigoyen confided to the United States Minister that the Argentine Government was willing to agree on a line that would yield to Chile "all below the Straits".

No further evidence is needed to refute the categoric assertions made by Argentina about the "Atlantic/Pacific principle." — — — — —

The conclusion which can be drawn is that the Atlantic was never a sea of exclusive Argentine jurisdiction either before or after 1810, the year chosen as the reference date for the uti possidetis. Until the last few months of the diplomatic debate and negotiations which preceded the 1881 Treaty, Chile was asserting rights over the whole of the Southern part of the Continent which were based on legitimate titles emanating from the Spanish Crown, confirmed through three centuries, and recognized by geographers, cartographers and serious writers.

Through all the negotiations which culminated in the 1881 Treaty, there was never a mention of the "Atlantic/Pacific principle" or of "the Cape Horn meridian line". Every compromise proposal made by Argentina during the negotiations contradicts the assertions about that purported "principle" or that novel "line": none of them contains those elements which are now claimed as having always existed.

The interpretation of the 1881 Treaty in relation to the Beagle region advanced by Argentina in these proceedings has no foundation either on the Spanish Royal Orders prior to 1810 or on the history of the negotiations which concluded in the Treaty.

## APPENDIX B

### NOTES AND COMMENTS ON THE DISCOVERY OF THE BEAGLE CHANNEL

The descriptive account given in the Argentine Memorial of the discovery of the Beagle Channel introduces some elements of confusion concerning both the facts and the opinions of its first explorers. The Chilean Government accordingly feels it is necessary to complement the background information submitted in its Memorial (Ch. Mem. Chapter II, pages 9 *et seq.*), in order to give a clear description of the facts and to reestablish the truth concerning the views expressed by Captains King and Fitz-Roy in this matter.

As indicated in the volume of "Remarks concerning the Cartographical Evidence" submitted with the Chilean Memorial, it was from the sixteenth century onwards that the major European powers increasingly began to explore the seas and coasts of the lesser known continents. During the eighteenth century England and France were particularly outstanding in connection with the exploration and reconnaissance of the Pacific Ocean. However, the coasts of southernmost South America, and especially those in the vicinity of Cape Horn, were among the regions which were still virtually unexplored at the beginning of the nineteenth century.

Even though the discovery of the Strait of Le Maire, Nassau Bay and Cape Horn during the seventeenth century had opened up passages other than the Straits of Magellan, there were at the beginning of the 19th century no maps or nautical charts giving a true picture of the region between the Straits and Cape Horn. This situation, *inter alia*, prompted the British Government to undertake the exploration and survey of the southern coasts of the American continent.

#### I. First Expedition of H.M.S. Beagle (1826—1830)

With this purpose in mind the British Admiralty in the year 1825 sent two ships "Adventure" and "Beagle" on an exploration and surveying expedition under the orders of Captain Phillip Parker King, a man who had already distinguished himself during similar reconnaissance operations in New Holland. The instructions given to the expedition mention specifically the survey of the coast of Tierra del Fuego ("Narrative", Vol. 1. Page XV).

The expedition sailed from Plymouth on the 22 May 1826 and returned on the 14 October 1830.

During the course of this lengthy mission, Captain King instructed his subordinate, Captain R. Fitz-Roy, on 18 November 1829, to complete the exploration and survey of the coast lying between the Strait of Magellan and Cape Horn. Until then the "Adventure" had only explored the Cape Horn area.

The instructions for the survey given to Fitz-Roy specified "that the most interesting part of the coast was that portion between Christmas Sound and the Strait of Le Maire, . . ." They mentioned the openings between New Year Sound and Nassau Bay; " . . . and also the openings to the eastward of Nassau Bay as far as Nueva Island", and, finally the examination of the possible communication with the sea of a considerable body of water near Nassau Bay and Admiralty Sound. ("Narrative". Vol. 1. Page 560).

The journeys of exploration of HMS "Beagle" were mainly carried out by smaller craft and it was during these expeditions that the Channel which is named after the ship was discovered and explored.

In the month of March, 1830, while Fitz-Roy was with the "Beagle" in Christmas Sound, he wrote in his diary for the 14th. of the month that Master Murray had returned from an exploration to the North and that:— " . . . he also saw a channel leading further to the eastward than eyesight could reach, whose average width seems to be about a mile." ("Narrative", Vol. 1 Page 417). This was the opening, in Cook Bay, of what is known today as the southwest arm of the Beagle Channel.

On April 2nd., the "Beagle" dropped anchor in Orange Bay, within Nassau Bay. From that date until the end of May, (with the exception of some days during which the ship explored the southernmost part of the archipelago,) practically the entire endeavour was concentrated on the exploration and survey of the coasts of the upper part of Nassau Bay, the vicinities of Nueva Island, and the search for interior channels which were believed to exist in the area. Fitz-Roy himself, having discovered the Beagle Channel in the west, was trying to find its communication with the Strait of Magellan. The main features of this exploration are as follows.

Between the 3rd. and the 15th April, starting from Orange Bay with two boats, an exploration was carried out of the sounds and bays to the West and North, including part of the southern coast of Navarino Island.

Midshipman Stokes explored Tekenika Sound, and Master Murray left in the opposite direction to explore and survey part of the southern coast of Navarino Island, as far as what was then called Warren Bay ("Narrative". Vol. 1. Page 427). Master Murray entered Ponsonby Sound to the North, as he was instructed to, and thus discovered the Narrows now named after him, and he also entered a channel which he followed eastward. Thus he reached some clay cliffs which were part of what was afterwards discovered to be an island (Gable).

From those clay cliffs Master Murray saw the continuation of the channel in which he had been sailing stretching uninterruptedly in an East-Southeasterly direction. These elements and the description given by the Master allowed Fitz-Roy to assume, quite rightly, that Murray had seen the Eastern mouth of the Channel " . . . opening into the outer sea . . ." ("Narrative". Vol. 1. Page 429).

In the meantime Stokes setting out from Orange Bay, had explored, during a second expedition, part of Ponsonby Sound in an unsuccessful search for a communication between Ponsonby and New Year Sounds. Referring to Stokes' return, Fitz-Roy makes the following entry in his diary for April 15, 1830:— "His examination, 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. 1. Page 430).

Early in May 1830, the "Beagle" explored and surveyed the coasts of Barnevelt and Evout Islands, which are situated in the eastern part of Nassau Bay, and on the afternoon of the 2nd May, the ship dropped anchor in what is now known as Lennox Cove.

Next morning Master Murray set out in the whale-boat to explore the South coast of Tierra del Fuego, between Slogett Bay and Cape Good Success. However, as both Parties to the Arbitration coincide on the scope of this survey it is unnecessary to go into it as it is outside the points in dispute in the present arbitration.<sup>1</sup>

As has been said, Captain Fitzroy, having decided to seek a possible communication between the recently discovered Channel and the Straits of Magellan, and with this purpose in mind, himself sailed from Lennox Cove on May 4th., heading as speedily as possible towards Murray Narrows ("Narrative". Vol. 1 Pages 437 and 438). In this exploration Fitz-Roy entered for the first time the Beagle Channel and headed westward along its Northwest Arm. This journey convinced him that no communication existed between this channel and the Straits and he decided to return to his ship.

On the same 4th May on which Fitz-Roy sailed towards Murray Narrows, Midshipman Stokes left on his reconnaissance work, complying with the orders given to him by the Captain, which said:— " . . . to continue the survey of the coast from the East side of the Head of Nassau Bay to the vicinity of "New Island" (Nueva Island). Thus, Stokes had to continue eastward the survey of the southern coast of Navarino Island which Murray had only surveyed as far as Warren Bay (See above).

Stokes' exploration and surveys in May 1830 were conducted in two parts:— the first, between 4th and 10th May, and the second between 11th and 17th May. The fact that there were two separate expeditions can be concluded from a reading of entries in the log of the "Beagle" and the "Narrative". As for their respective dates, the Government of Chile concurs with the references appearing in the Argentine Memorial. This coincidence of opinion does not, however, extend to the reconstruction of these journeys, on which there is a divergence between the opinions expressed in the Argentine Memorial, and the conclusions which the Chilean Government has reached after a thorough examination of the data. In the judgment of the Chilean Government, Stokes' two trips took place as described below:—

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1. As the Argentine Memorial states: "Murray's findings are not here relevant." (para 38, c, p.47)

On 4th May Stokes first headed North sailing along the coast of Lennox and then West in the direction of Cape Rees (Navarino Island). He then sailed South through Goree Road and thence again West as far as Warren Bay. (See. Ch. Pl. No. 1). This route was justified, for his orders were to continue the surveys of the "head of Nassau Bay", and it is usual in surveys for a surveyor to overlap part of the previous survey (in this case that of Master Murray) to ensure that there is no distortion. The "crossing point" of this survey by Stokes with the previous one by Murray was in front of Warren Bay, which can be drawn from the fact that there are depth marks found there that do not correspond to the soundings of Master Murray. There is also an additional element. The name "Fracture Hill", which appears in the 1829-1830 charts seems to indicate the spot where one of Stokes' sailors suffered an accident when bringing a dead guanaco on board ("Narrative". Vol. 1 Page 445). As a consequence of this accident, Stokes had to hasten back aboard the ship. The second trip began on the following day. On May 11th Stokes sailed in the direction of Cape San Pio, to link his surveys with those which, starting from Slogett Bay and to the East, had been entrusted to Master Murray.

From Cape San Pio Stokes travelled West to complete the surveying task entrusted to him. In so doing he explored and surveyed the coast of the Beagle Channel as far as Gable Island and returned to Lennox Cove along the East coast of Picton on May 17th. His track can be retraced with the help of the sounding marks found in the original charts.

Captain Fitz-Roy wrote in his diary:— " . . . soon after the Master 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. 1. Page 449)<sup>(1)</sup>

These surveys brought to an end the explorations of the Beagle Channel carried out during the first "Beagle" expedition. With this information and with the help of Stokes (see letter from Fitz-Roy to King of November 10th., 1830) Fitz-Roy, back in England, drew the manuscript charts (Ch. Pl. No. 1 and Arg. Pl. No. 7), so remarkable in their precision and details, (which have remained unpublished until the present arbitration), and which were used as the basis for Chart No. 1373.

It must be emphasized here that at the end of this 1830 exploration all the elements for the definition of the Beagle Channel to be included later by Commander Phillip Parker King, Head of the Expedition, in his report to the Admiralty of October 15th, 1830 were already known (Ch. Ann. No. 1A). When delivering his lecture to the Geographical Society of London, King also had charts of the area and from them he was able to calculate the length of 120 miles which he assigned to the Beagle Channel ("Narrative". Vol. 1 Page 580).

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(1) In 1918, when retracing the probable course followed by Stokes when entering the eastern mouth of the Beagle Channel, the British Admiralty Hydrographer excluded the possibility that the Eastern mouth surveyed by Stokes was "Picton Pass", as now alleged by Argentina (See Ch. Pl. No. 116).

In 1831 Captain Fitz-Roy published his "Views" of the southern coasts, and the first edition of the Sailing Directions, whose main author was Commander Phillip Parker King, appeared in 1832.

Section VII of the Sailing Directions was written by Captain Fitz-Roy and, in the same way as the entire work, its purpose was to be an aid to navigation. For this reason the Beagle Channel was not given an outstanding place. It appeared only as a remarkable geographical accident, but of no use to navigation by sailing ships. It was thus mentioned in connection with Cook Bay, Nassau Bay and Lennox Cove, and among the indications given about it were that it has more than one communication with Nassau Bay, and also that its eastern mouth is North of Lennox Island.

In spite of the fact that this last sentence has lent itself to much discussion, the Chilean Government would not reject the opinion given by the British Hydrographer in 1918 which says that it can be interpreted as indicating a "generally northerly direction", a possibility which is not rejected either by the Argentine Memorial (Arg. Mem. Pages 58 et seq.)<sup>(1)</sup>

It can therefore be said, in synthesis, that after the end of the first expedition of the "Beagle" the characteristics of the Beagle Channel and particularly those of its eastern mouth were fully known. It is also evident that since Captain King himself was never in the Channel the elements which he gave to the Admiralty in 1830 in connection with this matter must have come from Captain Fitz-Roy, who in turn obtained them from Murray and Stokes, they being the ones who had explored and surveyed it personally.

## II. Second Expedition of H.M.S. Beagle (1831-1836)

The second expedition to the southern regions of the American Continent resulted from the wish of the Admiralty to measure meridians and effect other scientific studies and exploration in the area. There was also the wish to give Fitz-Roy a chance to return to their native land the three inhabitants of Tierra del Fuego who had survived their trip to England.

Thus, on the 11th November 1831 Fitz-Roy was given general orders, as well as detailed instructions concerning the work he had to carry out. In these instructions, the Beagle Channel itself was given a mere twenty words, when indicating that the survey of the coasts of the Channel and of Whaleboat Sound that had been left unsurveyed, was to be completed ("Narrative". Vol. 2, Pages 22 to 40). An examination of the manuscript charts of the previous expedition reveals that only a partial survey had been made of the northwestern arm, of the communication with Whaleboat Sound, and of the coast of the southwestern arm.

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(1) See, however, that in 1918 the Hydrographer considered that it was difficult to interpret as "true" the reference to the "North" in the Sailing Directions. "We can only conclude"—he stated—"that in the final opinion of the discoverers, the eastern mouth of the waterway lay to the North (Magnetic) of Lennox Island. The variation at the date in question being about 20° East". (Ch. Ann. 122, Page 306).

It is clear that this is how Captain Fitz-Roy saw the matter, for every time he mentioned survey work in connection with the Beagle Channel during this second trip, he spoke of the Northwest and Southwest arms of the Channel ("Narrative". Vol. 2. Pages 117, 124, 127 and 215). The only other mentions of the Channel were in relation to his efforts to return the natives to their places of origin, and to the prospects for missionary and civilizing work in the area.

After Fitz-Roy had completed his work in the southernmost tip of South America with the survey of the East coast of Tierra del Fuego and the Hermite Islands in the month of February, 1834, ("Narrative". Vol. 2. Page 323), he went to visit Jemmy Button, and during this voyage the "Beagle" did what had only previously been possible with boats, and sailed through the Channel discovered by Master Murray.

On his way to the Channel, on 27th February, Fitz-Roy dropped anchor two miles south of Cape Rees (Navarino Island) (which it has been possible to establish with the help of the ship's log), and on the following day, after sailing for almost three hours, he anchored in a cove.

### III. The Irrelevance of a dubious cove.

This part of Fitz-Roy's travels deserves mention here only because Argentina has attempted to draw arguments in favour of its thesis for the interpretation of the 1881 Treaty (Arg. Memorial Page 50, Paragraph 40, and Page 74, Paragraph 56) from the undetermined location of this cove and from isolated references in the "Narrative" to a geographical accident called "Portrait Cove".

It should be remembered that the name "Portrait Cove" is to be found only in three illustrations appearing in Volume 2 of the "Narrative":— in the engraving called "Fuegian (Yapoo Tekeenica) at Portrait Cove"; in the engraving bearing the caption "Cove in Beagle Channel (Portrait Cove)", and in the map "Part of Tierra del Fuego" which was included in the volume (Ch. Pl. No. 3). There are no references to it by name in the text of the "Narrative" itself.

The first point to be noted is that the first of these engravings does not correspond to any known single drawing by Conrad Martens, the official artist of the "Beagle". It appears to be a composition by the engraver T. Landseer based on two elements:—the portrait of a Fuegian, attributed to Martens, and a sketch of a group of natives next to a hut drawn, undoubtedly, by Martens in 1834. The original sketch for this last drawing is entitled "Entrance to the Beagle Channel—A family group". (Underlining added).<sup>(1)</sup>

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(1) The photographs used to substantiate these statements are held by the Agent of Chile and are at the disposal of the Court of Arbitration and of the Agents of the Republic of Argentina.

Thus, in the light of this explanation alone, it can be said that "Portrait Cove" was not and should not, be regarded as being in the Beagle Channel, but rather at the entrance to it.

This same point, which was apparently unknown to the authors of the Argentine Memorial, justifies the assertion that the reference to "Portrait Cove" in the title to the other engraving in the "Narrative" should only be regarded as a reference of a general nature to the Beagle Channel area. Although the engraving carries the caption "Cove in Beagle Channel", the drawing which was apparently used by Landseer as a basis for it does not have any caption. Moreover, this general nature of the captions to the engravings is confirmed by the other engraving which appears on the same page of the "Narrative", entitled "Murray Narrows—Beagle Channel". As the Court will know, Murray Narrows are not part of the Channel although they are in the Beagle Channel area.

Moreover, that there is a lack of precision in some of the references in the "Narrative" is confirmed by a comparison of the "Narrative" with the logs of the "Beagle". For example, whereas Fitz-Roy's diary in the "Narrative" states having been "till the 5th. (March) actively occupied, by day, in working to windward (westward) through the Channel", the log shows that the "Beagle", was anchored in Ponsonby Sound (i.e. outside the Channel) on the 4th of March.

The Argentine Memorial purports to reinforce the questionable conclusions it has drawn from the engravings in the "Narrative" with various references to the logs of the "Beagle" which have previously remained unpublished. However, it is unnecessary to go into greater details on this matter, since neither Fitz-Roy nor Darwin referred to "Portrait Cove", and none of the logs mentions a cove by that name. In truth, as the distinguished Argentine sailor, Jose Maria Sobral, said, it is impossible to prove beyond a doubt which is "Portrait Cove", since both Darwin and Fitz-Roy omitted its name.

It is true that in one of the maps published with the "Narrative" (Ch. Plate No. 3), the name "Portrait Cove" appears indicating imprecisely a location on the east coast of Navarino Island, but it must not be forgotten that the name was eliminated from Admiralty Chart No. 1373, published in 1841, on the basis of the work done by Fitz-Roy. Although it is not possible to determine the exact motive for such a decision, it can be reasonably inferred that "Portrait Cove" definitively disappeared from British nautical cartography because of the doubts and contradictions surrounding the references to it.

#### IV. The views of King and Fitzroy

All the background documents that have been analysed show that Fitz-Roy agreed with his superior officer, Commander King, on the definition of the Beagle Channel. Had it been otherwise, there would be no explanation for Fitz-Roy's silence on this matter in the "Narrative", for every time he disagreed with the opinion of King he formally said so.<sup>(1)</sup>

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(1) In Volume 1 of the "Narrative" there are approximately 30 footnotes added by Captain Fitz-Roy in which he recorded his personal opinions as compared with those of King which appeared in the text. None of them contradict King's conception of the Beagle Channel, as found in his report of 1830 or in his lecture of 1831.

There is yet another fact pointing in the same direction. On the 18 January, 1833, when Fitz-Roy was getting ready to take the Fuegians from Goree Road to Woollya, he entered in his diary:— "My intention was to go round the northeast part of Navarin Island, along the eastern arm of the Beagle Channel through Murray Narrows, to the spot which Jemmy called his country". ("Narrative". Vol.2. Page 127). The mere reading of this entry shows that in Fitz-Roy's mind the waterway along the northeast part of Navarino Island, and the eastern arm of the Beagle Channel were two different waterways; he would not, otherwise, have made a distinction between them as he does above. What is more, on the following day Fitz-Roy wrote ("Narrative", Vol II, p. 202) while in Cutfinger Cove:— "This singular canal like passage is almost straight and of nearly an uniform width (overlooking minute details) for one hundred and twenty miles", which is something he could not have written of the Beagle Channel if, as maintained now by Argentine, the channel had turned sharply towards the South only a few hundred yards from the spot where he was.

Thus, the arguments submitted by Argentina are contradictory and confused.

But the Argentine Memorial, on the basis of such arguments comes to a conclusion that is doubly absurd:— it supposes that the negotiators of the 1881 Treaty, intent on finding a solution to a controversy covering hundreds of thousands of square kilometres would have determined the boundary line south of Tierra del Fuego on the basis of two engravings in the "Narrative"; the "abstract of meteorological journal" included in the Appendix to Volume II of the "Narrative": the name of a cove which appears in a map in the "Narrative" and which was subsequently eliminated on the publication of Chart No. 1373; and the logs of the "Beagle", unpublished to this day and the contents of which could not have possibly been known to the negotiators.

In the same way, the Argentine arguments would mean that the negotiators did not take into account the definition of the Channel as found in the text of the "Narrative" itself and which describes it as " . . . extending 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". ("Narrative". Vol. 1. Page 580).

This definition of the Channel, fully consistent with the one officially given to the Admiralty in 1830 by King, as Head of the Expedition which discovered it, can only have been based on the reports and charts drawn up by Fitz-Roy and the crew of the "Beagle" since, as has already been said, King did not visit the Beagle Channel area. All this leads to the conclusion that, on the basis of all the contemporary documentary evidence now available, the discoverers of the Beagle Channel were agreed in attributing to it the following characteristics:—

- (a) it lies in an almost straight line; in a general east west direction;
- (b) it stretches from Cape San Pio to Christmas Sound;
- (c) it has only one eastern mouth giving on to the open sea;

- (d) the eastern mouth of the Channel may be seen from the cliffs of Gable Island, in an East-Southeast direction<sup>(1)</sup>; and
- (e) the Channel is of a length of about 120 miles.

\* \* \* \* \*

With reference to the Beagle Channel the Argentine Memorial states (para. 43, p. 53)

"... It is an axiom that later generations must look for definition of a territory or place to the material published by the original explorer and discoverer."

The Government of Chile is pleased to leave on record the fact that it shares this view with no reservations whatsoever.

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(1) The eastern mouth must necessarily be the opening between Cape San Pio and Nueva Island, for Picton Pass cannot be seen from Gable Island.

# BOUNDARY TREATY BETWEEN ARGENTINA AND CHILE

1881

En nombre de Dios Todopoderoso. Animados los Gobiernos de la República Arjentina y de la República de Chile del propósito de resolver amistosa y dignamente la controversia de límites que ha existido entre ambos países, y dando cumplimiento al Artículo 39 del Tratado de Abril del año 1856, han resuelto celebrar un Tratado de Límites y nombrado a este efecto sus Plenipotenciarios, a saber :

S.E. el Presidente de la República Arjentina, al Doctor Don Bernardo de Yrigoyen, Ministro Secretario de Estado en el Departamento de Relaciones Exteriores;

S.E. el Presidente de la República de Chile, a Don Francisco de B. Echeverría, Cónsul General de aquella República.

Quienes, después de haberse manifestado sus plenos poderes y encontrándolos bastantes para celebrar este acto, han convenido en los artículos siguientes:

## Artículo primero :

El límite entre la República Arjentina y Chile es, de Norte a Sur, hasta el paralelo cincuenta y dos de latitud, la Cordillera de los Andes. La línea fronteriza correrá en esa extensión por las cumbres más elevadas de dichas Cordilleras que dividan las aguas y pasará por entre las vertientes que se desprenden a un lado y otro. Las dificultades que pudieran suscitarse por la existencia de ciertos valles formados por la bifurcación de la Cordillera y en que no sea clara la línea divisoria de las aguas, serán resueltas amistosamente por dos peritos nombrados uno de cada parte. En caso de no arribar éstos a un acuerdo, será llamado a decidir las un tercer perito designado por ambos Gobiernos. De las operaciones que practiquen se levantará un acta

In the name of Almighty God. The Governments of the Republic of Chile and of the Argentine Republic, desirous of terminating in a friendly and dignified manner the boundary controversy existing between the two countries, and giving effect to Article XXXIX of the Treaty of April, 1856, have decided to conclude a Boundary Treaty, and have for his purpose named their Plenipotentiaries as follows:—

His Excellency the President of the Republic of Chile, Don Francisco de B. Echeverria, Consul-General of that Republic;

His Excellency the President of the Argentine Republic, Dr. Don Bernardo de Irigoyen, Secretary of State for Foreign Affairs.

These Representatives, after exchanging their full powers, and finding the same sufficient for the purpose of this act, have agreed upon the following Articles:—

## 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 upon which they should be in accord, and also by the third Expert on the points decided by the latter. This

en doble ejemplar, firmada por los dos peritos en los puntos en que hubieren estado de acuerdo y además por el tercer perito en los puntos resueltos por éste. Esta acta producirá pleno efecto desde que estuviere suscrita por ellos y se considerará firme y valedera sin necesidad de otras formalidades o trámites. Un ejemplar del acta será elevado a cada uno de los Gobiernos.

#### Artículo segundo:

En la parte austral del Continente y al norte del Estrecho de Magallanes, el límite entre los dos países será una línea que, partiendo de Punta Dungeness, se prolongue por tierra hasta Monte Dinero; de aquí continuará hacia el Oeste, siguiendo las mayores elevaciones de la cadena de colinas que allí existen, hasta tocar en la altura del Monte Aymond. De este punto se prolongará la línea hasta la intersección del meridiano setenta con el paralelo cincuenta y dos de latitud, y de aquí seguirá hacia el Oeste coincidiendo con este último paralelo hasta el divortia aquarum de los Andes. Los territorios que quedan al Norte de dicha línea pertenecerán a la República Argentina; y a Chile los que se extiendan al Sur, sin perjuicio de lo que dispone respecto de la Tierra del Fuego e islas adyacentes el artículo tercero.

#### Artículo tercero:

En la Tierra del Fuego se trazará una línea que, partiendo del punto denominado Cabo del Espíritu Santo en la latitud cincuenta y dos grados cuarenta minutos, se prolongará hacia el Sur, coincidiendo con el meridiano occidental de Greenwich, sesenta y ocho grados treinta y cuatro minutos, hasta tocar en el canal "Beagle". La Tierra del Fuego, dividida de esta manera, será chilena en la parte occidental y argentina en la parte oriental. En cuanto a las islas, pertenecerán a la República Argentina la isla de los Estados, los islotes próximamente inmediatos a ésta y las demás islas que haya sobre el Atlántico al oriente

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 Espíritu 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.

de la Tierra del Fuego y costas orientales de la Patagonia; y pertenecerán a Chile todas las islas al Sur del canal "Beagle" hasta el Cabo de Hornos y las que haya al occidente de la Tierra del Fuego.

#### Artículo cuarto:

Los mismos peritos a que se refiere el artículo primero fijarán en el terreno las líneas indicadas en los dos artículos anteriores y procederán en la misma forma que allí se determina.

#### Artículo quinto:

El Estrecho de Magallanes queda neutralizado a perpetuidad y asegurada su libre navegación para las banderas de todas las naciones. En el interés de asegurar esta libertad y neutralidad, no se construirán en las costas fortificaciones ni defensas militares que puedan contrariar ese propósito.

#### Artículo sexto:

Los Gobiernos de la República Argentina y de Chile ejercerán pleno dominio y a perpetuidad sobre los territorios que respectivamente les pertenecen según el presente arreglo. Toda cuestión que, por desgracia, surgiera entre ambos países, ya sea con motivo de esta transacción, ya sea de cualquiera otra causa, será sometida al fallo de una potencia amiga, quedando en todo caso como límite inmovible entre las dos Repúblicas en que se expresa en el presente arreglo.

#### Artículo séptimo:

Las ratificaciones de este Tratado serán canjeadas en el término de sesenta días, o antes si fuese posible, y el canje tendrá lugar en la ciudad de Buenos Aires o en la de Santiago de Chile.

#### 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.

#### Article V

The Straits of Magellan shall be neutralized for ever, and free navigation assured to the flags of all nations. In order to assure this freedom and neutrality, no fortifications or military defences shall be constructed on the coasts that might be contrary to this purpose.

#### Article VI

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 Agreement will remain as the immovable one between the two countries.

#### Article VII

The ratifications of the present Treaty shall be exchanged within the period of sixty days, or sooner if possible, and such exchange shall take place in the city of Buenos Ayres or in that of Santiago de Chile.

In testimony of which the Plenipotentiaries of the Republic of Chile and of the Argentine Republic have signed and sealed with their respective seals, and in duplicate, the present Treaty, in the city of Buenos Ayres, on the 23rd

En fé de lo cual los Plenipotenciarios de la República Argentina y de la República de Chile firmaron y sellaron con sus respectivos sellos, y por duplicado, el presente Tratado en la ciudad de Buenos Aires a veinte y tres días del mes de julio del año de Nuestro Señor mil ochocientos ochenta y uno.

(L.S.) BERNARDO DE YRIGOYEN.

(L.S.) FRANCISCO DE B. ECHEVERRIA.

day of the month of July, in the year of our Lord 1881.

(L.S.) FRANCISCO DE B. ECHEVERRIA

(L.S.) BERNARDO DE IRIGOYEN

