

In the matter of

THE BEAGLE CHANNEL ARBITRATION

VOLUME I

REPLY

of the

GOVERNMENT of CHILE

1975

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IN THE MATTER OF THE BEAGLE CHANNEL ARBITRATION REPLY OF THE GOVERNMENT OF CHILE

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NOTES

1. In this Volume,

"Ch. Mem." denotes a reference to the Chilean Memorial, Volume 1, 1973.

"Ch. C.M." denotes a reference to the Chilean Counter-Memorial, Volume 1, 1974.

"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 a number from 337 to 385 (inclusive) denotes a reference to an item in Volume II to the Chilean Counter-Memorial, 1974.

"Ch. Ann." followed by number 386 or above denotes a reference to an item in Volume II to the Chilean Reply, 1975.

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

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

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

"Arg. C.M." denotes a reference to the Argentine Counter-Memorial, Volume I, 1974.

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"Arg. C.M. Ann." denotes a reference to an item in Volume II to the Argentine Counter-Memorial, 1974.

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

"Arg. C.M. Map." denotes a reference to a map in the Atlas accompanying the Argentine Counter-Memorial, 1974.

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 Reply has been drafted in readiness for delivery to the Court of Arbitration on 1st July, 1975, in accordance with the Order dated 20th December, 1974, it does not take into account any documents which may have been received from the Government of Argentina after 21st May, 1975.
4. In this Reply, emphasis has been added except where otherwise stated.

INTRODUCTION

1. The present Reply is submitted by the Government of Chile pursuant to an Order of the Court of Arbitration of 20 December 1974 and in reply to the Counter-Memorial filed by the Argentine Government in October 1974.

2. Before elaborating upon the conception of this Reply, the Government of Chile considers that it is bound to call attention to certain features of the Argentine Counter-Memorial.

THE GENERAL TONE OF THE ARGENTINE COUNTER-MEMORIAL

3. Although this aspect of the Argentine pleading will certainly not have escaped the attention of the Court, the Government of Chile would be failing in its duty were it not to protest in the face of the insinuations, accusations, sarcasm and insults with which the Argentine Government has found it necessary to pad its Counter-Memorial.

Whilst it is proper, in an international adjudication or arbitration, for each of the Parties, in their endeavour to counter the opposing argument, from time to time, to resort to the tactics of polemic or irony, it is the duty of the Parties at all times to maintain the dignity called for by respect for the Court as well as respect for the other Party to the proceedings. The maintenance of those standards of dignity is particularly called for in the present proceedings, which derive from the common wish of two sister nations of Latin America of putting an end to their only remaining territorial dispute.

4. The targets of certain charges in the Argentine Counter-Memorial are the Governments of Chile at the close of the nineteenth century. Against them the complaint is laid, that they, by clever devices, systematically shuffled off their international obligations and, especially, the duty to interpret and to apply international agreements in good faith.

5. A prime example of such charges is provided by the attack mounted against Plate 8 of the Chilean Atlas (the Barros Arana map of 1876) (Arg. C.-M. pp. 119-133, paras. 28-33). As the Court is aware, the Argentine Government alleges that the southernmost horizontal section of the red line which features on the map could not have existed

when Señor Barros Arana forwarded the map to his Government in 1876 (this point will be considered further later on in the Reply, Chapter II, paras. 42-59). The very existence of this section of the line on the map obviously obliges the Argentine Government to seek an explanation: but the Argentine "explanations" consist of a number of spiteful insinuations:

"... when the original of this map is examined ... it is realized that *every hypothesis becomes possible* ... the line traced in 1876 by Sr. Barros Arana was, in all likelihood, 'completed' at a later date." (Arg. C.M. pp. 130-131, para. 33).

6. The "Bases of Agreement" of 3 June 1881 provided the Argentine Government with another occasion for allegations of bad faith, not to say trickery, on the part of the Chilean officials of the time. By means of a subtle and almost undetectable change introduced into the wording of the third of the Bases, the Chilean Government, so the story goes, would have sought to obtain by stealth the opening upon the Atlantic which it would never have obtained by frank and open negotiations. Hence this reference to a "climate of equivocation and of confusion artificially entertained between different proposals and texts, having differing purport" (Arg. C.M. p. 192, para. 7). Is it not made a ground of complaint against the Chilean Government of 1881 that it had, by cunning and persistent manoeuvres, done all in its power to create a lingering doubt as to the actual effect of the Treaty and thereby let it be understood that its text entirely confirmed a purported "third base"? Moreover, once aware of the text signed on 23 July and thus of the defeat of the manoeuvre of 3 June, Chile is accused of a near-desperate attempt to ascribe a "wittingly distorted" interpretation to the Treaty (Arg. C.M. p. 237, para. 25): an interpretation corresponding not to the Treaty as it really was, but as the Chilean Government would have wanted it to be. In this regard the Argentine Government does not hesitate to speak of "the fabrication of the Chilean 'understanding' of the Treaty", a "fabrication" which, in particular, would have taken the form of the preparation of the Chilean Authoritative Map of 1881 for the needs of the present case (Arg. C.M. pp. 183-190, paras. 3-5).

It is necessary to reread what the Argentine Government has written in this connection:

"The Chilean Government did not have and could not have had any such sincere 'understanding' ... What the Chilean Memorial calls an 'understanding', and is attempting to pass off as 'an interpretation in good faith' given by the Chilean Government to the Treaty in 1881, was, and could not be other than the predetermined intention to disregard the international agreements to which this Government was giving its approval. This 'understanding' was and could not have been other than the deliberate determination to build up from the beginning and under the guise of a so-called 'interpretation'—known perfectly well to be erroneous—, a pretext which would enable it to attempt to introduce in the application of the Treaty certain modifications of its clauses: those modifications which it had not been able to secure at the time of the negotiations" (Arg. C.M. pp. 195-196, para. 8; emphasis in original).

Moreover, the Argentine Counter-Memorial has no hesitation in emphasizing "the contrast between the Chilean tendentious interpretation of the Treaty of 1881 and the interpretation in good faith by Argentina" (Arg. C.M. p. 233). For it, the interpretation accorded to the Treaty by the Argentine authorities of the time "was in complete good faith", whereas

"the official Chilean interpretation can only with difficulty be considered to be an interpretation ... it was nothing less than the expression of a deliberate and barely disguised intention to set aside the letter and the spirit of the Treaty". (Arg. C.M. p. 234, para. 24).

7. Also, the Chilean Government is reproached for the same element of bad faith on the morrow of the signature of the Protocol of 1893:

"... hardly had the two Governments put their signatures to the solemn reaffirmation of Argentina's exclusive jurisdiction over all the Atlantic coasts, than the Chilean Government through its conduct departed from respect for this principle" (Arg. C.M. p. 235, para. 24).

8. The alleged contriver of all these manoeuvres is clearly indicated by the Argentine Counter-Memorial: Señor Diego Barros Arana himself, the distinguished Chilean statesman and diplomat, the direct interlocutor of the Argentine Government throughout the negotiations and, as it may be rightly put, the co-author, together with Señor Bernardo de Irigoyen, of the settlement of 1876-1881. "A remarkable person and, no doubt, a true Chilean patriot", concedes the Argentine Government (Arg. C.M. p. 188, note 10); but a man said to have become after 1881 "the advocate of the extreme thesis" of Chilean sovereignty to the south of Tierra del Fuego (Arg. C.M. p. 131, note 65), and capable of overcoming every scruple in order to make his views dominant: "Señor Barros Arana," it is said, "had no qualms in resorting to such methods when they entailed a service to his country's interests" (Arg. C.M. p. 188, note 10).

Therefore we are presented with a Barros Arana misguided, nay, deranged, by his extreme patriotism who would have conceived of creating the "distorted retrospective interpretation of the 1876 proposals and thereby of the 1881 Treaty", (Arg. C.M. p. 132, para. 33) by "completing" the line on the map of 1876 with a horizontal line resulting in the representation of Picton, Nueva, and Lennox as Chilean (Arg. C.M. p. 131, note 65, and p. 188, note 10). It is claimed, also, that upon the advice of Barros Arana, the Chilean Government would have conceived an interpretation in bad faith of the Protocol of 1893 with the ink barely dry (Arg. C.M. p. 235, para. 24). The Chilean diplomat was familiar with "such methods", for previously, in 1881, he "did not hesitate to propose to his Government that it put forward a manifestly false interpretation of an agreement" (Arg. C.M. p. 188, note 10). Those are the very words used by the Argentine Government when referring to one of the most distinguished figures of Chile!

For those who know the moral character of Barros Arana—a scholar with whose friendship Mitre, Avellaneda, Saenz Peña, and other Argentine statesmen felt honoured—this kind of accusation shall appear only as a spiteful reaction against an embarrassing witness! The authors of the Argentine Memorial might have done well in reading the speech from Señor Bernardo de Irigoyen to the Argentine Chamber of Deputies in 1881:

“Señor Barros Arana—said Irigoyen—is a man of great political probity”.¹

9. In the conclusion to its chapter devoted to the interpretation of the Treaty by the two Governments of the time, the Argentine Government returns once again to an accusation of bad faith:

“General international law requires that *treaties be interpreted in good faith and carried out in good faith* ... Now, *Chile's conduct* in relation to the interpretation and to the execution of the Boundary Treaty of 1881 *has been characterized*, in the present matter, by *its indifference to this requirement* ... Even the conclusion of a Protocol, whose sole purpose was to give an ‘authentic’ confirmation to the interpretation to be given to the clauses of the Treaty, did not lead the Chilean Government into the way of interpreting and carrying out *in good faith* this agreement ...” (Arg. C.M. pp. 235-236, para. 25).

10. It must be admitted that the allegations of bad faith are evenly distributed by the Argentine Government. It is not only the Chilean rulers of the end of the last century who are the victims of the bellicosity of the Argentine Counter-Memorial, but all those concerned, in one capacity or another, in the conduct of the present proceedings. The Argentine Counter-Memorial thus teems with progressively more spiteful insinuations: the citation of truncated texts (Arg. C.M. p. 102, note 38; p. 338, para. 6); the distortion of

¹ Furthermore, the chivalrous telegram which Irigoyen sent to Barros Arana a few hours after the ratification of the 1881 Treaty is strong evidence of the high opinion which the former had of the latter:

“Time, reflexion and the sterility of all the later forecasts—he wrote—have sanctioned at last *the formula to which you gave in your country, six years ago, the respected influence of your name.*” (Ch. Ann. No. 517)

All this happened after the purported “false interpretation” of the Barros Arana-Elizalde Treaty of which Barros Arana is accused in the Argentine Counter-Memorial. (Arg. C.M., p. 188, note 10).

These statements are the more significant when one considers that Irigoyen had read the despatch on which Barros Arana is said to have suggested such a “false interpretation” and that he referred to the “great political probity” of the Chilean diplomat precisely in connection with that interpretation. (Cf. Irigoyen speech to the Chamber, p. 168 in the printed Spanish version).

It is with such a documentary background that the Argentine Government dares now to impute to Barros Arana the manoeuvre of trying “*to bring back Patagonia in the arbitration*” in spite—it claims—of Patagonia having been *excluded* from the arbitration. This is a remarkable assertion. Only two years ago the *Argentine Memorial* had stated a different idea:

“*The treaty provisions were also unclear on whether Patagonia was to be included or excluded from the arbitration*” (Arg. Mem. p. 171, para. 57).

The Argentine Agents appear thus to have disagreed, only two years ago, with the accusation which the Argentine Agents were to utter against Barros Arana in 1974...

translations (p. 79, para. 3; pp. 112-113, para. 25; p. 386, para. 22); the production of misleading maps which have been modified or "trimmed" (p. 91, note 27; p. 105, note 41; p. 125, note 57; p. 126, note 60; pp. 130-131, note 64); on the subject of "the invention of the Mapa García" (pp. 201-210, para. 12-15; p. 216, para. 18; pp. 437, sqq.); "KDISCRI natory selection" of the map in order to create a position which "is not a genuine one" (p. 460, para. 40; cf. p. 496, para. 67—and many other such items).

On yet other occasions it is the very reasoning of the Chilean Memorial which is advanced as involving bad faith: "... one cannot really suppose that it can be altogether in good faith that the Chilean Memorial tries to give the impression ... " (p. 80, para. 3); or still better: "... it cannot in good faith be asserted" (as the Chilean Government does) "that ..." (p. 111, para. 24).

11. It is not for the Chilean Government to investigate the objectives pursued by the Argentine Government in having such recourse, virtually page by page, to such allegations of fabrication—if not of fraud—of intentional distortion and of bad faith on the part both of the Governments of Chile in the nineteenth century and of the draftsmen of the Chilean Memorial.

Perhaps it has been necessary for the Argentine Government to palliate the weakness of its arguments by an indiscriminate onslaught intended to bring discredit upon all the Chilean material in the present proceedings. The accusations of bad faith would then appear as an extension of the somewhat unpleasant allusion to "the aggressiveness of Chile's foreign policy" and to "the Chilean expansionist policy" of the nineteenth century (Arg. C.M. p. 273, para. 4. and p. 429, para. 34) in order to complete a brand image of a Chile depicted as being in the last century "a South American Prussia: united, efficient and expansive" (Arg. C.M. p. 272, para. 3), seeking to cut off Argentina from the Southern Atlantic (Arg. C.M. p. 491, para. 66) and aspiring even today, faithful no doubt to this tradition, "to gain control over the Southern Atlantic Ocean" (Arg. C.M. p. 371, para. 34). Perhaps quite simply the Argentine Government thought it necessary to throw suspicion upon the most important documents relied upon by the Chilean Government as establishing the interpretation of the Treaty of 1881. The Argentine Government would thus hope in some way to swamp documents as significant as the Barros Arana map of 1876, the Chilean 1881 Authoritative Map, or the Irigoyen map of 1881, with such a flood of insinuations and allegations that the Court would be led to brush them to one side. This general approach would assist in the comprehensive attack on the general body of the cartography, a subject to which it will be necessary to return in due course.

Whatever the Argentine objective may be, one fact is certain: advanced without benefit of proof or justification, the spiteful imputations of the Argentine Counter-Memorial are conducive to casting an unfavourable light upon the Government of Chile, its

Agent and his advisers. Some mistakes have no doubt been made — on both sides — in the handling of the large mass of documents, often in manuscript, concerning the case; but the Chilean Government can respectfully assure the Court that, on its part, on no occasion has an argument been advanced, or a document employed, in bad faith.

12. The deliberately sarcastic and insulting tone adopted by the Argentine Counter-Memorial is not what the Government of Chile has a right to expect from a responsible and friendly Government. The Government of Chile would like to believe that the sole purpose of the Argentine side was to obscure the weakness of its position in the case itself by verbal aggressiveness. For its part, whilst taking the appropriate opposing stance in the face of the views put forward in the Argentine Counter-Memorial, the Government of Chile is absolutely determined, out of respect both for the Court and the other Party in the case, to maintain the standard of courtesy which is called for in international proceedings.

THE ARGENTINE DOCUMENT: A COUNTER-MEMORIAL OR A NEW MEMORIAL?

13. In its Order of 7 December 1973 concerning the presentation of Counter-Memorials, the Court of Arbitration specified that:

“Accompanied by the necessary explanatory or supporting documents, each Counter-Memorial shall

(i) set out the further facts and legal considerations which the Party delivering it may regard as relevant in the light of the Memorials . . .”

Consequently the Chilean Government expected that, in its Counter-Memorial, the Argentine Government would criticise the reasoning of the Chilean Memorial in order to confirm, to elaborate and finally to complete the contentions which it had expounded previously in its Memorial.

It was thus not without some surprise that the Chilean Government has found itself confronted by a Counter-Memorial which involves such substantial changes that it is no exaggeration to describe it as an almost completely new presentation of the Argentine position. To be sure the Government of Chile draws some conclusions from the fact that, on reading the Chilean Memorial, the opposing Party has felt bound to change its position; but it will not find its task less arduous since it must, in the present stage of these proceedings, react to a substantially fresh body of reasoning.

In matters of substance as well as form, the Argentine pleading deviates from the normal practice of international arbitrations.

14. The Chilean Government proposes to devote the first Chapter of the present Reply to an analysis of the new Argentine case and, in that connection, to an evaluation of the changes—sometimes subtle, sometimes crude—introduced by the Argentine Government into the positions adopted by its Memorial.

THE ARGENTINE COUNTER-MEMORIAL AND THE QUESTION OF THE “ESSENTIAL SIMPLICITY OF THE PRESENT DISPUTE”.

15. The Court will not have failed to mark to what extent the Argentine Government appears irritated by “the Chilean insistence in its Memorial upon the essential simplicity of the present dispute” and by “the simplified version of the case offered by Chile” (Arg. C.M. p. xv; cf. p. 282, para. 18, and pp. 381-383, para. 16). Perusal of the Chilean Counter-Memorial will have given little or no satisfaction to the Argentine Government on this account (see Ch. C.M. p. 17, para. 11).

16. It is not difficult to understand why the Argentine Government is so very much bent on seeing the present dispute as complex and difficult (cf. Ch. C.M. 77-78, para. 30). It knows only too well that if the argument is focussed, as it ought to be, upon the interpretation of the Treaty of 1881, the Argentine assertions inevitably come into collision with the provisions of Article II generally attributing to Chile the territories to the south of the Dungeness-Andes line; and also with the specific dispositions in Article III which clearly leave Picton, Nueva and Lennox amongst the islands attributed to Chile. A substantial effort had been made by the Argentine Government in its Memorial to read the provisions of the Treaty in a sense compatible with the Argentine claims, but it could not ignore that on this ground its position was extremely weak. For this reason, as the Chilean Government has shown (Ch. C.M. pp. 17 sqq., paras. 12 sqq.; and pp. 20-21, para. 22), the Argentine Government had bolstered up its first line of reasoning by a second which, no longer based on the provisions of the Treaty and the circumstances in which they were drawn up, rests on elements external to the Treaty. It will be shown in Chapter I of the present Reply that the Argentine Government now goes even further: in the Argentine Counter-Memorial the extrinsic elements prevail over all others and thus it is stated baldly:

“It follows that the principle of the *uti possidetis juris* of 1810 and, as a consequence, the Atlantic-Pacific division of oceanic jurisdiction, are entirely relevant to the interpretation of the 1881 Treaty; and in particular that, *in case of doubt, the interpretation should lean against any disturbance of the uti possidetis juris* of 1810” (Arg. C.M. pp. 75-76, para. 32).

Consequently it is no longer the Treaty as such which, in the new Argentine presentation, directly determines the outcome of the dispute, but an interpretation of the Treaty subordinated to external principles: thus, by means of the principle of *uti possidetis juris*, it is this "heritage of the past: the Cape Horn frontier"—no longer directly the Treaty of 1881—which serves as the criterion for delimitation of the "vertically adjacent territories" of the two countries (Arg. C.M. p. 77, para. 1).

17. The selection of such an approach (the details of which will be considered in Chapter I) imposes serious strains upon the Argentine Government, not only in its effort to justify the thesis as such, but also in its attempt to place in the background the questions—very simple ones—which are at the heart of the case, such as: are the disputed islands "sobre el Atlántico al Oriente de la Tierra del Fuego y costas orientales de la Patagonia", in which case they would belong to Argentina? The Argentine Government is thus obliged to drown the key issues in the case, whose solution in turn resolves the dispute submitted to the Court, in a flood of questions of detail the pertinence of which is not always apparent. It is significant, for example, that only a few lines are devoted in the Counter-Memorial to the problem of the definition of the Beagle Channel in the words of the Treaty—"todas las islas al Sur del Canal Beagle"—the very problem which the Argentine Memorial justifiably underlined as the central element in the present case (Arg. Mem. p. 382, para. 27).

18. But the complexity of the Argentine Counter-Memorial results equally from the use—far too frequent for it to be unintentional—of a method for which the Argentine Government appears to have a particular liking: a method which consists in stirring up around each of the maps and documents a deliberately fostered confusion, with the apparent intention of throwing doubt upon the significance of the maps and documents pertinent to the negotiation of the Treaty.

19. There is no lack of examples of this type of proceeding.

Does the Barros Arana map of 1876 (Ch. Plate 8) obstruct the Argentine interpretation of the Irigoyen proposals? If it is not possible to spirit it away, then it will be sought to destroy its credibility. From the very beginning, as if to emphasize the colour, reference is made to "the astonishing red line on Plate 8 of the Chilean Atlas" (Arg. C.M. p. 119). Then, through the pages, the element of doubt is slowly but artfully built up in order to arrive at the conclusion that "it is totally *unlikely* that Señor Barros Arana himself could have traced in 1876 the line which appears on the map published as Plate 8 in the Atlas of the Chilean Memorial" (Arg. C.M. pp. 129-130, para. 33). Since this line which is so much in the way of the Argentine Government is to be found on the map, like it or not, the task of discovering its origin is left to the imagination:

“... it *might be* that the authorities of the Chilean Archives ... and they *might* have taken another map ... It *could also be* ... What is important is that the line traced in 1876 by Señor Barros Arana was, *in all likelihood*, ‘completed’ at a later date ... *In all likelihood*, this other section was added after Elizalde’s proposals ... This section was *probably* added ... (Arg. C.M. pp. 130-132, para. 33).

20. The same “reasoning” technique is maintained in respect of the alleged differences between the bases of 3 June and the Treaty signed on 23 July.

When and how did Señor Irigoyen become aware that the Chilean Government had attempted, as the Argentine Government puts it, by a subtle yet radical modification of the formula of 1876 to obtain a Chilean opening towards the Atlantic, and how was he able *in extremis* to safeguard the alleged object of his constant concern, namely the exclusive jurisdiction of Argentina on the Atlantic coast as far as Cape Horn?

Fundamental as this question is, it is one to which no document offers any sort of solution. It will be seen why! If the Court cares to cast an eye over the Argentine Counter-Memorial, there will be found, in place of an answer, certain completely unsupported suppositions.

The Argentine Government, whose attention was directed to other aspects of the bases—one is told—did not immediately become aware of the Chilean manœuvre, but when it came to his knowledge Señor Irigoyen took the matter in hand immediately, by means of negotiations so discreet that they have always remained unknown, in order to restore at the eleventh hour a text consonant with his proposals of 1876: “... *one cannot be far from the truth* in saying that this *must* have happened at the moment ... He *must* immediately have pointed the thing out to the Chilean diplomat ... It is thus *more than likely* that both Governments ... *may have agreed* to proceed with the greatest discretion ...” (Arg. C.M. pp. 170-171, para. 14). And it is on this unbelievably fragile foundation that the Argentine Counter-Memorial has no hesitation in setting an incredible intellectual conjecture intended to cast doubt on the significance of all the documents and maps invoked by the Chilean Government. For each of these documents and for each of these maps—and in particular for the Chilean 1881 Authoritative Map—it will be said that they do not reflect the definitive text of the Treaty—kept secret for long months—but a purported “third base” of 3 June: that which the Chilean Government had allegedly attempted to introduce into the Treaty but which the vigilance of Señor Irigoyen had been able to ward off at the last minute.

21. One last example here—but there will be others later: that of the map communicated by Señor Irigoyen to the British representative in Buenos Aires and “showing the line established by the Treaty” (Ch. Plate 21). Not being able to challenge the

existence of this map, about which nothing was said in the Argentine Memorial, the Argentine Government undertakes now to undermine its credibility by a complicated and confused set of conjectures:

“It is not difficult to *reconstruct the facts as they may have occurred* ... Mr. Petre ... *probably* saw the issue of ‘La Ilustración Argentina’ which contained the ‘map’ ... It *would have been natural* for Mr. Petre to have mentioned to the Minister his wish to obtain this publication and for Señor Irigoyen to reply that it would give him pleasure to send it to him, it being understood that it would be on a private basis. After this Mr. Petre bought on his own two copies of the ‘map’ and forwarded them to London” (Arg. C.M. p. 219, para. 19).

And in this fashion a perfectly straightforward occurrence—the despatch by Señor Irigoyen to Mr. Petre of two copies of a map showing the frontiers of the Treaty ¹—becomes the object of a series of gratuitous suppositions and unfounded hypotheses which, by their very confusion, tend to throw suspicion upon the value of the map in question as an evidence of the interpretation of the Treaty on the part of the Argentine negotiator himself.

All these examples will, of course, be dealt in detail below.

22. Thus being unable to establish that the interpretation of the Treaty is not the one borne out by the documents pertaining to the negotiations, the Argentine Government tries at any rate to draw these items into a vortex of confusion, perhaps in the hope that, if once their probative value were sapped by doubt and suspicion, the Court would be persuaded to attach no further importance to them. By building hypothesis upon hypothesis, by repeated attempts “to reconstruct the facts as they may have occurred” (Arg. C.M. p. 219, para. 19), by setting forth constructions as speculative as the story of the bases of 3 June, the Argentine Counter-Memorial has succeeded only too well in complicating the case.

This complication of the case, which the Chilean Government has done its best to avoid up till now, is aggravated as a result of certain somewhat unhappy methods employed by the authors of the Argentine Counter-Memorial. By failing to publish certain documents relevant to important episodes—such as the full text of Virasoro’s Report of 1893² or others known to have been kept in the Argentine Archives—the Argentine Government does not make things easier either for the Court or the Chilean Government.

Another such source of not inconsiderable complication lies in the process by which a document (map or text) is cited, and reservations and explanations relative to it are slipped into a separate passage, more often than not in a footnote.

¹ Mr. Petre’s despatch to the Foreign Office, of 20 December 1881, reads as follows: “... I have now the honour to inclose two copies of the map showing the line of frontier established by the Treaty, which Doctor Irigoyen has been kind enough to send me privately” (Ch. Ann. No. 47, p. 149).

² This has, since the date of the Argentine Counter-Memorial, been transmitted, upon request, to the Agent for Chile by the Agents for Argentina.

In this way a misleading impression is created in the mind of the reader, without the Argentine Government being seen to be at fault formally speaking: typical specimens of the *genre* are to be seen in the matter of the length of the negotiations of June 1881 (Arg. C.M. p. 165, note 20 and p. 168, para. 13; cf. below Chap. II, para. 111) and in the references to Map 10 of the Argentine Atlas (Arg. C.M. p. 199, para. 11, and p. 206, note 34; cf. below Chap. II, para. 133).

THE ARGENTINE COUNTER-MEMORIAL AND THE DOCUMENTARY EVIDENCE

23. The approach of the Argentine Counter-Memorial with regard to the problem of the documents in the case calls for two observations.

24. The first concerns the attitude adopted with regard to the documents, and particularly the cartographic items, invoked by the Chilean Government as being closely linked to the Treaty of 1881 and which provide confirmation of the interpretation of its provisions. The Court will not have failed to notice that in the presence of this evidence the Argentine Government adopts two complementary tactics.

One of them takes the form of impugning virtually *en bloc* the collection of relevant maps put in evidence by Chile, on the basis that there is simply no map in existence which assists in the interpretation of the Treaty, with the exception of the maps relating to discovery of the Beagle Channel (see for example, Arg. C.M. pp. 223-229, para. 22; pp. 431 sqq.; pp. 456-457, para. 37; p. 459, para. 39; p. 463, para. 44; pp. 478-479, para. 58). The Counter-Memorial does not hesitate to complain that the Chilean Government is "assigning to cartography something of a magical effect" (Arg. C.M. p. 393, para. 31), and it goes so far as to say in effect that no map which fails to correspond with the Argentine interpretation of Article III of the Treaty "can be qualified of being 'fully consonant' with the terms of the Treaty" (p. 459, para. 39).

The second tactical method consists of attacking the relevant maps one by one. No doubt the Argentine Government would prefer that the maps did not exist, for they show only too clearly the position of the Beagle Channel for the negotiators of the Treaty, and to whom they decided indeed to attribute sovereignty over Picton, Nueva and Lennox. It has been seen above how, being unable to suppress the maps, the Counter-Memorial seeks to undermine their credibility by allegations which in any case are no more than pure hypotheses. The atmosphere of confusion deliberately created around the maps most closely related to the conclusion of the Treaty is certainly one of the most artful as well as one of the most important aspects of the reasoning of the Counter-Memorial.

What has been said of the maps applies also to other documents of the negotiation and as will be seen, to the bases of 3 June.

25. As a second observation, the Chilean Government wishes to point to the fact that the Argentine Government in certain respects seems to persist in that inadequacy of documentation which has been brought to the attention of the Court already in the Introduction to the Chilean Counter-Memorial (pp. 1-4).

26. In contrast—it will be noted—and in fulfilment of the announcement made by the Agent for Chile at the Meeting of the Court, at The Hague on 29 November 1974, the Government of Chile is publishing amongst the Annexes of the present Reply:

- the records of the secret sessions of the Chilean Congress when the 1881 Treaty was approved (Ch. Annexes Nos. 514-516);
- the telegrams exchanged between the Chilean Minister for Foreign Affairs and Señor Echeverría, the Consul General of Chile at Buenos Aires, with reference to the Treaty (Ch. Annexes Nos. 409, 428-9, 433-4, 436-7, 443-7, 449-50, 453, 456-7, 459, 463, 466-7, 469, 471-4, 478, 480-3, 485, 488-9, 491-6, 498-502, 505, 507-12).

The Court will be able to see that all these documents are wholly in agreement with the recital of facts contained in the Chilean pleadings and that, at the same time, they belie some of the hypotheses advanced by the Government of Argentina in its own pleadings.

27. The Government of Chile ventures to hope that the Government of Argentina, acting in like manner, will put into the record many documents which are known to exist and which, in spite of the requests from the Agent for Chile, still are not in the hands of the Court.

Among these documents, some of which may be of the utmost importance for the interpretation of the 1881 Treaty, the following may be mentioned here:

- (a) Official and complete *text of the speech* by Señor Irigoyen to the House of Deputies of Argentina in 1881 with reference to the Treaty.
- (b) *Report on the 1881 Treaty* from the Committee of Foreign Relations of the House of Deputies of Argentina.
- (c) *Official records* of the discussion of the 1881 Treaty in the *House of Deputies* of Argentina.
- (d) *Official records* of the discussion of the Treaty in the *Senate* of Argentina and, eventually, report of the Senate's Foreign Affairs Committee.
- (e) A "*mapa en vivos y resaltantes colores*" prepared under instructions from Señor Irigoyen in 1881 for the use of the Argentine Congress, to illustrate the several proposals for a compromise settlement of the Chilean-Argentine boundary question.

- (f) The "*official papers*" sent to the Argentine Congress by Señor Irigoyen alluded to by the Argentine Foreign Minister in 1881 in his above-mentioned speech.
- (g) *Survey of Tierra del Fuego* made by surveyor J. Díaz in 1890.

CONCEPTION AND PLAN OF THE REPLY

28. In the present Reply the Government of Chile will confine itself to giving its views upon the new elements contained in the Argentine Counter-Memorial.

29. It follows from this, in the first place, that in so far as the Argentine Counter-Memorial restates theses and arguments already expounded in the Argentine Memorial, it is in the Counter-Memorial deposited by the Government of Chile, and not in the present Reply, that the Court is respectfully asked to find the Chilean answer. It has appeared pointless to the Chilean Government, for example, to rehearse in full the refutation of the so-called "oceanic principle" to which considerable attention has been devoted already in its Counter-Memorial.

30. The limited object of this Reply signifies, in the second place, that a fresh exposition of the Chilean position will not be found here. This will be recapitulated briefly in the final Chapter, but the other Chapters of the Reply will be devoted to refuting, to the extent judged to be necessary, the new arguments advanced by the Argentine Counter-Memorial.

31. From this flows an important consequence to which the Chilean Government finds it necessary to draw the attention of the Court: the need to reply to the Argentine Counter-Memorial will lead the Chilean Government to operate upon the ground on which the opposing Party has placed the dispute.

Thus, for the purposes of refuting the Argentine line of reasoning, the Chilean Government will be required to deal at length with certain questions which are in its view secondary, whilst conversely it will be led to pass quickly over fundamental issues.

Both the choice of the questions examined in the present Reply and the relative importance accorded to them should not be regarded as expressing the Chilean case in all respects, because they are in considerable measure the result of the necessity in which the Chilean Government finds itself of not leaving unanswered the new Argentine arguments. The Chilean Government is perfectly aware of the inconvenience which results from this obligation thus to follow the opposing Party onto its ground and of the risk of assisting, in some measure, by long and tedious discussions upon points of detail, to complicate a case which is really simple.

32. It is in this perspective that the present Reply is conceived: not as an exposition of the fundamental questions in the case, as these appear in the eyes of the Chilean Government, but as a refutation, point by point, and therefore without any overall logical order, of the new arguments and fresh theses contained in the Argentine Counter-Memorial.

33. Consequently the following Chapters are as follows:

Chapter I will be devoted to an analysis and a general assessment of the new Argentine case. In this Chapter the Chilean Government proposes to evaluate the changes wrought in the Argentine thesis in relation to the first Argentine pleading and hence to make clear at the outset its view on the points—certain of which are of great importance—which do not call for very lengthy consideration. The questions which require fuller examination will be treated in the later Chapters.

In *Chapter II* response will be made to the particularly complicated and tortuous constructions devoted by the opposing Counter-Memorial to the antecedents of the Treaty, to its conclusion and to its contemporaneous interpretation by the Parties; that is to say, mainly to Chapters III, IV, and V of the Argentine Counter-Memorial.

Chapter III will include the observations of the Government of Chile upon the practice of the Parties after the signing of the Treaty and certain other issues pursued in the Argentine Counter-Memorial: among others, the Protocol of 1893, the history of the dispute, acts of jurisdiction, and the islands in the Channel.

Chapter IV will refer to cartography and its relevance to the present dispute. This Chapter has been made necessary by the comprehensive challenge which the Argentine Counter-Memorial tries to make to the maps closely linked to the Treaty, as well as the general attitude which it has adopted with regard to cartographic evidence.

Chapter V will mainly refer to early explorations of the Southernmost part of South America, to the discovery of the Beagle Channel, and to some geographical aspects of the present case.

An appendix on the tracks of the “Beagle” and her boats (called “Appendix C”) has been added at the end of the present volume.

Since the general approach adopted may lead to the real issues becoming lost to view, the Chilean Government considers it necessary to proceed in a *final Chapter* to what may be described as putting the case back on its feet. It is proposed to review therein briefly the key issues in the dispute and shortly restate the Chilean position.

This volume is accompanied by three volumes:

Vol. II : Annexes numbered from 386 to 530, consecutively to the numbering of the Annexes in Volume II of the Chilean Counter-Memorial.

Vol. III : "Supplementary remarks concerning the cartographical evidence".

Vol. IV : An atlas containing plates, numbered from 163 to 206, consecutively to the numbering of Chile's "second Atlas".

CHAPTER I

THE NEW ARGENTINE CASE

1. In the Introduction to the present Reply the Chilean Government has indicated that the Argentine Counter-Memorial in comparison with the Memorial comprises innovations on such a scale that it is difficult to see the pleading as anything other than an almost completely new Argentine case. On certain issues the Counter-Memorial firmly takes the opposite course to that stated in its Memorial. More often, however, the shift of view lies not so much in the denial of what had been put forward in the Memorial as in a subtle change in the proportions of things and, in particular, of perspectives. Without being actually abandoned, certain parts of the reasoning, given strong emphasis in the Memorial, are now evoked only with caution in the Counter-Memorial; or else, contrariwise, certain ideas hardly sketched in the Memorial move to the foreground in the Counter-Memorial. Such shifts of position are certainly not unusual in judicial proceedings, and the Chilean Government would not dream of making an issue of the matter if they did not assume in the present case, by reason of their number, their importance and the coherence of the intention lying behind them, a fundamental importance for the understanding of the case and, by the same token, for the solution of the dispute.

2. The changes introduced into the Argentine Case are too numerous and above all too extensive for it to be possible to summarize them in one simple formula. The Chilean Government will try nevertheless to suggest what is the general conception of the Argentine case and what are the arguments advanced in support of this conception so far as they may be amenable to sensible development.

3. It is the content and significance of this development upon the planes both of the strategy and the tactics of the Argentine Government which the Chilean Government proposes to examine in the pages which follow.

I. THE GENERAL CONCEPTION OF THE ARGENTINE CASE

A. *The Nature and Extent of the Dispute*

4. (a) For the Argentine Memorial, the territorial settlement of 1881 must be understood in the light of several considerations which work together: to the south of the Beagle Channel the Treaty proceeded by way of a division of maritime jurisdictions, and

not of territory; this division was inspired by the "oceanic principle" according to which, and in conformity with historical considerations and the constant political demands of Argentina, the eastern coast as far as Cape Horn must belong to Argentina and the western coast to Chile; the delimitation of maritime jurisdictions effected by the Treaty had as its object essentially the guarantee of Argentine predominance in the zone of the Beagle Channel in order to make Argentina the mistress of the maritime routes leading to the port of Ushuaia, as a counterpart to which the Treaty is said to have recognised the predominance of Chile over the zone of the Straits of Magellan.

5. To be sure the Counter-Memorial pursues the theme of the "oceanic principle" on a vast scale, as it does also, less elaborately but nonetheless unambiguously, that of the maritime frontier (see for example, Arg. C.M. p. 88, para. 11; p. 108, para. 22; p. 176, para. 17). By way of compensation, so to speak, the themes of Ushuaia and of Argentine predominance in the zone of the Beagle Channel have disappeared almost completely. No longer to be found, save in passing (cf. Arg. C.M. p. 112, para. 24), is the issue concerning the idea, so often put forward in the Memorial, that the compromise of 1881 was completely centred upon Ushuaia, "this all-important base for maritime and mercantile commerce in this Southern region" (Arg. Mem. p. 381, para. 24) and "a port sufficiently large and sheltered to be the base for its (Argentina's) sea communications in the South, its logical future area of development" (Arg. Mem. pp. 406-7, para. 42). Not a single word now about the idea according to which the Treaty of 1881 had the object of giving to Argentina, with sovereignty over Lennox, "the key to the entry to the Channel" (Arg. Mem. p. 411, para. 44) and of sanctioning the "recognition of the overriding Argentine interest in the Beagle Channel, ensuring to that country possession of Ushuaia" (Arg. Mem. p. 408, para. 43).

6. (b) An analogous change appears in the manner in which the content and extent of the present dispute are conceived.

Geopolitical, not to say political, considerations, utterly foreign to the interpretation of the Treaty (cf. Ch. C.M. p. 26, para. 32; p. 31, para. 48), are certainly to be found in the two Argentine pleadings, but with nuances which deserve attention. The Court will recall how, in the final pages of its Memorial, devoted to "the dispute in the light of modern developments in the Law of the Sea" (Arg. Mem. pp. 439-443, paras. 62-65), the Argentine Government recorded that "the life of the region revolves around Ushuaia" and that "the location of the international sea boundary in the approaches to, and as far as, Ushuaia is a matter of great daily practical importance: certainly vastly more important than any conceivable exploration of the land economy of the disputed islands." The extent of the present dispute was thus perfectly clear in the eyes of the Argentine Government:

"The allotment to Chile of the three Atlantic islands would mean, not the gaining by that country of a few hundred acres of sheep grazing, but a *major penetration by Chile of the Atlantic system*. It would give Chile *effective control and dominion over all the sea approaches to an Argentine city*,¹ a port and naval base, the only major settlement of any size in the entire Beagle Channel area" (Arg. Mem. p. 442, para. 65).

It is therefore by reference to the maritime communications with Ushuaia and the zone of influence of Argentina in the region of the Beagle Channel that the Argentine Government asked the Court to prevent what it called "a major penetration by Chile of the Atlantic system", or again, a few lines above, an "intrusion of Chilean sovereign rights into the Atlantic Ocean".

7. The Counter-Memorial reveals an important evolution in Argentine thinking on this point. Discarding in 1974 what was admired in 1973, the Argentine Government now writes, in what probably constitutes one of the key passages of the Counter-Memorial:

"One might well think" [this is exactly what the Argentine Government *did think* in its Memorial], "that it is Chile's ambition . . . of hindering the free maritime communications of Argentina in the Beagle Channel, which has conferred such a high degree of importance to the present dispute. *Such an analysis would be inadequate*. Though Chile's pretensions over *all*² the channel islands have been made a matter of legal claim and strive to find some justification, they remain, nevertheless so fragile that they cannot cause serious concern to the Argentine Government. The real dispute is concentrated upon the three islands Picton, Lennox and Nueva. In fact, the Chilean claim indicates the desire to gain control over the southern Atlantic Ocean . . ." (Arg. C.M. p. 371, para. 34).

8. Thus, if one understands the position clearly, the Argentine Government's fear of seeing the maritime communications of Ushuaia threatened by Chile was linked to a claim by Chile over *all* the islands in the Channel. Now of course—it is said—the Chilean Government formulates this claim with arguments so weak that the Argentine Government need no longer have the least fear on this score.³ The Argentine Government would have it understood that as Chile will not have "all the Channel islands", consequently the dispute is concentrated upon Picton, Nueva and Lennox. It is upon this question that the Court will have to pronounce and it is this question which brings "such a high degree of importance to the present dispute", because "the Chilean claim indicates the desire to gain control over the South Atlantic Ocean". The principal issue in the dispute—it is concluded—is thus no longer the safeguarding of the maritime access to Ushuaia, but the protection of Argentina against the ambitions of Chile to extend her control over the South Atlantic (cf. Arg. C.M. pp. 490-1, and 494, para. 66).

¹ The Court is respectfully reminded, as the Chilean Government had occasion to point out in its Counter-Memorial, that at this period Ushuaia had not yet been founded.

² The word *all* is underlined in the text.

³ On the islands within the Channel, see below Chapter III, section G.

9. The gap separating the Argentine Counter-Memorial from the Memorial can thus be appreciated. Whereas in the Memorial the Argentine preoccupations—those of the 19th century as well as those of today—were presented as bearing upon the protection of the maritime communications of Ushuaia and, as a corollary, the safeguarding of Argentine interests in the Beagle Channel area, the perspectives are considerably different in the Counter-Memorial. Of Ushuaia, almost no mention is made, either as the pivot of the territorial settlement of 1881, or as the precise issue of the present dispute—the name is barely even mentioned in passing (for example, Arg. C.M. p. 371, para. 34; p. 403, para. 10).

What is presently at stake, according to the Argentine Counter-Memorial, is no longer only the determination of a maritime frontier in the vicinity of Ushuaia, that is to say in the zone of the Beagle Channel, but, more extensively, the control of the whole Southern Atlantic. A controversy on sovereignty of some islands has thus become a geopolitical issue.

10. The “oceanic principle” itself is given a new colouring. In the Memorial this “principle” was tied to the apportionment of the coasts and kept a certain close relation to territory. Thus the Memorial describes the frontier of the Treaty, as it was seen by the Argentine Government, as traced in such a way as to assure, not merely in the region of the Strait of Magellan, but also further to the south,

“...the most complete respect for the continuity of *Argentine jurisdiction and control over its Atlantic territorial waters* ... and for the corresponding continuity of *Chilean jurisdiction and control over its Pacific territorial waters*” (Arg. Mem. p. 408, para. 43; cf. p. 410, para. 44).

No doubt the Counter-Memorial in numerous passages takes up the idea of an exclusive Argentine jurisdiction on the Atlantic coasts, but it is clear that the Atlantic ambitions of Argentina henceforth have a much wider significance: in the place of the “principle” of the “Argentine sovereignty over the shores and the territorial waters of the Atlantic” (Arg. Mem. p. 410, para. 44), the Counter-Memorial now invokes a much wider “principle”:

“Through the diplomatic correspondence and in proposals and in counter-proposals, and other documents, a principle was hereby settled of *‘exclusive Argentine jurisdiction in the Atlantic Ocean...’*” (Arg. C.M. p. 73, para. 31).

Thus, it is no longer solely the territories “on the Atlantic” (that is to say, having an “Atlantic frontage”) together with their territorial waters which the Argentine Government, claims on the basis of the “oceanic principle”, but an “exclusive Argentine jurisdiction in the Atlantic Ocean”. The shift is remarkable and it follows that the Counter-Memorial does not flinch from making the control of the South Atlantic the real crux of the case.

11. (c) It is not surprising that in order to achieve a semblance of harmony with this revised conception of the dispute, the Argentine Government has tried to place the entire history of the dispute in a new light: this history is now presented as having been a long struggle between the two countries for control of the South Atlantic.

11 bis. Being accused in the Argentine Memorial of having sought "to advance eastwards towards the Atlantic" (Arg. Mem. p. 135, para. 17; cf. p. 148, para. 33)—that is to say of having sought to acquire in the South Atlantic territories touching on the Atlantic—Chile now finds herself charged with ambitions of a very different dimension. It is no accident that the Counter-Memorial multiplies the allusions to a Chile compared shortly before "to a South American Prussia: united, efficient and expansive" (Arg. C.M. p. 272, para. 3), to "Chile's expansionist aims" of the 19th century (Arg. C.M. p. 85, para. 8), to "the aggressiveness of Chile's foreign policy" (Arg. C.M. p. 273, para. 4), or again to "the Chilean expansionist policy" (Arg. C.M. p. 429, para. 34) round about 1900.

It is no accident either that the accusation, stated briefly in the Memorial, that the Chilean Government had sought in 1953, by a "stratagem", to displace the limits between the Atlantic Ocean and the Pacific Ocean in such a way as to slide the Pacific as far as the latitude of Tierra del Fuego—Staten Island (Arg. Mem. pp.267-8, para. 95), is repeated with unexpected insistence in the Counter-Memorial. The argument is nevertheless rather weak since, as the Chilean Government has demonstrated in its Counter-Memorial, it is Argentina and not Chile which has taken the initiative in displacing the limit of the two Oceans ¹. On any view of the matter, the scientific work of 1953 cannot have the slightest bearing upon the interpretation of the Treaty of 1881 ("Further Remarks . . .", p. 79).

No matter: the Counter-Memorial does not weary of denouncing what it characterises in turn as "geographical fantasies" (Arg. C.M. p. 45, note 1), as "sophisticated cartography" (Arg. C.M. p. 269, para. 32), as "a cartographical operation that might even be thought 'chauvinistic'" (Arg. C.M. p. 281, note 16), or as "cartographical sophistry" (Arg. C.M. p.481, para. 60); and the Argentine Government even goes as far as devoting many pages in its Counter-Memorial to this "Chilean stratagem" (pp. 481 sqq., para. 59 sqq.).

In the belief of the Argentine Counter-Memorial, for a century the ambitions of Chile have not varied: it was necessary for Chile, today and in the past, to satisfy its so-called

¹ On the title page of an Argentine official publication of 1952, emanating from the Ministry of the Navy (Dirección General de Navegación e Hidrografía), is to be read, beneath the title "Radio ayudas a la Navegación", the sub-heading: "Costa Atlántica Americana (Desde Río San Lorenzo hasta la Isla Diego Ramírez)". So the Argentine Government annexes to the Atlantic Ocean a large area to the west of the meridian of Cape Horn. An operation of a similar type has been mounted by means of various Argentine Official maps (Ch. Plate No. 205). The Argentine Government would do well to weigh its words carefully before making an imputation of a Chilean "stratagem" of displacing the oceans!

desire to gain control over the Southern Atlantic Ocean (cf. Arg. C.M. p. 494, para. 66; p. 175, para. 17).

The Argentine Government even goes further: within this "South Atlantic" Chile wishes to establish sole control and to expunge all Argentine influence. Does not the horizontal line on certain of the Chilean maps take the form—the Argentine Counter-Memorial puts it in so many words—of "an image of a sort of 'geopolitical' oceanic boundary which would serve of itself to *separate* ¹ Argentina from the seas and lands (Antarctica ² and several islands)" situated to the south of Tierra del Fuego and of Staten Island (Arg. C.M. p. 491, para. 66)? In short, each and every one of the manoeuvres of the Government of Chile for a century and a half

"...are but different guises of the same permanent purpose: to subtract the South Atlantic Ocean from the Argentine jurisdiction, and to extend over it the Chilean jurisdiction" (Arg. C.M. p. 490, para. 66).

And even the Memorial presented by the Chilean Government in the present proceedings indicates—it is alleged—"some concession to those on the Chilean side who support a territorial expansionist policy drawing certain precedents from the past" (Arg. C.M. p. 379, para. 14).

11 ter. In face of the expansionist and aggressive dynamism of Chile, the Counter-Memorial recounts an Argentine resolution to defend the rights which she would have inherited from the colonial past. It is against this background that the impressive figure of Sr. Bernardo de Irigoyen has been painted in: a man "absolutely determined to put a stop to Chile's expansionist aims" (Arg. C.M. p. 85, para. 8), a minister who was, more than any other "intransigent ... on the exclusion of any Chilean presence on the Atlantic" (Arg. C.M. p. 137, para. 34), in a few words "the indomitable champion of Argentina's exclusive presence on the Atlantic coasts from Rio de la Plata to Cape Horn" (Arg. C.M. p. 147, para. 1). It is still this "heritage of the past": "the Cape Horn frontier" which, a century later, the Argentine Government intends to safeguard against the ambitions of Chile in the present proceedings: as if the Court of Arbitration had been called to the assistance of the shade of Irigoyen in order to protect the "South Atlantic", this Argentine Sea, from the ever reviving ambitions of Chile.

12. (d) It thus appears in a clear light how the distortion of the nature of the dispute—which the Chilean Government has already criticised (Ch. C.M. pp. 26-32, paras. 33-50)—has been accentuated in the Argentine Counter-Memorial. Without doubt

¹ Emphasis in original.

² This is the first time that the Argentine Government goes so far as to link the present dispute to territories south of Cape Horn.

the Argentine Memorial already conceived the problem as being that of establishing a maritime frontier rather than a division of islands. But, at the very least, this determination of the maritime frontier between the two countries remained related to a delimitation of territorial waters in the area of the Beagle Channel, that is to say, to the territorial compromise effected by the Treaty of 1881 as seen by Argentina.

According to the Argentine Memorial, the actual dispute had as its object the protection of this compromise against Chilean attempts to disturb the equilibrium brought about by the Treaty. This equilibrium involved, so it was said, a correspondence of the dominance of Chile over the Strait of Magellan, to ensure freedom of her communications with Europe, with the dominance of Argentina over the Atlantic coasts, to ensure the communications between Ushuaia and the south (cf. Arg. Mem. p. 406, para. 42). At no time, either in its Memorial or in its Counter-Memorial, has the Argentine Government ventured to maintain that the negotiations of 1876-1881 or the Treaty of 1881 had any bearing upon the control of the Southern Atlantic. With justification the Argentine Government evokes the control over the Strait of Magellan; it evokes—wrongly, in the view of the Government of Chile—control over the area of the Beagle Channel and the Atlantic coasts; never has it gone as far as to claim to be able to find in the negotiations of 1876-1881, or in the provisions of the Treaty, or in the course of the many vicissitudes of the dispute between the two countries, the slightest reference to control of the South Atlantic. This new concept of control over the Southern Atlantic Ocean is a purely political conception, which it is impossible to relate in any way whatsoever to the territorial settlement of 1876-1881.

13. (e) By the same move, the famous “oceanic principle” itself changes its character.

In the Argentine Memorial, it was presented as being linked to the Treaty: it could be deduced from the Treaty by a proper interpretation of the latter; thus it was, as it might be put, internal to the Treaty. Clearly this was only a pretence, for neither in the antecedents of the Treaty nor in its actual text is it possible to find the least support for such a “principle”, and under cover of the interpretation of the Treaty, the Memorial was doing nothing other than applying a postulate external to the Treaty, which the Government of Chile has called “a pre-1881 premise” (Ch. C.M. p. 99, para. 13), “a prefabricated mould” (Ch. C.M. p. 99, para. 67). But, whatever the true character of the “oceanic principle” in the Memorial, at least the Argentine Government was doing its best to present it as integrated with the system of the Treaty: hence in particular the remarkable attempt of Chapter VI of the Argentine Memorial to read each of the provisions of Article III of the Treaty as so many expressions of the “oceanic principle” (see on this point the observations of the Chilean Government: Ch. C.M. pp.68-98, paras. 13-66).

In its Counter-Memorial, the Argentine Government no longer tries to keep up appearances. The "oceanic principle" is no longer written *in* the Treaty; deriving validity from the *uti possidetis juris* of 1810, it is *external* to the Treaty and is indispensable to its interpretation in as much as it is an overriding principle:

"...the principle of the *uti possidetis juris* of 1810 and, as a consequence, the Atlantic-Pacific division of oceanic jurisdictions, are entirely relevant to the interpretation of the 1881 Treaty: ... in case of doubt, the interpretation should lean against any disturbance of the *uti possidetis juris* of 1810 ... Any concession of territory to Chile that runs contrary to the Atlantic jurisdiction of Argentina as far as Cape Horn could only be effected by a clear and express provision of that Treaty. There is no such provision to be found in the Treaty" (Arg. C.M. pp. 75-6, para. 32).

14. Consequently, the "oceanic principle" as it is conceived in the Counter-Memorial means that the provisions of the Treaty of 1881 no longer apply. It now involves the application of a distinct rule, anterior and external to the Treaty, and from which there can be no derogation save by an express and unambiguous provision.

On this occasion the matter is expressed with clarity and frankness: what the Argentine Government now asks of the Court is not so much to apply the provisions of the Treaty of 1881 but rather to apply the two "principles", alleged to be its corollaries, of the *uti possidetis juris* of 1810 and of the Atlantic-Pacific division of oceanic jurisdictions.

This important question will be touched upon again further on (paras. 63-91).

15. It goes without saying that the Government of Chile is unable to accept the conception of the case which the Argentine Government now places before the Court. According to the common opinion of the Parties, the present dispute relates exclusively to the interpretation of the Treaty of 1881 (see Ch. C.M. pp. 12-13, para. 4). Even if it is supposed, *quod non*, that the Treaty established maritime frontiers in the area of the Beagle Channel, it cannot be regarded, even using the most strained interpretation, as bearing upon the control of the South Atlantic. Such a concept was entirely foreign to the negotiations of the Treaty, and no document before or after 1881—up to and including the Argentine Memorial of 1973—has ever invoked it in relation to the territorial settlement of 1881. To accuse Chile of having sought by means of the horizontal line on certain 19th century maps ¹, "to separate Argentina from the seas and lands (Antarctica and several islands)" of the extreme south, and thus "to subtract the South Atlantic Ocean from the Argentine jurisdiction and to extend over it the Chilean jurisdiction" (Arg. C.M. pp. 490-1, para. 66) is at once an untruth and also involves a complete and unacceptable transformation of the present case.

¹ On the significance of this line, see Ch. C.M. p. 95, para. 61; cf. below paras. 52-54 and Chapter II, para. 49.

16. The task of the Court, that which has been defined in the *Compromiso* of 22 July 1971, is to decide according to the formulation of the question by Chile “the questions referred to in her Notes of 11th December 1967 . . . and to declare that Picton, Lennox and Nueva Islands, the adjacent islands and islets, as well as the other islands and islets whose entire land surface is situated wholly in the region” defined in the *Compromiso* belong to Chile.

According to the formulation of the question by Argentina, the Court is called upon “to determine what is the boundary-line between the respective maritime jurisdictions of the Argentine Republic and of the Republic of Chile” in the region defined by the *compromiso* “and in consequence to declare that Picton, Nueva and Lennox Islands and adjacent islands and islets belong to the Argentine Republic”. The first pleadings of the two Parties were at one in considering that the answer to the question is to be found exclusively in the interpretation of the Treaty of 1881. It is not for the Argentine Government to ask the Court today to pronounce upon a problem with no connection whatever with the Treaty of 1881 and its antecedents; with no connection whatever with the dispute subsisting between the two Parties for several decades; with no connection whatever with the *Compromiso* of 1971: the concept of “control over the Southern Atlantic Ocean” has always been, and still is, completely foreign to the present case; the Government of Chile respectfully begs the Court to see that it so remains.

B. The Geographical Scope of the Dispute

17. The Chilean Government in its Counter-Memorial found itself obliged to point out

“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” (Ch. C.M. p. 4, para. 16).

The Government of Chile was troubled by certain passages of the Argentine Memorial which could give the impression that the Argentine Government was asking the Court to pronounce upon the status of islands external to the “hammer” described by the *Compromiso*, and in particular on Terhalten, Sesambre, Evout, Barnevelt, and the Wollaston and Hermite groups.

Two Argentine diplomatic notes of 3 March and 2 July 1973 increased the concern of the Chilean Government in seeing the Argentine Government endeavouring to widen the geographical extent of the dispute—which both Parties were agreed in seeing as the last

dispute between them in this region—and accordingly to put in issue once again the hitherto undisputed sovereignty of Chile over the islands (on the whole question, see Ch. C.M. pp. 4-10, paras. 15-31).

Likewise the Chilean Government set forth the view that the introduction into the interpretation of the Treaty of 1881 of *a priori* principles such as the “oceanic principle” and its corollary “the principle of the Cape Horn meridian”, as well as the insistence upon the maritime character of the frontier to be determined, could not be unrelated to the attempt of the Argentine Government to widen the conflict to vast areas, hitherto uncontested, outside the “hammer”, and consequently to open a new territorial issue between the two countries, a dispute which, according to the Argentine Government, would naturally be decided upon the basis of the same principles—that is to say, in favour of Argentina (cf. Ch. C.M. p. 21, para. 24, and pp. 31-2, paras. 49-50).

18. The Argentine Counter-Memorial transforms these uncertainties as to the intentions of Argentina into near-certainties.

Concerning the Chilean Authoritative Map of 1881, the Argentine Counter-Memorial alleges that if the Chilean Government understood it to depict the true solution adopted by the Treaty, it would have been necessary to represent on this map certain “Atlantic” islands other than those which are to be found there:

“...would it not have been necessary ... to have included in the map the islands—*Evout and Barnevelt*— which had inexplicably been left out and which also were of an ‘Atlantic character’? And was there not a risk that questions would be raised concerning *other islands*?” (Arg. C.M. p. 186, para. 4).

A little further on, it is explained why the Chilean Government had wished not to reveal, even to the members of its own Congress, the precise significance of the Treaty which it had just signed. The Government had not desired, so it is said, to make generally known that

“...the Government had had to recognize Argentine sovereignty not only over the *Isla de los Estados* and over certain islets more or less in close proximity to it, but also over all the *remaining islands*¹ of the southern archipelago which give upon the Atlantic Ocean ...” (Arg. C.M. p. 191, para. 6; cf. p. 175, para. 17).

In the same order of ideas, the Counter-Memorial does not omit to spell out that the Argentine policy during the entire negotiation of the Treaty was to obtain, not only the Atlantic coast to the north of the Beagle Channel,

“...but, just as imperatively, the *other islands of the Fuegian archipelago which give upon the same ocean as far as Cape Horn*” (Arg. C.M. p. 223, para. 22).

¹ Only these first words are underlined in the text.

Perhaps it will be objected that these passages of the Counter-Memorial relate to the three disputed islands and that the Chilean Government quite needlessly sees in them a confirmation of its preoccupation. In this case the Court may wish to reread two passages from the Argentine Counter-Memorial. The first of them concludes the Chapter dealing with the interpretation of the Treaty of 1881:

“Argentina is firmly convinced that the ‘Tratado de limites’ of 1881, in its text and in its signification clearly confirmed by its preparatory work, attributes to *Argentina exclusive sovereignty over every island of the austral Archipelago giving upon the Atlantic Ocean . . .*” (Arg. C.M. p. 236, para. 25).

Of even greater clarity is the passage in which the Argentine Government invokes its proposal of 1959 to submit to the International Court of Justice the question, not only of Picton, Nueva and Lennox, but also of the other Southern islands situated to the east of the meridian of Cape Horn (see on this point Ch. C.M. p. 5, para. 17), and takes pains to specify that if Lennox “is situated in the zone in which the Arbitral Tribunal is competent”,

“ . . . other islands situated outside that zone are not subject to the present arbitration and . . . the Argentine Government will reserve its position with regard to them” (Arg. C.M. pp. 369-70, para. 32).

19. The Argentine Government does not formally ask the Court to pronounce immediately upon the status of Evout, Barnevelt, Sesambre and the other southern islands to the east of the “Cape Horn frontier”; the *Compromiso* excluded such a submission. The Argentine Government calls upon the Court in the present phase to deal with the islands within the “hammer” but to do this on the basis of considerations—such as the control of the South Atlantic—which would allow Argentina to open a fresh dispute with Chile as soon as the present proceedings are ended ¹.

20. It is not without interest to note that, on this occasion, the future claims of Argentina over the southern islands are announced without ambiguity in the Counter-Memorial itself, whereas in 1973 it was in separate diplomatic notes that the Argentine Government formulated this claim over all of “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” (Ch. Annex No. 381). Doubtless the explanation is to be found in the circumstances set forth earlier that the Argentine Case is non presented more

¹ The case of Navarino, an island indisputably “on the Atlantic”—and yet Chilean—obviously causes difficulty to the Argentine Government (cf. Ch. C.M. p. 19, para. 19, and especially p. 60, para. 52). The Argentine Counter-Memorial describes Navarino as “the last of the islands to be placed under Chilean sovereignty, because it is situated almost in its entirety on the ‘Pacific’ side” (Arg. C.M. p. 110, para. 23; cf. p. 186, note 9. See also below para. 99).

And what about the island of Cape Horn itself or Freycinet island? Does the Argentine Government consider them to be on the “Pacific side” or the “Atlantic side” or are they to be divided?

independently of the interpretation of the Treaty of 1881 than it was at the time of the elaboration of the Memorial. What the Argentine Government now asks of the Court is the delimitation of maritime jurisdictions in this part of the world in such a way as to leave to Argentina the complete mastery of the South Atlantic, which has the implication, amongst others, of sovereignty over all the islands situated to the east of the "Cape Horn frontier", including those whose Chilean character and sovereignty had not given rise to the slightest difficulty in the past.

21. The outcome of these observations on the general strategy of the Argentine Government as it appears in the Counter-Memorial becomes self evident.

It is clear that the Argentine Memorial had already based its interpretation of the Treaty upon *a priori* assumptions completely foreign to the Treaty of 1881. But this was done *sub rosa* and it expended a great deal of effort in trying to persuade the reader that the interpretation concerned principles written in the Treaty. One of the specific objects of the Chilean Counter-Memorial was to remove the obscurity from this presentation and to establish how, under the guise of an interpretation of the Treaty, the Argentine Government was in reality seeking to draw the case very far from its mooring place, the Treaty of 1881.

In the Argentine Counter-Memorial this drift has been accentuated and, at the same time, the movement has been carried out quite unashamedly. From an interpretation of the provisions of the Treaty presented as including the "oceanic principle" one is taken now to the direct application of an "oceanic principle" situated outside, and superior to, the Treaty: a principle said to antedate the Treaty and which must be applied unless there is an express provision to the contrary. For the Argentine Government the Treaty is no longer the direct and exclusive source of the rights of the Parties, it is self-sufficient no more and it must be interpreted subject to a superior norm, the "oceanic principle": a principle no longer conceived as it was in the Memorial, just to guarantee for Argentina the exclusive control of the Atlantic coastline and the territorial waters fringing it, but as intended—both outside and within the region submitted to arbitration—to protect, from the territorial appetites of Chile, the whole of the South Atlantic, thus given the status of an Argentinian *mare nostrum*.

Such a conception carries within itself its own contradiction, and the Government of Chile is confident that the Court of Arbitration will restore the case to its true character and dimensions, namely: by virtue of the Treaty of 1881 to whom belong the territories situated *within the zone defined in the Compromiso*—the territories which are the object of the last dispute between Argentina and Chile in this region of the world?

II. THE REASONING

22. The tactic pursued by the Argentine Government in its Memorial was characterised by two features:

The first was the juxtaposition of two forms of reasoning having a different character and basis. Putting itself first of all on the ground involving the interpretation, properly speaking, of the Treaty of 1881, the Argentine Government attempted to establish that the islands in dispute belong to Argentina because they are not situated "al Sur del Canal Beagle", but on the eastern part of the archipelago of Tierra del Fuego. In this context are to be placed the efforts made by the Argentine Government to obtain acceptance of an eastern sector of the Channel conceived in such a way as to place the Channel west of the three islands. In order to palliate the obvious feebleness of this first tactic, the Argentine Memorial at the same time put the matter on a second ground: that of the so-called "Atlantic-Pacific principle". This substitute reasoning, intended to take its turn with the very weak arguments based upon the situation of the islands in relation to the Channel, provided a supplementary advantage, which the Chilean Government has underlined on many occasions: that of giving some basis for eventual claims by Argentina over territories situated outside the "hammer", and in particular over the islands situated to the south of it. (See Ch. C.M. pp. 20-21, paras. 22 and 24; cf. above, para. 18).

But—and this is the second feature of the tactic used in the Memorial—the Argentine Government took great care to present its substitute reasoning based upon the "oceanic principle" as being related to the interpretation of the Treaty just as much as its first line of reasoning. That this relation is purely fictitious, is certain; but it is equally certain that the efforts made by the Argentine Government in order to establish that the principle was to be found written *in* the Treaty bore witness to the importance which it attached to keeping the discussion before the Court within the framework of interpretation of the Treaty.

23. The rigidities imported by the Argentine Government into its general strategy in the case have inevitably rebounded on its tactics. As has been seen, the Argentine Counter-Memorial, even if it did not completely break adrift from the interpretation of the Treaty of 1881, nonetheless kept some distance from it, and the general conception of the Argentine case, as it appears in the Counter-Memorial, deviates from the precise problem of the interpretation of the relevant provisions of the Treaty of 1881 in order to settle the dispute defined in the *Compromiso*. The tactics of the Argentine Government have undergone a parallel development. Certain arguments closely linked to the Treaty are practically abandoned or receive substantial modification; others are recalled with less insistence. On the other hand the ideas related to what the Chilean Government has called the "subsidiary or fall-back position" of the Argentine Memorial (Ch. C.M. p. 21, para. 22) are moved to the front of the stage.

24. The new tactic of the Argentine Government is thus characterised by a double movement in an opposing sense: the relative effacement of what may be called the conventional reasoning, that is, that internal to the Treaty and based upon its interpretation; the significant expansion of the unconventional reasoning, that is to say that based upon "principles" totally external to the Treaty.

The Chilean Government proposes to furnish some examples of this development and to formulate the remarks which it demands.

A. The Concepts in Retreat

(i) The Treaty of 1881 considered as a compromise and as the only source of the rights of the Parties

25. In its Counter-Memorial, the Chilean Government was pleased to be able to leave on record that the Parties appeared to agree on one important point:

"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 had 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." (Ch. C.M. pp. 13-14, para. 6).

This agreement of the Parties upon the character of the Treaty of 1881 as a compromise putting an end to all claims and conflicting titles from the past and constituting henceforth the exclusive source of the rights of the Parties appeared firmly established. It was expressed previously in the arbitration of 1902 (see the passages cited in Ch. Mem. pp. 79-80, para. 27). It had been confirmed with great clarity in the Memorials submitted by the two Governments in the present proceedings (Ch. Mem. p. 21, paras. 1-2; p. 46, para. 34; pp. 56-7, paras. 6-7; Arg. Mem. p. 142, para. 27; p. 166, para. 52; p. 351, para. 8). The Chilean Government considered that it could not be placed in issue.

26. Therefore it is not without surprise that the Chilean Government has found that the Argentine Counter-Memorial takes an opposite stand on this matter to that of the Memorial.

The Memorial pointed out quite correctly that:

"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).

"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).

The Argentine Counter-Memorial on the contrary, heaps scorn upon the attempt, as the Argentine Government would put it, by Chile to limit the significance of the principle of *uti possidetis juris*:

"...under a pretence that 'the object and purpose of a Treaty' was to effect a global settlement under which Argentina's claims were to be recognized over most of Patagonia in return for the recognition of Chile's claims over most of the southern lands (a formula designed tacitly to obscure the relevance of the content of the *uti possidetis juris* of 1810) ... (Arg. C.M. pp. 63-4, para. 20) ¹;

or again:

"...by pretending that the boundaries Treaty constituted a compromise which erased, with a stroke of the pen, everything that went before ..." (Arg. C.M. p. 77, para. 2).

27. Desiring, as will be seen below (paras. 70 et seq.) to derive more arguments than was done in the Memorial from the historical circumstances prior to 1810, the Argentine Government could hardly fail to try to minimise the importance of the Treaty of 1881 as an exclusive source of the territorial rights of the Parties in the areas which it governed. Otherwise how was it able to state that the principle of *uti possidetis juris* of 1810 is an overriding principle which governs the interpretation of the Treaty (Arg. C.M. pp. 75-6, para. 32)? Once reduced to the level of one among several sources of the rights of the Parties, the Treaty would become less of an impediment for the Argentine Government, since henceforth it would be possible to give precedence to the *uti possidetis juris* and the "Atlantic principle" over the provisions, properly speaking, of the Treaty.

28. If the purpose of this tactical move is obvious, its failure is inevitable. In this connection some brief observations will suffice.

29. How could it be denied that the Treaty constituted a compromise? All of the extended history of the genesis of the Treaty is there to bear witness: in concluding the Treaty in 1881, the two Governments were not making a declaration of the legal situation existing in 1810. By a reciprocal abandonment of their legal positions, the Parties had on

¹ It is interesting to compare the interpretation for which Chile is reproached with that given by the Argentine Government itself in the proceedings of 1902 and in its Memorial in the present case (see the passages cited in Ch. C.M. p. 58, para. 47).

the contrary subscribed to what the eminent Argentine jurist and statesman, Luis Varela, has called a “vraie transaction entre des prétentions extrêmes” (*La République argentine et le Chili: Histoire de la démarcation de leurs frontières*, Buenos Aires, 1899, Vol. I, p. 22); that is to say they created a solution putting an end to the controversies of the past.

30. Is it necessary to recall that the Treaty characterises itself, in Article VI, as a “transacción”, in other words, a compromise? The meaning of the term is clear. According to the “*Dictionnaire de la terminologie du Droit international*” (Paris, 1960), “la transaction” is an “accord par lequel deux ou plusieurs Etats règlent une contestation entre eux en se faisant des concessions mutuelles”.

“an agreement by which two or more states settle a dispute between them by making mutual concessions”.

The *Dictionnaire* provides several quotations supporting this definition, one of which is particularly interesting. It is that of Vattel, whose authority was very considerable in South American legal circles at the end of the last century.

“*La Transaction est un second moyen de terminer paisiblement un différend. C’est un accord, dans lequel, sans décider précisément de la justice des prétentions opposées, on se relâche de part et d’autre, et l’on convient de la part que chacun doit avoir à la chose contestée, ou l’on arrête de la donner tout entière à l’une des parties, au moyen de certains dédommagements, qu’elle accorde à l’autre.*”

(Vattel, *Le Droit des gens, ou Principes de la loi naturelle*, livre II, chap. XVIII, para. 327.)¹

“The transaction is a second method of settling a dispute peacefully. It is an agreement in which, without deciding expressly upon the justice of the opposing claims, there is some withdrawal on each side, and it is accepted that each should have the parcel in dispute of that the grant of all to one of the Parties is avoided, by means of certain compensations given by one Party to the other”.

¹ Carlos Calvo, the well known Argentine diplomat and jurist, stated in his “*Dictionnaire de Droit International Public et Privé*” (Berlin/Paris, 1885):

TRANSACTION. En jurisprudence, la transaction est un acte par lequel les parties terminent une contestation existante ou préviennent une contestation à naître.

La transaction implique toujours une renonciation simultanée et réciproque à tout ou partie des prétentions mises en avant de part et d’autre: c’est une entente sur un terme moyen qui résout la difficulté pendante, tandis que dans l’arrangement amiable... c’est en général l’un des contractants qui facilite l’accord en abandonnant isolément le droit ou l’objet dont la revendication formait la matière du débat.

See also the definition of Andrés Bello, cited in Ch. Mem. p. 56, note 4.

In characterising the form of their undertaking as a “transacción”, the draftsmen of the Treaty could not have been more explicit about its significance: by no means a simple confirmation of former titles inherited from the colonial past, but an “arrangement” (“arreglo”) requiring a “transacción”, namely the renunciation by each of the Parties of certain rights which each had claimed as being based upon pre-existing titles¹.

31. Perhaps the Argentine Government will allow the last word to Sr. Irigoyen himself. In this Report to the President of the Republic of 15 April 1877, speaking of the negotiations which had been carried out under his auspices with Sr. Barros Arana in the preceding year, the Argentine Minister persistently used the word “compromise”:

“...we agreed that a *compromise solution* was to be preferred...

...if Argentina were called upon to make certain concession in the course of the *compromise*...

The Chilean Minister said that a prudent and equitable *compromise solution*...

Having established the essential preconditions of both sides for discussions, *we began to discuss the matter of a compromise solution*...” (Arg. Mem. Ann. No. 14, p. 133, at pp. 135, 136, 141).

Some years later, in the course of his speech to the Argentine Chamber of Deputies of 31 August, 1 and 2 September 1881, speaking of the history and content of the Treaty signed some weeks earlier, the Argentine Minister was to recur emphatically to the theme of the compromise. First of all, referring to the arrangement of 1876, he was to declare this:

“Finding that arbitration involved all the drawbacks that I will mention later, I considered it preferable to negotiate for a *compromise settlement* ... Conversations did in fact begin with Sr. Barros Arana, and their outcome was a draft *compromise solution*, the same, to all intents and purposes, as the one now under discussion, in that the only difference is one of ten minutes²...” (Arg. Mem. Ann. No. 12, p. 93, at p. 102).³

¹ Since the Argentine Government has shown itself to be so punctilious in the matter of translations, it will be in order to draw attention to an error which has slipped into its translation into English of the bases of the Treaty of 1881: the word “transacción” in Article VI is rendered inaccurately as “agreement” (Arg. Mem. p. 190, para. 72). The authors of the translation which featured in the Argentine Evidence of 1900 showed a little more respect for the original Spanish, since they translated, on that occasion, “transacción” by the English word “transaction”. It is to be noticed in this connection that the Argentinians L. Varela and Montes de Oca in addition to Baron d’Avril, have translated the word into French: “transaction”.

² This involved the displacement of the point of departure of the frontier line to the north of the Strait of Magellan from Mount Dinero to Point Dungeness (see Ch. C.M. pp. 54-5, para. 39).

³ To avoid any controversy, the text given above is the translation of the Argentine Memorial (see also Ch. Ann. No. 42, p. 116 at p. 127).

Then, speaking on this occasion of the Treaty signed on 23 July, Sr. Irigoyen was to affirm in terms which give some echo of the definition given by Vattel:

“...what other way out is there but a *compromise*? ... We have considered a direct agreement, a *compromise*, which is in accordance with the spirit and the letter of the Treaty of 1856.

“But *the compromise*, as the very word indicates, implies removing matters from the strictly legal plane, in order to place them in the context of mutual concessions, one giving up part of its rights, giving up other of its claims.

“This is the essence of a *compromise* which, since it is based on the agreement of the Parties, cannot imply the complete submission of one (Party) nor the absolute preponderance of the other” (Ibid., at p. 113).¹

32. For Sr. Irigoyen, the Argentine negotiator, the Treaty involved—from the very fact that it had the character of a compromise, of a “*transacción*”—mutual concessions, reciprocal renunciations of certain pre-existing rights. His Report of 1877 as much as his speech of 1881 relate the many formulae of compromise envisaged by both Governments; each one of these formulae involved different concessions for each of the Parties, and, by their very definition, none of the formulae confirmed the rights which each Government believed were to be derived from the legal situation of 1810. The formula finally settled upon by the negotiators involved renunciation by each Government of a part of its claims and, like the others, therefore, could not confirm the position of either Party on the validity of its pre-existing rights.

It is the very essence of the “*transacción*” adopted that, from then on, it is the Treaty alone which defines the respective rights of the two countries and that it renders inoperative every territorial claim founded upon an earlier title. Sr. Irigoyen never suggested the survival of any former titles.

The Treaty of 1881 established thenceforth a new allocation of the territorial rights of the two countries and it necessarily and ineluctably implied the lapsing of previous titles. In the terms of Article VI of the Treaty, the territorial rights of the two Countries were thenceforth those which “*belong to them according to the present arrangement*” (“*les pertenecen según el presente arreglo*”)—and not those which belonged to them by virtue of other titles; even if a difficulty were to arise in the future, the boundary specified in the Treaty was to remain as “*immovable*” between the two countries (“*quedando en todo caso como limite inmovible entre las dos Repúblicas el que se expresa en el presente arreglo*”).

¹ The concept of “*compromise*” is explained in almost identical terms in the same speech with reference to the negotiations of Sr. Elizalde and of Sr. Montes de Oca (see Ch. Ann. No. 42, p. 116 at p. 134): “*Compromise is impossible without sacrificing something, without renouncing rights, aspirations or interests, this being precisely the essence of compromise*”.

33. By disputing today that the Treaty of 1881 had, by reason of its character of “transacción”, made a *tabula rasa* of the pre-existing rights and titles, and by invoking, outside the Treaty and as somehow superior to it, the rights allegedly inherited from the past, the Argentine Government puts in issue the entire territorial settlement of 1881; as a consequence, it betrays the principles set out in the speech of Sr. Irigoyen, to which it has declared its attachment and, a more serious matter, it ignores the international obligations contracted by Argentina.

34. As the Treaty of 1881 has, in the eyes of the authors of the Argentine Counter-Memorial, ceased to be a compromise involving a *new* definition of the rights of the Parties, it can be understood that the analysis of the elements in the compromise of 1881—the *quid pro quo* aspects—no longer have any real interest for them. Beyond the constant repetition of the *Atlantic* claim of Argentina, no other consideration now appears to take their attention: in the Counter-Memorial hardly any trace is to be found even of the purported correspondence between the Argentine predominance in the area of the Beagle Channel so as to protect Ushuaia and the Chilean predominance in the region of the Strait of Magellan. On reading the Argentine Counter-Memorial, one is given a picture of the long negotiations of 1876-1881 more or less in terms of a debate which bore exclusively on respect for the “oceanic principle” said to have been inherited by Argentina by reason of the *uti possidetis juris* of 1810 and constantly threatened by Chile.

When the documents of the negotiations of 1876 to 1881 are reread, it is astonishing that the Argentine Government dares to present, as the principal stake in the negotiation, as its axis and its pivot, as its alpha and its omega, one of the few problems which were *never* mentioned.

35. The main victim of the new Argentine tactic is, thus, the Treaty of 1881. It is no longer presented as a compromise making a *tabula rasa* of pre-existing titles. It is, now, no more than one title among others, a title which moreover gives way to pre-existing titles, promoted by the Argentine Counter-Memorial to pre-eminence: the *uti possidetis juris* of 1810 and its corollaries, the “Atlantic principle” and the “principle of the Cape Horn frontier”. The new prestige given to these concepts will be the object of comment in due course.

(ii) *The terms in the relevant provisions of the Treaty of 1881*

36. Given that the Argentine Counter-Memorial has ceased to see in the Treaty of 1881 the exclusive and direct source of the rights of the Parties in the regions to which it relates, it was to be expected that its authors would take less interest in the interpretation of

each of the terms of the relevant provisions. The decline in the effort relating to interpretation of the terms of the Treaty effectively constitutes one of the most striking tactical changes in the new Argentine case.

37. The observation which has just been made will no doubt be challenged by Argentina. The Counter-Memorial, it will be said, does at least devote three whole Chapters—Chapters III, IV and V—to the study of the Treaty, to its antecedents and to its interpretation. And is it not stated as early as the Introduction that it is intended by the examination of the antecedents of the Treaty to complete “the conclusions established in the Argentine Memorial, reached on the basis of the textual interpretation of the Treaty: conclusions which are here confirmed in their entirety and point by point” (Arg. C.M. p. xii)?

All that is no doubt true. The Chilean Government nonetheless is still left with the impression—to put it no higher—that the interpretation of the Treaty as such undergoes an appreciable decline by reason of the direct application of the *a priori* “principles” which are at the heart of the Argentine conception.

The evidence of this decline is not lacking and some of it may now be pointed out.

38. At the outset it is to be remarked that if the Introduction of the Argentine Counter-Memorial announces that Chapters III, IV and V “contain the essence of the Argentine case on the meaning of Articles 2 and 3 of that Treaty” (Arg. C.M. p. xiii), the promise seems to be rather badly kept. The three chapters of the Argentine Counter-Memorial constitute in fact a suite of variations upon a single theme: the vicissitudes of an imaginary struggle by Argentina, and notably by Sr. Bernardo de Irigoyen, to safeguard the “Cape Horn frontier” inherited from the past, against the diverse and repeated attempts by Chile to put it in issue. Of the economy of the territorial settlement established by the Treaty there is no longer any question, nor is there any analysis on the legal plane of the articulation of the pertinent provisions of Articles II and III of the Treaty. The Counter-Memorial fails to carry out the intention stated in its Introduction both upon the level of the actual dynamics of the negotiations and upon the plane of the legal analysis of the terms of the Treaty.

Likewise, whilst it is true that the headings of the various Chapters are keyed to the Treaty of 1881, this is a piece of bluff, because the chapters treat only of the Argentine jurisdiction over “the Atlantic” and of the “Cape Horn frontier”. As has been pointed out already, on reading the Argentine Counter-Memorial it is easy to get the impression that the only matter at stake in the negotiations of 1876 to 1881 had been respect for this

"Cape Horn frontier". However, while many questions were in issue—Patagonia, the Strait of Magellan, Tierra del Fuego, the other southern islands, and so forth—the purported "Cape Horn frontier" was never among them.

39. This general statement is confirmed in various particular respects.

It is the case that the articulation of Articles II and III of the Treaty is only accorded incidental and superficial notice, in inappropriate contexts, and without the Counter-Memorial being prepared to attach any particular significance to the matter: a few lines concerning the *uti possidetis juris* in order to recall to mind that, according to the Argentine Government, the final provision of Article II has no fundamental significance (Arg. C.M. pp. 64-65, para. 20, and p. 76, para. 32)¹ and a reference concerning the islands in the Channel (Arg. C.M. p. 381, para. 16). The least that may be said is that it does not add up to much.

40. Within the same framework, it is to be noted that while, as been pointed out, the Argentine Counter-Memorial confirms in its Introduction the textual interpretation of the Treaty which the Argentine Government had proposed in Chapter VI of its Memorial, and which the Chilean Government has already refuted in detail in its Counter-Memorial (Ch. C.M. pp. 67-99, paras. 11-67),² it returns to this interpretation in the actual body of the Counter-Memorial somewhat discreetly and exclusively in the context of an illustration of the "oceanic principle". The reading of "*al oriente de la Tierra del Fuego*" as meaning "*in the eastern part of the archipelago of Tierra del Fuego*" is expressly confirmed, together with the reading of "*sobre el Atlantico*" as meaning "*facing the Atlantic*", and that of "*hasta el Cabo de Hornos*" as meaning "*to the west of Cape Horn*" (Arg. C.M. pp. 95-102, paras. 16-17). But, beyond the fact—which perhaps has no particular significance—that these analyses occur not in relation to the interpretation of the Treaty itself but to the proposals of 1876, it will be noticed that the Argentine Government does not seek to attach decisive importance to them: thus the interpretation of "*sobre el Atlantico*"—if one supposes it to be a fundamental question, since that is *the only mention of either of the two oceans* in the Treaty—appears to have merited only a modest footnote (Arg. C.M. p. 97, note 34). Doubtless it will be replied that the Argentine Government had not wished to trouble the Court by a repetition of the arguments

¹ This thesis has already been refuted by the Chilean Government (Ch. C.M. pp. 64-67, paras. 7-9).

² The Chilean Government will not repeat this refutation here, and begs the Court to refer to the matters cited in the Counter-Memorial. Certain complementary points will be made when an answer is given to the Argentine theses concerning the "oceanic principle" or the various phases of the negotiation of the Treaty.

contained in its Memorial and that a simple reference seemed sufficient. But such an explanation could hardly be convincing in relation to a question which appears to be so crucial that in the Counter-Memorial the Argentine Government insists upon the oceanic *leitmotiv* tirelessly in spite of its being fully expounded already in the Memorial.

41. But it is in connection with the interpretation of the words “al Sur del Canal Beagle” that the attitude of the Counter-Memorial more clearly reflects the new Argentine tactic of running away from the Treaty of 1881. No process of interpretation, however laboured, could permissibly result in these words serving as an illustration of the “oceanic principle”. Moreover, no one could be unaware of the weakness of the thesis of a frontier line through Paso Picton, so the Government of Argentina appears to have had no choice but to attempt to minimize the importance of the very concept of the Beagle Channel for the solution of the dispute. This minimizing of the interest of the definition of the Beagle Channel—in an arbitration which bears this name!—constitutes one of the most remarkable operations of the Argentine Counter-Memorial. It deserves some further attention.

(iii) *The concept of Beagle Channel within the meaning of Article III of the Treaty*

42. The Court will of course recall that in its Memorial the Argentine Government attached a decisive importance to the Beagle Channel in the territorial settlement of 1881. According to the Argentine Memorial, the Channel was then conceived of as a frontier separating the Argentine part of Tierra del Fuego to the north from the Chilean islands to the south:

“...the boundary line having arrived in the Beagle Channel, *the Channel itself was then employed as a natural seaway boundary*” (Arg. Mem. p. 361, para. 16).

“...the authors of the Treaty did not intend the same vertical division to continue in the Channel and south of it; *they wanted to use the Beagle Channel itself as the frontier*” (Arg. Mem. p. 381, para. 25).

Accordingly it appeared essential to the Argentine Government, in order to settle the present dispute, to determine the line of the Channel within the meaning of Article III of the Treaty since the placing of the disputed islands in relation to this line straightaway determines their appurtenance either to Chile or to Argentina.

The Argentine Government came to write:

“...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).

43. The Argentine Counter-Memorial changes this approach completely. This is what the Argentine Government now writes:

"Sr. Irigoyen never suggested, and the idea never occurred to Sr. Barros Arana, that the text of the third 'Basis' should indicate that the course of the Beagle Channel constituted the Argentine-Chilean boundary; much less, that it constituted the final portion of that boundary" (Arg. C.M. p. 102, para. 18; cf. p. 195, para. 8).

No longer being a frontier, by the same token the Channel evidently loses a good part of its significance for the solution of the dispute:

"...within the context of this system ¹, the determination of the course of the Beagle Channel is in the last resort only of relative importance" (Arg. C.M. p. 102, para. 18).

"the exact determination of the eastern course of the Beagle Channel and its 'Atlantic' mouth is not as essential as has sometimes appeared for the determination of the contents of the third 'Basis' of the 1876 proposals" (Arg. C.M. p. 107, para. 21).

This having been said, the Counter-Memorial keeps the Channel in the place assigned to it by the Memorial: between Navarino and Picton; but it adds discreetly:

"...even if the course of the Beagle Channel had not been such as it was conceived at that time, and certainly such as the 1876 negotiators saw it, it would not have made much difference" (Arg. C.M. p. 102, para. 18).

44. Thus, according to the Argentine Counter-Memorial, the course of the Channel which was in the minds of the Parties in 1881 is now of little account. What used to constitute the question—are the islands placed to the north or the south of the Beagle Channel?—becomes of no more than anecdotal significance, since what matters in the end is not so much the clear terms of the Treaty—"todas las islas al sur del Canal de Beagle"—as the "system" claimed by the Argentine Government to derive from the "oceanic principle", the dogma of the "Cape Horn frontier", and the *uti possidetis juris* of 1810.

45. The motivation of this tactical operation of minimizing the Channel is clear: in the first place, not to link the outcome of the claim over Picton, Nueva and Lennox to that of the argument, which the Argentine Government knows to be feeble, concerning the track of the eastern part of the Channel; at the same time, to provide support for the attack upon the Barros Arana map of 1876, which is such an impediment because it shows only too clearly what the Parties envisaged in 1876. Having laid down as an axiom that the Channel did not form a frontier in the intentions of the negotiators of the Treaty, it

¹ i.e. the system of the third "Basis" of 1876.

becomes easier to allege that Sr. Barros Arana could not have actually drawn such a frontier on the map and, consequently, that the horizontal line on the latter does not reflect the arrangement of 1876.

46. The Chilean Government is bound to reject the virtual recasting of the dispute to which the new tactics of the opposing Party leads. If the approach of the Argentine Government were to be followed, an approach which it hopes to commend to the Court, that would mean that since the outset of the dispute, that is for nearly three quarters of a century everyone, on both sides, would have been mistaken about the import of the case: the consultation of the British Admiralty by the Argentine Government concerning the course of the Channel as early as 1894-1896 (see Arg. Mem. pp. 216-219, paras. 20-23); the position taken by the Argentine Government in 1905 (see Ch. Mem. p. 93, para. 17); the accumulation of the most diverse Argentine theories about the course of the Channel, to the point in 1931 when the Argentine Minister of Foreign Affairs and jurist, Carlos Saavedra Lamas, then counted ten different theories (see Ch. C.M. pp. 81-83, paras. 36-38); the researches of the British Admiralty on the course of the Channel (see Ch. C.M. pp. 91-93, paras. 52-55, with references to the Chilean Memorial); the efforts made by the Argentine Government in its Memorial of 1973 to establish that the Channel passed between Navarino and Picton: all these researches, all this work, all this thinking, would thus have been pointless!

Now for the Argentine Government the Channel is not a frontier and it matters little, in determining the status of the disputed islands, to discover where it lies.

Faced with such a situation, the Argentine Government doubtless would have said: "They can hardly be serious!" (Arg. C.M. p. 97, para. 16).

47. It will be enough for the Chilean Government to make two short, but decisive, observations in order to give this new Argentine tactic its due.

48. The first of these is so straightforward that one hesitates to formulate it. Here are islands disputed between two States on the basis of a boundary Treaty which attributes to one of them "todas las islas al sur del Canal Beagle, hasta el Cabo de Hornos": how could anyone dare to assert that it matters little whether the islands are, or are not, situated to the south of the Channel; and that the outcome does not depend on their relation to the Channel?¹

A legal interpretation which defies good sense must be completely vitiated.

¹ Cf. Minutes by the British Director of Intelligence, 26 August 1915: "If the islands in question are South of the Beagle Channel, they are Chilean; if North they belong to Argentina" (Ch. Ann. No. 104, p. 274 at p. 275). Nothing is clearer than this.

49. The second observation concerns the general economy of the territorial settlement of 1876-1881. Once the Parties were agreed in giving to Argentina a continuous Atlantic coastline from Patagonia to the south-eastern extremity of Tierra del Fuego and Staten Island, it was necessary to define a new "horizontal" frontier in order to separate the territories specially accorded to Argentina to the south of the Dungeness-Andes line, from the territories further south which were to remain in the hands of Chile. Thus it was a proper *frontier* which the negotiators of the Treaty defined. The Parties would have been able to define this west-east frontier—which they were bound to define in some form or other—by an abstract concept, such as a parallel. Instead, they chose to make use of the Beagle Channel which appeared on the maps as a transverse body of water separating, Tierra del Fuego and Staten Island from the groups of islands further to the south ¹.

50. These are the same considerations which, as the Chilean Government has shown in its Counter-Memorial (Ch. C.M. p. 50, para. 30; pp. 94-5, para. 61), also justify the conclusion—independently of all the materials in the documentary evidence—that the part of the *Beagle Channel* which the negotiators had thus retained as a frontier, could be none other than the seaway fringing the southern coast of *Tierra del Fuego*. Only this seaway was capable of fulfilling the function expected of it by the negotiators of the Treaty, namely, the separation of the Argentine territories of Tierra del Fuego and Staten Island from the Chilean islands located farther south, by a west-east line following on from the north-south line from Cape Espíritu Santo. A seaway bending towards south-south-east between Navarino and Picton would not have achieved this end, and, as the Chilean Government has already pointed out, it is not "all the islands *to the south* of the Beagle Channel" which it would then have been necessary to define as Chilean, but "all the islands *to the south and to the west* of the Beagle Channel". A frontier defined in terms of the separation of territories to the north from territories to the south can itself only be a west-east alignment; and it requires a great deal of imagination to envisage the seaway described by the Argentine Government as being the Beagle Channel fulfilling this condition (cf. below paras. 110-116).

51. If the Channel which the negotiators of the Treaty had in mind followed the complicated course offered today by the Argentine Government, with an angle of almost

¹ If the Channel had not been conceived of as a frontier, Sr. Barros Arana would not have been able, in explaining the Irigoyen proposals in his dispatch of 5 July 1876, to use the expression: "the other islands located south of the Beagle Channel down to Cape Horn would be Chilean" ("Las otras islas situadas al sur del Canal Beagle hasta el Cabo de Hornos serían chilenas" (Ch. Ann. No. 21, p. 42); and Thomas O. Osborn, the United States Minister in Buenos Aires, no more could have written, in his report to Secretary of State Blaine: "all the Islands to the south of Beagle Channel up to Cape Horn . . . will belong to Chile" (Ch. Ann. No. 37, p. 96 at p. 98).

90° at the north-eastern extremity of Navarino, they would surely have discussed this part of the boundary with as much attention to detail as they had discussed the line to the north of the Straits, since in both cases it was necessary, if the Argentine Government is to be believed, to be carefully on the look-out to preserve the integrity of Argentine jurisdiction over the Atlantic coasts. Without any doubt, they would have devoted the same care to defining, in Article III of the Treaty, this complicated alignment which would dissociate the fortune of Picton, Lennox and Nueva from that of the other southern islands and especially of Navarino, as they did to defining, in Article II, the minor changes of orientation in the Dungeness-Andes line ¹. The fact that no difficulty arose in the course of the negotiation of the Treaty concerning the exact location of the Channel, as well as the fact that Article III of the Treaty does not accompany the mention of the Channel with precise geographical co-ordinates, show clearly that for the Parties, the Channel, intended to divide the Argentine and Chilean territories, did not have a complicated and sinuous course, but was quite simply the quasi-rectilinear seaway running along the southern coast of Tierra del Fuego ².

52. The remarks made above make it possible to understand, as the Chilean Government has already put the matter, "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" (Ch. C.M. p. 95, para. 61).

53. By refusing to see the simple truth—the Channel as a frontier between the two countries—the Argentine Counter-Memorial was bound to seek elsewhere the explanation of this rectilinear alignment prolonged in the direction of the ocean. This explanation, it believed it could discover, as has been pointed out already, in the "expansionism" of Chile. According to the Argentine Government, this extension of the line as far as Cape San Pio was a mere product of the policy of Chile tending to create a "barrier toward the south" (Arg. C.M. p. 371, para. 34) and was consequently evidence of

¹ Thus Montes de Oca's first proposal of 1879, when abandoning the horizontal concept of the Beagle Channel frontier, defined with the utmost precision the whole course of the suggested line. (cf. Ch. Ann. No. 33, p. 72).

² Cf. the opinion of Reclus who referred to "ce remarquable fjord du Beagle Channel qui, semblable à un large fleuve, bordé de glaciers, sinue entre la Terre de Feu et les archipels du sud" (Ch. Ann. No. 382, French and English version of extracts of "Nouvelle Géographie Universelle").

“...an attempt to instil an idea in the cartography: an image of a sort of ‘geo-political’ oceanic boundary which would serve of itself to *separate* ¹ Argentina from the seas and lands (Antarctica and several islands) situated south of the Isla de los Estados and southeast end of the Isla Grande de Tierra del Fuego” (Arg. C.M. p. 491, para. 66).

The Chilean Government believes that it has emphatically demonstrated that such an explanation entirely misconceives the function of the Beagle Channel in the general economy of the territorial settlement of 1876-1881. In order to lay the issue finally to rest, it will be enough to add a single detail. It is the case that this same line prolonged towards the east parallel to the southern coast of Tierra del Fuego and of Staten Islands, this line in which the Argentine Government feigns to see the expression of the “expansionism” of Chile, is to be found on certain maps of *Argentine* provenance, such as the map of Sr. Elizalde of 1873 (Ch. Plate 9), the maps of Paz Soldan of 1887 (Ch. Plates 36 and 37), the map of Latzina of 1888 (Ch. Plate 48) (see also Ch. Plate 178) as well as the sketch by means of which Baron d’Avril, the French Minister in Santiago, illustrated for the purposes of the French Government the arrangement in the course of conclusion in July 1881 (Ch. Plate 12). Would the Argentine Minister of Foreign Affairs, Elizalde, Paz Soldan, Latzina and Baron d’Avril, have all been the agents of Chilean “expansionism”? It can be added that in the course of the arbitration of 1898-1902 concerning the frontier in the Andes the Argentine Government—without any reservation—relied on an official Chilean document of 1882 (*Sinopsis Estadística y Geográfica de Chile*, 1882. Santiago de Chile, 1883, p. 3) ² which described the boundary as passing “to the east of the said channel (Beagle) by the southern side of the Island of Los Estados”. (Argentine Evidence, 1900, p. 533).

54. Furthermore, the course of the Beagle Channel, as it flows ineluctably from the philosophy of the territorial settlement of 1876-1881, is confirmed by other aspects of the negotiations capable of establishing the intention of the Parties: the circumstances of discovery, maps, etc. The Chilean Government considers it superfluous to recapitulate these considerations here and begs leave to refer to its Counter-Memorial (Ch. C.M. pp. 77-97, paras. 30-63), where the Court will also find the references to the relevant passages in the Memorial.

The Argentine Counter-Memorial provides hardly any new items bearing upon the problem of the precise determination of the Beagle Channel, which in its view is no longer

¹ Emphasis in original.

² The same document was published in the “*Diario Oficial de la República de Chile*” of 10 March 1882 (Ch. Ann. No. 519).

an issue of great weight. Therefore, the Chilean Government will merely add some observations upon certain points of detail contained in the Argentine Counter-Memorial.¹

55. In the first place it is appropriate to direct some attention to a new argument concerning the course of the Beagle Channel, for Argentina now a secondary issue. It concerns certain maps, all later than the Treaty it must be noted, and all of Argentine origin, on which the inscription of the Channel is carried along the north coast of Navarino and between this coast and Picton (Arg. C.M. p. 107, para. 21; p. 231, para. 23; p. 454, para. 33).

If the Court would care to refer to these maps—namely Ch. Plates 37 and 48, and Maps 19, 20, 24 and 27 of the Argentine Atlas—it will ascertain that the fact that three letters of the toponym “Canal Beagle” slant along the north coast of Navarino cannot be taken to mean that for the compilers of the maps the Channel ran down to Oglander Bay.

One cannot fail to notice that on two of the maps (Ch. Plates 37 and 48) the drawing of the frontier line and the colouring are arranged in such a way that Picton, Nueva and Lennox appear as Chilean territories (See “Some Remarks . . .”, pp. 35-6 and 42-3). Even if the compilers of the maps had believed that the Beagle Channel followed the coast of Navarino between that island and Picton, as the Argentine Counter-Memorial would have it, there is absolutely no doubt that for them the islands were Chilean.² Consequently it is clear that the location of the reference “Canal Beagle” upon these maps has no significance—for or against!—as support for the argument of the Argentine Government.³

56. On its part the Chilean Government wishes to emphasise the cavalier fashion in which the Argentine Counter-Memorial tries to disembarass itself of what has always been the conviction of the Chilean Government on the question of defining the Beagle Channel, a conviction held with a consistency not to be found on the Argentine side. The Argentine Counter-Memorial feigns surprise in face of the position of the Chilean Memorial upon this fundamental issue of the course of the Channel:

“The Chilean Memorial does not say whence comes such a conclusion, nor what evidence could be produced to suggest that *this bizarre idea* was shared by the 1876 negotiators” (Arg. C.M. p. 103, para. 19).

¹ The circumstances of the discovery will not be treated here: that question will be the subject of Chapter V of this Reply. (See also “Appendix C”.)

² It is a fact that, for Paz Soldán, Beagle Channel extended to Cape San Pio. (See Chapter IV, para. 152)

³ For other comments on these maps see “Supplementary Remarks . . .”.

According to the Argentine Counter-Memorial, there is nothing more than an unproven assertion by the Chilean Government, of an axiom, of

“... assertions ... so absurd that no navigator or geographer of the time had ever thought of advancing them ...” (Arg. C.M. p. 195, para. 8).

The “axiom”, it is said, was relatively recent moreover, since

“... the extension of the Beagle Channel to the vicinity of Isla Nueva is a *new and recent conception* of the Beagle Channel; it *does not appear before the 1911* Chilean Sailing Directions” (Arg. C.M. p. 323, para. 64).

“Chile’s conception of the eastern course of the Beagle Channel in 1904 and even in 1907 was *not*¹ that which it maintains today. Definitely it did not pass in its contentions of that date between Cabo San Pio and Isla Nueva; its oriental mouth did not surpass an imaginary line between Cabo Maria in Picton Island and Punta Final in Isla Grande. *Cabo San Pio was not an element of the Chilean Case*” (Arg. C.M. p. 329, para. 71).

In consequence, the Argentine Counter-Memorial affirms, the Chilean position on the course of the Channel deserves no more than a contemptuous silence on the part of Argentina. Refutation is achieved by denial:

“Assertions of this kind require no more than a flat refutation and a few brief comments” (Arg. C.M. p. 104, para. 20).

57. The objective pursued by the authors of the Argentine Counter-Memorial of overwhelming the Chilean conception, represented as a recent invention, with their contempt, is only too clear. It was necessary at all costs to show that never in the 19th century, and in particular in the period of discovery, had anyone been able to imagine for an instant that the Channel could pass between Cape San Pio and Nueva.

Consequently it was necessary to protest the belief that the Chilean Government itself had not had such an “absurd” idea before 1911.

That is why, whilst accepting 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), it was necessary in the Counter-Memorial to take the line that the negotiators of 1876-1881 had two maps at their disposal, and two only (see. Arg. C.M. pp. 87-89, paras. 10-11; p. 478, para. 58), which allowed *a priori* the ruling out of the British and French maps of 1842, 1850, 1854 and 1856 showing the Beagle Channel between Picton, Nueva and

¹ Emphasis in original.

Cape San Pio (Ch. Plates 5, 7 and 52; Ch. Mem. pp. 15-16, para. 26; Ch. C.M. p. 94, para. 59).¹

For this purpose, it was necessary to adopt the line that the discoverers of the Channel—the men whose opinion is decisive in the eyes of the Argentine Government when it is a question of determining the intention of the negotiators of the Treaty (see Ch. C.M. pp. 83-85, paras. 39-42; cf. Chapter II of the present Reply)—never held the view that the Channel passed between Cape San Pio and Nueva. Thus in the Argentine conception it was necessary to wait until the year 1911 before the Chilean Government was to imagine such an “absurd” formula, and consequently it was inevitable that Chile would by then have lost contact with the intention of Fitzroy and of King. That is precisely the burden of the Counter-Memorial: neither Cape San Pio nor Nueva had ever been a part of the conception of the Channel which those who had discovered and first described it had (see for example Arg. C.M. p. 3, para. 3; p. 7, para. 6; p. 8, para. 7; p. 9, para. 8; p. 11, para. 10; p. 12, para. 10; pp. 33-34, paras. 28-29; p. 105, para. 20). In the case of Nueva Island, the Counter-Memorial adds with emphasis that for the discoverers of the Channel this island constituted “a distinct feature standing separate in the open sea” (Arg. C.M. p. 8, para. 7), “a geographical feature clearly detached from the coast and without any connections to mouths or channels of any kind” (Arg. C.M. p. 4, para. 4). In this connection the Counter-Memorial underlines “the autonomous and Atlantic characteristic of Isla Nueva” and “the independence of Isla Nueva from the Channel and its Atlantic characteristics” which are to be derived from the work of discovery (Arg. C.M. pp. 10-11, paras. 9-10). The relationship between this argument and that of the recent origin of the “absurd” invention of the Channel fringing upon the south coast of Tierra del Fuego as far as Cape San Pio is clear.

58. The Chilean Government is nonplussed by this line of reasoning. The Argentine Government is free to criticize the Chilean conception of the definition of the Beagle Channel; therein lies one of the important issues between the Parties in the present case. But it is inappropriate for the Argentine Government to behave as if the Chilean argument was an invention of recent origin, completely lacking foundation and advanced without the slightest justification.

How is it possible for the Argentine Government to write that the Chilean position upon this crucial question dates only from 1911? Could it have forgotten the Chilean Authoritative Map of 1881, of which its own view was that it reflected not so much the Treaty as signed but more the Treaty as the Chilean Government wished it to be? Could it

¹ The Court will find the observations of the Argentine Government upon the maps in Arg. C.M. pp. 453-4, para. 33. It will appreciate their significance.

have forgotten that before the end of 1881 the Chilean Hydrographic Notice No. 35 (Ch. Ann. No. 46 (c), p. 148 (d)), which was communicated to the British Admiralty and other Hydrographic departments, stated that the Treaty boundary followed the meridian of Cape Espiritu Santo southward "until it falls into the Beagle Channel; thence along this Channel until it enters the Atlantic"? Could it have forgotten the numerous Chilean maps, which, immediately after 1881, depicted the very conception of the Channel which is set forth by the Chilean Government in its Memorial, its Counter-Memorial and the present Reply (see Ch. Plates 13 to 19 inclusive, 29 and 128)? Could it have forgotten that on the map annexed to his Report of 1890 Sr. Barros Arana likewise presented in the clearest terms, the same conception of the course of the Channel as that which is expanded by the Chilean Government today (Ch. Plate 49)? Yet the Argentine Counter-Memorial itself mentions this map as evidence of the "extremism" of the interpretations of Sr. Barros Arana from 1890 onwards (Arg. C.M. p. 131, note 65). Thus in the Argentine Government's own view the "extremist" thesis of Chile relating to the definition of the Beagle Channel had already received official expression in 1890!

Again, how can the Argentine Government commit itself to such unfounded assertions as the allegation that the Chilean thesis was invented only after 1911—when in actual fact on other occasions it takes exception to certain Chilean official maps much earlier than this date (notably the Authoritative Map of 1881 and the Barros Arana map of 1890) on the basis that they show a line passing between Cape San Pio and Nueva and proceeding further to the east? And how does it dare to describe as 'absurd' and as mere 'assertions' a conception which has been shared, as the Memorial and Counter-Memorial of Chile have shown, by *Argentine* official maps both before and after the conclusion of the Treaty (see for example, Ch. Plates 9, 21, 25, 34, 38) and also by Baron d'Avril (Ch. Plate 12, Sketch B)?

In addition, this was the conception adopted by the British Admiralty as corresponding to "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. 299 at p. 306, Ch. C.M. pp. 91-93, paras. 53-54). The conception of Captain King is illustrated graphically and with exceptional clarity on the blue tinted chart appended to the Memorandum supplied to the Admiralty by the Hydrographer (Ch. Plate 117).

If absurdity there be in the Chilean conception of the Channel, it is at least to a great extent shared out . . .

59. As to the Argentine assertion that for the discoverers of the Channel and also for the Government of Chile (that is until 1911), Cape San Pio and Nueva were completely alien to the concept of the Beagle Channel, this will be given detailed refutation in

Chapter V of this Reply. A few short observations will suffice for the present:

— It is difficult to understand how the Argentine Counter-Memorial can claim to extract any support from the Weddell map of 1823-24 (Arg. Mem. Map 5, and Arg. C.M. p. 10, para. 9), compiled before the first explorations of Fitzroy.

— No more can it be understood how the Counter-Memorial can derive support for this view from a purported map of Fitzroy “No. 27 *Beagle Channel*” (Arg. Mem. Map 8).¹ Nueva is not shown on this map and this appears to have aroused considerable hope for the Argentine Government and it is adverted to on a number of occasions, in particular to point out that “it never occurs to Fitzroy to include Isla Nueva in his charting of the Beagle Channel” (Arg. C.M. p. 11, para. 9) and that on this map “*the passage north of Picton does not even appear! The author had evidently not thought it necessary that it should appear on a chart intended to show the whole course of the Beagle Channel!*”² (Arg. C.M. p. 105, para. 20; cf. Arg. C.M. p. 15, para. 13, and p. 33, para. 28). This map had already been made use of by the Argentine Government in its Memorial (see in particular Arg. Mem. pp. 42-3, para. 35; pp. 74-5, para. 57; p. 386, para. 28) and the Chilean Government had the occasion to make known its point of view concerning this map in its “*Further Remarks . . .*” (p. 9). It is enough to point out that it is an abuse for the Argentine Counter-Memorial to refer every now and then to Chart “No. 27. *Beagle Channel*”, when it bears indeed the title: “No. 27. *Part of Tierra del Fuego*”, and only part of the Channel, even in the Argentine conception, appears on it. Furthermore, this map was not one of those known to have been used during the negotiations of the Treaty.

— As to the alleged absence of Cape San Pio from the conception of Fitzroy and King, the Argentine Government seems willing to forget that on his return to England in 1830 Captain King took care, both in his report to the British Admiralty in 1830 and in his lecture to the Royal Geographical Society in London, to locate the Channel very precisely as extending as far as Cape San Pio (Ch. C.M. pp. 89-90, para. 50).³

60. The Chilean Government hopes that it has accorded the attempt of the Argentine Counter-Memorial to take the case out of the ambit of the interpretation of the Treaty the vigorous dismissal which it deserves. It is against this background that it is possible to understand the minimising of the role of the Treaty as a compromise constituting the exclusive basis of the rights of the Parties, the very slight interest attaching to the analysis of the terms to be found in the relevant provisions of the Treaty and, above

¹ The precise title of this map is mentioned by the Argentine Counter-Memorial, p. 11, para. 10; but this does not prevent the Government of Argentina from invoking the title which the map did not receive . . .

² Emphasis in original.

³ Cape San Pio appears on all the charts drawn in the wake of the discovery of the Channel (Ch. Plates 1 and 2; Arg. Mem., Maps 6 and 10).

all, the sudden change of policy in the Counter-Memorial relating to the importance of the definition of the Beagle Channel as a boundary between the two countries in the settlement of the dispute.

After having analysed the arguments and concepts which are the intended victims of the new Argentine tactics, it is now possible to examine the arguments and concepts which can be better appreciated if they are once again placed in relief.

B. *The Concepts Highlighted*

61. Whilst considerably reducing the weight of the arguments directly concerned with the interpretation of the 1881 Treaty, the Argentine Government to-day attaches increased importance to the *a priori* "principles" which provide at one and the same time the opportunity to make good the deficiencies of its position based upon the actual interpretation of the Treaty and to lay the ground for the extension of the dispute to all the southern islands, including those outside the area submitted to arbitration in the *Compromiso* of 1971 and whose attribution to Chilean sovereignty is out of any controversy.

The Argentine Memorial originally gave an important place to these "principles", and especially to the "oceanic principle" which was presented at once as an historical fact, as a consistent Argentine political doctrine, as the basis of all the negotiations in the course of the nineteenth century, and, finally, as the principle dominating the territorial settlement of 1881. In its Counter-Memorial the Chilean Government has had occasion to present its views about these points. (Ch. C.M. pp. 18-21, paras. 15-24, in particular para. 23; pp. 38-43, paras. 5-15, in particular paras. 5-7).

It is not a matter for surprise that in the Argentine Counter-Memorial, which is characterised by a certain tendency to run away from a normal process of interpretation and to rely upon considerations outside the text of the Treaty, these "principles" enjoy an even more privileged place. But it is not merely a change of stress or emphasis which is evident in the Counter-Memorial in this context; it is rather a distortion of fundamentals which can be seen. In the view of the Government of Chile, this aspect of the matter calls for especial examination.

62. In this respect the Argentine Counter-Memorial presents a major characteristic. At the same time as it increases in importance, the "oceanic principle" changes its basis: whereas in the Memorial it was linked to the common intention of the Parties, it is now presented as related to the *uti possidetis juris* of 1810, which is itself regarded as being "a part of the Treaty of 1881". The Chilean Government proposes first of all to analyse the

meaning and effects of this shift in the Argentine reasoning. Subsequently, it will demonstrate that the *uti possidetis juris* of 1810 cannot provide a basis for the “oceanic principle”, so that this purported “principle” is as inadmissible in the second Argentine pleading as it was in the first one where, it was presented as based upon the alleged intention of the Parties.

(i) *The “Atlantic-Pacific principle” as a “consequence” of the uti possidetis juris of 1810*

63. In the Argentine *Memorial* the “oceanic principle” and its alleged corollary, the “principle of the Cape Horn meridian” were presented—no doubt mistakenly, but presented just the same—as elements of the common intention of the Parties and, by that token, as integrated with the territorial settlement of 1881. The *Memorial* stated, for example, that this “principle” was a part of the “terms of reference” imposed upon the negotiators of the Treaty by their respective governments (Arg. Mem. p. 405, para. 42). For this reason—it was alleged—to interpret the Treaty, that is to say to search for the common intention of the Parties, it was indispensable to consider this “principle”, which was said to have dominated the entire territorial settlement in conformity with the common intention of the two Governments.

In the Argentine *Counter-Memorial*, the previously dominant theme of the common will of the Parties to establish the so-called “principle of oceanic division” is played in rather muted notes. In contrast, the *Counter-Memorial* describes with a great wealth of detail how the Chilean Government, far from having been in accord with the Argentine Government in the matter of respect for such an “overriding principle”, would have done whatever was necessary, up to the very last, to obtain this “result it had never been able to attain before . . . its old dream come true of establishing its sovereignty over part of the southern Atlantic coasts” (Arg. C.M. p. 162, para. 10).¹

64. Indeed, the Argentine Government could hope to introduce into the interpretation of the Treaty a principle presented as having been the object of agreement between the *two* Governments and a basic doctrine of *both* Parties; but it became impossible for it to link to the search for the intention of the Parties *a principle on which, on its own avowal, there had been no meeting of minds*: is it not the case that the *Counter-Memorial* relates at length that the Chilean Government had not accepted this “principle”,

¹ It is difficult to understand how, whilst complaining that throughout the 19th century Chile had the intention of establishing herself on the Atlantic coast, the Argentine *Counter-Memorial* can at the same time invoke—as the *Memorial* had done already (Arg. Mem. p. 132, para. 15)—the Chilean constitutions of 1823 to 1833 in order to claim that Chile had espoused the ‘frontier of Cape Horn’ (Arg. C.M. p. 78, para. 3). On the purport of this argument derived from the Chilean constitutions, see Ch. C.M. Appendix A, p. 165.

either before or after the signature of the Treaty? To link such a "principle" to the search for the common intention of the Parties was no longer tactically viable.¹

65. For this reason the Argentine Government has been constrained to find a new anchorage for the "Atlantic-Pacific principle". This new haven has been found in the principle of *uti possidetis juris* of 1810. The reasoning of the Counter-Memorial then runs as follows: (a) The Treaty of 1881 gives formal expression to the *uti possidetis juris* of 1810; (b) the position in 1810 involved acceptance of the Atlantic-Pacific principle and the Cape Horn frontier; (c) from this it followed that the Treaty of 1881 gives formal recognition to the Atlantic-Pacific principle and the Cape Horn frontier (Arg. C.M. pp. 45-76). Consequently the following assertions are to be found in the Argentine Counter-Memorial:

"...this principle of the *uti possidetis juris* of 1810 is contained in the Treaty of 1881... (It) is indeed a part of the Treaty of 1881" (Arg. C.M. p. 45, para. 1).

"...the *uti possidetis juris* of 1810 principle was present during all the earlier negotiations, ... it forms part of the Treaty of 1881, at the same time constituting an essential element for its interpretation" (Arg. C.M. p. 46, para. 2).

"...a principle which was continuously prominent in both the negotiations to 1881 and in the preparation of the text of the Treaty..." (Arg. C.M. p. 48, para. 5).

"...the principle thus incorporated into the Treaty of 1881 is an essential element for its proper interpretation" (Arg. C.M. p. 59, para. 17).

"the *uti possidetis juris* of 1810 has been a permanent juridico-political element always present in the negotiations of the Parties from the beginning of the controversy until the entry into force of the Boundary Treaty of 23 July 1881" (Arg. C.M. p. 75, para. 32).

"It follows that the principle of the *uti possidetis juris* of 1810 and, as a consequence, the Atlantic-Pacific division of oceanic jurisdictions are entirely relevant to the interpretation of the 1881 Treaty; and in particular that in case of doubt, the interpretation should lean against any disturbance of the *uti possidetis juris* of 1810" (Arg. C.M. p. 75, para. 32).

"...a heritage of the past, still vital for the understanding and the solution of the matter which has been submitted to the Court of Arbitration" (Arg. C.M. p. 78, para. 2).

66. Doubtless the Argentine Government will not fail to affirm that, in its Counter-Memorial, the "oceanic principle" does remain linked to the interpretation of the Treaty of 1881; and that the Government of Chile is trying to pick a quarrel by seeking to establish that, in the new Argentine case, such a "principle" is external to the Treaty (cf. above Introduction, p. 7, para. 16).

¹ The purely *unilateral* character of the "oceanic principle" in the new Argentine thesis is not glossed over in the Argentine Counter-Memorial: "Later on, during the 1810-1881 period, *Argentina firmly undertook the defence of its sovereignty over the totality of its Atlantic coastline, from Rio de la Plata as far as Cape Horn. Through the diplomatic correspondence and in proposals and counter-proposals and other documents, a principle was hereby settled of 'exclusive Argentine jurisdiction in the Atlantic Ocean'* despite Chile's ambition to extend its jurisdiction from the point it had occupied in the Strait of Magellan, first to the Rio Santa Cruz and, later, over all of Patagonia as far as Rio Negro". (Arg. C.M. p. 73, para. 31).

There is no point in playing with words: without question it is always by reference to the interpretation of the Treaty that the reasoning of the Counter-Memorial proceeds; but the basis of the "oceanic principle" is not at all what it was before. *In the Memorial* it was an element in the common intention of the Parties, *now* it is an element of the *uti possidetis juris* of 1810, which is itself an element in the common intention of the Parties. It is no longer as a basic principle which dominated the entire negotiation of the Treaty that the "oceanic principle" is invoked by the Argentine Counter-Memorial, but as an element of the legal situation of 1810 to which the Parties are regarded as having intended to refer.

This is clearly the burden of the following very significant words used in the Counter-Memorial: "the heritage of the past: the Cape Horn frontier" (Arg. C.M. p. 77). This is also the import of the denial of the character of the Treaty as a compromise, which is no longer seen as having substituted a new title for the pre-existing rights and titles which had become null and void: it is no accident that this denial is to be found in the Counter-Memorial precisely in the context of the concept of "the heritage of the past: the Cape Horn frontier". In other words the "oceanic principle" is no longer linked to the search for the intention of the Parties directly and preeminently, but by means of the *uti possidetis juris* of 1810 as an intermediary.

The Argentine Counter-Memorial deals with the matter unequivocally:

"...the principle of the *uti possidetis juris* of 1810 and, as a consequence, the Atlantic-Pacific principle of oceanic jurisdictions, are entirely relevant to the interpretation of the 1881 Treaty..." (Arg. C.M. p. 75, para. 32).

"At the attainment of their independence, the two young neighbouring Republics inherited, therefore, from the colonial administration, by virtue of the principle of the *uti possidetis juris* of 1810, the two essential criteria for the delimitation of their 'vertically' adjacent territories...: namely... the criterion of the exclusive jurisdiction of each Republic to the coasts, whether continental or insular, of the Atlantic and the Pacific..." (Arg. C.M. p. 77, para. 1).

"...the fundamental principle of respect for the *uti possidetis juris* of 1810, comprising notably the uninterrupted sovereignty of Argentina on all the Atlantic coast as far as Cape Horn..." (Arg. C.M. p. 80, para. 4).

"The respect for the all-important, historical boundary-criterion of the *uti possidetis juris* of 1810, namely, that of strict division of coasts and jurisdictions..." (Arg. C.M. p. 85, para. 8).

67. This 'link' (Arg. C.M. p. 59) between the principle of *uti possidetis juris* of 1810 and the "oceanic principle" induces the Argentine Government to deal with them in the same Chapter and to set forth, as illustrating the former, examples of the latter. If the Court would care to refer to Chapter II of the Argentine Counter-Memorial, it will be able to ascertain that for the Argentine Government these two "principles" are simply synonymous; to such an extent that when a 19th century text speaks of Argentine

sovereignty over the Atlantic coast, the Counter-Memorial does not hesitate to analyse it as being understood to refer to the principle of *uti possidetis*.

68. In the new Argentine case the primary principle is thus the *uti possidetis juris* of 1810, of which the "oceanic principle" becomes a mere consequence, a simple application. Of course the purpose of this restructuring of the Argentine argument is to protect the "oceanic principle": seeing that this "principle" could no longer be presented as having been the object of the common intention of the Parties at the time of the working out of the territorial settlement of 1876-1881, it was necessary to discover a new basis for it, and the Argentine Government thinks that this basis is now to be found in the *uti possidetis juris* of 1810, which itself is tacked on to the Treaty of 1881.

69. Chilean Government will have no difficulty in showing that the *uti possidetis juris* of 1810 does not play the role assigned to it by the Argentine Counter-Memorial in the Treaty of 1881.

Thus the conclusion is inevitable: the "oceanic principle", together with its foundation, the *uti possidetis juris* of 1810, are both elements external to the Treaty; the Argentine Counter-Memorial, itself, in spite of appearances, rests them on grounds other than the interpretation of the Treaty of 1881.

(ii) *The Principle of the Uti Possidetis Juris of 1810*

The Uti possidetis juris of 1810, keystone of the reasoning in the Argentine Counter-Memorial

70. The Argentine *Memorial* attached importance to the legal situation of 1810 (Arg. Mem. pp. 117-127, paras. 1-10). Its objective was to show that the "Atlantic-Pacific principle" had prevailed in fact and in law since before 1810, and that as a consequence, the Parties had not introduced a novel element when in turn they gave a formal status to the "oceanic principle" in the negotiations during the 19th Century and in the territorial settlement of 1881. The situation prevailing in 1810 was thus exploited by the Memorial in order to show that the "oceanic principle" maintained by the Parties as a guiding principle of their territorial settlement of 1876-1881 had its roots in the colonial past and constituted a geopolitical constant for the two countries over a long period.

71. In the *Counter-Memorial*, the *uti possidetis juris* of 1810 plays a fundamentally different role. Now:

“...it forms part of the Treaty of 1881, at the same time constituting an essential element for its interpretation” (Arg. C.M. p. 46, para. 2).

By the Treaty of 1881, as it is now put, the two Governments had intended to give formal recognition to the principle of *uti possidetis juris* of 1810 and, by this means, to give final confirmation to the legal position of 1810. Seeing that this calls for respect for the “oceanic principle”, that is to say “the Cape Horn frontier”, so the argument goes, it must follow that this latter principle is itself recognized by the Treaty of 1881 (see in particular, p. 46, para. 2).

In this way the legal position of 1810, conceived by the Argentine Memorial as a straightforward historical element, now rises to the status of a fundamental principle of the Treaty, of which it is presented as forming an integral part.

Thus, the “heritage of the past” acquires a decisive legal significance of its own, since the Treaty is to be interpreted no longer by reference to its actual provisions and in the light of the circumstances in which it was drafted, but according to developments prior to 1810. That is why the Argentine Government does not omit to underline the importance which it attaches to “a heritage of the past, still vital for the understanding and the solution of the matter which has been submitted to the Court of Arbitration” (Arg. C.M. p. 78, para. 2).

Nothing could be clearer than this: the Court is no longer asked to decide whether Picton, Nueva and Lennox are part of the territories allocated to Argentina in the settlement of 1881, but in substance to declare that the islands belong to Argentina by virtue of the *uti possidetis juris* of 1810 incorporated in the Treaty.

72. Thus the full extent of the change in the Argentine reasoning can be appreciated. From being an historical concept indicating the old roots of the solution adopted in 1881, the *uti possidetis juris* moves in the Counter-Memorial to the rank of an autonomous principle governing the whole issue.

It is with reference to “the all-important historical boundary-criterion” (Arg. C.M. p. 85, para. 8) no less, that the Argentine Government has no hesitation in writing that in case of doubt this criterion overrides all other considerations: because the Treaty embodies it, the Treaty cannot be interpreted in such a way as to derogate from it:

“...in case of doubt, the interpretation should lean against any disturbance of the *uti possidetis juris* of 1810” (Arg. C.M. pp. 75-6, para. 32).

73. The Chilean Government is unable to follow the Argentine Government in its attempts to make the *uti possidetis juris* of 1810 the keystone of the whole case. However, it is necessary to prevent any possibility of misunderstanding the Chilean position.

While the Chilean Government disputes that the *uti possidetis juris* of 1810 could govern the interpretation of the Treaty and therefore determine the outcome of the present

dispute, this is not at all because it fears the consequences of such a principle. The position in fact and law prevailing in 1810 is in no way unfavourable to the Chilean case; this has been demonstrated in Appendix A of its Counter-Memorial (Ch. C.M. pp. 152-164). The Chilean Government considers this situation quite simply to be irrelevant. For the same reasons it considers also to be irrelevant the contradictory claims upon the territories dealt with by the 1881 Treaty that the two States based upon the *uti possidetis juris* throughout their prolonged territorial controversy in the 19th Century.

This point appeared to be so obvious that the Chilean Government saw fit to limit itself to some modest statements about the matter in its two previous pleadings (Ch. Mem. p. 21, para. 2; Ch. C.M. p. 37, para. 4). The new significance conferred upon the *uti possidetis juris* of 1810 by the Argentine Counter-Memorial necessitates a rather more detailed consideration of this question.¹

The Alleged Misunderstanding of the Meaning of the Concept of Uti Possidetis Juris by the Chilean Memorial.

74. The first observation by the Chilean Government will be to register its astonishment in the face of the charge made against it of not understanding—or of pretending not to understand—the concept of *uti possidetis juris* of 1810: according to the Argentine Counter-Memorial the Chilean Government has confused this specialised institution of South American law with the European concept of the acquisition of territory by occupation (Arg. C.M. pp. 46-7, para. 3; p. 81, para. 4). The Argentine Government can rest assured: the Chilean Government is well aware that the South American principle is linked to sovereignty *de jure* as it existed, even if in theory, in 1810, and not to occupation *de facto*; and it is equally well aware that the main objective behind the doctrine was the exclusion of any possibility of *res nullius* the old Spanish territories. Thus the lesson in international law which the Argentine Government has seen fit to introduce into its Counter-Memorial was entirely without point.²

¹ The question of the commitment of the two Governments, and in particular the Argentine Government, to the “oceanic principle” between 1810 and 1881 will be examined separately later on (paras. 93-99).

² The reproach that the Chilean Government had written *uti possidetis* instead of *uti possidetis juris*, “thus eliding an essential part of the name of this Spanish-American principle” (Arg. C.M. p. 81, para. 4), is amusing: the same shorter form had been used on many occasions by the Parties themselves in the course of their negotiations in the 19th Century (for example, in the Report of Sr. Irigoyen of 24 June 1877: Arg. C.M. Ann. No. 3, p. 5 at p. 8; or the Treaty of 18 January 1878, article II, Ch. Ann. No. 27, p. 58); the short form no more implies a misunderstanding of the term *uti possidetis* here than on other occasions (cf. the book by Luis Varela, the Argentine jurist and statesman: *La République argentine et le Chili; histoire de la démarcation de leurs frontières*, Buenos Aires, 1899, Vol. I, pp. 19 sqq., in which the author speaks consistently of the ‘*uti possidetis* of 1810’ without any misunderstanding that this must refer to ‘*uti possidetis juris*’).

As recently as 1973, the Argentine Agents used the same form in at least ten different passages of their Memorial...

75. Within the same general framework, the Argentine Counter-Memorial complains that the Chilean Government has invoked acts of occupation in support of its claim to Picton, Nueva and Lennox instead of relying upon the legal title of 1810: "Chile has claimed rights to territories over which it had no title but instead brandished possession as its main argument" (Arg. C.M. p. 47, note 3). In this connection the Counter-Memorial cites a Chilean Note of 1915 and the general body of references in the Chilean Memorial to "acts of jurisdiction".

The Argentine Government need have no qualms on this score. If in the course of the long controversy with Argentina until 1881, the Chilean Government had occasion to refer to acts of occupation, it never invoked them as a mode of acquisition of territories which at that time would have been *res nullius*, but as a confirmation of a sovereignty which was Chile's by virtue of the *uti possidetis juris* of 1810 (see, for example the Chilean Note of 31 January 1848; Ch. Ann. No. 6, p. 9).

76. Throughout this controversy, each of the Parties invoked its own acts of occupation or the absence of acts of occupation on the part of the other Party; these acts of occupation were not relied upon as titles of acquisition of territory in dispute, but merely as *evidence* of pre-existing disputed titles. In its Note of 30 August 1848, the Chilean Government wrote as follows:

"...Titles are produced which each of the interested Parties declares to be clear, authentic and unquestionable... It seems just and proper that both Governments should reciprocally communicate the foundations of their claims..." (Ch. Ann. No. 8, p. 11).

76 bis. The Argentine Counter-Memorial itself cites several cases in which the Argentine Government sought to justify what it considered to be legal rights on the basis of effective occupation.

Thus the work of Velez Sarsfield, in order to justify Argentine claims, in 1850 relied upon the fact that

"that territory ... is under a present possession..." (Arg. Mem. p. 139, para. 22).

Similarly, an Argentine Note of 9 October 1873 invoked the

"...jurisdiction which the Argentine Republic had exercised in the Atlantic Ocean for half a century without opposition...",

whilst upbraiding the Chilean Government for not having

"...exhibited a single official document dating from before or after 1810 ... which would prove that Chile had, at any time, jurisdiction over the Atlantic coasts" (Arg. C.M. pp. 67-8, para. 24; cf. Arg. Mem. pp. 155-6, para. 40).

Furthermore, on several occasions the Argentine Government has invoked acts of sovereignty carried out on this coast in order to support its claim to the Atlantic coast as far as Staten Island (on these acts, see Arg. Mem. pp. 145-6, para. 31; Ch. Ann. No. 15, p. 22 at p. 28). Of particular interest in this connection are the following Argentine Notes: the Note of 30 June 1875 relying upon acts of sovereignty carried out by Argentina on the Atlantic coast as far as Staten Island in conformity with rights regarded by her as already subsisting (Ch. Ann. No. 17, p. 31, at p. 32); the Note of Sr. Irigoyen of 4 September 1875 trying to show that the Argentine Government exerted its jurisdiction on all the southern territories (Arg. C.M. Ann. No. 13, p. 67 at p. 70); the Note of 30 May 1877 emphasizing that "Chile never took possession of the Atlantic; this possession always belonged to the Argentine Government" (Arg. C.M. Ann. No. 10, p. 45 at p. 52) and insisting at length and in detail upon all the acts of jurisdiction carried out by Argentina on the Atlantic coast, and especially over "Isla de los Estados, situated towards Cape Horn, that is to say, in the southernmost part of this Continent" (ibid., at pp. 56-7; on this Note, cf. Arg. Mem. p. 162, para. 47, and Arg. C.M. p. 69, para. 27; cf. further on, para. 103).

77. Even to-day, the Argentine Government does not hesitate to avail itself of acts of jurisdiction purportedly carried out by Argentina before and after 1810 whilst at the same time alleging against Chile the lack of Chilean acts of jurisdiction. Thus the following passages appear in the Counter-Memorial:

"There is not a single reference to an act of jurisdiction by the Spanish authorities in Santiago, or later of the Republic of Chile, in any part of the Atlantic littoral as far as Cape Horn" (Arg. C.M. p. 63, para 19).¹

"The Spanish authorities of Buenos Aires before 1810, and *after this date the Argentine authorities, have permanent and continuously exercised jurisdiction* over all the Atlantic coasts from the Rio de la Plata as far as Cape Horn" (Arg. C.M. p. 75, para. 32).

78. To sum up, the Chilean Government is entirely in agreement with the Argentine Government as to the significance of *the principle of uti possidetis juris* of 1810 before the Treaty of 1881, which settled by a compromise the territorial dispute between the Parties. But this is as far as its agreement goes.

¹ Such an argument is based on wrong information but, at the same time, it is at the very least unexpected when the numerous charges formulated by the Argentine Government against Chile for having consistently sought to establish herself on the Atlantic are considered (in the "Jeanne Amélie" incident in 1876, etc.). The argument is more strange when one remembers the words used by Señor Irigoyen himself in the Argentine Chamber of Deputies in 1881. In his speech he mentioned several Chilean acts of jurisdiction on the Atlantic coasts, such as a Chilean warship landing a party in Rio Gallegos and leaving signals "of possession and dominion", the arrival of another Chilean ship at River Santa Cruz with "purpose of carrying out acts of jurisdiction" and the capture of the "Devonshire" (Irigoyen's speech, printed version, pp. 18-19). The Argentine Foreign Minister also mentioned the formal statement issued by the Government of Chile in 1873 to the effect that it would not tolerate any foreign "act of jurisdiction" south of the River Santa Cruz (Ibid., p. 56).

79. Where the Government of Chile differs from the Argentine Government is when it comes to defining *the role* of the principle of *uti possidetis juris* of 1810 in the territorial settlement of 1881 and in the interpretation of the Boundary Treaty of 1881.

The Argentine Counter-Memorial takes pains to try to establish that this principle was an integral part of the Treaty of 1881 and, with this object, it places reliance upon the negotiations leading up to the Treaty as well as the preamble of the latter, which states that the Parties were “giving effect to Article XXXIX of the Treaty of April 1856” (“dando cumplimiento al artículo 39 del Tratado de Abril del año 1856”). The motive of this essay has been shown above: to endow the “oceanic principle” and “the Cape Horn frontier” with a seemingly contractual basis, in the hope of representing them as having received formal recognition by the Treaty as institutions inherited from the colonial past.

80. It is correct, as the Argentine Counter-Memorial recounts, that the two countries have very often taken account of the *uti possidetis juris* of 1810. This is shown in particular by Article 3 of the Treaty of Friendship, Alliance, Commerce and Navigation signed on 20 November 1826 (Ch. Ann. No. 1, p. 1; see Ch. Mem. p. 21, para. 3; Arg. Mem. pp. 131-2, para. 14; Arg. C.M. p. 49, para. 5). However, it is worth noting that already in this agreement—the first to be concluded between the two countries which concerned frontiers—the Parties provided that the boundaries of their respective territories would be guaranteed “... *either as recognized before their emancipation, or later by virtue of special treaties*” (Ch. Ann. No. 1, p. 1).

The Argentine Government has probably not given sufficient attention to the latter part of this provision.

The principle of the *uti possidetis juris* of 1810 was enunciated by the parties in 1826; but *the determination of its actual content*, on the other hand, was going to lead to considerable difficulty. Each of the two Governments rested its claims on titles existing prior to 1810, with the result that, in practice, the application of the principle was invoked in contradictory senses by each of the Parties. The Chilean and Argentine Memorials have both given accounts of the endless controversy about title, evidenced by exchanges of diplomatic notes and by the publication, both in Buenos Aires and Santiago, of works of a more or less official provenance intended to establish the superiority of the claims of one of the States to those of the other (Ch. Mem. pp. 22-3, paras. 6-9; Arg. Mem. pp. 135-140, paras. 18-24; Arg. C.M. p. 50, note 13).

81. In this context the two Governments included in their new Treaty of Peace, Friendship, Commerce and Navigation of 1855 article XXXIX, the terms of which are worth recalling:

"Both contracting Parties recognise as the boundaries of their respective territories those existing as such at the time they broke away from Spanish domination in the year 1810, and agree to defer the questions that have arisen or may arise regarding this matter in order to discuss them later peacefully and in a friendly manner without resorting ever to force, and in case of not being able to reach a complete agreement, to submit the decision to the arbitration of a friendly nation" (Ch. Ann. No. 9, p. 12; cf. Arg. Mem. p. 141, para. 26; Arg. C.M. pp. 49-50, para. 6).

This article—to which, as the Court will be aware, the preamble of the 1881 Treaty refers—contains two complementary provisions: the first, confirming the principle of the *uti possidetis juris* of 1810 already propounded in the preceding Treaty of 1826; the second, providing that the differences already existing or which might arise in the future, in respect of the precise fixing of frontiers within the framework of this principle, would be settled eventually by means of one of the following modes of peaceful settlement: either friendly arrangement between the two Governments or arbitration by a third Government. Thus whilst reiterating the principle of the *uti possidetis juris* of 1810, the Treaty of 1855 deferred the resolution of the actual issues until such time as a friendly arrangement was concluded, or, in default of that, recourse to arbitration.

*"Terminada la discusión, las partes contratantes debían seguir uno de estos caminos; únicos a que habían prestado su concurso en el artículo 39 de dicho Tratado: la transacción o el arbitraje".*¹

"The debate having concluded, the contracting Parties were to follow one of these two routes; the only ones which they had agreed upon in Article 39 of that Treaty (1856's): a compromise or an arbitration".

82. The lengthy negotiations which developed between 1865 and 1881 had the implementation of this provision as their precise object in seeking a solution to the concrete problems concerning delimitation of frontiers whether by means of direct settlement or recourse to arbitration (cf. Ch. Mem. p. 23, para. 11; Arg. Mem. p. 143, para. 28; Arg. C.M. p. 50, para. 7). Thus it is that the first of the actual proposals for a settlement, that of the Chilean diplomat Lastarria in 1865, was formulated as having been made "in a desire to settle in a friendly manner the *question of borders* which they left pending by virtue of Article XXXIX of their Treaty of 30 August 1855" (Ch. Ann. No. 11, p. 15; Ch. Mem. p. 24, para. 11; Arg. Mem. pp. 143-4, para. 28; Arg. C.M. p. 50, para. 7). The point could not be made more clearly: the determination of frontiers had not been achieved in 1855 and consequently it was now necessary to settle this issue which had not been resolved in practice simply on the basis of the reference to the *principle* of *uti possidetis*.

The discussion of this process of the precise fixing of frontiers was to go on for some time. The Argentine Counter-Memorial itself refers to this distinction between the *principle* of the *uti possidetis*—of which there is no question—and its precise content—which was the true issue in the territorial dispute:

¹ The Chilean *Memoria de Relaciones Exteriores*, 1876, p. XXIV.

"The reference to the *uti possidetis juris* of 1810 by both Parties was constant in the complicated course of negotiations ... During these negotiations there was a very long discussion between the Governments (Frias-Ibañez correspondence) on the legal titles over the southern territories on the basis of the *uti possidetis juris* of 1810" (Arg. C.M. p. 54, para. 10).

83. In view of the formula involving either direct agreement or arbitration, reference was constantly made to Article XXXIX of the Treaty of 1855.¹

It is in this perspective that the Treaty signed on 18 January 1878 is to be placed: the Parties recalled that the Treaty of 1855 had embodied the principle of *uti possidetis* whilst referring the determination of its actual content to friendly arrangement or to arbitration; it was also provided that "the Governments of both Republics have maintained that their titles to dominion over the southern territories of the Continent are clear, precise and indisputable". For these reasons, the arbitrator was required to determine "what was the *uti possidetis* of 1810 in the disputed territories"²

The proposal of Sr. Elizalde of 30 March 1878 is to be seen within the same perspective. This proposal gave Sr. Barros Arana a choice: either a settlement by means of a compromise ("transacción") or an arbitration restricted to certain territories (Arg. C.M. pp. 135-6, para. 34; see also Ch. Ann. No. 29, p. 65; Ch. Mem. p. 29, para. 32; Arg. Mem. pp. 171-2, para. 58). In the same way, the Fierro-Sarratea Treaty of 6 December 1878, whilst recalling the principle of *uti possidetis*, submitted the question of its content to arbitration in conformity with the Treaty of 1855 (Ch. Ann. No. 31, p. 68; Arg. C.M. Ann. No. 4, p. 13; Ch. Mem. pp. 30-1, paras. 34-35; Arg. Mem. p. 174, para. 60; Arg. C.M. p. 58, para. 15, and p. 140, para. 35).

84. The negotiations of 1876, renewed and brought to a successful conclusion in 1881, had exactly the same aim: the precise determination of the boundaries of the two countries in accordance with Article XXXIX of the Treaty of 1855. The negotiators, from the very beginning, sought "a practical solution": it was a question of conciliating by means of a compromise, by a "transacción", the incompatible claims of the two Governments. As to this process, the Report of Sr. Irigoyen of 15 April 1877 leaves no room for doubt (Arg. Mem. Ann. No. 14, p. 133). In the event that no agreement was reached, an arbitrator was to determine "which was the 1810 *uti possidetis* in the territories in dispute?" (Report of Sr. Irigoyen of 24 June 1877: Arg. C.M. Ann. No. 3, p. 5, at p. 8). This was

¹ See for example the Chilean note of 29 October 1872: Ch. Ann. No. 15, pp. 22, at pp. 23 and 29; the Chilean Note of 31 July 1875: Ch. Ann. No. 18, p. 34 at p. 35; the Argentine Note of 4 September 1875: Ch. Ann. No. 19, p. 37; the official despatch of Baron D'Avril of 17 November 1877: Ch. Ann. No. 25(a), p. 50, etc.

² See Ch. Ann. No. 27, p. 58; Ch. Mem. p. 29, para. 31; Arg. Mem. pp. 170-1, para. 57; Arg. C.M. pp. 56-7, para. 14, and p. 134, para. 34).

confirmed by the Chilean Foreign Minister, Sr. Alfonso, in his speech to the Chamber of Deputies on 15 November 1877:¹ in respect of the negotiations of 1876 it was a matter of

“... *alcanzar primero un arreglo amistoso que pusiera término desde luego i por completo a la cuestión, i en defecto de este arreglo la constitución del arbitraje, en conformidad a las estipulaciones del Tratado de 1856*”.

“first reaching an amicable agreement which would, from that moment onwards and for good, bring an end to the question, and in the event of failing to come to a friendly agreement, to set up an arbitration, in conformity with the clauses of the 1856 Treaty” (Ch. Ann. No. 392, p. 11).

The matter was reported faithfully by Baron D'Avril when he informed Paris that:

“*Ainsi, la négociation pour un arrangement direct et amiable avait échoué. M. Barros Arana s'occupe alors de préparer l'arbitrage prévu par la stipulation de 1856*” (Ch. Ann. 25 (a) and 25 (b), pp. 50 and 53).

“Negotiations towards a straightforward and amicable settlement therefore failed. Mr. Barros Arana then set about making preparations for arbitration as provided by the 1856 stipulation.

85. In these circumstances the significance of the reference to Article XXXIX of the Treaty of 1855 in the preamble to the 1881 Treaty can be readily understood. As in the case of other solutions provided for since 1865, it was a matter of “giving effect to Article XXXIX of the Treaty of April, 1856” (“*cumplimiento al Artículo XXXIX del Tratado de Abril del año 1856*”) by one of the two procedures provided for in that article precisely for determining the frontiers of the two countries: namely, a direct agreement between the Parties. Thus the Treaty of 1881 involved implementing Article XXXIX of 1855, the two Parties having agreed to settle by means of a “*transacción*” the long fought issue of the effective determination of their frontiers. In the place of the *uti possidetis juris* the Treaty brought about a division of territories based upon a direct agreement, exactly in the manner prescribed in 1855. Consequently, it is with justice that Sr. Irigoyen was able to declare, in a passage of his speech already quoted earlier (para. 31):

“... We have considered a direct agreement, a compromise, which is in accordance with the spirit and the letter of the Treaty of 1856” (Arg. Mem. Ann. No. 12, p. 93, at p. 113).

86. The Argentine Government feigns to believe that the Chilean Government has deliberately disregarded this relationship between the Treaty of 1855 and that of 1881; it goes so far as to give the impression of having discovered the links between the two Treaties (cf. Arg. C.M. p. 48, para. 4). If the Argentine Government had read the Chilean Memorial with more attention, it would have found that the Chilean Government was well aware of the link between the Treaty of 1881 and that of 1855 (Ch. Mem. p. 56, para. 5,

¹ See also Ch. Ann. No. 391.

and p. 57, para. 7; see also Ch. C.M. p. 37, para. 4). As the Chilean Government has had occasion to write in its Counter-Memorial:

“...Article XXXIX of the 1855 Treaty was ... 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 ...’; and the 1881 Treaty purported nearly 30 years later to be the implementation of the 1855 Agreement” (Ch. C.M. p. 37, para. 4).

87. The foregoing observations justify the conclusion that the Treaty of 1881 in no wise recognized that the *uti possidetis* of 1810 was an independent principle governing the fixing of the boundaries of the two countries, so that it would be appropriate to-day to seek to establish the legal position in 1810 as a means of giving effect to the intention of the Parties in 1881. The Treaty of 1881 constituted that direct agreement provided for by Article XXXIX of the Treaty of 1855 and which the Parties had vainly sought after since then. The territorial settlement embodied in it was self-sufficient and involved no explicit reference to the legal position prevailing in 1810. Quite the contrary: by this settlement, reached at the conclusion of lengthy negotiations and at the cost of reciprocal concessions, the Parties intended to resolve peacefully (“resolver amistosa”), as they had envisaged ever since 1855, the annoying controversy over their respective titles which had deeply divided them for many years. This explains why, for example, in the face of a Chilean suggestion for adding to the six Bases of Agreement of 3 June 1881 a seventh Base providing for arbitration upon titles, with eventual financial consequences (Ch. Ann. No. 36(J), p. 85), the Argentine Minister Irigoyen had set up a categorical defence founded upon the apprehension that if this ‘fresh question’ were left in suspense,

“...the question as to titles would continue to divide them. Their Governments might find themselves impelled to appeal to the right thus reserved them and discussions would be renewed with all the unfriendly consequences they generally give rise to” (Ch. Ann. No. 36 (L), p. 88).

The intention of Sr. Irigoyen to end the disputes about the *uti possidetis juris* of 1810 once and for all could not have been more forcibly expressed, and it is clear that the rights of the Parties in the areas concerned could not in the future derive from any source other than the Treaty of 1881, which had made all prior rights *ipso facto* null and void.¹

88. The Argentine Government has gone to great trouble in its attempt to show that already prior to 1810 the disputed territories belonged to Argentina *de jure* (Arg. Mem. pp. 117-127, paras. 1-10; Arg. C.M. pp. 59-61, para. 18); and this has caused the Chilean

¹ Cf. Luis Varela, who analyses the Treaty of 1881 in the terms that it had instituted “a conventional line which bore no relation to the *uti possidetis* of 1810” (op. cit. p. 22). The French text reads: “une ligne conventionnelle qui ne répondait (pas) à l’*uti possidetis* de 1810”.

Government to show that this analysis does not bear examination (Ch. C.M. Appendix A, pp. 152-164). This issue, whatever its historical interest might be, has strictly no relevance to the present case, since it revives the endless discussions of the 19th century on the respective strength of the titles invoked by the two Governments, to which the Treaty of 1881 had the very object of putting an end. For the same reason the various territorial claims which the two Parties mooted at various stages of the extended negotiations are also irrelevant with respect to the Treaty of 1881.

89. It is easy to see to what an extent the Argentine Counter-Memorial misconceives the very character of the Treaty of 1881 and the relationship between the latter and the Treaty of 1855 when it dares to maintain that the principle of *uti possidetis juris* of 1810 was present throughout the negotiation of the 1881 Treaty and as a result formed part of it (see the passages of the Argentine Counter-Memorial cited above, para. 65).

Certainly the principle was present in the negotiations; but its presence served only to establish the uncertainty of its content and to induce the finding of a precise formula which would bring an end to the long standing dispute about boundaries.

In making this principle an "essential element" of the interpretation of the Treaty, the Argentine Government forgets that the territorial dispute arose precisely because the two Governments were unable to agree upon the content of the *uti possidetis juris* of 1810: otherwise how can one account for the number of delimitations envisaged by the Parties, and in particular the various proposals discussed by Sr. Irigoyen himself with his Chilean counterparts recounted in his Report of 15 April 1877 (Arg. Mem. Ann. No. 14, p. 133), and again in his speech of 1881 in the Chamber of Deputies (Arg. Mem. Ann. No. 12, p. 93)? Can it be said that each and every one of these formulations, in spite of their diversity, reflected the legal situation of 1810? The truth is that the formal recognition of the principle of the *uti possidetis juris* of 1810 provided no precise assistance in the determination of its content.¹

Without some procedure of actual implementation, this principle could only be applied with difficulty; it is this means which was brought into being by the Treaty of 1855 when it provided for either friendly agreement or recourse to arbitration, and it is this procedure which was finally put into effect by the conclusion of the *Tratado de Límites* of

¹ Some writers have emphasized the inability of the principle of the *uti possidetis* to provide effective guidance in settling boundary disputes (see for example P. de la Pradelle, *La frontière*, 1928, pp. 76 sqq.; Hyde, *International Law*, 2nd ed., 1947, pp. 498 sqq.; and cf. Waldock, *British Year Book of International Law*, Vol. 25, 1948, pp. 325 sqq.). International jurisprudence also gives some support for this view (cf. Fisher, "The Arbitration of the Guatemalan-Honduran Boundary Dispute", *American Journal of International Law*, Vol. 27, 1933, pp. 403 sqq.).

1881.¹ What the Argentine Government wrote in the arbitration over the boundary in the Palena river area is also true of the boundary in issue in the present case:

“The Treaty of 1881 marked a *new beginning* in the endeavour to settle the Argentine-Chile boundary, by substituting the Cordillera of the Andes for the *original uti possidetis juris principle which had proved inclusive*” (“Argentine-Chile Frontier Case”, Argentine Memorial, p. 190).

It is a matter for regret that the Argentine Government has not seen fit to maintain in 1974 the very discerning analysis of the Treaty and its relation to the principle of *uti possidetis* which it made only nine years ago.

90. In order to show conclusively, if it should still be necessary, how wrong is the argument of the Argentine Counter-Memorial to the effect that the *uti possidetis juris* of 1810, as “part of the Treaty of 1881” (Arg. C.M. pp. 45-6, paras. 1-2) would be “still vital for the understanding and the solution of the matter which has been submitted to the Court of Arbitration” (Arg. C.M. p. 78, para. 2), it is enough to follow the Argentine line of reasoning for a little way. It would have the consequence that, disregarding those provisions of the Treaty which define the terms of the “transacción”, the Court would be required to give effect to one and only one provision of this Treaty: the item in the Preamble which refers to Article XXXIX of the Treaty of 1856. Further, it would have the consequence that the attention of the Court must be focused upon the legal position of 1810 and thus must allocate Picton, Nueva and Lennox to Argentina or to Chile according to whether these islands fell within the Vice-Royalty of Buenos Aires or the Captaincy-General of Chile in 1810. In a word it would mean that the Court would see its task in terms of the situation prior to 1881 and as though the question put before it was still the question put to the Arbitrator by virtue of the Treaty of 18 January 1878: did the disputed territories belong to the Vice-Royalty of Buenos Aires or to the Captaincy-General of Chile (Ch. Ann. No. 27, p. 58)?

91. It is obvious that this cannot be the task of the Court. The Treaty of 1881 has been signed and ratified by the two States; it cannot be removed from the record by a mystical resurrection of the legal position of 1810. The sustained effort of the negotiators

¹ In order to support the argument that the Treaty of 1881 embodied the principle of *uti possidetis juris* of 1810, the Argentine Counter-Memorial refers to two Notes of Sr. Irigoyen of 23 August 1875 (Arg. C.M. pp. 68-9, para. 26, and pp. 83-4, para. 7; Arg. C.M. Ann. No. 7, p. 21, and No. 9, p. 41; cf. Arg. Mem. pp. 159-161, paras. 44-45). Read and reread these Notes as one will: in their texts can be seen the question of Chilean claims to the Strait of Magellan, of the *status quo*, and various other questions, but nothing concerning the *uti possidetis juris* of 1810. The very term is not to be found!

of the two countries could hardly have been undertaken merely to affirm an *uti possidetis juris* which has been shown to be impossible to apply in practice. The Treaty of 23 July 1881 cannot be reduced to a passage in its preamble; nor can it be seen on analysis as a mere confirmation of pre-existing uncertainties.

It is not the duty of the Court to breathe life into the 19th century controversies in order to discover and refurbish the "heritage of the past", and its role cannot be that which would have been appropriate prior to the conclusion of the Boundary Treaty. Far from it: the present arbitration is not concerned with the title to Picton, Nueva and Lennox at the end of the colonial period in the framework of the *uti possidetis juris* of 1810, but to decide upon the allocation of the three islands by means of the application of the provisions of the Boundary Treaty of 1881, in other words by reference to the compromise solution which, shouldering past disputes aside, now provides the sole source of the territorial rights of the two countries in the regions covered by it. The question of finding whether an "oceanic principle" existed before 1810, or between 1810 and 1881, simply makes no sense.

Conclusion

92. The Chilean Government deplores the fact that it has been forced to trouble the Court with extended explanations concerning a matter which may appear to it to raise no difficulty. However, once the Argentine Government had made the principle of *uti possidetis juris* of 1810 the keystone of its new case, it became necessary for the Chilean Government to expose this attempt to centre the whole case upon this principle: a principle the content of which was the object of so much disagreement between the Parties in the 19th century that they envisaged various compromise formulae; a principle which, far from being recognized as such in the Treaty of 1881, was entirely alien to it. By virtue of Article VI of the Treaty the rights of the Parties flow solely and exclusively from the Treaty itself: it can only be repeated that to ask the question, to whom did the disputed islands belong in 1810, would be to regard the Treaty of 1881 as non-existent.

The attempt of the Argentine Government to make the principle of *uti possidetis* "the all-important, historical boundary-criterion" (Arg. C.M. p. 85, para. 8) constitutes one of the least responsible operations of the Argentine Counter-Memorial, and also, as the Chilean Government hopes that it has shown, one of the feeblest. The famous "oceanic principle" which, according to the new Argentine version, has its basis in the *uti possidetis juris* of 1810, falls down at the same time and appears for what in truth it is: a complete myth, developed for the purposes of refurbishing a weak Argentine case.

(iii) *The "Oceanic" Myth and the Concept of the "Cape Horn Frontier"*

The absence of a basis for the "oceanic principle"

93. In the first "production" of the Argentine thesis, the "oceanic principle" and its corollary, "the Cape Horn meridian", were substantially based upon an assumed intention of the *two* Parties, throughout the 19th century, to make of it the "overriding principle" and the "fundamental criterion" for the settlement of their boundary problems. If this alleged common intention of the two Parties could have been established as a fact, the "oceanic principle" should have been considered as governing the interpretation of the Treaty, and any interpretation which ignored it would have had to be discarded as not conforming to the intention of the Parties; but the Chilean Government hopes to have shown in its Counter-Memorial that only a fictitious reconstruction of the intention of the Parties would allow the connection of the "oceanic principle" with the intention of the negotiators of the Treaty, for neither the Chilean Government nor even the Argentine Government ever made this "principle" the basis of the territorial settlement reached in 1881 (see Ch. C.M. pp. 19-20, paras. 18-21; pp. 39-43, paras. 8-15).

Thus it is not surprising to find that in its Counter-Memorial the Argentine Government has abandoned its attempt to present the "Atlantic-Pacific principle" as the expression of the *common* intention of the Parties. It has already been seen that the new Argentine version is content to assert that the *Argentine* Government, throughout the negotiations of the 19th century, had not ceased to defend the Atlantic doctrine and that Chile, on her part, had done everything possible to resist this "doctrine" even after the signature of the Treaty.

94. The problem, then, is to discover the source of the legitimacy, if any, of the "oceanic principle", given that it does not reflect the intention of the two Parties to the Treaty of 1881. The Argentine Counter-Memorial persistently alleges, but without supporting evidence, that the Argentine negotiators, and especially Sr. Bernardo de Irigoyen, set much store by this "principle" and that they had brought it to the attention of their Chilean counterparts on every possible occasion. The Chilean Counter-Memorial has shown that this was an *a posteriori* and unsubstantiated reconstruction of the history and that the Argentine Government in the 19th century had not the slightest idea of a "meridian of Cape Horn". The "Atlantic coast" which it then claimed bore no relation to the "Atlantic" concept which is set forth in the Argentine pleadings in the present case (see Ch. C.M. pp. 40-50, paras. 12-29; cf. pp. 164-173).

It is worth recalling that even eight years after the conclusion of the Treaty, the Argentine Government considered itself to have had title over "Pacific" territories. The source is a Memorial presented by Estanislao S. Zeballos to the Argentine Government

and approved by it on 24 December 1889, reference to which is found in the Report by the Argentine Expert Valentin Virasoro, dated 28 June 1893 (Cf. Arg. C.M. Ann. No. 63, p. 217, an "extract" which does not reproduce the section relevant to Zeballos' Memorial).¹ The proposition that Argentina had title over territories on the Pacific appears thus:

"II. Chile jamás había pretendido la Patagonia. El dominio de la República Argentina, confirmado por título derivado de autoridad real comprendía toda la Patagonia, la Tierra del Fuego y las tierras situadas sobre el Océano Pacífico, hasta 200 leguas contadas desde el Cabo de Hornos, hacia la Gobernación de Chile."

"II. Chile had never claimed Patagonia. The dominion of the Argentine Republic, confirmed by the title derived from royal authority, included the whole of Patagonia, Tierra del Fuego, and the lands situated on the Pacific Ocean, up to 200 leagues measured from Cape Horn towards the Gobernación of Chile."

However, the matter does not rest there. Even if it were true—and it is not—that the Argentine Government had throughout the 19th century defended a "principle of oceanic division" or a concept of the "Cape Horn frontier", that would still not mean that such a doctrine (peculiar to *one* of the Parties, and to which, as the Argentine Counter-Memorial itself avers, Chile has never adhered, with the exception of an imaginary acquiescence in 1876²) should have been applicable to-day as a principle of interpretation of the territorial settlement of 1881. How is it possible to write, as the Argentine Government does so readily, that the defence by *Argentina* of her sovereignty over the entire Atlantic coast "settled" the "principle" of the "exclusive Argentine jurisdiction in the Atlantic Ocean" (Arg. C.M. p. 73, para. 31)?

In this fashion an alleged political doctrine, purely Argentine and, therefore, unilateral, would have been the parent of a "principle" of law applicable to the *two* Parties and from which the Treaty of 1881 could not derogate: rarely in international proceedings is to be seen expounded a theory so contrary to the well established principles of international law.

95. In order to camouflage the purely unilateral character of the "oceanic principle" in its new version of the case, and in the hope of giving it at least a contractual flavour, the Argentine Counter-Memorial, as has been seen, has mounted a last rescue attempt in the form of linking this "principle" to the *uti possidetis juris* of 1810, which, according to it, should have been sanctioned by the two Parties, and not only by Argentina: thus the

¹ The Agents for Argentina, upon request, have transmitted to the Agent for Chile a copy of the Report by Virasoro.

² (Cf. Arg. C.M. p. 127, para. 30. On this point, see Chapter II of this Reply, paras. 10 et seq.).

“Atlantic principle” at the very least would have an indirect contractual basis, by means of the interposition of *uti possidetis*.

This is the meaning and the *raison d'être* of this “*uti possidetis juris of 1810*” operation, an operation which, as has already been shown, is devoid of any validity and which risks sliding the whole of the present case from the ground of the interpretation of the Treaty of 1881 towards geopolitical conceptions which are completely foreign to it.

96. Consequently the ground gives way under the famous “Atlantic-Pacific principle”: it is not a contractual principle, that is to say one which reflects the will of the two Parties; it is not even a principle embraced by the intention of Argentina when the Treaty of 1881 was concluded; and even if it had then existed, it would be a purely unilateral principle, valueless for interpreting the Treaty. At this point it is justifiable to ask the question: what exactly is this famous “principle”? The truth now appears in broad daylight: this “oceanic principle”, on which the Argentine Government founds its whole case, appears with features which in truth it has possessed all along, but which the Argentine Government has done everything possible to conceal. What is really involved is a fictitious axiom, lacking any historical foundations and all legal basis, created out of nothing by the Argentine Government for two distinct purposes. First, in order to hide the weakness of a claim purportedly based upon the provisions and general economy of the Treaty of 1881. Secondly, in order to prepare the way for Argentine claims concerning territory whose Chilean character nobody had dreamed of putting in issue.

97. Having knocked to pieces the oceanic myth on which the Argentine Government has built its entire case, the Chilean Government should be able to end its criticism there. But might it not be said that this shows a readiness to be satisfied with general observations and to shirk a detailed examination of the Argentine reasoning? Accordingly, the Chilean Government is obliged to round off the arguments developed earlier—and which in its opinion, are enough to put an end to the “Atlantic” postulate in the Argentine thesis—by some remarks directed to particular points.

98. So as to avoid repetition and not to weary the Court, the Chilean Government wishes at the outset to affirm in their entirety the observations made concerning this problem in its Counter-Memorial.

No doubt the demonstration that the Chilean Government, had, during the negotiations leading to the conclusion of the Treaty of 1881, never thought of any kind of “oceanic principle” is now somewhat out of place since, far from asserting the adherence of the two Parties to this so-called “principle”, the Argentine Counter-Memorial on the contrary paints a fresco of the incessant struggle which Argentina had to wage in order

to safeguard this "principle" against the "expansionism" of Chile. But, leaving that on one side, the observations of the Chilean Counter-Memorial retain their importance, in particular in establishing that even on the side of Argentina there was never a question, in the course of the negotiations of the Treaty, of any "Atlantic-Pacific principle" whatever. Chapter II of the present Reply will provide the occasion for the Chilean Government to refute in more detail the reasoning of the Argentine Counter-Memorial on this point: nevertheless it must be reaffirmed that a purely Argentine "oceanic" doctrine, that is to say a *unilateral* doctrine, cannot be given the status of a criterion for the interpretation of a *bilateral* instrument such as the Treaty of 1881, even if it were proved to have existed.

It is with the benefit of these observations that the Chilean Government proposes to set forth some views intended to supplement those already elaborated in its Counter-Memorial.

The "Oceanic Principle" and Navarino

99. The uncertain and contradictory nature of the "Atlantic principle" is brought to light by the attitude which the Argentine Government is constrained to take in regard to Navarino.

The Chilean Government has already indicated the problem in its Counter-Memorial: there it has asked how it is possible to reconcile the doctrine of the "exclusive Argentine jurisdiction on the Atlantic coast" with the recognition of the sovereignty of Chile over Navarino island, which, in the view of the Argentine Government, has an incontestable "Atlantic frontage" or "Atlantic façade" (Ch. C.M. p. 19, para. 19, and p. 60, para. 52).

The question, so elementary that one hesitates even to formulate it, remains completely unresolved in the Argentine Counter-Memorial, which gives the force of a general principle to the proposition that the Treaty of 1881 "...attributes to Argentina exclusive sovereignty over *every island* of the austral archipelago giving upon the Atlantic Ocean..." (Arg. C.M. p. 236, para. 25).

In order to find a way out of the impasse, the Argentine Counter-Memorial has found an unexpected answer: Navarino, it is explained, is

"...the last of the islands to be placed under Chilean sovereignty, because it is situated almost in its entirety on the 'Pacific' side" (Arg. C.M. p. 110, para. 23).

According to this, the criterion for distribution of territories should no longer be the presence of an "Atlantic frontage" but the proportion of territories and coasts respectively on the Atlantic "side" or on the Pacific "side", in other words to the east or to the west of

the meridian of Cape Horn.¹ But the Court may well wish to glance at a map. If this were the appropriate criterion of division, Tierra del Fuego itself would be placed under Chilean sovereignty, since it also, as in the case of Navarino, "is situated almost in its entirety on the 'Pacific' side". The Argentine reasoning is certainly rather less than coherent.

The Concept of "Atlantic coast"

100. The Argentine Counter-Memorial has taken great trouble in its attempt to establish that the claims of Argentina in the 19th century over the "Atlantic coast" included the territories and the waters to the south of Tierra del Fuego and Staten Island as far as Cape Horn.

The Chilean Government has given this argument its deserts in its Counter-Memorial (Ch. C.M. pp. 43-50, paras. 16-30). It has shown, on the basis of indisputable documentary evidence, that in the minds of the Argentine Government of the time, what was sought was the continuity of the Atlantic coastline from Patagonia as far as the furthest point on the arc of a circle formed by Tierra del Fuego and its natural prolongation, Staten Island. The islands to the south of this arc of a circle, that is to say beyond this natural and rectilinear section which represents the Beagle Channel on the maps, were not included in this claim to the "Atlantic coast", a claim which Argentina linked to some acts of jurisdiction carried out by her along the coast of Patagonia and upon Staten Island. The Chilean Government would like to add certain supplementary matter to the evidence provided in its Counter-Memorial.

101. First of all it is necessary to call attention to the fact that on the maps of the 18th and 19th centuries the term "Atlantic Ocean" was commonly applied only to the sea washing the coasts on the northern sector of the arc of a circle described above (see the cartography cited in "*Further Remarks...*", pp. 78-9). The oldest maps distinguish between the Atlantic Ocean, to the north of this arc of circle, and the sea area washing the southern islands, to which a variety of names are applied: 'Novum Mare Australe', 'Mare Magellanicum', 'Nouvelle Mer du Sud' (Ch. Plates 141, 143, 144, 149, 152).² This distinction was to persist for the better part of the 19th century. For example, it has been seen that in 1878 the map illustrating the Fierro-Sarratea Treaty of 6 December 1878

¹ This did not prevent the Argentine Government from proposing on 17 April 1879 a solution which gave to Argentina this very island of Navarino which is now described as "situated almost in its entirety on the 'Pacific' side". (Arg. Mem. p. 176, para. 61 and p. 423, para. 51; Arg. C.M. p. 145, para. 37. Cf. below Chap. II, para. 71.)

² For the views of the navigators in the 18th century, see "*Further Remarks...*", p. 78.

shows that by the expression "Sea and coasts of the Atlantic Ocean and the adjacent islands" the Parties did not have in mind the regions situated to the south of Tierra del Fuego and of Staten Island (Ch. Plate 11; Ch. C.M. p. 47, para. 22). Again, the map of Julio Popper illustrating a lecture given to the Argentine Geographic Institute in 1891—ten years after the conclusion of the Treaty of 1881—was to produce the new name "Argentine Sea" for what the author himself described as "*the unnamed maritime extension* which bathes the southern extreme of the Republic and which extends from Staten Island to Cape Horn and from the Beagle Channel to the Atlantic Ocean" (Ch. Plate 55; "*Some Remarks . . .*", p. 46). This map produced by Popper is all the more significant because it emanated from an author who was particularly favourable to the Argentine claims in this region (cf. Ch. Mem. p. 85, para. 2). The name "Mar Argentino", distinct from that of "Oceano Atlantico" is also to be found on another official Argentine map of the 19th century (Ch. Plate 125). From these items the Chilean Government does not intend to draw a conclusion about the geographic limits of the Atlantic Ocean, but, nevertheless, it believes that they confirm that in the course of the 19th century when the Argentine Government laid claim to the "Atlantic coast" that pretension related exclusively to the seaboard in the shape of an arc of a circle formed by Patagonia, the south-eastern extremity of Tierra del Fuego and Staten Island.

102. The Argentine Government denies that by its Note of 30 June 1875 asserting the existence of Argentine jurisdiction "to the extreme end of the Continent, that is, to the island of Estados" (Ch. Ann. No. 17, p. 31 at p. 32) it had restricted the concept of "Atlantic coast" to the coast of Patagonia, of Tierra del Fuego and of Staten Island. By this expression, of which the Argentine Counter-Memorial remarks that it "does not occur in any other document", the Argentine Minister of Foreign Affairs—it is alleged—desired only to describe the extreme point reached at this period by Argentine acts of jurisdiction, but did not intend to fix the limits of the Argentine claim to territory (Arg. C.M. p. 79, para. 3; cf. Ch. C.M. p. 45, para. 17).

103. However, it is the case that, two years after the Note of 1875, another Argentine Note, dated 30 May 1877, concerning the "Jeanne-Amélie" incident (on which, see Arg. Mem. pp. 161-2, para. 47, and Arg. C.M. p. 69, para. 27), signed by the Minister of Foreign Affairs, Sr. Irigoyen, was to describe the Argentine claims in the following terms:

"...the jurisdiction which this Government had in the Atlantic and which Y.E.'s Government declared it is prepared to respect comprised *all the territories of the South and the coasts thereof including the Strait as far as Punta Arenas*, and if a clearer demonstration is

necessary the undersigned would like to recall the 1868 concession of *Isla de los Estados*, situated towards Cape Horn¹ that is to say, in the southernmost part of this continent, to Captain Luis Piedra Buena" (Arg. C.M. Ann. No. 10, p. 45, at p. 57).

So in 1877 Irigoyen confirmed what he had written as early as 24 August 1875: that, in his view, the Argentine jurisdiction over "all the Southern coasts" extended "*as far and including the Straits*" and that "the jurisdiction always exercised by Argentina" over "*the coasts of the Atlantic*" extended "*as far as the Straits*". (Ch. C.M. p. 168).

In his report to the President of Argentina of 15 April 1877 relating to the negotiations of 1876, Irigoyen had also stated, in reaction to a renewal by Barros Arana of the proposal for a frontier on the Gallegos River, that he had once more expressed his "firm opposition to all proposals which would involve the abandonment of our rights to any point on the Atlantic" (Arg. Mem. Ann. No. 14, p. 133, at p. 143): the identification of the "Atlantic coast" as being that of Patagonia could not be any clearer than this.

This restricted meaning of "Atlantic coast" was shared by the Government of Chile. To the several documents invoked in its previous pleadings, the Government of Chile now adds a telegram which has recently come to light. (Ch. Ann. No. 399).

In that telegram, dated 30 May 1879, the Chilean Foreign Minister referred to a compromise proposal he had mentioned to Sarratea, the Argentine Envoy in Santiago, and described it as follows:

"all the coast of the Atlantic for the Argentine Republic, all the Straits and Tierra del Fuego to Chile, Staten Island to the Argentine Republic. An arbitrator will determine the boundaries of Central Patagonia, according to the titles . . ."

It is hardly necessary to underline the distinction drawn by the Chilean Foreign Minister between "*all the coast of the Atlantic*", on the one hand, and Tierra del Fuego with Staten Island on the other hand.

The Argentine Minister was to confirm the position later on in his speech to the Chamber of Deputies in 1881:

" . . . we were only trying to preserve our rights along the extensive coasts of the Atlantic and our dominion over the vast expanse which lies between Rio Negro and Magallanes" (Arg. Mem. Ann. No. 12, p. 93, at p. 102).

It is not without interest to recall that the incident concerning the "Jeanne-Amélie" which precipitated the Note of 30 May 1877 invoked by the Argentine Counter-Memorial occurred not in the vicinity of the southern islands but to the north of the Strait of Magellan, at approximately 50° latitude, off the coast of Patagonia.

¹ In the Spanish original: "*sobre el Cabo de Hornos*".

104. The documents cited above allow a better understanding of a passage in the speech of Sr. Irigoyen in 1881, by which the Argentine Government sets great store (Arg. Mem. p. 199, para. 77, and p. 418, para. 48):

“... 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 1500 miles ... and they will all remain under the exclusive jurisdiction of this Republic, whose flag will be the only one flying as a symbol of sovereignty from Río Negro down to the Strait and Cape Horn” (Arg. Mem. Ann. No. 12, p. 93, at p. 115).¹

The Chilean Government has already had occasion to suggest that this passage is to be clarified with the aid of another passage from the same speech, in which Sr. Irigoyen makes it clear that the Treaty of 1881 recognized the sovereignty of Argentina *over the coasts of Patagonia and Staten Island* (Ch. C.M. p. 48, para. 27).² This explanation is strikingly confirmed if this passage is compared with the two Argentine Notes referred to in the preceding paragraph. The Argentine claim as it was formulated as early as 1875 (and which had been satisfied by the Treaty of 1881) related to the Atlantic coast as far as the Straits, on the one hand, and, on the other, as far as Staten Island, “*sobre*” Cape Horn, that is to say first over the coast of Patagonia as far as the Strait of Magellan, then over its natural prolongation, the coasts of Tierra del Fuego and Staten Island.

This reference to Cape Horn as a shorthand form identifying what was in fact the southeastern extremity of the arc of a circle described above, and in particular Staten Island, is a familiar feature of Argentine documents at this time. It is to be seen, for example, in a document invoked by the Argentine Memorial as evidence of the exercise of Argentine jurisdiction over the Atlantic coast, namely the Argentine Law of 6 October 1868 conferring the concession to Luis Piedra Buena of Staten Island “*situada sobre el Cabo de Hornos*” (Arg. Mem. p. 146, para. 31).³ It is also to be found as it has been seen above in the Note of 30 May 1877 sent by Irigoyen to Barros Arana in which the Argentine Minister recalled an act of jurisdiction performed in favour of Piedra Buena. (Arg. C.M.,

¹ This passage comes from the printed version of the speech. Until now the Government of Argentina has failed to produce the original text of the speech or the Records of the House of Deputies which are supposed to include it.

² Furthermore, it is worth noticing that the reference to Cape Horn does not appear in the part of the Argentine *Memoria de Relaciones Exteriores* of 1882 which deals with the Treaty of 1881. Therefore, the Government of Chile could only know of the reference in the 1890's, when the printed text of Irigoyen's speech was made publicly available. (See Chap. II, para. 157).

³ The Argentine Government accompanies its translation of this passage with the word *sic* which is a clear reflection of its discomfort in the face of this assimilation of Staten Island to Cape Horn.

Ann. No. 10).¹ The relationship of this definition of Staten Island conceived as the extreme end of the continent and that of the Note of 30 June 1875 (so disputed by the Argentine Government) will not escape the attention of the Court.

105. The meaning of the passage quoted from the speech of Sr. Irigoyen thus becomes entirely clear, more particularly if it is compared with the two Argentine Notes of 30 June 1875 and 30 May 1876 (this latter Note being that of Sr. Irigoyen himself): Argentina was not claiming sovereignty as far as the precise geographical point known under the name of Cape Horn, but only sovereignty over the Atlantic coast as far as the extremity of the continent, that is to say as far as Staten Island, situated "on" Cape Horn. In order to support this claim Argentina availed herself of some few acts of jurisdiction, carried out by her on the coast of Patagonia to the north of the Straits and over Staten Island, and she wished to avoid losing the benefit of these acts. This is the real meaning of the claim over the "Atlantic coasts" as expressed, for example, in the Report of Sr. Irigoyen of 15 April 1877 to the Argentine President in which he insists on the fact that:

"... *ni al tratar del arbitraje ni al tratar de la transacción he abandonado **nuestra actual jurisdicción***² en todas las costas del Atlántico." (Arg. Mem. Ann. No. 14, p. 133, at p. 148).

"... neither when dealing with the arbitration nor when dealing with the compromise did I abandon **our present jurisdiction** over all the Atlantic coasts."

Argentina had exercised some acts of jurisdiction over the coast of Patagonia to the north of the Straits and over Staten Island (cf. Ch. C.M. p. 44, para. 17), but she had certainly not exercised acts of this kind over the islands to the south of Tierra del Fuego and Staten Island, and her claim over the "Atlantic coast" did not extend to these islands.

106. Thus, the mention of "Cape Horn" in certain Argentine documents needs to be given its proper significance, which differs from that attributed to it by the Government of Argentina.

¹ Similarly, a report of the Commissariat-General of Immigration of 10 March 1879 contains a reference to "la propiedad de la isla denominada del Estado, situada sobre el Cabo de Hornos". ("the ownership of the island called del Staten, situated on Cape Horn").

The text may be found in "Isla de los Estados. Documentos oficiales relativos a la reclamación de los herederos de D. Luis Vernet..." (Buenos Aires, Imprenta de la América del Sur, 1879).

² The Argentine Government translates "*nuestra actual jurisdicción*" by "our present *sovereignty*" (cf. also Arg. C.M. p. 111, para. 24). This somewhat inexact translation has been corrected in the English text above. Cf. the Note of Sr. Irigoyen of 24 August 1875 in which the Argentine Minister made reference to "*the jurisdiction always exercised* by it [Argentina] over the Coasts of the Atlantic until River Santa Cruz and as far as the Straits" (Ch. C.M. p. 168).

To begin with, the likely rhetorical intention of Irigoyen's words—already suggested by the Chilean Counter-Memorial—finds some support in the Argentine Counter-Memorial which invokes the views of two Argentine authorities to the effect that Irigoyen may have misled the Congress “to facilitate the approval of the Treaty”, as Varela put it. (Cf. Arg. C.M., p. 251, footnote 24; also Arg. Mem., p. 376, footnote 25).

But, even leaving aside these facts, the words attributed to Irigoyen may have been intended merely to emphasize that he had obtained from Chile the continuous Atlantic coastline from Patagonia as far as the Straits and, further south, of Tierra del Fuego and Staten Island, “situated on Cape Horn”.

It needs to be added that the “notes” said to have been sent by Irigoyen to some Argentine diplomats abroad (Arg. C.M. Ann. No. 55), where another reference to “Cape Horn” is found, do not appear to contain an *interpretation* of the Treaty but, rather, certain *comments* which, in the view of the person who wrote them, it might be useful to publish abroad. (See below, Ch. II, para. 157).

In this respect, anyway, it is interesting to see that, at the conclusion of his long and remarkable speech, the Argentine Minister did not fail to call to mind that the future of Argentina did not lie in the southern regions but further to the north:

“The Pampa with its vast plains; the mysterious jungles of Misiones; the little known bends of the Pilcomayo and the Bermejo; unbelievable channels; opening the Andes to steam locomotives, and the very roughness of Patagonia, have all been subjected to study, projects and relatively daring enterprises. But I do not recall that either the waters or the shores of the Strait were ever the object of thought or enterprise from anybody at any time. It would seem that destiny has desired to point to us silently that *neither the development nor the future greatness of the Nation lies in those parts*”. (Ch. Ann. No. 42, p. 116, at p. 141).¹

107. The foregoing provides the clearest confirmation that when the Argentine Government spoke, both before and after the conclusion of the Treaty, of her sovereignty over the “Atlantic coasts”, it had in mind the coasts of Patagonia “as far as the Strait” as

¹ The assertions of the Argentine Memorial to the effect that the territorial settlement of 1881 had as its object the protection of access to Ushuaia, “the base for its [Argentina's] sea communications in the south, its logical future area of development” (Arg. Mem. pp. 406-7, para. 42) and following from this the attribution to Argentina of Picton, Nueva and Lennox, keys to this access, take on a very peculiar flavour, in the light of Irigoyen's words.

well as their natural prolongation, the coastline of Tierra del Fuego and of Staten Island, "situated on Cape Horn": the islands to the south of Tierra del Fuego and of Staten Island were never embraced by the Argentine claim to the "Atlantic coast".¹

The "Vertical" Line of the "Cape Horn Frontier"

108. Even more than it does in its Memorial perhaps, the Argentine Government in the Counter-Memorial attaches capital importance to the concept of the "Cape Horn frontier", the so-called "vertical" frontier, that is to say north to south, on either side of which the land and waters are divided between the two States in accordance with an oceanic criterion: to Argentina what is to the east of this frontier, in other terms what is "Atlantic"; to Chile what is to the west of this frontier, in other terms what is "Pacific". Thus the Argentine Counter-Memorial speaks about

"...the delimitation of their 'vertically' adjacent territories from their respective northern boundaries..." (Arg. C.M. p. 77, para. 1);

and, reverting to the theory of "steps" already set out in the Memorial, it evokes the succession of a "horizontal" tier from the meridian of Cape Espiritu Santo to the meridian of Cape Horn, followed by a "vertical" step descending southwards in the direction of Cape Horn (Arg. C.M. p. 176, para. 17). According to the Counter-Memorial, the Beagle Channel line employed by Article III of the Treaty in order to allocate to Chile all the islands to the south of the Channel, could be nothing other than a waterway, which after a "horizontal" section—between meridian 68° 34' and the meridian of Cape Horn—descended "vertically" the length of the eastern coast of Navarino and then southwards in the direction of Cape Horn. This theory, to which the Argentine Government obviously attaches great weight, can be found expressed in various forms:

¹ The Argentine Counter-Memorial quotes two articles from newspapers published after the ratification of the Treaty, one in Buenos Aires, the other in Santiago, which, in the view of the Argentine Government, confirm the interpretation of the Treaty as embodying the "oceanic principles" (Arg. C.M. p. 178, para. 18). The Argentine Government has been rather incautious in quoting these two articles. The one from "El Constitucional" after having stated that "the *Atlantic coasts* remain, to their full extent, under the exclusive dominion of Argentine sovereignty", immediately adds (in a passage which the Argentine Counter-Memorial does not reproduce): "and the insular region to the South of the Strait will be divided from East to West between the two Republics along the line of the Andes" (Arg. C.M. Ann. No. 25, p. 99 at p. 100): so, for the Buenos Aires newspaper, as for the Argentine Government in the course of the long negotiations of the Treaty, the "Atlantic coasts" had nothing to do with the "insular region to the South of the Strait". As for "El Ferrocarril" of Santiago, on the very day in which it published the article quoted by the Argentine Counter-Memorial, it also published the Authoritative Map which showed that Picton, Lennox and Nueva belonged to Chile by virtue of the Treaty; adding that this map showed "the boundaries of Chile and the Republic of Argentina in accordance with the Treaty approved by the Congresses of both countries"! ("Some Remarks...", p. 19).

"The second step would follow the course of the Beagle Channel, 'horizontally' at first, and then curving towards the south, at more or less the meridian of Cape Horn, and towards that Cape. This was the essence of the proposals made by Minister Irigoyen in 1876, which later, in 1881, became the final clauses of the Treaty" (Arg. C.M. p. 86, para. 9).

"Starting at the intersection of the 68° 34' meridian with the Beagle Channel, this boundary (proposed in 1876 by Sr. Irigoyen) necessarily would have taken at first a 'horizontal' direction, following, from west to east, the course of the Beagle Channel as far as the longitude of Cape Horn, since the islands to the south of the Channel were attributed to Chile with the qualification that they were attributed as far as Cape Horn. From this point, the boundary along the Channel would have curved southwards" (Arg. C.M. p. 109, para. 23).

"...The boundary then would have continued towards the south, more or less along the eastern margin of Nassau Bay, towards Cape Horn" (Arg. C.M. p. 110, para. 23).

"...a second step formed by a 'horizontal' part following the course of the Beagle Channel from the meridian 68° 34' to the meridian of Cape Horn; and of a 'vertical' section—ever following the course of the Beagle Channel—along the eastern coast of Navarino, between that island and Picton, continuing then between Picton and Lennox and finally towards the south in the direction of Cape Horn". (Arg. C.M. p. 176, para. 17).

109. The concept of a "vertical" frontier which "more or less" follows the meridian of Cape Horn—and, as a corollary, the concept of a Channel which, by nothing less than a miracle, becomes at the same time "vertical" in order to follow the meridian in question—constitutes one of the most remarkable contrivances of the Argentine arguments. In its Counter-Memorial (see especially Ch. C.M. pp. 56-60, paras. 40-52) the Chilean Government has shown that the territorial settlement elaborated between 1876 and 1881 did not involve any division of territory based upon an oceanic criterion and did not give any room at all to a dividing line which "more or less" would follow the meridian of Cape Horn. The dominant concerns of those who worked out the settlement of 1881 were these: Patagonia, the Strait of Magellan, the continuity of Argentine sovereignty over the Atlantic coast from Patagonia in the north to the extremity of Tierra del Fuego and Staten Island in the south, and the maintenance of Chilean sovereignty over all the islands south of the Straits.

110. At this point it is useful to turn back once more to the dynamics of the territorial settlement of 1876-1881. As the Chilean Government has shown (Ch. C.M. pp. 64-67, paras. 6-10), it is the Dungeness-Andes line which in principle played the role of an "horizontal" dividing line between the two countries in this settlement. This basic idea was expressed earlier in the Irigoyen proposals of 1876:

"Esta línea será la división entre la República Argentina que quedará al Norte y la República Chilena al Sud."

"This line shall be the division between the Argentine Republic which will lie to the north and the Chilean Republic to the south."¹

¹ Translation taken from the Argentine Memorial, p. 164, para. 51.

It was subsequently affirmed in the course of the negotiations of 1881 conducted through the mediation of the two Osborns. On 9 May 1881 the United States Minister in Santiago was informed of the Chilean proposal of a dividing line north of the Straits, and added:

“The region to the south of this line, with the exception of the Island Los Estados which would be Argentine, would belong to Chile. The region to the North to the Argentine Republic” (Ch. Ann. No. 36(c), p. 80).

Consequently the Chilean Government on 9 May only recognized a single derogation from the line of the Straits, that of Staten Island, and it was not until 28 May that it was to accept a second derogation, in the form of the division of Tierra del Fuego, which the Argentine Government had made a condition *sine qua non* of the settlement (cf. Ch. C.M. p. 45, para. 18, and p. 54, para. 38). These two cases represented restricted derogations from a general principle: division by means of a “horizontal” line to the north of the Strait of Magellan.

The Argentine Government saw the matter in the same way. Thus on 20 May 1881 the representative of the United States in Buenos Aires made it known that while the Argentine Government upheld its claim relating to the division of Tierra del Fuego, apart from that “the whole to the south of the line would belong to Chile” (Ch. Ann. No. 36(F), p. 82).

This concordance between the Argentine and Chilean negotiators is hardly a matter for surprise: whereas Chile had for long laid claim to Patagonia up to a line far to the north, it was to be expected that the Argentine Government, which strongly contested this claim, should at the least accept, by way of compromise, that Chile should receive the territories to the south of the Straits, though with the exception of a part of Tierra del Fuego and of Staten Island.

111. The bases of 3 June 1881 as well as Article II of the Treaty were to give final expression to the principle of a division according to the “horizontal” Dungeness-Andes line. Since the Chilean Government had, on 28 May, eventually agreed to assign to Argentina territory to the south of this line not restricted to Staten Island but now including the eastern part of Tierra del Fuego, the Chilean Minister of Foreign Affairs, Sr. Melquiades Valderrama, took care to leave no room for misunderstanding when, on 3 June, he sent to the representative of the United States, for transmission to the Argentine Government, the text of the “terms of settlement which, as I take it, harmonize with the ideas recently manifested by both Governments” (“bases de arreglo que responden, segun creo, a las ideas manifestadas recientemente por uno i otro Gobierno”) (Ch. Ann. No. 36(K), p. 86; the Spanish text of the despatch of Sr. Valderrama appears in Ch. Ann.

No. 404, p. 46). Indeed, the second base left not the slightest room for doubt; after having defined the "horizontal" Dungeness-Andes line, it provided consequentially that:

"Los territorios que quedan al norte de dicha línea pertenecerán a la República Argentina, i a Chile los que se extiendan al sur, sin perjuicio de lo que dispone respecto de la Tierra del Fuego e islas adyacentes, la base tercera".

It is only after this setting out of a principle, and in the light of it, that the third base proposed by Sr. Valderrama was to attribute certain territories to the south of the line to Argentina and went on to confirm the attribution of all the remaining territories to Chile. The text of the second base elicited no more than the following terse commentary from Sr. Irigoyen: *Aceptada como se propone* ("Accepted as proposed") (Ch. Ann. No. 36(L), p. 87). It is in these circumstances that Article II of the Treaty signed on 23 July 1881 was to restate word for word the formulation of the final principle of the second base of 3 June.

112. Thus in the economy of the settlement of 1881 the attribution to Argentina of a half of Tierra del Fuego and of Staten Island took the form of an exception to the principle propounded at the end of Article II. As has been seen, this way of formulating the matter, resulting from the very nature of the negotiation, found expression in the text proposed on 3 June by Sr. Valderrama and in Article II of the Treaty. The provision of the Treaty is still more explicit than the text of the bases of 3 June: the division of territories by means of the "horizontal" Dungeness-Andes line in fact acquired a semi-colon in the text signed on 23 July. Hence the text of the Treaty reads:

"Los territorios que quedan al Norte de dicha línea pertenecerán a la República Argentina; y a Chile los que se extienden al Sur, sin perjuicio de lo que dispone respecto de la Tierra del Fuego e islas adyacentes el artículo tercero".

Thus, without any substantial change of the second base of 3 June, the principle according to which the "horizontal" Dungeness-Andes line constituted the basic division between the territories to the north and those to the south, stands out in clearer relief. At the same time it appears, with as much clarity as one could wish for, that the proviso *sin perjuicio* involves a limitation exclusively relating to the general attribution to Chile of territories to the south of the line.

113. It is this limitation attached to the attribution to Chile, as a principle, of all the territories to the south of the "horizontal" Dungeness-Andes line which was implemented in Article III of the Treaty, as it had been previously in the third base of 3 June. But in

order to show more clearly that it was only a question of giving content to a derogation, this provision at the same time involved a reiteration and confirmation of the attribution to Chile—which had already been effected in Article II—of all the other territories situated to the south of the line.¹

It was indispensable nevertheless to determine the exact limits of this derogation agreed to by Argentina. In other words, it was necessary to indicate precisely the western and southern bounds of the territories conceded to Argentina in derogation from the principle of the Dungeness-Andes line. And so the line of the meridian of Cape Espiritu Santo divided Tierra del Fuego from north to south *hasta tocar en el Canal Beagle*. Following from this in sequence was the line of the Beagle Channel itself, hugging the southern shore of Tierra del Fuego. Thus the territories recognised as Argentine by way of exception to the south of the Dungeness-Andes line were defined with precision, being encompassed in the right angle formed by the line of the meridian of Cape Espiritu Santo and the Beagle Channel. Consequently, the line of the Channel could not be anything but “horizontal” for its entire length: a line which, after having been “horizontal”, turned sharply into a “vertical” posture, would not have fulfilled the function required of it (cf. above, paras. 49-50).

114. The concept of a line which would have followed the direction of the meridian of Cape Horn “vertically” is thus completely incompatible both with the general philosophy of the settlement of 1881 and with the Treaty itself. It is provided in clear terms that the vertical line of the meridian of Cape Espiritu Santo terminates when it touches the Beagle Channel: if the Parties had intended to establish a “vertical” line of division to the south of the Channel also, either they would have prolonged that of the meridian of Cape Espiritu Santo or they would have given a precise indication of some alternative location. The negotiators of the Treaty were perfectly aware of the notions of longitude and latitude and they had made full use of them as a means of defining the Dungeness-Andes line in Article II as well as in prescribing the dividing line of Tierra del Fuego in Article III: if they had thought of converting into a boundary the “vertical” line of the meridian of Cape Horn, they would have so provided in plain terms. This would have been especially the case when, if one were to take the word of the authors of the Argentine Counter-Memorial, Sr. Irigoyen attached decisive importance to this frontier.

¹ It is necessary to emphasize that the clause *sin perjuicio* does not cover all the territories of which mention is to be made in Article III, but only *Tierra del Fuego e islas adyacentes*; if it covered all the territories mentioned in Article III, it would have been drafted thus: *...sin perjuicio de lo que dispone el artículo tercero*. The reservation exclusively thus concerns Tierra del Fuego, the islands to the east of Tierra del Fuego, and Staten Island. In contrast the islands to the east of the *costas orientales de la Patagonia* were not envisaged by the clause *sin perjuicio*: as far as these were concerned, Article III confines itself to confirming that these islands, situated to the north of the line, belong to Argentina.

115. Many other significant considerations show that the concept of a “vertical” frontier along the meridian of Cape Horn is in itself incompatible with the intention of the Parties.

As has been pointed out already, if the ‘vertical’ frontier of Cape Horn had been present to the minds of the Parties, the very concept of *al Sur del Canal Beagle* would have been singularly inappropriate: for then it would have been necessary, just as they had provided in Article III itself with reference to Tierra del Fuego, to attribute the islands to the west of the boundary line to Chile, and the islands to the east of it to Argentina; in employing a “vertical” alignment, it is appropriate to refer to “to the west” and “to the east”, but not “to the south”. The fact that Article III attributes to Chile *todas las islas al Sur del Canal Beagle* of itself excludes the hypothesis of a “vertical” frontier following the meridian of Cape Horn.

It is also evident that if the Parties had had in mind a “vertical” frontier, the division of territories would have had to be effected symmetrically: just as Article II attributes to Argentina the territories to the north of the Dungeness-Andes line and to Chile the territories to the south of this line; just as Article III provides that “Tierra del Fuego, divided in this manner, shall be Chilean on the western side and Argentinian on the eastern”; and, just as Article III defines as Argentine the islands *al Oriente de la Tierra del Fuego* and as Chilean those *al Occidente de la Tierra del Fuego*. If the Argentine interpretation were correct, it would have been necessary to provide not only that the islands to the south of the Channel up to Cape Horn (for which the Argentine Government would have one read “to the west of the meridian of Cape Horn”) were allocated to Chile, but also to add a clause providing that the islands “to the east of the meridian of Cape Horn” were allocated to Argentina.

Moreover, if the Argentine contention were right, the reference to the position of the islands in relation to the Channel would have been completely without point. For if *hasta el Cabo de Hornos* indicated a “vertical” frontier along the meridian of Cape Horn, it would have been unnecessary to allocate islands by reference to the Channel alignment.¹

Finally, if the boundary line was to be “the Cape Horn meridian”, why should only Staten Island be mentioned as allocated to Argentina? Why should the negotiators have omitted mentioning the others to the South—such as Picton, Nueva and Lennox—which appeared on all the available maps?

116. The unreality of the concept of “the Cape Horn frontier” stems from yet another consideration.

¹ This might be one of the reasons why the Argentine Government now attaches only secondary importance to the concept of Beagle Channel, as has been seen already.

In the course of describing the boundary in the rather short stretch between the Andean *divortia aquarum* and the Beagle Channel, Articles II and III of the Treaty refer to not less than ten geographical features. Is it really credible that, if the Parties had had in mind a line which after being "horizontal" was to become "vertical", with the effect of separating Chilean territory from Argentine territory on an east-west basis, they would not have taken the care to describe it with similar precision? Why is there this accumulation of geographical criteria for the Dungeness-Andes line, this meticulousness in the definition of the dividing line in Tierra del Fuego? Why such a sudden laxity if it was a matter of giving formal expression to this "heritage of the past": "the Cape Horn frontier"? The explanation is very simple: the negotiators of the Treaty did not think for a single moment of dissociating the fate of Picton, Nueva and Lennox from that of the other islands of the Cape Horn archipelago. For them *todas las islas al Sur del Canal Beagle* were to belong to Chile. There never was a question of defining or describing any "vertical" line cutting off one group from another.¹

117. The reading of *hasta el Cabo de Hornos* as meaning "to the west of the meridian of Cape Horn" is the offering which the Argentine Government asks the Court to place upon the altar of the "oceanic principle". The Chilean Government has given this strange method of interpretation the treatment it deserves (Ch. C.M. pp. 97-8, paras. 64-66). It only wishes to add a detail which is not without piquancy.

The Argentine Government makes a strong complaint of the Chilean Government having created "...the real distortion which must have been intentional..." by translating *hasta el Cabo de Hornos* as "down to Cape Horn",

"so as to introduce the idea of a downward direction, southwards, which the words *hasta el* do not imply" (Arg. C.M. pp. 113-4, note 49).

Yet in the English translation which it gave to the Treaty in the course of the arbitration of 1902, the Argentine Government itself translated *hasta el Cabo de Hornos* as "down to Cape Horn":

"...and all the islands south of Beagle Channel down to Cape Horn... shall belong to Chile".

"Down to Cape Horn", as the Argentine Government put the matter at the time; "up to Cape Horn", in the translation of the Chilean Government both now and in 1902: whether up or down those phrases are very unsuited to expressing the idea of a "vertical" line which would succeed in ruling out the attribution of islands to Chile *towards the east!*

¹ About the geographical concept of "Cape Horn archipelago", see Chapter V, para. 48.

118. Carried away by its enthusiasm for this "Cape Horn frontier", the Argentine Government goes on to describe its effects. Without doubt, one of the high spots of the Counter-Memorial is provided by the description of the views which would open up to the voyager rounding Cape Horn from west to east. To the west, "he would see only Chilean islands as far as Cape Horn". But beyond Cape Horn everything suddenly was to change:

"...once he had doubled the Cape, he would enter the Atlantic and would see the Argentine banner waving over all the islands he would encounter on his way towards the north-east" (Arg. C.M. p. 101, para. 17).

Thus, once the "frontier post" of Cape Horn was passed, the intrepid sailor would see the Argentine flag flying successively over Deceit Island, over Barnevelt, Evout, Terhalten and Sesambre, and then, further north, over Lennox, Nueva and Picton! ... The authors of the Argentine Counter-Memorial complain that the Chilean Government makes use of "forensic geography": they apparently prefer to take shelter behind "forensic poetry"! Perhaps after such a flight of fancy it would be rather prosaic to recall that the flag that actually flies over all these islands is the flag of Chile.

119. Moreover, the Argentine Government is incautious in making play with the mythical concept of the "Cape Horn frontier". For if this theory were applied thoroughly, it would be necessary to recognize *ipso facto* as Chilean, by reason of their placing entirely to the west of this "frontier", all the islands situated in the part of the Channel considered by the Argentine Government to be its "horizontal" sector. Are not Gable and Ushuaia Bay situated to the west of "the Cape Horn frontier" after all?

120. The Chilean Government will now bring to a close its refutation of the imaginary principle of the division of territories according to whether they are to be found to the east or to the west of a "vertical" line constituted by the alleged "Cape Horn frontier". It has already been shown above that these concepts were completely alien to the intention of the Parties, and even to the intention of Argentina alone, with or without the interposition of the *uti possidetis juris* of 1810. However, at this point something further must be said.

These concepts, which the Counter-Memorial puts in the forefront of its argumentation, are not only *external* to the territorial settlement worked out from 1876 onwards and definitively established by the Treaty of 23 July 1881, they are radically *opposed* to it. In this way, it is possible to see the eccentricity of the claim formulated by the Argentine Counter-Memorial that the "oceanic principle", as a "consequence" of the *uti possidetis juris* of 1810, attains the status of a sort of superior norm in the framework

of which the provisions of the Treaty are to be interpreted (Arg. C.M. pp. 75-6, para. 32). What the Argentine Government is asking the Court is neither more nor less than to move away from the interpretation of the Treaty of 1881 and to put the matter upon an entirely different footing: that of a geopolitical doctrine of an "oceanic" type which the Argentine Government hopes will lead to a result which it knows could not be attained by reasoning based upon the interpretation of the Treaty.

CONCLUSION OF CHAPTER I

121. The situation is now clear to view. As much by means of its general conception of the case as by the reasoning employed, the Argentine Counter-Memorial seeks to draw the discussion—and the Court of Arbitration—as far as possible from the point of departure.

122. It is to be remembered that at the outset the Parties were agreed about the mission of the Court and about the means of settling the dispute. The mission of the Court is defined by the *Compromiso*, namely: to determine to which of the Parties the territories (or, according to the Argentine formulation, the maritime jurisdictions) within the zone in the shape of a "hammer" described in the *Compromiso* should be allocated. As for the method of settling the dispute, following the exchange of the Memorials the Parties seemed to be agreed that the dispute was to be decided exclusively by the interpretation of the Treaty of 1881 (cf. Ch. C.M. pp. 12-13, para. 4).

123. Now, however, the Argentine Counter-Memorial confuses the tracks and changes the perspectives. The determination of the sovereignty over the zone of the "hammer" is masked by Argentina's extensive geopolitical preoccupations with control of the South Atlantic, and the Court is informed that she intends to claim all of the islands and marine areas to the east of the meridian of Cape Horn: henceforth Picton, Nueva and Lennox are no more than the initial objective, in some sense the outposts, of a dispute in which Argentina clearly intends to encompass Evout, Barnevelt, Sesambre, L'Hermite and Wollaston.

The new Argentine strategy required a new set of tactics. Thus it is no matter for surprise that the reasoning put forward to persuade the Court has also changed its ground. Whilst the Argentine Memorial strove to find a grounding for the claim of Argentina upon contractual foundations, now every effort is made to distract the attention of the Court from concepts which are too closely linked with the interpretation of the Treaty of 1881. The provisions of the Treaty cease to be the centre of interest; the definition of the course

of the Beagle Channel ceases to be the question behind the questions; the Treaty itself is no longer accepted as the exclusive source of the rights of the Parties in the region concerned, and its significance is in practice reduced to an alleged embodiment of the legal position prevailing in 1810. Consequently the *uti possidetis juris* of 1810 occupies the place left vacant by the concepts linked to the interpretation of the Treaty. No doubt the Argentine Government makes a show of relating this principle to the intention of the Parties. But it knows only too well that even appearances are not kept up: whom does the Argentine Government expect to convince that the endless negotiations prior to 1881, with their numerous formulas by way of compromise, should have merely led up to the formal recognition of the legal situation of 1810, the content of which had never ceased to be in controversy throughout the 19th century? Nevertheless that is the Argentine thesis: in 1881 the Parties recognized the *uti possidetis juris* of 1810, and, since this involved the division of territories according to the "oceanic" criterion, in other words that of the Cape Horn frontier, this same partition, this "heritage of the past", was at one and the same time brought about by the Treaty of 1881. In this way the Counter-Memorial is able to present the *uti possidetis juris* of 1810 and the "Atlantic-Pacific principle" as integral with the treaty of 1881.

124. The Chilean Government trusts that it has succeeded in removing these sources of confusion and in restoring certain fundamental truths.

(a) It would be absurd and illogical to interpret the long and difficult negotiation of the Treaty of 1881 as having resulted in nothing other than the formal recognition of the *uti possidetis juris* of 1810, the actual content of which the Parties had never been able to agree upon. The Treaty of 1881 represents a formulation of a compromise picked out from numerous other suggestions of one kind or another in the course of the ten years which preceded its conclusion; it constitutes the expression of a carefully elaborated compromise solution, whose foundation was laid by the Argentine Minister, Sr. Bernardo de Irigoyen in 1876, and which, after some modification and the removal of many obstacles, was finally adopted by both Governments. To reduce the Treaty of 1881 to the role of confirming the legal position of 1810, to refer to "a heritage of the past, still vital for the understanding and the solution of the matter which has been submitted to the Court of Arbitration" (Arg. C.M. p. 78, para. 2), and to hold this up as an interpretation of the Treaty, involves putting the reconstruction of the legal position of 1810 above all else. It constitutes a rather insulting belittling of the work of the negotiators and a failure to recognize the inventiveness and gifts of Sr. Bernardo de Irigoyen.

The formula suggested by the Argentine Minister in 1876 was *new* and not merely a facile confirmation of a vague *uti possidetis juris* of 1810. Thus it is the Treaty of 1881 alone which defines the territorial rights of the two countries in the regions to which it

applies, without there being any need to interpret it by reference to an *uti possidetis juris* of 1810 whose vagueness was the source of the very difficulties which the two Governments desired to clear up once and for all in the 1881 Treaty.

125. (b) The “principle” according to which the respective rights of sovereignty of Argentina and Chile in this southern region would be apportioned by virtue of an “oceanic” criterion, in the form that territories to the east of the “vertical frontier” constituted by the meridian of Cape Horn would belong to Argentina and those to the west of this “frontier” would belong to Chile, cannot conceivably have any basis.

126. — In the Argentine Government’s own profession, this “principle” cannot be considered to be the expression of the common intention of the Parties since, according to the Argentine Counter-Memorial, the Chilean Government consistently opposed an “oceanic” criterion of the apportionment of territory throughout the negotiation of the Treaty. The attempt of the Argentine Counter-Memorial nonetheless to link this criterion to the will of the Parties, by maintaining that the Treaty embodies the *uti possidetis juris* of 1810 and that the “Atlantic-Pacific principle” is a part of the latter, must be rejected: in the first place because, as it has just been pointed out, the *uti possidetis juris* of 1810 is not relevant to the interpretation of the Treaty of 1881; and secondly, because, in any case, the “oceanic” principle formed no part of the legal situation of 1810, as the Chilean Government has shown in Appendix A of its Counter-Memorial (pp. 152 et seq.).

127. — The “oceanic principle” and its corollary, the concept of the “Cape Horn frontier”, thus would constitute, at most, purely Argentine doctrines or pretensions, on which the Parties were never in agreement. This unilateral nature of the “oceanic principle”, at the same time, rules it out as a principle of interpretation of the Treaty.

But the Chilean Government does not leave the matter there: it has shown in its Counter-Memorial (and Chapter II of this Reply will deal with the matter in even greater detail) that the “oceanic principle” and the concept of the “Cape Horn frontier” cannot even be regarded as the expression of a unilateral pretension of the Argentine Government in the course of the negotiation of the Treaty of 1881.

128. (c) Consequently the “Atlantic-Pacific principle” and the concept of the “Cape Horn frontier” are completely alien to the Treaty of 1881 and are utterly irrelevant to its interpretation. It is possible to discern in these concepts political doctrines, dreamed up by certain circles in Argentina *subsequent to the conclusion of the Treaty of 1881*, and now blithely resurrected by the Argentine Government in order to lay claim to territories other than those allocated to her by the Treaty of 1881.

129. (d) The “oceanic principle” and the notion of the “Cape Horn frontier” are not only external to the Treaty; they are contrary to it. As the maps connected with the negotiation of the Treaty entirely bear out, to the south of Tierra del Fuego the territorial settlement of 1881 could only establish a “horizontal” delimitation intended to divide the Argentine territories of Tierra del Fuego and Staten Island from the Chilean territories formed by *todas las islas al Sur del Canal Beagle*. The idea of a “vertical” dividing line along the meridian of Cape Horn, within the framework of the territorial settlement of 1881, is a complete misinterpretation, and it comes as no surprise that none of the documents of the negotiation and none of the maps relating to them gives the slightest substance to such an idea: quite the reverse, it is a “horizontal” frontier, following the southern coast of Tierra del Fuego from west to east, which is shown with great clarity on the maps most closely linked to the negotiation of the Treaty.

130. (e) The Argentine Government knows only too well that the Treaty of 1881—whose origins and general economy are perfectly familiar to it—did not have as its object, and was not intended, to confer upon Argentina, sovereignty over all the southern islands having an “Atlantic façade”. This was not in the minds of the negotiators of either Government and, if the Argentine negotiators had formulated such a claim, there can be no doubt that the Chilean negotiators would have immediately rejected it.

Wanting to obtain to-day, by way of the present arbitration, a judicial blessing upon this geo-political doctrine of an “oceanic” type which it never had in mind before 1881 and whose blossoming is subsequent to the conclusion of the Treaty, the Argentine Government is forced to resort to distorting the discussion and recasting the dispute. Indeed, the Argentine Government attempts to turn the present arbitration to its own advantage in order to bring about a new territorial settlement, in substitution for that of 1881 which, for reasons which are patent, it appears no longer to regard as satisfactory. So, the Court of Arbitration is invited by the Argentine Government to undertake a virtual revision of the territorial settlement of 1881. The Chilean Government had previously formed the view that there were telltale signs of this in the efforts made by the Argentine Government, in its Memorial, to mould the interpretation of the Treaty to its present political requirements (cf. Ch. C.M. p. 99, para. 67). In its new case, the Argentine Government now comes out into the open and, in doing so, entirely confirms Chile’s earlier analysis of things.

CHAPTER II

FROM IRIGOYEN'S 1876 PROPOSALS TO THE 1881 TREATY

OBJECT OF THE PRESENT CHAPTER

1. The object of the present Chapter is to reply to Chapters III, IV and V of the Argentine Counter-Memorial.

In this connexion, the Chilean Government considers it necessary to submit one preliminary observation of very great importance.

2. Apparently, Chapters III to V of the Argentine pleading are concerned with the interpretation of the Treaty of 1881. Under the common title "Antecedents, negotiation and interpretation of the Treaty of 1881", they are devoted respectively to "The antecedents", that is to say, to the Irigoyen proposals of 1876 and the negotiations of 1877-79 (Chapter III); "The negotiation", that is to say, the final negotiations of 1881 (Chapter IV) and "The interpretation", that is to say, the way in which the Parties interpreted the Treaty during the period between its signature and its ratification and also during the months immediately following its ratification (Chapter V). At first sight therefore, the standpoint adopted seems to be that of the interpretation of the Treaty.

3. A careful consideration of these three Chapters leads, however, to a different conclusion. Far from establishing the *common intention* of the Parties, these Chapters give a lengthy account of their *divergencies*. An Argentine Government which is determined to impose the "Oceanic" criterion inherited from the past confronts a Chilean Government determined not to permit its "Atlantic" ambitions to be frustrated and impelled with the hope of "substituting for the entirely 'vertical', historical boundary, a new boundary with a 'horizontal' final section, with the aim of establishing Chile, at some latitude or other, on the Atlantic coast" (Arg. C.M. p. 82, para. 5); that is the picture with which the Court is presented by these three Chapters of the Argentine Counter-Memorial.

4. The Chilean Government might leave these pages of the Argentine document to plead for themselves; for where could it find a more brilliant demonstration of the fact that the wills of the two Parties never came together on this so-called "fundamental criterion" which the Argentine Government saw fit to make the corner-stone of its whole contention? Faced by what—to use an expression coined by the authors of the Argentine Counter-Memorial—one is tempted to call an "operation of self-destruction as effective as it is

unprecedented" (Arg. C.M. p. 381, para. 15), a point-by-point refutation of the Argentine allegations concerning the history of the negotiation of the Treaty may indeed seem to be superfluous.

5. If the Chilean Government has nevertheless decided to refute in detail Chapters III, IV and V of the Argentine Counter-Memorial, it is because it wishes to show that the Argentine negotiators themselves never argued in favour of any "Atlantic principle" or any "Cape Horn frontier" whatsoever and that these "principles" have therefore not even the value of a doctrine advocated unilaterally by one of the Parties. The "oceanic" preoccupations of Sr. Irigoyen in 1876, the momentary acceptance of these views by the Chilean Government in 1876 and then its rejection of them in 1881, the history of the Chilean attempt to modify the 1876 text and of the re-establishment of that text *in extremis* by Sr. Irigoyen—all this lies within the realm of pure and simple imagination. The Chilean Government felt it was its duty to re-establish the historic truth in the face of this attempt "to reconstruct the facts as they may have occurred" (Arg. C.M. p. 219, para. 19).

I. THE IRIGOYEN PROPOSAL OF 1876

6. As the Chilean Government has already had occasion to point out and to emphasize in its Counter-Memorial (Ch. C.M. pp. 14-15, para. 7), the two Parties are in agreement in attaching decisive importance to the proposals put forward by Sr. Irigoyen in 1876, and also, by way of consequence, to the negotiations which led up to them and those that followed them, since, according to the very accurate expression in the Argentine Memorial, the Treaty of 1881 constitutes "as 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). The Chilean Government can only welcome the fact that the Argentine Government has not altered its position on this point and that it confirms what it quite rightly terms "the absolutely fundamental importance of the negotiations of 1876" (Arg. C.M. Introduction, p. xv, and cf. pp. 82-83, para. 6). Accordingly it fully agrees with the opposite Party in thinking that "it is therefore imperative to re-examine the matter with some care" (Arg. C.M. p. 83, para. 6).

7. The detailed development of the negotiations has been elaborated upon already in the Chilean Counter-Memorial, and the Court is requested to refer to the important material there set forth (Ch. C.M. pp. 51-53, paras. 32-35). In particular, it is established there that according to Irigoyen himself "the dispute was finally reduced to the narrow

strip between 52° parallel and the Magellan Strait and also to Tierra del Fuego island" (Ch. C.M. p. 53, para. 34).

The Argentine Counter-Memorial devotes fifty pages to the 1876 proposals (pp. 82-133). Three questions are dealt with in turn: the frame of mind of the Argentine Minister (pp. 83-86, paras. 7-8); the analysis of his proposals (pp. 86-108, paras. 9-21); the Chilean understanding of the Irigoyen proposals and, in particular, the question of the Barros Arana map, which forms Plate 8 of the Chilean Atlas (pp. 112-133, paras. 25-33). These are the three points which will be considered in turn hereunder.

A. Sr. Irigoyen's "frame of mind"

8. The Argentine Memorial already sought to accredit the image of a Sr. Bernardo de Irigoyen who was the indomitable defender of the "Atlantic-Pacific principle": Was not his temporary absence from the Government given as the reason for the Elizalde proposals of 1878 and the Montes de Oca proposals of 1879, which showed so little regard for the "Oceanic criterion"? Was it not asserted that "with the return of Irigoyen to the Argentine Ministry of Foreign Affairs, Argentine policy reverted once more to its absolute adherence to the "Atlantic-Pacific (Arg. Mem. p. 423, para. 51)?

In the Counter-Memorial the portrait becomes clearer and the features more pronounced:

"There can be . . . no doubt about the *frame of mind* in which the Argentine Minister of Foreign Affairs entered upon the negotiations. His opposite number know perfectly well the limits beyond which Sr. Irigoyen would refuse to go, when it came to making concessions. Indeed, we know that, from the first meeting, Sr. Irigoyen drew the attention of the Chilean Minister to the fact that *Argentina would never adhere to a settlement including the attribution to Chile of any part whatever on the Atlantic coast, 'however tiny it might be'*"¹ (Arg. C.M. p. 84, para. 7).

Although the Argentine Minister, it continues, showed "great understanding . . . to certain vital Chilean interests", he was none the less "absolutely determined to put a stop to Chile's expansionist aims" and to ensure "the respect for the all-important, historical boundary-criterion of the *uti possidetis juris* of 1810, namely, that of strict division of coasts and jurisdictions, following the maxim: the Pacific for Chile, the Atlantic for Argentina" (Arg. C.M. pp. 84-85, para. 8).

This "frame of mind" which was that of Sr. Irigoyen at the moment of entering upon the negotiations, was never, we are told, to undergo any change subsequently. If the Argentine Government agreed to a few concessions in regard to the "Oceanic" doctrine in 1878, this was because, as had already been explained in the Memorial, Foreign Affairs were at that time in the hands of another Minister, Sr. Elizalde:

¹ Emphasis in original from "Argentina . . ." to the end of the quotation.

“...it is immediately apparent that that Minister's ideas were completely different from those of Sr. Irigoyen... he was not so intransigent as Sr. Irigoyen on the exclusion of any Chilean presence on the Atlantic” (Arg. C.M. p. 137, para. 34).

And if the final negotiations of 1881 evolved as the Argentine Government alleges they did, this is said to be because of the return to the Ministry of Sr. Irigoyen, “the indomitable champion of Argentina's exclusive presence on the Atlantic coasts from Rio de la Plata to Cape Horn” (Arg. C.M. p. 147, para. 1).

9. The objective pursued by the authors of the Argentine Counter-Memorial in stressing so insistently the frame of mind of the Argentine Minister is only too evident: since the Argentine negotiator of the Treaty was determined to safeguard the “Atlantic-Pacific principle” and the “Cape Horn frontier”, any interpretation of the Treaty of 1881 which does not incorporate these concepts must, according to the Argentine contention, be rejected *a priori*.

10. It is a singular approach that a Treaty is interpreted by reference to the frame of mind of *one* of the Parties and, more particularly, to positions which that Party had taken up before entering upon the negotiations. Even supposing that the Argentine Government had put forward such claims before the opening of the negotiations, those claims would have no more value for the interpretation of the Treaty concluded five years later than the unchanging claims of Chile over the whole of the territories of Patagonia. Even supposing that the Argentine negotiator entered upon the negotiations of 1876 with the “frame of mind” attributed to him, why should that “frame of mind” be more decisive in regard to the interpretation of the Treaty of 1881 than that of the Chilean negotiator who, for his part, entered upon the negotiations, as we know, with definite instructions to claim for Chile all the territories situated to the south of the Santa Cruz River or at least of the Gallegos River and also the whole of Tierra del Fuego (cf. Ch. Ann. No. 20, p. 41)? And if the Treaty was to be interpreted in the light of Sr. Irigoyen's determination to exclude any presence of Chile on the Atlantic coast even to the south of Tierra del Fuego, why should it not just as well be interpreted in the light of the Chilean Government's determination to maintain the sovereignty of Chile over all the southern islands? To make the position taken up by one of the Parties—and, what is more, its position at the outset of the negotiations—a decisive element in the interpretation of the Treaty which resulted from those negotiation and which embodied mutual concessions, constitutes a strange method of interpretation.

11. Furthermore, the documents relied upon by the Argentine Counter-Memorial in support of its study of the psychology of Sr. Irigoyen, do not in any way justify the conclusions which the Argentine Government draws from them.

We have already had occasion to show that Sr. Irigoyen's notes of 23 August 1875, which are cited by the Argentine Government as evidence of its alleged attachment to the doctrine of *uti possidetis* as the source of the "Oceanic principle" (Arg. C.M. pp. 68-69, para. 26, and pp. 83-84, para. 7) prove nothing of the sort, since, quite simply, they do not mention it (see above, Chapter I, p. 64, para. 89, note 1).

The note of 4 September 1875, which is also cited by the Argentine Government (Arg. C.M. p. 83, para 7), constitutes a reply to a protest by the Chilean Government against acts of jurisdiction carried out by Argentina on the Patagonian coast and does no more than mention the rights claimed by Argentina by virtue of the *uti possidetis*; it falls within the series of the innumerable diplomatic notes, both Chilean and Argentine, claiming such rights and has no weight with regard to the scope of the compromise territorial settlement proposed later by the Argentine Minister in 1876.

As for the notes of 30 May 1876 and 30 May 1877 (Arg. C.M. p. 84, para. 7) they do not relate to the negotiations already in course, but to the incident of the "Jeanne-Amélie" which had occurred *to the north of the Strait of Magellan*, off the coast of Patagonia; in them the Argentine Government reiterated once more its claim to the Atlantic shore of Patagonia and to Staten Island, just as in its earlier note of 24 August 1875 it had claimed for its country "the coast of the Atlantic until River Santa Cruz and as far as the Straits" (see above, Chapter I, p. 71, para. 103).

The notes cited by the Argentine Counter-Memorial fall within the context of the controversy over the rights to Patagonia and the Strait of Magellan and they have nothing to do with the problem of the southern islands. The purpose of the proposal put forward by Sr. Irigoyen in July 1876, moreover, was precisely to get round this controversy thanks to a compromise formula, as is clearly obvious from the detailed account given of it by the Argentine Minister himself in his report of 15 April 1877 to the President of the Republic (Arg. Mem. Ann. No. 14, p. 133).

12. The argument based on the allegedly "Oceanic" frame of mind of Minister Irigoyen will be finally disposed of by simply recalling two facts.

13. In 1878, Sr. Irigoyen gave his full agreement to the proposal made by his successor, Sr. Elizalde, and also to the map which was intended to illustrate it.¹ Yet the Argentine Government itself recognizes that the proposal and the map "employed a completely different criterion from that of Irigoyen" and maintains that they would never have been envisaged if the latter had still been the Minister for Foreign Affairs (Arg. C.M.

¹ "... the President and the ex-Minister Dr. Irigoyen approved the basis and map which I presented . . ." (Report of Dr. Rufino de Elizalde to Argentine Foreign Minister of 16 May 1878 - Cuestión de Límites con Chile, p. 5. Buenos Aires 1878) (Ch. Mem. p. 30, para. 33).

p. 137, para. 34, and Arg. Mem. pp. 172-173, para. 59; cf. Ch. Mem. p. 30, para. 33, and Ch. C.M. p. 43, para. 14). It appears to have forgotten that, a short time before, Sr. Irigoyen had proposed personally to Sr. Barros Arana a formula which would have left to Chile a fringe to the north of the Straits "*and all the islands to the south*". Nothing could have been clearer (see the telegram of Barros Arana of 7 February 1878: Ch. Ann. No. 343, p. 72).

14. In 1881, the Argentine Minister showed to the representative of the United States in Buenos Aires on a map the concessions he was prepared to make to Chile. In a despatch of April 1881, Thomas O. Osborn wrote in fact to the Secretary of State of the United States as follows:

"In my last interview, 31st of March last, with the Minister of Foreign Affairs, he pointed out to me on the map *the boundary line which his Government was willing to accept*—see Map 1876 line and dots—which yields to Chile all below the Straits and that portion north of the Straits from a point on the summit of the Andes to a point on the Straits..." (Ch. Ann. No. 35, p. 77. Cf. Ch. Mem. p. 33, para. 4).¹

The map in question is published as Plate No. 172 in the Atlas attached to the present Reply. The line shown on it agrees with the description given in the despatch from the United States diplomat: no territory to the South of the Straits appears as being allocated to Argentina.²

But it is time to put an end to these speculations as to the "frame of mind" of the the Argentine negotiator and turn to the consideration of the content and meaning of his 1876 proposals.

B. *Content and meaning of the 1876 proposals*

15. As the Court is aware, it was in the course of his negotiations with the Chilean diplomat Diego Barros Arana, and after lengthy discussions, that the Argentine Minister

¹ Two years earlier, Sr. Montes de Oca also had proposed: "*To the south of the Strait to Chile*" ("*Al Sur del Estrecho para Chile*") (See below, para. 72).

² The Argentine Counter-Memorial, obviously embarrassed by this all too clear expression of Sr. Irigoyen, hastens to read the words "*all below the Straits*" as granting to Chile merely "*possession of the entire southern shore*" (Arg. C.M. p. 150, para. 2). "All below the Straits" can, however, mean only "all the territories to the south of the Straits" and it alters the true meaning of this expression to limit it merely to the southern shore of the Straits. This is clearly shown also by the contrast in the above quotation between "*all below the Straits*" and "*that portion North of the Straits*"; in the first case what is covered is the whole of the territories to the south of the Straits, in the second only a fringe to the north of the Straits. Thomas O. Osborn's note of 20 May 1881 (Ch. Ann. No. 36(F), p. 82) was to confirm fully the meaning, about which there could already be no ambiguity, of Sr. Irigoyen's proposal as reported by the North-American diplomat on 4 April. It is sufficient to examine the map attached to the Osborn Despatch of 4 April to see that the interpretation given by the Argentine Counter-Memorial is purely imaginary.

Bernardo de Irigoyen submitted to his opposite number what he was later, in his speech in 1881, to call "a draft compromise solution, the same, to all intents and purposes, as the one now under discussion, in that the only difference is one of ten minutes". (Arg. Mem. Ann. No. 12, p. 93, at p. 102).¹ The two negotiators agreed on this formula, or, more precisely, they agreed to submit it to their respective Governments. That is what Sr. Irigoyen states in his Report of 15 April 1877:

"Having drafted these terms, we agreed to submit them to our respective Governments, and I must mention that the Chilean Minister specifically stated that he accepted them for submission to his Government" (Arg. Mem. Ann. No. 14, p. 133, at p. 141).

The Chilean diplomat fulfilled his undertaking in his despatches of 5 and 10 July 1876 (Ch. Ann. Nos. 21 and 22, pp. 42 and 43). Ignoring its negotiator's recommendation, however, the Chilean Government rejected Irigoyen's formula, because by making the dividing line start north of the Straits at Mount Dinero, it did not give Chile "the full and complete possession of all the Straits" (as to the Chilean refusal of the Irigoyen proposals, see Ch. C.M. pp. 46-47, para. 21, and p. 54, para. 39; Arg. Mem. pp. 167-169, para. 54 and pp. 416-417, para. 47). It was not until five years later that the shifting of the starting point of this line from Mount Dinero to Point Dungeness, accompanied by a displacement of the boundary line 10' towards the north, was to enable the Chilean Government to agree (cf. Ch. C.M. p. 55, para. 39).² It is quite natural that, in these circumstances, "Irigoyen's 1876 proposals" and "the Bases of Agreement of 1881" should be regarded as identical in meaning.

The so-called "system" of the 1876 proposals

16. Now, abandoning its earlier explanations, as has already been noted, concerning the determination of the Argentine negotiators to safeguard the means of access to Ushuaia and the predominance of Argentina over the zone of the Beagle Channel (see however Arg. C.M. p. 112, para. 24), the Argentine Government chooses to stress its

¹ The text of the formula proposed is reproduced in Spanish in Arg. Mem. pp. 165-166, para. 51. (The English translation is to be found in Ch. Ann. No. 22, pp. 43-44; Ch. Mem. p. 28, para. 26; Arg. Mem. pp. 164-165, para. 51; Arg. Mem. Ann. No. 12, p. 93, at p. 103, and No. 13, p. 131).

² The Chilean Government does not understand how the Argentine Counter Memorial can say that "in that way" (i.e. the location of the boundary at Point Dungeness) "all the Atlantic frontage including this small stretch of the eastern mouth of the Magellan Strait" (i.e. the stretch from Point Dungeness to Cape Virgenes) "remains under Argentine sovereignty". (Arg. C.M., p. 74, footnote 71) Even in the "secret instructions" of 1881, to which Argentina attaches such importance, Irigoyen himself explained that by the Treaty Argentina "gives up the part it has on the Straits . . ." (Arg. C.M. Ann. No. 55, p. 189 at p. 191). In its Memorial the Argentine Government expressed the same opinion as Irigoyen. (Arg. Mem. p. 374, para. 20); Irigoyen in 1881 "admitted to Chile the total ownership of both shores of the Strait . . ." (Arg. C.M. p. 223, para. 22).

theory of the “stepped boundary” the last two sections of which—those to the south of Tierra del Fuego—were, it was said, entirely maritime in character and followed a direction which was at first “horizontal” (from the 68° 34’ meridian “as far as the longitude of Cape Horn”) and then “vertical” (following “more or less the meridian of Cape Horn”) (Arg. C.M. p. 86, para. 9, and pp. 109-110, para. 23). That, we are told once more, is “the system which inspired the proposals” and of which it is said that “anybody who studies that system would appreciate with all needful clarity the course of the boundary which resulted from the allocation of the islands” (p. 109, para. 23). This “system” is presented by the Counter-Memorial in the following terms:

“Starting at the intersection of the 68° 34’ meridian with the Beagle Channel, this boundary necessarily would have taken at first a ‘horizontal’ direction, following, from west to east, the course of the Beagle Channel as far as the longitude of Cape Horn, since the islands to the south of the Channel were attributed to Chile with the qualification that they were attributed as far as Cape Horn. From this point, the boundary along the Channel would have curved southwards, following the bend which the Beagle Channel forms around Navarino, the last of the islands to be placed under Chilean sovereignty, because it is situated almost in its entirety on the ‘Pacific’ side. The boundary would have passed between this island and the islands of Picton and Lennox, which were expressly attributed to Argentina because they were situated *sobre el Atlántico* and, at the same time they were totally excluded from attribution to Chile as they were neither situated to the south of the course of the Beagle Channel nor to the west of the longitude of Cape Horn. The boundary then would have continued towards the south, more or less along the eastern margin of Nassau Bay, towards Cape Horn. This was the second step of the boundary conceived by Sr. Irigoyen for the solution of the problem of the southern sector of the Argentine-Chilean boundary” (Arg. C.M. p. 109-110, para. 23).

17. The “clarity” of the “system” described in the Argentine Counter-Memorial cannot be questioned—although it may seem surprising that it did not prevent the innumerable variations of the Argentine contentions since the end of the nineteenth century (cf. Ch. C.M. pp. 79-80, paras. 32-34). What is none the less certain, is that this “system” bears no relation whatsoever to historical truth. May it please the Court to refer to the actual text of the Irigoyen proposal: it will not find in it the slightest trace of any “longitude of Cape Horn”, any right angle change of direction at the level of that “longitude”, any line winding its way between Navarino, Picton and Lennox, any division of the “oceanic” type or any “entirely maritime boundary”.

But there is something even more serious. From reading the Argentine Counter-Memorial, it would be easy to gain the impression that the Argentine Minister put his proposal forward straightaway, at the very beginning of the negotiations, with a view to safeguarding his “oceanic” doctrine whilst taking account of “certain vital Chilean interests”. The truth is quite different. It is sufficient to read the Report of these negotiations which he himself presented to the President of the Republic on 15 April 1877 (Arg. Mem. Ann. No. 14, p. 133) and the account given by the Chilean negotiator, for his

part, to his Government in his despatch of 10 July 1876 (Ch. Ann. No. 22, p. 43), to realize that the negotiations were lengthy and difficult and that many other formulas were put forward by one or other of the two sides before arriving at the formula which they finally adopted. The discussion had borne mainly on Patagonia and the Strait of Magellan and also on the Argentine claim regarding the "Atlantic coast" (understood in the sense in which that term was taken at that time). Of the "meridian of Cape Horn"; of Navarino, the island said to be Chilean because it was "situated almost in its entirety on the 'Pacific' side"; of Picton and Lennox, said to be Argentine islands because they were "situated 'on the Atlantic' "; of a line which was vertical and then horizontal—of all that (which, according to the Argentine Counter-Memorial, constituted the essential matter) quite simply not a single word. The real meaning of the Irigoyen formula, as it emerged from the course of these negotiations which were centred on Patagonia, the Strait of Magellan and the continuity of the Atlantic coast-line, has been made clear by the Chilean Government in its previous pleadings (see in particular Ch. C.M. pp. 51-59, paras. 31-49); it has nothing to do with the ingenious but incorrect "system" today conceived by the Argentine Government.

The cartography used by Irigoyen and Barros Arana

18. According to the Argentine Government, "Sr. Irigoyen had in front of him a chart", this rather categorical assertion being at once toned down by the word "probably": "Probably, indeed, two charts were used for the Argentine-Chilean negotiations of 1876 and 1881, both compiled by the British Admiralty; these were the only authoritative maps of the austral regions of South America available at the time" (Arg. C.M. p. 87, para. 10). A little later, the assertion once more becomes categorical: "these were *the only maps* which were used during the 1876 and 1881 negotiations" (Arg. C.M. p. 478, para. 58).¹

19. It is difficult to see how this 1974 assertion, which is based on a mere hypothesis ("probably"), can be reconciled with the statement made in the Argentine Memorial, in 1973, according to which "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), which, moreover, was confirmed by Sr. Irigoyen himself in his speech in 1881 (p. 383, cited *ibid.*).²

¹ This wavering between a pure and simple assertion and a hypothesis is a characteristic feature of a method which is found frequently in the Argentine Counter-Memorial; whilst avoiding the reproach of saying untruths, it hopes to create an impression which the reader will be unable to shake off.

² The United States Minister in Buenos Aires also mentions in his account of the ratification debate in the Argentine Congress that Sr. Irigoyen referred to maps (note of 8 October 1881, Ch. Ann. No. 497, p. 164). (Cf. the speech by Irigoyen: Ch. Ann. No. 42, p. 116, at pp. 135 and 138).

It is therefore an entirely gratuitous supposition to allege that the two negotiators of 1876 consulted only two charts, when there existed many others—of which one at least was of Argentine origin, namely, the one prepared the previous year on the instructions of the Argentine Central Committee for the Philadelphia Exhibition. On these charts, nearly all small-scale, the Beagle Channel appeared as an almost straight-line division between Tierra del Fuego and the southern islands, a dividing line which of itself constituted an inevitable boundary line and which it was natural that the negotiators should have adopted as such without any discussion or difficulty (cf. below, Chap. IV, paras. 21-26).

20. The two charts used by the negotiators in 1876 and 1881 are said by the Argentine Government, to have been Admiralty Chart 554, revised by Mayne in 1867, and the famous Admiralty Chart 1373. But it is not upon the latter that the Argentine Counter-Memorial relies the most; the one it exploits throughout is Chart 554, or the Mayne Chart, to which it reverts on many occasions.

21. It is true that in his telegram of 5 July 1876, informing his Government of the Argentine proposals, Barros Arana said: "In order to understand the words of the Government of Argentina, please see map of the Strait of Captain Mayne" (Ch. Ann. No. 21, p. 42). This chart, which has not been precisely identified,¹ would have enabled the Chilean Minister for Foreign Affairs to whom the telegram was addressed to understand the solution proposed by Irigoyen in regard to the thorny problem of the Straits, on which the negotiations had been so difficult: it must have shown the eastern part of the Straits, with various possible starting points for a dividing line—Mount Dinero, Point Dungeness, Cape Virgenes; also Mount Aymond, over which the line suggested by Irigoyen passed; and finally the starting point of the line to the south of the Straits, Cape Espiritu Santo, the meridian of which was to divide Tierra del Fuego. No chart bearing the name of Captain Mayne—either No. 554 or another—showed the islands beyond the Channel, but that in no way impeded the understanding of the proposal by the Chilean Government since Barros Arana stated unambiguously that "all other islands to the south of the Strait would be Chilean".

22. Those being the facts, here now is what they become as presented by the authors of the Argentine Counter-Memorial:

¹ Contrary to the Argentine assertions, it is not possible to know precisely which was the "Mapa del Capitan Mayne" to which Barros Arana referred in 1876 (see "Supplementary Remarks..." on Arg. C.M. Map No. 5).

"Sr. Irigoyen showed this Chart to Barros Arana, in order to explain his ideas and to show him the actual course of the line he proposed. When Sr. Barros Arana himself . . . informed Santiago of Irigoyen's proposals, he recommended his Government to look at the Chart the better to understand them." (Arg. C.M. pp. 87-88, para. 10).

Thus far one can follow the Argentine Government (cf. Barros Arana's report of 1890, Ch. Ann. No. 58, p. 169, at p. 177).

But here comes the sudden twist. Since this chart stops short too soon towards the south and east to show the eastern section of the Channel and the southernmost islands, it could have been used by Irigoyen only for the purpose of showing his opposite number the *land* part of the frontier, in other words, the boundary line as far as the Beagle Channel; beyond that "it was necessary to change maps" (Arg. C.M. p. 89, para. 11). The Mayne chart—it is further asserted—is therefore "the Chart which Sr. Irigoyen had used to show Sr. Barros Arana the course of the *land* boundary he proposed on either side of the Strait" ¹ (Arg. C.M. p. 118, para. 27). From that to the conclusion that Irigoyen did not merely *show* the chart to Barros Arana, but that he *drew* that "land boundary", appears to have been just a short step. A few lines later indeed a new idea makes its appearance: that of "the boundary line *traced* and proposed by Irigoyen" (p. 119, paras. 27 and 28). Once that step had been taken, it only remained to establish the new version firmly by speaking of the line "that Sr. Irigoyen had *traced and showed* to the Chilean Minister". (Arg. C.M. p. 127, para. 30), of "the line *traced* by Sr. Irigoyen *and showed* by ² Sr. Barros Arana on Fitzroy's chart, revised by Mayne" (Arg. C.M. p. 188, para. 5). From a Chart which Barros Arana advises his Minister to consult in order to understand a part of his telegram, one is led to slide step by step to a chart on which there is said to have been a line *traced* by Sr. Irigoyen and *showed* to Sr. Barros Arana.

The purpose of this operation—conducted with remarkable artifice, it must be admitted—is obviously to rule out Plate No. 8 of the Chilean Atlas, that is to say, the map which Barros Arana attached to his despatch of 10 July 1876 in order to illustrate Irigoyen's proposals (Ch. Ann. No. 22, p. 43, at p. 45). Since the line proposed by Irigoyen was allegedly traced on a chart which did not show the eastern section of the Beagle Channel and the islands to the south of it—such is the Argentine argument—it follows that Barros Arana could have traced on the map attached to his despatch only that same line, that is to say a line to the north of the Channel:

"The attentive reader of Sr. Barros Arana's despatch of 10 July could not expect to see on the new map anything more than the boundary line traced and proposed by Irigoyen . . ."
(Arg. C.M. p. 119, para. 27).

¹ Emphasis in original.

² This should doubtless read: "to".

"One thing seems thus established ¹. The Chilean Government, when informing Parliament and foreign diplomats of the 1876 negotiations, presented Argentine proposals of that year as the Argentine Foreign Minister had formulated them; and showed the only line that Sr. Irigoyen had traced and showed to the Chilean Minister in Buenos Aires . . ." (Arg. C.M. p. 127, para. 30).

Such is the weak evidence with which the Argentine Government hopes to convince the Court that the "horizontal" section of the line appearing on Ch. Plate 8 cannot logically have been traced by Barros Arana: since Irigoyen "traced" in the presence of the Chilean Envoy only the line Dungeness-Andes and the line of Cape Espiritu Santo, how—one is asked—can it be imagined that Barros Arana could have had any idea of drawing a horizontal line that could not appear on the Mayne Chart?

23. The reasoning is admirable; unhappily for Argentina it is fallacious. There is no document that speaks of a chart on which Irigoyen "traced" a "land boundary" which stopped short at the Beagle Channel. Neither in Irigoyen's reports nor in his speech of 1881 is there any mention of such a fact. Furthermore, the Argentine Government contradicts itself, since it itself asserts that for the southern insular part the negotiators used, not the Mayne Chart but Chart 1373 on which the whole of the Beagle Channel is shown and also the islands to the south.² Can it plausibly be imagined that the Argentine Minister, who is presented as being so anxious to conserve for his country the "Atlantic" islands to the south of Tierra del Fuego, was not careful to draw (if indeed he drew anything at all) on Chart 1373, which he had before him according to the admission in the Argentine Counter-Memorial, the line which would have met this requirement?

The geographical concepts embodied in the 1876 proposals

24. With regard to Irigoyen's third basis, the Argentine Counter-Memorial repeats, but in briefer fashion, the analysis it had undertaken in the Memorial (in connexion with Article III of the Treaty) of the various geographical concepts of which use was made (Arg. Mem. pp. 363-404, paras. 17-41; Arg. C.M. pp. 89-108, paras. 12-21).

In its Counter-Memorial the Chilean Government has shown that the Argentine Government's interpretation obliges one to read almost every one of the terms employed in a sense different from the one it naturally bears in the context: Argentina would no

¹ It is to be noticed how easily the Argentine Counter-Memorial is able to "establish" without any foundations.

² "In order to deal with the 'islands', it was necessary to change maps as well as to change clauses . . . The Chart to which he (Irigoyen) referred when he examined the problems concerning the southernmost insular territories of South America was . . . the famous Chart No. 1373 . . ." (Arg. C.M. p. 89, para. 11).

longer have attributed to it "*las demas islas que haya sobre el Atlantico al Oriente de la Tierra del Fuego*", but "*the other islands there may be on the Atlantic or facing it in the eastern part of the archipelago of Tierra del Fuego*"; as for Chile, it would no longer receive "*todas las islas al Sur del Canal Beagle hasta el Cabo de Hornos y las que haya al Occidente de la Tierra del Fuego*", but "*all the islands to the south of the Beagle Channel and to the west of Cape Horn and those there may be in the western part of the archipelago of Tierra del Fuego*". The Chilean Government does not intend to repeat this demonstration, and it begs the Court to be good enough to refer to it (Ch. C.M. pp. 67-99, paras. 11-67); here it will confine itself to refuting the few new elements which the Argentine Counter-Memorial has been able to contribute.

25. (A) The meaning of "*Tierra del Fuego*" in the third basis of 1876 (and therefore in the last sentence of Article III of the Treaty).

The Argentine Government persists in maintaining that, although the expression "*Tierra del Fuego*" does relate to Isla Grande in Irigoyen's second basis the same words refer to the whole of the southern archipelagoes in the third basis: whence it would follow that Sr. Irigoyen intended to give Argentina the islands of the eastern part of the archipelagoes, in other words, the "Atlantic" islands situated to the east of the "Cape Horn frontier". The arguments advanced in the Counter-Memorial in support of this surprising change in the meaning of the same word as between the second and the third of the 1876 proposals—and as from one sentence to another in Article III of the Treaty—are as weak as those which are put forward in the Memorial and which the Chilean Government has already refuted.

26. (a) It is first alleged that Chart 1373 uses the term "*Tierra del Fuego*" in its broad sense, covering all the islands of the archipelago:

"It was therefore logical that Sr. Irigoyen . . . referring to a chart in which the term *Tierra del Fuego* is clearly used for the entire archipelago, himself used the same language" (Arg. C.M. p. 91, para. 13).

The Chilean Government will first observe that the argument goes too far, for the Argentine Government itself does not dispute the fact that in the second of the 1876 bases the *Tierra del Fuego* which is divided by the Cape Espiritu Santo meridian is nothing but Isla Grande. Why should Sr. Irigoyen have followed Chart 1373 for the third basis but rejected it for the second? The Argentine argument is truly weak.

If it was desired at all costs to deduce something in this connection from Chart 1373, it would moreover be the opposite of what the Argentine Counter-Memorial seeks to find there. If the Court will be good enough once more to consult this chart (published as Ch.

Plate 4 and Arg. Mem. Map. 11), it will note that the name Tierra del Fuego does not appear there, except in the title, which is worded: "*The south-eastern part of Tierra del Fuego with Staten Island, Cape Horn and Diego Ramirez Islands*". The chart does indeed show "*the south-eastern part of Tierra del Fuego*" (i.e. Isla Grande), and also the islands mentioned in its title, which constitute the outermost reference marks of the chart. If it does indicate anything else it is that "Tierra del Fuego" is a concept that is distinct from "Staten Island" and "Cape Horn", and can therefore relate only to Isla Grande.

27. It should however be recalled that, in any case, charts and narratives of the discovery cannot be considered as being *ipso facto* conclusive for the interpretation of the 1876 proposals and the Treaty of 1881. It is certain that the term "Tierra del Fuego" was used—and is still so used today—to designate sometimes Isla Grande and sometimes the whole of the southernmost archipelagoes. The problem is not to find out what this term can cover, but what it does in fact cover in the context of the 1876-1881 formula. The Chilean Government has shown in its Counter-Memorial that the Tierra del Fuego of the third basis of 1876 is precisely the same Tierra del Fuego as that of the second basis, namely, Isla Grande. (Ch. C.M. pp. 73-74, paras. 21-23). Against this evidence Fitzroy's charts and narratives, even supposing they have the interpretation put on them by the Argentine Government, are of no avail.

28. It must be pointed out also that the later charts, which illustrate the negotiations more directly, quite clearly limit the name "Tierra del Fuego" to Isla Grande. This is true of the Argentine 1875 map used by Barros Arana (Ch. Plate 8); of the map which Irigoyen sent to Mr. Petre in 1881 (Ch. Plate 21); and of the map which Barros Arana annexed to his report in 1890 (Ch. Plate 49).

Contrary to the insinuation made in the Argentine Counter-Memorial (Arg. C.M. p. 92, note 29), it is therefore not only maps of doubtful authenticity and validity that support the toponym of "Tierra del Fuego" as relating only to Isla Grande.

29. (b) No less weak is the argument based by the Argentine Counter-Memorial on the fear expressed by the Chilean Government on 18 May 1881, concerning the "indeterminación" of the boundary proposed for Tierra del Fuego and the suggestion which it made in the same telegram to the effect that the whole of Tierra del Fuego should be reserved for Chile in order to avoid any future difficulty. According to the Argentine Counter-Memorial there could be no such anxiety concerning Isla Grande, which was going to be clearly cut by meridian 68° 34'; the anxiety could therefore relate only to the southern islands. The Argentine Government seems to attach great importance to this reasoning since it returns to it on at least four occasions (Arg. C.M. pp. 93-95, para. 15; pp. 109 and 110, para. 23; pp. 127-128, para. 31; pp. 154-155, para. 5).

It is however sufficient to refer to the telegram of 18 May 1881 (Ch. Ann. No. 36(E), p. 81) and to replace it in the context of the 1881 negotiations to grasp its significance.¹

In order to give Argentina a continuous Atlantic coast-line as far as Staten Island, where it had performed some acts of jurisdiction, Irigoyen and Barros Arana had in 1876 envisaged a twofold exception to the principle that all the territories to the south of the Strait of Magellan should be Chilean; according to the 1876 bases, Argentina was indeed to obtain, in addition to Staten Island itself, the eastern part of Isla Grande. The Chilean Government having refused to subscribe to these bases in August 1876, negotiations were resumed in 1881. At first, the Chilean Government tried to limit to Staten Island the exception to the principle that all the territories to the south of the Straits were to belong to Chile. This is clear from the telegram of 9 May 1881 (Ch. Ann. No. 36 (C), p. 80), in which the Chilean Government proposed that: "The region to the south of this line, *with the exception of the island of Los Estados*, which would be Argentine, would belong to Chile". It is this attempt to limit to Staten Island the exception granted to Argentina which is confirmed by the telegram of 18 May. To justify this attempt, the Chilean Government pleads the indefiniteness of the boundary proposed for the division of Tierra del Fuego (i.e. Isla Grande). The Cape Espiritu Santo meridian was certainly theoretically accurate, but it passed through regions that were still but little known, and its purely abstract trace called for material demarcation which when undertaken proved to be very difficult. This demarcation was indeed to give rise to many problems and forced the two Governments, among other things, to look for a solution on the identification of the Cape Espiritu Santo in the 1893 Protocol (see Ch. Mem. p. 71, para. 7; p. 74, para. 15; p. 75, para. 18; Arg. Mem. pp. 204-207, paras. 3-5). It also made necessary the use of twenty-five boundary-posts placed along the boundary, a task which could not be completed until 1895 (Ch. Mem. p. 77, para. 22, and Ch. Ann. No. 66, p. 198). The fears expressed on 18 May 1881 by the Chilean Government regarding the second basis of 1876 were therefore not purely imaginary.

The Argentine Government having made known as early as 20 May that it was making the partition of Isla Grande a condition of the settlement, the Chilean Government ended up by accepting it on 28 May, and in consequence submitted on 3 June the well-known six "bases of agreement" (see Ch. C.M. p. 45, para. 18, and p. 54, para. 38).

The fears expressed by the Chilean Government on 18 May 1881 were thus related to the second of the 1876 bases, the one in which the term "Tierra del Fuego" referred, as agreed by the Argentine Government itself, to Isla Grande. In regard to the "islas" of that

¹ Some confusion is caused, in this respect, by the English version of this telegram. For the Spanish text refers to "*indeterminación de deslindes*", and not to "the boundaries *not being fixed*". The meaning of the Spanish phrase is clear: the Chilean Government was worried by the "confusions as to jurisdictions" which might arise from the choice of a boundary which would not be visible on the ground, such as a natural feature would.

third basis there was no need for any "anxiety": the formula proposed by Sr. Irigoyen did not entail the slightest "*indeterminación de deslindes*", since it was already agreed that, in principle, all the territories to the south of the Andes-Dungeness line were to belong to Chile. If this "indeterminación" had related to the "islas" and not to "Tierra del Fuego" the two Governments would have taken care to remove it by means of a more detailed description of the allocation of the islands. There can be no doubt that Irigoyen would have readily agreed that in the Treaty, the course of the frontier along the Cape Horn meridian (assuming he really had that line in his mind) should be clearly described so as to leave no "*indeterminación de deslindes*" in regard to the "Atlantic" islands to the south of Tierra del Fuego.

It is difficult to see how the telegram of 18 May 1881 could have related to a "Tierra del Fuego" other than Isla Grande. The 1876 proposals, which served as a basis for the negotiations of 1881, contained two separate provisions, one devoted to the "Division de Tierra del Fuego" and the other to "Islas". Again and again the telegrams throughout the 1881 negotiations draw the distinction between "Tierra del Fuego" and "islands" (see for example Ch. Ann. No. 36 (D), p. 81; cf. Ch. Ann. No. 36 (I) and No. 36 (J), p. 84, reproduced also in Arg. C.M. p. 156, para. 6). This was made particularly clear by the Argentine Government when it replied to the telegram of 18 May by a telegram which referred to "Tierra del Fuego and islands" (Ch. Ann. No. 36 (F), p. 82).

It was therefore somewhat imprudent of the Argentine Counter-Memorial to allege that, with that telegram of 18 May 1881, it furnished "documentary proof" that the term "Tierra del Fuego" applies, both in the third basis of 1876 and also in the last sentence of Article III of the Treaty, to all of the archipelagoes to the south of the Strait of Magellan (Arg. C.M. p. 95, para. 15).¹

30. (c) Many other documents could be cited in support of the interpretation of "Tierra del Fuego" as referring solely, in Irigoyen's proposals, to Isla Grande. Apart from the actual structure of the 1876 formula and the maps mentioned in para. 28, above reference can be made to the whole of the documents relating to the demarcation of Tierra del Fuego, between 1890 and 1895. In them "Tierra del Fuego" is *always* taken as synonymous with "Isla Grande" (cf. below, Chapt. III, para. 89). Thus the Argentine Government writes to its Expert on 7 May 1890 with regard to "mapping out the line in *Tierra del Fuego from Cape Espiritu Santo to Beagle Channel*" (Ch. Ann. No. 53, p. 163). The Argentine Expert did likewise on 3 July 1890 (Ch. Ann. No. 57, p. 168).

¹ The Argentine Government was more reserved on this matter in its Memorial, in which it did not attempt to deduce any such risky conclusions from the telegram of 18 May 1881 (see Arg. Mem. p. 186, para. 70).

Such was also the attitude of Barros Arana in his report of 1890 (Ch. Ann. No. 58, p. 169 at p. 177). The two Experts shared the same point of view in their Minute of 16 April 1892 (Ch. Ann. No. 61, p. 188). The instructions given to their Experts jointly by the two Governments on 1 January 1894 left not the slightest room for doubt (Ch. Ann. No. 65, p. 196). And what of the Minute drawn up on 9 October 1895 by the two Experts to record that "the operation of demarcation and marking of Tierra del Fuego was terminated" (Ch. Ann. No. 66, p. 198)?¹ It will be noted with interest that the drafting of this Minute, in which "Tierra del Fuego" is indisputably synonymous with "Isla Grande", took place *after* the Argentine Government had asked its assistant on the demarcation sub-commission, Lieutenant Juan Martin, for his opinion on the concessions granted by Chile in respect of Picton and Nueva and after Martin had stated that, in his opinion, those two islands belonged to Chile but that it would be preferable to have the question studied in London (Arg. Mem. pp. 216-219, paras. 20-23).

It may be added that, when reporting to his Government on Irigoyen's proposals, almost immediately after they were put forward, Barros Arana had drawn a clear distinction between "Tierra del Fuego" and the "Islands" (telegram of 5 July 1876 (Ch. Ann. No. 21, p. 42)). On this point, nothing could be clearer than the Report submitted to the Argentine Government by Expert Virasoro in 1893:

*"El comienzo de la demarcación en la Tierra del Fuego sufrió también entorpecimiento, por no haber podido ponerse de acuerdo las comisiones en la elección del punto de partida del meridiano, que según el tratado debe ser en dicha isla la línea divisoria."*²

"There was also a hitch in the beginning of the **demarcation of Tierra del Fuego**, because the commissions were unable to reach agreement on the choosing of the starting point of the meridian which, according to the Treaty, must be the dividing line **in that island.**"²

Sixteen years later, when Luis Varela studied the demarcation of the frontiers between the two countries, on the basis of unpublished documents kept by the Argentine Government, he drew just as clear a distinction between the *île de la Terre de Feu et l'Archipel qui se prolonge jusqu'au Cap Horn* (Op. cit. Vol. I, p. 22, cf. p. 59).

31. In conclusion, neither in the Counter-Memorial nor in the Memorial has the Argentine Government succeeded in demonstrating the undemonstrable, namely, that in the third basis of 1876 (and in the last sentence of Article III of the Treaty of 1881) the term "Tierra del Fuego" is intended to apply to the whole of the southern archipelagoes.

¹ The Argentine Memorial speaks of "Demarcation on *Isla Grande* (1894-1895)" (Arg. Mem. p. 211); but this was not the terminology employed by the Parties, who spoke of demarcation of *Tierra del Fuego*.

² The above quoted passage does not appear in the extract of the Report, dated 26 June 1893, which was published as Annex No. 63 to the Argentine Counter-Memorial. The complete text of the Report has been provided by the Agents for Argentina to the Chilean Agent, upon request.

32. (B) The meaning of “*sobre el Atlantico*”, “*al Oriente de la Tierra del Fuego y costas orientales de la Patagonia*” and “*hasta el Cabo de Hornos*”.

As on these points the Argentine Counter-Memorial is confined essentially to repeating the argumentation of the Memorial (Arg. C.M. pp. 95-103, paras. 16-18), the Chilean Government may venture to refer purely and simply to the relevant observations in its own Counter-Memorial (Ch. C.M. pp. 70-75, paras. 15-26, and pp. 97-98, paras. 64-66) and also to those which it has had occasion to submit on the so-called “Cape Horn Frontier” in Chapter I of the present Reply (paras. 108-120).

To those will be added merely a few brief remarks called for by new arguments in the Counter-Memorial.

33. — In support of its understanding of “*hasta el Cabo de Hornos*” as meaning “on the Pacific side of the Cape Horn frontier” the Argentine Counter-Memorial considers it may recruit Barros Arana himself, whose report of 1890, it is said, “sums up the intentions of the negotiators of the 1881 Treaty” (Arg. C.M. p. 99, para. 17). The Argentine Government showed itself to be somewhat imprudent in thus calling Barros Arana to its assistance, for a glance at the map attached to his report (Ch. Plate 49) shows that, for the Chilean negotiator, the frontier line, far from following the Cape Horn meridian “vertically”, runs “horizontally” to the north of Picton and Nueva, thus leaving the disputed islands, although to the east of the Cape Horn meridian, under the sovereignty of Chile.¹

34. — It must be strongly emphasized that Irigoyen’s third basis mentions the Atlantic solely in connexion with islands situated to the north of the Beagle Channel: the attribution of the islands to the south of the Beagle Channel is made *in globo* to Chile, without any mention of any Ocean whatsoever. This is easily understood: the islands “*sobre el Atlantico*” which were attributed to Argentina are in a certain sense an appurtenance of the continuous Atlantic coast-line from Patagonia to Staten Island. For the islands to the south of the Channel that circumstance did not apply. This fact is very accurately expressed in Barros Arana’s telegram of 5 July 1876:

“*Las otras islas situadas al sur del Canal Beagle hasta el Cabo de Hornos serían chilenas. Serían pues, chilenas todas las demás islas al sur del Estrecho*”.

“The other islands located south of the Beagle Channel down to Cape Horn would be Chilean. Thus all other islands to the south of the Strait would be Chilean.” (Ch. Annex No. 21, p. 42).

¹ This map shows also that, for Barros Arana, “Tierra del Fuego” is synonymous with *Isla Grande* (cf. *supra*, para. 28).

35. — The Court will know how to judge the argument which the Argentine Counter-Memorial bases on the Chilean Constitution. The authors of the Argentine document have no hesitation in writing that:

“His (Irigoyen’s) concern to recognise Chile’s legitimate aspirations in this matter was such that he used almost the same words as those of the Chilean Constitution then in force, according to which the Chilean territory extended as far as Cape Horn (*hasta el Cabo de Hornos*) . . . And this was clearly a frontier to the east, not to the south” (Arg. C.M. p. 101, para. 17).

Here is the relevant part of the Chilean Constitution of 1833:

“*El territorio de Chile se extiende desde el desierto de Atacama hasta el Cabo de Hornos . . .*”.

“The territory of Chile extends from the Atacama desert as far as Cape Horn” (cited in Arg. Mem. p. 132, para. 15).

Seeing in that provision of the Chilean Constitution a boundary to the *east* really calls for a great deal of imagination . . .

36. (C) The line of the *Beagle Channel* according to Sr. Irigoyen.

This question, which the Argentine Counter-Memorial considers as of relatively minor importance (Arg. C.M. pp. 102-108, paras. 18-21), has been considered in Chapter I of this Reply (paras. 42-59). There is no need to revert to it here.

Conclusion

37. Just as the Argentine Memorial does, the Counter-Memorial makes a complete travesty of the content and meaning of the proposals which Irigoyen and Barros Arana agreed in July 1876 to submit to their respective Governments. The Argentine pleadings overlook the fact that the Andes-Dungeness line in principle was to serve as a general dividing line between the two countries:

“*Esta línea será la división entre la República Argentina que quedará al Norte y la República Chilena al Sud*” (Arg. Mem. p. 165, para. 51).

“This line shall be the division between the Argentine Republic which will lie to the North and the Chilean Republic to the South” (Arg. Mem. p. 166, para. 51).

They overlook the fact that it is as an exception to this principle that Irigoyen’s bases attributed to Argentina the eastern part of Tierra del Fuego and the islands to the east of it. They also overlook the fact that the remaining islands situated to the south of the dividing line defined in the first basis, and in particular “*todas las otras islas al sud del Canal de Beagle hasta el Cabo de Hornos*” were to belong to Chile: *Whether these islands*

are situated on one side or on the other of the Cape Horn meridian, whether they are or are not "Atlantic" islands, whether the Atlantic Ocean goes less far, as far or further to the west than the Cape Horn meridian, matters little; the whole of the islands to the south of the Channel as far as Cape Horn ("todas las islas al sud del Canal Beagle hasta el Cabo de Hornos") were attributed to Chile by the Irigoyen proposals.

C. *The Chilean understanding of the Irigoyen proposals of 1876*

Barros Arana's despatches of 5 and 10 July 1876

38. According to the Argentine Counter-Memorial, Irigoyen's proposals were so clear that Barros Arana could see nothing different in them from what the Argentine Government sees in them today:

"...Sr. Irigoyen's notion of the final sector of the Argentine-Chile boundary could not leave many doubts in the mind of a careful and disinterested student of the proposals" (Arg. C.M. p. 109, para. 23).

"Could Irigoyen's counterpart, the Chilean Minister in Buenos Aires, have been mistaken about the reach of the proposals presented to him? This would be astonishing, for the talks could not have been more explicit nor more insistent on the point in question" (Arg. C.M. p. 112, para. 25).

The authors of the Argentine document doubtless forgot that in 1896, fifteen years after the conclusion of the Treaty, the Argentine Government thought it necessary to enquire of the British Admiralty concerning the line followed by this "final sector of the Argentine-Chile boundary" (Arg. Mem. pp. 216-219, paras. 20-23), and that its notions concerning that line were to be the subject of innumerable variants before the present arbitral proceedings impelled it to fix its ideas (see Ch. C.M. pp. 79-80, paras. 33-34, and pp. 81-82, para. 37). It would therefore have been surprising if Barros Arana had straightaway seen, behind the very clear terms of the Irigoyen proposals, a mysterious "stepped boundary", the last step of which followed "vertically" the direction of the Cape Horn meridian by edging its way between the islands of the region.

39. But, to learn how Barros Arana understood the proposals which Irigoyen had just made to him, it is sufficient to refer to the two despatches which he immediately transmitted to his Government to inform it of the formula envisaged: a telegram, fairly brief, on 5 July 1876 (Ch. Ann. No. 21, p. 42) and a despatch, more detailed and accompanied by a map, on 10 July 1876 (Ch. Ann. No. 22, p. 43; Ch. Plate 8).

40. In his telegram of 5 July, the Chilean negotiator explains that the Argentine proposals attribute to Argentina "*la (isla) de los Estados, islotes vecinos i demas islas del Atlantico*" ("Staten Island, the neighbouring islets and the remaining islands of the Atlantic")¹ and he continues:

"Las otras islas situadas al Sur del Canal Beagle hasta el Cabo de Hornos serian chilenas. Serian, pues, chilenas todas las demas islas al Sur del Estrecho".

"The other islands located south of the Beagle Channel as far as Cape Horn would be Chilean. Thus all the remaining islands to the south of the Strait would be Chilean".²

This wording could not be more precise. In the first of the three bases proposed by Irigoyen, it was specified, with regard to the "horizontal" dividing line to the north of the Strait of Magellan, that "*el sur de esta línea sería chileno*" ("the south of this line would be Chilean"). As an exception to this principle, the eastern part of Tierra del Fuego and Staten Island were attributed to Argentina, although situated to the south of the Straits, with a view to guaranteeing to it the continuity of its Atlantic coast-line from Patagonia to Staten Island; and the islands "*sobre el Atlantico*" situated off that coast-line, and therefore to the north of Beagle Channel, were by way of consequence attributed to it. South of Beagle Channel, on the other hand, there was no longer any question of Atlantic coast-line and it was quite natural that the third basis attributed *all* the remaining islands ("*todas las otras islas*") to Chile without making any reference to any ocean. The wording of the Barros Arana telegram expresses his idea perfectly: south of the Beagle Channel all the islands would be Chilean, since, with the exception of part of Tierra del Fuego, Staten Island and the islands there might be "*sobre el Atlantico*" east of Isla Grande, "all the remaining islands to the south of the Strait would be Chilean". The telegram of 5 July agrees perfectly therefore with the text of the Irigoyen bases; the condition of being "*sobre el Atlantico*" is relevant only for the islands to the north of the Channel, as shown by the reference to their being east of Tierra del Fuego and eastern coasts of Patagonia; it is not at all relevant for the islands to the south of the Beagle Channel.

41. The despatch of 10 July does not any more than that of 5 July give any ground for supposing that Sr. Barros Arana could have conceived of the boundary proposed by Irigoyen as winding its way between Navarino, on the one hand, and Picton and Lennox on the other, with a view to taking account of some "Oceanic criterion". This despatch does

¹ The Chilean Government fails to understand the reproach levelled against it for having translated "*demas islas*" by "*other islands*" instead of by "*remaining islands*": "*demas*" and "*otras*" have the same meaning. It sees no objection to adopting the Argentine translation for the word "*demás*".

² Here too the Argentine Government's translation has been used (Arg. C.M. p. 113, para. 25). In regard to the reproach levelled at the Chilean Government for having translated "*hasta el Cabo de Hornos*" by "down to Cape Horn" (Arg. C.M. pp. 113-114, note 49), it will be recalled that this was also the translation given by the Argentine Government itself in the 1902 Arbitration (see *supra*, Chap. I, para. 117).

not in truth dwell on the description of the boundary to the south of Tierra del Fuego. The reason for this is easy to understand; it is quite simply that there was no difficulty in that region. What had given rise to a problem in Barros Arana's discussions with Irigoyen was the line to the north of the Straits and the division of Tierra del Fuego: to the south of this island, there had been no question of attributing any territory whatsoever to Argentina. It is obvious that, if Barros Arana had understood that Irigoyen's third basis implied a complex delimitation of the southern islands, according to their position on one side or the other of the "Cape Horn frontier", he would have explained it to his Government instead of having written merely that "*serían chilenas todas las demás islas al sur del Estrecho*". Furthermore, there is no reason why Barros Arana could have suspected so complex a delimitation, since there had never been any question of such a thing with his Argentine opposite number and nothing in the attitude of the latter had allowed it to be supposed that he was thinking of a division of the southern islands according to their position in relation to the Cape Horn meridian.

That such is the case is clear from the map he attached to his despatch.

Barros Arana's Map and the so-called "astonishing red line on Plate 8 of the Chilean Atlas"

42. As has already been pointed out on several occasions, Barros Arana attached a map to his despatch of 10 July with a view to showing his Government the proposals which the Argentine Minister had just submitted to him. It may be interesting to introduce here the relevant passage from that despatch:

"A few months ago a lithographic map of this country was printed here and which to some extent has an official nature since the committee in charge of preparing Argentinian products for the Exhibition of Philadelphia ordered it to be drawn up. This map incorporates the dividing line proposed in 1872 . . .

"With this note I am sending you a copy of this map. In this you will find the dividing line proposed in 1872 drawn in as a thick dotted line. I have also drawn in on the same map, using red ink, the approximate line which is now proposed¹ so that you can see at a glance the difference between the two proposals" (Ch. Ann. No. 22, p. 43, at p. 45).

It is on this Argentine map of 1875 that Barros Arana drew in red the line proposed by Irigoyen (Ch. Plate 8). The map bears on its left side the following handwritten note: "The red line shows the proposal dealt with in the above despatch". It seems to the Chilean Government to be of considerable importance (cf. Ch. Mem. pp. 28-29, paras. 27-29), since on this map—illustrating the proposal for settlement which mentioned the Beagle Channel for the first time—the Channel is shown as a waterway running in a straight line

¹ In the original Spanish: "*En él tambien he trazado aproximativamente con tinta colorada la linea que ahora se propone . . .*"

along the southern coasts of Tierra del Fuego and the islands Picton, Nueva and Lennox are clearly shown there as allocated to Chile. Plate 8 thus represents the way in which at least one of the 1876 negotiators understood the proposals and, as other maps, some of them of official Argentine origin, were later to confirm this view, the Chilean Government thought that it constituted a document of great interest for the determination of the intention of the Parties. It was all the more so since the description which appeared on this map coincided exactly with the terms in which, in his telegram of 5 July, Barros Arana had described the proposals (*supra*, para. 40) and which Irigoyen was to confirm in his Speech in 1881 (cf. Ch. Mem. p. 45, para. 31).

43. One can understand that the Argentine Government, whose views are so radically contradicted by the Barros Arana map, did its utmost to rid itself of such embarrassing evidence. The Argentine Government does not confine itself, however, to casting doubt upon the evidential value of this map; it goes so far as to insinuate that the Chilean Envoy or someone else might very well have falsified it:

"It must be emphasized that when the original of this map is examined . . . it is realized that *any hypothesis becomes possible*. The original is in a deplorable state; and it appears that *it has been subject to many manipulations*. Under the "linea lacre", much darker and thinner than the one in Plate 8 of the Atlas of the Chilean Memorial, the trace of other lines drawn in red pencil, but curiously become pale pink today, can be clearly distinguished. The Argentine Government respectfully begs the Court of Arbitration to be so good as to examine this original and to compare it with the "reproduction"; or, rather, with the *drastic renovation which appears on Plate 8*, and to take note here also of the "fidelity" of the reproductions in the Chilean Atlas". (Arg. C.M. pp. 130-131, note 64).

To accuse the opposite Party, in international judicial proceedings, of having falsified documents is a serious matter, in which a responsible Government should not engage lightly and without reliable proof. In this connexion, the Chilean Government would venture to recall what the Agent of the Argentine Government stated in 1966 before the Court of Arbitration in the *Palena* case:

"...All has been speculations, theories, innuendos and suggestions. But this is a very serious matter, my Lord, and this is a Court of Law. You must decide these matters upon evidence properly presented.

"In the submission of Argentina, no proof has been submitted to sustain this challenge. If Chile asserts fraud and forgery, Chile must prove it. The Argentine Republic will expect Chile to say whether or not fraud and forgery are alleged; if the answer is yes, then Argentina asks where the proof is. Chile must either substantiate the charge and argue the legal consequences of it, or must withdraw the charge and be silent." ¹

¹ The statement of law is correct but the Argentine Agent was mistaken as to facts which induced him to make it. For as the Agent for Chile was careful to point out in his reply: "Chile does not accuse anyone of fraud or forgery". ("Corrected transcript of Oral Hearings", Vol. III, p. 5 and p. 103).

The Argentine Government may have doubts about the evidential value of the Barros Arana map; it is not entitled, without any proof whatsoever, to accuse the Chilean Government of having carried out a "drastic renovation" of this map or to insinuate that "any hypothesis becomes possible". If it considers that the Chilean Government has falsified the map for the purposes of this case, let it prove it. Otherwise, it should withdraw this accusation. The Chilean Government will confine itself to pointing out that the differences in shade between the red line of the original and that of the reproduction appearing in the Chilean Atlas are due to the reproduction process used for the first Atlas, which was not a photographic process. In order to put an end to the controversy, a photographic copy of the original, in its present state, is produced as a further Plate in the Atlas attached to the present Reply (Ch. Plate 169). The original, which the Agent of the Government of Argentina has been able to examine and which the Court now has before it, is the very one the Chilean Government found in its archives where it had lain until research in connection with this controversy unearthed it some fifteen years ago. The Court will be able to note that, for all useful purposes in the present proceedings, the reproduction of Plate 8 of the Chilean Atlas does not present any inaccuracy.

44. Apart from this question of the "renovation" of the Barros Arana map, it should be noted that the attitude of the Argentine Government with regard to this map is selective. The Argentine Government does not question the authenticity of the map as a whole; it does not dispute either the fact that Barros Arana attached a map to his despatch of 10 July 1876 in order to illustrate the proposals that Irigoyen had just submitted to him, or the fact that the map produced by the Chilean Government under the number 8 is indeed that map. What the Argentine Government disputes is only the authenticity of the horizontal section of the red line, that is to say, the section marking the west-east frontier along the Beagle Channel, starting from the Cape Espiritu Santo meridian. In its opinion, this line cannot "logically" have been drawn by Barros Arana himself in 1876.

45. The Chilean Government considers it necessary to emphasize that it has never had any reason to doubt the authenticity of the line appearing on the map or to question the authenticity of the map as a whole. In its view, the map found in its archives reflects so well the description of the Irigoyen proposals given by Barros Arana in his despatches of 5 and 10 July and it corresponds so well to the way in which, in their turn, later maps (the authenticity of which is not questioned) presented those proposals (on this point see below, para. 65), that it is justified in considering the red line appearing on this map as the authentic expression of the way in which Barros Arana understood the Argentine Minister's proposals. That position, unambiguously taken by the Government of Chile in its Memorial, has not changed.

46. For the purpose of disputing the authenticity of the horizontal section of the red line of Plate 8, the Argentine Counter-Memorial does not rely on material elements the value of which might possibly be checked only by expert examination, but on argumentation.¹ As has been said, its contention appears to be that Sr. Barros Arana cannot logically have himself drawn in the horizontal line in 1876 and that therefore this line can only have been added later, whether by himself or by some other person matters little. The reasoning on which it relies, moreover, is hardly worthy of being called so, since it takes the form rather of a series of suppositions and conjectures from which the Argentine Government thinks it can deduce certainties. To show this, it is only necessary to follow step by step the various phases of the chain of argument put forward.

47. (a) *First Argentine argument:* Barros Arana could not have shown his Government a line which Irigoyen Had not shown to him.

As has been seen, the Argentine Counter-Memorial maintains that, to illustrate his proposals, the Argentine Minister had "shown" Barros Arana a chart (Admiralty Chart 554, revised by Captain Mayne) and had "traced" on that chart the line resulting from those proposals. Seeing that this chart stops short too soon southwards and eastwards to show the eastern section of the Beagle Channel and the disputed islands, it is alleged that the line "shown" and "traced" by Irigoyen could be none other than the horizontal line to the north of the Strait of Magellan, followed by the vertical line of the Cape Espiritu Santo meridian. The line "shown" and "traced" by Irigoyen could therefore, by the very force of things, represent only the "land-boundary" stopping short at the point where the Cape Espiritu Santo meridian reaches the Beagle Channel. Equally—according to the Argentine Counter-Memorial—Irigoyen could neither have "shown" nor "traced" on the Mayne chart his "maritime boundary" running along the Beagle Channel and the Cape Horn meridian (Arg. C.M. pp. 118-119, paras. 27-28, cf. *supra*, para. 22).

It is impossible—continues the Counter-Memorial—that Barros Arana could have shown his Government, on the map which he annexed to his despatch of 10 July, a line which his Argentine opposite number had not shown to him and which furthermore did not correspond to the description of the proposals which the Chilean negotiator himself gave in his despatch:

¹ The only material element referred to by the Argentine Counter-Memorial is the fact that the marginal note appearing on the left hand side of the map is not in Barros Arana's handwriting. (Arg. C.M. p. 130, para. 33). While this fact is totally irrelevant, it may be pointed out: (a) that the Government of Chile has never alleged that Barros Arana himself wrote the marginal note (cf. Ch. Mem. p. 28, para. 27); (b) that there are a number of notes in the same volume which contains the correspondence from the Chilean Legation in Buenos Aires in 1876 (including Barros Arana's despatches of July 1876) which appear to have been written by the same hand which wrote the marginal note; and (c) that it was very unusual for Ministers to write in their own handwriting the official letters, etc. which they signed.

"It was thus very far from his (Barros Arana's) thoughts to take upon himself the task of doing what Sr. Irigoyen himself had not done, namely, to make an actual trace of the boundary line in this final section of the frontier" (Arg. C.M. p. 118, para. 27).

"One cannot but be astonished . . . to see in Plate 8 . . . a red line which by no means ends where *the line traced by Sr. Irigoyen* ended; and which, furthermore, is projected on a course which does not in the least correspond with any that could result from the allocation of islands as proposed by Irigoyen; which proposal Sr. Barros Arana had correctly transmitted to his Government" (Arg. C.M. p. 119, para. 28).

48. Neither the first nor the second sentence of this "reasoning" stands up to even the most superficial examination.

The Chilean Government has already had occasion to dispose of this legend about Chart 554 on which, it is said, Irigoyen traced a "land-boundary" stopping short at the Beagle Channel (*supra.* paras. 21-22). If indeed the two negotiators used Chart 554—which is possible—they could have used it, as the Counter-Memorial admits (Arg. C.M. p. 89, para. 11), only for the Strait of Magellan and Tierra del Fuego. If one supposes, with the Argentine Government, that Irigoyen illustrated his proposals graphically in the presence of Barros Arana, one fails to see why he would have limited such illustration to the zone to the north of the Channel. If, as is claimed, Irigoyen "traced" the boundary line to the north of the Channel on Chart 554, why should he not have "traced" on another map (Chart 1373 for instance) the line which is further to the south? For a Minister who is said to be so determined to preserve his country's sovereignty over the southern islands situated to the east of the "Cape Horn Frontier" such negligence would be really difficult to understand!¹

But let us even suppose for a moment, however unlikely such an hypothesis may be, that the Argentine Minister illustrated his proposals on a map only in regard to the frontier to the north of the Beagle Channel, without doing the same thing for the frontier to the south of the Channel. Even supposing that that was the case, it would still be impossible to see why Sr. Barros Arana too should have been satisfied with one incomplete graphical illustration when he intended to explain to his Government the real scope of the Argentine proposals. He had all the less reason to be so because he was using for this purpose not Chart 554 which did not cover the whole of the zone covered by the Irigoyen proposals, but an Argentine map of 1875 which, unlike Chart 554, allowed him to describe the frontier from one end of its course to the other. Is it not conceivable that the Chilean negotiator—even if his Argentine opposite number had in his presence "traced" only one part of the frontier—gave his Government complete information? Why and for what

¹ It is probably in order to make more plausible the assertion that Sr. Irigoyen did not trace the line to the south of Tierra del Fuego that the Argentine Counter-Memorial is at such pains to maintain, in flat contradiction to the Memorial, that in the Irigoyen proposals the Beagle Channel did not play the role of a frontier (see Chapter I of this Reply, para. 45).

purpose should it be asserted, as the Argentine Counter-Memorial does not hesitate to assert, that Barros Arana *could* not submit to his Government a line “which by no means ended where the line traced by Irigoyen ended?”

49. The Argentine Government does, it is true, add another argument. It is impossible, it says, that, after stating in his telegram of 5 July that “the remaining islands of the Atlantic be Argentinian”, Barros Arana could have sent to his Government on 10 July a map showing a line which “incorporates into Chilean territory all the ‘Atlantic’ islands of the Fuegian archipelago outside of Isla de Los Estados” and, what is more, a line which, continuing audaciously beyond Cape San Pio very far out into the Atlantic, went beyond “the boldest Chilean pretensions ever propounded” (Arg. C.M. pp. 119-120, para. 28).

The Argentine Government has doubtless misread the telegram of 5 July. Otherwise it would not speak of there being a contradiction between that telegram and the horizontal line of Plate 8. It is true that, according to the Chilean negotiator, the Argentine proposals gave to Argentina, in addition to Staten Island and the neighbouring islets, “the remaining islands of the Atlantic”; but the following sentence shows *a contrario* that Sr. Barros Arana was there referring to the islands situated *to the north of the Beagle Channel*.

For it is clear that for Sr. Barros Arana “the other islands”—those “located south of the Beagle Channel as far as Cape Horn”—meant the same as “*all* the other islands to the south of the Straits”. And he wrote that these islands “would be Chilean” without reference to any ocean. If the Argentine contention was true, the Chilean negotiator ought to have mentioned the Pacific Ocean when referring to the islands allocated to Chile. He did nothing of the sort!

As for the fact that the line was prolonged beyond Cape San Pio, the Chilean Government has already given the explanation earlier in this Reply (cf. *supra* Chap. I, paras. 52-54).

50. To sum up, one cannot see why Barros Arana would not have *been able* to indicate to his Government a boundary-line running along the Channel which the proposals mentioned specifically. It is only if Irigoyen had not proposed any frontier to the south of Tierra del Fuego—that is to say, if there had not been the third basis—that the horizontal line of Plate 8 would have been logically inconceivable; for, in that case, the Chilean negotiator would have imagined a proposal that had not been made to him. That was not the case, since Irigoyen’s third basis *did exist* and since it allocated to Chile the islands to the south of the Beagle Channel. Accordingly, there is nothing logically impossible in Barros Arana having traced the line resulting from that third basis. He *could* have refrained from doing so since there had been no difficulty about those islands but

that does not mean that he *was bound* to refrain from doing so. On the contrary, everything points to the fact that he transmitted to his Government a complete graphical description—including the third basis—of the proposals.

51. (b) *Second Argentine argument:* The Chilean Government did not react, it is alleged, as it would have done if Barros Arana had sent it a map including the “horizontal” frontier running along the Beagle Channel.

The Counter-Memorial assumes that the Chilean Foreign Minister, Sr. Alfonso, to whom—it is said—Barros Arana had just telegraphed on 5 July that “the ‘Atlantic’ islands of the Archipelago of Tierra del Fuego were reserved to Argentina”, would not have failed to be “pleasantly surprised” if, on 10 July, he had really received from the same Barros Arana a map giving Chile all the southern islands, including the “Atlantic” islands. Now, in his despatches of 1 August and 23 October 1876 (Ch. Ann. Nos. 23 and 24, pp. 47 and 48) to Barros Arana, Sr. Alfonso expresses no surprise and “reacted as if that section of the boundary line had not appeared at all on the map sent by the Chilean Minister in Buenos Aires” (Arg. C.M. p. 121, para. 29).

52. The first thing to be noted is the strange way in which the Argentine Counter-Memorial distorts the Barros Arana telegram of 5 July. Where did the authors of the Counter-Memorial discover that the Chilean negotiator informed his Minister “that the ‘Atlantic’ islands of the Archipelago of Tierra del Fuego were reserved to Argentina”? The telegram of 5 July says nothing of the sort. May it please the Court to refer to the Spanish text and the English translation which are given a few pages earlier in the Argentine Counter-Memorial (p. 113) and it will judge for itself.

Sr. Alfonso had in truth no reason to be “pleasantly surprised” and to tell his negotiator that he was so. It was natural—need it be repeated yet again?—that, leaving aside the eastern half of Tierra del Fuego and Staten Island, “all the remaining islands to the south of the Strait would be Chilean”, as Barros Arana said in that same telegram of 5 July. There was nothing in that to call for any display of enthusiasm. What Sr. Alfonso was primarily concerned about was the solution envisaged for Patagonia and the Strait of Magellan. That was what he wrote about in his two letters of 1 August and 23 October 1876, and it was because of that that he rejected the Irigoyen proposals and reverted to the initial claim for a Chilean Patagonia extending as far as the Rio Gallegos and for a “full and complete possession of all the Strait”, at the same time suggesting that the matter should be submitted to arbitration (see also Sr. Alfonso’s note of 18 July 1876, quoted in Arg. Mem. p. 168, para. 54)¹

¹ In his speech of 15 November 1877, which will be referred to in the following paragraph, Sr. Alfonso confirmed clearly that the rejection of the Argentine proposals was due to the fact that they deprived Chile of the eastern mouth of the Strait (Ch. Ann. No. 392, p. 10, at p. 12).

Why should Minister Alfonso speak of the southern islands, for which no problem arose, in his letters giving expression to his negative reaction to the Argentine proposals? Thus, far from being favourable to the Argentine contention, Sr. Alfonso's silence in this regard is, on the contrary, a complete refutation of it. If Sr. Alfonso had really understood that, in its third basis, the Argentine Government intended to allocate to Argentina those of the southern islands which are situated to the east of the Cape Horn meridian, he would most certainly have made known his refusal of such a solution just as he made known his refusal to contemplate a solution which did not guarantee for his country complete mastery over the Strait of Magellan.

53. (c) *Third Argentine argument:* Sr. Alfonso's speech of 15 November 1877 and Baron d'Avril's report and sketch.

The Argentine Government thinks it can find another proof of the absence of any horizontal line on the map which Barros Arana attached to this despatch of 10 July 1876 in the speech which Sr. Alfonso delivered in the Chilean Parliament on 15 November 1877 and in the way in which Baron d'Avril, French Minister in Santiago is said to have understood that speech (Arg. C.M. pp. 122-127, para. 30.) The reasoning advanced—which is somewhat difficult to follow because of its subtleness—seems to run in this way:

— The Chilean Minister stated that he was laying before the Chamber “a map on which a red line has been traced to indicate the boundaries between the respective Republics in the event that that proposal had been accepted”.

The map referred to by Sr. Alfonso has not been identified, and in a letter from the Agent for Chile, dated 14 June 1974, to the Argentine Agent the *possibility* was mentioned that the map shown by Sr. Alfonso was the one sent by Sr. Barros Arana. In that letter the Argentine Counter-Memorial has found grounds for asserting that Sr. Alfonso *did show* that map to the Chamber.¹

— Having thus, again, taken a possibility for a fact, the Argentine Counter-Memorial continues that it is possible to gain an idea of this map by consulting the despatch which Baron d'Avril addressed to the French Government two days later, on 17 November, “*en y joignant un croquis qui m'a paru indispensable*” (“attaching a sketch to it which I consider indispensable”) (Ch. Ann. No. 25(a), p. 50). This sketch being to the same scale as the map on which Barros Arana depicted the proposals—it is wrongly asserted²—it can be deduced from it that

¹ The letter from the Agent to is in the hands of the Court, a mere reading of it will show that the Agents for Argentina misunderstood its contents (Cf. Arg. C.M. para. 30, pp. 122-124).

² On the probable source of the sketch see Ch. Plate 170 and “Supplementary Remarks...” on this Plate).

"Minister Alfonso *must*, therefore, *have given* Baron d'Avril both the text of the Argentine proposals, secret until then, and *the possibility of examining and making use, for his sketch, of the map with the line traced according to these proposals: the same map which he had made available to the Chamber of Deputies*" (Arg. C.M. p. 125, para. 30).

— Baron d'Avril's sketch (Ch. Plate 12, Sketch "A") shows only the line to the north of the Channel, that is to say, the horizontal line to the north of the Straits and the vertical line dividing Tierra del Fuego, without showing any frontier line to the south of Tierra del Fuego. From this, continues the Counter-Memorial, it may be deduced that Baron d'Avril based himself on the model given to him by the map which was presented to the Chamber by Sr. Alfonso and which is said to have been no other than Barros Arana's map:

"on the map he might have seen in 1877 *in the Chilean Parliament or in the Chilean Foreign Ministry, and according to which he drew his first sketch* . . . Baron d'Avril did not see a boundary traced beyond the meeting point of the 68° 34' meridian and the Beagle Channel; for otherwise he would surely have reproduced it" (Arg. C.M. p. 126, para. 30).

— From this succession of hypotheses, which, moreover, are contradictory, the Argentine Government deduces a certainty. Since Baron d'Avril traced his sketch—on which the horizontal line does not appear—according to the map which Minister Alfonso gave him (according to the version given on page 126 of the Argentine Counter-Memorial: "Minister Alfonso *must have given* Baron d'Avril . . . the map")¹ or which *he saw* in Parliament or in the Ministry (according to the version given on page 127: "On the map he *might have seen* in the Chilean Parliament or in the Chilean Foreign Ministry . . ."), and since that map was the very one that Barros Arana had sent to Santiago the previous year, proof was established—there was no hesitation about writing this!—that the map sent by Barros Arana in 1876 did not show the horizontal line. Such indeed is the conclusion of this example of daring:

"One thing seems thus to be *established*. The Chilean Government, when informing Parliament and foreign diplomats of the 1876 negotiations, presented Argentine proposals of that year as the Argentine Foreign Minister had formulated them; and *showed the only line that Sr. Irigoyen had traced and showed* to the Chilean Minister in Buenos Aires, *namely the land boundary-line* running from the meeting point of the Cordillera with parallel 52° 10' to Monte Dinero, and from there along the meridian of 68° 34' to the Beagle Channel . . . It was *far from its intention to invent a supposed section of maritime boundary, of which nobody had ever spoken*, and which would have proceeded 'horizontally' from meridian 68° 34' to end in the Atlantic at the meeting point of the 55° parallel with the 62° meridian" (Arg. C.M. p. 127, para. 30).

¹ A little later, this hypothesis becomes an assertion: "the map which Minister Alfonso *had given* him" (p. 130).

54. This reasoning constitutes a striking example of the method of the Argentine Counter-Memorial: an accumulation of hypotheses on hypotheses, which leads up to a firm assertion. But let us take a closer look at things.

It is true—it is even the only element of the reasoning which is so—that Sr. Alfonso stated, in the speech which he delivered in the Chamber in reply to a question put by a deputy, Sr. Balmaceda, that “for a better and clearer understanding of the division which has been proposed” he was laying before the Chamber a map in which that division would be indicated by a red line.¹ After having read aloud the full text of those proposals, that is to say, the three bases, Sr. Alfonso had explained that the Chilean Government had rejected them “after due and careful consideration”, the conclusive reason for that rejection having been “that it deprives Chile of the eastern end of the Strait”; and he added that “this consideration was of sufficient weight to advise a renunciation of all the considerable advantages that could accrue from an amicable settlement”. The Minister had then stated:

“Los puntos designados bajo los nombres Monte Dinero i Cabo del Espiritu Santo, que son los que sirven de partida para zanjar la cuestión tanto al norte como al oriente i sur del Estrecho, se encuentran situados cerca de la boca oriental del mismo Estrecho, pero dentro de él, aceptados como limites divisorios con las líneas que de ellos se hace partir, Chile tendría la mayor parte del Estrecho, pero quedaria sin la boca oriental”.

“The points indicated by the names Monte Dinero and Cape Espiritu Santo which serve as an element for settling the question both to the north and to the east and south of the Strait, are situated near the eastern end of the said Strait, but within it, being accepted as dividing boundaries with the lines that are drawn from them, **Chile would have the greater part of the Strait, but would not have the eastern end.**”

And it is at this precise point in his speech that Sr. Alfonso stated that “for a better and clearer understanding of the division which has been proposed” he was laying a map before the Chamber.

Things are quite clear. After reading Irigoyen’s three proposals to the Chamber, the Chilean Minister dealt with the first two, the most important and the most delicate, the ones relating to the delimitation to the north and to the south of the Straits. He explained to the deputies why, in spite of the advantages to be gained from the Argentine proposal, these first two bases had appeared to the Chilean Government to be unacceptable. They gave Chile the greater part, but not the whole of the Straits, as Sr. Alfonso had already clearly written to Barros Arana as early as 1 August 1876 (Ch. Ann. No. 23, p. 47). And it was to enable his listeners the better to grasp this point clearly, by describing very precisely the geographical features adopted as landmarks in the Irigoyen proposals, that Sr. Alfonso presented a map.

¹ This was the first time that the 1876 proposals were made public. This was correctly reported by Baron d’Avril (Ch. Ann. No. 25(a), p. 50).

From that point onwards, everything is conjecture, as that map could not be discovered in the archives of the Chilean Parliament. The Chilean Government sees no objection, however, in accepting the Argentine version, according to which "the map made available to the Chamber of Deputies by Minister Alfonso was simply that map on which Sr. Barros Arana had traced the line corresponding to Irigoyen's proposal" (Arg. C.M. p. 124, para. 30).

55. As for the argument based on Baron d'Avril's sketch, a few very simple observations will suffice to dispose of it.

(i) In his despatch, Baron d'Avril wrote as follows:

"I enclose a translation of this unpublished document (i.e. the 1876 proposals), and am attaching a sketch to it, which I consider indispensable" (Ch. Ann. No. 25(b), p. 53)).

How can the Argentine Government deduce from this that "Minister Alfonso *must*, therefore, *have given* Baron d'Avril . . . *the possibility of examining and making use*, for his sketch, of the map . . . which he had made available to the Chamber of Deputies", or that Baron d'Avril "*might have seen*" this map in the Parliament or in the Ministry of Foreign Affairs? There can be no doubt that, if Baron d'Avril had had the possibility of seeing the map in the Parliament or in the Ministry, and still more if he had had the privilege of receiving it directly from the hands of Minister Alfonso (" . . . *the map which Minister Alfonso had given him* . . ." p. 130), he would not have failed to mention it.

However, Baron d'Avril started his despatch by making it clear that he intended to refer to the matter "*d'après le discours de M. Alfonso*" without any mention of having spoken to him.

(ii) From a reading of the Argentine Counter-Memorial it would be easy to gain the impression that Baron d'Avril's sketch is a copy of Seelstrang and Tourmente's map used by Barros Arana in 1876 (Arg. C.M. pp. 122-127, para. 30). To be convinced of the contrary, it is sufficient to place the two maps side by side (Ch. Plate 170). The Barros Arana map is accurate and detailed; it shows the southern islands, and, in particular Picton, Nueva and Lennox. The French diplomat's sketch is diagrammatic and approximate ("very simplified", says the Argentine Counter-Memorial, p. 126, note 59); the southern islands are not shown on it, except for Navarino, which is strangely enlarged. But, what is more pertinent to the point, some of the geographical features depicted on the sketch do not appear on the map from which the sketch is said to have been traced . . . It is difficult therefore to agree that, in drawing his sketch, Baron d'Avril based himself on the Barros Arana map, even if one were to admit that he had seen the map in the Parliament or in the Ministry.

(iii) It can be understood that Baron d'Avril contented himself with representing the frontier as far as the Beagle Channel by a red line on his map. This sketch was intended to illustrate his despatch of 17 November 1877 in which he was concerned only with the difficulties that arose from the delimitation to the north and to the south of the Straits:

*"La proposition de Buenos Ayres concédait au Chili la majeure partie du détroit de Magellan et de la Terre de Feu, mais le débouché du détroit sur l'océan Atlantique, était attribué à la Confédération Argentine. La transaction ne fut pas acceptée par le Chili qui veut non seulement garder tout le détroit et toute la Terre de Feu, mais s'établir le long de l'Atlantique"*¹ (Ch. Annex No. 25 (a), p. 50).

"The Buenos Aires proposal conceded the greater part of the Strait of Magellan and of Tierra del Fuego to Chile, but the opening of the Straits onto the Atlantic was granted to the Argentine Confederation. The transaction was not accepted by Chile, who not only wishes to keep the whole of the Straits and all of Tierra del Fuego, but also to establish itself along the Atlantic" (Ch. Annex No. 25 (b), p. 53).

Baron d'Avril was careful, notwithstanding the diagrammatic character of his sketch, to mention the main landmarks of the Irigoyen proposals: "Mount Dinero", "Mount Aymond", "Strait of Magellan", "Cape Espiritu Santo", "Beagle Channel"—the last-named being marked by a light dotted line from west to east, which shows it up clearly, and also the two ends of the Strait of Magellan are shown by the same dotted line.² The other landmarks mentioned in the discussion are also shown there: the Cordillera of the Andes, Rio Santa Cruz, Rio Gallegos, and also the site—far to the north of the Straits, on the "Atlantic Coast", of the "Jeanne-Amélie" incident (cf. above, para. 11). It should be noted that, furthermore, Baron d'Avril's sketch could not give rise to the slightest misunderstanding as to the scope of the third basis, as all the geographical elements of that basis (Staten Island, Atlantic Ocean, Tierra del Fuego, Patagonia, Beagle Channel, Cape Horn) are clearly represented there.

(iv) It may not be superfluous to recall that, a year later, on 30 December 1878, the same Baron d'Avril sent his Government a copy of the map which was published by "El Mercurio" and which represented the Irigoyen proposals of 1876 completely, that is to say,

¹ The point should be noticed that Baron d'Avril cared to draw a distinction between the consequences of Chile's keeping Tierra del Fuego and her establishing herself along the Atlantic. Obviously, for the French Envoy, the "Atlantic" did not refer to Tierra del Fuego.

² The Argentine Counter-Memorial misrepresents the Chilean Memorial in this respect. Furthermore it can be seen how erroneous is the interpretation of this dotted line running along the Beagle Channel which is given by the Argentine Counter-Memorial (p. 126 note 59), when it presents it as indicating "the existence of islands in the interior of the Beagle Channel". On a sketch such details would be very unlikely. Moreover, the assertion in the Counter-Memorial contradicts what that same document states concerning the relationship between the Barros Arana map and Baron d'Avril's sketch, since the former does not contain any representation of the "islands in the interior of the Beagle Channel". To borrow the expression used by the Argentine Government, "Does it not provoke a smile?" (*ibid.*).

with the frontier running along the Beagle Channel (Ch. Plate 11 and Ch. Ann. No. 32(b), p. 71). If he had considered that there was the slightest contradiction between the interpretation of the 1876 proposals given by "El Mercurio" and the one he had himself given in his 1877 sketch, he would not have failed to make this clear.

56. (d) *Fourth Argentine argument*: The anxiety expressed by the Chilean Government on 18 May 1881 concerning the "*indeterminación de deslindes*" resulting from the proposed division of Tierra del Fuego.

The Argentine Government sees further confirmation of the impossibility of imputing to Barros Arana the "horizontal" line of Plate 8 in the anxiety which the Chilean Government displayed five years later, on 18 May 1881, concerning the indefiniteness of the frontiers resulting from the formula proposed by Irigoyen for Tierra del Fuego. There could be no reason for this anxiety, it says, if the horizontal line had appeared on the Barros Arana map, for the Chilean Government would then have known quite clearly how Tierra del Fuego (meaning the archipelago of Tierra del Fuego) would be divided according to the Irigoyen proposal. If the Chilean Government displayed this anxiety in 1881—it is alleged—it is because it did not know how the archipelago would be divided, and this, concludes the Counter-Memorial, proves that Barros Arana had not shown it on his map (Arg. C.M. pp. 127-128, para. 31).

This argument is surprising. Even without a map to illustrate them, Irigoyen's proposals were easily comprehensible, since they gave Chile "*todas las otras islas al Sud del Canal de Beagle hasta el Cabo de Hornos*". A cartographical illustration facilitates comprehension but was not indispensable to give meaning to the Argentine proposals. By dint of repeating that Irigoyen had not drawn a line to the south of Tierra del Fuego, the Argentine Counter-Memorial ends up by reasoning as if the Argentine Minister had quite simply proposed nothing for south of Tierra del Fuego, that is to say, as if the third of the Irigoyen bases did not exist!

But the Argentine argument is not only surprising; it is also groundless. As has already been shown (*supra*. para. 29), the anxiety which the Chilean Government displayed on 18 May 1881 has nothing at all to do with the division of the whole of the archipelago, but to that of Tierra del Fuego "*stricto sensu*". It relates to the division of an island, the interior of which was still but little known, by an abstract line (meridian 68° 34') which would not be shown on the ground by any geographical feature. The object of the telegram was to persuade the Argentine Government to abandon the division of Tierra del Fuego which Chile found it very hard to accept. The telegram has nothing to do with the line of the Beagle Channel and proves nothing regarding the Barros Arana map.

57. (e) *Fifth Argentine argument:* The absence of any mention of the Barros Arana map in certain later Chilean documents.

To supplement its "reasoning" directed towards proving that the horizontal line of Plate 8 did not appear on the map sent to Santiago by Barros Arana on 10 July 1876, the Argentine Counter-Memorial invokes lastly the fact that the Chilean authorities did not mention the Barros Arana map during the years that followed the conclusion of the 1881 Treaty; for instance, there is no mention of that map either in the Bertrand report of 1904 or in the Alvarez Memorandum of 1906 (Arg. C.M. pp. 128-129, para. 32).

It is true that Bertrand and Alvarez do not mention Barros Arana's map. But there is nothing surprising in that. That map was filed away in the archives and, in the first decade of the present century, neither Sr. Bertrand—who was dealing with an Argentine proposal for the demarcation of the Beagle Channel—nor Sr. Alvarez had any reason to delve in the archives for the purpose of determining the scope of a proposal which had been rejected in 1876. It is quite common for certain documentary information essential for the interpretation of a Treaty to be discovered by the Governments concerned only on the occasion of some exhaustive study being conducted at the time of judicial or arbitral proceedings, and such is the case with the map attached to Barros Arana's Report of 1876.

It is not the Argentine Government that will deny what has just been said. For it appears to have been unaware, as recently as 1973, of the existence of the Elizalde map of 1878 and of Irigoyen's "secret instructions" of 24 October 1881, the latter of which was mentioned for the first time in 1974, in its Counter-Memorial. The Barros Arana map, moreover, is not the only one of which Bertrand and Alvarez said nothing. Many other important maps which have been brought to light in connexion with the present arbitral proceedings, and of which the authenticity is not disputed (such as the Chilean Authoritative Map of 1881), are omitted in their studies.

58. (f) *Conclusion of the Argentine argumentation:* That the horizontal line on Plate 8 was not drawn by Barros Arana in 1876.

This is how the lengthy speculation of the Argentine Counter-Memorial concerning Plate 8 ends:

"The several facts described in the previous paragraphs, and the findings in regard to them, compel one conclusion and one only: it is totally unlikely that Sr. Barros Arana himself could have traced in 1876 the line which appears on the map published as Plate 8 in the Atlas of the Chilean Memorial; and it is unthinkable that he could have had the intention of showing graphically by such a line the Argentine proposals of that year" (Arg. C.M. pp. 129-130, para. 33).

59. The Argentine Government may have felt it necessary to give some further explanation. For, if the horizontal line was not drawn by Barros Arana in 1876, what was its

origin? Here imagination is given a free rein and numerous hypotheses are considered (Arg. C.M. pp. 130-132, para. 33): The horizontal line could have been added later by Barros Arana himself, for instance, at the time when he supervised the preparation of the Chilean Authoritative Map in 1881.¹ It might also have been added after Elizalde's proposal in 1878 or perhaps after the bases of 3 June 1881, with a view to accrediting "a distorted retrospective interpretation of the 1876 proposals" (p. 132, para. 33).

The Argentine Government does not hesitate even before the hypothesis that in spite of everything Barros Arana himself drew the horizontal line of Plate 8 in 1876. In that case, it is said, the Chilean diplomat "wittingly took upon himself to deceive his own Government about the range of the Argentine proposals *in order to push it into an acceptance, which in any case did not come about*" and this would mean that the Chilean Government itself did not have any faith in this very favourable line, since otherwise it would have accepted the Argentine proposals (p. 132). It seems like a dream; does the Argentine Government ignore that it was not because of Irigoyen's third basis that Chile rejected the 1876 proposals, but because of the first, which did not leave it "the full and complete possession of all the Strait" (Chilean note of 1 August 1876: Ch. Ann. No. 23, p. 47; cf. *supra*. paras. 15 and 54)? In 1973, in its Memorial, the Argentine Government seemed to have retained a truer recollection of these events (see Arg. Mem. p. 169, para. 54; cf. Ch. C.M. p. 54, para. 39). And if Barros Arana had really drawn the horizontal line in 1876, continues the Counter-Memorial, it would have to be assumed that Sr. Alfonso showed the Deputies in 1877 a different map more faithful to the Irigoyen proposals (that is, without the horizontal line) and, it adds, it is to be regretted that the Chilean Government of today does not appear to be as wise as Minister Alfonso in 1877 (pp. 132-133).

Carried away by its imagination, the Argentine Government appears not to have noticed an obvious contradiction: if, before sending his despatch, *Barros Arana may after all, have drawn the "horizontal line"*, how could Minister Alfonso have shown to Baron d'Avril the same map *without a line*, as it alleges? Does the Argentine Counter-Memorial imply that Alfonso erased the line before showing it to the French Envoy and that, later on, someone else drew it again?

A map without a line . . . a line without a map . . . a line that appears or disappears at will, in accordance with the needs of the argument . . . Does it all not suggest that the truth is somewhere else?

¹ Does the Argentine Government realize the absurdity of such an hypothesis? If Barros Arana had really "completed" (Arg. C.M. p. 131, note 65) his 1876 map in 1881, is it not probable that in his 1890 report he would have relied on that map, "arranged" by him to fit in with his claims (Ch. Ann. No. 58, p. 169)? But he does not mention it!

60. D. Conclusion

The fantastic argumentation of the Argentine Counter-Memorial ends up there, and it is time to draw conclusions from it. They are all of paramount importance.

61. (a) The first is of course the out-and-out failure of the operation. Its object, it must not be forgotten, was to prove that the Irigoyen proposals of 1876 provided to the south of the Beagle Channel for a delimitation which, after following the Beagle Channel "horizontally" from the $68^{\circ}34'$ meridian as far as the north-eastern point of Navarino, continued in an oblique direction towards the south, "more or less" following the Cape Horn meridian, so as to leave to Chile the almost entirely "Pacific" island of Navarino and to Argentina the "Atlantic" islands of Picton, Nueva and Lennox. To establish this point the Argentine Counter-Memorial set out to show that the Irigoyen proposals were so clear that neither Barros Arana nor the Chilean Government could have been mistaken, and were not mistaken about the scope of the Argentine proposals. This attempt was however stopped short by an insurmountable obstacle, namely, the map which Barros Arana had himself sent to his Government on 10 July 1876 and which showed a line following the Beagle Channel and quite clearly leaving all the islands to the south—including those of the "Atlantic" side of the Cape Horn meridian—under the sovereignty of Chile. As it could not overthrow this obstacle, the Argentine Government tried to go round it by casting discredit on the authenticity of the horizontal line which runs along the Beagle Channel and further east. Hence this interminable "demonstration" dotted throughout with suppositions erected into certainties: an Irigoyen who is supposed to have "shown and traced" on Chart 554 a line stopping short at the Channel; a Barros Arana who could not himself have invented a horizontal line which Irigoyen had not shown him; a Chilean Government supposed never to have had the slightest idea of a frontier in the Channel which Barros Arana had not shown it. All this through the use of "might", "must", "likely" and "unlikely", intended to act as a demonstration.

62. This demonstration is erroneous, as the Chilean Government hopes to have shown. It is erroneous, in the first place, because it rests on hypotheses that are devoid of the slightest inkling of proof. It is erroneous also because even if it were true—which is not the case—that Barros Arana contented himself with drawing on his map the frontier to the north of the Beagle Channel, the Chilean Government was not at all mistaken, either in 1876 or later, as to the scope of Irigoyen's bases. Sr. Barros Arana had clearly explained them to the Government in his telegram of 5 July, and the Authoritative Map of 1881 showed that there was not the slightest misunderstanding on this point on the part of the Chilean Government (cf. below, para. 65).

63. But the Argentine demonstration is not merely erroneous; it is also absurd and unreasonable. Can it really be believed that Sr. Irigoyen who, it is said, placed so much importance on Argentina's sovereignty over the "Atlantic" islands, was not careful to make clear to his Chilean opposite number where the line proposed by his third basis actually passed? And can it really be believed that the Chilean Government would not have reacted if it had understood that this third basis took from it yet a few more islands to the south of the Straits, in addition to half of Tierra del Fuego and Staten Island?

But there is something more! By dint of repeating that Irigoyen did not show Barros Arana any line to the south of Tierra del Fuego, that Barros Arana himself did not show his Government any line of this kind and that the Chilean Government did not show it to its Parliament or to foreign diplomats, the Argentine Counter-Memorial ends up by making it appear as though between Irigoyen and Barros Arana there had quite simply never been any question of any frontier whatsoever beyond the point of intersection of meridian 68° 34' and the Beagle Channel:

"It was far from its (the Chilean Government's) intention to invent a supposed section of maritime boundary, of which nobody had ever spoken . . ." (Arg. C.M. p. 127, para. 30);
" . . . neither in 1876 nor in 1881, had a boundary line been traced beyond the meeting-point of the meridian of 68° 34' with the Beagle Channel (Arg. C.M. p. 129, para. 32).

Not content with maintaining that the frontier proposed by Irigoyen in 1876 to the south of Tierra del Fuego and confirmed by the Treaty in 1881 was not the one claimed by the Chilean Government, the Argentine Government ends by saying that neither in 1876 nor in 1881 was there ever any question of anything whatsoever beyond the intersection of the meridian of Cape Espiritu Santo with the Channel. The Chilean Government must therefore have been dreaming: quite simply there must have been no third basis of 1876 and no Article III of the Treaty of 1881! . . . How then was the Argentine Government able to ask the Court, in the Compromiso of 1971, "to determine what is the boundary-line between the respective maritime jurisdictions of the Argentine Republic and the Republic of Chile" in the area of the "hammer" if it was true that "nobody had ever spoken" of that boundary-line?

64. (b) The second conclusion relates to the method followed in the Argentine Counter-Memorial. If the Argentine Government intended to maintain that in 1876 the Chilean authorities had understood the Irigoyen proposals in the way the Argentine Government interprets them today, and if it intended for that purpose to dispute the authenticity of the Barros Arana map, it was its duty to produce proof of its allegations. If, for instance, it had produced one of the maps shown by Irigoyen to the Argentine Congress in 1881, or the complete text of the Argentine Foreign Minister's speech on the Treaty, or

the documents submitted by him to the Congress before the ratification debate¹, and if therefrom it emerged that the 1876 proposals really had the meaning that is placed upon them today by the Argentine Government, then it would have been possible to admit that proof had been furnished that Barros Arana could hardly have understood the proposals in the way they are illustrated in Plate 8; then it would have been possible to interpret the Irigoyen proposals as confirming the concept of the "Cape Horn frontier".

But the Argentine Government has failed to produce any proof and has confined itself to arguing about lines which *might have been drawn* on maps which *might have been used*, interviews that *might have taken place* and sketches which *might have been copied* from maps which *might have been shown*.

Instead of *proving* that Plate 8 is not authentic, it has contented itself with *allowing it to be understood* that it is "totally unlikely" that it is so.

This is so much the case that the Chilean Government has had to take it upon itself to produce proof that these suppositions were not plausible. Hence the difficult, complex and lengthy character of the foregoing developments, for which it is hoped that the Court will kindly not blame the Chilean Government; the case of Plate 8 is not the only example of this Argentine method. Such a reversal of the burden of proof, which compels the Chilean Government constantly to furnish lengthy and difficult negative proof, has no place in international judicial proceedings.

65. (c) It is necessary finally—and this is no doubt the most important point—to make sure that the length and complexity of the controversies, such as the one to which the Barros Arana map has just given rise, do not obscure the real discussion. "The heart of the matter—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"; this definition given in the Argentine Memorial (Arg. Mem. p. 348, para. 5) remains entirely valid. It is for the purpose of interpreting the Treaty of 1881 that it is necessary to seek the intention of the Parties, and it is for the purpose of seeking the intention of the Parties that it is necessary to concentrate study on the 1876 proposals and the way in which the Parties understood them. The Argentine Government pretends to have it admitted that the Chilean authorities understood those proposals as the Argentine Government itself understands them today and not as the Barros Arana map shows they understood them. It hopes thus to establish the fact that on one occasion at least the wills of the Parties came together in regard to the confirmation of the "Oceanic principle" and the "Cape Horn frontier". That moment, even in the Argentine contention, was ephemeral and led to nothing, since at the

¹ The production of these documents has been requested by the Agent of the Government of Chile, but so far without any result.

resumption of the negotiations, early in 1881, the Chilean Government—it is asserted—reverted to its traditional hostility to those “principles”.

What has been said above shows that even that brief interlude of “oceanic” understanding exists only in the imagination of the authors of the Argentine Counter-Memorial. The Argentine negotiator did not at all entertain the ideas that are today attributed to him retrospectively. As for the Santiago authorities, they never saw—and could not see—in the 1876 proposals what the Argentine Counter-Memorial thinks it can read into them today. Evidence of this is furnished, apart even from Barros Arana’s despatches and his map of July 1876, by the Chilean Authoritative Map of 1881 which shows an 1881 line expressly stated to coincide “throughout its course over Tierra del Fuego and through Beagle Channel” with the one proposed in 1876. The Authoritative Map of 1881, the authenticity of which is not questioned by the Argentine Government, thus proves irrefutably that the Chilean Government understood the Irigoyen proposals of 1876 exactly as represented by Plate 8 of the Chilean Atlas.¹

The Argentine Government, for its part, was fully aware of the way in which the Chilean Government understood the 1876 proposals and it never showed the slightest disapproval or made the slightest protest. The Barros Arana’s telegram of 5 July and his despatch of 10 July 1876 were published in the Chilean *Memoria de Relaciones Exteriores* of 1876—without evoking any protest although the Argentine Minister for Foreign Affairs, Sr. Montes de Oca, and Sr. Irigoyen himself took account of that document (cf. Ch. C.M., Appendix A, p. 169, and p. 81, para. 35; also Irigoyen’s report of 18 July 1878).² Nor did the “El Mercurio” map of 1878, as has just been seen, give rise to the slightest reaction in Argentina. As for the Authoritative Map of 1881, which presented the line shown on the map as coinciding with that of 1876 “throughout its course over Tierra del Fuego and through Beagle Channel”, it was known in Buenos Aires and neither Sr. Irigoyen nor any other Argentine authority objected to it (cf. Ch. C.M., Appendix A, p. 169 and Ch. Annex No. 364, p. 125). How can anyone imagine that a tendentious or erroneous interpretation

¹ Mention might be made also, although it has no official character, of the map published in 1878 by “El Mercurio” (Ch. Plate 11) which likewise represents the 1876 proposals in the same way as they are illustrated by Plate 8. This map, which Baron d’Avril communicated to the Paris Government, was known in Argentina without giving rise to the slightest reaction there (cf. Ch. C.M. pp. 80-81, para. 35, and Appendix A, p. 169). The Argentine Government alleges that the Authoritative Map of 1881 was prepared at a time when the Chilean Government wished to give a distorted view of the Treaty and that the representation of the line shown there as coinciding with the 1876 proposals is not conclusive; but the “El Mercurio” map was issued at a time when, according to the Argentine Government, the Chilean Government understood the Irigoyen proposals as the Argentine Government interprets them today (cf. Arg. C.M. p. 127, para. 31). The fact is of no little interest.

² In that report Irigoyen stated: “I have gone through the Report submitted by the Chilean Minister for Foreign Affairs to the Congress of that Republic” (“*Cuestion limites con Chile — Exposicion presentada al Congreso Nacional por . . . Dr. Manuel Montes de Oca*”, p. 20, Buenos Aires 1878).

of the 1876 proposals by the Chilean Government would have remained without any reaction through the years and until 1974?

66. The conclusion is clear. Far from showing a coming together, even ephemeral, of the wills of the two Parties in regard to an allocation of territories according to their situation in relation to the "Cape Horn frontier", the analysis of the documents concerning the 1876 negotiations reveals an agreement of wills on a formula which made the frontier pass longitudinally along the Beagle Channel, thus skirting the southern coast of Tierra del Fuego and leaving to Chile the islands Picton, Lennox, Nueva, and all the others down to Cape Horn.

II. THE NEGOTIATIONS OF 1877-1879

The Elizalde proposal of 30 March 1878

67. Negotiations having been resumed in 1877 following on the failure of the Irigoyen proposals of 1876 and a Treaty of Arbitration having itself been signed on 18 January 1878 without any result (on this Treaty, cf. Ch. Mem. p. 29, para. 31, and Ch. Ann. No. 27, p. 58; Arg. Mem. pp. 170-171, para. 57; Arg. C.M. pp. 134-135, para. 34),¹ the new Argentine Foreign Minister, Rufino de Elizalde, submitted to Barros Arana on 30 March 1878 a proposal for a "transacción" accompanied by a map to illustrate it (Ch. Ann. No. 29, p. 65, and Ch. Plate 9).² The Chilean diplomat gave to his Government an account of this proposal in a despatch of 13 April 1878 (Ch. Ann. No. 30, p. 66) to which he attached a "rough sketch" (Ch. Plate 10) which, so far as the proposed division was concerned, was identical with the map that had been communicated to him by the Argentine Minister.

The Argentine Government is obviously embarrassed by this proposal, which radically contradicts its contentions. It therefore repeats in its Counter-Memorial (pp. 137-139, para. 34) the attempt at an explanation which it had already put forward in its Memorial (pp. 171-173, paras. 58-59, and p. 423, para. 51): the departure of Irigoyen from the Ministry of Foreign Affairs had, it says, led to an eclipse of Argentina's "oceanic" policy, for Sr. Elizalde "was not so intransigent as Sr. Irigoyen on the exclusion of any Chilean presence on the Atlantic".

¹ On the *status quo* clause of this Treaty, mentioned in the Argentine Counter-Memorial (p. 134, para. 34), see below, para. 69.

² The Elizalde map has now been photographically reproduced. (Ch. Plate 171).

The explanation collapses if it is only remembered that, before submitting his proposal to Barros Arana, Elizalde had taken care to secure the agreement of his predecessor, Sr. Irigoyen, not only in regard to the text of his proposal but even in regard to the map which was to accompany it (cf. Ch. Mem. p. 30, para. 33; Ch. C.M. p. 43, para. 14). That Sr. Irigoyen should have given that agreement is moreover not surprising to anyone who knows his real "frame of mind" (cf. *supra*. paras. 11-14).

68. Elizalde's proposal, the map submitted by him to Barros Arana to illustrate that proposal and the "rough sketch" which the Chilean diplomat made of it for his Government (Ch. Plates 9 and 10) are of quite special interest, as the Chilean Government has already shown (Ch. Mem. p. 30, para. 33; Ch. C.M. p. 42, paras. 13-14 and Appendix A, p. 170).

They destroy the postulate of the Argentine leaders' "oceanic" policy during the negotiation of the Treaty, since the frontier proposed by the Argentine Minister left to Argentina direct access to the Pacific and gave Chile all the "Atlantic" islands to the south of Tierra del Fuego.

They show that, in the mind of the Argentine negotiators, the Beagle Channel extended in a straight line beyond Navarino towards the Ocean, skirting the southern coast of Tierra del Fuego.¹

They furnish at the same time (as do several other maps of Argentine origin) evidence of the absurdity of the Counter-Memorial's allegation that the prolongation of the line beyond Cape San Pio, to the east, which is found on certain Chilean maps (in particular the Barros Arana map of 1876 and the Authoritative Map of 1881) expresses Chile's "expansionist" policy in regard to the South Atlantic (on this question, see *supra*. Chapter I, paras. 52-53).

The Fierro-Sarratea Treaty of 6 December 1878 and the "El Mercurio" map (Ch. Plate 11).

69. As the Chilean Government has already shown (Ch. Mem. pp. 30-31, paras. 34-35; "Some Remarks . . .", pp. 16-17; Ch. C.M. p. 47, para. 22), the Fierro-Sarratea Treaty and the cartographical illustration of it which was published by "El Mercurio" (Ch. Plate 11) show clearly that, in the terminology of the Argentine Government in 1878,

¹ It requires a good deal of imagination to read into Elizalde's text ("... *hasta el Canal de Beagle, siguiendo por éste paralelo al grado 55 latitud sud hasta el Océano Atlántico* . . .") or to gain from the attached map the idea (which the Argentine Counter-Memorial does not hesitate to advance) that, for Elizalde, the proposed frontier line and the Beagle Channel parted at the Cape Horn meridian (Arg. C.M. p. 138, para. 34; see also "Supplementary Remarks . . .", on Ch. Plate 171).

Picton, Nueva and Lennox were not included in the concept of "sea and coasts of the Atlantic Ocean and the adjacent islands", but in that of "sea and coasts of the Strait of Magellan, channels and adjacent islands". The text of the Treaty shows also that the concept of "sea and coasts of the Atlantic Ocean" was distinct from the concept of "adjacent islands" and that the former did not include the latter. At the same time, this Treaty throws light retrospectively on that of 18 January of the same year, which was mentioned above (para. 67). As the Argentine Counter-Memorial points out (p. 140, para. 35), the clause relating to the *status quo* is practically the same in the two texts. This is so much the case that in both of them the "Atlantic coast" over which Argentina was to exercise its jurisdiction during the period of the *status quo* was that to the north of the Le Maire Strait and Staten Island, as is clearly shown by the "El Mercurio" map. (Ch. Plate 11).¹

70. The Argentine Memorial displayed great discretion in regard to the Fierro-Sarratea Treaty, to which it devoted only a few lines. As for the "El Mercurio" map—which, as we are aware, was known in Buenos Aires and had given rise to no reaction there (Ch. C.M. p. 80, para. 35, and Appendix A, p. 169)—it quite simply did not mention it (Arg. Mem. p. 174, para. 60). It is understandable that, being embarrassed by the publication of this map in the Chilean Atlas, the Argentine Government takes advantage of its Counter-Memorial to try to discredit it, as it does with the other maps which contradict its views. It is true that there are errors in this map, particularly in regard to the line proposed by Sr. Elizalde a few months earlier; the Chilean Government did not wait for the Argentine Counter-Memorial to draw attention to this fact ("Some Remarks . . .", p. 16).

¹ The same concepts are found, with the same sense, in another Treaty relating to the *status quo*, concluded six months later, on 3 June 1879 (its text is published in Ch. Annex No. 346, p. 79 and Arg. C.M. Ann. No. 12, p. 65. Cf. Ch. Mem. p. 31, para. 36; Arg. C.M. p. 143, para. 36).

The Argentine Counter-Memorial presents the *status quo* clauses of these three Treaties (18 January 1878, 6 December 1878 and 3 June 1879) as granting to Argentina jurisdiction over "the islands situated in the Atlantic, without any exception, and therefore certainly as far as Cape Horn" (Arg. C.M. p. 135, para. 34, and cf. pp. 141-143, para. 36). Actually, none of these clauses mentions Cape Horn. What is attributed to Argentina during the *status quo* period, is only jurisdiction over "*los territorios bañados por el Atlantico, comprendidos hasta la boca oriental del Estrecho de Magallanes y la parte de la Tierra del Fuego bañada por el mismo mar*" and "*las islas situadas en el Atlantico*" (Treaty of 18 January 1878) or "*el mar y costas del Atlantico e islas adyacentes*" (Treaties of 6 December 1878 and 3 June 1879)—in other words, on the Atlantic seaboard as far as the eastern end of Tierra del Fuego and the islands adjacent thereto. As for the Strait of Magellan, "*sus canales e islas adyacentes*", the three clauses gave jurisdiction over them to Chile. The Argentine Counter-Memorial, in order to give an appearance of strength to its interpretation, bases itself on an article in the "Buenos Aires Standard" reproduced in the "Money Market Review", according to which the clause in the Treaty of 18 January 1878 gave Argentina "jurisdiction along the seaboard to Cape Horn" (Arg. C.M. p. 141, para. 36). May it please the Court to compare the Treaty (Ch. Mem. Ann. No. 27, p. 58) with the summary which that article gives of it (Arg. C.M. Ann. No. 17, p. 81). It will see for itself the errors with which this article teems. It speaks of jurisdiction of Chile "in Magellan's Strait and islands" whereas the Treaty speaks of "*todo el Estrecho con sus canales e islas adyacentes*"; the article mentions Cape Horn, the name of which does not appear in the Treaty, etc. The Argentine Government calls to its assistance some very unreliable witnesses . . .

But there is no reason why these errors should render suspect the other indications of the map, especially when they are confirmed by other documents, as is the case of the 1876 boundary-line, which is represented exactly as it was two years earlier on the map which Barros Arana attached to his despatch of 10 July 1876 (Ch. Plate 8) and as it was to be represented three years later on the Chilean Authoritative Map of 1881 (Ch. Plate 13). If the representation of the 1876 line which appears on the "El Mercurio" map had been incorrect, the Argentine negotiators, who knew it, would not have failed to point it out to their Chilean opposite numbers when the negotiations were resumed in 1881 on the basis of the 1876 proposals. The Argentine Government has still less justification for casting doubt on the way in which the "El Mercurio" map describes the *status quo* line, since this map was published precisely for that purpose. Furthermore, it is because it illustrated that line that Baron d'Avril considered it sufficiently important to communicate it to the Paris Government: "*Vous y trouverez*", he wrote "*l'indication de la ligne divisoire qui devra constituer le status quo jusqu'au moment où l'arbitre aura prononcé sur le fond*" (Ch. Ann. No. 32 (a), p. 70).

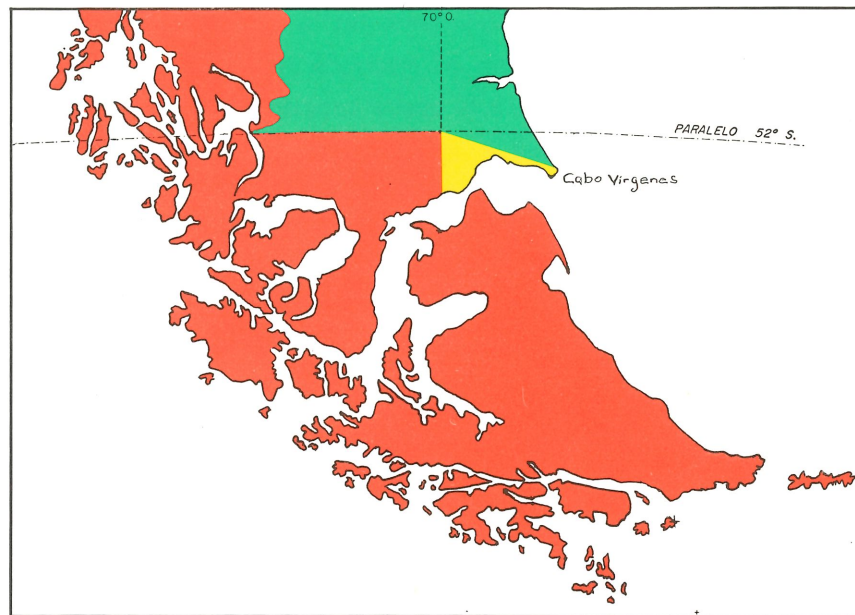
Montes de Oca's proposals of 1879

71. The proposal submitted by the Argentine Minister for Foreign Affairs, Sr. Montes de Oca, to the new representative of Chile, Sr. Balmaceda, on 17 April 1879, was presented by the Argentine Memorial as being the only case, apart from the Elizalde proposals of 1878, in which the Argentine Government suggested a settlement granting Chile a territory east of the Cape Horn meridian. In both cases, this exception to the "Atlantic" policy of Argentina was due, it was explained, to the absence of Sr. Irigoyen from the Government (Arg. Mem. pp. 174-176, para. 61 and p. 423, para. 51). Care was moreover taken in the Argentine Memorial to make it clear that the Montes de Oca proposal gave Chile only a "small stretch of Atlantic frontage" and left to Argentina Picton, Nueva, Lennox, Terhalten, Sesambre, Evout and even Navarino (*ibid.*). The Argentine Counter-Memorial confirms that the proposal of April 1879

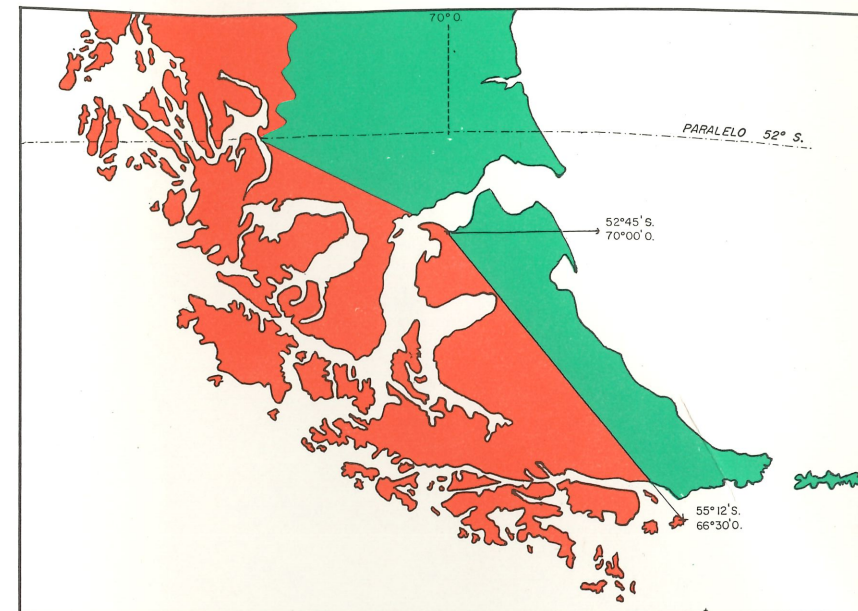
"...conceded to Chile something more than did Elizalde's proposal in the area of the Strait but considerably less than the Irigoyen proposals in the southern archipelago, since *the large island of Navarino, situated almost entirely to the west of the longitude of Cape Horn, was attributed to Argentina.* ¹ *Therefore it did not at all enter into the calculations of Minister Montes de Oca to abandon to Chile all the territories south of the southern coast of Isla Grande de Tierra del Fuego*" (Arg. C.M. p. 145, para. 37).

¹ Does the Argentine Government realize that it itself thus contradicts the theory of "the heritage of the past, the Cape Horn frontier"? Does it remember that, a few pages earlier, it explained that, by virtue of this theory, Navarino was to belong to Chile "because it is situated in its entirety on the 'Pacific' side" (Arg. C.M. p. 110, para. 23. Cf. *supra*, Ch. I, para. 99)?

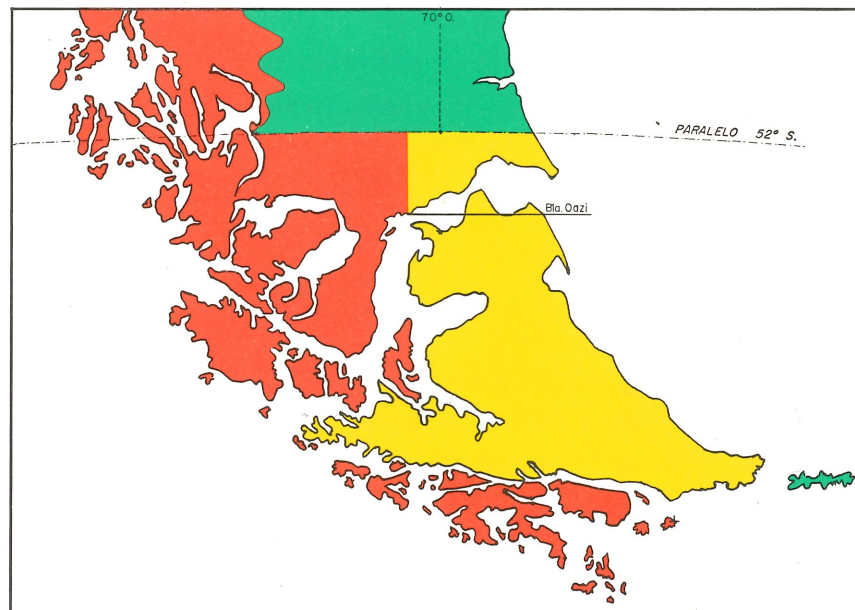
PROPOSALS MADE FOR A COMPROMISE SETTLEMENT
BY SR. MONTES DE OCA IN MAY 1879.



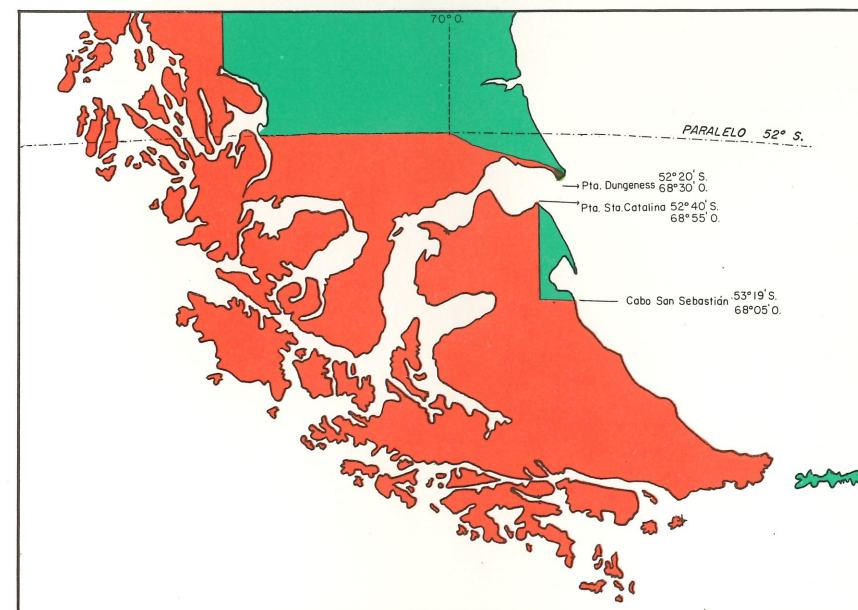
12 May 1879: Recognition of sovereignty together with limited arbitration. (Chilean Annex No. 398.)



28 May 1879: Wider arbitration over whole of Patagonia, Strait of Magellan and Tierra del Fuego: "post-Award mutual concessions" if Argentina succeeds in the arbitration. (Chilean Annex No. 345.)



28 May 1879: Recognition of sovereignty together with a limited arbitration. (Chilean Annex No. 345.)



28 May 1879: Wider arbitration over whole of Patagonia, Strait of Magellan and Tierra del Fuego: "post-Award mutual concessions" if Chile succeeds in the arbitration. (Chilean Annex No. 345.)

Figure 1

Key:

- To Chile: ■
- To Argentina: ■
- Arbitration: ■

72. The Chilean Government has shown in its Counter-Memorial that the proposal of 17 April 1879 was far from being the only one that was submitted by Montes de Oca to Balmaceda. In none of these proposals (apart from the first) was there any "non-negotiable" element whatsoever of "Atlantic frontage". *In all the proposals (save for the first), Picton, Nueva, Lennox and all the other southern islands down to Cape Horn were to be attributed to Chile* (Ch. C.M. p. 43, para. 14, and Appendix A, pp. 170-171.) (cf. *intra*, Fig. No. 1). The Chilean Government would like to contribute to the discussion another document from these negotiations. This is a telegram sent by Balmaceda to his Government on 12 May 1879 to report to it on an interview he had just had with the Argentine Minister:

"...Mr. Montes de Oca considers necessary to discuss from now on the bases for the settlement on limited arbitration, and on this effect he asked me to transmit the following proposal:

"To the south of the Strait to Chile and also to the north of it the territory lying to the south of degree 52 latitude S. and up to degree 70 longitude W..." (Ch. Ann. No. 398, p. 35).

It is therefore not only a "small stretch of Atlantic frontage north-east of Cape Horn" (Arg. Mem. p. 176, para. 61 and p. 423, para. 51) that Montes de Oca was prepared to grant to Chile, but *all the territories to the south of the Strait of Magellan*: (*"Al sur del Estrecho para Chile"*).

One cannot fail to be struck by the similarity of this formula to that which Irigoyen himself had employed in a proposal to Barros Arana in February 1878 "Chile would then be left with the whole of the Strait . . . and all the islands to the south" (See Ch. Annex No. 343, p. 72) and to the one he was to employ three years later when, having returned to the Ministry of Foreign Affairs, he was ready to "yield" to Chile "all below the straits" (see *supra*, para. 14).

Conclusion

73. Both in the Counter-Memorial and in the Memorial, the Argentine Government appears embarrassed by the Argentine proposals of the years 1878 and 1879, which were so little in conformity with the "Atlantic-Pacific principle" and the "Cape Horn frontier", said to be inherited from the colonial past, that *allegedly gave Argentina territories situated to the west of the Cape Horn meridian and Chile territories situated to the east of that alleged frontier*. The Argentine Government hopes to escape the obstacle by sheltering behind the over-facile argument that the Ministers Elizalde and Montes de Oca were less intransigent in regard to the "oceanic principle" than Irigoyen:

"This interim period is undoubtedly marked by Irigoyen's temporary absence from the direction of Argentine foreign policy" (Arg. C.M. p. 133, para. 34).

"With the return of Irigoyen to the Argentine Ministry of Foreign Affairs, Argentine policy reverted once more to its absolute adherence to the Atlantic-Pacific principle" (Arg. Mem. p. 423, para. 51).

This explanation, most unfortunately for the Argentine contention, is radically contradicted by the documents analysed above: the Elizalde proposal of 30 March 1878 (Ch. Annex No. 29, p. 65) and the map which accompanied it (Ch. Plate No. 9) were submitted to Irigoyen who approved them (cf. above, para. 67); and the Montes de Oca proposals of May 1879 (Ch. Annex No. 398, p. 35) which gave Chile all the territories to the south of the Strait of Magellan, had been suggested by Irigoyen as early as in the beginning of 1878 (Ch. Annex No. 343, p. 72) and were to be taken up again by him three years later. There was in reality no breach in Argentine policy on these questions as a result of the departure of Irigoyen from the Ministry nor was there to be any on his return.

But that is not the only interesting feature of the negotiations of 1877-1879. They also illustrate the way in which the Argentine Government understood the concepts "coast of the Atlantic", "Beagle Channel", "Tierra del Fuego", and the neat distinction between that island and those forming the Cape Horn archipelago. Thus they throw light on the bases of agreement reached in 1876 between Irigoyen and Barros Arana, and also upon the Treaty of 1881 which results from them.

III. THE NEGOTIATIONS OF 1881 AND THE SIGNATURE OF THE TREATY

The great discovery of the Argentine Counter-Memorial: the matter of the bases of 3 June

74. The Memorials of the two Parties described, in almost identical terms, how, in the absence of direct diplomatic representation between the two Governments at the beginning of 1881, contacts were established between them through the intermediary of the Ministers of the United States in the two capitals: Thomas A. Osborn in Santiago and Thomas O. Osborn in Buenos Aires. They then described how the distance between the two Governments gradually lessened, through the telegrams exchanged between the two Osborns, until on 3 June the Chilean Foreign Minister, Sr. Valderrama, was able to transmit to the Buenos Aires Government the text of six "bases de arreglo" which, after modifications bearing on the first and the fifth bases, were confirmed in the Treaty signed on 23 July. Both Memorials emphasized lastly the direct relationship between the

proposals of 1876, the bases of 3 June 1881 and Articles II and III of the Treaty. Between the bases of 3 June and the Treaty, the similarity seemed to be complete. Between those last two documents and the proposals of 1876, one difference lay in the shifting of the dividing line to the north of the Strait of Magellan.¹ Such is the account which the Court will find both in the Memorial of the Chilean Government (Ch. Mem. pp. 33-39, paras. 1-18) and in that of the Argentine Government (Arg. Mem. pp. 179-191, paras. 65-74, and pp. 424-425, para. 52).

The Argentine Memorial stated in particular that, in its despatch of 3 June 1881, submitting to the Buenos Aires Government the "bases de arreglo",

"...the Chilean Government *confirmed the terms of settlement* ..." (Arg. Mem. p. 188, para. 72).

It then stated that:

"...the bases proposed by the Chilean Government were *accepted with some modifications in the drafting of the first and the fifth bases*" (p. 190, para. 73);

and lastly it concluded this account of the final negotiations by stating that:

"*On those bases the Boundary Treaty between both Republics, was finally signed* ... on 23rd June (sic) 1881" (p. 191, para. 74).

There was no question whatsoever of any "innovation" which the bases of 3 June introduced in relation to those of 1876, as the Court may note by re-reading the passages of the Argentine Memorial devoted to the "preparatory work of the Treaty and the circumstances of its conclusion" (Arg. Mem. p. 359, para. 14; pp. 414-415, para. 46; pp. 424-427, paras. 52-53). These bases were presented as the confirmation pure and simple of those of 1876 and as purely and simply foreshadowing the provisions of the Treaty.

Agreement seemed thus to have been reached between the two Parties in regard to the fact that "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" (Ch. C.M. p. 59, para. 50).

75. The Argentine Counter-Memorial now calls everything into question and puts forward an entirely new version of the conclusion of the Treaty. Here it is:

(a) The Chilean Government did indeed propose to the Argentine Government in 1881 that the territorial dispute should be settled on the basis of the proposals submitted to

¹ On this shifting, see Ch. C.M. pp. 54-55, para. 39, and *infra*, para. 82.

Barros Arana in 1876 by Irigoyen, but it took advantage of the "bases de arreglo" to engage in a manoeuvre of which, if it had succeeded, the effect would have been to distort completely the meaning of the 1876 proposals. Into the deepest hidden fold of the text of the bases of 3 June the Chilean Government in fact slipped a revolutionary innovation—the establishment of Chile on the Atlantic. If this innovation had been confirmed by the Treaty, the disputed islands would today be Chilean and the "Atlantic" ambition of Chilean policy would have been satisfied:

"... the text of Sr. Valderrama's 'third basis', transmitted ... six days after the formal acceptance without reserve of the 'Basis' prepared by Sr. Irigoyen in 1876, *departs from the text of the 1876 Basis on a very important point* ... If the changes in the text of the proposals transmitted on 3 June 1881 by the Chilean Government to the Argentine Government, as compared with the text of the 1876 Argentine proposals, could have been passed off as the final text of the Treaty, Chile would then have obtained a result it had never been able to obtain before ... its old dream come true of establishing its sovereignty over part of the southern Atlantic coasts" (Arg. C.M. pp. 159-160 and 162, paras. 8 and 10).

(b) But Argentina had at the head of its diplomacy a man of the quality of Bernardo de Irigoyen, that "indomitable champion of Argentina's exclusive presence on the Atlantic coasts from Rio de la Plata to Cape Horn", that man for whom Argentine sovereignty over all the territories to the east of the "Cape Horn frontier" was the "*condition sine qua non*" of any agreement (Arg. C.M. pp. 147-148, para. 1). Irigoyen did not at once perceive the Chilean stratagem, but he was not slow to discover the trap and he insisted on "the restoration" of the original text of 1876 (Arg. C.M. pp. 170-171, para. 14):

"This put an end to the repeated Chilean attempts to get a solution for Tierra del Fuego and the southern archipelago, and thus for the southern Atlantic, different from the one envisaged and proposed by Sr. Irigoyen in 1876. The division of islands in the extreme south, according to the strict application of the criterion of oceanic jurisdictions, was definitely adopted" ¹ (Arg. C.M. p. 175, para. 17).

(c) The manoeuvres of the Chilean Government did not however come to an end with the signature of the Treaty on 23 July 1881. Instead of recognizing honestly that the Treaty gave Argentina the "Atlantic" islands to the south of Tierra del Fuego, the Chilean Government engaged in a series of machinations with the object of accrediting both within Chile and abroad, an "understanding" of the Treaty contrary to the provisions of the latter. To this end, the Chilean Government systematically maintained "a climate of equivocation and of confusion" (Arg. C.M. p. 192, para. 7) between the text of its bases of June and those of the Treaty, in the hope of causing it to be believed that the Treaty signed on 23 July confirmed the bases of 3 June, whereas, in reality it contradicted them in regard to

¹ Emphasis in original from "The division of islands ..." to end of quotation.

the problem of the southern islands. The Argentine Counter-Memorial is particularly severe with regard to this "tendentious interpretation" for which the Chilean Government attempted to secure the acceptance of public opinion both in Chile and abroad:

"...the official Chilean interpretation can only with difficulty be considered to be an interpretation... It was nothing less than the expression of a deliberate and barely disguised intention to set aside the letter and the spirit of the Treaty" (Arg. C.M. p. 234, para. 24).

By thus suggesting that the Treaty of 23 July coincided with the bases of 3 June and by seeking "to establish and maintain its presence over the insular shores of the southern Atlantic which were denied to it by the Treaty of 1881", the Chilean Government "wittingly distorted" the letter and the spirit of that Treaty (Arg. C.M. pp. 236-237, para. 25).

Such is the version which is set forth, in nearly one hundred pages, by Chapters IV and V of the Argentine Counter-Memorial and which is summarized in the Introduction to that pleading:

"Chapter IV explains in particular how *the text of 1876*, proposed by Chile and accepted by Argentina through the channel of the American Ministers' mediator *was nevertheless subtly but materially changed in the bases of June 1881* transmitted by the Chilean Foreign Minister Valderrama, *but re-established at the very last moment by the Argentine Foreign Minister Irigoyen* in the Treaty of 1881.

"Chapter V deals especially with the invention by Chile of an '*understanding*' of the Treaty of 1881 which, by returning to the text of Valderrama's bases of June 1881, *tried to nullify the re-establishment made by Irigoyen of the true text of 1876...*" (Arg. C.M., Introduction, p. xiii).

76. *This version*, it is hardly necessary to stress, *is entirely new*: never—absolutely never—had the Argentine Government mentioned any substantial difference between the third basis of June 1881 and the third basis of 1876, a difference which the final text of the Treaty is said to have effaced by reverting to the original formula of 1876. At no time in the long history of the dispute did the Argentine Government, or anyone else on the Argentine side, speak of anything whatever of this kind. *Even in 1973, the Argentine Memorial completely ignored this question*, and the Argentine Government must have great aplomb—the Chilean Government regrets to have to write this so bluntly—to declare itself "taken aback" by the silence of the Chilean Memorial regarding the difference between the third Valderrama basis and the third Irigoyen basis (Arg. C.M. p. 160, para. 8; cf. p. 161, note 17, and p. 173, para. 16)—a difference concerning which it is nevertheless admitted that no one (not even Irigoyen) perceived it at the time (Arg. C.M. pp. 163-164, para. 11) and of which the Agents and Counsel of the Argentine Government were themselves unaware only two years ago!

77. The Argentine Government is of course at liberty to produce in its Counter-Memorial new elements calculated to support its case, and the Chilean Government will not complain of its doing so. What the Chilean Government may, on the other hand, reproach the opposing Party for is for having built up such a gigantic construction, with innumerable ramifications, on a ground that is entirely and totally specious, for *all this story of the bases of 3 June is purely and simply imaginary*. Only too delighted no doubt at a "discovery" which came in the nick of time to prop up a sadly tottering case, the authors of the Argentine Counter-Memorial must have fallen into the trap of their own illusions. The Chilean Government finds it somewhat difficult to understand how they came to rush thus headlong into an operation as fanciful as it was risky.

A. *The negotiations up to 3 June 1881*

78. An account of the 1881 negotiations having been given several times already by the two Parties ¹, the Chilean Government would like, for the convenience of the Court, to draw up a diagrammatic and chronological table of the various phases of those negotiations conducted through the intermediary of the two Osborns.

79. Attention should, however, first be drawn to certain special features of that correspondence from the documentary point of view.

Usually the text of a diplomatic note is to be found in the archives of the Government which is the author of it and also in the archives of the Government to which it is addressed. In the present case, the negotiations were not conducted directly by the two Governments since at that time there were no diplomatic missions of Chile or Argentina, respectively, in Buenos Aires and Santiago. The views of each Party were brought to the knowledge of the other through the intermediary of a telegram addressed by the United States Minister in one of the capitals to his colleague in the other. Hence it follows that the text of the telegrams exchanged between the Osborns does not appear in the Chilean archives as original governmental documents kept as such.

80. That text has come to us through various channels.

(a) An English version of the telegrams appears as an annex to a despatch addressed to the U.S. Secretary of State Blaine on 1 July 1881 by Thomas O. Osborn, United States Minister in Buenos Aires. It is this collection which the Chilean Government published as

¹(Ch. Mem. pp. 33-37, paras. 1-13; Ch. C.M. pp. 53-55, paras. 37-39; Arg. Mem. pp. 179-191, paras. 65-74; Arg. C.M. pp. 147-157, paras. 1-6).

Annexes Nos. 36 (A) to 36 (U) to its Memorial, at pp. 78-95.¹ It is this version also that has been used by the Argentine Government (Arg. Mem. p. 181, note 85). However these telegrams are not copies of originals, but the translation into English of documents which—except on two occasions—were sent or received in Spanish.

(b) The *originals* of the telegrams *received* by the United States Legation in *Buenos Aires* do not appear to be in the archives of that Legation, at present kept in Washington, with but one exception—the telegram addressed by Thomas A. Osborn to his Buenos Aires colleague on 24 July 1881 (Ch. Ann. No. 36 (V), p. 95). That is the only original telegram found—loose inside a volume—by the Agent of the Chilean Government in the “National Archives” of the United States of America.

(c) Neither the *originals* nor *copies* of the *telegrams sent* by the United States Legation in *Santiago* have been found in the archives of that Legation, which also are kept in Washington.

(d) In the archives of the Department of State there is also, in a bound volume, a manuscript and, apparently contemporary copy of telegrams exchanged between Thomas A. Osborn and Thomas O. Osborn. They appear in parallel *Spanish and English versions*. The volume, entitled “Correspondence of Thomas A. Osborn, April-July 1881”, belonged to the Archives of the American Legation in Buenos Aires. This is probably the collection, distinct from that mentioned in (a), to which the Argentine Counter-Memorial refers when it speaks of a “Spanish version side-by-side with an English translation”. At first sight, there do not seem to be any differences between this English version and the one mentioned in (a).

(e) The main items of the telegraphic correspondence exchanged between the United States Ministers were published also, in Spanish, in the *Memoria de Relaciones Exteriores* of the Chilean Ministry of Foreign Affairs for 1881 (pp. 132-168) and in the *Memoria de Relaciones Exteriores* of the Argentine Ministry of Foreign Affairs for 1882 (pp. 9-37). The dates of the various telegrams are not always the same in the two publications. There are also certain textual differences, as will be seen for the bases of 3 June (*infra*, para. 94).

(f) An English translation of the Spanish version appearing in the Chilean *Memoria* of 1881 was published by the Chilean Government as Annex No. 26 of the Chilean Statement of 1902, in the arbitral proceedings then in course. That translation differs at several points from the English version mentioned above in (a) and (d).

(g) It should be noted lastly, that the Agent for Chile, upon request, has received from the Agents of Argentina the copies of ten telegrams which were kept in the Argentine archives and were mentioned by the Argentine Counter-Memorial (Arg. C.M., p. 151, note 6).

¹ This English text was not, then, checked against the original Spanish, it being assumed that it was correct.

81. The first contacts between the two United States diplomats are recorded in Santiago-Osborn's letter of 15 November 1880 (Argentine "*Memoria de Relaciones Exteriores*" for 1882, p. 3) and in Buenos Aires-Osborn's reply of 4 January 1881 (Ch. Ann. No. 34, p. 74). The two diplomats mentioned the possibility of arbitration, and this first correspondence is not of any great interest so far as concerns the ultimate negotiation of the Treaty (for a summary of these letters, see Arg. Mem. pp. 181-182, para. 66, and Arg. C.M. pp. 149-150, para. 2).

The first really relevant element of the negotiations is thus supplied by the letter which Thomas O. Osborn (Buenos Aires) addressed on 4 April 1881 (Ch. Annex No. 35, p. 76) to the Department of State in Washington to inform it of an interview he had just had, on 31 March with Minister Irigoyen. In this interview, relates Osborn, the Argentine Minister "pointed out to me on the map the boundary line which his Government was willing to accept—see Map 1876 line and dots—which yields to Chile all below the Straits" (Ch. Ann. No. 35, p. 76, at p. 77 and Ch. Plate 172). The interest of the dispatch and of the map mentioned in it has been seen above (see *supra*. para. 14).¹

82. It was on 28 April that the real negotiations between the two Governments opened, through the intermediary of the Osborns. The way they developed, up to 3 June, was as follows:

(i) 28 April (Ch. Ann. No. 36 (A), p. 78): Santiago-Osborn proposes to his Buenos Aires colleague "that you and I should take the matter up, with a view to endeavouring to accomplish the finding of some means of settlement" and asks him: "Could you think of any basis to propose?"

(ii) 30 April (Ch. Ann. No. 36 (B), p. 78): Buenos Aires-Osborn communicates to Santiago-Osborn an exchange of letters that took place in March between Sr. Sarratea, the former Consul-General of Argentina in Chile, and Sr. Luis Saenz Peña, an Argentine politician who was a friend of Minister Irigoyen. As Sr. Sarratea thought that a settlement on the basis of the Irigoyen proposals of 1876 would be possible for the Chilean Government, and as Sr. Saenz Peña considered such a formula would be acceptable to the Argentine Government, the United States representative in Argentina informed his colleague in Santiago that the points of view of the two Governments had drawn

¹ This information, given personally by Irigoyen disposes at the same time of the argument which the Argentine Government seeks to deduce, in regard to his "frame of mind" from a letter of 24 October 1880 from the French Legation (Arg. Mem. p. 180, note 84, and Arg. C.M. p. 148, para. 1). The Chilean Government has already submitted this letter to critical examination in its Counter-Memorial (Ch. C.M. Appendix A, pp. 172-173).

sufficiently close together to permit of the opening of negotiations on those bases (on the Sarratea-Saenz Peña exchange of letters, see Ch. Mem. p. 34, para. 5; Arg. Mem. pp. 182-183, para. 67; Arg. C.M. pp. 150-151, para. 3).¹

(iii) 9 May (Ch. Ann. No. 36 (C), p. 80): Santiago-Osborn reports that the Chilean Government demands on the one hand, that the dividing line to the north of the Strait of Magellan should be moved 10' towards the north and that its starting point should be moved towards the east, from Mount Dinero to Cape Virgenes and, on the other hand, that the whole of the region to the south of this line, with the sole exception of Staten Island, should belong to Chile (cf. Ch. Mem. pp. 34-35, para. 6; Ch. C.M. p. 45, para. 18 and pp. 54-55, para. 39; Arg. Mem. p. 184, para. 68; Arg. C.M. p. 152, para. 4).

(iv) 11 May (Ch. Ann. No. 36 (D), p. 80): Buenos Aires-Osborn informs his colleague that the Argentine Government proposes, as a definitive compromise ("*transacción definitiva*") that, in addition to the proposed attribution of Staten Island to Argentina, the starting point of the line to the north of the Straits should be fixed at Point Dungeness ² and "Tierra del Fuego and Islands will be divided between the two Republics, in accordance with the terms agreed on by Messrs. Barros Arana and Irigoyen in July 1876". The Argentine Government thus refused to limit to Staten Island the exception to the principle of the sovereignty of Chile over the territories to the south of the Straits and confirmed its adherence to the last two bases of 1876 (cf. Ch. Mem. p. 35, para. 7; Arg. Mem. pp. 184-186, para. 69; Arg. C.M. pp. 152-154, para. 4).

(v) 18 May (Ch. Ann. No. 36 (E), p. 81): Santiago-Osborn reports the hesitations of the Chilean Government in regard to the two Argentine demands. The Chilean Government feared that a line starting from Point Dungeness "would have, in some places, to cross the water, and thus give rise to misunderstandings" and that the division of Tierra del Fuego might cause an "*indeterminación de deslindes*". The Chilean Government therefore made a last attempt to protect the integrity of the island, to which it attached so much importance (see *supra*, para. 29).

¹ The Argentine Counter-Memorial is in error in speaking of "an agreement between the two Ministers". Buenos Aires-Osborn confined himself to transmitting the Sarratea-Saenz Peña correspondence to his colleague, mentioning the fact that the points of view had drawn closer together in so far as one reflected the Chilean point of view and the other the Argentine point of view.

² That is to say to a point intermediate between Mount Dinero, proposed by Irigoyen in 1876, and Cape Virgenes, claimed by the Chilean Government on 9 May. At the same time the Argentine Government agreed to the removal of the line from 52° 10' to 52°, as the Chilean Government requested in that same telegram of 9 May.

(vi) 20 May (Ch. Ann. No. 36 (F), p. 82): Buenos Aires-Osborn informs his colleague of the Argentine Government's categorical refusal to abandon the division of Tierra del Fuego and of the islands as envisaged in Irigoyen's proposals of 1876 and the demand for Point Dungeness (Ch. Mem. pp. 35-36, para. 9; Ch. C.M. p. 45, para. 18; Arg. Mem. p. 186, para. 70; Arg. C.M. p. 155, para. 5).

(vii) 21 May (Ch. Ann. No. 36 (G), p. 82): To obviate any misunderstanding, Santiago-Osborn asks his colleague to make the Argentine position quite clear.

(viii) 23 May (Ch. Ann. No. 36 (H), p. 83): Buenos Aires-Osborn confirms that the Argentine proposals are those of 11 May and that "they cannot be modified".

(ix) 28 May (Ch. Ann. No. 36 (I), p. 84): Santiago-Osborn informs his colleague that the Chilean Government accepts the Argentine demands: "Tierra del Fuego and the islands would be divided in accordance with the proposition made by Mr. Irigoyen to Barros Arana in 1876"; the line to the North of the Straits would start from Point Dungeness (Cf. Ch. Mem. p. 36, para. 11; Ch. C.M. p. 45, para. 18 and p. 55, para. 39; Arg. Mem. p. 187, para. 71; Arg. C.M. pp. 155-156, para. 6).

(x) 31 May (Ch. Ann. No. (J), p. 84): Buenos Aires-Osborn informs his colleague that the Argentine Government accepts this Chilean proposal: "the division of Tierra del Fuego and the islands as indicated by you will be accepted in accordance with the proposition Irigoyen-Barros 1876"; the line to the north of the Straits will be in conformity with the Chilean proposal of 28 May. In conclusion the United States diplomat wrote:

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

(On this telegram of 31 May, cf. Ch. Mem. pp. 36-37, para. 12; Arg. Mem. p. 188, para. 72; Arg. C.M. pp. 156-157, para. 6).

83. The sense of these negotiations is perfectly clear. Whilst taking the three elements of the proposals of Irigoyen of 1876 as a starting point for discussion, the Chilean Government was not in complete agreement with any of them at the beginning of the negotiations: it did not agree with the first because it provided for a line to the north of the Straits which did not give it the whole of the northern shore of the Straits and a sufficient hinterland; it did not agree with the second and the third because, although it accepted

yielding Staten Island to Argentina, it was unwilling to give her other territories to the south of the line described in the first part of the proposal. In the course of the negotiations the points of view drew closer to each other: Buenos Aires agreed to move the dividing line to the north of the Straits, while Santiago resigned itself to the other two demands and agreed that Argentina should receive more than Staten Island to the south of the Straits. It was around these two problems—the fixing of the dividing line to the north of the Straits and the division of Isla Grande—that the controversy evolved and it was by mutual concessions (by Chile on the second point and by Argentina on the first) that agreement was finally achieved.

Of any difficulty whatsoever concerning the attribution of the islands to the south of the Beagle Channel, according to their position in relation to the Cape Horn meridian, there is not the slightest trace throughout the whole of this correspondence.

84. After the telegram of 28 and 31 May there no longer remained any divergence between the Parties. They were henceforth agreed on the two points under discussion:

— In accordance with the wishes of Chile, the first element of the 1876 proposals would be modified so that the dividing line to the north of the Strait of Magellan would start from Point Dungeness instead of from Mount Dinero and it would follow parallel 52° instead of parallel $52^{\circ} 10'$. Chile would thus receive to the north of the Straits a strip of land larger than that proposed by Irigoyen in 1876.

— In accordance with the wishes of Argentina, the second and third elements of the the proposals of 1876 would be maintained as they were, and Chile would yield to Argentina, south of the Straits, in addition to Staten Island, the eastern part of Isla Grande of Tierra del Fuego.

The Argentine Government having asked the Chilean Government, in the telegram of 31 May, for official confirmation of its agreement before expressing its own, the Chilean Government drafted the “*bases de arreglo*” of 3 June.

B. From the “bases de arreglo” of 3 June to the signature of the Treaty on 23 July 1881

Scope and structure of the bases of 3 June

85. As has just been seen, agreement between the two Governments was practically achieved on the points under discussion following the telegrams of 28 and 31 May, and it only remained, as Thomas O. Osborn, of Buenos Aires, suggested, for them to be asked to give it official confirmation. That was precisely the object of the “bases of 3 June”. On that date, the Chilean Minister for Foreign Affairs, Melquiades Valderrama, addressed

to the United States representative in Santiago a note in which, after thanking the two diplomats for their assistance, he wrote:

*"...me permito solicitar de V.S. su concurso amistoso para hacer llegar a conocimiento del Gobierno Argentino las siguientes bases de arreglo, que responden, según creo, a las ideas manifestadas recientemente por uno i otro Gobierno".*¹

"...I beg to solicit Y.E's. friendly aid in order to the transmission to the Argentine Government of the following terms of settlement which as I take it, harmonize with the ideas recently manifested by both Governments" (Ch. Annex No. 36 (K), p. 86).

In the mind of the Chilean Minister, it was therefore simply a matter of setting down, in black and white, the agreement to which the negotiations conducted through the intermediary of the two United States diplomats had already led.

The United States representative in Santiago transmitted the text of Valderrama's note to his colleague in Buenos Aires that same day and asked him to bring it to the knowledge of the Argentine Government, adding that, in his opinion, the six bases proposed by Valderrama might with advantage be supplemented by a seventh relating to certain financial compensation (Ch. Ann. No. 36 (K), p. 85; cf. above Chapter I, para. 87).

86. Of the six bases proposed by the Chilean Minister, four are of no direct interest from the standpoint of the present dispute—the first, concerning the frontier running along the Cordillera of the Andes to the north of the 52nd parallel; the fourth concerning the demarcation of the boundary; the fifth relating to the régime of the Strait of Magellan; the sixth, with the provision that the two Governments “will exert full dominion ever after over the territories that respectively belong to them by virtue of the present agreement”.

The second and third bases, on the other hand, are of direct interest in the present dispute and call for more detailed examination.

87. The “segunda base” of 1881 followed from the first element of the proposals of 1876. It fixed the dividing line to the north of the Strait of Magellan and, as has been seen, it incorporated two modifications of the 1876 formula. Instead of starting from Mount Dinero, the line starts from Point Dungeness and instead of following parallel 52° 10', it follows parallel 52°. Furthermore, this “base segunda” states explicitly that “*los territorios que quedan al norte de dicha linea pertenecerán a la Republica Argentina i a Chile los que se estiendan al sur, sin perjuicio de lo que dispone respecto de la Tierra de Fuego e islas adyacentes, la base tercera*”. The meaning of this clause has been analysed above (Chap. I, paras. 110-112).

¹ The complete Spanish text of this note is contained in Ch. Annex No. 404, p. 46.

88. It is in the "*base tercera*" that the last two elements of the 1876 provisions are brought together—those which were entitled "*Division de la Tierra del Fuego*" and "*Islas*". As has been seen, it was only on 28 May, that is to say, just a few days before the drafting of the six "*bases de arreglo*", that the Chilean Government had finally accepted this. That it combined them in a single base, instead of making two separate bases of them, is quite logical, since they were intimately connected.

The last two elements of the proposals of 1876 thus formed an indivisible whole, and it is not surprising that, in the proposals and counter-proposals of the month of April and May, 1881, the concept "*Tierra del Fuego and islands*" was always treated as being inclusive and unitary, as it is in Valderrama's "*base tercera*" and as it was to be in Article III of the Treaty.

There is no need to dwell here on the meaning of the first part of this third basis. Both Parties are agreed that the dividing line within *Tierra del Fuego* is identical with that of the proposal of 1876.¹

It is the second part of this "*base tercera*" which calls for attention, because, according to the Argentine Counter-Memorial, it is there that Valderrama slipped in a subtle but fundamental change of what Irigoyen had proposed in 1876.

The "tercera base" of 3 June. The alleged difference between it, Irigoyen's third proposal of 1876, and Article III of the Treaty.

89. The third element of the 1876 proposals was, it must be recalled, drafted in the following terms:

"ISLAS"

Pertenecerán á la República Argentina la Isla de los Estados, los islotes próximamente inmediatos á ésta y las demás islas que haya sobre el Atlántico al Oriente de la Tierra del Fuego y costas Orientales de la Patagonia, y pertenecerán á Chile todas las otras islas al sud del Canal de Beagle hasta el Cabo de Hornos y las que se hallan al Occidente de la Tierra del Fuego".

"ISLANDS"

"There shall belong to the Argentine Republic **Isla de los Estados, the islets in close proximity to it and such remaining islands as are on the Atlantic to the East of Tierra del Fuego and Eastern coasts of Patagonia** and there shall belong to Chile all the other islands to the South of the Beagle Channel as far as Cape Horn and those which are to the West of *Tierra del Fuego*".²

¹ On the substitution of "*hasta tocar en el Canal Beagle*" for "*hasta el Canal Beagle*", see Ch. C.M. p. 59, note 1.

² To obviate any controversy, the English translation quoted here is that of the Argentine Government (Arg. Mem. p. 165, para. 51; cf. Arg. C.M. p. 159, para. 7).

For this proposal—it is said—Valderrama, through a minute change of wording, substituted an entirely different proposal:

“En cuanto a las islas pertenecerán a la República Argentina la Isla de los Estados, los islotes próximamente inmediatos á esta isla demás que haya sobre el Atlántico al Oriente de la Tierra del Fuego y costas orientales de la Patagonia . . .”

*“As regards the islands, the island of los Estados, the remaining small islands there may be in the immediate vicinity thereto on the Atlantic to the east of Tierra del Fuego and eastern coast of Patagonia, will belong to the Argentine Republic . . .”*¹

On this point, the contention of the Argentine Counter-Memorial is as follows:

The 1876 formula gave Argentina three categories of islands: Staten Island; the islets near it; and, lastly, the *remaining islands* (“*las demas islas*”) on the Atlantic to the east of Tierra del Fuego and eastern coast of Patagonia.

This third category—it is alleged—included some “Atlantic” islands other than Staten Island: the Southern “Atlantic” islands and, in particular, Picton, Nueva and Lennox. On the contrary, the proposal of 3 June 1881, the argument continues, reduced to only two categories the islands allocated to Argentina, since it attributed to Argentina only “the Island of los Estados, the remaining small islands there may be in the immediate vicinity thereto on the Atlantic to the east of Tierra del Fuego . . .”. Apart from Staten Island and the neighbouring islets in the Atlantic, therefore, Valderrama’s “*tercera base*” would have attributed nothing more to Argentina, and, in particular, not the “Atlantic” islands, such as Picton, Nueva and Lennox:

*“The mention of the ‘islas’, of the ‘Atlantic’ islands other than Isla de los Estados, and which, according to the division contemplated by Sr. Irigoyen, were to go to Argentina, thus ensuring this country’s exclusive jurisdiction over all the Atlantic coasts, as far as Cape Horn, has just completely disappeared from this new text . . .”*² Henceforward, there would no longer be, for Argentina, the ‘*demás islas*’, the ‘*remaining islands*’ in the southern archipelago, apart from Isla de los Estados; consequently, all the islands of this archipelago, without making any distinction between ‘Atlantic’, and ‘Pacific’ islands, would be attributed to Chile. The division contemplated in the 1876 proposals, based on the rigorous application of the criterion for the division of the maritime jurisdictions, was automatically turned upside down by the slight changes in the drafting of the text” (Arg. C.M. pp. 160-161, paras. 8-9).

90. According to the Argentine Counter-Memorial, this apparently minor but in reality fundamental change constituted a subtle manoeuvre on the part of the Chilean Government³ intended to set aside the “oceanic” criterion which allegedly served as a

¹ On the origin of this translation see above, para. 80 (a). It will be shown that this translation is wrong (see below para. 96).

² Emphasis in original.

³ The Counter-Memorial does not use these words, but such is indeed the sense it gives to the operation ascribed to the Chilean Minister.

basis for the 1876 proposals, and to enable Chile to realize "its old dream... of establishing its sovereignty over part of the southern Atlantic coasts" (Arg. C.M. p. 162, para. 10). If the Chilean Government had succeeded in inserting Valderrama's "*base tercera*" into the Treaty signed a few weeks later, "Chile would have obtained a result it had never been able to obtain before" and the frontier resulting from the Treaty would have been that of the red line of Plate 8 of the Chilean Atlas (Arg. C.M. pp. 162-163, para. 10). But that was counting without the vigilance of Irigoyen, whose whole policy was thus threatened. The Chilean manoeuvre was defeated and the text of Article III of the Treaty re-established the 1876 formula and granted Argentina "*la Isla de los Estados*" *los islotes próximamente inmediatos á ésta y las demás islas que haya sobre el Atlántico al Oriente de la Tierra del Fuego*":

"The '*demas islas*', the *remaining islands*, on the Atlantic, of the southern archipelago, which Sr. Irigoyen, in his 1876 proposals, intended to reserve to Argentina, *were therefore included in the definitive text of Article III of the Treaty*¹: even though they had vanished from the proposals transmitted on 3 June 1881 by the Chilean Government to the Argentine Government... *The restoration of the original formula, accepted by the Parties at the end of the negotiations, is the more significant and decisive for the interpretation of the Treaty*, just because it is a restoration, which the Parties considered indispensable before the '*Tratado de límites*' could be finally concluded, inserting again, in the text of Article III, the terms that had been omitted in the text of the '*tercera base*' " (Arg. C.M. p. 173, para. 16; cf. pp. 175-176, para. 17).

The explanations which the Argentine Counter-Memorial offers the Court concerning the circumstances in which this "restoration" of the original Irigoyen text in the definitive text of the Treaty was carried out will be considered later. The Chilean Government will also consider the consequences which the Argentine Government draws from the alleged change of Irigoyen's third proposal in Valderrama's "*base tercera*" and of its re-establishment *in extremis* on the eve of the signature of the Treaty. For the moment it is to the very existence of the alleged difference between the "*base tercera*" of 3 June 1881 as compared with the 1876 proposal and with the text of the Treaty that the Chilean Government would like to direct the Court's attention.²

¹ Emphasis in original.

² The Argentine Counter-Memorial points out quite correctly that Valderrama's "third base" shows a difference in wording as compared with that of Irigoyen in regard to the islands attributed to Chile. Irigoyen attributed to Chile "*todas las otras islas al sud del Canal de Beagle*". Valderrama speaks of "*todas las islas al sud del Canal de Beagle*". The Chilean Government has shown that this is a matter of a simple grammatical correction (Ch. C.M. p. 67, para. 10). For the Argentine Counter-Memorial this modification is connected with the modification alleged to have been made in the designation of the Argentine islands (Arg. C.M. p. 160, para. 8). If that were so, it would be impossible to understand why the alleged re-establishment of the 1876 text in Article III of the Treaty did not cover this point also. For the Treaty designates as Chilean "*todas las islas al sud del Canal Beagle*", *precisely as does the "tercera base" of Valderrama*. (cf. below para. 112).

91. Juxtaposition of the three texts in question—that of 1876, that of 3 June and that of the Treaty—both in their Spanish original and in a correct English version—brings out quite clearly the perfect coincidence, so far as concerns the determination of the islands attributed to Argentina¹, of the text of the Treaty with that of 1876. In both cases three categories of islands are designated as Argentine.

- “*la Isla de Los Estados*”,
- “*los islotes próximamente inmediatos á ésta*”
- “*las demás islas que haya sobre el Atlántico al Oriente de la Tierra del Fuego y costas orientales de la Patagonia*”.

At first sight, on the other hand, the *English version* which Argentina utilises of the “*base tercera*” of 3 June appears different since it attributes to Argentina

“... *the island of los Estados, the remaining small islands there may be in the immediate vicinity thereto on the Atlantic to the east of Tierra del Fuego and eastern coast of Patagonia*”.

Whilst appreciating the perspicacity of those on the Argentine side who, by attentive reading, discovered the difference in wording between *the translation* of Valderrama’s text and the texts of 1876 and the Treaty, the Chilean Government was none the less puzzled by one fact which could not fail to attract its attention: a change of such importance, which, according to the Argentine argument, called into question the fundamental principles of the settlement then being worked out, had passed completely unperceived until 1974. According to the Argentine Counter-Memorial itself no one noticed this radical change at the time. The circumstances in which Irigoyen is supposed to have discovered and then thwarted Valderrama’s manoeuvre, moreover, remain—and the Argentine Counter-Memorial makes no mystery about it—most obscure (cf. *infra*, para. 112).

In any case, not a single one of those taking part in the negotiations breathed a word about it. Although one can perhaps understand that, from the Argentine point of view, it may have seemed natural that the Chilean side should have preferred to keep silent about this episode, how can it be explained that not a word was said of it in the innumerable telegrams exchanged between the two Osborns or between the two Governments and these two diplomats? How can it be explained that, having regard to the primary importance Irigoyen attached—as it is alleged—to the exclusive jurisdiction of his country over the “Atlantic coasts” including the coast to the south of Tierra del Fuego, the Argentine Minister, in his speech in 1881, kept completely silent about what he would normally have been bound to consider a diplomatic success of the first order, a success for his country but also a personal success?

¹ So far as the islands attributed to Chile are concerned, it has just been that the Treaty did not revert to the 1876 formula: “*todas las otras islas al sud del Canal de Beagle*” but retained that of the June bases: “*todas las islas...*”. No one, during the negotiations, suggested that this 1881 text implied a change of the scope of the 1876 formula.

How can it be explained that another distinguished Argentine Minister for Foreign Affairs, Sr. Estanislao Zeballos, related in his *Memoria de Relaciones Exteriores* for 1891-1892 (p. 241) that "*estas bases fueron aceptadas por el Gobierno Argentino en general, y durante el debate fueron modificadas la primera y la quinta*" ("these bases were accepted in general by the Argentine Government and, during the debate, bases first and fifth were modified" (Ch. Annex No. 525, p. 220))? How can it be explained that, in the detailed account he gave in 1899 of the origin of the Treaty of 1881 the Argentine jurist and statesman Luis Varela said nothing at all of this matter?¹

How can it be explained that none of those—and they were numerous—who since then have studied the Treaty of 1881, whether on the Argentine side or on the Chilean side, has ever mentioned this purported last-minute re-establishment by Irigoyen of his initial text of 1876 which Valderrama had allegedly "subtly but materially changed"? How can it be explained that, in a recent work, based on the best sources, an historian of the State University of Buffalo could write that

"Valderrama then prepared six formal bases . . . These bases, slightly amended² upon Argentine insistence, became the basic text of the Treaty soon to be signed." (Harold F. Peterson, *Argentina and the United States, 1810-1960*, State University of New York, 1964, p. 244)?

How can it be explained, lastly, that the authors of the Argentine Memorial themselves knew nothing of all this story two years ago and that they were convinced, then, just as the Chilean Government is, that the "*base tercera*" proposed by Valderrama on 3 June 1881 had passed as it stood into Article III of the Treaty signed on 23 July?

Alerted by these questions, which are as decisive as they are simple, the Chilean Government was led to consider the question of the actual reality of this alleged difference between Valderrama's third basis, on the one hand, and the proposal of 1876 and the text of the Treaty, on the other hand. It cannot do better than submit to the Court the course and the result of its investigations.

¹ This is what he wrote:

"*Les négociations continuèrent pendant tout le mois de mai et en juin, et à la date du 3 de ce dernier mois, le Gouvernement du Chili proposa le texte du Traité actuel de 1881, qui fut accepté avec deux modifications seulement, introduites par le Ministre argentin, Sr. Irigoyen: l'une dans l'article 1^{er}..., la seconde... (qui) se rapportait à la neutralité du Détroit de Magellan*" (*La République argentine et le Chili: Histoire de la démarcation de leurs frontières*, Buenos Aires 1899, tome I, p. 203).

"The negotiations continued throughout the months of May and June and, on the third day of the later month, the Government of Chile proposed the text of the present Treaty of 1881, which was accepted with only two modifications introduced by the Argentine Minister Sr. Irigoyen: one in Article I . . . ; the second (which) related to the neutrality of the Straits of Magellan". (*La République argentine et le Chili: Histoire de la démarcation de leurs frontières*, Buenos Aires 1899, Vol. I, p. 203).

² It is stated on the same page that these "two minor amendments" related to Bases 1 and 5.

92. The Chilean Government directed its attention in the first place to the original *Spanish text of Valderrama's note*, since the Argentine chain of argument is based, in particular, on a comparison of that text with the text of 1876 and that of the Treaty (cf. Arg. C.M. p. 172, para. 15). The text used by the Argentine Government for the purposes of this comparison is, as has been said, a text at second hand. As for the original of this document, it is not in the United States National Archives and the Chilean Government does not know whether it exists or where could it be found. The document which Irigoyen received was not the original note written and signed by Valderrama. That note was handed to Thomas A. Osborn in Santiago and its contents were immediately telegraphed in Spanish to Thomas O. Osborn in Buenos Aires who communicated them to Irigoyen. It is therefore not on the basis of the note written and signed by Valderrama that Irigoyen drafted his reply, but on the basis of the telegraphic text which Thomas O. Osborn received from his Santiago colleague.

93. Although the original of Valderrama's note (that is to say, the manuscript handed by him to Thomas A. Osborn) has not been found, there are several documents which reproduce its substance. Some of them are not of official character but others are official.

(a) The documents of a non-official character consist mainly of extracts from the press. As will be seen later, in view of the secrecy which both Governments had agreed to maintain about these negotiations, the Chilean and the Argentine press had to content itself with whatever information it could obtain on the "bases".

A few of these articles have been published as Annexes to the Argentine Counter-Memorial, but in English translation—of what sort will be seen! The Chilean Government having thought it desirable to refer to the original text of those newspapers (Ch. Annexes Nos. 425, 426 and 441, pp. 95-97), was able to establish the following facts, which are very instructive both as regards the value of the Argentine story of the bases of 3 June and also as regards certain methods of the Argentine Government.

(i) "*El Mercurio*" (Valparaiso) of 13 July and "*El Ferrocarril*" (Santiago) of 14 July 1881 state that, according to the information gathered by them, Argentina would receive as a result of the Treaty:

("El Mercurio")

*"las islas de los Estados, islotes proximos a éstas y demas islas sobre el Atlantico al oriente de Tierra del Fuego y costas orientales de Patagonia."*¹

("El Ferrocarril")

"las islas de los Estados, islotes proximos a éstas y demas islas sobre el Atlantico al oriente de Tierra del Fuego y costas orientales de Patagonia."

¹ These above-mentioned texts have been copied directly from the original newspapers. It is evident that "*El Ferrocarril*" merely transcribed the information given by "*El Mercurio*". The translations published as

The Argentine Government publishes an accurate translation of these articles (Arg. C.M. Ann. Nos. 29 and 30, pp. 111 and 113: "To the Argentine Republic will belong Isla de los Estados, the islets near it and the remaining islands on the Atlantic . . ."), but maintains that they do not relate to the bases of 3 June 1881 but . . . to Irigoyen's proposal of 1876 (Arg. C.M. pp. 179-180, note 1)! These texts may be read and re-read in vain; nothing of the kind can be found in them. Quite the contrary; these articles mention, amongst the arrangements provided for, the neutralization of the Strait of Magellan—which was not included in the 1876 proposals but was introduced in 1881! It is indeed, therefore, the bases of 3 June to which these newspapers refer, and not those of 1876.

(ii) The "*Tribuna Nacional*" (Buenos Aires) of 24 July 1881 published "the bases of the Treaty . . . obtained from reliable sources, but which are not official" (the Treaty had been signed the previous day). Under the title "Base tercera" one reads:

"En cuanto á las islas, pertenecerán á la Republica Argentina la Isla de los Estados, los islotes proximamente inmediatos á ésta isla, *demás que haya sobre el Atlántico*, al oriente de la Tierra del Fuego y costas orientales de la Patagonia . . ." (Ch. Ann. No. 441, p. 96).

This text, it will be noticed, is strictly identical with the one which appears in the Washington Archives, but with a comma between "isla" and "demás".

According to the Argentine Counter-Memorial, "*Tribuna Nacional*" published the text of the bases which Valderrama wished to have adopted, but which Irigoyen caused to be set aside at the last minute. That text, it is alleged, "only attributed to Argentina some few 'islets' near Isla de los Estados" (Arg. C.M. p. 181, para. 1). No one who has read the text, published by the newspapers in Spanish could fail to be surprised by such an assertion, since that text attributes to Argentina, without the slightest doubt, the same three categories of islands as the Irigoyen proposals of 1876 and the Treaty of 1881. But, in actual fact, the Argentine Government took care not to present to the Court the original text of the article in the "*Tribuna Nacional*" but published in its place a fundamentally inaccurate translation, which attributes to Argentina:

" . . . the Island of los Estados, the remaining small islands there may be in the immediate vicinity thereto, on the Atlantic, to the East of Tierra del Fuego, the Eastern coast of Patagonia . . ." (Arg. C.M. Ann. No. 32, p. 121).

Argentine Annexes Nos. 29 and 30 suggest the existence of two different news items (See Ch. Annexes Nos. 425 and 426 for a comparison of the translations).

It is unnecessary to dwell upon the news items published on the same date, 14 July 1881, by "*El Independiente*" (Santiago), which the Argentine Counter-Memorial mentions with the allegation that they, too, reflect the 1876 bases (Arg. C.M. p. 180, note 1). These items are, in fact, manifestly incorrect even from the standpoint of the most extreme Argentine interpretation of the bases of 1876, since they give Argentina "the dominion over *all the remaining southern seas and territories as far as Cape Horn*".

This fact is all the more remarkable because, as will be seen, there is an official English translation of this same newspaper article which is completely accurate and which the Argentine Government mentions (Arg. C.M. p. 203, paras. 12-13) but takes care not to reproduce! (cf. below para. 98, note 1 and Ch. Annex No. 441, p. 97-99).

(iii) "*El Siglo*" and "*El Constitucional*" (Buenos Aires) of 25 July 1881 also published a text of the six bases of the Treaty. In the first of these newspapers, the third base appears as attributing to Argentina:

"... *la isla de los Estados, los islotes proximately inmediatos a esta isla, demas los* ¹ *que haya sobre el Atlantico...*"

In the second, Argentina receives:

"... *la isla de los Estados, los islotes proximately inmediatos a esta isla y demas que haya sobre el Atlantico...*"

Here, too, the Argentine Government has produced an inaccurate English translation, the same as the one it gives to the "*Tribuna Nacional*" article (Arg. C.M. Ann. Nos. 33 and 34, pp. 125 and 129).

94. (b) But there exist also official publications of the Spanish text of the "*bases de arreglo*" of 3 June 1881 and it is to be regretted that the Argentine Government, which states that it "checked" the text of the Osborn telegrams in its archives (Arg. C.M. p. 151, note 6), did not pursue its researches to the point of consulting these publications, which moreover were eminently accessible. The Spanish text of the Valderrama note, attached to Thomas A. Osborn's telegram of the same date, is in fact given fully, as has been seen (supra, para. 80 (e)), both in the Argentine *Memoria de Relaciones Exteriores* for 1882 and in the corresponding Chilean publication for 1881. In these official documents, the importance of which will not escape the Court, Valderrama's "*base tercera*" appears in the following text:

— in the Argentine *Memoria*:

"... *la Isla de los Estados, los islotes próximamente inmediatos á esta isla y demas que haya sobre el Atlántico al oeste (sic) de la Tierra del Fuego y costas orientales de la Patagonia...*" (MRE 1882, pp. 23-24)

— in the Chilean *Memoria*:

¹ This is certainly a printer's error: the wording should be "*las demás*".

"...la isla de los Estados, los islotes próximamente inmediatos a ésta i las demas islas que haya sobre el Atlántico al oriente de la Tierra del Fuego i costas orientales de la Patagonia..." (M.R.E. 1881, p. 149) (Ch. Ann. No. 404, p. 47).¹

This wording, it will be noted, is identical with that which is found in Article III of the Treaty.²

95. The original text of the "base tercera", as received by Thomas A. Osborn from Valderrama, reads as follows:

"En la Tierra del Fuego se trazará una línea que partiendo del punto denominado Cabo del Espíritu Santo, en la latitud 52° 40', se prolongará hacia el Sur, coincidiendo con el meridiano occidental de Greenwich 68° 34', 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 las demas islas que haya sobre el Atlántico al oriente 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 hayan al occidente de la Tierra del Fuego".

There are thus several variants of the original Spanish text: "*demas que haya*" (with or without a comma before these words), "*demas las que haya*", "*y demas que haya*", "*y las demas que haya*". This diversity is doubtless due to the telegraphic transmission and to the numerous copies to which Valderrama's note gave rise. But what should be noted is that, although they are of varying linguistic elegance, all these wordings are synonymous³ and all imply the attribution to Argentina of other islands in addition to

¹ As has been pointed out (above para. 80 (f)), the Chilean Government published in its Statement of 1902 an English translation of the Valderrama note made from the Spanish text of the Chilean *Memoria* of 1881. In this translation, the third base specifies as allocating to Argentina:

"... Staten Island, the small islands next to it and the other islands on the Atlantic to the east of Tierra del Fuego and of the eastern coasts of Patagonia..." (Annex No. 26 to Chilean Statement, 1902, p. 220; Ch. Annex No. 406, p. 52).

² The text of the Valderrama note published in the two *Memorias* differs on other points also. In the "Base segunda" the dividing line to the north of the Strait of Magellan after reaching Mount Dinero "*continuará hacia el Oeste*" in the Chilean document; "*continuará hacia el Norte*" in the Argentine document. The second version is obviously erroneous. In the "*base tercera*" itself, apart from the difference in regard to the "islas", the Chilean *Memoria* correctly grants to Argentina the "*demas islas que haya sobre el Atlántico al oriente de la Tierra del Fuego...*" whilst the Argentine *Memoria* attributes to Argentina the "*demas (islas) que haya sobre el Atlántico al Oeste de la Tierra del Fuego...*" Here, too, the error is obvious. A last difference, finally, in the "base quinta": the Chilean text speaks of "*el libre tránsito marítimo por el Canal*", whereas the Argentine text speaks of "*el libre tránsito por el Canal*". The text published in the Chilean *Memoria* is the correct one.

³ It might be necessary to stress that in Spanish the word "*demas*" means "*other*". Preceded by "*los*" or "*las*", it means "*others*" or "*the others*". According to a Spanish authority (Julio Casares "*Diccionario Ideológico de la Lengua Española*", p. 264) the word "*demas*" is an adjective which, preceded by the articles "*lo*", "*la*", "*los*", "*las*" means "*lo otro*", "*la otra*", "*los otros*", "*los restantes*", "*las otras*". This authority adds: "In plural, it is often used without an article".

Staten Island and to “los islotes próximamente inmediatos a ésta”.¹ Both Governments, and also, furthermore, both Osborns, conducted the negotiations in Spanish and, whatever may have been the wording employed, it could not give rise to any misunderstanding. As has been seen (*supra*, paras. 84-85) the six “bases de arreglo” drafted by Valderrama on 3 June were intended merely to confirm “las ideas manifestadas recientemente por uno i otro Gobierno”.

They were confined to putting into form an agreement already entirely achieved between the two Governments through the telegrams of 28 and 31 May, and this agreement explicitly embodied confirmation, so far as concerns “Tierra del Fuego y las islas”, of the Irigoyen proposals of 1876.² If Valderrama had not drafted his “bases de arreglo” and if the Valderrama note of 3 June had not been sent, the situation would not have been different; agreement had already been reached and the bases of 3 June had no other object than to give it form with a view to the drafting of the Treaty³. That is what the Argentine Memorial expressed with remarkable accuracy:

“By this note (of 3 June) the Chilean Government confirmed the terms of the settlement . . .”

“On those bases, the Boundary Treaty between both Republics, was finally signed . . .” (Arg. Mem. pp. 188 and 191, paras. 72 and 74).

The conclusion is clear. *The “base tercera” proposed by Valderrama on 3 June 1881 did not embody the slightest innovation as compared with the third proposal of 1876; nor is there the slightest difference between this “base tercera” of 3 June and Article III of the Treaty.* No one appears to have thought otherwise before 1974.

96. Once assured on this point, it remains for the Chilean Government to endeavour to explain the wrong arguments made about it in the Argentine Counter-Memorial.

¹ Another variant will be noticed. One reads sometimes “islotes proximamente inmediatos a ésta isla” and sometimes “islotes proximamente inmediatos a ésta”. In this case, as in the other, the variant does not alter the meaning, because “ésta”—usually with an acute accent—is a pronoun, equivalent to “celle-ci” in French and “this one” in English.

² Chilean proposal of 28 May:

“La Tierra del Fuego y las islas se dividirían conforme a la proposición del Sr. Irigoyen hecha a Barros Arana en 1876”.

(“Tierra del Fuego and the islands would be divided in accordance with the proposition made by Sr. Irigoyen to Barros Arana in 1876”. (Ch. Annex No. 36(I), p. 84)).

Argentine answer of 31 May:

“Se aceptará la división de la Tierra del Fuego y las islas como Ud. indica, *con arreglo a la proposición* Irigoyen Barros Arana, 1876”.

(“The division of the Tierra del Fuego and Islands as indicated by you will be accepted in accordance with the proposition Irigoyen-Barros 1876”. (Ch. Annex No. 36(I), p. 84)).

³ H. F. Peterson (*op. cit.*, *supra*, para. 91) speaks of the “six formal bases drawn up by Valderrama following on the agreement reached at the end of May” (p. 224).

These arguments had their source—the Chilean Government is convinced of it—in the wrong English translation of the Valderrama note which Thomas O. Osborn attached to his note of 1 July 1881 to the Department of State (cf. above, para. 80(a)). Instead of making the concepts “remaining islands” and “on the Atlantic” distinct from that of “islets in the immediate vicinity thereto” (to Staten Island), this version, as has been seen, contracts these two categories of islands defined as Argentine into a single one, that of “the remaining islands there may be in the immediate vicinity thereto on the Atlantic”.

But, it must be strongly emphasized, this wrong translation had no bearing upon the negotiation of the Treaty which was wholly conducted in Spanish (see below para. 99).

97. The Argentine Counter-Memorial lingers over several Press cuttings, from which it tries to draw a conclusion with reference to the bases of Valderrama.

The Chilean Government submits that these cuttings are devoid of any relevance to the present matter, for they did not have the slightest influence on the course of the negotiation.

It is necessary to add that the English translations of these Press cuttings which appear in the Argentine Counter-Memorial do not correspond to the Spanish original and they give the impression of having been written for the needs of the argument. The Chilean Government is ready to furnish to the Court, if it considers it necessary, all explanations on this subject.

98. The facts are thus clear: there is the true text of Valderrama’s “base tercera” (see above para. 95) and several variants, more or less elegant from the linguistic point of view, but all equivalent and free of ambiguities. On the other hand, there have been found various English versions of that “base”, most of them accurate ¹ but one of them—that of the United States Legation in Buenos Aires—most certainly defective, which may have resulted from the error of a copyist or, perhaps, of the translator who misunderstood the text received by Thomas O. Osborn.

It is in any case, on this error, consisting of the contraction into two categories of the three categories of islands attributed to Argentina, that the whole construction of the Argentine Counter-Memorial has been built.

¹ For instance, the text published in English by the “Buenos Aires Herald” (Arg. C.M. Ann. 35, p. 135). Special mention should be made of the English translation of the bases published by “Tribuna Nacional” (Cf. above para. 93) prepared by the Foreign Office which reads: “. . . the Island “de los Estados” and the small islands in its immediate vicinity, as well as those in the Atlantic to the East of Tierra del Fuego and the Eastern shores of Patagonia . . .” (Ch. Ann. No. 441, p. 99).

99. If this defective translation had had any influence whatsoever on the process of the negotiations, the importance which the Argentine Government attaches to it could be explained. But, as suggested above, that is by no means the case. It is *in Spanish* that Valderrama's note of 3 June 1881 was transmitted to the Argentine Government, and it is to a *Spanish version* that the Argentine Government gave its agreement the very next day, saying in particular: "Base tercera: aceptada como se propone" (Ch. Ann. No. 407, p. 54; English text in Ch. Ann. No. 36(K), p. 87). *It is not on the English translation which Thomas O. Osborn sent later to Washington that the wills of the two Parties came together and that their agreement was established on 3 and 4 June, but on a Spanish text on the substance of which neither of the two Governments appears to have been mistaken.*¹

100. That the Argentine Government did not resist the temptation to exploit to the full the "discovery" it thought it had made is comprehensible, since it could thus rid itself at one stroke of the most embarrassing cartographical documents (such as the Chilean 1881 Authoritative Map and Irigoyen's map) and of the most embarrassing evidence (such as that of the Osborns themselves, Valderrama, Baron d'Avril, the British Admiralty and the Foreign Office): it was sufficient to maintain that all these documents and all this evidence related to the purported bases of 3 June—that is to say, to a Treaty as the Chilean Government would have liked it to be—and not to the Treaty as it was in fact signed.

By linking the fundamental part of its argumentation with this decisive "discovery" the Argentine Government was however running an enormous risk: if the "discovery" was proved to be a snare, the whole edifice would collapse like a house of cards!

If the Argentine Government had pursued its research a little further, if it had only taken the trouble to consult the *Memoria* of its own Ministry of Foreign Affairs, it would have avoided basing Chapters IV and V of its Counter-Memorial—those Chapters which, with Chapter III, contain "the essence of the Argentine case on the meaning of Articles II and III" of the 1881 Treaty (Arg. C.M. Introduction p. xiii)—on so risky an hypothesis as that of an unsubstantiated "restoration" by Irigoyen of the original text of his proposal of 1876 which Valderrama was alleged to have "subtly but materially changed" (*ibid*) in a desperate effort for the purpose of "establishing its (Chile's) sovereignty over the southern Atlantic coasts" (Arg. C.M. p. 162, para. 10). It would have realized that the odds were too great. It would have understood that, as everyone was convinced (including itself just two years ago), the Chilean Minister Valderrama had done no more, in the "bases de arreglo" which he submitted to the Argentine Government on 3 June 1881, than put into shape what the two Governments had agreed upon, namely, the confirmation, so far as concerns Tierra del Fuego and the islands, of the solution proposed by Irigoyen to Barros Arana five years earlier. *It would have understood that, between the third proposal*

¹ (See Ch. Ann. No. 408, p. 56).

of Irigoyen of 1876, the "base tercera" of 3 June 1881 and Article III of the Treaty of 23 July 1881 there is not the slightest material divergence.

But the Argentine Government could have been put on the track of its mistake without even undertaking these searching investigations of the original Spanish version of Valderrama's note. In order to explain the events subsequent to 3 June 1881, it was compelled to undertake, over nearly seventy-five pages (Arg. C.M. pp. 163-237, paras. 11-25), a reconstruction of facts that was so acrobatic, so unlikely, that it should have seen therein an alarm signal. *Inaccurate in themselves*, as has just been seen, the allegations based upon Valderrama's transvestism of Irigoyen's third proposal of 1876, and of Irigoyen's re-establishment of the latter in Article III of the Treaty, are shattered also by the fictitious and unreasonable reconstitution of the facts subsequent to 3 June which the Argentine Government has undertaken. That is what the Chilean Government proposes now to show.

The scenario imagined by the Argentine Counter-Memorial: a "restoration" of the text of 1876 by Irigoyen in the course of direct and secret negotiations after the disappearance of the Osborns from the scene.

101. It was of course not sufficient for the Argentine Government to find that the Chilean Minister Valderrama, whilst making a pretence of putting into form Irigoyen's 1876 proposals, had tried to slip into the text of his "base tercera" a change which would profoundly modify the substance of them. It had still to explain how the Argentine Minister Irigoyen had managed to redress the situation and to re-establish that exclusive sovereignty of Argentina over the Atlantic which—it is asserted—lay at the heart of his 1876 proposals and which Valderrama's text was endeavouring to endanger.

According to the Argentine Counter-Memorial, things occurred in two phases.

(a) In the first period, the Argentine Minister did not perceive the Chilean manoeuvre and believed sincerely that the third basis was the faithful reproduction of his own 1876 proposal. For three weeks, from 3 to 25 June, the discussion, conducted, as previously, through the intermediary of the two United States diplomats, related exclusively to the first and fifth bases, and the question of the third base was not even raised. The Chilean manoeuvre was therefore on the point of succeeding:

"In fact, at a certain moment, this result seemed almost to have been achieved . . .

The attention of the Argentine Government was concentrated on the contents of the first and above all, of the fifth of these "bases" . . .

It was hardly then to be expected that the text which was now received and which, at first sight seemed to be a faithful copy of the 1876 proposals, harboured a change capable of bringing about an essential modification of the effect of these proposals . . .

It is not surprising, therefore, that nobody paid very much attention to the second "Base" and the third "Base"

...The three following weeks were spent in a continued exchange of messages.... Finally, on 25 June...there came to an end the first phase of the negotiations..." (Arg. C.M. pp. 163-165, para. 11).

(b) On 25 June "the good offices of the United States Ministers at Santiago and Buenos Aires...came virtually to an end". The Parties had henceforth no longer any need of their intermediaries and

"...these two personalities, accordingly, virtually disappeared from the scene... There is no record of any further intervention except for that on 9 July..." (Arg. C.M. pp. 165-166, para. 12).

But the departure of the two American diplomats—it is claimed—did not put an end to the negotiations. The "preliminary negotiations" were succeeded, as from 25 June, by the "later negotiations" conducted "outside the control" of the two Osborns and "in the most complete secrecy" (p. 167, note 22), "with the greatest discretion" (p. 171, para. 14). It is probably during this final phase, between 25 June and 23 July—one is told—that Irigoyen perceived the dangerous drafting of the "base tercera" and informed his Chilean opposite number that he would not sign such a text.¹

"The Chilean Government was not able to do otherwise than to bow to it and to accept that the indispensable corrections were made to the 'Third Basis of the Treaty' so as to get back to the 1876 text and to the allocation of the 'islands' contemplated there" (Arg. C.M. p. 170, para. 14). It is in these circumstances that the Argentine Minister Irigoyen and the Chilean Plenipotentiary Echeverría signed the Treaty on 23 July:

"This put an end to the repeated Chilean attempts to get a solution for Tierra del Fuego and the southern archipelago, and thus for the southern Atlantic, different from the one envisaged and proposed by Sr. Irigoyen in 1876. The division of islands in the extreme south, according to the strict application of the criterion of division of Oceanic jurisdictions, was definitely adopted" (Arg. C.M. p. 175, para. 17).²

(a) The first part of this scenario is entirely correct. On receiving the text of Valderrama's note of 3 June, Irigoyen did not perceive in the "base tercera" any change from his 1876 proposal, which the Parties had agreed upon through the telegrams of 28 and 31 May. As early as on 4 June, he asked Thomas O. Osborn to transmit his Government's reply to Valderrama through the intermediary of his colleague in Santiago:

¹ This Chilean interlocutor of Irigoyen is not clearly identified in the Argentine Counter-Memorial. The point will be dealt with in another part of this Chapter (see below, para. 109).

² Emphasis in original from "The division..." to end of quotation.

"Base primera; aceptada con una breve adición que la complementa . . .

Base segunda: aceptada como se propone.

Base tercera: aceptada como se propone

Base cuarta: aceptada como se propone.

Base quinta: aceptada pero con la siguiente redacción . . .

Base sexta: aceptada como se propone".
(Ch. Annex No. 407, p. 54-55).

"First Basis: Accepted, with a brief addition to complement it . . .

Second Basis: accepted as proposed.

Third Basis: accepted as proposed.

Fourth Basis: accepted as proposed.

Fifth Basis: accepted, but with the following wording . . .

Sixth Basis: accepted as proposed"
(Ch. Annex No. 36 (L), p. 87).

As for the seventh basis, the addition of which Thomas A. Osborn had taken the initiative of suggesting (cf. *supra* para. 85), the Argentine Minister said he was opposed to it because there was a risk of it raising "una nueva cuestión" ("a fresh question") so that the problem of the titles would continue to divide the two countries (cf. above Chap. I, para. 87).

As the Argentine Counter-Memorial states (Arg. C.M. p. 165, para. 11), telegrams continued to flow between the two capitals for about three weeks.¹ The modification requested by the Argentine Minister in regard to the first basis was accepted without difficulty by the Chilean Government as early as on 9 June (Thomas A. Osborn's telegram of 11 June: Ch. Ann. No. 36(M), p. 89). The question of the neutralization of the Strait of Magellan took longer to settle, and it was not until 25 June that Valderrama was able to submit to his Argentine colleague a draft of the "base quinta" to which the latter was able to give his agreement on 27 June (Ch. Annexes Nos. 36 (P) and 36 (S), pp. 93 and 94).

103. Thus, by the actual admission of the Argentine Counter-Memorial, Irigoyen remained for at least three weeks unaware of the trap which allegedly had just been set for him by his Chilean colleague. Do not the authors of the Argentine Counter-Memorial realize that this fact alone would be sufficient to ruin their theory of the "base tercera"? How could it be imagined that a politician of the stature of Irigoyen could have been so easily taken in? How could it be imagined that he could have paid no attention to the "base tercera", which settled the problem of Tierra del Fuego and islands, when it had been on the division of that island that agreement had taken the longest time to reach only a few days previously (cf. *supra*, para 82)?

How could it be thought that a statesman of whom we are told that he made respect for the "principle of oceanic division" a *sine qua non* condition of settlement, could have written with his eyes closed: "Base tercera: aceptada como se propone", without even

¹ In addition to the documents published in Ch. Ann. Nos. 36(L) and 36(S), pp. 87-94, see the other telegrams published as Ch. Annexes Nos. 409-424 and 427 to 434, pp. 75-84).

taking the trouble to check whether the text he was accepting guaranteed respect for this fundamental requirement of his policy? And why then, if it had been possible to discuss the first and fifth bases for three weeks, would it not have been possible to discuss also the third which, if the Argentine argument is to be believed, set at risk interests much more fundamental for Argentina?

The truth is infinitely more simple. If the Argentine Minister raised no objection concerning the "base tercera" and if he accepted it "como se propone", it was not because his attention "was concentrated on the contents of the first and above all the fifth of these "bases", but simply because it seemed to him—quite rightly—to be in conformity with the 1876 proposals which the two Governments had just decided to adopt on that point. If the Argentine Minister had not recognised his own child in the Chilean Minister's third basis, he would not have failed to raise the problem.

104. There would be nothing more to say of this period of 3 to 25 June if, in the Argentine Counter-Memorial, there was not a certain mystery hovering over one question which is not without interest. Can it be that, in the Argentine story, the two Osborns also were victims of their own naïvety, or else, being less ingenuous and more perspicacious than the Argentine Minister, did they leave the scene on 25 June aware of the bomb which Valderrama had lodged in his "base tercera"? The Argentine Counter-Memorial alleges that, in their reports addressed to Washington on 1 and 22 July, the two United States Ministers in Buenos Aires and Santiago "described the tenor of the 'third base' in entire conformity with the text sent by Valderrama on 3 June 1881 to the Argentine Government, and not with the Irigoyen-Barros Arana text of 1876" (Arg. C.M. p. 166, para. 12), but the Argentine Counter-Memorial does not state whether or not they were aware of that fact. On page 164 there seems to be a suggestion that, being in a hurry to succeed, they had paid no more attention than Irigoyen to the question of the third basis. A little earlier, however, there seems to be an insinuation that at least Thomas A. Osborn—the one in Santiago—had understood what was going on: "by his office (he) was the person most likely to know the real intentions of the Chilean Government" (Arg. C.M. p. 162, para. 9; cf. p. 182, para. 2).¹

And here we are once more plunged into a sea of improbabilities. If the American diplomat posted to Santiago had so understood, how could he have had the effrontery to accompany his despatch communicating Valderrama's telegram to Buenos Aires with a commentary according to which, in his opinion, "the terms maintained in the despatch of the Minister tend to a satisfactory solution" (Ch. Annex No. 36 (K), p. 85). That would have been much more than diplomatic skill on his part; it would have been sheer trickery.

¹ Baron D'Avril too seems to be regarded as having understood at the latest on 2 July (Arg. C.M. pp. 181-182, para. 2).

And if the American diplomat posted to Buenos Aires had so understood, how could he have had the effrontery not to alert the Argentine Government, with whom he entertained relations of confidence? Thus, if the Argentine Counter-Memorial is to be believed, the two American personalities, to whom the two Governments addressed their warmest thanks for their decisive intervention (cf. below para. 106) left the scene on 25 June either as very incompetent and credulous diplomats or as men who although more perspicacious than Irigoyen acted dishonestly.¹ Not content with blackening the memory of Minister Irigoyen, the Argentine story hardly does much honour to the two Osborns!

105. (b) But it is the second part of the scenario which is the most fantastic. It is 25 June. The Osborns virtually leave the stage, having brought the “preliminary negotiations” to a successful conclusion—it is asserted—they make way for direct and secret negotiations between the Parties, and it is during these negotiations that the Valderrama trap is dismantled and the text of 1876 re-established.

The whole of this story—the Chilean Government begs the Court and the opposing Party to excuse the use of such blunt language—is inaccurate from one end to the other.

106. (i) This disappearance of the two Osborns from the scene—with the exception, says the Argentine Counter-Memorial, of a telegram of 9 July (Arg. C.M. p. 166, para. 12)—is a pure fabrication. Does not the Argentine Government realize that this telegram alone proves that on 9 July, half-way through the alleged direct negotiations between the Parties, the United States diplomats, far from having disappeared from the scene, were following the development of the affair with great interest?

The Argentine Government will not challenge the evidence of Irigoyen himself:

“...Durante la negociación de 1881, no tuve oportunidad de hablar con el actual perito de Chile, que se encontraba en aquella república. No recuerdo haber cambiado con él carta ni telegrama alguno sobre el artículo 1º del tratado, y ni hubo motivo para ello. Las cuatro bases principales del pacto, estipulándose sin intervención de persona extraña a la negociación: fueron concertadas entre los dos gobiernos por intermedio de los ministros mediadores, que se limitaron a transmitir literalmente las notas que recibían

“...During the negotiation of 1881, I had no occasion to talk to the present expert of Chile, who was in that Republic. I do not remember having exchanged with him either letter or telegram on the 1st Article of the Treaty, and I do not have any reason for it. The four main bases of the pact were stipulated without the mediation of any person foreign to the negotiation: they were concerted between both Governments by means of the mediator Ministers, who limited themselves to transmitting literally the notes

¹ The congratulations they addressed one to the other after the signature of the Treaty on the “happy result obtained” (Ch. Ann. Nos. 36 (U) and 36 (V), p. 95), would thus take on retrospectively a somewhat sinister character...

de los ministros de relaciones exteriores". (text published as an appendix to E. Quesada's book *La Política Chilena en El Plata*, Buenos Aires, 1895, p. 278).

received from the Ministers for Foreign Affairs".

A few days before signing the Treaty, Irigoyen had proposed to the Chilean Plenipotentiary, Echeverría that he "sign a protocol recording the two Governments' gratitude towards the representatives of the United States in Santiago and in Buenos Aires for their benevolent participation in concluding the Treaty"¹ (Echeverría's telegram of 22 July 1881 to the Chilean Foreign Minister: Ch. Annex No. 434, p. 84) and Irigoyen had himself written on 20 July to Thomas O. Osborn mentioning the "co-operation of you and your honourable colleague in Chili" (Ch. Ann. No. 431, p. 81).

It would be difficult to explain such evidence of gratitude if Irigoyen had felt that the two diplomats had left the scene a few weeks previously, either knowingly leaving him in ignorance of Valderrama's objectives or having themselves been too unintelligent to discover the trap allegedly laid by the Chilean Minister.

Other evidence could be adduced in the same sense. Thus, in the *Memoria de Relaciones Exteriores* for 1891-1892 (at p. 241), the Argentine Foreign Minister, Estanislao Zeballos, also does not make the slightest allusion to any interruption, on 25 June, of the good offices mission of the two North-American diplomats: "El Tratado de 1881 *fué negociado* telegráficamente de Gobierno á Gobierno, *por intermedio de aquellos dos diplomaticos*" ("the Treaty of 1881 was negotiated by telegraph from Government to Government by means of those two diplomats) (Ch. Annex No. 525, p. 219).

In his work already cited, Luis Varela, whom the Argentine Counter-Memorial describes as "an observer of the time who was well versed in these matters" (Arg. C.M. p. 251, note 24) wrote:

"...ceux-ci (les Ministres nord-américains) poursuivirent seuls la négociation jusqu'au bout..." (p. 202).

"Le traité fut définitivement conclu dans la première quinzaine de Juillet 1881, et était signé, le 25 (sic) du même mois, à Buenos Ayres, par le Consul Général du Chili, M. Francisco B. Echeverría, nommé Plénipotentiaire à ce seul effet, et par M. le Docteur Bernardo de Irigoyen, Ministre des Affaires Etrangères de la République Argentine.

"...the latter (the North-American Ministers) pursued the negotiations alone up to the end..."

"the Treaty was finally concluded in the first fortnight of July 1881 and was signed on the 25th (sic) of the same month in Buenos Aires by the Chilean Consul-General, Mr. Francisco B. Echeverría, appointed Plenipotentiary for that purpose alone, and by Dr. Bernardo de Irigoyen, Minister for Foreign Affairs of the Argentine Republic.

¹ Authorisation for this was given by Valderrama. See Ch. Ann. No. 436, and 436A, for the text of the relevant Protocol.

Le récit que nous venons de faire, en détaillant toute la marche suivie jusqu'au moment de la conclusion du Traité du 23 Juillet 1881, démontre, comme nous l'avons dit, que les procédés employés dans cette circonstance, sont sortis des règles ordinaires de la diplomatie.

Aucun des Gouvernements intéressés n'est intervenu dans ses préliminaires, et, dans tout le développement de la négociation, ce furent des diplomates étrangers qui ont servi d'intermédiaires entre les Hautes Parties Contractantes" (p. 204).

The account we have just given, with details of the whole sequence of events up to the time of the conclusion of the Treaty of 23 July 1881, shows, as we have said, that the procedure employed in this case departed from the ordinary rules of diplomacy.

Neither of the Governments concerned intervened in the preliminaries and, throughout the course of the negotiations, it was foreign diplomats who acted as intermediaries between the High Contracting Parties".

107. The distinguished Argentine jurist obviously knew nothing at all of the disappearance of the two American diplomats from the scene four weeks before the signature of the Treaty. He states, on the contrary, that they "pursued the negotiations right to the end".

There is even more. Not only did the two United States Ministers *not* disappear from the scene on 25 June, but they pursued "the journey to the end" and continued their mission of good offices after the signature of the Treaty up to its ratification, in order to overcome last-minute difficulties and to prevent the text signed on 23 July from becoming another in the series of treaties signed by the two Governments but never ratified (cf. *infra*, para. 118). In Buenos Aires it was always Thomas O. Osborn who acted; in Santiago, Thomas A. Osborn's mission was carried on by his successor, General Kilpatrick. As annexes to the present Reply, the Court will find various documents proving the constant relationship that existed between the two United States Ministers and the two Governments concerned and between themselves, and bearing witness to the active part they played as late as *in September and October 1881* in ensuring the success of the definitive ratification of the Treaty (see Ch. Annexes Nos. 440, 468, 470, 475, 479, 484, 486, 487, 490, 503, 504, and 513, p. 182).

The Court will specially take notice of the note dated 8 October 1881 (Ch. Annex No. 497, p. 164) in which Thomas O. Osborn reports to the Department of State how, a few days previously, he had been informed, about four o'clock in the afternoon, by Irigoyen, that the Treaty had just been ratified. Thus, in spite of the secrecy of the debates, the Argentine Minister had been anxious to pass the news immediately to the American diplomat. Thomas O. Osborn reports also that, during the debates, Irigoyen had asked him

"...to again accept the uses of the wires and communicate with Mr. Kilpatrick our Minister at Santiago, that we might use our good office in bringing about some understanding

as to the time and mode of ratifying the Treaty by both Congresses and thereby relieve both countries from doubts and anxieties" (Ch. Annex No. 497, p. 164).¹

The American Minister even mentions certain suggestions he had submitted to Irigoyen concerning the procedure for ratification and he states that "only (the) night before last I received a message from the Minister saying that he had accepted my suggestion".

For personages whose mission "came virtually to an end" on 25 June and who "virtually disappeared from the scene" at that date, the two United States Ministers were to show themselves astonishingly active three and four months later! If the Argentine Government had pushed its investigations further², it would have avoided such imprudent assertions.

108. (ii) With the "later negotiations" which, between 25 June and 23 July are said to have resulted in establishing the original text of 1876, the fantasy of the authors of the Argentine Counter-Memorial reaches one of its high peaks.

Of the very existence of these negotiations, and *a fortiori* of their content, the Argentine Government furnishes not the slightest proof. The statement that they were "shrouded in the most complete secrecy" is doubtless sufficient, in 1974, for it to justify its silence on this point. The only indication it puts forward is a passage from Irigoyen's speech in the Chamber on 31 August stating that, the Argentine Government having obtained certain modifications,

"... it signed the Treaty on 23 July, that is to say, *fifty days* after the essentials were made known in the Republic" (Arg. C.M. p. 168, para. 13).

It is from that that the Counter-Memorial does not hesitate to deduce that:

"It has *thus been established* ... *that after the preliminary negotiations* achieved through the American diplomatic representatives in both capitals acting as intermediaries, *later negotiations continued directly between the two Parties* (ibid).

Is that what the Argentine Minister says? Not a bit of it. What he says is merely that the Treaty was signed fifty days after the date on which the bases of it filtered through to Buenos Aires, that is to say, fifty days after 2 June. *He does not say that the negotiations were pursued for fifty days.* Quite the contrary—three lines earlier—Irigoyen stated clearly that:

¹ Cf. the telegrams attached to Osborn's note (Ch. Annexes Nos. 468, 470, 476, 479 and 484).

² How could it thus have overlooked Irigoyen's messages to Thomas O. Osborn, which must certainly appear in its archives?

"The basic positions of the Treaty under discussion were made known in this city on 2 June, having been cabled from Chile where the Government anticipated their publications. At the time only the bases for negotiation were under discussion. The negotiation itself was still pending and *was concluded twenty days later*" (Ch. Ann. No. 42, p. 116).¹

109. According to the Argentine Government, these direct negotiations, of which, it is repeated, not the slightest proof is supplied, are thus said to have proceeded "with the greatest discretion"—"as if it were but the correction of a drafting error"—in such a way as not to alert political circles, the press and public opinion and not to strengthen the opposition of certain Chilean circles hostile to the Treaty (Arg. C.M. pp. 170-171, para. 14, and p. 176, para. 18).² The Parties apparently succeeded so well in their effort at "discretion" that, even in 1973, the Argentine Government knew nothing about these negotiations and it was only in 1974 that it gained knowledge of this episode. The Chilean Government would be glad to have in its turn knowledge of the documents discovered by the Argentine Government!

It is not surprising that the Argentine Counter-Memorial remains so discreet about the details of these negotiations on the "base tercera". Who negotiated with whom? and where did they negotiate? The Counter-Memorial mentions in vague terms contacts between Irigoyen and "the most important Chilean personalities", one of whom was Barros Arana "through the intermediary of the Consul-General (in Santiago), Sr. Arroyo" (Arg. C.M. p. 169, para. 13). But why does the Argentine Government not produce the despatches allegedly exchanged between Irigoyen and Arroyo? The Counter-Memorial mentions also, in terms no less imprecise, the negotiations of which "everything seems to indicate" (sic) that they took place, in Buenos Aires this time, between Irigoyen "or his assistants, and the Chilean Consul-General in Buenos Aires, Echeverría" (ibid). As annexes to the present Reply are published the messages exchanged up to the time of signing of the Treaty between the Chilean Government and Echeverría, (Ch. Annexes Nos. 409, p. 57, 428 and 429, pp. 76-79, 433 and 434, pp. 83-84, and 436, p. 89);

¹ The Court will not fail to note the procedure which consists of deforming a text at a place in the Counter-Memorial where such deformation is useful to the reasoning being pursued (p. 168) whilst slipping in somewhere else, preferably in a footnote, a sentence intended to make it possible to evade any reproach of inaccuracy (p. 165, note 20). Irigoyen indicated, in his speech of 31 August 1881 to the Chamber of Deputies, that "*the negotiation lasted throughout twenty days*". Unfortunately, there is no cross-reference from one of these passages to the other . . .

² The Counter-Memorial mentions "an internal situation (in Chile) which was . . . causing endless delays in the signing of the Treaty" (p. 176, para. 18). It was therefore not the pursuit of "later negotiations" which explains why the Treaty, on which the two Governments were agreed since 25-27 June, was not signed until 23 July, but certain internal political difficulties in Chile. That is the truth, to which moreover, Irigoyen himself bears witness when, in October 1881 he explained to Thomas O. Osborn that "la demora desde el 25 de junio a 22 de julio fue explicada en telegrama del Sr. Osborn fecha 9 de julio, por dificultades que el Gobierno de Chile creyó conveniente allanar en aquellos días." ("the delay from 25 June to 22 July was explained in a telegram from Mr. Osborn, dated 9 July, by difficulties which the Chilean Government thought it desirable to overcome at that period") (Ch. Ann. No. 506, p. 175).

between Arroyo and Irigoyen (Ch. Annexes Nos. 411, p. 59, 413 and 414, pp. 61-62, and 424, p. 72); and between Sr. Barros Arana and Sr. Irigoyen (Ch. Annexes Nos. 412, p. 60, 415-419, pp. 63-67 and 423, p. 71).

The Court will note that as late as 14 June 1881, Echeverría knew nothing about the negotiations (Ch. Ann. No. 409). It will also note that, on 18 July, Echeverría received from the Chilean Government, by telegram, the necessary powers to sign as "plenipotentiary ad hoc" a Treaty of which the telegram gave the full text "on which, as I have already mentioned to Y.E. both Governments are agreed".

"Queda VS... autorizado para suscribir el Pacto que ha de poner término a la dilatada cuestión de límites con esa República, y cuyo Pacto contendrá los siguientes artículos, sobre los cuales, como ya lo he indicado a VS, están ambos Gobiernos de acuerdo".

"You will therefore be authorized to sign the Pact that will put an end to the long drawn out boundaries question with that Republic. This Treaty will contain the following articles, on which the two Governments are agreed, as I have already informed you" (Ch. Ann. No. 428, p. 76).

The Argentine Government agreed to consider as sufficient the full powers thus accorded by telegram, and confirmed the same day by a telegram direct from Valderrama to Irigoyen, as evidenced by a telegram from the latter to the Chilean Foreign Minister (Ch. Ann. No. 430).

In those circumstances, the Chilean plenipotentiary brought Irigoyen, on 18 July, the text which the Santiago Government had sent him. Irigoyen, for his part, having read the articles of the Treaty as transmitted from Santiago, agreed to sign without the slightest drafting difficulty having arisen.

Echeverría reported these facts to his Government in a telegram of 23 July (Ch. Ann. No. 434) in which he stated:

"En la redacción del Tratado no ha habido dificultad alguna. El Sr. Irigoyen aceptó, en todas sus partes, la redacción contenida en el telegrama de VS fecha 18 del corriente..."

"In the draft of the Treaty there had been no problem whatsoever. Minister Irigoyen accepted entirely the contents of the telegram of Y.E. of the 18th instant".

It may also be mentioned that, in a despatch to the Foreign Office, the British Minister in Buenos Aires, Mr. Petre, stated on 19 October 1881, after the ratification of the Treaty by the Argentine Parliament and before its ratification by the Chilean Parliament:

"I shall not fail to forward to Y.E. the official text of the Treaty of July 23rd as soon as it is published but the Chilean Consul General who signed it,¹ informs me that the text which was published at the time by some of the Buenos Aires newspapers ... is a correct transcript of the original" (Arg. C.M. Ann. No. 27, p. 108).

¹ i.e. Echeverría.

Thus, *even in October 1881* Echeverría, with whom Irigoyen is alleged to have conducted the final negotiations, with a view to evading the trap laid by Valderrama on 3 June—if the Argentine Counter-Memorial is to be believed—knew nothing at all about the alleged difference between the “base tercera” of Valderrama and the Treaty to which he had himself affixed his signature, on behalf of the Chilean Government, on 23 July!

110. The documentary evidence, as can be seen, does not tally with the fabulous stories of the Argentine Counter-Memorial. Of the negotiations in depth between the personalities who were going to sign the Treaty (Arg. C.M. pp. 169-170, para. 13), not the slightest trace. How can the Argentine Government dare to state (pp. 170-171, para. 14) that “one cannot be far from the truth”, by saying that it was during the negotiations with Echeverría that Irigoyen discovered the real scope of the “base tercera” of 3 June? How can it assert that Irigoyen “must immediately have pointed the thing out to the Chilean diplomat”, giving him to understand that the 1876 text must be re-established, and that the Chilean Government could do nothing other “than bow to it”? How does the Argentine Government dare to add that “it is thus more than likely” that the two Governments decided to conduct the operation “with the greatest discretion” and that “it is probably” for that reason that Sr. Irigoyen contented himself with the restoration of the attribution to Argentina of the “Atlantic islands” without insisting on the re-establishment of the word “otras”?¹

Once more, one cannot fail to be surprised at the lighthearted way in which the Argentine Government rushes into such fantasies. The end of the “preliminary negotiations” on 25 June with the disappearance of the Osborns from the scene, the phase of the secret “later negotiations” on the “base tercera” conducted directly between the Parties, the re-establishment of the 1876 text during the last phase—all this never existed.

111. The truth, quite simply, is that the negotiations lasted about twenty days, that is to say, until 25-27 June, but exclusively on the first and fifth bases—never on the third base. The truth is that on 25-27 June the negotiations were ended and it remained only to arrange for the signature of the Treaty.

The Argentine Government cannot be unaware—since it mentions them discreetly (p. 165, Note 20)—of the following concordant sources of evidence:

— The Chilean Minister, Melquiades Valderrama (Ch. Ann. No. 41, p. 107, at p. 111):

“El 27 de Junio quedaron convenidas todas las bases del Tratado i el 23 de julio inmediato se firmaba el instrumento auténtico” . . .

“On 27th June all the bases of the Treaty were agreed upon and on 23rd July the authentic instrument . . . was signed immediately”.

¹ On this point, cf. above, para. 90.

— The Argentine Minister, Bernardo de Irigoyen (Ch. Ann. No. 42, p. 116):¹

“El 2 de Junio fueron conocidas en esta ciudad las estipulaciones fundamentales del Tratado . . . La negociación estaba pendiente; quedó terminada veinte días más tarde”.

“The basic provisions of the Treaty . . . were made known in this city on 2 June . . . The negotiation itself was still pending and **was concluded twenty days later**”.

— and Thomas O. Osborn who, in a note dated 23 July 1881, reporting to Secretary of State Blaine that the Treaty had just been signed, the same day, in Buenos Aires, added this:

“Some delay was caused by failing to come to an agreement on the part of Chile in reference to the wording of basis *or* article *fifth* (Ch. Ann. No. 439, p. 93).²

Nor can the Argentine Government be unaware of the unequivocal passage in the *Memorial* of the Argentine Minister Zeballos for 1891-1892 (p. 241; cf. *supra*, para. 91):

“Estas bases fueron aceptadas por el Gobierno Argentino en general, y durante el debate fueron modificadas la primera y la quinta”.

“these bases were accepted in general by the Argentine Government and **during the debates first and fifth were modified**” (Ch. Ann. 525, p. 220).

Nor can the Argentine Government be unaware of the perfectly explicit account given by Varela (cf. above, para. 91):

“...à la date du 3 de ce dernier mois (juin) le Gouvernement du Chili proposa le texte du Traité actuel de 1881, qui fut accepté avec deux modifications seulement, introduites par le Ministre Argentin, Docteur Irigoyen: l'une dans l'article 1er . . . La seconde modification se rapportait à la neutralité du Détroit de Magellan”. (op. cit. p. 203; cf. aussi p. 205).

“...on the 3rd of the latter month (June) the Chilean Government proposed the text of the present Treaty of 1881, which was **accepted with two modifications only, introduced by the Argentine Minister, Dr. Irigoyen: one in Article 1...the second modification related to the neutrality of the Strait of Magellan** (op. cit. p. 203, cf. also p. 205).³

The fact that no one had ever heard a word of these negotiations from 25 June to 23 July 1881, which would have related to one of the most important aspects of the whole of the settlement—the principle of the allocation of the territories according to their

¹ In the work mentioned above (para. 106) Irigoyen describes the discussions to which the first and the fifth bases gave rise. Of any negotiation on “la base tercera” not the slightest word. Cf. also Irigoyen’s telegram mentioned above in para. 109, note 1.

² As it is known this article fifth deals with the Straits of Magellan and, therefore, has nothing to do with “base tercera”.

³ In the same sense: H. F. Peterson, op. cit. (above, para. 91), p. 244.

situation in relation to the "Cape Horn frontier"—should of itself have alerted the Argentine Government and impelled it to check the probability of its suppositions.

Conclusion

112. In the Argentine Counter-Memorial the account of the 1881 negotiations is completely dominated by the story of the bases of 3 June. The Argentine Government may have thought that there it had made a sensational discovery, which would enable it to support the "oceanic principle" and its claim to the disputed islands. Perhaps it did not realize that thereby it reduced to nothing its earlier argument about the meeting of the will of the *two* Parties on the "oceanic" criterion. According to the new Argentine contention the "oceanic principle" could, at the very most, pass only for a unilateral Argentine doctrine; but the Chilean Government hopes to have shown that this purported principle does not amount even to that and that Irigoyen was not in the least inspired by it in working out the 1881 settlement. Anyway, it is not the story of the bases of 3 June that can help the Argentine Government to back up its theory of Minister Irigoyen's "oceanic" doctrine.

It is untrue, in the first place, that the Chilean Minister Valderrama, instead of confirming the Irigoyen proposals of 1876 on which the Parties had at last just reached agreement, "subtly but radically" changed them in his "base tercera" of 3 June. It is the contrary that is true. The "base tercera" of 3 June is identical with the 1876 proposals and allocates the same islands as the latter to each of the two countries.

Next, it is untrue that the 1876 text was reintroduced into the Treaty in the course of secret negotiations conducted directly between the Parties after 25 June, the date of the alleged cessation of the good offices mission of the United States representatives in the two capitals. It is the contrary that is true. The text of Article III of the Treaty is identical with the bases of 3 June and allocates the same islands as the latter to each of the two countries. The ending of the mission of the two American diplomats on 25 June is a pure and simple invention. The secret negotiations leading up to the re-establishment of the 1876 text are another. The truth is that, apart from the first and the fifth bases, the "bases de arreglo" proposed by Minister Valderrama on 3 June 1881 were accepted by the Argentine Government almost immediatly and gave rise to no later negotiations. The negotiations on the first and the fifth bases were themselves concluded on 25-27 June, and only a few difficulties of an internal nature—related to opposition in the Chilean Congress—delayed the signature for a few weeks.

113. If the matter were expressed diagrammatically, it might be said that the story of the bases of 3 June must be rejected on four grounds.

- It is proved to be untrue, in the first place, since there is no difference between the 1876 proposals, the “base tercera” of 3 June and Article III of the Treaty of 23 July 1881.
- Next, it is also proved to be untrue by the fictitious reconstitution of facts which it compelled the Argentine Government to undertake.
- It is proved untrue furthermore by its psychological unlikelihood since it is hard to believe that Minister Irigoyen could have kept complete silence about this outstanding diplomatic success.¹
- It is proved to be untrue, lastly, by the contemporary understanding of the Treaty. After having demolished—one hopes—this pseudo-discovery of a negotiation on the “base tercera”, it is not without interest to show how its collapse is fatal for the whole of the Argentine chain of argument concerning the contemporary understanding of the Treaty. It is this point which the Chilean Government proposes now to develop more in detail.

IV. THE CONTEMPORARY UNDERSTANDING OF THE TREATY

The argument of the Argentine Counter-Memorial: that the documents relied upon by the Chilean Government reflect the bases of the Treaty, and not the Treaty itself.

114. In its Memorial (Ch. Mem. pp. 39-45, paras. 19-30) the Chilean Government put forward evidence, cartographic and other “so closely linked to the actual negotiation and conclusion of the 1881 Treaty as to furnish contemporaneous and positive indication of the intentions of the Chilean and Argentine Governments when they signed and ratified the Boundary Treaty” (Ch. Mem. p. 43, para. 28). Chapter V of the Argentine Counter-Memorial (Arg. C.M. pp. 179-237) does the impossible to free itself of these over-embarrassing items of evidence. For that purpose it proceeds to a systematic denial the *leitmotiv* of which is simple enough: whenever a map or a document reflects an interpretation of the Treaty contrary to the present views of the Argentine Government, it is maintained that that map or that document interprets not the Treaty as it was signed on 23 July 1881 but merely the bases of the Treaty in the form in which they are said to have been proposed by the Chilean Foreign Minister.

115. The Argentine reasoning is as follows:

Once the Treaty had been signed on 23 July, the Chilean Government was anxious “to avoid revealing the final text of the Treaty to public opinion; and particularly, to avoid

¹ It is all the more unlikely since, according to certain observers, the Argentine Minister was counting on the settlement of the territorial dispute with Chile to favour the pursuit of his political career (cf. the report by Sir Horace Rumbold, British Minister in Buenos Aires, dated 1 May 1881).

letting it be known what had happened over the text of Article III". That is why—it is said—the Chilean President Pinto asked, even before the signature, "that the debate on the Treaty in the Argentine Chamber of Deputies . . . be held in secret session". The text of the Treaty therefore remained secret until after the exchange of ratifications on 22 October (Arg. C.M. pp. 176-178, para. 18).

From this fact, the Argentine Counter-Memorial pretends to draw a radical consequence, namely, that, so far as the contemporary interpretation of the Treaty is concerned, any interpretation made either before the signature of the Treaty or between that signature and the ratification, is devoid of any validity. That is true—it is claimed—of the evidence of third parties, such as the Osborns, Baron d'Avril or the British Admiralty, because those who supplied it knew only the "bases of the Treaty" and were not in a position to know that the Treaty as really signed differed from those "bases". That is still more true—it is alleged—in the case of documents of Chilean origin, such as the Authoritative Map or the Hydrographic Notice. The Chilean Government knew the truth, of course, but—it is said—it knowingly took advantage of this period of uncertainty to attempt to regain under the veil of interpretation of the Treaty, what it had lost at the negotiation. Far from reflecting the Treaty as it was—it is maintained—the Chilean documents therefore reflect the Treaty as Valderrama had unsuccessfully tried to make it become on 3 June. But that is said to be true even of documents of Argentine origin, such as the map communicated by Irigoyen to the British representative in Buenos Aires *after the ratification of the Treaty*. The map is said to have been prepared before the ratification of the Treaty and also reflected the bases but not the Treaty.

116. The point from which this reasoning starts is correct. It is true that the Chilean Government asked the Argentine Government that the ratification debate should take place in secret session "in order to deprive opponents in both countries from the weapons which the public session would provide them flattering national self-esteem" (Arg. C.M. Ann. No. 21, p. 89). It must however, be made clear that what was feared in Chile was not at all that public opinion might be alerted as to "what had happened over the text of Article III"—for nothing at all had happened to Article III—but that the neutralization of the Strait of Magellan was considered by some members of the opposition in Congress to be too high a price to pay for the settlement. That was the point on which the negotiations had already been held up and it was on that point that there was a chance of the ratification breaking down.¹ Nor was the Argentine Government free from internal difficulties. As early as on 29 June, Mr. Egerton, British Chargé d'Affaires in Buenos Aires, wrote to the Foreign Office that:

¹ This is what Baron d'Avril explains clearly in his despatch of 2 July (Ch. Ann. No. 38(a), p. 99).

“...every effort *on both sides* has been made to preserve secrecy...

“Of the press and of its capacity for stimulating public opinion *in this country and in Chile* against the present proposed settlement, *both Executives* stand in apparent awe”.

These fears were not unfounded either in Buenos Aires or in Santiago, since the representatives of the United States in both capitals had to intervene, as has been seen (above, para. 107), in September and in October to avoid a final breakdown.

This having been made clear, it is true that, as the Argentine Counter-Memorial says, the definitive text of the Treaty was not made public immediately after its signature and that, from the beginning of June only the “bases” of it were known.¹

The Argentine Counter-Memorial is therefore not wrong in emphasizing that the news items supplied by the press, even after the signature of the Treaty, could give an account only of the “bases” (Arg. C.M. pp. 179-181, para. 1). But, as has already been stated (above, paras. 93 and 97) the news items published concerning these “bases” both in the Chilean newspapers and even abroad, gave a version of the third basis of the Treaty which did not give rise to the slightest misunderstanding in the minds of the readers. The “bases” published allocated to each of the two countries exactly the same islands as the Irigoyen proposals of 1876 which had been known for several years, and as the Treaty itself which had just been signed.²

117. But though the starting point of the Argentine reasoning is true—namely, that until the end of October 1881 the official text of the Treaty was not public—the consequences that the Argentine Counter-Memorial deduces from it are not true, since they all rest on the false hypothesis that there is a difference between the “base tercera” of 3 June and Article III of the Treaty.

The Chilean Government might therefore refrain from going further in the critical examination of the other side’s argumentation, for, *after the collapse of the story of the bases of 3 June, nothing is left of Chapter V of the Argentine Counter-Memorial*. It is however

¹ Cf. Baron d’Avril note of 2 July 1881: “Les négociations ont abouti à un arrangement... dont les dispositions principales sont déjà connues... (The negotiations led to a settlement... the main provisions of which are already known” (Ch. Ann. No. 38(a) p. 101).

² The Argentine Counter-Memorial disposes of these news items in several different ways. Sometimes it argues that they reflect not the bases of June 1881 but the proposals of 1876 (“El Mercurio” of 13 July; “El Ferrocarril” and “El Independiente” of 14 July; Arg. C.M. pp. 179-180, note 1). Sometimes it gives an English translation of them, sufficiently deformed so that it can maintain that the article in question shows the difference between the bases—which it quotes—on the one hand, the 1876 proposals and the Treaty, on the other hand (“Tribuna Nacional” of 24 July, “El Siglo” and “El Constitucional” of 25 July; Arg. C.M. p. 181, para. 1). Sometimes, finally—when it has no other means of escape—it confines itself to saying that the newspaper, “which probably received its information from other sources, published the ‘Bases of the Treaty’... in the corrected text of the final negotiations, and ready to be transcribed in the Treaty’s articles” (Arg. C.M. p. 181, note 3). As will be seen the Argentine Government has an answer for everything!

not entirely useless to go a little further in to the Argentine chain of argument, both to denounce certain special features of it and because it throws light retrospectively on the imaginary character of this story about the "bases". The Chilean Government could hardly have dreamed of a more effective ally than this Chapter V of the Argentine Counter-Memorial!

118. A. *The Reports of the United States intermediaries*

According to the logic of its system, the Argentine Counter-Memorial cannot of course bestow any credit, in regard to the interpretation of the Treaty, on the reports sent to Washington by Thomas O. Osborn and Thomas A. Osborn on 1 and 23 July 1881. As these two diplomats had, under this system, disappeared from the scene as early as 25 June, that is to say, a month before the signature of the Treaty, their reports, it is told, could describe only the "bases" of the Treaty and not the Treaty itself (Arg. C.M., pp. 166-167, para. 12, and p. 182, para. 2).

It has been shown above where the truth lies concerning this alleged disappearance of the Osborns from the scene as from 25 June (cf. *supra*, paras. 106-107). No one knew better than they what had happened; for nothing had happened without them. Their reports therefore retain their full value (cf. Ch. Mem. p. 44, para. 29).

119. B. *Baron d'Avril's despatch and map* (Chilean Plate 12B)

The interpretation of the 1881 settlement given by a man like Baron d'Avril is certainly well worth knowing, since for over four years the French diplomat had—with his well-known attention—followed the successive phases of the negotiations and had been careful to inform his Government regularly about them. That is why the Chilean Government thought it should mention in its Memorial the despatch he sent to Paris on 2 July 1881 and the sketch he attached to it (Ch. Mem. pp. 39-40, para. 19-20 A; Ch. Ann. No. 38(a), p. 99; Ch. Plate 12B).

The Argentine Counter-Memorial points out, quite rightly, that, on the date at which he was writing—2 July—the French Minister in Santiago could report only on the bases of the Treaty (Arg. C.M. pp. 181-182, para. 2). But what the Argentine Government omits is that Baron d'Avril's evidence carries with it the most stinging denunciation of the incoherence of the Argentine argument. For, had there been in the "base tercera" the slightest difference from the 1876 proposals the French diplomat, alive as he was to these problems, would not have failed to notice it and to point it out to the Paris Government.

C. The so-called "fabrication of the Chilean understanding of the Treaty": Chilean Authoritative Map and Chilean Hydrographic Notice, 1881

120. There is no need to dwell on the importance, for the interpretation of the Treaty, of Chile's Authoritative Map of August 1881, known also as the Prieto Map (Ch. Plates 13 to 19), and the Chilean Hydrographic Notice of November 1881 (Ch. Ann. No. 46(c), p. 148(d)). This importance derives in the first place from the fact that these documents, both of which are official, express in the clearest possible way how the Chilean Government understood the Treaty immediately after its signature (in the case of the map) and its ratification (in the case of the Notice).

It is certain—and the Argentine Counter-Memorial is not wrong in pointing it out (Arg. C.M. p. 196, para. 9)—that the interpretation of a Treaty by one of the Parties is only a unilateral point of view which has no right to prevail over the different point of view of the other Party. But in the present case, the Chilean interpretation is confirmed precisely by the early Argentine interpretation (such as is shown by the maps of "La Ilustración Argentina"—Ch. Plate 21— and of the "Official publication" of 1882—Ch. Plate 25—) and its interest therefore cannot be minimized.¹

This interest is all the greater since the Chilean map and the Notice both received the widest publicity. The Authoritative Map was published in Santiago and diffused through the diplomatic channels to numerous foreign capitals. It was known in Buenos Aires (Ch. Mem. p. 41, para. 22; "Some remarks . . .", p. 19; Ch. C.M. Appendix A, p. 169; Ch. Ann. No. 364, p. 125) without arousing the slightest protest there. The Hydrographic Notice was published in the Chilean *Diario Oficial* and it too was disseminated abroad *inter alia* to the British Admiralty, which received it with the Authoritative Map. (On these two documents, see Ch. Mem. p. 40, paras. 21-24; "Some remarks . . ." pp. 18-22).

121. It is easy to understand that the Argentine Government tried the impossible in excluding from the discussion documents which so overwhelmingly shatter its claims. In the hope of succeeding in that endeavour it invented the following story (Arg. C.M. pp. 183-196, paras. 3-8):

The Chilean Government—it is said—whose attempt "to establish itself in the Atlantic" had just been brought to nought at the last minute and who had had to bow before the Argentine Government, took advantage of the period of uncertainty during which the text of the Treaty remained unpublished to keep up the confusion between the Treaty and its "bases", and to pass off as the expression of the Treaty solutions which were

¹ About this important 1882 map see below para. 160 and also Chapter IV para. 101 et seq.

in reality those of the “bases”. That is why it undertook to “fabricate” documents which, under cover of illustrating the Treaty, in reality reflected the “bases”; it sought also, thanks to “the ambiguity and confusion” (Arg. C.M. p. 192, para. 7), “to achieve its end through the interpretation of the text itself which it had not been able to change” (Arg. C.M. pp. 187-188, para. 5). The Map and the Notice therefore—it is alleged—do not by any means constitute the expression of a “sincere understanding”, nor even “an interpretation in good faith”, but the expression of

“...the predetermined intention to disregard the international agreements to which this Government was giving its approval. This ‘understanding’ was and could not have been other than the deliberate determination to build up from the beginning and under the guise of a so-called ‘interpretation’—known perfectly well to be erroneous—, a pretext which would enable it to attempt to introduce in the application of the Treaty certain modifications of its clauses: those modifications which it had not been able to secure at the time of the negotiations” (Arg. C.M., p. 196, para. 8).

The official Chilean interpretation of 1881—it is stated—is a “tendentious interpretation” and “can only with difficulty be considered to be an interpretation”. It is rather “the expression of a deliberate and barely disguised intention to set aside the letter and the spirit of the Treaty”. It therefore constitutes a disregard of the obligation laid on States, in international law, to interpret Treaties in good faith (Arg. C.M. pp. 233-237, paras. 24-25).

122. It is from this standpoint that the Argentine Counter-Memorial attacks both the Chilean Authoritative Map of 1881 and the Chilean Hydrographic Notice of the same year.

123. (a) *The Chilean Authoritative Map of 1881.* The reasoning of the Counter-Memorial develops in three stages (Arg. C.M. pp. 183-193, paras. 3-7).

(i) The Counter-Memorial explains in the first place that the official Chilean Map was prepared at a time when the Chilean Government still had every reason for hoping that its manoeuvre would succeed. In support of this affirmation, the Counter-Memorial asserts that the map was ordered “very early” (Arg. C.M. p. 183, para. 3), which is explained later as meaning before even the signature of the Treaty (p. 185, para. 4). It also mentions the fact that this map refers to the “proposición de Junio de 1881” (“the June 1881 proposal”) and does not refer to the Treaty itself (p. 185, para. 4). It is therefore natural—it is said—that the authors of the map should have represented the division of the territories in accordance with the bases of 3 June: Picton, Nueva and Lennox were therefore naturally described as Chilean.

(ii) The Counter-Memorial then asserts that when the map was ready for publication the Treaty had already been signed and the map should have been up-dated to take account of the change which had occurred at the last minute at the request of Irigoyen. For that purpose, it would have been necessary to change the colouring of Picton, Nueva and Lennox, to show that the Treaty attributed those islands to Argentina. It would have been necessary also to include on the map the other southern "Atlantic" islands, such as Evout and Barnevelt. The Chilean Government, however, refrained from carrying out these corrections and published the map as it had been prepared, that is to say, in conformity with the bases of 3 June.

Now, for the Argentine Counter-Memorial, it is not by simple negligence that the Chilean Government published, in August 1881, a map reflecting former and out-dated proposals. It is with a full knowledge of the facts that it acted in this way, because that made it possible for it "to carry out another operation" (p. 187, para. 5) which consisted of presenting as the line of the 1876 proposal the horizontal line, running the length of the Beagle Channel, which had been proposed in reality not by Irigoyen in 1876, but by Elizalde in 1878. The Chilean Government, which knew at that time that the Treaty had reverted to the 1876 formula, is accused of having knowingly falsified the 1876 formula by adding to it part of the Elizalde line of 1878; that is the calculation which the Argentine Counter-Memorial attributes to the Chilean Government in August 1881 (Arg. C.M. pp. 187-190, para. 5).

(iii) It is therefore a map that reflected not the arrangement which had just been signed, but the arrangement for which it had not succeeded in gaining acceptance, that the Chilean Government distributed as from September 1881 both among the members of Congress and among the press and in diplomatic circles; such is the claim of the Counter-Memorial. Neither the members of Parliament nor the journalists and the diplomats posted to Santiago could imagine for a single moment the confusion that was being voluntarily kept up by the Chilean Government between texts of different effect (Arg. C.M. pp. 192-193, paras. 7-8). But today, concludes the Argentine Counter-Memorial, the truth is known as to the scope of the third basis of June and the Authoritative Map can no longer be regarded as reflecting the Treaty of 23 July.

124. Even apart from the collapse of the basic premise of this reasoning—namely, the story of the bases of 3 June—the Chilean Government would like to make the following remarks.

(i) The map bears the date "August 1881" and the Argentine Government has supplied no evidence whatsoever to contradict this date.

125. (ii) It is true that the map mentions not the Treaty but the “proposal of June 1881”. It is likely that this was done because in August of that year the Treaty had not yet been approved by the Chilean Congress. Besides, there could be no objection to talking of the “*proposición de Junio de 1881*” since the Treaty was in all points identical to it. Furthermore, it was stated on the map itself that this proposal coincided “with that of 1876 . . . throughout its course over Tierra del Fuego and through Beagle Channel”. As it was known that the Treaty had taken over the 1876 proposals, no misunderstanding could arise as to the settlement effected by the Treaty.

126. (iii) If the Chilean Government had thought in August that the map needed to be “up-dated” in order to take account of the text of the Treaty, it would surely have refrained from distributing it to the members of Congress who were called upon to ratify the Treaty. Unless the latter are taken to be incapable of reading a text side by side with a map, the Government would not have run the risk of illustrating the text of the Treaty with a map that had become inaccurate. If the Government had wished to deceive the Congress, it would at the very least have taken the precaution of replacing the words “*proposición de Junio de 1881*” by the words “*límites del Tratado de 23 de julio de 1881*” (“boundaries of the Treaty of 23 July 1881”) in which case it could have hoped that no-one would pay any attention to the alleged discordance between the map and the text.

127. (iv) It is this same map which the Chilean Under-Secretary of State handed officially on 26 October 1881—*after* the ratification and publication of the Treaty—to the British Minister in Santiago, who transmitted it the next day, at the same time as the text of the Treaty, to the Foreign Office, adding that this map recorded “the limits *as now established*” (Ch. Ann. No. 46, p. 148). Here again, can it really be thought that the Chilean Government would have had the effrontery to communicate to the British Government as an illustration of a Treaty which was already published, a map which—as alleged—was wholly in contradiction with that Treaty?

128. (v) The members of the Chilean Congress and the British diplomat hardly emerge with increased credit from the story told by the Argentine Counter-Memorial since, if that pleading is to be believed, not one of them noticed the abyss which separated the text of the Treaty from that of the map—although the reference to the “*proposición de Junio de 1881*” should have attracted their attention! They would have not been alone—it is suggested—since many other diplomats “were persuaded that the allocation indicated on the map as corresponding to the ‘*proposición de Junio de 1881*’ was, in fact, the new boundary established by the Treaty” (Arg. C.M. p. 192, para. 7). All these diplomats are thus alleged to have shown themselves lacking in their duty, since all of them

are supposed to have attached to the text of Treaty—which had just been ratified and published—a map that was in reality out of date—the Minister of Italy (Ch. Ann. No. 42 (a), p. 142); the Minister of France, Baron d'Avril, who pushed ingenuousness so far as to stress the fact that this map showed “très nettement” (“very clearly”) the Treaty frontier (Ch. Ann. No. 43 (a), p. 142 (a)); the Belgian Chargé d’Affaires, who sent it to Brussels, at the same time as the translation of the Treaty, stating that it was “une carte montrant les diverses phases de la question *et le dernier arrangement*” (“a map showing the several stages of the problem *and the last settlement*”) (Ch. Annex. No. 46 (b), p. 148 (c)); and still others. It is not only “the ambiguity and confusion” which “escaped from the hitherto closed circles of the Congress, and infiltrated information in Chile and abroad” (Arg. C.M. p. 192, para. 7); like a contagious disease which no sanitary barrier could have halted, the mental deficiency of the members of the Chilean Congress is supposed to have spread to diplomatic circles and foreign Governments and nowhere did any one perceive the yawning gap which separated the text of the Treaty from this Authoritative Map!

129. (vi) To say the least it is intriguing that, in its Memorial in 1973, the Argentine Government itself considered that the object of the map was “also . . . to show, by colouring, the division agreed *in the Treaty* of 1881” (Arg. Mem. p. 220, para. 25). Of that map reflecting the bases and not the Treaty, there was no question one year before the Counter-Memorial.

130. (vii) Just a word, finally, about the Machiavellian calculation imputed to the Chilean Government of omitting to show on the map the Elizalde proposal of 1878 so as to be able, in a sense, to borrow from that proposal the “horizontal” line running along the Beagle Channel and pass it off for a line that was already proposed in 1876.

It must be said, in the first place, that the map is far from representing all the proposals—very many in number—made during the years prior to 1881 in attempts to settle the dispute.

In support of its argument that Elizalde’s line was intentionally forgotten by the authors of the map, the Argentine Government does, it is true, put forward that, by a strange coincidence, Valderrama was guilty of the same “forgetfulness” in his Report of 17 September 1881 (Ch. Ann. No. 41, p. 107). The argument does not hold water since that Report did not intend to present a complete history of the negotiations; for instance, it did not refer to all the proposals from Irigoyen. Neither did it give an account of the various proposals of Montes de Oca, although one of them is illustrated on the map.¹

¹ The French geographer Maunoir would have been guilty of the same “forgetfulness” in his report reproduced in Ch. Ann. No. 47 (b), p. 149 (d) and (f). Was he then an accomplice in this operation of “obliteration” of the name of Elizalde? . . .

And the authors of the Argentine pleadings, when omitting any reference to Montes de Oca’s proposals of May 1879, were also accomplices of the Chilean “Machiavellism”?

Since the Argentine Counter-Memorial thinks it can shelter behind the Report by Valderrama, it may be recalled that, in this document, the Chilean Minister described the frontier established by the Treaty in the following terms:

"The Treaty ensures for Chile dominion of the Straits of Magellan, the major part of Tierra del Fuego, *all the islands to the south of the Beagle Channel* and to the west of Tierra del Fuego; in other words, the Straits and *all the territories extending to the south with the exception of Tierra del Fuego bathed by the Atlantic and the Island of Los Estados belong to Chile*" (Ch. Ann. No. 41, p. 113).

Will the Argentine Government go so far as to maintain that, when presenting the Treaty to the Congress on 17 September, the Chilean Minister intentionally described a boundary rejected by the Treaty?

131. (b) *The Chilean Hydrographic Notice of November 1881.* With regard to the Hydrographic Notice published in the Chilean *Diario Oficial* and transmitted to the British Admiralty at the same time as the map, after the ratification and publication of the Treaty, the Argentine Counter-Memorial finds only this to say:

"... the Notice was distributed along with the "Map" which in the end served the purpose of a graphic interpretation of the "Notice". The two documents thus complemented each other and ended by providing a completely false representation of the situation resulting from the Treaty" (Arg. C.M. p. 194, para. 8).

Thereupon, sliding from the Notice itself, to the commentary made about it in the Chilean Memorial, the Argentine Government rushes into a confused and aimless criticism of that commentary (pp. 194-195, para. 8).

The extreme embarrassment of the authors of the Argentine Counter-Memorial is understandable. The Notice does describe the Treaty boundary to the south of the Strait of Magellan in terms that are strictly identical to those employed by Minister Valderrama in his Report mentioned in the preceding paragraph, and the Report and the Notice alike correspond exactly to the colouring of the Authoritative Map indicating the "proposición de Junio de 1881" and that of 1876. *There is thus perfect concordance, so far as the territories to the south of the Straits are concerned, between the proposal of 1876, the "proposición de Junio de 1881", shown on the Chilean Authoritative Map of August 1881, the description of the Treaty frontier given by Minister Valderrama in his Report to the Congress of 17 September 1881 and the Chilean Hydrographic Notice of November 1881.* Once more, can it be believed that the Chilean Government would have been so imprudent, if the story of the bases of 3 June were true, as not to wipe from the map the mention of "proposición de Junio de 1881" which gave away the whole trick?

D. The Argentinian Understanding of the Treaty. The information supplied to the British Government

132. The Chilean Government has shown in its Memorial (Ch. Mem. pp. 42-43, paras. 25-27(b)) that its interpretation of the Treaty, as evidenced in particular by the Authoritative Map, the Hydrographic Notice and Valderrama's Report, was completely corroborated by Argentine official documents, such as the map communicated at the end of 1881 by Minister Irigoyen himself to the British Minister in Buenos Aires, Mr. Petre (Ch. Plate 21) and by British documents drawn up on the basis of information supplied by the Argentine Government. (See also "Some Remarks . . ." on Ch. Plate 20, p. 23).

The Argentine Counter-Memorial makes desperate efforts to challenge these documents and to convince the Court that they have not the meaning and scope given to them by the Chilean Government. As might be expected, the story of the bases of 3 June is again utilized to the full but, once more, the allegations turn to the disadvantage of their authors.

British Admiralty Chart No. 789 (Argentine Atlas Map 10)

133. The Argentine Counter-Memorial describes how, on the basis of news items gathered from the Argentine Press by the "Times" of 11 July 1881, the British Admiralty drew up a map on which not only Picton, Nueva and Lennox were shown as attributed to Argentina, but also Navarino, Wollaston and Hermit Islands, and also Cape Horn itself (Arg. C.M. p. 199, para. 11; Arg. Atlas Map 10).

On seeing this map as reproduced in the Argentine Atlas, one might think that the Admiralty interpretation supports the Argentine allegations in the present controversy.

On reflection, however, one wonders about the curious boundary line depicted on the chart, which prolongs the dividing line of Tierra del Fuego straight to the south, over the Beagle Channel, and is bound to be intrigued by the presence, on the map, of a circle around the islands shown as Argentine by colour to the south of the Channel and a few lines of explanation, all so faint and effaced that it is difficult to read there anything other than the date: "28/X/81". The reader of the Counter-Memorial remains unsatisfied until he comes to a footnote, a few pages further on, in which, with reference to quite another question, the Counter-Memorial makes, as it were, some kind of confession: soon after colouring the map—it is said—the Admiralty itself had "doubts as to the accuracy of Chart 789 drawn on the basis of the information published by the 'Times' of 11/VII/1881" and corrected it by "a circle . . . in black pencil, drawn round the islands of the southern archipelago which had been shown as Argentine, with a note saying that these islands now

seemed to be Chilean” (Arg. C.M. pp. 206-207, note 34)¹. It should be stated that this correction was made on the Chart on 28 October 1881, that is to say, the day after the interview that Lord Tenterden, the British Under-Secretary for Foreign Affairs, had with the Minister of Argentina in London, Sr. García. During that interview the Argentine diplomat had handed to the British Under-Secretary the text of the bases of the Treaty, as published by the “Tribuna Nacional” on 24 July (cf. supra, para. 93 and infra, para. 139). At the time, the Foreign Office had not yet received from its representative in Santiago either the Chilean Authoritative Map (cf. Ch. Ann. No. 46, p. 148 and No. 46 (d), p. 148 (e)) or the Chilean Hydrographic Notice (which was published in November 1881 and came to London only in January 1882). Thus, it will be noted, it was solely on the basis of official Argentine information that the British Admiralty corrected its earlier depiction of the 1881 boundary and showed the islands to the south of the Beagle Channel, including Picton, Nueva and Lennox, as belonging to Chile.

The utilization by the Argentine Counter-Memorial of British Admiralty Chart No. 789, (in addition to illustrating a method of which it is not the only example (cf. Introduction, para. 22, and supra, para. 111)), thus turns against the argument it was called upon to support. *It is indeed the Argentine Government itself which supplied the British Government, in October 1881, with the information according to which Picton, Nueva and Lennox were, like all the islands to the south of the Channel, attributed to Chile.*

Irigoyen's circular letter of 27 July 1881

134. The Argentine Counter-Memorial states that on 27 July, that is to say, four days after the signature of the Treaty, the Argentine Minister for Foreign Affairs, not being able yet to render public the actual text of the Treaty, addressed to his representatives abroad “a clipping from the 24 July edition of the newspaper ‘Tribuna Nacional’ which . . . published the ‘bases of the Treaty’ in the text provisionally established during the preliminary negotiations” (Arg. C.M. p. 201, para. 12). Sr García, the Argentine Minister in London, acknowledged receipt of it on 8 September (Arg. C.M. p. 202, para. 12).

In the mind of the Argentine Government, this indication concerning Irigoyen's circular of 27 July was intended to support its argument that the map produced by the Admiralty on the basis of information supplied by Sr. García (Ch. Plate 20) could not be a reflection of the Treaty, but only an expression of the bases of 3 June—and that it is why, therefore, it wrongly attributed the disputed islands to Chile. The question of this Admiralty chart will be considered later (see below para. 136). For the moment it is not without interest to dwell for an instant on this circular of 27 July.

¹ On this point see Chapter IV, para. 43; also “Supplementary Remarks . . .” on Ch. Plate 173.

135. If one refers to this document (Arg. Ann. No. 43, p. 161)¹, one sees that the Argentine Minister states that he will “at the appropriate time” communicate to the Argentine representatives abroad:

“all the antecedents which may be of assistance in reaching a clear understanding of this negotiation in order that after Your Excellency has seen them, he may make them known to the Members of the Diplomatic Corps with whom he is in touch. In the meantime, I am annexing the bases of the Treaty which may be used by Your Excellency on an unofficial basis”.

Irigoyen did not refer to any text provisionally established during the preliminary negotiations. What he really meant was that it was necessary to be prudent since the Treaty was meeting with certain opposition in Chile. While offering to inform later about the negotiations, he was sending to the Argentine representatives abroad “the bases of the Treaty”.

It was indeed “the bases of the Treaty”—as he himself put it—and not some out-of-date and abandoned “bases” that the Argentine Minister communicated to his diplomats. It is hard to image that, four days after his diplomatic victory over Valderrama, he would have distributed among the Argentine representatives abroad, as “bases of the Treaty”, a text reflecting what the Chilean Minister would wish to have obtained but which, thanks to his (Sr. Irigoyen’s) own wisdom, he had been unable to obtain. Was not the Argentine Government aware that, by publishing Irigoyen’s circular of 27 July, it was signing the admission that, according to Irigoyen himself, there was not the slightest difference between the bases of the Treaty and the Treaty itself? Sr. García moreover was not mistaken since, on 8 September, he acknowledged “receipt of the clipping containing the text of the Treaty” (Arg. C.M. Ann. No. 44, p. 163)². For him as for Irigoyen, the “bases of the Treaty” and the “text of the Treaty” coincided.

British Admiralty Chart No. 786 (Chilean Plate 20)

136. It was on the basis of these news items that the Argentine Minister in London asked Irigoyen for authorization—and obtained it—to visit the Foreign Office. In the course of his interview with Lord Tenterden, Under-Secretary for Foreign Affairs, on 27 October 1881, Sr. García handed to Lord Tenterden the extract from “Tribuna Nacional”

¹ The Argentine Counter-Memorial publishes the letter addressed to the Minister of Argentina in Brazil, and not the one addressed to Sr. García in London. It should be noted, moreover, that no mention is made in this letter of the “clipping” from the “Tribuna Nacional”.

Sr. García’s acknowledgment, on the other hand, does mention the latter.

² The text published by “Tribuna Nacional” on 24 July quite correctly attributed to Argentine—in addition to “la isla de los Estados” and “los islotes proximately inmediatos a ésta”—“demás que haya sobre el Atlantico . . .” (see above, para. 93). On the ad-hoc English translation of the “Tribuna Nacional” article published by the Argentine Counter-Memorial, (see below para. 139).

thinking—according to the Argentine Counter-Memorial—that that was the text of the Treaty and being unaware of the fact that it related really to the bases of 3 June drastically modified later. Therefore, Lord Tenterden asked his staff for an English translation of the Argentine press extract and ordered that the Admiralty be asked to supply him with a map. It was in these circumstances that the Admiralty sent him Chart. No. 786 on which it had marked rather approximately “the division which seemed to result from the text in question” (that is to say, from the text of the bases published by “Tribuna Nacional”). Comparing the Admiralty chart with the translation of the bases which his staff had prepared for him—so the Argentine story goes on—Lord Tenterden noticed a discordance between the two documents and he “must have then realised” that the “Tribuna Nacional” text corresponded to the state of the negotiations a month before the signature of the Treaty. It was then that he wrote on the extract from the “Tribuna Nacional” the following note: “This is not the actual Treaty but the bases of what it is believed has been signed”. That is why—it is alleged—the Foreign Secretary, Lord Granville, in his acknowledgment to Sr. García of the receipt of the “Tribuna Nacional” text, on 14 November, spoke of a text “showing the general bases of the Treaty”. From these facts—it is said—the conclusion is clear: Admiralty Chart No. 786 (Ch. Plate 20) cannot be regarded as reflecting the Argentine understanding of the Treaty, for it constitutes only an illustration of the bases of 3 June. In other words, the probatory value of this chart for the interpretation of the Boundary Treaty “is . . . absolutely nil” in the eyes of the Argentine Government.

Such is the Argentine story about Admiralty Chart No. 786 (Arg. C.M. pp. 202-207, paras. 12-14).

137. Once again nearly everything is untrue.

(i) If the Argentine Counter-Memorial is to be believed, Minister Irigoyen did not content himself with leading his own Ambassadors into error by sending them an out-of-date text on 27 July. He did better than that. *Even in October*, when the ratified text of the Treaty was about to be made public at any moment, Irigoyen is supposed to have knowingly allowed his representative in London to give the Foreign Office information which he knew to be inaccurate and of which he knew the inaccuracy could not fail to become apparent to all in a very short time! Irigoyen is thus supposed to have allowed Sr. García to give the British Government a completely false picture of the distribution of sovereignties in the South Atlantic—a region where the British Admiralty had played an important role since the beginning of the century and in which it took so great an interest.

In his Minute of the interview, Lord Tenterden said clearly that:

“The Argentine Minister called yesterday and left with me the accompanying newspaper extract containing the Treaty . . . He said that it had now been ratified by the Assembly and was completed” (Arg. C.M. Ann. No. 48, p. 173).

And Sr. García reported in the same way to Irigoyen on 30 October that:

“As Lord Tenterden told me he was anxious to know the terms of that agreement, *I showed him the Treaty and . . . added that my Government had requested me to leave a copy* (Arg. C.M. Ann. No. 45, p. 165).¹

To inform a foreign Government of a Treaty already ratified and completed whilst at the same time providing an erroneous text . . . The authors of the Argentine Counter-Memorial indeed saddle the Argentine diplomacy of the XIXth century with curious behaviour!

138. (ii) The Admiralty, having been requested by the Foreign Office to illustrate graphically the Treaty of which the bases had just been communicated by Sr. García, indicated in manuscript on Chart No. 786 the main features of the Treaty and represented the frontier prescribed by a dotted line. This chart, which is endorsed “Map to illustrate *Boundary Treaty* between Chile and Argentine Republic—as communicated by Señor García, Oct. 27, 1881 and procured from the Admiralty by the Librarian”, is bound in Foreign Office Volume 6/372 immediately after the Minute of the interview of 27 October drafted by Lord Tenterden (Arg. C.M. Ann. No. 48, p. 173). To get rid of this Admiralty testimony, the Argentine Counter-Memorial alleges that the comparison between it and the text of the “Tribuna Nacional” translated into English by the Foreign Office put Lord Tenterden on the track of the truth. It is there that he “must have then realized” that that text was not the one of the Treaty but that of the bases of 3 June (Arg. C.M. p. 204, para. 13). This allegation is difficult to understand, since both the chart and the translation had their source in the same document, namely, the text of the bases published by “Tribuna Nacional”. How could any divergence whatsoever appear from the comparison of these two documents? The chart—it is told often enough—reflected the bases and not the Treaty. As for the translation, it was that of the text of “Tribuna Nacional”, that is to say—and, once more it is told often enough—that of the bases. How then could Lord Tenterden have understood, on examining these two documents that Sr. Garcia had communicated to him information that was largely out of date? It is like floating in a sea of fiction.

139. (iii) It may not be useless to recall that this translation of the “Tribuna Nacional”, made by the Foreign Office, gave Argentina “the island of los Estados and the small islands in its immediate vicinity, *as well as those* in the Atlantic to the East of Tierra del Fuego and the eastern shores of Patagonia”. The authors of this translation had therefore understood the “Tribuna Nacional” text (“la isla de los Estados, los islotes

¹ To obviate any controversy, the translation used is that of the Argentine Government (cf. also Ch. Ann. No. 46 (a), p. 148(a)).

proximamente inmediatos a esta, *demas que haya sobre el Atlantico . . .*”) exactly as they would have understood—and as they were to understand a little later (cf. above, para. 93)—the final text of the Treaty. As related above, the Argentine Government seems to be unaware of this translation, which is in the same Foreign Office volume 6/372 as Lord Tenterden’s Minute and Chart No. 786, since, in its place, the Argentine Counter-Memorial published a fresh translation in which the “base tercera” is translated “. . . the Island of los Estados, the remaining small islands there may be in the immediate vicinity thereto, on the Atlantic, to the East of Tierra del Fuego, the eastern coast of Patagonia . . .” (Arg. C.M. Ann. No. 32, p. 121, at p. 122). Yet, it was not such a translation which Lord Tenterden and Lord Granville consulted but that made by the Foreign Office in 1881, which rendered in a very accurate way the text of “Tribuna Nacional”.

It is really by antiphrasis that the Argentine Counter-Memorial, basing itself on what it calls facts “stated accurately”, dares to conclude in a peremptory way that the value of this Chart No. 786 as evidence of the interpretation of the Treaty is “absolutely nil” (Arg. C.M. pp. 206-207, para. 14).¹

140. In its attempt to attack the value of that chart, the Argentine Counter-Memorial adduces yet another argument. In his account of the interview of 27 October with Lord Tenterden, Sr. Garcia wrote this:

“Finally, I presented to him a copy in French of the book by Sr. Olascoaga and *the plan of the southern regions which contain the new frontier*” (Arg. C.M. Ann. No. 45, p. 165 at p. 167²).

The Chilean Government had stated in its Memorial that it had not succeeded in finding this plan but that “it can be inferred with little doubt that it showed a boundary line running to the north of Picton and Nueva islands” (Ch. Mem. p. 43, para. 27 (b); cf. “Some Remarks . . .” p. 23). The Argentine Counter-Memorial alleges that Sr. Garcia was thus alluding to a map contained in Olascoaga’s book which he had presented to Lord Tenterden, showing the frontier not with Chile but with the Indians. The Chilean Government, it is concluded, thus gave itself over to “hazardous suppositions and fabrications” (Arg. C.M. pp. 207-210, para. 15), which throw a light retrospectively on the whole of this heading: ‘The invention of the Mapa Garcia’ ” (p. 201).

The Chilean Government cannot accept such insinuations. Never has it spoken of any “Mapa Garcia” whatsoever. This expression which is the fruit of the “invention” of the authors of the Argentine Counter-Memorial can be sought in vain in the Chilean

¹ On the information that can be derived from this Chart, see Ch. Mem. p. 43, para. 27(b), and “Some Remarks . . . p. 23.

² See above, para. 137, note 1 (Spanish text: “. . . y el plano de las regiones australes que encierran la nueva frontera”).

Memorial. The Chilean Memorial and Atlas speak of "Irigoyen's Map" (Ch. Mem. p. 42, para. 25), never of "Garcia's Map" or of "Mapa Garcia" (compare Chilean Plates 20 and 21). The Chilean Memorial simply said this: The map which Sr. Garcia said he had handed to Lord Tenterden has not been found, but it is reasonable to suppose that it showed frontiers similar to those on Admiralty Chart No. 786. Stress was placed by the Chilean Memorial on the probative value of the Admiralty Chart and not on that of the map handed over by Sr. Garcia, which in fact has not been found. It suffices to re-read paragraphs 27 and 27(b) of the Chilean Memorial (pp. 42-43) to be convinced that it is on the indications of the British chart drawn up according to Sr. Garcia's information that the Chilean Government relied and not on any "Mapa Garcia". When he said he had handed to the Foreign Office "el plano de las regiones australes que encierra la nueva frontera", was Sr. Garcia alluding to the map included in Olascoaga's "La Conquête de la Pampa" or was he referring to a map showing the frontiers with Chile? No one can say with certainty, although the second hypothesis is more plausible since the subject matter of the interview was the Treaty recently concluded with Chile and not the campaign against the Indians. It matters little, anyway: what alone matters is that the Admiralty, on the basis of the information furnished by the Argentine Government, interpreted the Treaty of 23 July 1881 in exact conformity with the interpretation of the Chilean Government.

"Irigoyen's Map" (Chilean Plate 21)

141. In its Memorial the Chilean Government has shown the considerable interest attaching to the map communicated in December 1881 by Minister Irigoyen to the British Minister in Buenos Aires and transmitted by the latter to the British Government (Ch. Mem. p. 42, paras. 25-26, and "Some Remarks . . ." pp. 24-25). It is obvious, as the Chilean Government emphasized, that even though this map was of private origin,—a publication by a newspaper and nothing more—"communication of it by such a person makes it plain that it did reflect the intentions of the Argentine Government when concluding the Treaty and their understanding of it immediately afterwards" (ibid., p. 42, para. 26). This was all the more so because, at the date when Minister Irigoyen communicated this map to the British diplomat, the Treaty had been ratified for more than two months; its text was public and the same diplomat had communicated it to his Government as long ago as on 28 October (Arg. C.M. Ann. No. 42, p. 157). It would truly be hard to find a more official Argentine interpretation than this.¹

¹ Let it be remembered that this map shows that, to Irigoyen's mind, the Beagle Channel was as described by the Chilean Government and that Picton, Lennox and Nueva belong to Chile according to the Treaty. Combined with the explanations of Mr. Petre (see Ch. Ann. No. 47, p. 149), it shows also that the concept of the "Atlantic seaboard" does not include the islands to the south of Tierra del Fuego (Cf. Ch. Mem. p. 42, para. 26; Ch. C.M. pp. 47-48, para. 25).

142. The embarrassment of the Argentine Government in the presence of so conclusive a document is understandable. Not being able to challenge it as a whole, the Argentine Counter-Memorial piles, one on another, criticisms of detail, none of which stands up to examination, while some are disarmingly childish. To show this, it will be sufficient to review them one by one.

143. (i) The Chilean Plate 21, it is alleged in the first place (Arg. C.M. p. 216), has stronger colours than the original. That is true, since Plate 21 is not a photographic reproduction, but that changes nothing in the significance and effect of this map. Anyway, the Court will find a photograph of the original in the new Chilean Atlas (Plate 175).

144. (ii) The map of "La Ilustracion Argentina" has mistakes in it, it is next maintained (Arg. C.M. pp. 216-217). That, too, is true, but those errors—avowedly minor—are irrelevant. Two observations must be made anyway. The first is that, although the Chilean Government relies on this map, that is not because it would place any special value on "La Ilustracion Argentina"¹, but because the map published by that review was handed to a foreign diplomat by an Argentine Minister—and not just by any Minister but by the Minister for Foreign Affairs who had negotiated and signed the Treaty. It is of course not the source of this map which gives it importance, but the fact that *Irigoyen* sent it to the British diplomat in order to illustrate the Treaty.

145. (iii) But the fundamental argument of the Argentine Counter-Memorial is drawn, once more, from the legendary story of the bases of 3 June. This time, the argument was more difficult to handle, since the map was published on 10 November and communicated to Mr. Petre in December—that is to say, well after the text of the Treaty was published. It was therefore no longer possible to maintain, as in the case of the Chilean Authoritative Map or the British Admiralty Chart, that it was a reflection of the June bases. No matter, something else must be found. And this is what was found: although the map was published on 10 November, "its preparation *probably* began quite a time before this date", for "it is *reasonable to suppose*" that such work could not be carried out in less than two weeks. Therefore the author of the map "*in all likelihood, had before him*" the text of Valderrama's bases, but "it was already too late to introduce any modifications" (Arg. C.M. pp. 217-218, para. 18).²

¹ That is why the argument advanced by the Argentine Counter-Memorial to the effect that, a month later, the same publication spoke of the "coasts, islands and territories in the south of the Republic, comprising as far as Cape Horn" (Arg. C.M. pp. 221-222, para. 20) would be of no significance whatsoever if such was a correct translation of the original Spanish; but the translation is wrong.

² A mere glance at Ch. Plate 174 of the Atlas submitted with the present Reply will show that the map of "La Ilustracion Argentina" it derived from Seelstrang and Tourmente's map of 1875. Therefore, contrary to the assertions of the Argentine Counter-Memorial even in 1881 it would have been possible to produce in a matter of few days the coloured map inserted in "La Ilustracion Argentina" (see "Supplementary Remarks . . ." on Ch. Plate 174).

Thus, if the Argentine Counter-Memorial is to be believed, the map published by "La Ilustracion Argentina" on 10 November and communicated by Minister Irigoyen to Mr. Petre in December—in both cases after the ratification and publication of the Treaty—nevertheless reflected the June bases, because there had been no time to bring it up to date! The Court will remember that, in the case of the Chilean Authoritative Map, the Chilean Government was accused of having knowingly neglected "to up-date" it. Here the editors of an Argentine magazine did not have time to bring it up to date. In both cases it is an out-of-date map that was published!

What strange journalistic behaviour, to publish, without the slightest reservation, a map based on a document which the editors of the newspaper knew needed to be brought up to date! And what strange diplomatic behaviour for a Minister of Foreign Affairs to hand to a foreign diplomat—who, as he was aware, could compare it with the text of the Treaty, which he had had for two months—a map which he would be the first to know was out of date (since it is he—it is asserted—who had caused the text of the "base tercera" to be changed), and that, too, without his adding the slightest reservation or the slightest explanation. The argument does not say much either for the probity of Irigoyen or for the shrewdness of Mr. Petre! The Counter-Memorial, being aware of this, alleges that Mr. Petre's allusion to the fact that "the Argentine Republic . . . is left in full possession of the Atlantic seaboard" (cf. Ch. Mem. p. 42, para. 26 and Ch. C.M. pp. 47-48, para. 25) would indicate that "probably" and "most likely" Minister Irigoyen would have drawn Mr. Petre's attention to the inaccuracy of the map (Arg. C.M. pp. 220-221, para. 20). But how can it be imagined that, if that was the case, Mr. Petre would not have informed the Foreign Office of this striking difference between the Treaty and the map? Instead of which, Mr. Petre communicates to London "the map showing the line of frontier established by the Treaty"!

146. The Argentine Counter-Memorial maintains, lastly, that "the sending to Mr. Petre, as a personal courtesy, of a publication such as 'La Ilustracion Argentina' could not have any value as an official communication" (Arg. C.M. p. 221, para. 20). The Counter-Memorial tells us that "it is not difficult to reconstruct the facts as they may have occurred". During a visit to Sr. Irigoyen, Mr. Petre "probably saw an issue of 'La Ilustracion Argentina'", "it would have been natural for Mr. Petre to have mentioned to the Minister his wish to obtain this publication and for Sr. Irigoyen to reply that it would give him pleasure to send it to him, it being understood that it would be on a private basis. After this Mr. Petre bought on his own two copies of the 'map' and forwarded them to London" (Arg. C.M. p. 219, para. 19). It will be noted, in passing, that the Argentine Government speaks with two different voices. On page 219, Mr. Petre *bought* copies of the map. On page 221, it was Irigoyen who *sent* them to him! That Mr. Petre did not buy

the two maps is certain if only because he said himself that Irigoyen "sent them to him". The Argentine Minister in fact did not communicate to the British diplomat copies of the commercial edition of this review, but a "Special publication", a special edition different from the commercial edition.¹ As for maintaining that the handing by the Minister for Foreign Affairs, the one who negotiated and signed the Treaty, of a map illustrating that Treaty to a foreign diplomat who will communicate it immediately to his Government, "could not have any value as an official communication", the Chilean Government will refrain from any criticism of so unexpected a statement . . .

147. From this harassment the Irigoyen map emerges unsmirched and it is not by sarcastically describing it as "artistic" that the Argentine Counter-Memorial can succeed in lessening its importance. It would be impossible to find a more eloquent illustration of the way in which, a few weeks after the exchange of ratifications of the Treaty of 1881, the Argentine Government interpreted it and, more particularly, of the way in which that Government understood the concepts of Beagle Channel and "Atlantic Coasts".

The "Irigoyen map" thus confirms fully what the news items communicated by Sr. Garcia to the Foreign Office two months earlier had already revealed of the Argentine understanding of the Treaty immediately after its entry into force.

Irigoyen's "secret instructions" of 24 October 1881

148. To save its contention that the Argentine Government did not have the understanding of the Treaty which nevertheless is, beyond any doubt, revealed both by the news items given to the British Government by Sr. Garcia in October and the map communicated by Irigoyen to Mr. Petre in December 1881, the Argentine Counter-Memorial mentions instructions which the Argentine Minister for Foreign Affairs is supposed to have addressed to certain representatives of his country abroad on 24 October. These instructions—it is claimed—leave no doubt as to the fact that, contrary to what the Chilean Government thinks, Irigoyen considered the "Atlantic" islands south of Tierra del Fuego as attributed by the Treaty to Argentina (Arg. C.M. pp. 211-215, paras. 16-17).

Yet once more, it is not without interest to consider the Argentine chain of argument closely.

¹ Apart from the words "Special publication" Mr. Petre's copies show a Brunswick Peninsula in colours whereas it is white in the commercial edition (cf. Ch. Plate 175).

149. The Argentine Counter-Memorial says, in the first place, that on 24 October 1881 Irigoyen "forwarded a certified copy of the final text of the Treaty to all the Argentine representatives posted abroad". In this document (Arg. C.M. Ann. No. 54, p. 187), the Argentine Minister stated:

"The bases of the Treaty were already sent to Your Excellency with a previous letter. I herewith enclose the complete text".

Irigoyen was thus referring to his circular letter of 27 July, by which he had communicated to Argentine diplomatic agents the text of the bases published in "Tribuna Nacional", telling them that, pending the official publication of the Treaty, they could use them "on an unofficial basis" (cf. above paras. 134-135).

Regarding this official communication to all the Argentine representatives posted abroad of the "texto íntegro" of the Treaty on 24 October 1881, there would be nothing to add if it did not show, yet once more, the total unreality of the story of the bases of 3 June. It was already very unlikely that on 27 July, that is, four days after the signature of the Treaty, Irigoyen could have sent to his representatives abroad "bases" of which it is claimed that they were contradicted on a fundamental point by the Treaty. It is still more difficult to follow the Argentine Counter-Memorial when it allows it to be understood that the text sent on 24 October was intended to correct the text communicated on 27 July. Can it be really thought that the Argentine Minister—even if he had wished to observe some discretion in July—would not have dotted the i's and crossed the t's once the Treaty was ratified, so that the safeguarding of the "oceanic principle"—a "condition *sine qua non*" of the Agreement, as it was said to be—would be seen to be clearly ensured in the eyes of foreign Governments?

150. But on this same date, 24 October 1881, continues the Argentine Counter-Memorial, Minister Irigoyen disseminated yet another document. In a "personal letter to a restricted number of Argentine representatives abroad" he sent "notes" ("*apuntes*") showing how those diplomats should comment on the Treaty in the countries to which they were accredited. Irigoyen stated in this letter that:

"It is advisable to proceed with caution but to let people know one way or another the scope of the Treaty, and this with all reserve" (Arg. C.M. Ann. 55).

As to the "notes" attached, the Argentine Counter-Memorial writes as follows:

"The notes (*"los apuntes"*) which were attached to *the letter*, a copy of which is also to be found in the Archives of the Argentine Ministry *next to the letter* reproduced above, cover six pages of manuscript" (Arg. C.M. pp. 212-213, para. 16).¹

After this statement of a documentary nature, the Counter-Memorial proceeds to an analysis of the "notes" in question.

151. But, before taking up the contents of these "notes", the Chilean Government wishes to draw the attention of the Court to certain facts which are nothing short of disquieting.

(i) Whereas the ratified text of the Treaty was distributed by Irigoyen, as the Argentine Counter-Memorial itself asserts, "to all the Argentine representatives posted abroad", the secret instructions of the same day were sent only "to a restricted number of Argentine representatives abroad"—in fact, to precisely five. Of itself, this fact would perhaps not call for attention. But there are others.

(ii) Neither the letter nor the "*apuntes*" bear any signature. This is clear in the translation published in Annex No. 55 of the Argentine Counter-Memorial and is also clear in the original manuscripts in the Argentine Archives, of which the Agent of the Argentine Government has had the courtesy to supply a photocopy to the Agent of the Chilean Government at the request of the latter. As, moreover, these documents are not in Irigoyen's handwriting² it is not even known if he drafted the "notes" or if they were in fact despatched, or whether these are merely drafts on which no action was taken.

(iii) As the Argentine Counter-Memorial itself states (p. 212, note 41), the list of addressees for the notes is not the same as that for the addressees of the covering letter: seven instead of five.

(iv) Lastly, and above all, the stress placed by the Argentine Counter-Memorial on the fact that the "notes" were "found in the Archives of the Argentine Ministry next to the letter" raises some doubt, for a glance at the numbering of the various sheets is sufficient to reveal a "gap" between the letter and the "notes". On the letter are the numbers 516, 2896 and 43, whilst the numbering of the "notes" starts with 523, 2903 and 50 and then runs on normally up to the end of the "notes". The Chilean Government is quite prepared to believe that the "notes" were found "next to the letter", but it would nevertheless be

¹ An English translation of the letter and of the "notes" of 24 October is given in Arg. C.M. Ann. No. 55, pp. 189 and 190. The Spanish text of the letter and of certain passages of the "notes" is reproduced in the Argentine Counter-Memorial (pp. 212-214).

² The fact that the documents are not in Irigoyen's handwriting is clear if a comparison is made between the "notes" and a specimen of his writing (see Fig. 2). The point needs to be stressed because in the "*French version*" of Chapter V of the Argentine Counter-Memorial (which has been kindly furnished by the Argentine Agent with a letter dated 21 January 1965) the reference is made to "*la minute écrit de la main de M. Irigoyen*" (p. 153).

glad to receive some clarification concerning the seven sheets—neither published nor mentioned in the Argentine Counter-Memorial—which apparently were bound between the “letter” and the “notes”.¹

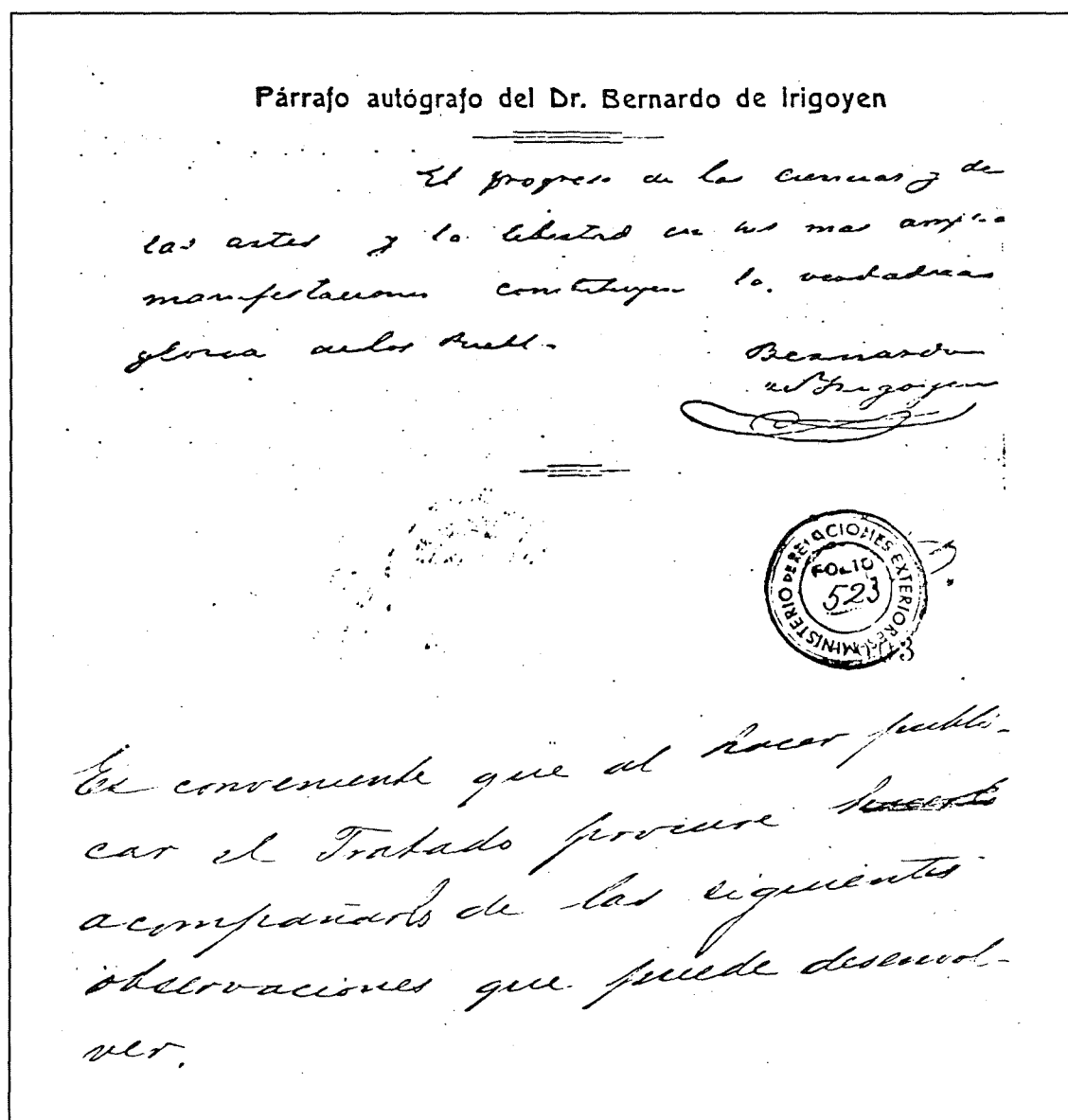


Figure 2. — Irigoyen's handwriting and the handwriting of the “secret instructions” (Arg. C.M. Annex No. 55).

¹ In order that this point may be clearer, the upper part of the pages is reproduced as Fig. 3.

This is an amazing argument. It is obvious that, when writing that "the transaction has dealt with the region south of degree 52", Irigoyen did not mean that the Treaty settled only the territories to the south of the 52nd parallel. That would have been a flagrant misstatement, since Articles I and II of the Treaty, as also moreover the proposals of 1876, concern also territories situated to the north of the 52nd parallel. Patagonia had not ceased to be at the very heart of the controversy, together with the Strait of Magellan. To interpret this sentence from Irigoyen's "notes" as meaning that "the subject of the Argentine-Chilean settlement was the area south of the 52nd parallel" is to deny the evidence. The meaning of Irigoyen's statement is clear. He meant that, by the Treaty, Argentina did not renounce any of its claims over Patagonia, to the north of the 52nd parallel, and that the "transacción"—that is to say, the abandonment of certain claims (cf. *supra*, Chap. I, paras. 30-32)—related only to territories to the south of that line. This is what is quite clearly apparent if the sentence in question is read when replaced in its context:

"The vast region of Patagonia from degree 39 to degree 52 has remained exempt and outside all discussion and all transaction and recognized as exclusively Argentine. The transaction has dealt with the region to the south of degree 52.

One part of this region remains to the Argentine Republic, without conditions or limitations of any sort.

Another part remains to Chile" (Arg. C.M. Ann. No. 55 at p. 191).¹

It needs a good deal of imagination to deduce from this that the "demás islas sobre el Atlántico al Oriente de las costas orientales de la Patagonia" can be only the "Atlantic" islands south of the 52nd parallel!

154. (ii) "The Argentine Republic remains owner of the vast region of Patagonia, of all the coasts of the Atlantic as far as Cape Horn" (Arg. C.M. Ann. No. 55 at p. 191). Irigoyen may be said not to have been wrong, if it is recalled that for him Staten Island was "situada sobre el Cabo de Hornos". That is exactly what Argentina had claimed throughout the negotiations (on the concept of "costas del Atlántico" in Irigoyen's terminology, see above, Chapter I, paras. 104-107). A few weeks later, the British Minister in Buenos Aires, Mr. Petre, commenting for the benefit of his Government on the map which Irigoyen had communicated to him and on which Picton, Nueva and Lennox were shown as Chilean, also wrote: "The Argentine Republic, as Your Lordship will see, is left in full possession of the Atlantic seaboard" (Ch. Ann. No. 47, p. 149).

155. (iii) The Court will not fail to observe that, no more than in any other of his diplomatic communications, the Argentine Minister does not breathe a word, in his "notes" of 24 October 1881, of the story of the bases of 3 June. The question arises once

¹ It would have been clearer if Argentina had translated the word "transacción" on both occasions as "compromise", instead of as "transaction".

more: if he had really succeeded, at the last minute, in “restoring” in Article III of the Treaty its original text of 1876 and thereby defeating the Chilean manoeuvre of 3 June, can it be thought that he would not have drawn the attention of the addressees of these notes to it—especially when, according to the Argentine Counter-Memorial, he is said to have pointed out to them that Argentina remained mistress of the “Argentine” islands “to the south of Tierra del Fuego”? Once more the Argentine Government has called in aid a document which annihilates its arguments!

156. Even if the “notes” of 24 October had the meaning which the Argentine Counter-Memorial attributes to them, the Chilean Government fails to see how they could serve as evidence of the Argentine understanding of the Treaty. Sr. Irigoyen does not in any sense present them as being an interpretation of the Treaty, but merely as “a basis for the comments which you may publish on the Boundaries Treaty with Chile”. Even in this form, he advises his diplomats to be careful. “It is advisable to proceed with caution . . . And this with all reserve”. The impression conveyed is that Irigoyen was seeking to establish his “personal image” and to appear as a statesman who had been able to secure for his country, not only the whole of Patagonia, but also the guarantee of the neutralization of the Strait of Magellan and sovereignty over the “Atlantic coasts”. The tone of the “apuntes” of 24 October (as moreover was already the tone of his speech at the end of August beginning of September in the Chamber of Deputies), is that of a man who is anxious—quite properly—to emphasize the diplomatic successes he has gained, in the hope perhaps that they would help to ensure the advance of his political career (see above, para. 113). That would make still more unlikely the silence kept concerning the re-establishment *in extremis* of the 1876 text, if any such re-establishment had really taken place!

157. But that it is not all. Had the “instructions” really been forwarded by Irigoyen—as claimed by the Argentine Counter-Memorial—it would still be necessary to consider the legal effect of the contrasting attitude of both Parties. On the one hand, the Chilean Government was making its interpretation of the Treaty known in broad daylight (in particular, by the publication and dissemination of the Authoritative Map and the Hydrographic Notice) and was thus giving the Argentine Government the opportunity to protest if that Government thought it necessary—which was not the case. On the other hand, the Argentine Government contented itself with an interpretation addressed, confidentially and with reservations, to some of its own diplomats, as if it wished not to be officially bound by the commentaries it was encouraging its representatives to make! As a consequence the Chilean Government was prevented from knowing anything at all of these “secret instructions”, of which it heard mention for the first time in the Argentine Counter-Memorial of 1974—nearly a century later!

Even if they had the scope attributed to them by the Argentine Counter-Memorial, these "instructions" would be void of all value vis-à-vis Chile as an expression of the official Argentine interpretation of the Treaty at the time of its conclusion.¹

The alleged absence of any official Argentine cartographic interpretation before 1888.

158. Apart from the map handed by Irigoyen to the British Minister in Buenos Aires in December 1881 (*supra*, paras. 114 and 147), several other official Argentine maps published in the years immediately following the entry into force of the Treaty serve to confirm how the Argentine Government understood the territorial settlement of 1881. The Chilean Government has supplied all necessary information on this point in its Memorial (Ch. Mem. p. 69, para. 2, and "Some Remarks...", pp. 27-28, 33-34, 36-37), and respectfully begs the Court to refer thereto.

159. To extricate itself from these proofs of the Argentine understanding of the Treaty, the Argentine Counter-Memorial obviously could not take refuge yet once more behind the over-facile argument that these maps corresponded, not to the Treaty but to the June bases. With the best will in the world, it was no longer possible to maintain that these documents had been prepared before the text of the Treaty was known and that there had not been time to modify them to take account of the Treaty. So the authors of the Argentine Counter-Memorial had to try to find something else and they maintained quite simply that none of these maps has a truly official character. The first official Argentine map, they claim, did not see the light of day until seven years after the conclusion of the Treaty.

160. This is simply not true: the Court will see that the first Argentine map which deserves to be described as official was printed and distributed by the Argentine Government in 1883 and not in 1888. This Argentine map was reproduced as Plate 25 of the first Chilean Atlas. To the comments made about it in the Chilean Memorial it is necessary to add the following elements:

- (i) The printing of the "publicación oficial" containing the map was authorized by the Argentine law No. 1205;
- (ii) There were public tenders for the printing of that work and the bid was won by

¹ It may be recalled that also the printed text of Irigoyen's speech in the Chamber of Deputies remained secret for several years. The Government of Chile brought attention to that fact already in 1902: "It is important to remark here that *although Señor Irigoyen's speech appears to have been printed in 1882, it was not known in Chile till several years later. There is reason to believe that, as it was delivered during some secret sessions of Congress, it was withheld*, and this supposition is confirmed by the fact that *the Argentine writers themselves who upheld the claim to ports in the Pacific never quoted the authority of this statesman previous to the year 1895: an unaccountable circumstance had they been acquainted with his speech*". (Chilean Statement, 1902, Vol. I, p. 341).

Messrs. Schiller, Lass and Alberto Larsch, as attested by Argentine Decree of 21 September 1882;

(iii) The printing and distribution of the “publicación” were made under the supervision of Sr. Latzina, its author, who was then Director of Commercial Statistics of Argentina;

(iv) The map was made by Sr. Latzina under a commission from the Argentine Minister of Interior, *Sr. Irigoyen himself*;

(v) The Law and Decrees that refer to this “publicación oficial” bear, all of them, the signatures of President Roca and of Sr. Irigoyen, then Minister of Interior, and are published as Ch. Ann. No. 520 to this Reply (see also Ch. Ann. No. 521 and 522).

Such is the map which the Argentine Counter-Memorial does not hesitate to describe as “a purely private map” (Arg. C.M. para. 22, p. 226).

This description is far from the truth; all the above mentioned elements—about which nothing is said in the Argentine pleadings—make Latzina’s map *the first map showing the official interpretation of the Treaty of 23 July 1881*.¹

161. The arguments advanced by the Argentine Counter-Memorial for the purpose of denying any official character to that map and to other Argentine maps mentioned by the Chilean Memorial (Arg. C.M. pp. 226-229, para. 22, for Ch. Plates 25 and 38; pp. 464-465, paras. 45-46, for Ch. Plate 34) are so poor as to defy criticism (see *infra*, Chapter IV, paras. 101 *et seq.*). More interesting still is the explanation given by the Argentine Counter-Memorial of this alleged silence kept by Argentine official cartography until 1888. The Argentine Government, it is maintained, had had satisfaction by securing the re-establishment in the text of the Treaty of the principle of “oceanic” division which was contained in its proposals of 1876 and which Valderrama had surreptitiously tried to delete from it. There was therefore no need for it to make this re-establishment official by means of maps. The Chilean Government, on the contrary, refusing to accept the failure of its manoeuvre of 3 June, immediately felt the need to publish maps likely to accredit an interpretation of the Treaty in conformity, not with what the Treaty said, but with what the Chilean Government would have liked it to say. The fact that the Argentine Government did not consider it necessary to publish officially maps illustrating its interpretation of the Treaty was thus, it is alleged, proof that its interpretation was given “in good faith”, whilst the need felt by the Chilean Government to illustrate the Treaty by official maps is alleged to be evidence that its interpretation “can only with difficulty be considered to be an interpretation” (Arg. C.M. pp. 223-224, para. 22, and pp. 233-237, paras. 24-25).² The argument does not even merit refutation.

¹ On this matter, see also Chapter IV, paras. 101 *et seq.*

² The same accusations of bad faith are levelled against the Chilean Government of its interpretation of the Protocol of 1893 (Arg. C.M. p. 235, para. 24). The question of the Protocol of 1893 will be considered in Chapter III hereunder (paras. 1-36).

E. Conclusion

162. As the Court may note, the Argentine Government has found an expeditious and convenient method for escaping from documents, cartographic or other, which establish the interpretation given by the two Parties in the periods which immediately followed the conclusion of the Treaty of 1881.

The Chilean documents are automatically impugned because—it is said—they form part of a manoeuvre designed to accredit an interpretation which was based on a text different from that of the Treaty and, in fact, rejected by the Argentine Government.

As for the Argentine documents, they are ruled out either as being established at a date when the text of the Treaty was not yet sufficiently known or as lacking official character. If only the Counter-Memorial had been able to produce, in positive fashion, some Argentine official document conforming to the sense of its present interpretation. But the only one it has succeeded in finding is Sr. Irigoyen's alleged "secret instructions"—so confidential and so little official that the Argentine Government itself was unaware of them only two years ago!

163. The truth is quite different. The way in which the Chilean Government understood the Treaty is proved, with all the clarity possible, by the Authoritative Map of August 1881, by the statement publicly issued by the Chilean Foreign Minister in relation to the Treaty (see above, para. 130), and by the Hydrographic Notice of November 1881. These documents, which are confirmed by others, some older, some more recent, were quite official and public in character and the Argentine Government would no doubt have protested to the Chilean Government if it considered that the latter was misrepresenting the intentions of the Parties.

But the Argentine Government's interpretation is deduced not only from its silence in the face of the official Chilean documents. It emerges also, in a positive manner, from various documents of official Argentine origin or inspiration, such as the British Admiralty Chart No. 786 established on the basis of information supplied by the Argentine Minister in London, the map handed by Sr. Irigoyen to Mr. Petre, or the official Argentine map of 1882, distributed abroad under instructions from Sr. Irigoyen, then Minister of Interior (see Ch. Ann. Nos. 521 and 522).

164. It can thus be seen how far the Argentine Counter-Memorial is in error when it asserts that:

"...at the time the Argentine-Chilean Treaty came into force, there already existed, on the two sides of the Andes, a serious divergence of interpretations ..." (Arg. C.M. p. 233, para. 24).

On the two sides of the Andes, on the contrary, exactly the same interpretation of the Treaty was given: an interpretation which left no room for any so-called "oceanic criterion" or any so-called "Cape Horn frontier"; an interpretation which considered Picton, Lennox and Nueva as belonging to Chile; an interpretation, therefore, in conformity with the ordinary meaning of the terms of the Treaty in their context and in conformity with the preparatory works and the circumstances in which the Treaty had been concluded.

That is what is proved by the official documents, both Argentine and Chilean, from which the Argentine Counter-Memorial has made so many vain efforts to extricate itself.

V. CONCLUSIONS OF CHAPTER II

165. If the Argentine Counter-Memorial is to be believed, the negotiations of 1876-1881 followed the pattern of a scenario in five acts.

(a) *First Act: the proposals submitted by Sr. Irigoyen to Sr. Barros Arana in 1876.*

These proposals—it is said—were based entirely on the "system" of the "stepped boundary" intended to maintain Argentina's exclusive jurisdiction over the "Atlantic coasts". Hence a "vertical" frontier across Isla Grande, and then "horizontal" along Beagle Channel from meridian 68° 34' to the intersection with the meridian of Cape Horn, then "vertical" again along this latter meridian. This "system"—it is added—was based on a fundamental principle of the colonial period: to Argentina the "Atlantic" territories, that is to say, those situated to the east of the meridian of Cape Horn; to Chile the "Pacific" territories, that is to say, those situated to the west of the "Cape Horn frontier". It is thus that the Argentine Minister is said to have understood his proposals. It is thus also—it is claimed—that the Chilean negotiator and the Chilean Government understood them. Hence it follows, it is concluded, that it is not conceivable that the "horizontal" line shown on the map which Sr. Barros Arana sent to his Government to explain to it Sr. Irigoyen's proposals in July 1876 could have been drawn at that time by the Chilean diplomat.

(b) *Second Act: the negotiations of 1877-1879*

The proposals submitted by Buenos Aires to Santiago in 1878 and 1879 did not respect the "Atlantic-Pacific principle", it is recognized. But—it is immediately added—this fact is explained by the temporary absence of Sr. Irigoyen from the Government.

As soon as he resumes his place at the head of Argentine diplomacy, everything will be back in order. In other words, the proposals of the Ministers Elizalde and Montes de Oca, and also the Treaties envisaged at that time and the maps produced to illustrate them—all these documents are said to be irrelevant for the interpretation of the Treaty of 1881.

(c) *Third Act: the negotiations of 1881 to 25 June*

Negotiating through the intermediary of the United States Ministers in the two capitals, the Parties agreed in April-May 1881 to take up again the last two of the 1876 proposals, with their “oceanic” meaning of course. Then, suddenly, came the dramatic turn of events of 3 June: under cover of confirming the 1876 bases—it is asserted—the Chilean Minister Valderrama in reality modified very profoundly the wording of the base concerned with the “islas” so as to do away with the “oceanic principle” and give to his country Picton, Lennox and Nueva, in short so as to establish Chile on the Atlantic in violation of all that had been agreed a few days earlier.

(d) *Fourth Act: the “restoration” of the 1876 text in Article III of the Treaty*

During direct negotiations conducted without the co-operation of the United States diplomats, between 25 June and 23 July 1881, Minister Irigoyen, having become aware of the trap laid for him by his Santiago colleague, defeated that manoeuvre at the last minute and made the re-establishment of the 1876 text the *sine qua non* condition of agreement. The Chilean Government had to bow to it—and it was thus that the Treaty was signed, confirming the “oceanic principle” and giving Argentina all the “Atlantic” islands, including Picton, Lennox and Nueva.

(e) *Fifth Act: after the negotiation of the Treaty*

At the request of the Chilean Government, the text of the Treaty remained secret up to the time of the exchange of ratifications, in October 1881. This interval made it possible for the Chilean Government to carry out a further manoeuvre which took the form of “fabricating” documents which, under cover of interpreting the Treaty, in reality reflected the bases of 3 June. With a cynical use of ambiguity, the Chilean Government is said to have tried to make up at the level of official interpretation for what it had had to yield at the

level of negotiation. The Argentine Government, on the contrary, did not feel any need to give an official interpretation of the Treaty and none of the information coming from it or documents drawn up by it can, by definition, be regarded as an expression of its interpretation of the Treaty. Those of the Argentine documents which were prepared before the publication of the Treaty, in October 1881, were drafted with reference to the bases—it is claimed—and therefore cannot be considered as corresponding to an official interpretation of the Treaty. For different reasons, neither the Chilean documents nor the Argentine documents can therefore serve to provide an understanding of the way in which the Parties interpreted the Treaty.

166. The Chilean Government hopes it has shown that this story rests on an accumulation of hypotheses all of which are equally fantastic.

It is not true that the 1876 proposals were conceived of either by the Argentine Government or by the Chilean Government as comprising any sort of “stepped boundary” the last step of which was supposed to follow “more or less” the meridian of Cape Horn. Sr. Barros Arana’s official communications of 5 and 10 July 1876 prove the contrary. These documents were officially known in Argentina no later than 1878 and did not arouse the slightest reaction there. From the outset, the agreement of the Parties was thus established on an allocation of territories exclusive of any “oceanic” criterion and providing for the sovereignty of Chile over Picton, Lennox, Nueva and all the other islands to the south of the Beagle Channel down to Cape Horn.

It is not true that, in his bases of 3 June, the Chilean Minister Valderrama modified in any way whatsoever the third of the 1876 proposals. The “tercera base” of 3 June is identical with the third proposal of 1876. The story of the Chilean manoeuvre from beginning to end has been invented by the Argentine Government for the needs of its Counter-Memorial.

It is not true that, at the last minute, in secret and direct negotiations, Sr. Irigoyen obtained the re-establishment of the 1876 text—for the simple reason that there was nothing to re-establish since nothing had been changed! Not surprisingly, the Argentine Government has been unable to furnish the slightest shred of evidence of the existence of such negotiations . . .

It is not true, lastly, that the Chilean and Argentine documents of 1881 and later years are irrelevant for the purpose of determining the contemporary understanding of the Treaty. Whether these documents reflect the Treaty or the bases, matters little, since the bases and the Treaty are identical so far as concerns the attribution of the “islas”.

167. With the story of the bases of 3 June, the Argentine Government was quite clearly pursuing a twofold objective: on the one hand, to give contractual support to the

"oceanic principle" and to the "Cape Horn frontier"; on the other hand, to impugn the documents, cartographic or other, which prove the intention of the Parties in a sense contrary to its claims.

On both counts the failure of the operation is obvious.

Far from having proved the agreement of the Parties on the so-called "principle of oceanic division", the Argentine Counter-Memorial—as has been emphasized several times—relates a story which, if it were true, would prove a fundamental disagreement on this point. Neither before nor after the signature of the Treaty did the Chilean Government—even according to the Argentine version—agree with the "oceanic" doctrine. But the truth is simpler; that "doctrine" was not even advocated by Argentina. It quite simply never existed. In any case, it is not the imaginary story of the bases of 3 June that is likely to give even the tiniest contractual character to a "principle" which is completely foreign to the Treaty. Under the ambitious but deceptive title "Antecedents, Negotiation and Interpretation of the Treaty of 1881", Chapters III, IV and V of the Argentine Counter-Memorial provide in themselves the negation of any contractual character of the *uti possidetis juris* of 1810 (to which, after a brief allusion at the beginning of Chapter III, there is practically no further reference in this long Argentine story of the genesis of the Treaty!) or of its *alter ego*, the "oceanic principle".

The desperate efforts of the Argentine Government to extricate itself from the documents closely connected with the negotiation of the Treaty collapse at the same time. Sr. Barros Arana's despatches, reports and maps; the "El Mercurio" map of 1878; Baron d'Avril's reports; the proposals and maps of Sr. Elizalde and of Sr. Montes de Oca; the Chilean Authoritative Map and the Hydrographic Notice of 1881; the map communicated to Mr. Petre by Sr. Irigoyen; the British Admiralty Chart No. 786; Sr. Valderrama's report to Congress in 1881; Sr. Irigoyen's speech to Congress—all these documents emerge, not only unsmirched but strengthened from the ruins of the story of 3 June.

More than ever it is certain that, in the intention of the Parties, the Beagle Channel was the waterway running along the southern coast of Tierra del Fuego. More than ever it is certain that, in the intention of the Parties, Picton, Lennox and Nueva were allocated to Chile. More than ever it is certain that neither the Argentine Government nor the Chilean Government, throughout the negotiations which led up to the Treaty of 1881, thought for a single moment of delimiting their respective sovereignties by "the meridian of Cape Horn". For in the innumerable diplomatic exchanges and internal reports which spread for five years over these long negotiations there was never a single occasion on which there was any question of this "Cape Horn frontier"!

It is therefore by departing from the true history of the inception of the Treaty of 1881, and of its very terms, that Argentina attempts to alter the territorial settlement of 1881. It is by invoking purported "principles" or geo-political doctrines forged subsequently,

which had and have no place in the contractual relations of the Parties, that Argentina lays claims over Picton, Nueva, Lennox and the other "Atlantic" islands.

The course initiated by the Government of Argentina, some years after the signature of the Treaty, in order to attain that objective, will be related in the following Chapter.

CHAPTER III

SUBSEQUENT PRACTICE OF THE PARTIES AND ANCILLARY MATTERS

INTRODUCTION

1. The purpose of this Chapter of the Reply is to deal with the various matters raised in Chapters VI to X, inclusive, of the Argentine Counter-Memorial. The treatment is as systematic as possible, given the overall objective of the Chapter. The primary material is contained in sections B to F which are all concerned in some way or other with the subsequent practice of the Parties to the 1881 Treaty. Much of the relevant evidence (for example, of acts of jurisdiction and concomitant Argentine inactivity) relates to the period before the dispute had begun to crystallise.

A. THE PROTOCOL OF 1893

2. Strictly the 1893 Protocol should be treated within the chronological development of events set forth in Section B of this Chapter. However, the Protocol is given great prominence in the Argentine Counter-Memorial and this forms the subject matter of a separate Chapter VI, which is given precedence over the two Chapters dealing with the so-called history of the dispute. With reference to the Beagle controversy, this takes the Protocol wholly out of the correct historical perspective. The evidence reviewed in sections B and E of the present Chapter reveals that, when the Protocol was concluded, no dispute was envisaged concerning islands south of Isla Grande. Indeed, no such dispute had been envisaged in the years intervening between the 1881 Treaty and the Protocol.

3. The Protocol of 1893 has no relation to the question of islands "south of the Beagle Channel" within the terms of Article III of the 1881 Treaty or to the *allocation* of islands of any description. The Protocol is exclusively concerned with *the survey and demarcation*, of "boundary lines", that is, of alignments *on land*. The Chilean position has been expressed already in the Memorial (pp. 73-79, paras. 13-25), and also in the Counter-Memorial (pp. 119-120, paras. 47-51). However, the Argentine Government insists upon the relevance of the Protocol to the extent of devoting thirty pages of the Counter-Memorial to the subject, compared with some ten pages in the Memorial (pp. 207-211,

paras. 7-10; pp. 411-414, para. 45). Whilst the reasoning in Chapter VI of the Argentine Counter-Memorial adds nothing concrete to the argument, the Chilean Government is obliged to make an ordered refutation of it.

4. The significance of the 1893 Protocol is to be seen primarily by study of its actual text, but it is convenient to examine its antecedents to discover whether its purpose included the determination of any question affecting islands, and, in particular, islands to the south of Isla Grande, or "south of the Beagle Channel". No evidence of such a purpose is to be found. The documentation of the period preceding the Protocol is reasonably adequate. There were two difficulties in implementing the provisions for demarcation in Articles I and III of the 1881 Treaty: (a) the interpretation of the clause of the Treaty concerning the Andean boundary, linked to the question of Argentine ports on the Pacific; and (b) the identification of Cape Espíritu Santo as the starting point of the meridian line which divides Tierra del Fuego.

5. Among the documents relevant to the background of these difficulties is the Report of the Chilean Expert Barros Arana dated 25 October 1890 (Ch. Ann. No. 58). The map attached to this Report (Ch. Pl. 49) illustrates the issues unambiguously.

With reference to the boundary in Tierra del Fuego and in the austral archipelagoes, there were only two "doubts" stated by the Chilean Expert: once concerning the coordinates which the Treaty attributed to Cape Espíritu Santo; the other derived from "the existence of several small islands in the area where the Beagle Channel separates Tierra del Fuego from the islands due South". This is a reference to the Bridges and other groups inside the Channel.

No reference occurs to Picton, Lennox and Nueva or to the remaining islands down to Cape Horn.

But that is not all. When mentioning the solution that, in his view, should be given to the Cape Espiritu Santo question, he gave a clear indication of the real frame of mind of the negotiators of the Treaty. He wrote:

"...la mente de los negociadores del tratado de 1881 fue fijar la línea divisoria de la Tierra del Fuego haciéndola partir del Cabo de Espíritu Santo. Este hecho me consta personalmente por haber entendido en la preparación de ese tratado, como me constan igualmente los propósitos que el gobierno argentino tuvo en vista al insistir en esa demarcación. Se quería que ésta dejase como dominio argentino todo el litoral de la Patagonia i de la Tierra del Fuego, que están al

"...the negotiators of the Boundary Treaty of 1881 had in mind to fix the boundary line in Tierra del Fuego making it start from Cape Espiritu Santo. Personally I am certain of this fact, having participated in the preparation of the Treaty, as I am equally certain of the intentions that the Argentine Government had in view when it insisted on such a demarcation. It was desired that it should leave under Argentine sovereignty all the littoral of Patagonia and of

lado del Atlántico, como se reconocía que Chile quedaba con el dominio absoluto del litoral de ambas orillas del estrecho, del de las demás islas i del continente del lado del Pacífico”.

Tierra del Fuego which are on the Atlantic side, just as it was recognized that the littoral of both shores of the Strait, of the remaining islands, and of the continent on the Pacific side, should be left under the absolute sovereignty of Chile”.¹

These words and the map attached to the Report make it clear that Barros Arana was not putting the status of Picton, Lennox and Nueva in issue and belies the conclusion which the Argentine Counter-Memorial has sought to derive from the Report (cf. Arg. C.M. pp. 290-291, para. 28).

6. During meetings of the Joint Sub-commission in 1892 the issues remained exclusively the *divortium aquarum* and the determination of the Cape Espiritu Santo meridian: see Ch. Ann. Nos. 59, 60, 61. Contemporary Argentine documents are entirely compatible with this view: Arg. C.M. Ann. Nos. 59, 60, 61.

7. At this period (1890 to the end of 1892) no question of the disposition of islands south of the Beagle Channel had arisen. The Argentine Memorial makes no suggestion to the contrary (pp. 204-207, paras. 3-6). Nor does the Argentine Counter-Memorial (pp. 242-245, paras. 4-7). Apart from the Cape Espiritu Santo problem, the discussions in 1892 focused upon the effect of the Cordillera formation in conjunction with the water-parting line. The concern was the possibility of Argentina getting ports on the Pacific north of the Strait of Magellan.

Since the Cordillera, according to the Treaty, has the role of a boundary only down the 52nd degree of latitude, the problem was obviously confined. This confinement of the problem to the area north of the Strait of Magellan is, in any case, apparent from the following documents: letter from the Chilean Expert to the Argentine Expert, 18 January 1892 (Ch. Ann. No. 59); Minute by the President of the Argentine Republic, 30 January 1892 (Arg. C.M. Ann. No. 59); Minute, 24 February 1892 (Ch. Ann. No. 60); letter from the Chilean Minister in Buenos Aires to the Argentine Foreign Minister, 12 September 1892 and telegram (enclosure) (Arg. C.M. Ann. No. 60); letter from the Chilean Minister in Buenos Aires to the Argentine Foreign Minister, 16 September 1892 and telegram (enclosure) (Arg. C.M. Ann. No. 61). Other items supporting this view are the extract from the work by O. Magnasco, in a second edition published in 1895 (Arg. C.M. Ann. No. 62; and Ch. Plate 49).

¹ This translation is more accurate than the one contained in Ch. Ann. No. 58, p. 178.

8. The Protocol was signed on 1 May 1893 (Ch. Ann. No. 62; Arg. Mem. Ann. No. 15), and the diplomatic exchanges in the period immediately preceding its conclusion are of obvious significance for an understanding of the scope and purpose of its provisions. Whilst the Argentine Memorial neglects these exchanges, the Counter-Memorial places some emphasis on the documents of this period (see pp. 246-247, paras. 8-9; pp. 257-262, paras. 19-25).

9. The principal item of this phase of the negotiations is the Act of the Experts dated 10 March 1893 (Ch. Ann. No. 63; see also Arg. C.M. Ann. No. 63). This item has been examined already in the Chilean Memorial (pp. 73-74, paras. 14-15). There it was pointed out that the extensive provisions of the Act of the Experts unequivocally show an exclusive concern with the regions north of the Strait of Magellan in relation to the problem of Chilean "points towards" the Atlantic and Argentine "points on the Pacific coasts". As with the documents of the period 1890-1892, the complications caused by the Cordillera refer—as was inevitable—to the zone north of the Strait of Magellan. The only other concern of the Act of the Experts was with the position of Cape Espiritu Santo in the context of the demarcation of Tierra del Fuego.

10. The Argentine Government is clearly much troubled by the "Act of the Experts" of 10 March 1893. It is significant that no attempt is made to deal with its actual content, apart from certain tangential comments (Arg. C.M. pp. 246-247, para. 9). These contain no reference to the questions of islands. However, a single sentence is quoted out of context from the third paragraph of the draft agreement thus:

'It being understood that, by the provisions of this Treaty, the sovereignty of each State over the respective coastline is absolute, in such a manner that Chile cannot lay claim to any point towards the Atlantic, just as the Argentine Republic can lay no claim to any on the Pacific coasts'.¹

As stated above, the antecedents of 1890-1892 provide clear evidence that, in accordance with the very terms of the Treaty of 1881, the Cordillera issue—and the related issue of control of the littoral—was confined to the regions north of the Straits. The text of the "Act of the Experts", on any reasonable construction, is further cogent evidence for this view. Virasoro's Report, published in such a mutilated form by the Argentine Counter-Memorial (Arg. C.M. Ann. No. 63) is of considerable importance in this respect.

11. The third paragraph of the "Act", which includes the excised sentence quoted by the Argentine Counter-Memorial (above, para. 10) provides unequivocal evidence for

¹ Emphasis added in the Argentine Counter-Memorial.

the exclusive confinement of the problem to the Andean region, i.e. north of the Strait of Magellan. The full text ¹ reads as follows:

'The Experts declare that, in their opinion and according to the spirit of the Boundary Treaty, the Argentine Republic retains her dominion and sovereignty over all the territory that extends to the east of the main range of the Andes as far as the Atlantic coasts, just as the Republic of Chile over the western territory as far as the Pacific coasts; it being understood that, by the provisions of this Treaty, the sovereignty of each State over the respective coastline ("litoral") is absolute, in such a manner that Chile cannot lay claim to any point towards the Atlantic, just as the Argentine Republic can lay no claim to any on the Pacific coasts. If in the peninsular part in the South, approaching parallel 52° South, the Cordillera should be found penetrating among the channels of the Pacific there existing, the boundary line shall be traced along the inland summits or heights which shall leave to Chile the coasts of the inlets'.

12. There is no single reference in the draft agreement to the southern islands, to Picton, Lennox and Nueva, or to islands of any kind whatsoever. The provisions are concerned with two problems exclusively: (a) the problem raised by the Cordillera (see in particular the first, second and third, sixth and seventh paragraphs) and (b) the identification of Cape Espiritu Santo for the purposes of the demarcation of Tierra del Fuego (see in particular the first and eighth paragraphs). The provisions of the Act of the Experts bear a very close relation to the final text of the Protocol of 1893: see the textual comparison, Ch. Ann. No. 63.

13. The Argentine Counter-Memorial (pp. 258-262, paras. 20-25) seeks to reduce the significance of the Act of the Experts of 10 March 1893 in somewhat eccentric fashion. The legal significance of the document is quite simply that it is a part of the *travaux préparatoires* of the Protocol of 1893 and on normal legal principles provides assistance in interpreting the Protocol. The Argentine Counter-Memorial insists upon the obvious, namely, that the document was a "mere project", was not a treaty but "a mere agreement between experts", "never reached the category of an international agreement", "was never signed; it remained a simple draft". The Chilean Government has never contended that the Act of the Experts was a formal international agreement. Its significance depends upon its role as an understanding of experts and a set of careful formulations which have a very close relationship with the terms of the Protocol ultimately signed.

14. After the Act of Experts of 10 March 1893 various further exchanges occurred prior to the signing of the Protocol on 1 May 1893. The Argentine Counter-Memorial (pp. 258-261, paras. 20-23) makes fairly extensive reference to passages from

¹ Taken from Arg. C.M. Ann. No. 63 (the source of the quotation).

the pertinent documents. None of the passages has any bearing upon sovereignty over islands south of the Beagle Channel. Several of the passages are concerned with the need to give the Act of the Experts the status of a formal international agreement (see Arg. C.M. p. 258, para. 20; p. 259, para. 22). This evidence naturally highlights the significance and durability of the Act of the Experts and the direct connection between that and the Protocol finally concluded. These and the other items simply emphasize the importance of the complication caused by the Cordillera having channels on the eastern side in the southern region close to parallel 52°. The items concerned are: telegram from the Argentine Foreign Minister to the Argentine Minister in Chile, 16 March 1893 (Arg. C.M. Ann. No. 66); telegram from the Argentine Foreign Minister to the Argentine Minister in Chile, 29 March 1893 (Arg. C.M. Ann. No. 67); letter from the Argentine Foreign Minister to the Argentine Minister in Chile, 29 March 1893 (Arg. C.M. Ann. No. 68). None of these items refers to islands of any description.

15. Other items concerned with the exchanges in April 1893, immediately preceding the Protocol, refer in straightforward terms either to the Cordillera or to the issue relating to Cape Espiritu Santo *but to no other issue*: see telegram from the Argentine Minister in Chile to the Argentine Foreign Minister, 4 April 1893 (Arg. C.M. Ann. No. 69); telegram from the Argentine Foreign Minister to the Argentine Minister in Chile, 6 April 1893 (Arg. C.M. Ann. No. 70); confidential letter from the Argentine Foreign Minister to the Argentine Minister in Chile, 7 April 1893 (Arg. C.M. No. 71).

Particular mention should be made of Virasoro's Report of 28 June 1893 which refers to "*the two cases of divergences which had arisen*".¹

16. The Argentine Counter-Memorial attempts to suggest a discontinuity between the Act of the Experts of 10 March 1893 and the Protocol of 1 May 1893. Its insistence on the need to convert the agreement into a more formal instrument militates strongly in favour of continuity. However, at one point it presents the Act of Experts as though it were a discarded project. Thus, in the words of the Argentine Counter-Memorial:

"On Argentina's initiative, the intent to sign the Act of 10 March was definitely abandoned" (Arg. C.M. p. 260, para. 23).

17. The evidence offered in support of this formulation is a telegram from the Argentine Foreign Minister to the Argentine Minister in Chile, dated 27 April 1893 (Arg. C.M. Ann. No. 52). This item, when read as a whole, bears no relation to the

¹ Those two cases, as maintained above, concerned exclusively the Cordillera part of the boundary and Cape Espiritu Santo. The above quoted reference from Virasoro's Report does not appear in the "extract" published as Annex No. 63 of the Argentine Counter-Memorial.

Argentine formulation quoted above. The Argentine Foreign Minister does not propose "abandonment" of any project or draft. Instead, the telegram is concerned with the precise articulation of Article 1 of the draft which became the Protocol. In view of the fact that the Protocol was signed only four days later it is most improbable that there was a substantial change of position or turning back at this stage. Unfortunately, the Argentine Government has not published the correspondence exchanged on the subject between the Argentine Foreign Minister and Señor Quirno Costa which might throw further light on the point.¹

18. The Argentine Counter-Memorial (pp. 255-257, paras. 17-18) insists upon the "additional and modificatory" element of the 1893 Protocol in relation to the Treaty of 1881. The Chilean Government is content to reiterate the view expressed fully in its Memorial (pp. 74-75, paras. 16-18) to the effect that the Protocol was a purely supplementary instrument for executing the 1881 Treaty. No doubt the difference between interpretation and "modification" of an instrument may be little more than a matter of degree and a question of choice of words. The essential point, in the submission of the Chilean Government, is this: the subject-matter, and objectives, of the Protocol, did not include the allocation of sovereignty over islands south of the Beagle Channel.

19. Having considered the antecedents and *travaux préparatoires* of the Protocol, it is necessary to refer to its actual provisions, which have a close affinity with the text of the Act of the Experts of 10 March 1893. The approach of the Argentine Memorial (pp. 209-210, para. 10; pp. 411-414, para. 45) to the text of the Protocol is simple: it consists of an assertion that the consequence of Article 2 is that *all the lands washed by the Atlantic Ocean* were to be under Argentine sovereignty and that the provision was not limited to the area of the Cordillera. The Argentine Counter-Memorial (pp. 247-255, paras. 10-16) repeats this view at some length. Apart from invoking "the Atlantic-Pacific principle", the relevance of which will be examined below (paras. 22-26), the only *textual* argument put forward by the Argentine Government (Arg. Mem. pp. 210, 413-414; Arg. C.M. pp. 239-254 *passim*) is to the effect that the second part of the first sentence of Article 2 (quoted above, para. 10) "... it being understood that ..." overrides the rest of Article 2 (instead of being taken with the other parts of the Article) and, indeed, the provisions of the Protocol as a whole. The reasons put forward in favour of this alleged overriding effect are two-fold.

¹ When Varela studied these problems there was kept in the archives of the Argentine Foreign Ministry a whole file about the Protocol of 1893. From this *dossier* the Argentine Counter-Memorial appears to have utilized only some few documents, while Varela quotes many telegrams and Virasoro refers to several despatches on the matter.

20. The first reason is that what is called "the second sentence" of Article 2 of the Protocol expresses "an absolute and general principle" (Arg. C.M. pp. 252-253, paras. 13-14): "the sovereignty of each State over the respective coastline is absolute". The principle is certainly in some sense "absolute" *when it applies*, and its sphere of application is made entirely clear *by the first part of what is in fact all one sentence. The first part refers to the territory to the east and west "of the main range of the Andes"*. The *second sentence* of Article 2 also ties the matter to the Cordillera. The second reason is rested upon the reference in the same (so-called) "second sentence" to the 1881 Treaty: "by the provisions of said Treaty". The Argentine Counter-Memorial (p. 253, para. 14) argues that this reference endows the language with an overriding generality. This argument rests upon a *non sequitur*, the unproven assumption that the 1881 Treaty involves a "principle" of oceanic division applied southward to Cape Horn. Elsewhere in this Reply this view is examined at length: see Chapter I, *passim*. The practical point of interpretation for present purposes is that the 1881 Treaty and the 1893 Protocol provide empirical evidence that their provisions are not a reflection of such a "principle", or of any hypothetical principle of oceanic division south of Isla Grande and Staten Island.

21. After establishing, to its own satisfaction, the existence of "a general principle" of oceanic division, the Argentine Government then tries to link this "principle" to areas south of the 52° parallel (Arg. C.M. p. 254, para. 15) by the following means:

"As for the relative and particular form of application of the general principle to the area *south* ¹ of parallel 52°, we must revert to Article 4 of the Protocol... This article embodies, as is well known, a decisive matter, because it modifies the Treaty of 1881 with regard to the boundary in Isla Grande de Tierra del Fuego".

How this assists the Argentine argument is something of a mystery. Article 4 of the Protocol has the precise purpose of assisting in the execution of Article 3 of the 1881 Treaty. It can hardly be said to modify the 1881 Treaty; nor does it embody or "apply" any general principle. Article 4 of the Protocol is the only provision applying south of the parallel 52°. Moreover, it clearly applies only to Isla Grande *and not to an archipelago*. The Cape Espiritu Santo alignment concerned a land boundary, as all the evidence shows. One significant item of evidence on the point is the Minute of Approval of the Work of Demarcation of Tierra del Fuego dated 9 October 1895 (Ch. Ann. No. 66). This refers explicitly to Article 4 and records the successful completion of the demarcation from Cape Espiritu Santo to the Beagle Channel. The Minute ends: "The Experts stated, in view of the foregoing, that the operation of demarcation and marking of Tierra del Fuego was terminated...".

¹ Emphasis in original.

22. The text of the Protocol makes no reference either to the Beagle Channel or to Picton, Lennox and Nueva. The word "island" does not appear in it.

The text of Article 2, *if read as a piece*—and there are no sub-divisions by paragraphing—refers exclusively to the territories flanking the main range of the Andes.

Varela, the well informed writer mentioned by the Argentine Counter-Memorial, gives the exact geographical scope of Article 2:

*"Le Protocole a voulu éviter, par son article 2^e, que le Chili pût traverser les Andes pour exercer juridiction sur les territoires qui se trouvent de côté-ci de la Cordillère, de même qu'il a voulu empêcher que l'Argentine passât la montagne pour planter son drapeau sur les vallées ou les contre-forts de l'Occident."*¹

"The Protocol has sought to prevent, through its Article 2, that Chile crosses the Andes to exercise jurisdiction over the territories lying to this side of the Cordillera, just as it has sought to impede Argentina from going beyond the mountain to raise her flag over the valleys or the foothills to the West".

In another part of his book, he stated with reference to the same Article 2 of the Protocol:

*"Cet article se borne a déclarer quel est l'esprit du Traité de 1881", en reconnaissant que chacune des deux nations conserve, c'est-à-dire continue dans la possession des territoires de l'Orient ou de l'Occident des Andes ..."*²

"This article limits itself to declaring what is 'the spirit of the 1881 Treaty' in recognizing that each of the Nations keeps—that is to say continues in the possession of—the territories to the East or to the West of the Andes ..."

Article 4 is concerned with Tierra del Fuego and that clearly relates exclusively to the demarcation of the land boundary along the Cape Espiritu Santo meridian.

The provisions of the Protocol have two concerns only in relation to the area south of the Straits: this is evidenced in the text in several ways. Thus Article 4 commences: "The demarcation of Tierra del Fuego shall begin simultaneously with that of the Cordillera..."; and Article 5 commences: "The demarcation upon the ground shall begin next spring, simultaneously in the Cordillera de los Andes and in Tierra del Fuego...".

23. It is certain that the burden of the Argentine approach to the interpretation of the Protocol is not based upon textual analysis but upon the proposition that Article 2 embodied the "Atlantic-Pacific principle" (Arg. C.M. pp. 249-250, paras. 10-11). This "principle" is interpreted as follows:

¹ L. Varela, op. cit, I. p. 113.

² Ibid., I, p. 332.

"Article 2 was intended primarily to settle the differences of interpretation which had arisen in the area of the Cordillera, but the principle that each country has *absolute*¹ sovereignty over its respective coastline is of general application and extends to the entire length of the maritime coasts of Argentina and of Chile". (Arg. C.M. p. 250, para. 11).

24. This interpretation is unwarranted both in terms of Article 2, in terms of Article 2 in relation to the other provisions, and in terms of the *travaux préparatoires*. However, as it does in the case of the 1881 Treaty itself, the Argentine Government imports "the Atlantic-Pacific principle" as a form of *jus cogens* which at one and the same time is both a part of the treaty itself and overrides it. The observations upon "the Atlantic-Pacific principle" and its *alter ego*, the *uti possidetis juris* of 1810 (in the Argentine version) in Chapter I of this Reply apply with equal force in the case of the Protocol of 1893.

25. The documents show only one kind of "Oceanic" concern in the negotiation of the 1893 Protocol: it was *the concern of the Government of Chile* on account of the Argentine claim that the Treaty gave Argentina a right to ports on *the Pacific Ocean*. But this concern related exclusively to the area north of the Straits of Magellan, where the peculiarities of the Andean system had given rise to divergences of view about the course of the boundary on the ground.

In technical terms, it was not a question of *delimitation* of sovereignties but of *demarcation* of a boundary already agreed in 1881.

26. No one understood this matter in any other sense and the Argentine Government itself was of the same opinion in 1900 when it put the divergence of the Experts, on this point, as follows:

"4. Whether it was possible, according to the Convention of 1881, *that the Argentine Republic should have territory on the shores of the Pacific, or whether Chile was to have exclusive sovereignty over the coast regions of said ocean* in the southern part of America" (quoted in Ch. Mem., p. 80, para. 29).

As the Government of Chile already has emphasized in its Memorial, any question regarding islands on the Atlantic is conspicuously absent from the Argentine list of points on which the opinions of Experts differed (Ch. Mem. p. 81, para. 29). One would look in vain in the documents, or in the 1900 Argentine "Report", for a single reference to a "principle" of oceanic division.

27. The Atlantic Ocean is mentioned once in the 1893 Protocol and everything shows that it was a referential element to the hydrographic basins of the Andean rivers.

¹ Emphasis in original.

But even this was rejected by the Argentine Government in 1900. Referring to Art. 3 of the Protocol, the "Report" stated:

"What reason, therefore, is there for saying that Article 3 has laid down the rule for the continental divide? Would it not be more logical to say that *if care has been taken to omit all reference to continent, to oceans or to hydrographic basins, it is because after the discussions that had taken place, it was desirable to abandon once for all the theory which is based on such features?* (Arg. Report, 1900, Vol. I, p. 270).

28. With the exception of a discussion of the 1899-1902 Arbitration, the Argentine Counter-Memorial eschews consideration of the subsequent practice of the Parties as evidence relating to the scope and interpretation of the 1893 Protocol. This reticence is striking, and it is evidenced not only in the Chapter of the Counter-Memorial dealing explicitly with the Protocol but also in Chapter VII, which purports to be concerned with "the history of the dispute in the period 1881 to 1907". The Court is respectfully asked to read again the views of the Chilean Government on the subsequent practice, set forth in the Chilean Memorial, pp. 77-79, paras. 21-25; and in the Chilean Counter-Memorial, pp. 119-120, paras. 49-51. An important source of evidence in this connection is the work of demarcation in Tierra del Fuego in 1894-1895. There is not a shred of evidence that the Experts were in any way concerned with the islands to the south of Tierra del Fuego. (See below, paras. 89 et seq. and, in particular, paras. 89-95).

29. The Argentine Counter-Memorial, at pp. 262-267 (paras. 26-30) makes an unsuccessful attempt to counter the evidence set forth in the Chilean Memorial (pp. 80-84, paras. 28-35) to the effect that in the 1898-1902 proceedings the position of both Governments was that the 1893 Protocol was restricted in scope to the Andes boundary northwards of latitude 52° S. In the same connection the Chilean Memorial states that in relation to Tierra del Fuego "the sole point of difference mentioned by Argentina in 1899 was the 'situation of Cape Espiritu Santo'" (Ch. Mem. p. 81, para. 29). The passages in the Argentine Counter-Memorial make no attempt to refute these propositions in the Chilean Memorial. All that the Argentine Government can find to say on these points is:

"Concerning the islands in the Atlantic, it is not surprising that the *Memorial* of 1900 did not mention them in relation to the Protocol of 1893 since this relatively minor difference was not at stake in the arbitration then in course" (Arg. C.M. p. 264, para. 27).

30. This by no means refutes the reporting by Chile of the clearly expressed Argentine views of 1899. Moreover, if the whole section of the "Report" of the Argentine Government to the Tribunal in 1900 (Chapter X, section 3 at pp. 276-281; reprinted as Ch. Ann. No. 526) is read, the precise and exclusive function of Article 2 of the Protocol is explained in the clearest terms. The issue settled by Article 2 of the 1893 Protocol

was exclusively related to the avoidance of Argentine ports on the Pacific coast and, as a correlative of this, "that the barrier of the most elevated crests of the Andes should not be overstepped for purposes of depriving her of her Patagonian valleys situated on the eastern side of the Cordillera" (Report, p. 280).

31. Moreover, in the same Report of 1900 the Argentine Government did not regard the phrase in Article 2 ("the sovereignty of each State over the respective coast line is absolute") as a reference to "the Atlantic coastline in its entirety" (cf. Arg. C.M. p. 256, para. 17). Thus the Report states (at p. 277):—

"Whatever efforts may be made to explain this Article in a sense contrary to its wording, it is impossible from a legal point of view to recognise the dominion of Chile over any territorial fraction lying to the east of the main chain of the Andes".

"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 west of the Andes divided by its main chain*. This Article contains the solemn statements which elucidate the spirit of the Treaty of 1881, and show the Experts how far they may go in their resolutions".

32. A remarkable feature of Chapter VI of the Argentine Counter-Memorial is the total absence of any reference to the islands in dispute. In fact the first occasion on which the Argentine Government linked the 1893 Protocol and the islands in dispute, in the context of diplomatic exchanges, was at the meeting of 16 March 1915 between the Chilean Minister in Buenos Aires and the Argentine Foreign Minister (Ch. Ann. No. 91). The reaction of the Chilean Minister in his despatch to Santiago reporting the discussions (dated 17 March 1915; Ch. Ann. No. 91) was to state that the draft proposed by Argentina was unacceptable: and one of the reasons given was that the introduction of the 1893 Protocol into a discussion of the southern islands was inadmissible since the Protocol was "only applicable to the Cordilleran regions". The Argentine Counter-Memorial (pp. 268-269, para. 32) quotes a passage from a Note also from the Chilean Minister in Buenos Aires to Santiago, dated 16 July 1915 (Ch. Ann. No. 103) in which he expresses views on the same lines and further reports on the series of exchanges he had had with the Argentine Foreign Minister. The hypothesis the Minister makes, quoted by the Argentine Counter-Memorial, in no way detracts from the consistency of the Chilean position in face of the novel use of the 1893 Protocol by Argentina.

33. It is the case that the Protocol of 1915 remained unratified. However, it was approved by the Senates of Chile and Argentina. When the Argentine Senate accepted the draft bill, approving the agreement as signed, the bill was presented as a recom-

mendation of the Commission for Constitutional and Foreign Affairs. The report and recommendation was signed by Sr. J. V. Gonzalez and two others. As reporter, Sr. Gonzalez delivered a speech on 21 September 1915.¹ This contains no reference to the 1893 Protocol. Referring to the issue to be submitted to arbitration, he stated the following:

“The antecedents of this question can be found in those very treaties which led to a solution of our dispute with Chile, the well-known 1881 Treaty, the Treaty of 17 April 1896, and, in particular, the Arbitration Treaty of May 1902 . . .”.

34. Of particular significance is the fact that, in the negotiations of the period 1904-1905 and 1907, and the associated documents, *there is a total absence of reference to the 1893 Protocol* (see the documents, Ch. Ann. Nos. 69, 70, 71, 72, 73, 74, 76, 76(a), 77, 78, 79, 80, 83). Yet it was in these exchanges that islands south of Isla Grande, or “south of the Beagle Channel”, were first the subject of discussion between the two Governments. It is significant that in the years immediately after the Protocol, the instruments which refer to the Protocol are exactly those which would be expected to, in accordance with the natural meaning of its provisions. Thus the Protocol is mentioned in the preambular part of the Minute of Approval of the Work of Demarcation of Tierra del Fuego dated 9 October 1895 (Ch. Ann. No. 66). This instrument recorded that: “the operation of demarcation and marking of Tierra del Fuego was terminated . . .”. The Protocol is also referred to in first provision of the Arbitration Agreement concluded on 17 April 1896 (Ch. Ann. No. 67): this agreement is exclusively concerned with the boundary along the Cordillera de los Andes and the area “in the neighbourhood of the 52nd parallel . . .”.

35. The Annexes to the Argentine Counter-Memorial (No. 63) contain an “extract” from the important Report from the Argentine Expert, Valentin Virasoro, to the Argentine Foreign Minister, dated 26 June 1893. Unfortunately, the “extract” does not contain several parts of the original Report which clearly contradict the present position of the Argentine Government.²

That Report makes no reference to the islands south of Tierra del Fuego or to the Beagle Channel, though it gives prominence to the “Act of the Experts” of 10 March 1893. This is transcribed in full “because it was the basis for negotiation later concluded . . .” (Arg. C.M., Ann. No. 63, at p. 217).

¹ Printed in *Obras Completas de Joaquín V. González*, Edición ordenada por el Congreso de la Nación Argentina, Buenos Aires, 1935, Vol. X, pp. 345-349, at p. 347.

² Virasoro's Report also contains a reference to a *map on the boundary line agreed in 1881* which Señor Zeballos, as Foreign Minister, ordered to be drawn in 1889. The Chilean Agent requested the Argentine Agents for a copy of this map and of 17 other items mentioned by Virasoro; they have not yet been produced.

36. In general, the Chilean Government has no intention, as the Argentine Counter-Memorial suggests (for example, p. 268, para. 32), of minimising the importance of the 1893 Protocol. The Chilean Government simply believes that the Protocol has no *relevance* to the disposition of the southern islands. After all, this was the view of Argentina until 1915.¹ The 1893 Protocol was concerned (a) with the *process of demarcation on the ground* and not with the allocation of territories; (b) with *land boundaries* in the Andean region and *not with sea boundaries in the Cape Horn archipelago*; and (c) with Tierra del Fuego exclusively with reference to *the identification of Cape Espiritu Santo* as starting point of the meridian line which was to divide that island.

In general the 1893 Protocol has to be understood in the context of the subsequent conduct of the Parties to the 1881 Treaty and the development of the dispute relating to the islands. The sections which follow, and sections B and F in particular, will deal with these matters.

B. THE ARGENTINE VERSION OF "THE HISTORY OF THE DISPUTE"

(i) *General Purpose of Sections B - F*

37. The Argentine Counter-Memorial devotes Chapters VII and VIII (pp. 271-371) to what it describes as "the history of the dispute". These chapters cover a variety of subject matter spanning the period from the conclusion of the 1881 Treaty to the date of the Compromiso in 1971. Whilst the material is padded out with supposition and items of little or no relevance, a considerable number of matters receive attention of some kind and the Chilean Government finds it necessary to deal systematically in sections B to D of the present Chapter of the Reply with the issues raised in these two Chapters of the Argentine Counter-Memorial. Sections E (on acts of jurisdiction) and F (the admissibility of evidence: the critical date and the role of protest) correspond to matters dealt with in Chapter X of the Argentine Counter-Memorial.

The Chilean Government is concerned in the present Chapter to refute the propositions set forth in Chapters VII, VIII and X of the Argentine Counter-Memorial. However, in the course of this necessarily elaborate process, it is important to place the material surveyed in its appropriate legal context. The present dispute concerns the interpretation of the 1881 Treaty and the developments subsequent to the conclusion of the Treaty are relevant because they constitute the subsequent practice of the Parties. As

¹ This was still the view of the Argentine Admiral Ernesto Basílico in 1963, as recalled in the Chilean Counter-Memorial. (cf. Ch. C.M. p. 120, footnote 1).

such they are a particularly reliable aid to its interpretation. The subsequent practice of the Parties includes Chilean acts of jurisdiction, elements of acquiescence on the part of Argentina in Chile's administration of the islands in dispute by virtue of the 1881 Treaty and diplomatic exchanges (including the absence of such exchanges at material times—that is to say, failure to protest). Whilst a substantial proportion of the material surveyed is relevant as the subsequent practice of the Parties to the Treaty, other items (for example, the British documents) are considered because: (a) these items appear in those parts of the Argentine pleading which are the object of systematic examination and refutation in the present Chapter; and (b) these items have their own relevance and probative value in the case.

(ii) *The Baseless Argentine Concept of “the History of the Dispute”*

38. Whilst the intention of the Chilean Government is to deal as far as possible in an orderly manner with the heterogeneous and disorganized material offered in Chapters VII and VIII of the Argentine Counter-Memorial, the Chilean Government does not accept the caricature of the “history of the dispute” which is offered in those Chapters. The Argentine presentation is unacceptable both in principle and as a matter of the handling of the evidence in the case.

39. The thesis of the Argentine Counter-Memorial is simple: ever since the conclusion of the 1881 Treaty “both countries were aware that there were differences and difficulties in the disputed area” (Arg. C.M. pp. 283-4, para. 22). In a later passage the view is stated again in these terms:

“For Argentina, the dispute which had been apparent since 1881 was dealt with at the highest level in 1904-5, 1907, 1915 and later on in successive negotiations up to our days.

“In actual fact, there is really a period of about 90 years which begins immediately after the 1881 Treaty, a period which is basically—barring some secondary nuances—continuous and homogeneous” (Arg. C.M. p. 333, para. 3).

A major purpose of this section of the Reply will be the evaluation of this thesis.

40. The approach of the Argentine Counter-Memorial to the concept of “the history of the dispute” is unacceptable as a matter of general principle. In the first place it does violence to the concept as it is generally understood among lawyers. The relevant passage in the *Manual of Public International Law*, edited by Max Sorensen (London and New York, 1968), at p. 675, is as follows:

“The expression ‘dispute’, like many others, has no precise connotation. In a wide sense it may be understood as ‘a disagreement on a point of law or fact, a conflict of legal views or of interests between [the parties]’ (*Mavrommatis Jurisdiction* case (1924), PCIJ Ser. A, No. 2, p. 11). In a restricted sense, on the other hand, a dispute may be said to have arisen when a party presents to another a specific claim based upon an alleged breach of the law and the latter rejects it . . .”

In the *Dictionnaire de la terminologie du droit international* (1960; preface by Judge Basdevant), “differend” is defined as follows:

“Opposition entre des prétentions ou des intérêts se traduisant dans la vie pratique par l’affirmation respective de vues opposées, la prétention élevée de part et d’autre de les faire prévaloir, le désaccord existant dépassant ainsi l’ordre intellectuel pour passer dans l’ordre pratique et devenir un élément de trouble”. [reference is then made to the definition in the *Mavrommatis Palestine Concessions* Case, PCIJ Series A, No. 2, p. 11].

41. Modern judicial opinion emphasizes the criteria of the existence of opposite views, which concern the performance or non-performance of certain legal obligations (see the Advisory Opinion, *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, I.C.J. Reports, 1950, p. 65 at p. 74). In the *South West Africa Cases* (Preliminary Objections), I.C.J. Reports, p. 319 at p. 328, the Court observed:

“In the case of the *Mavrommatis Palestine Concessions* . . . the Permanent Court defines a dispute as ‘a disagreement on a point of law or fact, a conflict of legal views or interests between two persons’. The said Judgment, in proceeding to examine the nature of the dispute, enunciates this definition, only after establishing that the conditions for the existence of a dispute are fulfilled. In other words, it is not sufficient for one party to a contentious case to assert that a dispute exists with the other party. A mere assertion is not sufficient to prove the existence of a dispute any more than a mere denial of the existence of the dispute proves its non-existence. Nor is it adequate to show that the interests of the two parties to such a case are in conflict. It must be shown that the claim of one party is positively opposed by the other”.

In his Dissenting Opinion in the same case Judge Morelli (at p. 567) stated:

“ . . . a manifestation of the will, at least of one of the parties, consisting in the making of a claim or of a protest is a necessary element for a dispute to be regarded as existing”.

In his Separate Opinion in the *Case Concerning the Northern Cameroons*, I.C.J. Reports, 1963, at pp. 109-110, Judge Fitzmaurice stated that he shared the view expressed by Judge Morelli in the *South West Africa Cases*.¹

¹ See also the Separate Opinion of Judge Morelli in the *Case Concerning the Northern Cameroons*, I.C.J. Reports, 1963, at pp. 133-140; and the remarks of Judge Gros in the *Nuclear Tests Case*, (Australia v. France), I.C.J. Reports, 1974, at p. 277, referring with approval to Judge Morelli’s views in the *South West Africa Cases*.

42. The criteria *all of which must be satisfied* for a dispute to come into existence are thus:

(a) The existence—as a matter of objective determination and not as a consequence of assertion or denial by individual States—of a conflict of interests;

(b) The making of a claim based upon legal grounds (or a protest based upon legal considerations) by one or more of the Governments concerned;

(c) That such a claim or protest should be expressed by properly authorised agents at the appropriate level and in an appropriate forum (in diplomatic exchanges, in applications sent to the Registry of the International Court, at a session of a diplomatic conference, or at a session of an organ of an intergovernmental organization);

(d) That the claim, or position expressed in a protest, of the one party is opposed by the other party.

43. The Argentine Government asserts that the present dispute has “been apparent since 1881” (see para. 39 above) and Chapter VII of their Counter-Memorial is entitled: “The History of the Dispute: from the Treaty of 1881 to the Negotiations of 1904-1905 and 1907”. This assertion and the bland assumption behind the title of Chapter VII (and also of Chapter VIII) of the Argentine Counter-Memorial are completely groundless. In the first place, the Argentine Government does not trouble to go beyond assertion to argument. Secondly, no consideration of the legal concept of a dispute is offered. Thirdly, in any case, no evidence is presented to support the assumption that the dispute was apparent immediately after the conclusion of the 1881 Treaty.

44. The Chilean Government repudiates the Argentine assertion that a dispute has been apparent since 1881 and in due course (paras. 47-49, 63 et seq. below) will set out a great deal of evidence contradicting such a view. For the present it is necessary to point out the salient and indisputable characteristics of the evidence in this perspective. The principal feature is the absence of diplomatic exchanges relating to the boundary in the Beagle Channel region until August 1904. This is common ground. The Argentine Memorial states (pp. 241-242, para. 56) that:

“It was during 1905 that the first official admissions of a dispute in the area were made by the two Governments”.

The Argentine Counter-Memorial (p. 328, para. 71; and see also p. 301, para. 43, the heading) puts the matter in these terms:

“The 1904-5 negotiations are the first where the dispute comes into the open”.

45. The statements taken from the Argentine pleadings involve a *petitio principii*. A dispute which has not “come into the open” is not, in legal terms, a “dispute” at all. Moreover, the Argentine formulations relate to a stage at which a great deal remained unclear and provisional (see below, paras. 103-111). The significance of these propositions set forth in the Argentine pleadings is clear: on the Argentine Government’s own admission no dispute which could satisfy the legal criteria (see para. 42 above) existed for at least twenty-three years after the conclusion of the Treaty of 1881.

46. There are other admissions on the same issue contained in the Argentine Memorial. Thus at p. 219 (para. 23) the Memorial states:

“It was not until the end of the century that the Argentine Government considered that its information on the area was sufficient to open negotiations formally with Chile”.

In respect of Lennox, even in the period 1904-1905 Argentine views concerning Lennox—whatever they might have been—remained unexpressed. Thus the Vergara Donoso-Rodriguez Larreta draft of 1905 (Ch. Ann. No. 78) makes no reference to Lennox. Accordingly the Argentine Counter-Memorial (p. 311, para. 52) states:

“In point of fact the draft prepared in Buenos Aires by the Argentine Minister Rodriguez Larreta and Sr. Vergara Donoso discreetly passed over in silence the case of Lennox, unlike the cases of Picton and Nueva, but this discretion was not considered sufficient by Chile”.

The Argentine Counter-Memorial points out that the Chilean counter-proposal reserved Chilean sovereignty over Lennox (see Ch. Ann. No. 80); but this fact in no way weakens the evidence which the episode furnishes of Argentine reticence and the absence of a claim to sovereignty over Lennox at this time.

47. The first inkling that the Government of Chile could perhaps have had of the possibility that Picton and Nueva (but not Lennox) might be put in dispute was shortly after Argentina submitted to the Court her Map XIV on 18 April 1901 in the Arbitration then taking place. However, as has already been stated, no comment was made at that time as (a) the islands were not in issue in that Arbitration, and (b) other evidence submitted by Argentina in those proceedings contained assertions which clearly contradicted the line on that map. (See in particular “Some Remarks . . .”, pp. 59-61; also Ch. Mem. para. 35, pp. 83-84).¹

Moreover, the Argentine Counter-Memorial itself now characterises the line on Map XIV as having been “a possible *compromise solution*” (Arg. C.M. p. 522). Thus it is clear

¹ For further observations on the equivocal nature of the line shown on this Map XIV see “Supplementary Remarks . . .” with reference to Arg. C.M. Map No. 42.

that the submission of Map XIV cannot be regarded as having brought a dispute into existence and, indeed, the Argentine Memorial states (at pp. 241-242, para. 56) that "it was during 1905 that the first official admissions of a dispute in the area were made by the *two* Governments". The reference to Chilean views in this paragraph is confined to the Report of the Chilean Minister for Foreign Affairs presented to the National Congress, 1903-1905, published in 1907.

48. Furthermore, when the Chilean officials had occasion to refer to the Southern islands, they acted unequivocally on the basis that these islands were under the sovereignty of Chile. This conclusion is to be found in the letters from the Chilean Expert Barros Arana to the Chilean Foreign Minister, dated 25 October 1890 (Ch. Ann. No. 58 and Ch. Pl. No. 49) and 10 May 1892 (Ch. Ann. No. 61 (a)); and also in the Report by Sr. Alejandro Bertrand, Director of the Chilean Boundary Demarcation Office to the same Minister, dated 30 September 1904 (Ch. Ann. No. 72 and Ch. Pl. No. 95).

49. This summary of the principal features of the evidence will be concluded by reference to the indisputable fact that *the first actual reservation of rights* by the Argentine Government took the form of a Note of 8 March 1915 (Ch. Ann. No. 88). This episode occurred 33 years after the conclusion of the Treaty of 1881: it is considered further below (paras. 135-137).

(iii) *Certain Aspects of Argentine Treatment of Topics in Chapters VII and VIII of the Counter-Memorial.*

50. There are certain aspects of the Argentine treatment which are not susceptible to criticism on normal technical grounds. One such aspect is the ready employment of unpleasant and unnecessary allusions, for example, to "the aggressiveness of Chile's foreign policy" (Arg. C.M. p. 273, para. 4). This facet of the Argentine Counter-Memorial has been considered in the Introduction to the present Reply (paras. 10, 11).

51. Another feature of the Argentine treatment is the roughness of the reasoning in some passages in the Chapters of the Argentine Counter-Memorial presently under consideration. At pp. 291-6, paras. 29-34, there is a series of references to maps of diverse origins (Perez Gacitúa's chart (para. 29); Martin's chart (para. 29; Arg. C.M. Map 32); a plan attached to the Bertrand Report dated 16 October 1903 (para. 30; Arg. C.M. Map 49); the Nordenskjöld map (para. 31; Arg. C.M. Map 36); Map of 1901 (para. 32; Arg. C.M. Map 41); the Skottsberg map (para. 33; Arg. C.M. Map 63). This leads to the

conclusion that the lines depicted in the Channel are significantly alike (Arg. C.M. p. 295, para. 34). This is a threadbare assumption since if the items concerned are studied the scale inevitably makes the depiction of lines impressionistic.

52. Furthermore, in the same passage, it is alleged that the depiction of the line "... in the Beagle Channel as far as the Cape Horn meridian¹, is generally the same as the one on the maps annexed to Bertrand's 1904 report and to Puga Borne's 1907 proposal ..." (Ch. Plates 95 and 101). This reasoning is rather less than sophisticated. In the first place, the scale of the maps varies considerably. Secondly, there is the conclusion that the lines on these various maps have a concordance as far east as the Cape Horn meridian. Having regard to the lack of support for the latter as a principle of concordance in the text of paragraphs 29-33 of the Argentine Counter-Memorial, the intrusion of the concept of the Cape Horn meridian is unconvincing and artificial to a degree.

53. Other examples of a logic so confused that it is impossible to follow can be found. Towards the end of the section on the demarcation of the period 1888-1904 the Argentine Counter-Memorial (pp. 284-301, at pp. 297-8, para. 38), produces the following fragmented set of propositions:

"In any case, it seems clear that the matter was eventually postponed . . . and the tracing of that line in the Beagle Channel, dividing jurisdictions was left aside for the time being.

"It is important not to forget, however, that Irigoyen proposed, and Chile finally accepted, a partition of islands. *There was no boundary line*², and the task of establishing it was postponed for the reasons already mentioned.

"Thus it is true to say that *the demarcation in Tierra del Fuego had not yet been completed*,³ and this is what the witnesses of that time said".

54. The significance of the demarcation in the period 1888-1904 will be considered further in due course (below, paras. 78-95). For the moment the Chilean Government finds it necessary to indicate the confusion in the thinking behind these propositions. They are disjointed as formulations which are supposedly related. The proposition that "there was no boundary line", but merely a partition of islands sits uncomfortably near the proposition, a few pages earlier (Arg. C.M.p. 295, para. 34; and see paras. 5 and 6 of the present Chapter) that a particular boundary line on the Beagle Channel "was ratified by the subsequent concordant conduct of the Parties, and has effectively been respected until now".

¹ Emphasis in the original.

² Emphasis in the original.

³ Emphasis in the original.

55. The roughness in the texture of the Argentine reasoning in the chapters ostensibly devoted to the "history of the dispute" affects the construction of events therein. Not only is there the totally unjustified representation that a dispute existed immediately subsequent to the conclusion of the 1881 Treaty, but the relevant formulations display a sloppiness and lack of consistency which indicate a superficial analysis. Thus in one place the Argentine Counter-Memorial refers to an alleged awareness by both countries even since 1881 of "differences and difficulties" in the disputed area (Arg. C.M. pp. 283-4, para. 22); whilst elsewhere the same pleading speaks of "the dispute which had been apparent since 1881" (Arg. C.M. p. 333, para. 3). In legal analysis and as a matter of political logic there is a world of difference between a dispute properly so-called and nebulous and unspecified "differences and difficulties".

56. The Argentine Counter-Memorial (p. 333, para. 3) also refers to "a period of about 90 years" commencing after the 1881 Treaty which is "basically—barring some secondary nuances—continuous and homogeneous". The usefulness and indeed the very sense of such a proposition defies understanding. In any case the proposition is belied by the substance of the Chapters. Thus, for example, Chapter VII refers to "to crucial negotiations of 1904-5" (p. 271, para. 1) and states (p. 302, para. 44) that the negotiations of 1904-5 "mark the end of a crucial period".

(iv) *The Irrelevance of the Argentine Version of "the general historical context, 1881-1904"*

57. The Chilean Government intends to deal carefully with each matter raised by the Argentine Counter-Memorial as being, in the view of its authors, pertinent to the history of the dispute. Nevertheless certain reasonable limits must be placed upon this reaction to the Argentine presentation. Thus there can be little point in offering a rival version of "the general historical context: 1881-1904" (Arg. C.M. pp. 271-80), since such background is irrelevant as a matter of principle. The issues before the Court are connected to the text of the Treaty of 1881 and the concept of relevance is thus placed within the framework of treaty interpretation. Thus items which form part of the preparatory work of the Treaty or constitute the subsequent practice of the Parties are relevant to the issues of interpretation of the Treaty concerning the disputed islands. It must follow that "the general historical context: 1881-1904" is in principle irrelevant to the legal issues in the present case. This is particularly clear when the Argentine Counter-Memorial (p. 272, para. 1) states that "it is necessary to be able to see [the conduct of the two Governments] in respect to Tierra del Fuego against the background of South American international relations in a particularly disturbed and even dramatic period".

58. What follows, in nine pages of the Argentine Counter-Memorial, is a wide-ranging and not very coherent account of the problems of Chile and Argentina—both domestic and external—over a twenty year span. The effect is sketchy and the style, which is brisk and facile, is rather unsuited to a pleading. In these nine pages no reference is made either to the provisions of the 1881 Treaty or to the islands in dispute. Item after item is mentioned which has no bearing upon the present dispute.

59. Moreover, the conclusions, for what they are worth (set out at p. 279, para. 16), are completely at variance with the Argentine presentation of the dispute “which had been apparent since 1881” (Arg. C.M. p. 333, para. 3). The conclusions include the following:

“vi. Up to 1902-3 the attention of both countries was monopolised by the solution of the vast dispute in the Cordillera. Nevertheless, Argentina sent in 1899-1900 the expedition of the ‘Almirante Brown’ to survey the Beagle Channel zone.

“vii. These lapses of time convey that the *tempo* of the Beagle Channel question was very slow, and that Tierra del Fuego was somewhat beyond the immediate concern of both Santiago and Buenos Aires”.

These conclusions militate against the existence of a dispute originating with the conclusion of the 1881 Treaty. The reference to the expedition of the ‘Almirante Brown’ is inappropriate. This survey had no relevance to the question of sovereignty over Picton, Lennox and Nueva for reasons set out below, paras. 193-194, 217.

60. But even if, for the sake of argument, the historical sketch of the external relations of the two countries was accepted as having at least a *provisional* relevance to the case, the reasoning in the Argentine Counter-Memorial is totally unconvincing. At pp. 271-274, paras. 1-6, the Argentine Government draws a picture of a strong Chile “in the position of using existing advantages to acquire adequate territorial basis for its strong national vocation . . .” (Arg. C.M. p. 273, para. 4).

Such a picture is not historically true, but even if it be accepted that relations between Chile and Argentina in 1881 were “unequal” that circumstance is irrelevant to the legal issues in the present dispute. The alleged inequality can have no effect upon the interpretation of the Treaty as concluded.

61. The Argentine Counter-Memorial (p. 274, para. 6) indulges in suggestion as a form of proof: an optimistic and self-defeating procedure. There it is stated:

“It is of the greatest importance to appreciate the urgency with which the Treaty of 1881 was signed; and to note how, as a result of this urgency, there was on both sides of the Andes the knowledge that divergences were likely to arise when criteria for territorial division came to be applied to the site”.

This is complete assertion, unsupported by any evidence and contradicted by a great deal of evidence (set forth below, paras. 67 et seq.).

62. No evidence of any substance of the existence of knowledge of divergencies prior to 1894 concerning Picton, Lennox and Nueva is offered by the Argentine Government (Arg. C.M. p. 277, para. 11; p. 290, para. 28 sqq.). The unconvincing Argentine argument that the southern islands were a concern of the Fifth Joint Sub-commission on Demarcation of 1894-5 is examined below, paras. 78-95. With reference to the years 1881 to 1894, the Argentine Counter-Memorial (p. 285, para. 23) is reduced to a quotation from the Barros Arana Report of 1890 (Ch. Ann. No. 58 at p. 178) where the Expert is referring to the small islands between Isla Grande and Navarino (see further para. 80 below); and an allusion to divergence in the cartography "which by then could not have escaped the attention of both Governments particularly after 1888". This observation involves nothing more than supposition but it does contain the useful point that divergence in the cartography took place a considerable time after the conclusion of the 1881 Treaty (for further comment, see para. 81 below; and Chapter IV, paras. 117-120).

(v) *The Argentine Thesis that the Dispute "had been apparent since 1881"*

63. It is the position of the Argentine Counter-Memorial (see above, paragraph 39) that the dispute "had been apparent since 1881" (Arg. C.M. p. 333, para. 3). This at any rate is *one* of the positions taken up in the Argentine pleadings. Another passage (Arg. C.M. pp. 283-4, para. 22) speaks not of a "dispute" being apparent but simply of "differences and difficulties in the disputed area" of which "both countries were aware". Moreover, in the Argentine Memorial on the opening page of the Introduction to Chapter IV (entitled "Origin and Evolution of the Beagle Channel Dispute"), page 203, the following passages appear:

"1. Within three years of the entry into force of the Boundary Treaty of 1881 Argentina had established its first settlement on the Beagle Channel. The founding of the Argentine administrative centre for Tierra del Fuego at Ushuaia took place on 12th October 1884.¹ The early years of the settlement are recounted in Chapter V of this Memorial; *but at this period of time*,² while both Argentina and Chile were engaged in consolidating their hold on the vast territories elsewhere which had been disputed for so long, *peace reigned in the Beagle Channel area*.

¹ On the founding of Ushuaia see the Chilean Counter-Memorial, pp. 22-23, paras. 27-28; p. 59, para. 43; pp. 130-131, paras. 96-99.

² In this respect Chapter V covers the period 1884 to 1893 (see pp. 293-302, which make insistent reference to developments said to relate to Ushuaia).

"2. This tranquillity was disturbed in 1892 when Chile started to insinuate itself into the three principal islands at the eastern end of the Beagle Channel. This infiltration took the form of the purported grant by the Chilean local authorities at Punta Arenas of licences to exploit or to occupy these islands. News of these concessions came to the attention of the Argentine local authorities at Ushuaia who . . . noted them with growing apprehension and despatched reports about such Chilean activity to the central Argentine Government. The Argentine Government, declining to be provoked, acted cautiously and calmly".

64. Thus the position of the Argentine Government discloses some striking inconsistencies. First, according to the Memorial, "tranquillity" existed until 1892 when Argentina first became aware of "Chilean activity". Secondly, in the Argentine Counter-Memorial the contrasting assertion is made that "the dispute had been apparent since 1881", but no evidence is adduced in support of this and related assertions. Indeed, there is much solid evidence that the islands were not the object of diplomatic correspondence until 1904 (see Ch. C.M. p. 129, para. 88, and below, paras. 97-101).

65. The Argentine Memorial, quoted in paragraph 63 above, states that in 1892, in face of Chilean activity in the disputed area, the Argentine Government "declining to be provoked, acted cautiously and calmly": in other words, nothing was done. No protest or other communication to the Chilean Government occurred. But Argentine inactivity and acquiescence was to continue:

"... apprised of insignificant Chilean activity by local officials in the area of the Beagle Channel, [the Argentine Government] chose to refrain at the time from any actions of its own which might widen the rift between the two countries or increase the tension, by then serious, between them. *It was not until the demarcation problem in the Cordillera was resolved in 1902 that both countries were able to turn their full attention to what had by then become recognizable as a growing dispute* about the boundary in the extreme south of the Continent" (Arg. Mem. p. 204, para. 2).

66. The reference to "insignificant Chilean activity" is of great importance. No competing Argentine acts of jurisdiction are alleged and in that case the *relative strength* of the Chilean activity would be, in legal terms, very significant indeed. The whole passage is in contrast with the concept of the Argentine Counter-Memorial of a dispute originating in 1881: and it is notable that for the Argentine Memorial the post-1902 situation was of something "recognisable as a *growing* dispute". The fear of straining relations is invoked yet again (Arg. Mem. p. 216, paras. 18 and 19) as a reason for Argentine inaction in 1898. In these situations, in spite of such a consideration, it would have been possible, and indeed normal, to have made a formal reservation of rights. None was made: and the significance of Argentine silence in the face of Chilean activity to 1904 is the subject of comment in the Chilean Counter-Memorial, pp. 110-115, paras. 15-36.

(vi) *Evidence Relating to the Immediate Aftermath of Conclusion of the Treaty of 1881*

67. It is now necessary to examine the substantial body of evidence which contradicts the Argentine thesis that a dispute—or “differences and difficulties”—existed from the time of the conclusion of the Treaty of 1881. However, at the outset it is worthwhile to emphasize the extreme unlikelihood of the Argentine hypothesis. It is relevant to recall the general character of the settlement of 1881 as a “transacción” (a compromise) and an “arreglo” (an arrangement) (see further Chapter I of this Reply, paras. 25-35). Given the extent and cumulative nature of the negotiation in the period 1876-1881, given the compromise character of the 1881 Treaty, given the hammering out of the precise issues dividing the two States, it is clear that no part of the boundary was left undefined. The fact that the 1881 Treaty contained provisions for subsequent demarcation (Articles I and IV) is evidence of finality on matters of principle. Important matters requiring further decision at the highest political level are not delegated to two or three Experts.¹ To assume otherwise is to run counter to common sense, the normal practice of governments and the general conception of demarcation. The object and purpose of the Treaty was to achieve a complete and definitive settlement (see the Chilean Memorial, pp. 56-59, paras. 4-10).

68. In the months subsequent to the conclusion of the Treaty on 23 July 1881 a considerable body of evidence accumulated from which it is clear that no remaining “differences and difficulties” on issues of principle were perceived by either Party.

69. A number of documentary and cartographic items indicate the lack of uncertainties. Among these the more important are the following:

(a) The report by the Minister for Foreign Affairs of Chile, Sr. Valderrama, to the National Congress of Chile, 17 September 1881 (Ch. Ann. No. 41).

(b) The speech by the Minister for Foreign Affairs of Argentina, Sr. Irigoyen, to the National Chamber of Deputies of Argentina, 31 August - 2 September 1881 (Ch. Ann. No. 42; Arg. Mem. Ann. No. 12).

(c) Despatches on the settlement from Baron d'Avril, French Minister in Santiago, to the Minister for Foreign Affairs of France, 24 and 28 October 1881 (Ch. Ann. No. 43(a) and (b)).

¹ To the Argentine Government, this position was absolutely clear in 1890. When the Chilean Expert invited Sr. Pico, the Argentine Expert, to discuss the instructions to be issued to their assistants for the demarcation, Sr. Pico replied that the question as to the boundaries between the two countries *had ended in 1881* and consequently *the discussion was closed*. Nothing had been left for the Experts except the technical work. The Argentine expert added:

“To study the facts, to draw up plans giving every detail, carefully and principally indicating thereon the features designated in the Treaty, so that the boundary could be fixed without hesitation; *that, in my opinion, constitutes the Expert's duty; to work not to discuss . . .*” (Letter from Pico to Barros Arana, dated 29 July 1890. Cf. Argentine Report, 1900, Vol. I, p. 245).

(d) Official Despatch from the German Minister in Buenos Aires to the German Imperial Chancellor, 29 July 1881 (Ch. Ann. No. 351). See also the Despatch of 19 July 1881 (Ch. Ann. No. 350).

(e) Official Despatch from the German Consul in Santiago to the Minister for Foreign Affairs of Germany, 24 October 1881 (Ch. Ann. No. 44).

(f) Note from Argentine Envoy in London to the Argentine Minister for Foreign Affairs, 30 October 1881 (Ch. Ann. No. 46(a); Arg. C.M. Ann. No. 45).

(g) Official Despatch from the British Minister in Buenos Aires to the Principal Secretary of State for Foreign Affairs, 20 December 1881 (Ch. Ann. No. 47; and see Chilean Plate 21).

(h) Contemporaneous Reports of the United States intermediaries: despatch of United States Minister in Buenos Aires, 1 July 1881 (Ch. Ann. No. 37); despatch of United States Minister in Santiago, 22 July 1881 (Ch. Ann. No. 39). See also the Chilean Memorial, pp. 44-45, paras. 29-30.

(i) Contemporary newspaper accounts, for example, Articles of 23 October 1881 in a Buenos Aires newspaper (Arg. C.M. Ann. No. 25); and of same date in a Santiago newspaper (Arg. C.M. Ann. No. 26).

(j) Letter from the French Minister in Buenos Aires to the Foreign Minister of France, 6 August 1881 (Arg. C.M. Ann. No. 39).

(k) Letter from the Argentine Minister in France to the French Foreign Minister, 3 December 1881 (Arg. C.M. No. 40).

(l) Circular Letter dated 27 July 1881 sent by the Argentine Foreign Minister to Argentine representatives abroad (Arg. C.M. Ann. No. 43).

(m) Minute by Lord Tenterden on his meeting with Sr. García, the Argentine Minister, dated 29 October 1881 (Arg. C.M. Ann. No. 48).

(n) Letter from the British Foreign Minister to the Argentine Minister in Great Britain, dated 14 November 1881 (Arg. C.M. Ann. No. 51).

(o) Circular Letter from Argentine Foreign Minister to Argentine diplomatic representatives abroad, dated 24 October 1881 (Arg. C.M. Ann. No. 54).

(p) Various contemporary maps, including Chile's 1881 Authoritative Map (Ch. Plates 13 to 19); the Admiralty map (Ch. Plate 20), and the Irigoyen Map (Ch. Plate 21). On the significance of these maps the Court is respectfully referred to the Chilean Memorial, pp. 40-41, paras. 21-22; pp. 42-43, paras. 25-27; and the Counter-Memorial of Chile, pp. 123-125, paras. 65-73; and Chapter IV of this Reply, paras. 22-24, 29-42.

70. This catalogue of specific items of evidence is important in its cumulative effect. Even allowing for a certain optimism which often attends the successful outcome of long negotiations, it is submitted that, if there had been any "differences and difficulties"

on the definition of the boundary *some* reference would have occurred in this diversity of sources. Yet no such reference, not even a mild suggestion, occurs.

In the mass of material referred to in para. 69 above, the only problems referred to are (a) the issues *prior to and settled by* the arrangement of 1881; and (b) the question of the reaction of political and other opinion to *the terms*—which, if the Court will forgive the stressing of what may be obvious, is not the same as the problem of the certainty, or not, of the elements of the settlement itself.

71. Apart from the *absence* of evidence in the documents of doubts and difficulties, there is much positive evidence of satisfaction with a general and definitive clearing up of boundary issues and the related question of the Strait of Magellan. Thus in the despatch dated 19 October 1881 from the British Minister in Buenos Aires to the British Secretary of State (Arg. C.M. Ann. No. 27) the following passage occurs (at p. 108):

“President Roca expressed to me his great satisfaction at the settlement of this question, which he said was a guarantee of lasting good relations with a kindred Republic, the only one, he added, between which and the Argentine Nation there was any subject of dispute”.

This passage, and the documents of 1881 in general, must be set against the somewhat dramatised account of relations in the region set forth in the early part of Chapter VII of the Argentine Counter-Memorial.

72. It is, furthermore, significant that a proportion of the documents cited in paragraph 69 above derives from entirely confidential and “internal” sources, for example, reports by diplomatic representatives of third states in Santiago and Buenos Aires to their Governments. Clearly, such sources would have had no inhibition in reporting, but rather a duty to report, any “differences or difficulties” either known to exist or the object of speculative reports.

73. This lack of questioning of the efficacy of the 1881 settlement in the immediate aftermath of the conclusion of the Treaty was to become a continuing feature of Argentine-Chilean official attitudes for years to come. There was an absence of diplomatic exchanges relating to the islands in dispute until August 1904 (see above, paras. 44-46). Moreover, until 1904 Argentine doubts remained exclusively internal (see above, para. 46). No reference to a dispute or to “differences and difficulties” concerning the islands in dispute is to be found in the Report of the Argentine Minister for Foreign Affairs, presented to the National Congress by Dr. Estanislao S. Zeballos for the period October 1891 to August 1892 (published in Buenos Aires, 1892) (Ch. Ann. No. 525). This contains

(pp. 238 et seq.) a survey of boundary questions involving Chile and, in particular, it reports on the demarcation arrangements flowing from the Treaty of 1881 and the Convention of 1888. This Report is the very place in which any dispute situation or situation likely to lead to a dispute would be aired—if there were any reason to do so.

(vii) *Development in the Period 1882-1888*

74. In the previous paragraphs the evidence contemporaneous with and immediately subsequent to the conclusion of the Treaty of 1881 has been considered. The intention of the Chilean Government is to review developments in proper sequence and the choice of “blocks” of years for this purpose is a matter to some extent of arbitrary choice. For the present purpose, 1888 is taken as a point of division only because the Argentine Counter-Memorial (at p. 276, para. 8; p. 283, para. 21; p. 284, para. 23) chooses to attach particular significance to the signing of the demarcation agreement in that year (on this see below, paras. 87-95).

75. The Chilean Government does not regard 1888 as in any sense a critical juncture: thus it would accept the view expressed in the Argentine Memorial, at p. 203, that the tranquillity of the region remained undisturbed during this period (see above, paras. 63-65. In the Argentine view the “tranquillity” was “disturbed” for the first time in 1892).

76. In the years 1882 to 1888 there was a complete absence of diplomatic correspondence between the two Governments concerning either the Beagle Channel or the southern islands. The Argentine Memorial and Counter-Memorial lack reference to any correspondence.

77. In this period there was Chilean activity in the disputed area. This activity has been examined in Chapter VII, para. 4, and Chapter X of the Chilean Memorial. Evidence of Argentine acquiescence and admissions against interest in the same period are set forth in the Chilean Counter-Memorial, p. 116, paras. 36 A and 36 B. For the related map evidence, the Court is referred to the Chilean Memorial, pp. 69-70, paras. 2-3; the Chilean Counter-Memorial, p. 116, para. 36 B; and this Reply, Chapter I, para. 53; Chapter IV, paras. 24-28, 31-35, 43-47. The general issue of acts of jurisdiction will be examined later in section E of the present chapter. The issue of protests will be considered in section F of the present chapter.

78. In the Argentine Counter-Memorial a substantial part (pp. 284-301) of Chapter VII is devoted to the arrangements for demarcation spanning the period 1888-1904. The authors of the Argentine Counter-Memorial expend not a little ingenuity in teasing out of the business of demarcation in Isla Grande some proof of "difficulties" which are then presented, by insinuation and suggestion rather than by argument, as evidence that the dispute over Picton, Nueva and Lennox was present to the minds of the Parties as early as 1888 or at any rate 1892.

79. The purpose of the authors of the Argentine Counter-Memorial is apparent from the following passage of that pleading (p. 284, para. 22):

"The fact of the matter is . . . that in the period after the Treaty there was no existing state of affairs favourable to Chile; that both countries were aware that there were differences and difficulties in the disputed area; and that they informally considered the difficulty in the Demarcating Commission with a view to a solution, but in any case they preferred not to attempt to extend the boundary demarcation beyond Isla Grande de Tierra del Fuego *because of the extremely delicate political state at the time, which demanded the solution of the other more important territorial questions, which had come to a head sooner than the Beagle Channel dispute*".¹

This passage speaks of "differences and difficulties in the disputed area" and then refers to "the Beagle Channel dispute": a clumsy equivalence. In the paragraphs which follow below the Chilean Government will establish that there is, in any case, no proof to support the assertion that the Boundary Sub-commission of 1894-5 was concerned with any question touching the southern islands. Finally, the passage purports to explain the lack of any actual outcome concerning Picton, Lennox and Nueva by reference to the "extremely delicate political state at the time". This is the *fourth instance of this type of excuse* (see paras. 63-65 and 66 above) for absence of Argentine diplomatic representations of any kind prior to 1904 concerning the disputed islands.

The items put forward in the Argentine Counter-Memorial as "evidence" of the "differences and difficulties" referred to in the passage quoted above will now be examined *seriatim*:

80. (a) A passage in the Barros Arana Report of 1890 (Ch. Ann. No. 58 at p. 178) which reads:

¹ Emphasis in the original.

"The second doubt concerning the demarcation indicated in Article III of the Boundary Treaty has originated due to the existence of several small islands in the area where the Beagle Channel separates Tierra del Fuego from the islands due South" (quoted Arg. C.M. p. 285).

This passage and the Report of Barros Arana as a whole are the subject of consideration in the Memorial of the Government of Chile and the Court is respectfully asked to refer to the relevant passages (Ch. Mem. pp. 71-72, paras. 8-12). It is there pointed out that the "small islands" in question were islands in the Channel, such as the *Eclaireurs*, and not *Picton*, *Nueva* and *Lennox*: this can be seen from Chilean Plate 49, the map attached to the Report of Barros Arana (see "Some Remarks . . .", pp. 43-44).

81. (b) A reference (Arg. C.M. p. 285, para. 23) to "the divergency in the cartography regarding the disputed area, which by then could not have escaped the attention of both Governments particularly after 1888". This supposition leaves open the questions of the nature of any divergency and the form of any reaction by the two Governments. No diplomatic exchange was provoked by any cartographic production of this period. The general nature of the cartographic evidence of this period is examined in the Chilean Memorial, pp. 69-70, paras. 2-3; pp. 85-89, paras. 1-8; and in this Reply, Chapter IV, paras. 24-39, 43-47.

82. (c) The fact that on 8 May 1890, the Conference of Experts decided (Ch. Ann. No. 54) that the demarcation was to go as far south as the Beagle Channel (Arg. C.M. pp. 285-286, paras. 23-24.) Since the Treaty of 1881 was only concerned with demarcation of lines on land (see Article IV), this is a matter of no surprise and no basis whatsoever for the inference that a dispute was then envisaged concerning *Picton*, *Nueva* and *Lennox*.

83. (d) Several divergences of opinion in 1892 are noted (Arg. C.M. pp. 286-287, paras. 25-27), for example, concerning the location of Cape *Espíritu Santo*, which have no relation whatsoever to sovereignty over *Picton*, *Nueva* and *Lennox*.

84. (e) A letter by the Governor of Tierra del Fuego dated 10 February 1892 (Arg. Mem. Ann. No. 16) to Buenos Aires (quoted, Arg. C.M. p. 288) relating to *Nueva* and *Picton*.

The reaction to this letter on the part of the International Boundaries Office of the Argentine Ministry of Foreign Affairs (Arg. C.M. p. 288; Arg. C.M. Ann. No. 73) was a note of only six lines which appears to contain the unfounded assumption that the fate of *Nueva* and *Picton* is a matter within the purview of the demarcation commissions.

85. (f) A further despatch from the Governor of Tierra del Fuego, dated 6 March 1893 (Arg. Ann. No. 17) to Buenos Aires (quoted Arg. C.M. pp. 288-289), concerning concessions by Chilean authorities relating to Picton and Nueva. No diplomatic communication with Santiago resulted.

86. (g) A report (quoted, Arg. C.M. p. 289) concerning Picton from the Governor of Tierra del Fuego, dated 15 February 1894 (Arg. C.M. Ann. No. 74). This, and the other two letters (e) and (f) above, were sent to the Argentine Minister in Santiago with a Note dated 12 March 1894 from the Minister of Foreign Affairs of Argentina (Arg. C.M. p. 296 and Ann. No. 75). The significance of this Note will be considered below (paragraph 90).

87. The documents thus adduced by the Argentine Counter-Memorial hardly point to a consciousness of a dispute concerning a point of principle. Certainly those concerned with the process of demarcation were unaware that their brief involved the attribution of Picton, Nueva and Lennox. Indeed, it would be odd for a boundary commission concerned with demarcation on the ground to have such a power. The Convention of 1888 (Ch. Ann. No. 50) was clearly concerned with the *execution* of the demarcation arrangements contained in the Treaty of 1881. Its terms make no reference to questions of title over islands. The Barros Arana Report of 1890 (Ch. Ann. No. 58) makes no reference to business relating to Picton, Nueva and Lennox. Such reference is also absent from the Report of the Argentine Expert, Sr. Octavio Pico, dated 1 May 1890 (Ch. Ann. No. 357).

88. The issues which gave rise to the 1893 Protocol and the terms of the Protocol itself did not include any question of sovereignty over Picton, Nueva and Lennox. The 1893 Protocol and its antecedents have been examined in the Chilean Memorial, pp. 73-77, paras. 13-20; the Chilean Counter-Memorial, pp. 119-120; and in section A of the present Chapter of the Reply.

89. When the work of demarcation in Tierra del Fuego was undertaken in 1894-5 subsequently to the 1893 Protocol, the Experts concerned showed no consciousness that they were concerned with the islands south of the Beagle Channel: see further Chilean Memorial, pp. 77-79, paras. 21-25. In his Report to Sr. Barros Arana dated 29 May 1895 (Ch. Ann. No. 65(a)) Sr. Lindor Perez, head of the Chilean Fifth Boundary Commission, makes no reference to Picton, Lennox and Nueva (see also Ch. Plate 186). However, the Argentine Counter-Memorial, at pp. 277, 290-299, makes a very unconvincing attempt to suggest that the question of the southern islands was a concern of the Fifth Joint Sub-commission on Demarcation of 1894-5.

90. The Argentine Counter-Memorial (pp. 295-6) hints that the fact that certain things were not done by the Joint Sub-commission meant that certain matters were "post-poned". For these hints and the supposition resting upon them to have any substance, it has to be proved that the mandate of the Sub-commission extended to Picton, Nueva and Lennox. No such proof is forthcoming. The Counter-Memorial (pp. 289-90, 296-8) places considerable reliance upon the Note from the Minister of Foreign Affairs of Argentina dated 12 March 1894 to Dr. Quirno Costa, the Argentine Minister in Santiago (Arg. C.M. Ann. No. 75). This certainly refers to the status of Picton as an issue: but hardly as one of great import. The Minister in Santiago is left with a discretion "...to call the attention of that Government". The Note is short and subdued in tone. No representation was made. On the basis of hints and an accumulation of hypotheses, the Argentine Counter-Memorial concludes: "it appears therefore, from the above evidence, that the matter of the tracing of a line in the Channel...was indeed dealt with in the 5th Sub-commission" (Arg. C.M. p. 297-98, para. 38).

91. There is no evidence to support this conclusion. There is some evidence that the Argentine Expert in the Sub-commission, Dr. Quirno Costa, made an internal enquiry about the status of Picton, Nueva and Lennox in relation to the Treaty of 1881 and received a brief report on the matter from Lt. Juan A. Martin, Argentine Assistant to the Boundary Sub-Commission, dated 18 May 1894 (Ch. Ann. No. 362; and see also No. 363a). The Report has been examined already in the Chilean Counter-Memorial, pp. 121-123, paras. 61-64. Lieutenant Martin regarded Picton and Nueva as Chilean and the Report is hardly conclusive of what went on *as a part of the work of the Joint Sub-commission*.

92. The Argentine Counter-Memorial refers to certain maps related to the work of the Joint Sub-commission.

First, there is the map reproduced as Plate 32 of the Argentine Atlas. This is a map produced by the Demarcation Sub-commission and showing a line in the Channel as far east as Harberton Bay. Though invoked as apparently relevant in the Argentine Counter-Memorial (pp. 292, 299, para. 41), this map has no bearing whatsoever upon Picton, Nueva and Lennox. This map is very similar to that referred to in the Argentine Counter-Memorial (p. 291, para. 29) as Perez Gacitúa's chart—and thus is irrelevant to the situation of Picton, Nueva and Lennox.¹ The exclusive purpose of these maps is plain: it was to illustrate and record the placing of boundary pillars in Tierra del Fuego according to the Minute of Approval of the work of Demarcation of Tierra del Fuego dated 9 October 1895 (Ch. Ann. No. 66). These pillars are shown upon the map produced by the Chilean element of the commission and reproduced in the Chilean Atlas (Plate 75; "Some

¹ The "Perez Gacitúa's chart" is published in the Atlas attached to this Reply (Ch. Plate 186).

Remarks . . .", p. 55 and "Supplementary Remarks . . ." on Ch. Plate 187). Incidentally, this map shows a line in the Channel running to the north of Picton Island. A similar map was published as part of a report published in 1906 by the Chilean Boundaries Office (Chilean Atlas, Plate 99; "Some Remarks . . .", p. 69).

93. The Argentine Counter-Memorial (pp. 298-299, para. 40) refers to the "Memoria" of the Chilean Ministry for Foreign Affairs of 1903-5 and 1905-6 as recording that demarcation in Tierra del Fuego (and indeed all demarcation according to the latter item) was complete with the exception of "the boundary line in the Beagle Channel". The first, inevitably obvious, point is that these statements occur eight years after the work of the Sub-commission of 1894-5. Secondly, such quotations are question-begging, since the significance of the phrase relating to the Channel depends in turn upon the interpretation of the Treaty of 1881.

94. The Argentine Counter-Memorial thus fails to produce evidence to substantiate the assertion that the Boundary Sub-commission of 1894-5 was concerned with the status of Picton, Lennox and Nueva. At the most it can be said that the Argentine Note to the Argentine Expert, Dr. Quirno Costa, referring to the status of Picton, reflects exclusively internal Argentine doubts. No Argentine protest resulted and the episode evidences Argentine knowledge of Chilean administration on Picton. The Minute of Approval of the Work of the Demarcation of Tierra del Fuego dated 9 October 1895 carries no hints of unfinished business. On the contrary, the Experts stated therein that "the operation of demarcation and marking of Tierra del Fuego was terminated" (Ch. Ann. No. 66, p. 198).

The Argentine Counter-Memorial asserts—without more—that the completion of demarcation in Isla Grande meant that "the demarcation in the archipelago of Tierra del Fuego was incomplete" (Arg. C.M. p. 300, para. 42). Its authors seem to have forgotten what the Argentine Government stated in the same respect only two years ago:

"An examination of all the Acts and reports regarding these works of demarcation reveals no indication that there were any demarcation works left pending in that particular area, including the Beagle Channel itself". (Arg. Mem. p. 212, para. 12).

The notion that the Sub-commission considered the status of Picton, Lennox and Nueva—in the context of demarcation of "Tierra del Fuego"—and then postponed the issue (hence, it is argued, it receives no mention in the records of the work done) is a supposition: a supposition contradicted by all the evidence.

95. When in August 1904 the Argentine Government proposed the determination of the axis of the Beagle Channel (Ch. Ann. No. 69), Sr. Bertrand, then Director of the

Chilean Boundary Demarcation Office, stated that the line of the Beagle Channel was not among those which the Experts were called to fix (Ch. Ann. No. 72, p. 206).

With reference to the same point, Sr. Bertrand stated:

"En Agosto último el Departamento Argentino de Relaciones Exteriores inició algunas gestiones para la determinación de la línea del límite en el Canal Beagle, e hizo una proposición acerca de la cual fué consultada esta Oficina.

*Tratándose de un canal marítimo de gran profundidad no puede hablarse propiamente de **demarcación en el terreno** por lo cual esta Oficina se ha limitado a indicar en los planos bastante exactos i detallados que existen, cual es, a su juicio, la ubicación de la línea imaginaria del límite, i la enumeración de las islas e islotes que, según el Tratado de 1881, deben quedar dentro de uno i otro país".*¹

Last August, the Argentine Ministry for Foreign Affairs initiated some démarches concerning the determination of the boundary line in the Beagle Channel, and made a proposal which was submitted to this Office for advice.

Since that Channel is a sea-channel of great depth it is improper to speak of **demarcation on the ground**. Therefore, this Office has limited itself to indicate on the existing plans, which are accurate and detailed, the position which, in its view, corresponds to the imaginary line of the boundary, and the enumeration of the islands and islets that, according to the Treaty of 1881, belong to one or the other of the countries.

(ix) *Other Evidence Relating to the Period 1888-1904.*

96. It is characteristic of the Argentine Counter-Memorial that the years 1888 to 1904 should be dealt with in terms of a patchwork of mostly irrelevant items stitched together with mere suggestion and hypothesis, whilst major facts and larger circumstances are left on one side. What is the evidence apart from the placid operations of the Joint Demarcation Sub-commission?

97. First of all, there is the evidence provided by the negotiation and terms of the 1893 Protocol. There is no evidence here that sovereignty over Picton, Lennox and Nueva was then in issue (see Chilean Memorial, pp. 73-77, paras. 13-20; Chilean Counter-Memorial, pp. 119-20; and section A of the present Chapter of the Reply).

98. Secondly, there is the general situation in terms of normal diplomatic communications between Chile and Argentina. The history is one of abstention by Argentina (see Argentine Memorial, pp. 203-4, paras. 1-2; pp. 213-16, paras. 14-19; and Argentine Counter-Memorial, pp. 296-300, paras. 36-42). Open Chilean activity in the area in this period produced not a single Argentine reservation of rights (see further below, section F, on the question of protest).

¹ Chilean *Memoria de Relaciones Exteriores* for 1903-1905, p. 182. Underlining in the original text.

99. There is other evidence, solid and cumulative, supporting the view that Chilean sovereignty in this period was understood to exist and generally accepted by Argentina. (On Argentine acquiescence in Chilean administration at this period of Picton, Lennox and Nueva see the Chilean Counter-Memorial, pp. 110-116, paras. 15-36B; pp. 120-121, paras. 52-60; pp. 128-142, paras. 85-134. For the map evidence relating to this period the Court is referred to the Chilean Memorial, pp. 69-70, paras. 2-3; pp. 85-89, paras. 1-8; and in this Reply, Chapter V, paras. 24-39, 43-47).

100. In its account of the history of the dispute the Argentine Counter-Memorial makes minimal reference to the 1898-1902 Arbitration (but cf. pp. 277-8, para. 12; p. 279, para. 16; p. 300, para. 42). This reticence was to be expected. Since if the thesis of the Argentine Counter-Memorial that Argentina was conscious of a dispute situation affecting islands to the south of the Beagle Channel were correct, the proceedings of 1898-1902 would have featured this question to some extent at least. In fact they do not. For examination of the Arbitration of 1898-1902, the Court is referred to the relevant passages of the Chilean Memorial, pp. 78-84, paras. 23-35.

101. Later in this chapter the issue of acts of jurisdiction will be considered and in that context the significance of hydrographic surveys as "acts of sovereignty" will be examined. For the present it is sufficient to refer to the expedition of Captain Saenz Valiente in the ironclad "Almirante Brown" in 1899-1900. This is referred to in Chapter VII of the Argentine Counter-Memorial (at p. 278, para. 13 and p. 283, para. 21). A single observation is called for. If, as the Argentine Government contends, Argentina at this period knew of a dispute relating to islands south of the Beagle Channel, it is strange indeed that the expedition evidently had no purpose related to such a dispute. The Reports of Saenz Valiente (Ch. Ann. No. 371 and see also the Report dated 28 April 1904, Ch. Ann. No. 367) reveal no reference to any actual dispute with Chile. The episode is considered further in the Chilean Counter-Memorial, pp. 127-8, paras. 81-84.

102. Indeed, any inference which may be drawn from the Reports of Saenz Valiente upon the expedition of 1899-1900 must be taken together with another expression of Argentine official opinion at this time. Thus in the Argentine Report to the Tribunal concerning the Argentine-Chilean Boundary, published in London, 1900, at p. 533, there is a passage (in English translation) quoted from a Chilean official publication, *Sinopsis Estadística y Geográfica de Chile*, a feature in the *Diario Oficial*, 10 March 1882 (Ch. Ann. No. 519). This passage makes no reference to any doubts concerning the southern sectors of the boundary with Argentina. Reference is made to the boundary in Isla Grande southwards from Cape Espíritu Santo "as far as the Beagle Channel, where it is cut by the

meridian 68° 34' west of Greenwich, and afterwards it passes to the east of the said Channel *by the southern side of the Island of Los Estados*". At that time faced with this description in their own pleading the Argentine Government made no reservation whatsoever.

(x) *The Negotiations of 1904-1905.*

103. The Argentine Counter-Memorial (pp. 301-312, paras. 43-52) gives great prominence to the negotiations between the two Governments in 1904-1905 and the related cartography. The *démarche* by Argentina in August 1904 (Ch. Ann. No. 69) is represented as nothing more than the surfacing of a difference already in existence. However, the Argentine Counter-Memorial (p. 304) refers not to a pre-existing "dispute" but to "a difference of opinion regarding the disputed area". The Argentine Memorial (pp. 241-242, para. 56) is more explicit in stating:

"It was *during 1905* that the *first* official admissions of a dispute in the area were made by the two Governments".

104. The position of the Chilean Government on these matters has been set forth in its Memorial (pp. 89-94, paras. 8-19) and also in the Counter-Memorial of Chile (pp. 128-129, paras. 87-88). It will be recalled that the view of the Chilean Government is that, prior to 1904, Argentina's official position in relation to the Beagle Channel and, in particular, to sovereignty over Picton, Lennox and Nueva, was "marked . . . 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" (Ch. C.M. p. 128, para. 87).

105. The first diplomatic reference to the matter was in 1904-5. The Argentine Counter-Memorial contributes nothing new to the picture presented in the documents. However, it suggests (p. 303) that the absence of surprise by Chile in face of the Argentine *démarche* of August 1904 is inconsistent with "the thesis of the *Chilean Memorial*". In fact the reaction of the Chilean Government, in the form of a despatch to the Chilean Minister in Buenos Aires dated 9 September 1904 (Ch. Ann. No. 71), was highly provisional: the Argentine suggestion would be duly considered. Whilst the Argentine and Chilean documents of 1904 and 1905 clearly indicate that both Governments were conscious of a new problem that needed to be dealt with, they equally indicate that the nature and extent of the controversy were by no means determined at this period.

106. It is the case that the atmosphere of the documents is one of restraint, cordiality and provisionality. This would be natural since relations at this time were normal. Moreover, the Parties were not concerned immediately and directly with clear issues but were seeking to determine precisely *what was to be in issue*. Hence the Chilean Government's reference to Sr. Alejandro Bertrand for a Report (Ch. Ann. No. 72). This also explains the tone of the Report to Congress in 1905 by the Chilean Minister of Foreign Affairs, as quoted in the Argentine Counter-Memorial (p. 303, para. 46):

"The first of these controversies must, in our judgment be limited to establishing what course was understood to be the Beagle Channel from the time of its discovery and what was understood to be its course at the time of the International Treaty which established it as the boundary".

107. The Argentine Counter-Memorial (pp. 305-306) makes the claim that several paragraphs of the Report by Bertrand reveal views as to the course of the Beagle Channel "at odds with what is repeated so many times in the *Chilean Memorial*". The point made by the Argentine Counter-Memorial depends upon the assumption that the references to "Tierra del Fuego" in Bertrand's text signify that the Channel did not extend as far as Cape San Pio. It is in fact normal for the term Tierra del Fuego to refer to the entire "mainland" of Isla Grande and not merely a sector of its southern coastline. Furthermore, if reference is made to the map annexed to the Bertrand Report (Chilean Plate 95), it can be seen that the pecked red line in the Channel goes eastward beyond Cape San Pio (which feature is marked).

108. In assessing the Bertrand Report (Ch. Ann. No. 72) it is necessary to have regard to its clearest feature. Sr. Bertrand was concerned principally with the precise division of the Channel and the attribution of the small islands, such as the Bridges group, between Isla Grande and Navarino. This concentration of interest is important. He makes no reference to a problem of sovereignty over Picton, Nueva and Lennox; he had no doubts that they were Chilean. He is interested in the islands within the Channel and this interest determines both the type of map to which he refers (those on a sufficient scale) and the form of the map annexed to the Report (Chilean Plate 95). The latter is on the scale 1:250,000 and shows the various small islands segregated by a pecked red line (described as "el trazo de la línea imaginaria").

109. In the context of the negotiations of 1904-1905, the Argentine Counter-Memorial (pp. 310-312, para. 52) copes somewhat gingerly with the pieces of evidence to the effect that Lennox was clearly assumed to be Chilean and that reference to the island in a Chilean counter-proposal of 1905 (Ch. Ann. No. 80) was by way of keeping the island out

of account *ex abundanti cautela*. Prior to this item of 1905 there is no evidence that Chilean sovereignty over Lennox was the object of any misunderstanding whatever. It is shown as Chilean on as many as sixty maps of the period 1888-1905.¹

The small collection of maverick items showing a boundary through Goree Road is considered in this Reply, Chapter IV, paragraphs 53-60, and, in particular, paragraph 58. *None of the fourteen maps listed* (in Chapter IV, paragraph 58), which show Lennox as Argentine, *is an official Argentine map*, with the apparent exception of two maps.

110. The first is Argentine Counter-Memorial Map 20. This map was included in a book by Pelliza. It is described as "official" in the Argentine Atlas. The text of the Counter-Memorial puts the matter rather differently:

"It is an Argentine publication, printed in Buenos Aires, and approved by decree, of 16 July 1888 which gave it an official character" (Arg. C.M. p. 508).

Pelliza's book and his purported "official map" will be dealt with in another part of this Reply (see Chapter IV, paras. 117 et seq.).

The second apparent exception is Map 23 of the Argentine Atlas. This map was inserted in the Argentine Catalogue for the Paris World Exhibition of 1889. It is on a scale of 1:8,500,000 and was printed in Paris; otherwise its provenance is unknown. It is a good example of a map which can have little probative value (see further Chapter IV, para. 144, footnote 1).

111. The Argentine Counter-Memorial shows extreme artificiality in suggesting that Lennox was "an issue" in 1904-5 and even earlier. The introduction in the later phase of the exchanges of a formal proviso into a Chilean draft is not much, if any, evidence that Lennox had been part of "a hard-fought compromise of interests" (Arg. C.M. p. 311, para. 52).

(xi) *The Puga Borne Proposal of 1907*

112. The Argentine Counter-Memorial (p. 312, para. 53) refers to the proposal by the Chilean Minister for Foreign Affairs, Sr. Puga Borne, of a "Complementary Treaty for the Demarcation of Boundaries" (7 September 1907; Ch. Ann. No. 83; Arg. Mem.

¹ See Chilean Plates 38 (1888 item), 39, 40, 41, 42, 43, 44 (1889 item), 45, 46, 47, 48 (1888 item), 49, 50, 51, 52, 53, 54, 55 (the Popper map), 56, 57, 58, 59, 60, 61 (1892 item), 63, 64, 65, 66, 67, 68, 69, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84 ("Argentine Evidence", Map XIV, 1901), 85, 86, 87, 88, 89, 91, 92, 93, 94, 95 (Bertrand, 1904), 96, 97, 98 (1888 item); and Argentine Counter-Memorial Maps 42, 43 (Moreno), 44, 45 (Moreno), 46, 48, 50, 51, 54, 55 (Cf. Arg. Mem. Maps 19, 23, 24, 25 which duplicate certain items listed).

Ann. No. 21). The terms of the proposal refer to "the imaginary frontier line" in mid-channel. This is indicated on the map annexed to the proposal (Chilean Plate 101; "Some Remarks . . .", p. 71 and "Supplementary Remarks . . ." on Ch. Plate 195). The title printed upon the original plan refers to "el trazo de la linea imaginaria". The map is very similar to, but not identical in all respects with Bertrand's map of 1904 (Chilean Plate 95; "Some Remarks . . .", pp. 67-68; and "Supplementary Remarks . . ." on Ch. Plate 195).

The Argentine Counter-Memorial is here concerned to make the point that:

"It is significant that Chile at that time, notwithstanding the earlier opinion of its Boundaries Office, and though it now seeks to maintain in its *Memorial* that the demarcation in Tierra del Fuego was completed by 1895, once again proposed a Treaty in the title of which appeared the word 'demarcation'."

This point lacks any basis in law or fact.

First, whilst it is true that the term "demarcation" (the fixing of alignments on the ground by physical indications) is sometimes used as a synonym for "delimitation" or "determination" of boundaries, it is the procedure envisaged in actual fact and in the particular context which counts.

Secondly, the Chilean Government does not need to "seek to maintain" that the demarcation of Tierra del Fuego was completed in 1895. As recalled above (para. 94) the Minute of Approval of the Work of Demarcation of Tierra del Fuego, dated 9 October 1895 (Ch. Ann. No. 66) records that "the Experts stated, in view of the foregoing, that the operation of demarcation and marking of Tierra del Fuego has been terminated". Two years ago, the Government of Argentina itself was of the same opinion (above, para. 94).

Thirdly, the normal significance of "Tierra del Fuego" is its use as a reference to Isla Grande: and the text of Article No. 1 of the Puga Borne proposal is entirely consonant with this view. The references to "Tierra del Fuego" in this text are clearly to Isla Grande and not to different parts of a unit of islands called Tierra del Fuego.

113. The Puga Borne proposal of 1907 provides clear evidence that the Chilean view was, as it had been all along, that Picton, Lennox and Nueva were Chilean. The Bertrand map of 1904 (Ch. Pl. No. 95) and the map annexed to the Chilean proposal of 1907 (Ch. Pl. No. 101) both exhibit an identical pecked red line segregating the small islands within the Channel, from the Espiritu Santo meridian to Cape San Pio, by means of a carefully drafted alignment which runs eastward north of Picton and Nueva (see also Ch. Plate 195).

Both these maps were on a scale of 1:250.000 and indicate careful thought about the alignment. In particular, the 1907 map—together with the text of Article No. 1 of the proposal—identifies the eastern end of the Beagle Channel at Cape San Pio, in the proximity of longitude $66^{\circ} 31'$. In “Some Remarks . . .” (p. 71) the Chilean Government pointed out that: “No indication has been found that the diplomatic representative of Argentina in Santiago or the Chancellery in Buenos Aires ever formulated any objection or expressed any reservation in relation to the precise identification of the eastern mouth of Beagle Channel which this plan contains.”

The Argentine Counter-Memorial offers no information on this and, except for a rather sneering remark, no explanation of the omission (Arg. C.M., p. 316, para. 55).

114. The pecked red line on these maps (Chilean Plates 95 and 101) is the object of much casuistry in the Argentine Counter-Memorial (pp. 312-320, paras. 54-59). Much of the comment therein is completely misconceived. Both maps make the obvious assumption that Picton, Nueva and Lennox are Chilean. Both maps produce a red line which is a *proposal* about the segregation of Argentine and Chilean islands *within the Channel*. The related documents make this common sense interpretation very clear: see the Bertrand Report (Ch. Ann. No. 72) and Article No. 1 of the Puga Borne proposal (Ch. Ann. No. 83). In both cases the pecked red line reaches Cape San Pio. Given the particular purpose of these two maps in relation to the small islands in the Channel, it is bizarre for the Argentine Counter-Memorial to suggest (at pp. 314-315) that they cast any doubt upon the status of Nueva or the position of Nueva in relation to the Beagle Channel. In any case the reference to the Beagle Channel in the provisions of the 1881 Treaty is not simply to an alignment reaching to Cape San Pio but also to a more or less rectilinear or latitudinal concept and in respect to that concept Nueva is clearly south of the Beagle Channel.

(xii) *Certain Aspects of the Cartography in the Period 1897-1911*

115. The Argentine Counter-Memorial (pp. 320-324, paras. 60-65) has a section which is concerned to disparage certain items of cartographic evidence which relate to the period 1897 to 1911. It is convenient to consider these items at this juncture.

116. The Argentine Counter-Memorial refers first of all to Chilean Plate 74, an official publication of 1897 for use in schools (“Some Remarks . . .”, pp. 54-55), and makes some very weak points about the placing of names on the map. Thus “Moat Bay” is marked and it is suggested that this rules out any extension of the Beagle Channel in that

course. If this point has anything in it, then the placing of "Goree Road" on the sheet contradicts the Argentine conception of the course of the Beagle Channel (Arg. Mem. Map 27). The Chilean map leaves no doubt as to title over Picton, Lennox and Nueva. Moreover, the line shown has a very strong resemblance to the line shown on Chile's 1881 Authoritative Map (Chilean Plates 13-19).

117. Next, the authors of the Argentine Counter-Memorial (pp. 320-323) mount an attack against Chilean Plate 75 ("Some Remarks...", p. 55; "Supplementary Remarks..." on Ch. Plate 187). The original map has the title "Map of the "Works carried out by the Fifth Chilean Sub-commission in Patagonia and Tierra del Fuego". The map is difficult to date precisely and the Chilean provisional view was 1897-1898. This difficulty is genuine but the Counter-Memorial indulges in a number of gratuitous insinuations about the dating. It is further alleged that: "The joint work with the Argentine Sub-Commission, during 1894-5, obviously has no relation whatsoever to what is depicted on this map" (Arg. C.M. p. 321). This statement is simply in error. The map shows the numbered boundary pillars in Tierra del Fuego including No. XXV near the coastline and thus agrees with other maps illustrating the Minute of Approval of the Work of Demarcation of 9 October 1895 (Ch. Ann. No. 66) (see Chilean Plates 75 and 187; Argentine Counter-Memorial, Maps 32 and 33).¹

118. Finally, the Argentine Counter-Memorial (pp. 322-323) points out that the precise course of the line drawn *within the Channel* on Plate 75 differs from that shown upon Plates 95 and 101, for example. The explanation for this is clear enough. For Bertrand and other Chilean officials at this time the difficulties (not involved strictly with demarcation on the land under the 1881 Treaty) precisely concerned the small islands, the Bridges and other groups, within the Beagle Channel. On this question and only in this respect, the lines were tentative: Bertrand's 1904 map is, of course, a *proposal* for an allocation. *None* of the maps indicates the slightest doubt concerning the status of Picton, Nueva and Lennox.

119. Concerning Chilean Plate 99, the Chilean Boundary Office Map, 1906, the Argentine Counter-Memorial (p. 323, para. 64) takes the point that on this map the inscription "Bahía Oglander" appears in a place which is incompatible with the view of the Chilean Government on the location of the eastern mouth of the Beagle Channel.

¹ It should be noted, also, that plate 57 of the Argentine Atlas contains a map of the demarcation of Tierra del Fuego which shows a *boundary line from the meridian of Cape Espíritu Santo to Picton Pass*. Yet, the map is presented as depicting the "demarcation" between 1892-1895. A comparison between that plate 57 and plate 32 of the Argentine Atlas will show that the line was "completed" in 1908 (see below para. 123; also "Supplementary Remarks..." on this Arg. C.M. Map).

This type of reasoning is obviously inconclusive. The placing of names of particular features may overlap with other features without their being mutually exclusive. With reference to that map, the important point is that the pecked red line showing the boundary line passes between Cape San Pio and Isla Nueva making unequivocal the allocation of the disputed islands.

120. Tacked on to the consideration of certain Chilean maps in the Argentine Counter-Memorial is the assertion that, after the Bertrand Map of 1904 (Chilean Plate 95), "the boundary line adopted by Chile in its cartography changed" (Arg. C.M. p. 323, para. 65). This assertion is supported by reference to Chilean Plates 91, 99, 106 and 122.

121. This assertion lacks proof. No change can be discerned unless it is supposed to be the fact that on these maps the eastward trending line is at an angle dipping southwards. It is impossible to read any significance into such variations in so far as the sovereignty of the disputed islands is concerned.

The eastern portion of the line on Bertrand's 1904 Map has a southward trend. On the other hand, Chilean Plate 74, an official map of 1897 (see above, para. 116), has a straight latitudinal attitude in its eastern sector. Subsequent to 1904, the Puga Borne map of 1907 (Chilean Plate 101) repeats the line on the Bertrand Map. The explanation of these variations is almost certainly that, as was the conception in Bertrand's Report (Ch. Ann. No. 72) there was an allocation of islands, based upon the 1881 Treaty insofar as Picton, Nueva and Lennox were concerned. Thus the line on the water north of Picton and Nueva was impressionistic for the most part, a latitudinal concept based upon the Treaty, reflecting allocation rather than "demarcation" or "alignment" of a boundary. However, *in the case of the smaller islands within the Channel*, eastward to and including the Bécasses, the precision of the alignment is significant since the purpose of the lines on the Bertrand and Puga Borne maps was principally to illustrate *a proposed segregation of the small islands*.

122. None of the maps of this period, and having a Chilean official provenance, casts any doubt upon the status of Picton, Lennox and Nueva. In contracts, many Argentine official maps show these three islands as Chilean at this period: see Chilean Plates 72, 93, and 110 (this map from the Argentine Official Year Book, 1912). For further consideration of the cartography the Court may care to refer to Chapter IV of the present Reply, paras. 52-62, and paragraphs 109 and 110 of the present Chapter.

123. It is the case that the Argentine map of 1908 (Arg. C.M. Map 57) shows a line passing between Navarino Island and Picton Island. This map was annexed to the book "The Argentine-Chilean Frontier - General Demarcation", published in Buenos Aires by the International Boundaries Office of the Argentine Ministry of Foreign Affairs and Worship. The map is—to an extent—a reproduction of a plan of the "Demarcation of Boundaries with Chile, Tierra del Fuego 1892-94-95", carried out by the Fifth Sub-commission. The alignment on this map is to be contrasted with Chilean Plate 75 ("Some Remarks . . .", p. 55; also "Supplementary Remarks . . ." on Arg. C.M. Map 57) which can be dated *circa* 1898. As it has been shown above (paras. 78-95) the Sub-commission was not concerned with the allocation of Picton, Lennox and Nueva. Arg. C.M. Map 57 is annexed to a book published in 1908 and it is not surprising that the alignment is one which not merely records the demarcation on land—the 25 pillars on Tierra del Fuego—but also the Argentine view of the status of Picton (the only island south of Beagle Channel depicted) in the period after the diplomatic exchanges of 1904-5. In other words Arg. C.M. Map 57 is not confined to recording the work of the Demarcation Sub-commission in 1892-5.

124. This map (Arg. C.M. Map 57) may be compared with Chilean Plate 99 ("Some Remarks . . .", pp. 69-70) which shows a line running eastward north of Picton Island and reaching the Ocean after passing between Cape San Pio and Nueva Island. This map has the inscription: "In the map appear the surveying works carried out by the 5th Chilean Boundary Sub-Commission and various other works carried out by several geographic commissions". This map was an official map published in 1906 as part of a book by the Chilean Boundary Office on the "Demarcation of the frontier line in the southern part of the country: Work of the 5th Chilean Boundary Sub-Commission with the Argentine Republic". The map clearly shows the Chilean interpretation of the boundary line resulting from the Treaty of 1881.

(xiii) *The Various Opinions of Holdich; and, in particular, the Meeting Between the Chilean Minister in London and Sir Thomas Holdich, 1906*

125. In a letter of 26 September 1918 (Ch. Ann. No. 118) the Foreign Office asked Sir Thomas Holdich "to express a view of the position of the end of the Channel and on the conflicting claims of the two Republics". Sir Thomas Holdich replied in a letter dated 30 September 1918 (Ch. Ann. No. 119). The views expressed in this letter have been examined in the Chilean Memorial (pp. 108-110, paras. 54-57), and substantial reservations regarding the soundness and relevance of the views of Holdich are there set

out. Since the Holdich thesis involved ascribing Chilean sovereignty to Picton and Lennox, it is natural that the Argentine Memorial (pp. 253-254, para. 74) should not display any enthusiasm for the conclusions of Holdich in 1918.

126. The Argentine Counter-Memorial (pp. 352-354, paras. 17-18) nonetheless picks out one or two aspects of the Holdich letter of 1918 "which deserve to be underlined". Since the whole approach of Holdich was to avoid close reference, and in general to avoid reference of any kind, to the precise terms of the Treaty, it is hazardous to rely upon any one of his premises or propositions. It is paradoxical for the Argentine Government to approve of certain items of the 1918 Holdich doctrine when, in the opinion of Holdich, only Nueva was Argentinian. In simple terms, even the modified view of Holdich in 1918 bears no relation to the alignment proposed on Map 27 of the Argentine Memorial.

127. The somewhat idiosyncratic approach in Holdich's letter produces a result which is literally unprecedented. The map (Chilean Plate 92) appended to Holdich's book "*The Countries of the King's Award*", published in 1904, shows a line north of Picton and Nueva, depicting therefore as Chilean the whole of the Cape Horn archipelago. However in 1918 he suggested that Nueva should go to Argentina and this was a remarkable change of view. Moreover, this permutation of Holdich is unique in the case: no other evidence or view on the allocation of territories effected by the Treaty ascribes only Picton and Lennox to Chile. From the scores of maps submitted by the Parties in these proceedings no one *contains this variation leaving Nueva east of the boundary*.

128. In 1906 the Chilean Government had done its best to obtain Holdich's opinion concerning the boundary alignment in the Beagle Channel. In telegrams dated 27 December 1905 and 6 January 1906 (transcribed in Ch. Ann. No. 527) the Chilean Foreign Minister, Sr. Federico Puga Borne, instructed the Chilean Envoy in London, Sr. Domingo Gana, to seek Holdich's opinion, if possible in writing. The outcome of this approach to Holdich is recounted in Gana's Official Despatch, dated 9 January 1906 (Ch. Ann. No. 527).¹

129. The key passages in this Despatch are as follows:

"When Sir Thomas showed me on the map the route he had followed in that area, I asked him what had been the reasons for designating in the description made in his book and on his map, as a mouth of the Beagle Channel, the one situated to the North of Picton and Nueva Islands.

¹ Incidentally the date 16 January 1906, given in the source used by the Argentine Counter-Memorial, is in error.

He did not answer my questions directly, but he seized the opportunity to tell me that it was a matter of doubt: that the Argentines, as it could be seen on the maps we had in front of us, maintained that the Beagle Channel, or its continuation in this part, was the mass of water which runs to the South of the above-mentioned islands.

I insisted, for my part, that he made known his opinion, as he had travelled through that region, and he was thus able to estimate if the Argentine claim was right or wrong.

He then observed that, if it were a questionable point in the region comprised in the [1902] Arbitral Award, his opinion might have been consulted, but that he did not consider it proper, nor did he want, to be involved in a controversy in which both parties might have good reasons to support their assertions.

I have travelled in this region, he added, as a mere tourist, without making studies or elaborate observations, and, therefore, I would not wish that my opinion be invoked in favour of one or the other of the interested parties.

Finally, he said that the Chilean Government have had or have at present officers of the Navy engaged in hydrographical studies in this part of the Channel, and the result of such studies will provide enough information on the matter.

At the end of our conversation, for a moment he kept silence, and then, seeming afraid of having pushed too far his unforthcoming attitude, and that this might be interpreted as a lack of co-operation and courtesy, he told me:

As you insist on knowing my opinion, I will tell you, but, privately and provisionally, that, in my view, and without forgetting that it is a controversial matter, the mouth of the Beagle Channel is the one indicated by the Chilean maps.

This statement of his opinion by word of mouth, expressed by Sir Thomas, given on that basis, cannot serve the purposes of Y.E. Regretting, for my part, not having reached the end in view, I addressed today to Y.E., the following telegram: "Holdich refuses to state or confirm what he wrote because he knew existence controversy between both countries. I am writing."

130. When Holdich visited Gana on this occasion he brought two maps with him.¹ The first was the so-called "Moreno map" (Chilean Plate No. 118; Arg. C.M. Map 43: on which see para. 168 of the present Chapter). The second map is described in Gana's despatch: it is an Argentine official map dated 15 February 1900.

131. The outcome of Gana's approach to Holdich was hardly conclusive, since Holdich would only express a view which was *private and provisional*. At the least the episode provides some assistance to Chile since Holdich favours the Chilean position on the identification of the mouth of the Beagle Channel. However, in the light of the different view expressed by Holdich in 1918—leaving Nueva to Argentina—and the provisional and *ex tempore* character of his 1906 opinion, perhaps no great weight can be given to the incident. However, the Argentine Counter-Memorial (pp. 324-325, paras. 66-67) insists upon the significance of the episode and refers to the absence of mention of it in the Chilean Memorial. Consequently, the Chilean Government has now provided an account of the

¹ The information identifying these maps is contained in Gana's Official Despatch of 9 January 1906, above mentioned.

matter. When the relevant items are examined, the Court will readily appreciate that there is nothing in the incident inimical to the Chilean position in the case.

(xiv) *Alvarez Memorandum, 1906*

132. The Argentine Counter-Memorial (pp. 325-326, paras. 68-69) makes various points to the effect that certain arguments used, and certain cartographic evidence invoked, by the Chilean Government in the present proceedings were ignored by Sr. Alejandro Alvarez in his memorandum to the Chilean Ministry of Foreign Affairs submitted on 19 January 1906 (Ch. Ann. No. 82). It may or may not be worth while remarking—since it is obvious—that an individual giving advice in the context of a diplomatic episode will not produce the same bulk of argument and evidence as a team of Agent, Counsel and others preparing pleadings in an international arbitration.

133. The Alvarez memorandum itself provides evidence (see section I, the opening paragraph) that in 1904-1906 the Chilean Government was still concerned with determination of the scope and character of the controversy (see also paragraphs 105-106 and 111 above).

(xv) *The New Argentine Sailing Directions, 1904-5*

134. In its Memorial (pp. 91-93, paras. 11-16) the Chilean Government examines the Chilean reaction in 1905 to certain novelties and changes in the latest Argentine Sailing Directions (Ch. Ann. No. 74(a)). There is little to add to this account. However, the Argentine Counter-Memorial (p. 327, para. 70) seeks to raise an obscuring cloud of dust by suggesting that the Chilean authorities must have had knowledge of the results of the “Almirante Brown” surveys some time before 1905 and also that the Chilean Memorial denied this. In fact the Memorial does no such thing. The point made in the Memorial clearly relates to the *official* charts and sailing directions. It is not “knowledge” of the surveys which was sought by the Chilean Hydrographic Office in 1905 but the charts and sailing directions as *published recently and officially* by Argentina and incorporating the results of the surveys (see Ch. Ann. No. 74(a); also Ch. Ann. No. 77).

(xvi) *The Diplomatic Exchanges of 1915*

135. The Argentine Counter-Memorial (pp. 334-340, paras. 4-8) runs over the diplomatic episode of 1915 which culminated in an Agreement on arbitration dated

28 June 1915 (Ch. Ann. No. 102; Arg. Mem. Ann. No. 23). In the submission of the Government of Chile the Argentine Government fails both to meet and to take any further the presentation of the matter set out in the Chilean Memorial (pp. 95-100, paras. 24-34). The Argentine Counter-Memorial uses the material as a vehicle for repetition of certain Argentine arguments. One such argument is the relevance of the 1893 Protocol to the islands in dispute: this question has been considered elsewhere, in section A of this Chapter, and, in particular, paragraph 32.

136. Another thesis reiterated in this section of the Argentine Counter-Memorial is that the dispute had been known to the Parties since 1881 (see Arg. C.M. pp. 333, para. 3).

This thesis has been rejected already by the Chilean Government in paragraphs 39, 63 and 99 above. The diplomatic episode of 1915 hardly fits the picture given by the Argentine Government of a long-standing controversy the dimensions and features of which were already well understood.

This is particularly clear from a despatch No. 27, sent by Señor Carlos F. Gomez, Argentine Minister in Santiago, to his Government, on 5 February 1915 (Ch. Ann. No. 529).¹ This despatch indicates:

(a) that Sr. Gomez favoured a compromise leaving *Picton to Argentina and Lennox with Nueva to Chile*; but he feared that this formula would be rejected in Chile because the Government of Chile was convinced that the Arbitral Award would be favourable to Chile even if it were rendered on the exclusive basis of Argentine documents.

(b) that Sr. Gómez suggested the inclusion of the Protocol of 1893 in the “compromis” because he feared that if only the Treaty of 1881 was applied, Argentina would lose the Arbitration.

(c) that Sr. Gómez believed that “in the present state of the question” it was “convenient” for Argentina to maintain that the Beagle Channel ended “more or less” at 65° 5' W.

(d) that he considered *that Picton Pass was not a part of Beagle Channel* but one of the “two passages to the Channel”, the other one being “Moat Channel” a name known to him to have derived from Argentine surveys.

(e) that he believed that the Protocol of 1893 had modified the Treaty of 1881.

(g) that, in his view, the Atlantic/Pacific division, allegedly made in 1893, contained as an “exception” “what might be situated to the south of the Beagle”.

¹ This despatch does not appear among the Annexes to the Argentine written pleadings. The Government of Chile has been able to secure a copy from the Buenos Aires Archives.

The despatch reveals the existence of other official documents which may be relevant to the present controversy but, unfortunately, have not been published or produced by the Argentine Government.

137. The despatch by the British Minister in Buenos Aires to the Secretary of State, dated 5 March 1915 (Ch. Ann. No. 87) refers to "a claim on the part of the Argentine Republic being mooted with regard to the islands of Picton and Nueva . . ." This is not a reference to a longstanding claim familiar to the diplomatic world at the time. Moreover, the Argentine *démarche* dated 8 March 1915 (Ch. Ann. No. 88) refers only to Picton and Nueva (Cf. Ch. Ann. No. 89), no doubt upon instructions from Buenos Aires.

Furthermore, the contents of the Argentine draft protocol submitted on 17 March 1915 (Ch. Ann. No. 92) and the Chilean reaction (Ch. Ann. No. 98) thereto establish beyond any doubt that the *scope* of the controversy was still the principal source of difficulty in reaching agreement on a procedure for peaceful settlement. The *démarche* of 8 March 1915 above mentioned was in fact the first occasion on which the Argentine Government found it necessary to reserve its rights: and even then only Picton and Nueva were referred to as being in question.

(xvii) *Diplomatic Exchanges 1917-1954*

138. In section F of the present Chapter consideration will be given to the general questions concerning the significance of protest in the present case, together with related matters. For the present it is considered useful to recall the salient features in the diplomatic exchanges subsequent to the developments in 1915.

139. Some exchanges took place in the period 1917-1920 (see Ch. Mem., pp. 115-117, paras. 68-74). The two Parties maintained their positions in protests at this time and nothing occurred to modify the final stance taken in the negotiations of 1915 and the Agreement of 28 June 1915. In its Counter-Memorial (pp. 361-364, paras. 24-27) the Argentine Government relates the exchanges in the period 1917 to 1920 and the question of the Bécasses and other islands in the Channel itself. This question is pursued elsewhere, in Section G of the present Chapter.

140. Between 1920 and 1938 not a great deal occurred at the diplomatic level. Nothing at all occurred until 1928. In that year, in reply to an Argentine *démarche* (Ch. Ann. No. 127), the Chilean Government (note of 29 October 1928, Ch. Ann. No. 128) referred in clear terms to "the *status quo* existing in relation to the question to be elucidated between our two countries . . ." This reference did not draw any reservation from the Argentine Government. Earlier, in a Note of 30 July 1920 (Ch. Ann. No. 124), the Argentine Government had referred to the Agreement on arbitration of 15 June 1915

as the background to relations on the question of Picton, Lennox and Nueva. It simply makes good sense that the Agreement of 1915, though unratified, should provide a point of reference. It is surprising that the Argentine Counter-Memorial (pp. 364-365, para. 27) is concerned to deny the role of the Agreement of 1915.

141. On 20 February 1931 Chile protested at the publication of an official Argentine map (Ch. Ann. No. 129). The Argentine Note in reply of 5 March 1931 (Ch. Ann. No. 130) contains the following:

“Your Excellency knows the long negotiations maintained on such a high level by both Chancelleries which as Your Excellency stated in your note terminated with the Protocol of 1915 . . .”

“In this situation neither of the Governments should exercise acts of predominion which might annul the terms of the aforementioned protocol . . .”

142. In the “Acta de Mendoza” of 1933 (Ch. Ann. No. 131) one of the conclusions reached by the Foreign Ministers of Chile and Argentina was as follows:

“To find, at the earliest possible time, a solution for the Beagle Channel question, by a direct arrangement or, alternatively, by speeding up the ratification by the two Governments of the 1915 Protocol in order to arrive at the arbitration therein provided for, as this is the only question still pending between both countries”.

143. The evidence provided by the documents referred to in the previous four paragraphs strongly suggests that a certain level of Argentine vigilance—by no means consistent or sustained—in respect of the controversy concerning Picton, Lennox and Nueva begins to develop after 1915. However, until 1915 the Argentine Government did very little by way of protest. (See further the Ch. Mem, pp. 118-121, paras. 1-13; cf. Arg. Mem., pp. 255-264, paras. 76-90). In its Counter-Memorial (p. 365, para. 28) the Argentine Government more or less accepts the account given in the Chilean Memorial when it states:

“But it is notably after 1953 that Chile entered upon the path of an active presence in the disputed zone and it is for this reason that Argentina’s protests became more frequent as from this date”.

This is an admission of Argentine epistolary lassitude over a period of 70 years. Moreover, this lassitude was in face of an actual Chilean presence in the islands, an administrative reality, which remained unchallenged by Argentina throughout (see further below, paras. 221-222).

144. In a Note of 14 June 1955 the Argentine Government proposed arbitration (Ch. Ann. No. 194). The draft agreement annexed to this Note has been examined in the Chilean Memorial (p. 121, para. 14). The developments after 1955 are considered thoroughly in the Chilean Memorial (pp. 121-126, paras. 15-33). The presentation in the Argentine Counter-Memorial (pp. 365-371, paras. 29-34) simply invited the drawing of different inferences from the same material.

145. The most recent diplomatic items bearing upon the history of the dispute and to its geographical scope are examined in the Chilean Counter-Memorial (pp. 4-10, paras. 15-31).

C. BRITISH DOCUMENTS, 1915-1918

146. In the period immediately prior to and some time after the conclusion of the Protocol providing for arbitration on 28 June 1915, a significant number of British official documents contained facts and opinions concerning the dispute. This was occasioned by a reasonable expectation that the British Government would at some stage act as arbitrator in accordance with the Treaties of 17 April 1896 and 28 May 1902, together with the provisions of the Protocol of 1915.

The relevant British documents are examined in the Chilean Memorial (pp. 100-104, paras. 34-45; pp. 108-114, paras. 54-67). The evidential value of these documents can be seen from a review of the circumstances in which the British Government became concerned with the question of the boundary in the region of the Beagle Channel.

The Chilean Government has employed many documents from foreign archives—French, American, German, Italian, etc.—but the British documents have a special significance. The British Navy discovered the Beagle Channel and surveyed the area. Consequently for a long time the official papers relating to the discovery and survey were in the hands of the Admiralty and were not in the public domain. Moreover, over the years the British Government appears to have been consulted by both Chile and Argentina on geographical and other points. Further reasons for British interest and expertise relating to the region are not far to seek. Britain's role as a sea power naturally caused her to attach interest to the area; and her role as Arbitrator in the 1898-1902 case involved detailed study of the Chilean-Argentine boundary controversy.

147. The Argentine Government in its Counter-Memorial (pp. 341-348, paras. 9-14) mounts an assault upon the weight of these documents, as an ensemble, as evidence in the case. It is worth noting that the Argentine Government makes no reservation as to the relevance of these materials. Indeed, no such reservation could be made. The internal assessments, made contemporaneously with the key phase in the development of the controversy concerning the Beagle Channel in 1915, of the Government of a third state, are clearly relevant and must have considerable probative value. This is particularly the case when the Government of the third state has the responsible role of Arbitrator-elect and has perfectly normal relations with the two Parties.

148. If the Argentine Government does not dispute the relevance and admissibility of the British documents, it nonetheless brings forward a number of considerations which are calculated to affect the weight of the evidence. These considerations are presented in blanket form affecting the British documents as a class and the Chilean Government finds it necessary to examine them in that light. The Argentine Counter-Memorial pays little attention to individual items, with the exception of the British Admiralty Hydrographer's memorandum.

149. In the first place (at p. 341) the Argentine Counter-Memorial alleges that the intention of the Chilean Government in its Memorial was to create an impression "that this documentation represents, to some extent, a sort of conspectus of what might have been the course of the arbitration, had it actually taken place in 1918". The Chilean Government did not present the documents with such an intention and the text of its Memorial very plainly offers the evidence as bearing upon the specific questions of interpretation concerning the understanding of the course of the Beagle Channel.

150. At pp. 341-342 the Argentine Counter-Memorial points to the "varied character" of the documents. It is true that the items do emanate from different officials, experts and agencies of the British Government. This circumstance would, in normal evidential logic, add to their cogency in relation to points on which consistent or substantially similar positions were taken.

151. The Argentine Counter-Memorial (pp. 342-345, paras. 10-11) stresses "the essentially Chilean character of the sources of information used in these documents". This point is put in two ways. First, it is said that "everything which might make for an argument supporting the Argentine viewpoint is, to speak plainly, absent from this documentation" (p. 342, para. 10). This is not the same thing as the Court will observe. In any case, the Argentine evaluation of the documents in this respect is simply unacceptable. For example,

in this connection the Argentine Counter-Memorial makes specific reference to the despatch of the British Minister in Buenos Aires dated 5 March 1915 (Ch. Ann. No. 87). When this document is read it is found to contain a perfectly adequate summary of developments and evidence known to him. The circumstance that the evidence he rehearses is predominantly favourable to Chile is not, of course, of itself evidence of partiality.

152. The major burden of the complaint set out in the last paragraph is that the British documents rely exclusively upon Chilean sources. The Chilean Government can only state that this is a palpably mistaken view. Thus in the despatch of 5 March 1915, referred to already (Ch. Ann. No. 87) the British Minister refers to a number of Argentine sources, including an article by Dr. Zeballos and a map published in 1910. Moreover, the British Minister was naturally in direct communication with the Argentine Minister for Foreign Affairs: see his despatch dated 10 March 1915 (Ch. Ann. No. 89). The Argentine Counter-Memorial shows a certain inconsistency in its comments. In the first place it expresses an unease that Moreno should be given any credence by the British officials (the text exhibits this unease at pp. 343-344 in a somewhat diffuse way). The facts were, of course, that the British Minister in Buenos Aires was garnering *any information* which he could forward to London: this might take the form of press articles, talks with the Foreign Minister or contact with experts like Moreno. In 1918 Dr. Moreno was probably the only person surviving who had been involved in the negotiations of 1881 (see paras. 158-165 below).

153. The second source of inconsistency in the Argentine Counter-Memorial (at p. 343) is the provision of examples of British officials insisting on "the need to obtain all possible data from Argentine sources" (Ch. Ann. Nos. 107, 108 and 109). This destroys the picture painted by the Counter-Memorial of a predisposition in British official circles to favour the Chilean point of view.

154. A further suggestion made by the Argentine Counter-Memorial (pp. 344-346, paras. 11-12) is to the effect that there were British political preoccupations "which motivated the United Kingdom in collecting certain information on the 'Beagle Case'". These passages of the Counter-Memorial are very obscure. They contain a suggestion that the British Government would incur political risks connected with the World War if arbitration occurred. If such a risk is suggested by some documents, it provides the basis for an inference that excuses were found *to postpone the arbitration*; it has no conceivable connection with the creation of a dossier of evidence *favouring one of the Parties to the dispute*.

155. The Chilean Government submits that the weight of the British documents stands unimpaired. The Argentine contention (Arg. Counter-Memorial, pp. 346-348, paras. 13-14) that the documents reveal "*a large number* of errors, of gaps and of contradictions" is without foundation. The "examples" of "errors", etc. provided in the Counter-Memorial are only two in number and, in any case, they lack point. Both alleged "errors" are simply matters of interpretation or opinion: the first concerning the placing of Nueva in relation to a line the course of which is given in indefinite terms in the document (Ch. Ann. No. 96); and the second concerning expressions of opinion relating to title to Lennox and the incidence of surveys in the waters of Picton.

D. MEMORANDUM OF DR. MORENO, 1918

156. In its Memorial (pp. 104-108, paras. 46-53) the Government of Chile gives prominence to the views of Dr. F. P. Moreno expressed in a memorandum dated 17 July 1918 (Ch. Ann. No. 113) delivered to the British Minister in Buenos Aires. In the opinion of Dr. Moreno Picton, Nueva and Lennox were Chilean in accordance with the 1881 Treaty. Moreover, he refers to Argentine sources for this view namely, the "Navigation Guide for the Argentine Coasts", in an official edition of 1900, and the opinion of the Head of the Argentine Demarcation Sub-Commission of 1894, Juan A. Martin (Ch. Ann. No. 362). Dr. Moreno was a former member of the Joint Boundary Demarcation Commission: he was in fact the Argentine Expert, appointed for the purposes of Article IV of the 1881 Treaty, in accordance with the Chilean-Argentine Convention of 20 August 1888 (Ch. Ann. No. 50).

157. The Argentine Counter-Memorial (pp. 348-351, paras. 15-16) contains a sharp attack on Dr. Moreno, typified by the statement:

"It is pointless to labour the other gaps or contradictions of this supposedly expert appraisal: it is clear that Moreno presented the matter in a superficial way and without objectivity".

158. The generalised and deliberate attack upon the credit of Dr. Moreno as a witness in 1918, comes as a surprise to the Chilean Government; and it would seem that the aspersions of the Argentine Counter-Memorial carry with them an element of desperation. The status of Dr. Moreno as an expert on geographical and boundary matters is well-attested. His views in that capacity are canvassed on many occasions in Argentine official and unofficial sources. As early as 1879 Dr. Moreno was present at a meeting of

“geographical specialists” held at the Government Offices in Buenos Aires precisely in connection with boundary issues between Chile and Argentina: this view is recorded fully in the *Argentine Report* in the Arbitration of 1898-1902, pp. 170-171. He is frequently mentioned by Sir Thomas Holdich in his Reports and in his book, *The Countries of the King's Award*, London, 1904. Dr. Moreno's *curriculum vitae* is entirely consonant with his status as a professional geographer and expert on orography and also the interaction of physical geography with boundary questions. He travelled extensively in Patagonia and the Cordillera of the Andes and in 1903 he visited the Beagle Channel in the company of Sir Thomas. He was a Gold Medallist of the Royal Geographical Society of Great Britain. He was a member of the American Geological Society and of other learned societies. He was the founder of the La Plata Museum and remained its Director from 1877-1906.

159. Dr. Moreno's expertise on boundaries was utilized by the Argentine Government over a very long period. He was associated with official study of the Chilean boundary issue in 1879 (see para. 164 below). Moreover, in his speech to the National Chamber of Deputies, 31 August-2 September 1881 (Ch. Ann. No. 42), Minister Irigoyen (at p. 138) states: “I have consulted Mr. Moreno on this subject (the question of Argentine outlets toward the Pacific) and will now read the notes he has kindly made available to me”. In 1895 an article by Dr. Moreno entitled “Argentine-Chilean Boundaries according to the 1881 Treaty and 1893 Protocol” was published in the newspaper “La Nacion”. The article appears in excerpted form in a book by Bertrand, published in Santiago in 1895 (Ch. Ann.No. 364). In this article, Moreno makes the following reminiscence:

“I cannot forget that a few days after this document (the Treaty of 1881) was signed, a map of the Magellanic region arrived in Buenos Aires, issued by the Chilean Hydrographical Office, whose seal it bears, circulated by ‘El Mercurio’ of Valparaiso,¹ and in which *the line agreed upon* had been traced . . .”

160. Consequently, it was natural that when the Argentine Expert appointed to the Joint Boundary Commission, Dr. Quirno Costa, resigned in July 1896, Dr. Moreno was appointed in his place (see the *Argentine Report* in the Arbitration of 1898-1902, p. 335). Thus the professional expert—in the ordinary sense—became also the official Expert, a representative of his Government, appointed in the context of the provisions of the 1881 Treaty, as the Argentine Counterpart of Sr. Barros Arana.

161. It is natural that on a number of occasions the Argentine Government has seen fit to set out, rely upon and give unreserved credence to, the opinions of Dr. Moreno.

¹ This was Chile's 1881 Authoritative Map; Chilean Plates 15 and 19.

Thus Chapter XII of the *Argentine Report* in the Arbitration of 1898-1902 refers at length to the "Proceedings of Señor Moreno as Argentine Expert" in relation to the demarcation following the Agreement of April 1896. In this Chapter (at p. 335) of the *Argentine Report*, the Argentine Government states the following:

"The Argentine boundary line, in nearly the whole of the extent of the Cordillera, and mainly in the points and regions concerning which the divergences of opinion have arisen, has been projected by Señor Moreno. For this reason it is necessary to place before the Tribunal the opinions which he holds, and upon which he has acted".

162. In the course of the Oral Reply in the *Palena* case (Corrected Transcript of Oral Hearings, III, Day 14, p. 4) H.E. Señor Don J. M. Ruda, the Argentine agent, had occasion to describe Dr. Moreno as "one of the Argentine's most distinguished citizens" and "an honourable man". Significantly, in the Argentine Memorial in the present case (pp. 252-253, paras. 72-73), Dr. Moreno's character and opinions are treated without harshness: indeed, his views are summarised in perfectly straightforward fashion. Moreover, he is described as "the Argentine expert on the Boundaries Commission and in the 1902 Arbitration of the Cordillera dispute". In para. 73 the Argentine Memorial records without criticism what it calls the "personal opinion" of Dr. Moreno set forth in the Memorandum of 1918.

163. The matter then comes to this. The reliability and general credit of Dr. Moreno, in the view of the Argentine Government, has remained unchallenged, from at least 1879 until the preparation of the Memorial in the present case in 1973. When the Argentine Counter-Memorial was drafted in 1974, the unfortunate Dr. Moreno was subjected to an abrupt and radical reassessment. Moreover, this reassessment relates to the opinion of Dr. Moreno expressed in 1918. At that time Dr. Moreno was a professional geographical and boundary expert, who had also been Argentine Expert in connection with the 1881 Treaty and 1893 Protocol: but his standing and importance as an expert witness went further. By 1918 Sr. Irigoyen and Sr. Barros Arana were both dead: Dr. Moreno was very probably the only surviving Expert connected with the negotiations leading up to the 1881 Treaty and who knew what was in the minds of the negotiators.

164. There is evidence ("Argentine Report" in the 1898-1902 Arbitration, at p. 170) that Dr. Moreno was present at a meeting of geographical specialists to advise the Argentine Government in connection with the negotiations concerning the boundary with Chile then in progress. The meeting took place early in 1879, during the diplomatic mission of Sr. Balmaceda.

It has been pointed out above (para. 159) that Irigoyen consulted Dr. Moreno in connection with the 1881 Treaty.

165. The "Argentine Report" (at pp. 170-171, in a long footnote) quotes passages from Moreno's book "*Some Notes on the Patagonian Lands*", published in 1878. In this work, Dr. Moreno, three years before the conclusion of the 1881 Treaty, refers to a "natural boundary" which, by way of Ponsonby Sound, would follow on to the south as far as Cape Horn.

In his Memorandum of 1918 Dr. Moreno, forty years later, held a different view.

The opinion held in 1918 would in that case be a considered opinion, subsequent to the 1881 Treaty, and by no means a casual view, in light of the fact that it involved a divergence from a view previously expressed in print.

166. The new-found reservations in the Argentine Counter-Memorial concerning the Moreno memorandum are to be set against this background. The arguments of the Argentine Counter-Memorial directed against Dr. Moreno's credit can hardly carry conviction. It is said that he should not have spoken contrary to the views of his Government. Would his credit as an Expert have been greater if all he did was to parrot the views of the politicians in power at any particular time?

167. The Argentine Counter-Memorial (p. 349, para. 15) states that "as long as he acted as Argentine expert in boundary matters, he never expressed any opinion contrary to that of his Government in relation to the Beagle Channel . . ." It is impossible to know what he may have said but is not available in documents. That an official of a Government avoided public contradiction of official views whilst holding office is no matter for surprise—it is, and always has been, normal practice.

168. The maps of 1901 and 1902 referred to in the Argentine Counter-Memorial (Arg. C.M. Maps 43 and 45), and bearing Moreno's name, are the object of unambiguous commentary in the Moreno memorandum itself ("Some Remarks . . .", p. 79). These two maps show Picton and Nueva as Argentine territory. Dr. Moreno says of this episode:—

"...I must here declare that this demarcation was made by the Argentine Legation in London *contrary* to my opinion. I had to consent to it so as not to increase further the many difficulties I experienced during the whole of my stay there in defending Argentine interests which were often misunderstood by our Government and their Representatives".¹ (Ch. Annex No. 113, p. 286 at p. 287).

¹ Emphasis in original.

169. The Argentine Counter-Memorial complains further (p. 350, para. 16) that Dr. Moreno "presents the matter as if it were a new question, only recently raised . . .". In the light of the material set forth earlier (see this Chapter, paras. 47-49, 63 et seq.), the attitude of the Argentine expert in 1918 is entirely understandable. In the view of the Argentine Counter-Memorial, it is inconsistent for Dr. Moreno to refer to the line drawn upon the maps of 1901 and 1902 as a line determined by "the Argentine authorities" (in fact, the Argentine Legation in London), and then to present the matter as if it were a new question, only recently raised . . . This argument is no more than a quibble. What is "recent" is very much a matter of relativity and taste. After all the first diplomatic exchanges concerning the boundary in the Beagle region took place in 1904 and the first reservation of rights by Argentina was in 1915. In his Note of 8 March 1915 (Ch. Ann. No. 87, p. 247) the British Minister in Buenos Aires treated the Argentine claim as a new one. Moreover, the line upon the maps in question (dated 1901 and 1902: see Ch. Pl. No. 118; "Some Remarks . . .", pp. 79-80; Arg. C.M. Maps 43 and 45) is inconsistent with the Argentine position as it developed much later, since it treats Lennox as under Chilean sovereignty.

The position taken by the Argentine Counter-Memorial with reference to Dr. Moreno means, indeed, that the man whose testimony was invoked by Irigoyen in his speech to the Chamber of Deputies in 1881 as to the territorial consequences of the Treaty knew nothing about the effect of the Treaty south of the Straits of Magellan; that the man who acted as Argentine Expert for the demarcation, in accordance with the Treaty, ignored what had actually happened in the Beagle region during the demarcation of Tierra del Fuego; that the man who advised the Argentine Government in the British Arbitration concerning the interpretation of the Treaty ignored how the Treaty ought to be interpreted . . .

In one sentence, it means that the authors of the Argentine Counter-Memorial, writing in 1974, knew better than the eminent expert who accompanied Irigoyen in the days of the negotiation and approval of the Treaty.

E. ACTS OF JURISDICTION

170. The purpose of the present section is to consider the material set forth in Chapter X of the Argentine Counter-Memorial which relates specifically to the incidence of acts of jurisdiction in the disputed area (pp. 401-428, paras. 8-33). The same chapter of the Argentine Counter-Memorial raises certain questions of principle concerning the critical date in the case and the role of protest (pp. 397-401, paras. 1-7; p. 429, para. 34). These questions are considered of great importance by the Chilean Government and will be examined integrally in section F of the present Chapter of the Reply.

(i) *The Chilean Position Concerning the Critical Date: Certain Misrepresentations in the Argentine Counter-Memorial*

171. Whilst the issue of the critical date is reserved for separate examination, it is nonetheless necessary to warn the Court that in the opening paragraphs of Chapter X of the Argentine Counter-Memorial (paras. 4-7) the position of the Chilean Government as to the critical date is misrepresented. Thus, there is the observation:

“Now if the critical date is, *as Chile argues*, the date of the Treaty in 1881, . . .” (Arg. C.M. p. 398, para. 4).

Nowhere in either the Memorial or the Counter-Memorial does the Government of Chile express the view explicitly or implicitly that 1881 is the critical date. Indeed no *single* date is adopted as *the* critical date: see the Chilean Memorial, pp. 129-130, paras. 10-11; the Chilean Counter-Memorial, pp. 108-109, paras. 7-11; and section F of the present Chapter. It is significant that the Argentine Counter-Memorial contains no reference to any page in the Chilean Memorial identifying the point at which Chile is alleged to have accepted 1881 as the critical date.

172. As a further preliminary certain other misstatements of a general character in the Argentine Counter-Memorial must be put right. The Counter-Memorial states that the Chilean Memorial:

“warns that this was a critical period; and admits that it was ‘only in 1904’ that Argentine ‘identified’ the dispute, though it might have been added that Chile itself had been aware much earlier than 1904 that its activities in the islands must eventually lead to a dispute, as was shown by its extreme caution over the ‘grant’ of part of Picton to Thomas Bridges in 1896” (Arg. C.M. p. 401, para. 7).

173. Two aspects of this statement call for correction. First of all, the passage in the Chilean Memorial to which reference is made (p. 172, para. 195) reads as follows:

“What then did the Argentine Government do? The answer is, virtually nothing. For twenty-three years, from 1881 to 1904, *no question whatsoever was raised* regarding Chilean sovereignty over the islands—and those were years, as the Argentine authorities must well have known, when the presence of an administration—theirs if the territory was theirs—was called for in all the islands. *Only in 1904 did the Argentine Government even begin to identify* the existence of a disagreement with the Chilean Government on the interpretation of the 1881 Treaty in the area” (Ch. Mem. p. 172, para. 195).

Thus the Chilean Memorial in fact says that Argentina was *only beginning* to identify “the existence of a disagreement” in 1904.

174. Secondly, the passage quoted from the Argentine Counter-Memorial (in para. 172 above) refers to "extreme caution" on the part of the Chilean Government over the grant to Thomas Bridges in 1896 of part of Picton. The facts show a certain caution, but "extreme caution" is hyperbole. The facts support three prepositions alone: (a) that the local administration in Punta Arenas saw fit to consult the Minister of Colonization; (b) that the caution arose simply from Picton's proximity to "the Argentine colony of Ushuaia"; and (c) that the view at the ministerial level in Santiago was that there was no doubt about the status of Picton. The whole run of documents (Ch. Doc. Nos. 64, 67, 68, 69 and 71), read together, shows that the Argentine Counter-Memorial has not stayed close to the facts.

(ii) *The Significance of Acts of Jurisdiction: In General*

175. In spite of the claim in the Argentine Counter-Memorial that 1881 is the critical date, *in actual practice* the treatment of acts of jurisdiction in Chapter X is on the assumption that the period 1881 to 1904 has particular significance. Moreover, the general considerations advanced (at pp. 400-401, para. 7-8; pp. 417-418, para. 22-23) in Chapter X of the Argentine Counter-Memorial are to the effect that the period 1881-1904 was of special importance: thus it is said that "the dispute first came into the open in 1904, when the Parties first attempted to negotiate a means for its settlement" (Arg. C.M. p. 400, para. 7). It will be recalled that in Chapter VII, purporting to deal with the history of the dispute, the Argentine Counter-Memorial gives very considerable prominence to the negotiations of 1904-1905 and 1907—witnessed by the very title of the Chapter ("...: from the Treaty of 1881 to the negotiations of 1904-1905 and 1907"). (Arg. C.M., Chap. VII).

176. It is now necessary to turn to the treatment in the Argentine Counter-Memorial of the specific issues and items of evidence relating to acts of jurisdiction. At the outset the Argentine Government presents the "juridical relevance" of acts of jurisdiction in the following style:

"... if the issue turns solely upon the provisions of the 1881 Treaty, it follows inexorably that unilateral acts of jurisdiction by Chile can only be relevant insofar as they evidence the common will of the Parties on the interpretation of those provisions"¹. (Arg. C.M. p. 397, para. 2).

¹ Emphasis in original.

177. The principle as stated thus far is unexceptionable. However, the Argentine Counter-Memorial interprets “the common will of the Parties” to mean something in the nature of formal synallagmatic transactions—and instances the Protocol of 1893. This is a perversion of the well understood concept of evidence of the subsequent conduct of the Parties in the interpretation of treaties. The Argentine Counter-Memorial continues:

“This is conceded by Chile and indeed illustrated by an apt citation from the *Argentine-Chile Frontier* case (cited *sub nomine* Palena case)” (Arg. C.M. p. 397, para. 2).

178. The quotation from the Report of the Tribunal in the *Palena* case which appears in the Chilean Memorial does not support the interpretation of the “conduct of the parties” contended for by the Argentine Government. The Tribunal, referring to the interpretation of a treaty, “where the process of interpretation may involve endeavouring to ascertain the comon will of those Parties”, says:

“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; cf. Ch. Mem., p. 127, para. 4).

This statement of the principle reflects the general view of the law—which is that the conduct of the parties means simply that, and that there is no requirement of a formal and explicit interaction of “wills”.

179. It follows that the Chilean Government repudiates the statement in the Argentine Counter-Memorial that “mere unilateral assertions or assumptions of title by Chile, without a corresponding reciprocity from Argentina, could only be relevant if Chile were seeking now to assert a new title resulting from some kind of ‘occupation’, and different from the title ‘determined definitively’ by the Treaty in 1881” (Arg. C.M. p. 397-398, para. 2).

(iii) *Omissions in the Argentine Counter-Memorial*

180. A major feature of Chapter X of the Argentine Counter-Memorial is the omissions. Its primary object is to counter Chapter X of the Chilean Memorial and much reference is made thereto. Yet no reference is made to the material listed at pp. 172-174 (para. 196) of the Chilean Memorial. This consists of items published in the Chilean Official Gazette, from 1892 onwards, relating to Chilean activity in the disputed area. Para. 197 of the Chilean Memorial observes:

"The first of these decrees to occasion a protest was No. 2008 of 15 December 1914. Yet there had been at least twelve decrees in the preceding thirteen years referring to Picton, Nueva and Lennox and indicating quite clearly that these islands were being treated as Chilean territory. Yet none of them elicited any protest" (Ch. Mem. p. 174, para. 197).

181. The silence of the Argentine authorities in face of this evidence of open Chilean activity calls for explanation. None is forthcoming. Moreover, no explanation exists. A very high proportion of the material in the Chilean Official Gazette is in the form of Decrees. It is not open to the Argentine Government to deny knowledge of such activity. In the *Fisheries Case* (United Kingdom v. Norway), the Judgment of the International Court of Justice contains the following passage (I.C.J. Reports, 1951, pp. 138-139):

"The United Kingdom has argued that the Norwegian system of delimitation was not known to it and that the system [of baselines for the territorial sea] therefore lacked the notoriety essential to provide the basis of an historic title enforceable against it. The Court is unable to accept this view. As a coastal State on the North Sea, greatly interested in the fisheries in this area, as a maritime Power traditionally concerned with the law of the sea and concerned particularly to defend the freedom of the seas, the United Kingdom could not have been ignorant of the Decree of 1869 which had at once provoked a request for explanations by the French Government. Nor, knowing of it, could it have been under any misapprehension as to the significance of its terms, which clearly described it as constituting the application of a system. The same observation applies *a fortiori* to the Decree of 1889 . . ."

182. On the particular question of knowledge of *the existence of decrees* this passage has, it is submitted, considerable relevance to the present case. In the *Fisheries* case the precise issue was in fact knowledge of a special feature of Norwegian legislation namely, a certain *system* for drawing baselines. In the present case the issue (in the present context) is simply knowledge of the *existence* of the Chilean decrees. Moreover, whilst the *Fisheries* case involved a situation off another coast, the situation in the present case is one of close territorial proximity. Furthermore, according to the opinions expressed in the Argentine Memorial (pp. 293-313, 319-323), there was considerable official interest in the area of the Beagle Channel on the part of Argentina, particularly after 1891. For example, it is said

"The end of the nineteenth century saw a further increase in interest in the area on the part of both the Argentine central government and the Argentine navy" (Arg. Mem. p. 310, para. 39).

183. There is a further omission in the Argentine Government's reaction to Chapter X of the Chilean Memorial. In para. 5 thereof reference is made to a recital in an Argentinian draft of March 1915 (Ch. Ann. No. 92) which was an attempt specifically to exclude the relevance of "the acts of jurisdiction exercised in the disputed territory". The Chilean Memorial makes the following observation:

“What then does the episode suggest? It conveys a clear consciousness on the part of Argentina of the relevance of acts of jurisdiction in the area. It indicates too that, even in 1915, Argentina desired that such conduct should be excluded from the consideration of the Tribunal—presumably because Argentina could adduce no suitable acts of jurisdiction but feared that Chile could” (Ch. Mem. p. 128, para. 5).

The Argentine Counter-Memorial makes no reference to this paragraph of the Chilean Memorial.

(iv) *Chilean Presence in the Disputed Area, 1881-1904*

184. In Chapter X of the Argentine Counter-Memorial (p. 401, para. 8) there is to be found the proposition that in the period 1881 to 1904 Chile did “significantly less than Argentina”. The Chilean Government regards this as an entirely unreasonable assessment of the evidence available in Chapter X of the Chilean Memorial, together with the material in Volume III of the Memorial. The material and considerations set forth in the Argentine Counter-Memorial remain a long way from substantiating the brave assertions of paragraph 8.

185. In the first place the Argentine Counter-Memorial states (p. 401, para. 9) that in the Chilean Memorial (p. 132, para. 24) “it is expressly stated that Chile has nothing whatsoever to show between the years 1881-92”. This is not what is stated in the Chilean Memorial. It is there stated that no administrative changes immediately followed the 1881 Treaty and that “the southern islands were treated as falling within the Territory of Magallanes” (Ch. Mem. p. 132, para. 24). Certainly it is to be recognized that in the period 1881-1892 Chile did little that was specifically referable to the disputed area *but this does not assist Argentina unless the Argentine Government can show Argentine acts in this period which were specifically referable to the area, and more significant than the Chilean activity.*

(v) *Aspects of the Period 1881-1891*

186. It is the case that the Argentine Memorial provides no specific instance of Argentine activity in the area during the period 1881-1891. Reference may be made to Chapter IV of the Argentine Memorial and, in particular, to Chapter V, pp. 293-302 (paras. 16-28) under the rubric “Activity in Tierra del Fuego up to 1893: Argentina”.

The material there presented is of a very general and diffuse character. The Argentine Counter-Memorial also fails to provide any specific instances of Argentine activity in the period 1881-1891. However, four items are there offered as evidence of "Argentine activity" during this period (Arg. C.M. pp. 419-423, para. 25). These require evaluation.

187. The first item is a reference (Arg. C.M. pp. 419-420, para. 25) to the Bove expedition of 1881. The Bove reports have considerable bearing upon the understanding of the course of the Beagle Channel in the period subsequent to the 1881 Treaty and the Chilean Counter-Memorial has already commented on this (Ch. C.M. pp. 130-131, paras. 96-102). There is not the slightest evidence that the Bove expedition had any political or administrative purpose connected with the assertion or maintenance of sovereignty or the normal process of administration (see his two reports, Ch. Ann. No. 353, pp. 92 et sqq.).

188. Next there is a reference (Arg. C.M. pp. 420-421, para. 25) to a Resolution of 24 September 1883 passed by President Roca (Arg. C.M. Ann. No. 80, p. 265) ordering the establishment of maritime sub-prefectures on Isla de los Estados and Tierra del Fuego. The Resolution makes no reference whatsoever to Picton, Lennox and Nueva or to the southern islands.

189. The third item invoked (Arg. C.M. pp. 421-422, para. 25) is Argentine Law No. 1532, of 16 October 1884, concerning "Organization and Boundaries of National Territories" (Ch. Ann. No. 48, p. 150; incidentally, the provision quoted in the Argentine Counter-Memorial, as Article 6, is in fact Article 1, para. 6). The Argentine Counter-Memorial then refers to Decree No. 14356 of 27 June 1885, issued in pursuance of Law No. 1532, by which the Departments of Ushuaia, Buen Suceso and San Sebastián in the Territory of Tierra del Fuego were created. Then there is the unproven assertion:

"The islands in dispute are not mentioned by their name, but it is clear that they are assigned to the Department of Buen Suceso" (Arg. C.M. p. 422, para. 25).

190. By way of proof, so to speak, the Counter-Memorial refers to maps by Paz Soldán of 1888 and 1890 (Arg. C.M. Maps 21 and 26). These maps—the authorship of which is more than doubtful—make no reference to the Decree nor indeed to the administrative divisions created by the Decree. The maps are not official publications (cf. also Chapter IV below, para. 154; Ch. Plate 36; and "Supplementary Remarks, on Arg. C.M. Maps 21 and 26). Furthermore, it is arbitrary to take these two maps as typical of the cartography of the period 1881 to 1891.

191. The maps of the period are examined in Chapter IV, para. 24 (i)-(vi), 25-28, 31-35, 43-47 (i)-(ii), 53-60. For example, the maps of Paz Soldán may be contrasted with Chilean Plate 35 ("Some Remarks" . . . , p. 34). This map, like those of Paz Soldán, is not official. However, it postdates the Decree of 1885 and is based on "the most modern official data". Moreover, it is also stated to be based upon information supplied by the Argentine expert Dr. F. P. Moreno and by Lieut. Col. Manuel Olascoaga, Head of the Military Typographic Office. Another item is of relevance. Chilean Plate 36 is another map by Paz Soldán, compiled and published in 1887. The alignment on this map, only two years after the Decree, is to the north of Picton and Nueva.

192. The fourth item offered by the Counter-Memorial relating to the period 1881 to 1891 is the Argentine Law No. 1838 of 28 September 1886 granting a concession to Bridges of "land . . . in the Governorship of Tierra del Fuego on the Beagle Channel . . . Gable islands and the nearby islets may be comprised in this area" (Arg. C.M. pp. 422-423, para. 25). The item is set out in Ch. Doc. No. 1 (a). The text in fact shows very clearly that the grant is of *an area of eight square leagues*, "on Beagle Channel, located between 66° 49' and 67° 30' longitude West of Greenwich . . ." Thus it is impossible to believe that the grant extends to any large islands to the south. The reference to "Gable Island and the nearby islets" bears its obvious meaning. In other words this item is utterly irrelevant to the matter in hand. This irrelevance is clear in the text of the Argentine *Memorial* (p. 296, para. 19) where is to be found a fascinating account of the sheep farming at Harberton which resulted from Law No. 1838.

193. Elsewhere in the Counter-Memorial, the Argentine Government places reliance upon expeditions. Thus, it is said:

" . . . Argentina had performed important acts of sovereignty in the disputed zone in the same period. Mention must be made here to the expeditions of Bove (1881-82), Lasserre (1884) and the 'Almirante Brown' (1899-1900), during the course of all of which anchorages and landings on the disputed islands were made, as well as surveys of the whole area". (Arg. C.M. p. 283, para. 21; cf. p. 280, note 15).

There is only one point to add, with reference to the voyage of the "Almirante Brown".

As it is known, the report on that voyage was published by the Argentine Ministry for the Navy in 1912, a publication which soon reached the hands of Chilean officials. No reference is found in the report, as printed, to sovereignty matters, and only some incidental hydrographic references suggest that, as already observed by the Government of Chile, Commander Saenz Valiente believed that the waterway running to the north of

Picton and Nueva was "an arm" of the Beagle Channel (cf. Ch. C.M. pp. 127-128, paras. 81-84).

The original report, a copy of which was furnished by the Argentine Government, on request from the Agent for Chile,¹ contains two passages which are of some interest for this case:

a) one of them concerns an act of jurisdiction performed by the Government of Chile. The original report reads:

"Con el fin de afirmar la posición, según se cuenta por los pobladores vecinos, el Gobierno chileno envió el año 1896 uno de usu (sic) aviso—el Huemul—cargado de animales vacunos que debía desembarcar en Isla Nueva e Isla Picton".

"In order to affirm its position, it is said by the neighbouring settlers, **the Chilean Government sent, in the year 1896, one of its despatch-boats—the Huemul—loaded with cattle which she was to unload on Nueva Island and Picton Island**".

This passage was published in 1912 slightly changed, by deleting the sentence: "In order to affirm its position, it is said by the neighbouring settlers".

No indication of the deletion—or of the reason for it—is given by the printed report. Was it done because it would have shown that this act was performed openly, as a clear expression of Chilean sovereignty?

b) the second passage is somewhat more interesting. It reads:

En el contrato de arrendamiento que los senores Bridges firmaron con el Gobierno chileno queda a favor de los primeros el usufructo de las mencionadas haciendas y en consecuencia cuando se requiera la provisión de carne fresca, ya sea por los buques loberos o de tránsito, se toman, como he dicho, a tiro, los animales que se necesitan o en su defecto se provee de hacienda lanar, de la estancia que dichos Señores tienen al S.E. de la isla".

"In the lease contract signed between Messrs. Bridges and the Chilean Government, the usufruct of said livestock remains in favour of the former, and, therefore, should the provision of fresh meat be required, either by sealing vessels or ships in transit, the animals that may be necessary are, as I have said, either hunted down or else such meat is provided from the sheep on the farm that said gentlemen have on the S.E. of the island".

This passage, which confirms that the Argentine authorities were acquainted with the existence of the concession granted by the Government of Chile to the Bridges, was not included in the printed report.

There only remains one comment to be made: in the original report, there is not one word which might indicate that the Argentine Navy considered that the above mentioned

¹ The copy of the original report so furnished appeared to be incomplete, a fact which the Agent for Chile represented to the Argentine Agents by letter No. 203 dated 30 September 1974. The missing part of the original report, some 78 pages, has not yet been produced.

Chilean acts of jurisdiction had taken place on Argentine territory. It is obvious that, had it been believed that those acts involved a transgression of Argentine sovereignty, there would be some trace of it in the report.

194. The view of the Chilean Government is that, whilst a pattern of *naval visits* may be evidence of a consciousness of sovereignty and a consequential routine flow of administration, hydrographic surveys and explorations *prima facie* have no reference to questions of sovereignty. Sir Gerald Fitzmaurice has expressed views on this question as follows:

“In the *Minquiers* case,¹ both sides adduced as evidence official hydrographic surveys of the groups and their waters carried out by them; but the Court based no conclusion on these, and only referred to the matter in order to point out that a French naval survey of 1831 was offset by a previous British one in 1813-15. Generally speaking, the primary object of a hydrographic survey, even an official one, is not the assertion of sovereignty, but the charting of certain waters for marine and cartographical purposes”. (*British Year Book of International Law*, Vol. 32 (1955-56), p. 56).

The major principle applicable here is the absence of activity performed “à titre de souverain” and what is said of hydrographic surveys applies equally to expeditions, such as those of Bove and Lasserre. (For the relevant documents: Ch. Ann. Nos. 353, 354, 355). Inasmuch as the Lasserre expedition had an administrative purpose—the setting up of sub-prefectures—it had no connection whatever with Picton, Lennox and Nueva.

195. In general the account of the period 1881 to 1891 provided in Chapter X of the Argentine Counter-Memorial fails to remedy the deficiencies evident in the Argentine Memorial. The Court is respectfully asked to refer to the Chilean Counter-Memorial, p. 110, para. 16; p. 116, paras. 36 A-36 B; pp. 132-136, paras. 103-115, for an examination of these deficiencies.

(vi) *Chilean Activity, 1892-1904*

196. There is no doubt that in the years 1892 to, say, 1904, there was more settlement and economic activity in Tierra del Fuego and the southern islands and that this is reflected in an increased incidence of administrative activity by both Governments in their respective territories. The Argentine Counter-Memorial treats the years 1892 to 1904 as a phase of the evidence (Arg. C.M. p. 423, para. 26) and it is convenient to examine the evidence relating to those years.

¹ (Interpolated reference) I.C.J. Reports, 1953, p. 47. The issues relating to surveys are dealt with by the Court at pp. 70, 71.

197. There can be no doubt that in this important period the weight of evidence of acts of jurisdiction is in favour of Chile. It will be helpful to the Court if the salient features of the evidence are set out, if at this stage, only by way of summary and convenient reference:

(a) There has been an absence of Argentine activity in the islands, which have at all material times been under effective Chilean control.

(b) There has been a routine flow of Chilean administration of a character consistent with the nature of the islands and their population at various periods: (cf. Ch. Mem. pp. 130-132, para. 12-22).

(c) The islands of Picton, Navarino, Lennox and Nueva were visited by Governors and other officials in 1892 and 1893 (Ch. Mem. pp. 135-136, paras. 35-39).

(d) Visits by the Chilean Navy occurred in 1902 (Ch. Mem. pp. 136-137, paras. 40-43).

(e) In the period 1892 onwards there was a consistent pattern of administrative and judicial acts relating specifically to the islands of Picton, Nueva and Lennox: (cf. Ch. Mem. pp. 139-168, paras. 56-174).

(f) The public activity of Chile, evidenced in the Chilean Official Gazette, from 1892 onwards, evoked no protest from the Argentine Government (Ch. Mem. pp. 172-174, para. 194-198).

(g) The Reports of Argentine Governors of Tierra del Fuego in the period 1892 to 1898 provide evidence of the paucity of Argentine activity in the disputed area and also provide the clearest confirmation of Chilean activity in the area (cf. Ch. Mem. pp. 120-121, paras. 52-60).

(h) In 1895 Thomas Bridges applied to the Chilean authorities for title to 40 hectares of land in Picton Bay (Ch. Mem. pp. 143-144, paras. 71-77). When he made his application Bridges was an Argentinian national who possessed detailed local knowledge and had in 1893 already obtained a grant from the Argentine Government of land at Harberton, near Gable Island.

(i) The material purporting to concern "Argentine activity" set out in the Argentine Memorial and which relates to the period 1892 to 1904, is basically irrelevant to the question of sovereignty over Picton, Lennox and Nueva (cf. Ch. C.M. pp. 136-140, paras. 116-130).

(j) The preponderance of map evidence relating to 1892-1904 is in favour of Chile (cf. Chapter IV of the present Reply, paras. 35-38 and 75).

198. Chapter X of the Argentine Counter-Memorial (pp. 402-415, paras. 10-20) makes a somewhat peevish and feeble critique of the evidence of Chilean activity in the years 1892 to 1904. The fragments offered in this critique must now be examined.

199. In note 13 on p. 402 the Argentine Counter-Memorial quotes a statement by an applicant for a lease of Picton (Ch. Doc. No. 25, p. 38) to the effect that the island “has never been occupied by anybody”. This footnote is affixed to a statement in the Counter-Memorial concerning alleged Chilean inactivity: clearly the statement is a reference to grants to private individuals. The letter of Governor Señoret to which the applicant’s petition is annexed is clear evidence of a power of disposition on the part of the Chilean authorities.

200. Also in note 13 on p. 402 the Argentine Counter-Memorial quotes a Note from Governor Señoret to the Minister for Foreign Affairs, dated 14 May 1894 (Ch. Doc. No. 47, p. 79) in which he states: “This (southern) part of Tierra del Fuego is totally unknown . . .” This chopped fragment of the document looks impressive until the original document is read. It then becomes clear that Señoret is referring to a large zone, including Navarino (which is named), which is indisputably Chilean. There is, of course, a great difference between an absence of full exploration (he says “until it has been fully explored”) and a lack of sovereignty. Absence of exploration is not a defect of title: and this has been particularly so in Latin-American practice. Furthermore, Señoret in point of fact is saying that there is not yet enough known about the area *for the purpose of fixing the bases and conditions for land auctions*. Indeed, the document is redolent of sovereignty evidenced by the preparations in train for the grant of concessions. There is no doubt that at this time there was a lack of large scale maps and detailed land surveys—as opposed to *charts* of the area: see the “Romanche” survey map (Ch. Plate 33). But this state of affairs touched the whole region south of the Strait of Magellan.

201. At pp. 403-404 the Argentine Counter-Memorial states:

“It also appears from the Chilean Memorial itself that it was 1905 before any Chilean postal service was provided for Islas Picton and Nueva ‘which till then had had to use the postal service at Ushuaia’” (Arg. C.M. pp. 403-404, para. 10).

The reference here is to the Chilean Memorial, p. 149, para. 95 (and see also para. 96). This is a good example of running on to one’s own sword. The Argentine Counter-Memorial makes no challenge to the following aspects of this episode: (a) Argentina has at no time established a postal service *in Picton Island*; (b) persons resident in Picton and Nueva Islands in 1904 apply to the *Chilean authorities* (Ch. Doc. No. 121) for the creation of a Postal Agency on Picton; (c) Chile establishes a Postal Agency accordingly. The establishment of a postal administration is, it is submitted, very clear evidence of administration *as sovereign*. This is particularly the case when the decision on the matter is effected by a Decree of the President of the Republic, countersigned by the Minister of the Interior.

202. The Argentine Counter-Memorial (pp. 404-405, para. 11) makes much of the turns of phrase in the report of Governor Señoret of 1892 (Ch. Doc. No. 15, p. 27). This report has been the object of comment in the Chilean Memorial (p. 171, paras. 186-187). If the document is read as a piece, it will be found that the emphasis is *not the acquisition of a new sovereignty but the "enforcement" of an existing right of government.*

203. The Argentine Counter-Memorial points out that Señoret asked Santiago for "authorisation" to visit the "southern" islands. The reason for this is simple: he was not proposing merely "to visit" the islands but to do this "taking all the necessary help with me to build the houses and foundations of a new town of the future". Señoret's concept was one of colonization of existing Chilean lands. The notion of colonization by peopling "new" areas was common to both Chile and Argentina at this time. For example, Chile has a "Ministry of Foreign Affairs, Public Worship and Colonization". In any case, Señoret received authorisation (see Ch. Doc. No. 18). The Minister stated that the operation would be paid for by funds provided for use by the Colonization Service. In this context, the only reasonable inference is that the Chilean Government was colonizing *its own territory.*

204. At p. 406, within note 21, the Argentine Counter-Memorial quotes certain documents said to show "the lack of Chilean communications and the dependence upon Argentine facilities". The first two documents quoted are: a Note from J. Montt of the Chilean Navy to the Ministry of the Navy (Ch. Doc. No. 88), dated 18 December 1901; and a Report to the Director of the Navy (Ch. Doc. No. 132(a)), dated 19 June 1905. If the construction most favourable to the Argentine contention (the existence of problems of communication in the area) is conceded, these two documents contain the clearest possible assumption in their texts: that is, that Picton, Lennox and Nueva are Chilean. *If it had been otherwise,* the authors of the Reports would not have had the concern about communications pointed out by the Argentine Government. Furthermore, Picton, Lennox and Nueva are listed along with Navarino. The Report of 1901 (Ch. Doc. No. 88, p. 127) refers to "the southern colonies", which are listed as: "Allen Gardiner (Tekenika), Nueva Island, Lennox Island, Navarino Island, Picton Island, Yellow Island, Gable Island and others". Yellow Island is the largest island off the east coast of the Hardy Peninsula. Like Navarino, it has always been indisputably Chilean.

205. The other three items quoted in note 21 at p. 406 of the Argentine Counter-Memorial are of later date and carry the same general assumption of Chilean sovereignty. The first item (Ch. Doc. No. 207, p. 285) makes no relevant reference to Picton, Lennox and Nueva. The second (Ch. Doc. No. 259, p. 403) and third (Ch. Doc. No. 291) do, but

if read as whole items, both clearly assume the existence of Chilean sovereignty. Ch. Doc. No. 259, dated 15 April 1915, contains the passage (with specific reference to Lennox and Navarino):

“A patriotic duty, with no other interest than bringing to light facts which say little for our country, compels me to write to you on this matter. Mr. Minister, it is your duty to put an end to this anomalous situation, *so that these islands may be settled by Chilean people who will live in them, not occupied by foreigners even if these are living in Chile* (Ch. Doc. No. 259, p. 403).

206. The Argentine Counter-Memorial (pp. 407-415, paras. 13-20) tries to denigrate the very solid evidence concerning occupation leases and permits (Ch. Mem. pp. 139-166, paras. 56-163). This evidence relates specifically to Picton, Lennox and Nueva. In the first instance, the Argentine Government remarks (Arg. C.M. p. 408, para. 14) that the early leases of 1892-1895 were “mere paper transactions, made in Punta Arenas”. What this means is that in fact several of the contracts were not taken advantage of. The fact remains that the Chilean authorities were acting as territorial sovereign in granting the rights, arranging to hold auctions and so on. It is the exercise of sovereignty which is significant, not the accidents which might prevent the concession becoming operative.

207. The granting of rights to Thomas Bridges on Picton Island on 26 November 1896 (Ch. Doc. No. 71, p. 109) is an episode of considerable significance. It is therefore not surprising that the Argentine Counter-Memorial (pp. 408-410, paras. 15-16) uses artificial means to detract from the probative value of the concession to Bridges. If the texts of the documents (Ch. Doc. Nos. 61, 64, 67, 68, 69 and 71, pp. 99, 102, 105-7, and 109) are read it is clear that the whole episode involved the affirmation of sovereignty by the Chilean authorities in respect of Picton. Indeed, the opinion of Barros Arana dated 15 February 1896 is worth quoting in full:

“*Picton Island, like the others situated to the south of the Beagle Channel, unquestionably belongs to Chile by the Boundary Treaty with the Argentine Republic of 1881. Our right to this possession has not been placed in doubt, nor could be, in view of the clarity with which this pact was made. However, to date and according to my knowledge, our Government has not made any act of sovereignty in those islands. The concession which is now applied for will give us an opportunity so to do, and so long as the person in question allows it to be seen clearly that Chile holds the legal right of ownership of those archipelagoes, which the applicant recognises in making his petition. This is my own private opinion on this matter. You, with your better judgment, will decide what is to be done*” (Ch. Doc. No. 67, p. 105).

208. It will be readily apparent that Barros Arana is saying that the concession will provide evidence of a *pre-existing* state of affairs, a practice in accordance with the Treaty of 1881: in other words the concession would be of evidentiary value *but would not be*

constitutive of sovereignty. Moreover, the actual documents do not support the suggestions that Governor Señoret *sought* a lessee and *offered* a lease to Bridges. The commentary in the Argentine Counter-Memorial (at p. 409, para. 15) refers to the alleged “activist” and “expansionist” policy of Governor Señoret. If this deployment of adjectives refers to anything at all factual, it could be a reference to the Chilean policy of colonization of *Chilean territory*. In Patagonia and the whole southern region the concept of colonization was well understood and it involved the settlement of existing national territory.

209. At pp. 411-415 (paras. 17-20) the Argentine Counter-Memorial sets forth an array of nagging items alleged to involve the deficiencies of Chilean administration in Picton, Lennox and Nueva in the period 1892 to 1905. This focus upon detail cannot avert attention from two important features of the very material referred to in the Argentine pleading. First, the episodes all point unequivocally to a Chilean administration—its character, the practical problems which existed and so on—but to an *existing* responsibility and *the mode of discharge* of that administrative responsibility.

210. Secondly, none of the items suggests that Argentina offered any level of administration whatsoever in Picton, Lennox and Nueva. Typical is the arrest of Lamas in Picton by Stuvén and his escape (Arg. C.M. p. 411, para. 18; Ch. Doc. No. 116, p. 166) in 1904. The outcome early in 1905 was:

“It has not been possible to apprehend the culprit, Aniceto Lamas, as he has entered Argentine territory, where I believe he is at present; . . .” (Ch. Doc. No. 116, p. 166 at p. 171).

The whole episode only makes sense on the basis that Picton was Chilean.

(vii) *Argentine Activity, 1892-1904*

211. It is a striking fact that Chapter X of the Argentine Counter-Memorial fails to bring forward any *specific evidence* of Argentine administration in Picton, Nueva and Lennox in the period 1892 to 1904, a period described as “critical” (Arg. C.M. p. 401, paras. 7 and 8) by the Argentine Government. No attempt is made to remedy the deficiencies of the Argentine Memorial in respect to acts of jurisdiction in this period which have been examined in the Chilean Counter-Memorial (Cf. Ch. C.M. pp. 110-115, paras. 15-36B; pp. 135-142, paras. 114-138).

212. As the Chilean Government has pointed out above (paras. 199-210), the documents discussed in Chapter X of the Argentine Counter-Memorial firmly point to Chilean

administration and Chilean sovereignty in Picton, Lennox and Nueva. In order to suggest Argentine activity the Counter-Memorial relies upon weak impression-creating devices.

213. First, there is an insistence upon “the dependence of the disputed areas upon Ushuaia” (for example, Arg. C.M. pp. 402-406, paras. 10-12). This line of argument involves an obvious *non sequitur*, since the economic role of Ushuaia in the area, such as it was, was not incompatible with Chilean sovereignty in various islands. What dependence *may* have existed would exist also for indisputably Chilean islands such as Hoste, Navarino and Yellow Island. When key issues, close to the question of sovereignty, came up—such as the maintenance of order, the creation of a postal agency or the granting of a concession—proximity to Ushuaia made no difference whatsoever.

214. The second device is to complain (Arg. C.M. p. 415, para. 21) that the material in Volume III of the Chilean Memorial is not “compelling reading” and that the idea was to impress the Court by the sheer bulk of the material. The appropriate way in which to deal with the Chilean evidence would be to provide better or at least equally cogent evidence of Argentine activity. This the Argentine Counter-Memorial conspicuously fails to do.

215. The third device is to refer to the irrelevant circumstances of “continuous and peaceful Argentine use of internal and territorial waters in the disputed area” (Arg. C.M. pp. 425-428, paras. 28-32) and of the number of inhabitants in Picton, Nueva and Lennox *in 1971*—but not in 1892, or 1900, or 1904. It is worth remarking that to make this point the Argentine Government refers exclusively to a Chilean source (Ch. Doc. No. 320).

216. In all the persiflage of the Argentine Counter-Memorial it is necessary to keep close to the evidence as such. The four items offered as evidence of Argentine activity in the period 1881-1891 have been examined above (paras. 186-192). What specific instances relating to the years 1892 to 1904 does the Argentine Counter-Memorial produce? First, there is a reference to a grant of a concession to Julio Popper “that included the disputed area” (Arg. C.M., p. 423, para. 26). In point of fact, there is no reference to Picton, Lennox and Nueva in Popper’s application (Arg. C.M. Ann. No. 81). Nor does any specific reference to these islands appear in the authorisation granted on 28 January 1893 (Arg. C.M. Ann. No. 81). The authorisation refers to “the uninhabited islands and lands south of Tierra del Fuego in the Southern seas of the Atlantic Ocean”, and all that was granted was a licence to explore.

217. Secondly, there is a reference to the survey by the “Almirante Brown” (Arg. C.M., p. 423, para. 27). This episode has been examined in the Chilean Counter-Memorial,

pp. 127-128, paras. 81-84, and p. 138, para. 122. It is difficult to discern the relevance of the survey to the question of sovereignty over Picton, Nueva and Lennox. Surveys have no *prima facie* relevance to questions of sovereignty as a matter of principle (see paras. 193-194 above).

218. Thirdly, the Argentine Counter-Memorial refers (pp. 424-425, para. 27) to the terms of the Argentine Decree of 19 May 1904 (Ch. Ann. No. 368, p. 131). The terms of this Decree are fully examined in the Chilean Counter-Memorial, pp. 139-140, paras. 125-130. There it is pointed out that the Argentine geographer Latzina understood the phrasing "all the others situate in the Atlantic which are under the legal sovereignty of the Argentine Republic" as a reference to the Falkland Islands.

(viii) *The Position in the Period after 1904*

219. The consequence is that the Argentine Counter-Memorial has entirely failed to substantiate the allegations of Argentine activity in the period 1892 to 1904 with specific reference to the islands in dispute (see above, paras. 211-218). When the year 1904 is reached no more evidence is supplied. Thus there is no attempt to deal with the various items of evidence set forth by the Chilean Government concerning the years after 1904 (see the Chilean Memorial, Chapter X *passim*; and the Chilean Counter-Memorial, p. 142, paras. 135-138).

220. The Argentine Government is clearly aware that at least an excuse for this omission to deal with the period after 1904 must be forthcoming. It is to be found at pp. 400-401 (para. 7), p. 418 (para. 23) and p. 419 (para. 25) of the Counter-Memorial. The excuse is quite simply that 1904 was the date "when the dispute first came into the open" and therefore evidence of events later than that would be inadmissible. This thesis is examined and refuted as erroneous in law in section F below.

(ix) *The Chilean Position Reaffirmed*

221. The Argentine Counter-Memorial contains the following passage:

"But it may be permissible to point out that even the *Chilean Memorial*, though qualifying Argentine activities as practically non-existent, is compelled, nevertheless, to admit Argentine administrative and other activity in respect of the disputed zone; which, however, it does, not under the rubric of 'Acts of Jurisdiction', but of 'Argentine efforts to revise the Boundary in the Beagle Channel Region'" (Arg. C.M. p. 418, para. 24).

This passage is a misrepresentation of the Chilean position. The admission alleged has never been made. No page reference is given but the general reference is clearly to the content of Chapter VIII of the Chilean Memorial. The Court will be aware that this Chapter of the Memorial is concerned with various matters unconnected with acts of administration in the disputed area. The Chilean position is clearly stated in the Memorial as follows:

“At all material times since the 1881 Treaty these islands, and the smaller islands and islets associated with them, have been treated as Chilean and in so far as the circumstances required have been under effective Chilean control. At no material time has Argentina ever manifested a presence in these islands”¹ (Ch. Mem. p. 129, para. 9).

The Chilean position remains unchanged.

222. The nearest the Argentine Counter-Memorial can get to evidence of actual administrative activity is set forth, with a becoming modesty, in a footnote as follows:—

“It will be noted that the events narrated in a dispatch from the British Consul in Punta Arenas to the Consul General in Valparaíso on 22.iii.1926, and which the *Chilean Memorial II*, reproduces as Annex 126, shows that the local Argentine authorities vigorously applied the juridical consequences of the Argentine claim to the Islands, in assimilating to an importation of goods into Argentine territory, the act of disembarking on these islands merchandise which was on board a Chilean vessel which had called at Ushuaia” (Arg. C.M., p. 364, Note 78).

This episode took place in 1926 and, for what it is worth, involves the clearest admission by conduct of *Chilean control and administration of the islands*. Thus the Argentine authorities at Ushuaia were making the same assumption, so far as possession of Picton, and Nueva is concerned, as the British Minister in Buenos Aires made when, in a Note of 5 March 1915 he wrote:

“The local press . . . has published details of a number of leases which have been made in accordance with the Chilean Decrees of October 7, 1914 and February 5, 1915 . . . It has at the same time been announced that the leases of the islands of Picton and Nueva have (1915) been renewed . . . The lessees are Chileans; their occupation is sheep growing *and no impediment has ever been put in their way by the Argentine Government*” (Ch. Ann. No. 87, p. 247).

¹ In 1958 Argentine naval forces landed for a short while on Snipe—and then withdrew (Ch. Mem. Chapter IX, p. 129, para. 9, note 1).

F. THE ADMISSIBILITY OF EVIDENCE: THE CRITICAL DATE
AND THE ROLE OF PROTEST

223. The sections of the Argentine Counter-Memorial devoted to the history of the dispute (Chapters VII and VIII) and to acts of jurisdiction (Chapter X) include scattered passages and references to the question of the critical date in the case and the place of protest. The Chilean Government intends to examine these questions in the light of the material in sections B and E of the present Chapter. The purpose of the examination will be to place the problems concerning the admissibility and the weight of the evidence in the present case in a proper perspective and to point out certain deficiencies in the Argentine Counter-Memorial.

224. The position of the Chilean Government on the issue of the critical date has been stated in its Memorial (pp. 129-130, paras. 10-11). In its view there is no particular date in the case which can be said to be a critical date in the sense that it has the effect of a guillotine, rendering evidence of subsequent conduct inadmissible *tout court*. The judgment in the *Minquiers and Ecrehos Case* (quoted Ch. Mem. p. 129, para. 10) and the Award of the Court of Arbitration in the *Palena case* (quoted Ch. C.M. p. 109, para. 10) provide strong indications that international tribunals are not prepared to employ the critical date in a rigid form and that the critical date is not necessarily the same for all purposes.

225. The "critical date" is an omnibus term which refers to the general problem of the weighing of evidence. In any case this will have a number of facets. Naturally, once both Parties are aware of the existence of a dispute, and also the nature and scope of the dispute, evidence of facts subsequent to the date at which the dispute "crystallises" *may* be of little weight if it is self-serving. However, even subsequent facts are admissible in three contexts at least:

226. (a) "in the 'special circumstances' of a given case, and more particularly where 'activity in regard to [the territory] had developed gradually long before the dispute as to sovereignty arose, and . . . has since continued without interruption and in a similar manner' ". (See Sir Gerald Fitzmaurice in the *British Year Book of International Law*, Vol. 32 (1955-56), p. 41, referring to the Judgment in the *Minquiers and Ecrehos Case*, I.C.J. Reports 1953, p. 47, at pp. 59-60). Thus the evidence of subsequent acts of the parties is admissible as evidence of what the situation *was* at the critical date, *provided that* the acts are not done with a view to improvement of the legal position (see Sir Gerald Fitzmaurice, *ibid.*, at pp. 23, 43).

227. (b) when the "subsequent facts" take the form of acquiescence and admissions against interest. Thus in the *Minquiers and Ecrehos Case*, I.C.J. Reports 1953, p. 47, at p. 72, the Judgment treated an episode of the period 1929-37 as implying a disclaimer of title by France in respect of the Minquiers: it is to be recalled that the Court in that case regarded 1888 as the date at which the dispute concerning the Minquiers crystallised.

228. (c) evidence of subsequent facts may be admissible to establish the consistency of the position of a particular government.

229. The Chilean position does not involve the selection of a particular date as "*the critical date*". The case has features dictated by its particular circumstances and the legal issues reflect the peculiarities of this dispute and no other. It follows that there are several "key" dates and significant phases of evidence: these include, but are not confined to, the following: (a) the negotiations of 1876-1881; (b) the conclusion of the 1881 Treaty; (c) the negotiations of 1904-1905; (d) the Argentine protest of 1915 and the Protocol of the same year; (e) the Compromiso of 1971. The incidence of the evidence itself and presentation in the respective pleadings indicate that certain periods of time and phases of evidence have a relatively greater importance than other periods of time and phases of evidence. In sum there are many and varied evidential items and issues and the matter is, in the respectful submission of the Chilean Government, best approached in terms of a wide judicial discretion to accept or reject evidence as appropriate and to give relevant evidence of whatever date the weight it merits according to the circumstances.

230. The Chilean position has been stated in clear terms in the preceding paragraph and, although the Chilean Government has dealt with the matter in another context (para. 171 above), it is at this point necessary to repudiate the attempt to misrepresent the Chilean position concerning the critical date which is made in the Argentine Counter-Memorial. At pp. 397-400 (paras. 2-7) the Argentine Counter-Memorial in several passages reports that Chile regards 1881 as "*the critical date*". For example, the phrase appears:

"Now if the critical date is, as Chile argues, the date of the Treaty in 1881 . . ." (Arg. C.M. p. 398, para. 4).

231. No reference is given to any passage in the Chilean Memorial. These assertions in the Argentine Counter-Memorial misrepresent the Chilean position in two ways. First, at no point does the Chilean Government express the opinion that 1881 is the critical date. Secondly, the Chilean position is not based upon the selection of a single date as "*the critical date*".

232. The Argentine approach to the problem of the critical date will now be examined. The Argentine position contains two distinct elements which co-exist at the price of a considerable amount of inconsistency.

233. In the Memorial (pp. 349-353, paras. 6-10) the Argentine Government states its conclusion concerning the problem of the critical date, namely that "the critical date is 1881, and any subsequent acts of either Party can make no difference to that position" (Arg. Mem. p. 353, para. 10). The Chilean Government cannot accept such an approach in terms of principle—leave aside the choice of date in the case. As a matter of law the proposition is far too dogmatic, and the Chilean view of the question of principle is set forth in the Counter-Memorial (pp. 108-109, paras. 7-11) and in this Chapter (above, paras. 224-229). Moreover, the Argentine position is so dogmatic and, in the context of the present case, artificial, that in practice it is not adhered to in either the Memorial or the Counter-Memorial of the Argentine Government. The Argentine Government accepts the relevance of subsequent practice in the interpretation of the Treaty of 1881 (Arg. Mem. p. 357, para. 14) and 138 pages of its Memorial are devoted to events subsequent to 1881 (Arg. Mem. pp. 203-340). Again, in the Argentine Counter-Memorial, on a conservative view, post-1881 facts are dealt with extensively and palpably in Chapters V (on the Interpretation of the 1881 Treaty), VI (on the 1893 Protocol), VII (on the so-called "history of the dispute", 1881-1907), VIII (on the so-called "history of the dispute", 1907-1971), and X (on acts of jurisdiction).

234. The second element in the Argentine position is to treat the years 1904 and 1905 as containing the critical date *in practice*. The tactical purpose of this choice of key date is the exclusion of as much evidence as possible relating to acts of jurisdiction and other types of subsequent practice of the parties as a source of interpretation of the 1881 Treaty.

235. In its Memorial the Argentine Government takes the position:

"It was during 1905 that the first official admissions of a dispute in the area were made by the two Governments" (Arg. Mem. p. 241, para. 56).

Elsewhere in the Memorial the formulation appears:

"...it was apparent, certainly by the early 1890's, that there were differences of interpretation of the Beagle Channel boundary. This period might perhaps be characterised as the time of the birth of the dispute;..." (Arg. Mem. pp. 351-352, para. 9).

However, in spite of these varied propositions in the Memorial, in its Counter-Memorial the Argentine Government is more insistent upon the significance of the years 1904 or 1905. The following formulations are to be found:

“In any event, Chile can show very little activity in the disputed islands, during the crucial period that ends in 1904” (Arg. C.M. p. 283, para. 21);

[Rubric] “The dispute comes into the open: the 1904-1905 negotiations” (p. 301, para. 43);

“...in fact the 1904-5 negotiations were truly important in the history of the dispute, because, from the juridical point of view, they mark the end of a crucial period” (p. 302, para. 44);

“The Chilean *Memorial* totally fails to reveal the historical importance of the process which began in 1881 and ended in 1904...” (p. 303, para. 45);

“*Conclusions.* (i) The 1904-5 negotiations are the first where the dispute comes into the open” (p. 328, para. 71);

“...in fact from the negotiations of 1904-5, the parties envisaged the possibility of having recourse to an arbitration...” (p. 357, para. 22);

“It is apparent from the history of the matter as set out in both Memorials...that the dispute first came into the open in 1904, when the parties first attempted to negotiate a means for its settlement. It follows that it is the years between the conclusion of the Treaty in 1881 and 1904 when the dispute came into the open, that alone matter for these so-called ‘acts of jurisdiction’; assuming, that is, that they are relevant at all” (p. 400, para. 7);

“The conclusion, therefore, to which the Chilean evidence inexorably points, is that Chile can show very little activity in respect of the disputed islands, during the crucial period from 1881 to 1904” (p. 417, para. 22).

236. Thus in spite of the assertion at certain stages that 1881 is *the* critical date, the Argentine Government clearly regards 1904 or 1905 as having equal and, for certain purposes of weighing evidence, greater significance, than 1881. Moreover, the Argentine position is not consistent. At some points the stance is the different one of insistence upon continuity, expressed in the following passages:

“For Argentina, the dispute which had been apparent since 1881 was dealt with at the highest level in 1904-5, 1907, 1915 and later on in successive negotiations up to our days. In actual fact, there is really a period of about 90 years which begins immediately after the 1881 Treaty, a period which is basically—barring some secondary nuances—continuous and homogeneous” (Arg. C.M. p. 333, para. 3).

“In the present case, a latent dispute has existed since the time the treaty was concluded; a dispute which became progressively clearer even before the boundary could be delimited by the Parties; in fact from the negotiations of 1904-5, the parties envisaged the possibility of having recourse to an arbitration; they have never ceased to be under the influence of the next attempt to conclude an agreement for arbitration” (Arg. C.M. pp. 357-358, para. 22).

237. The logic of these passages would favour a liberal reception of evidence over many years and stages of the dispute. However, the Argentine Counter-Memorial, in Chapter X, takes a contradictory position in the following passage:

"It is of course true that Chilean activity intensified gradually after the end of the period ended in 1905 and doubtless Chile would argue that the evidence could be relevant on the basis of the *dictum* in the *Minquiers* case; this, however, can hardly be so, for the situation after the dispute came into the open is not a continuation of the position before, and furthermore it would be difficult indeed to say that it was not action taken in order to improve Chile's position" (Arg. C.M. p. 418, para. 23).¹

238. There is no doubt that in the history of any dispute there comes a point at which the Parties are aware of the existence of a dispute and that consequently the reception or *weight* of evidence of facts subsequent to that date will be affected if the facts involve self-serving evidence. However, this rationale of the reception or weighing of evidence does not depend upon the existence of a "latent dispute" (cf. above) or of "differences and difficulties" (Arg. C.M. pp. 283-4, para. 22). It depends on three conditions for the existence of a mature dispute: (a) the knowledge of the Parties that a dispute over *legal rights* exists; (b) acceptance that the *dispute* requires formal *settlement* by negotiation or arbitration or adjudication, and is not a matter of clarification by enquiry and acknowledgement of error; (c) that the *precise scope* of the dispute is known to the Parties.

239. It is significant that the Note of 8 March 1915 (Ch. Ann. No. 88, p. 249) was the *first actual reservation of rights* by the Argentine Government. Whilst this event may not in itself necessarily be conclusive, it is a compelling piece of evidence in support of the conclusion that the Argentine Government was very late in forming the view that it had a legal claim to the islands. The Chilean Decree of 15 December 1914 (Ch. Ann. No. 85, p. 245) which provoked the first Argentine protest was, after all, part of a series of Decrees published in the Chilean Official Gazette over a period of years (cf. Ch. Mem., pp. 172-174, para. 196). Moreover, the Argentine reservation of 8 March 1915 only referred to the islands of Picton and Nueva.

240. The Argentine Counter-Memorial (pp. 356-365, paras. 21-28; p. 429, para. 34) is much concerned to minimise the legal significance of Argentine total failure to protest prior to 1915 and her epistolary lassitude generally prior to 1951 (cf. Ch. Mem., pp. 95-97, paras. 24-27; pp. 118-119, paras. 1-6; pp. 172-174, paras. 194-197; and Ch. C.M., pp. 110-116, paras. 15-36B; pp. 128-130, paras. 85-91). The Argentine Government offers certain general principles governing protests (Arg. C.M. pp. 356-360, paras. 21-23). The formulations are somewhat vague, but the following propositions may be extracted:

¹ Emphasis in original.

(a) "...one Party can only be blamed for not having protested against some act of the other Party which might, in the given circumstances, have the effect of altering their respective juridical positions: ..." (Arg. C.M. p. 358, para. 22);

(b) There is "a duty of reciprocal moderation tending to avoid anything likely to worsen the dispute" (p. 359, para. 23);

(c) Reservations of rights are probably unnecessary "whilst an arbitral procedure is in the process of being discussed by the Parties" (p. 360, para. 23), in respect of "an identifiable dispute" recognized as such by both Parties (p. 429, para. 34).

241. These propositions can hardly assist the Argentine Government in the present case. The issue is the interpretation of the Treaty of 1881 and the relevance of protests is necessarily enmeshed in the subsequent practice of the Parties as evidence of the proper interpretation of the key provisions of the Treaty. The view of the Argentine Government (see above, paras. 235, 236) is that the dispute has been "apparent" or "latent" since 1881 and, further, that the period 1881 to 1971 was a period which was "basically . . . continuous and homogeneous" (see above, para. 236). According to this view, an absence of protest at any time after 1881 in face of Chilean assertions or activity *prima facie* contrary to Argentine rights under the Treaty would alter the respective juridical positions. This would be so because Chilean assertions and activity, complemented by Argentine silence and inactivity, would constitute evidence of the subsequent practice of the Parties to the 1881 Treaty.

242. Argentine failure to make any reservation of rights prior to 1915 according to legal principle could, in the present case, only have adverse consequences. There was a source of legal rights in existence: the 1881 Treaty. There was an open and public assertion of the Chilean view from 1881 onwards and particularly after 1892: see above, paras. 67-143, 170-222. With the exception of the stay of some few hours of an Argentine platoon on Snipe Island in 1958, Argentina has not manifested any physical presence in the disputed islands. Argentina, from the period immediately subsequent to the conclusion of the Treaty, had either actual or presumptive knowledge of the circumstances calling for a protest. The Reports of the Governors to the Argentine Government in the years 1892-1894 (see above paras. 84-91) indicate that Argentina had knowledge of the situation in Picton and Nueva at that time. After 1892 Chilean activity increased and there was a routine flow of administration consistent with the circumstances of the region (see above, paras. 196-197, for a summary of the evidence). The Argentine Government could not have been ignorant of the Chilean Decrees of the period going back to 1892: see above, paras. 180-182.

243. The other two principles set forth in the Argentine Counter-Memorial (above, para. 240(b) and (c)) provide no assistance to the Argentine case. The second—the duty

to avoid worsening the dispute—can only apply when the dispute has crystallised. The third principle could not apply before 1915.

244. In conclusion, the Chilean Government wishes to state its position on a peculiarity apparent in the treatment of protest in the Argentine Counter-Memorial. The positions taken on the general principles concerning protest as applicable to the present dispute have the result that, logically speaking, virtually *at no time* was protest clearly relevant or appropriate. In the first place, it is said that “there was really nothing to protest about until the Chilean expansionist policy began gradually to get under way *in the years after 1892; . . .*” (Arg. C.M. p. 429, para. 34). At the same time, the Counter-Memorial takes the position:

“During a time when it was recognised by both States that there is an identifiable dispute between them, and when settlement of the dispute, whether by arbitration or otherwise, was in one form or another continually proposed by either or both of the Parties, it is difficult to see what purpose protest was supposed to serve” (Arg. C.M. p. 429, para. 34).

245. This is over-ingenuous. It is an attempt, artificial to a degree, to narrow down the relevance of protest in the case. Apart from its artificiality, the Argentine position has certain crippling defects. In the first place, *even on the Argentine view of the matter*, there was a gap between 1892 (the increase of Chilean activity) and 1915 when an identifiable dispute was referred to an agreed settlement procedure. During this period the weight of the evidence clearly favours Chile, and Argentina could only be at risk in failing to reserve her rights.

246. Secondly, the Argentine position assumes that protest is only called for when the dispute has reached maturity or is completely crystallised. This is a novel view of the law relating to protests. Moreover, it is particularly inapplicable to the circumstances of the present case. Especially after 1892 Chile was palpably in possession of Picton, Lennox and Nueva and the possession could only be by virtue of the 1881 Treaty and Chile’s understanding of her rights under the Treaty. Faced with this type of situation a State which conscientiously believes its rights to be in jeopardy can do one or more of three things: (a) formally reserve its position by means of protest; (b) propose resort to arbitration or other means of settlement suitable for resolution of disputes concerning legal rights; and (c) physically—though not necessarily using violence or provocative tactics—undertake acts of jurisdiction in the disputed region. In the years after 1892, and indeed at no time, has Argentina undertaken acts of jurisdiction in Picton, Lennox and Nueva (see above, paras. 211-222). Arbitration was not agreed upon until the Protocol of 1915 and this remained unratified by either Government.

247. In this situation the importance of protest, the formal reservation of rights, for Argentina would on grounds of law and common sense increase considerably in the period after 1892. Moreover, at least in principle, a State which merely protests over a period and undertakes no acts of administration by way of acting as sovereign must lose evidentially by reason of the inconsistency between its professions and its acts—or failure to perform certain acts.¹ In the present case, Argentina's claim did not emerge before 1915 and *never ceased to be a paper claim*. At all times the Argentine position has been at best built upon a belated articulation of a claim to islands openly and publicly administered by Chile, holding as sovereign in accordance with the 1881 Treaty.

G. THE ISLANDS WITHIN THE BEAGLE CHANNEL

248. Chapter IX of the Argentine Counter-Memorial (pp. 373-396) indulges in a virulent criticism of the position taken up by the Chilean Government in its Memorial (pp. 55-68) in regard to the islands situated within the Beagle Channel. Written in a sarcastic tone which, in more than one place, verges on insult, this chapter, of which clarity is not the chief quality, will call for only three brief observations on the part of the Chilean Government.

249. The first will be to note with satisfaction that the Argentine Government seems to admit that the "median line" which appears on Map No. 27 annexed to its Memorial is not satisfactory:

"...of course, it is necessary to determine the points between which the line is median, and the actual survey of the shores needs to be done with particular care in confined waters" (Arg. C.M. p. 389, para. 28).

The Argentine Government recognizes, as is seen, that the points chosen by the authors of Map No. 27 for the calculation of the median line are not immune from criticism and that a more careful determination of these points remains to be made. The Court will doubtless remember that, in its Counter-Memorial, the Chilean Government protested against the fact that the line appearing on Map No. 27 was median, not between Navarino and Tierra del Fuego, but between Navarino and certain islands (such as Bridges, Gable, Martillo, Yunque) considered as Argentine *a priori* and as a matter of principle (Ch. C.M. pp. 103-104, para. 74). The Chilean Government can therefore only welcome this implicit autocriticism of the opposing Party. In these circumstances, it is hard to under-

¹ This point is elaborated by Sir Gerald Fitzmaurice, *British Year Book of International Law*, Vol. 32 (1955-6), pp. 63-64, and, in particular, at p. 64, footnote 1.

stand why, a few pages further on, the Argentine Counter-Memorial should praise the merits of this Map No. 27 which, it says, "shows a line which indicates unequivocally the submission of Argentina" and thanks to which "the Argentine Government has avoided any uncertainty" (Arg. C.M. p. 395, para. 33).

250. The second observation relates to the criticism by the Argentine Counter-Memorial of the notion of "appurtenance" used by the Chilean Government (Arg. C.M. pp. 389-390, para. 29). The Chilean Government may perhaps be permitted to remind the Argentine Government of the part played by this concept in the theory of the continental shelf as stated in the Judgment of the International Court of Justice in the case concerning the *North Sea Continental Shelf* (I.C.J. Reports 1969, paras. 39, 42, 43, 46, 101) and also by numerous publicists (see, for example, Jennings, "The Limits of Continental Shelf Jurisdiction: Some Possible Implications of the North Sea Case Judgment", *International and Comparative Law Quarterly*, 1969, 819, at pp. 821, 823).

251. Lastly, one final remark to dispose of the irony with which the Argentine Government thought itself at liberty to treat what it terms "The Chilean Labyrinth: Interpretations 1 and 2" (Arg. C.M. p. 374). Has not the Argentine Government understood the Chilean position, or does it not wish to understand it? To obviate any unnecessary controversy, the Chilean Government cannot do better than recall the terms in which it has defined its position:

"...The intention of the two Governments as shown by relevant maps and the subsequent conduct of the Parties was to delimit the respective sovereignties of the two countries along a line following roughly the middle of the Channel, so as to leave to each of the coastal states the islands appurtenant to its own coast. For this reason Article III of the Treaty should be interpreted as giving to Argentina, together with the eastern section of Tierra del Fuego, the islets appurtenant to the northern shore of the Beagle Channel and to Chile, together with all the islands to the south of the Channel, the islets appurtenant to its southern shore.

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

...Should the Court of Arbitration be of the opinion that this interpretation of the Treaty cannot be sustained, then the only conceivable other interpretation would be that by which all the islands in the Channel belong to Chile. This alternative interpretation, which the Chilean Government now proposes to expound finds support both in the text of the Treaty itself and in the conduct of the Parties" (Ch. Mem. p. 65, paras. 23-24).

"...In the opinion of the Chilean Government, it should be repeated, with reference to the islands in the Beagle Channel, the intention of the Parties was to attribute to each of the coastal states the islands appurtenant to its respective shores: this intention is demonstrated unequivocally particularly by the maps and other documents pertaining to the negotiation

as well as by the subsequent conduct of the Parties, and most of all by the acts of sovereignty performed by each of them on the islands appurtenant to its own coast without calling forth reservations on the part of the other Government. Should the Court find that it cannot accept that interpretation, then the only possible interpretation is one which leaves to Chile all the islands within the Channel" (Ch. Mem. p. 68, para. 33).

Here there is neither "labyrinth", nor "operation of self-destruction" (Arg. C.M. p. 381, para. 15) nor is there any refusal by the Chilean Government to fulfil its obligations towards the Court (cf. Arg. C.M. p. 395, para. 33). It is not to the Chilean position as it is set forth, with all the clarity desirable, in the Chilean Memorial and Counter-Memorial (Ch. C.M. pp. 101-106, paras. 70-76) that the Argentine criticisms are directed, but to a position knowingly distorted for the purpose of being the better able to ridicule it.

H. GENERAL CONCLUSIONS

252. Without attempting to summarise all the points made in the foregoing chapter, it is necessary to formulate the general conclusions. They are as follows:—

253. (i) The Protocol of 1893 had no relation to any question of boundaries to the south of Tierra del Fuego. No basis for the contrary view exists either in the text of the Protocol or in the antecedents or in the subsequent practice of the Parties to the Protocol. The whole episode provides cogent evidence for the view that no dispute relating to the Beagle Channel boundary existed at that period.

254. (ii) The Argentine presentation of the so-called "history of the dispute" in Chapters VII and VIII of the Counter-Memorial is unacceptable. First, it is unacceptable in principle: that is to say, the Argentine pleading makes no attempt to relate its assertion of a dispute "which had been apparent since 1881" to the relevant legal criteria for the existence of a dispute. Secondly, such an assertion is unfounded in terms of the evidence in the case (see paras. 47-49, 63 sqq. of the present chapter). In particular no diplomatic exchanges concerning the boundary in the Beagle Channel occurred until 1904 and the first Argentine reservation of rights was in 1915. Thirdly, the position taken in the Argentine Counter-Memorial concerning the "history of the dispute"—a dispute said to be "apparent" since 1881—is substantially inconsistent with the picture drawn in the Argentine Memorial of a "tranquillity" which "was disturbed in 1892".

255. (iii) The particular reliance of the Argentine Government upon the arrangements for demarcation in Tierra del Fuego (1888 onwards) in its attempt to find evidence

of “differences and difficulties” completely lacks justification. The 1893 Protocol—the basis for the work of 1894-1895—was not concerned with the Beagle Channel boundary and there is no evidence whatsoever that the Joint Sub-commission was concerned with the islands south of the Beagle Channel or indeed with allocation of islands of any description.

256. (iv) Argentine attempts to reduce the evidential value of certain important material adverse to their position have been carefully refuted. In particular, the probative value of the British documents invoked by the Government of Chile in its Memorial, and the credit of Dr. Moreno as a witness, remain unimpaired. Whilst the value of this and other evidence is thus confirmed, the very nature of the Argentine assault on certain items of evidence and on the credit of Dr. Moreno indicates a lack of self-confidence in the strength of the Argentine case and the lack of support for Argentine positions in terms of hard evidence.

257. (v) The foregoing chapter has been predominantly concerned with an examination of the subsequent practice of the Parties to the 1881 Treaty. The subsequent practice of the Parties is to be evaluated in the light of the facts of undisturbed, public and routine flow of Chilean administration of Picton, Lennox and Nueva, by virtue of Chile’s rights under the 1881 Treaty, from the conclusion of the Treaty until the present day.

258. (vi) The Argentine Government fails to rebut the abundance of material set forth in the Chilean Memorial establishing a pattern of acts of jurisdiction in the disputed islands. No Argentine presence—no element of administration—has ever existed in Picton, Lennox and Nueva. The Argentine approach to this problem involves attempts to reduce the weight of evidence of Chilean administration rather than presentation of rebutting evidence of a positive kind. Thus allegations are made of the difficulties and deficiencies of Chilean administration—allegations which involve an admission of Chilean sovereignty since, otherwise, no issues concerning difficulties or deficiencies could arise.

259. (vii) One striking aspect of the subsequent practice of the Parties is the absence of any reservation of rights—concerning any of the islands in dispute—by Argentina until 1915. In any case, this reservation only related to Picton and Nueva. This evidence of Argentine acquiescence, this long absence of protest, is of particular significance in view of the fact that Chile was throughout in peaceful and open possession of the islands, holding as sovereign, by virtue of the 1881 Treaty. The Chilean Government

would at this point recall the Argentine thesis of a dispute "apparent since 1881". If it were the case—which the Chilean Government denies—that a dispute concerning the boundary had existed long before the Argentine protest of 1915, then the adverse effects of Argentine silence would be greatly increased.

CHAPTER IV

ISSUES RELATING TO THE CARTOGRAPHY

A. INTRODUCTION

1. This chapter is devoted to the various aspects of the cartography in the present dispute. The Chilean Government has considered it necessary to elaborate upon certain matters considered already in the previous pleadings; and, further, to give a critical analysis of the cartographical material presented—much of it for the first time—in the Argentine Counter-Memorial. The present Chapter consists of sections concerned with: the importance of maps in the present dispute; the Argentine challenge to particular items of cartography; principles concerning map evidence; heads of admissibility relevant to the present dispute; protests and maps; the boundary between the Atlantic and Pacific Oceans; the weight of map evidence—the general concordance of the official maps; cartographic novelty of 1888-1894—the opinions of Pelliza, Latzina, Paz Soldán and Hoskold; the collection of anomalous lines trending southwards; and general conclusions concerning the map evidence.

Whilst the Chilean Government presents its general conclusions on the issues concerning cartography in this Chapter, cartographical items are also considered where appropriate elsewhere in the present Reply. Thus the maps of the negotiation are examined in the context of Chapter II and the maps related to the discovery are considered in Chapter V and “Appendix C”.¹ Lastly, specific points concerning the Argentine Atlas and the Third Chilean Atlas are dealt with in the “Supplementary Remarks . . .”.

B. THE IMPORTANCE OF MAPS IN THE PRESENT DISPUTE

2. The Chilean *Memorial*² contains a considerable number of passages in which reference is made to the relevance of particular maps as evidence. This persistent reference is backed up by an Atlas containing 125 Plates and a volume consisting of “Some Remarks

¹ With reference to the maps linked to the voyages of the Nodal brothers, the Nassau Fleet, Cook, see also “Supplementary Remarks . . .” on Ch. Plate 163 and 165.

² See Ch. Mem. pp. 4-6, paras. 17-29; pp. 14-17, paras. 21-31; pp. 27-29, paras. 25-28; pp. 29-30, paras. 32-33; pp. 30-31, para. 35; p. 39, para. 19; pp. 40-41, paras. 21-23; pp. 42-43, paras. 25-27(b); p. 46, para. 34; pp. 50-51, para. 10; pp. 51-52, paras. 13-14; pp. 59-63, paras. 11-19; p. 65, para. 23; pp. 69-70, paras. 2-3; p. 77, para. 22; pp. 83-84, para. 35; pp. 85-87, paras. 1-5; p. 89, para. 8; pp. 91-92, paras. 11-15; pp. 94-95, paras. 22-23; p. 118, para. 2; p. 119, para. 6.

concerning the Cartographical Evidence" ("Some Remarks . . ."). Further reference to map evidence is made where appropriate in the Chilean Counter-Memorial.¹ The *Counter-Memorial* is accompanied by a second Atlas (Plates 126-162) and a volume consisting of "Further Remarks concerning the Cartographical Evidence" ("Further Remarks . . ."). The present *Reply* is furnished with a Third Atlas (Plates 163-206) and a volume called "Supplementary Remarks concerning the Cartographical Evidence" ("Supplementary Remarks . . .").

3. The general character of the Chilean use of map evidence requires emphasis. The key to the Chilean presentation is of simple design. The charts and maps are not presented artificially as an autonomous and separate body of material. The multiplication of references in the previous paragraph to passages in the Chilean Memorial and Counter-Memorial demonstrates the Chilean use of map evidence in relation to the general body of evidence and in particular and various appropriate contexts. "Map evidence", or "the cartography", is not presented as a separate department either of the evidence or of the case. Evidence consisting of maps and charts is used quite naturally when it fits into the fabric of the evidence as a whole.²

4. It follows that the cartography is not regarded by the Chilean Government as a *deus ex machina*. The charts and maps as a genus of evidence cannot in this case be in any sense autonomously conclusive. The charts and maps each have their individual relevance and weight. In particular, the charts and maps support and corroborate the evidence of other kinds set forth very extensively and with great particularity in the Chilean Memorial. Nevertheless, the importance of cartography will naturally increase in relation to other evidence of sovereignty in respect of sparsely inhabited areas.

5. The Argentine attitude toward the charts and maps available has two elements. The first is a policy of neglect. Apart from sections of Chapter II of the Argentine Memorial, concerning the discovery and exploration of the Beagle Channel and the Admiralty Charts prior to 1881, there is but sparse reference to map evidence (Arg. Mem. pp. 108-111, paras. 85-88; pp. 219-226, paras. 24-31; pp. 234-235, paras. 44-45; p. 429, para. 55). Certainly Volume III of the Argentine Memorial takes the form of a

¹ See Ch. C.M. p. 25, para. 31; pp. 32-33, paras. 52-57; pp. 40-43, paras. 12-14; pp. 46-48, paras. 20-25; pp. 48-49, paras. 27-28; pp. 54-55, para. 39; pp. 60-62, para. 53; p. 75, para. 26; p. 78, para. 31; p. 85, para. 42; pp. 89-90, para. 50; pp. 92-93, para. 54; pp. 94-97, paras. 59-63; p. 111, para. 17; p. 116, para. 36B; pp. 117-118, paras. 38-43; pp. 123-125, paras. 65-73; p. 134, para. 110; p. 140, paras. 128-130; p. 142, para. 137.

² It has to be recalled that the "Compromiso" mentions specifically maps among the "documents" that the Parties may deliver in these proceedings ("Compromiso", Art. V).

collection of 27 charts and maps, of which two have been specially drawn for the present case. The lack of substance in this collection is the object of general comment in "Further Remarks . . .", pp. 3-4.

6. The second element of the Argentine attitude is one of ambivalence and inconsistency. Somewhat belatedly, the Argentine Counter-Memorial devotes a little over a hundred pages to the topic of cartography—nearly a fifth of the volume. Moreover, annexed to the Counter-Memorial is the Argentine Atlas, a compilation of 86 plates. This quantity of attention denotes Argentine acceptance of the importance of maps in the present dispute. At the same time, the chapter on cartography in the Argentine Counter-Memorial is furnished with an introduction which reveals a certain reluctance to accept the role of map evidence.

C. THE ARGENTINE CHALLENGE TO PARTICULAR ITEMS OF CARTOGRAPHY

7. In its Counter-Memorial (see, in particular, pp. 119-133, paras. 28-33; pp. 436-447, paras. 6-24) the Argentine Government mounts an attack upon specific items of cartographic evidence contained in the Chilean Atlas. This attack involves certain insinuations, and charges about the "accuracy" of the reproductions of maps in the Chilean Atlas, which are exemplified by the following passage:—

"The most striking example of retouching which amounts practically to modification is in *Plate 8* of the *Chilean Atlas*, which purports to reproduce a map sent by Sr. Barros Arana to his Chancellery as an annex to a note dated 10 July 1876" (Arg. C.M., pp. 437-438, para. 8).

8. The general tone of the Argentine Counter-Memorial has been the object of criticism by the Chilean Government in the Introduction (paras. 3-12) of the present Reply. The attack upon the "accuracy" of some of the Chilean Plates provides examples of the insinuations and allegations which have made it necessary for the Chilean Government to protest at the outset of its third pleading.

9. The tone of the Argentine comment upon the Chilean cartography is one thing. The accuracy of the insinuations is another. The Chilean Government has rebutted in careful detail the charges relating to specific maps. The value and significance of Ch. Plate 8 is considered in "Supplementary Remarks . . ." and in Chapter II (paras. 42-64). The criticisms of other Chilean Plates are also dealt with in the "Supplementary Remarks . . ."

10. The Chilean Government repudiates the Argentine insinuations of "modification" of map evidence. At the same time it is anxious to assist the Court so that the best possible use can be made of the cartography. Consequently the Chilean Government has undertaken a practical and constructive course of action.

In the first place a number of maps have been reproduced again on the basis of photography so that the Plates show the maps in their present condition: facsimiles are thus provided of the "Barros Arana map" of 1876 (Plate 8 originally; reproduced in the third Chilean Atlas as Plate 169), of the "Elizalde map" annexed to his Note of 30 March 1878 (Plate 9 originally; reproduced in the third Chilean Atlas as Plate 171), and of the "Irigoyen map" (Plate 21 originally; reproduced in the third Chilean Atlas as Plate 175).

Secondly, the principal cartographic items the authenticity of which has been challenged have been handed to the Registrar in order that the Court can examine them as it sees fit in the light of the charges and criticisms made in the Argentine Counter-Memorial. This course of action on the part of Chile results from the necessity of assisting the Court and a desire to act in a constructive and practical spirit.

Chile does not accept that the Argentine accusations have been made out, even on a *prima facie* basis.

The Argentine Government has failed to observe the principle that allegations of bad faith involving States require a high standard of proof.

D. PRINCIPLES CONCERNING MAP EVIDENCE

11. The Argentine Counter-Memorial chides those responsible for the Chilean Memorial for failing to provide more than what is described as "a somewhat meagre juridical apologia for an Atlas of 125 Plates" (Arg. C.M. p. 431, para. 1). This observation is then followed by some very general propositions concerning the place of maps in the determination of boundary disputes. It is pointed out that no map is annexed to the Treaty of 1881. This is obvious and not a matter of controversy. Next, a number of statements (pp. 432-435) are made, and quotations introduced, to the effect that it is only in instances "in which maps are made an integral part of the agreement and in which they describe the adopted line, or in those maps adopted as the basis of an agreement or designated as official maps, that maps may be said to assume the character of primary or original evidence" (Arg. C.M., p. 433, para. 2). It is asserted also that non-official maps not "formally associated" with the agreement between the Parties "must always be subordinate" (Arg. C.M., p. 432, para. 2).

12. This attempt to sketch the principles upon which map evidence may be received is to an extent misconceived and confused. It will not suffice for the Chilean Government

to record its general reservation in the face of the views in the Argentine Counter-Memorial. It is necessary to take some pains to explain positively what the Chilean point of view is on the question of principle and thereby, in a spirit of diffidence, to provide the Court with some assistance in the matter.

13. The propositions concerning map evidence set forth in the Argentine Counter-Memorial involve three forms of error.

In the first place, on the technical plane it is inappropriate to state general principles about map evidence as a class. Map evidence is primarily a form of documentary evidence.¹ The provenance and precise relevance of maps varies greatly, as is the case with other documents. Consequently, general propositions, for example, that map evidence of certain types is "subordinate", are illogical. As in the case of documents in general, it is impossible to impose a general character of reliability or otherwise.

Secondly, it is incorrect in law to describe as "secondary" all maps which are neither an integral part of a boundary agreement, nor adopted as the basis of an agreement, nor designated as official maps. Everything depends on what is the fact in issue. For example, if it is the open character, the notoriety, of the exercise of sovereignty over territory, which is the fact in issue, then depiction of political facts upon maps and atlases in general circulation is primary evidence.

Thirdly, the Argentine Counter-Memorial makes an exception to its general position (set forth at pp. 432-33), an exception of such a character as to cast general doubt upon the soundness of that general position.

14. The exception is to the effect that maps "which are the result of skilled survey and exploration must in the nature of things be cogent and even conclusive evidence of geographical facts, notions and nomenclature: and such maps or charts obviously have a special importance where it is known that they were available to the persons who negotiated or drafted the provisions of the boundary treaty; and especially in those crucial interchanges between 1876 and 1881, and in the 1904 negotiations" (Arg. C.M., p. 434, para. 3).

15. This statement involves a major contradiction of the general Argentine position on maps and in substance supports the view that the relevance of maps, and their weight, does not depend entirely upon their being "designated as official" (aside from cases of incorporation in an agreement). Thus, for example, a privately produced map, relied

¹ See Rosenne, *The Law and Practice of the International Court*, 1965, p. 557; Simpson and Fox, *International Arbitration*, 1959, p. 210; Sandifer, *Evidence Before International Tribunals*, 1939, pp. 137, 156 sqq.; the United Kingdom Civil Evidence Act, 1968, section 10.

upon and adopted by a negotiator, becomes evidence of the views of that negotiator on particular issues. More particularly would this be the case where a map, of whatever provenance, is edited or superscribed by the hand of a negotiator. In other words the evidential significance of each cartographic item depends upon the particular circumstances.

16. The stilted and insufficient treatment of the principles of map evidence in the Argentine Counter-Memorial calls for a statement of the correct approach. As a preamble it may be said once more that there is no single governing principle concerning "map evidence" as a class, no more than there could be concerning "documentary evidence" as a class. Charts and maps, for the most part, play an entirely normal evidential role in the context of various familiar areas of legal principle.

E. THE HEADS OF ADMISSIBILITY RELEVANT TO THE PRESENT DISPUTE

(i) *Geographical facts, including toponymy*

17. The most obvious relevance of charts and maps is in establishing geographical facts, including toponymy. This view is shared by the Argentine Counter-Memorial (p. 434). On general principles of law, expert evidence is admissible and courts of arbitration have in the past utilised maps for this purpose: for example, in the *Island of Palmas* arbitration (R.I.A.A., Vol. II, 829 at pp. 852, 859-62) Judge Huber referred to the evidence of maps for the purpose of establishing the identity of the island in question and the toponymy at various times.

18. Thus it is natural for the Chilean Government to make substantial reference to the discovery and exploration of the Beagle Channel in its Memorial (pp. 9-15, paras. 7-25) and in "Some Remarks . . ." (pp. 2-11). The principal maps relating to the explorations of Fitzroy and King are set forth in the Chilean Atlas (Plates 1-4; "Some Remarks . . .", pp. 10-13). It is a matter of no surprise that in 1918, when the British Admiralty, at the request of the Foreign Office, studied the respective claims of the two Governments, the Memorandum of the Admiralty Hydrographer paid close attention to the explorations of Fitzroy and King (Ch. Mem. pp. 110-114, paras. 58-67; Ch. Ann. No. 122, p. 299).

(ii) *Geographical Knowledge at a Particular Period*

19. Another straightforward use of charts and maps, of open provenance and in general distribution at the material time, is to establish the state of geographical knowledge at a particular period. Adjudications concerning sovereignty over territory have commonly involved reference to map evidence in this connection.¹

20. It is pertinent to consider the evidence that certain charts were in common use in the years immediately preceding the conclusion of the 1881 Treaty and that these charts were available to the negotiators as a matter of probability.

21. The Chilean Atlas (Plate 105; see "Some Remarks . . ." pp. 73-74) contains a collection of sectors of four editions of British nautical Chart No. 1373, including the edition of 1877 (with corrections until 1884). The first edition of Chart No. 1373 appears as Plate 4 of the Chilean Atlas ("Some Remarks . . .", p. 13). Editions of Chart No. 1373 also appear in Maps in the Argentine Memorial, Vol. III. Therein Map 11 represents the first edition of 1841 (cf. Chilean Plate 4); and Map 12 the same chart "with corrections to 1869, additions to 1877 and minor changes to January 1879" (see "Further Remarks . . ." pp. 12-13). Map 13 in Volume III of the Argentine Memorial consists of another item based upon the chart of Parker King and Fitzroy with corrections by Captain Mayne (1867), published by the British Admiralty in 1875. This chart was corrected to July 1879 (cf. Arg. Mem. p. 107, para. 84).

22. According to the Argentine Memorial the negotiations of Article III of the 1881 Treaty took place "on the basis of 'chart 1373' subsequently revised and corrected in 1869 and 1877" (p. 107, para. 84 and pp. 386-7, para. 28). This way of expressing the significance of the British Admiralty charts current at the time of the negotiations is impermissible. The probability that these charts were *available* to statesmen of the time is hardly a matter of controversy: and, of course, no litigant could be expected to assume a burden of proving that certain charts were *not* used by the various negotiators at a particular time.

¹ Examples are to be found in the *Eastern Greenland Case*, P.C.I.J. Series A/B, No. 53, p. 52; the *Island of Palmas Arbitration*, R.I.A.A. II, pp. 859-60; and the *Honduras Borders Arbitration*, R.I.A.A. II, pp. 1325, 1357.

23. What is not established is that the allocation of territory involved in the 1881 Treaty and the antecedents bases of agreement was “on the basis” of the British Admiralty charts. On the contrary the actual representations of the political arrangements *which are known to exist*, and are presented in the Chilean Atlas, are not *based upon* maps deriving from the British Admiralty charts, or indeed *charts* of any description (pp. 32-34, paras. 51-57; p. 78, para. 31; and pp. 94-96, paras. 58-62).

24. The maps which are particularly relevant are those *used by the negotiators* to indicate the proposals leading up to the compromise embodied in the 1881 Treaty itself. None of these maps (Chilean Atlas, Plates 8, 9, 10, 16, 17, 21; and see also Ch. Plates 170, 172 and 174) is an Admiralty chart. The Barros Arana map (Ch. Plate No. 8) is based upon a small scale map by Seelstrang and Tourmente, published in Buenos Aires in 1875. The Elizalde map (Ch. Plate No. 9) is a manuscript map on a scale 1:1000,000. Barros Arana's sketch (Ch. Plate No. 10) is a manuscript sketch on a small scale. Then there is the “Prieto map” (Ch. Plates 13 to 19) which was used by the Chilean Government to inform the Chilean Congress and foreign governments of the contents of the settlement effected by the 1881 Treaty (see Ch. Plates 16 and 17). Lastly, there is the Irigoyen map (Ch. Plate No. 21) which, like the others, is on a small scale and is not based upon a chart but on the map by Seelstrang and Tourmente (see Ch. Plate 174; also the relevant passages of “Supplementary Remarks . . .”).

25. There is no doubt that at certain junctures certain of the personalities involved made *some* use of the Admiralty charts, which may have included one or more editions of a chart corrected by Captain Mayne (Arg. Mem. Map 13; see Ch. Mem. p. 27, para. 25 and footnote; telegram of Barros Arana of 5 July 1876 (Ch. Ann. No. 21, p. 42); Report of Barros Arana of 25 October 1890 (Ch. Ann. No. 58, p. 169); address of Irigoyen, 31 August-2 September 1881 (Ch. Ann. No. 42, p. 116 at pp. 135, 138)). The reference to charts in common use in order to understand geographical facts—principally the precise location of sounds in the latitudes of the Strait of Magellan (see Irigoyen's address referred to above)—has no necessary bearing upon the political allocation of well known island units. The “map of the Strait of Captain Mayne”, which seems to be Map 13 of Volume III of the Argentine Memorial, does not include the southern islands and stretches east only to approximately the meridian 68° 50' W.

26. In truth the question of the maps used by the negotiators relates to the issue of the intention of the Parties to the 1881 Treaty. It is now opportune to turn to the role of map evidence in the context of treaty interpretation.

(iii) *Map Evidence and Treaty Interpretation*

(a) *Maps as Part of the Preparatory Work*

27. It is common ground that the central question in the dispute is the intention of the parties to the 1881 Treaty. It is in this connection that the maps used by the negotiators *in terms of fact* and not merely as a matter of inference or probability achieve prominence. Maps used by the negotiators of the relevant agreement were taken into account by various members of the Arbitral Tribunal concerned with the *Alaska Boundary Case*, R.I.A.A., XV, 481 at pp. 494-5 (Lord Alverstone), 501 (Mr. Aylesworth), and 521-22, 530 (the United States members), in seeking to identify the channel called the Portland Channel.

28. The view of the Chilean Government on this issue is set forth very clearly in its Counter-Memorial in a passage which is important enough to justify setting it out once more:

“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 questions, 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 the Beagle Channel, and nothing more’ (Arg. Mem. pp. 382-383, paras. 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).¹ 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" (Ch. C.M. p. 78, para. 31).

29. In paragraphs 23-25 and 28 above, there is a review of the maps either known or probably available to the negotiators. However, certain maps are known to have been directly associated with the process of negotiation, the formulation of proposals and the working out of a compromise of existing territorial claims in the crucial negotiations of 1876-1881. The relevance of such evidence to the interpretation of the provisions of the Treaty of 1881 is undeniable. In conventional terms such cartographic items form a part of the preparatory work which may be resorted to for purposes of treaty interpretation.

30. The first of these maps integrated in the very process of negotiation is the map (Ch. Plate 8) enclosed with the despatch dated 10 July 1876 (Ch. Ann. No. 22, p. 43) sent by Sr. Barros Arana to the Chilean Foreign Minister. The despatch relates a part of the exchanges between the two Governments in 1876 reviewed in the Chilean Memorial (pp. 26-29, paras. 24-30), and further in this Reply, Chapter II, paras. 15 et seq. The terms of the despatch make the most explicit reference to the map enclosed, which was a map by Seelstrang and Tourmente published in Argentina in 1875. The despatch uses the map to illustrate the latest (1876) proposal by the Argentine Government. Barros Arana says:

"With this note I am sending you a copy of this map. In this you will find the dividing line proposed in 1872 drawn in as a thick dotted line. I have also drawn in on the same map, using red ink, the approximate line which is now proposed so that you can see at a glance the difference between the two proposals" (Ch. Annex No. 22, p. 43 at p. 45).

This line placed upon the map by Barros Arana corresponds with the latitudinal concept represented also on later maps contemporaneous with the 1881 settlement

¹ In this passage (Ch. C.M. p. 94, para. 59) the Chilean Counter-Memorial points out that "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. Mem. Map No. 16; Ch. Plate No. 8; Ch. Mem. p. 16, para. 27; Arg. Mem. p. 111, para. 88)". To this it may be added that Sr. Irigoyen knew not later than 1878 that Sr. Barros Arana had sent his Government a copy of the Seelstrang and Tourmente map of 1875 to illustrate his 1876 proposal (see the Despatch of Sr. Barros Arana dated 10 July 1876: Ch. Ann. No. 22, p. 43; also Irigoyen's Report to Montes de Oca, dated 18 July 1878 above mentioned: Chapter II, para. 65, p. 128, footnote 2).

(see Ch. Plate 11, line illustrating 1876 proposed compromise; Plate 12, Baron D'Avril's "sketch B" of 1881; and Ch. Plates Nos. 13-19, Chile's 1881 Authoritative Map).

31. In a Note of 30 March 1878 (Ch. Ann. No. 29, p. 65) Sr. Rufino de Elizalde, the Argentine Foreign Minister, set out proposals for a comprehensive compromise of territorial questions. These proposals and all the exchanges of 1878 are reviewed in the Chilean Memorial (pp. 29-31, paras. 31-35) and, further in this Reply, Chapter II, paras. 67-68. The alignment proposed was traced on a map (Ch. Plate 9) enclosed with the Note, "to clarify further the lines representing the bases for compromise and limitation" (Ch. Annex No. 29, p. 65). The map is a well presented and carefully made manuscript map, dated 30 March 1878 and signed by Elizalde (see Ch. Plate 171). The alignment along the Beagle Channel and eastwards into the Atlantic south of Staten Island corresponds clearly to the more or less rectilinear division represented by the Beagle Channel employed as a latitudinal concept.

32. The Elizalde proposal was contained in a Note sent to the Chilean negotiator, the Chilean Plenipotentiary in Buenos Aires, Sr. Barros Arana. Barros Arana retained the map sent by Elizalde for the archives of his mission. However, as an enclosure to his despatch of 13 April 1878 (Ch. Ann. No. 30, p. 66) to the Chilean Foreign minister he sent a sketch depicting the Elizalde proposal of 30 March 1878. This sketch is reproduced as Plate 10 of the Chilean Atlas. The sketch is a straightforward representation of the alignment as it appears on Elizalde's map annexed to his Note of 30 March 1878.

32. Lastly, there is the map (Ch. Plate 172) which was sent to the United States Secretary of State by the United States representative in Buenos Aires, Thomas O. Osborn, in 1881. In his despatch of 4 April 1881, Thomas O. Osborn related that in his last interview with Sr. Irigoyen the latter had pointed out on this map "the boundary line which his Government was willing to accept". The despatch then states: "see Map 1876 line and dots" (Ch. Annex No. 35, p. 76 at p. 77; cf. Ch. Mem. p. 33, para. 4). Sr Irigoyen was describing the concessions he was prepared to make to Chile, viz. *all the territories to the south of the Strait of Magellan*: this episode is examined further elsewhere in this Reply. (See above, Chapter II, para. 14).¹

(b) *Map Evidence and the Subsequent Practice of the Parties*

33. A very significant role in the interpretation of treaties is played by the subsequent practice of the parties. In the *British Year Book of International Law*, Vol. 33 (1957), pp. 224-5, Sir Gerald Fitzmaurice stated that:

¹ Upon the curious interpretation given by the Argentine Counter-Memorial to the sentence "all below the Straits" used by the United States Minister see Arg. C.M. p. 150, para. 2, note 4.

"Subsequent practice is . . . primarily *one* of the extraneous means . . . of interpreting a text not clear in itself; and, considered as such, it is chiefly its superior *reliability* as an indication of the real meaning and effect of a text that justifies its treatment as an independent major principle of interpretation". (Emphasis in the original).

In a Separate Opinion in the *Expenses* case, I.C.J. Reports, 1962 at p. 201, Sir Gerald expressed himself as follows:

"According to what has become known as the 'principle of subsequent practice', the interpretation in fact given to an international instrument by the parties to it, as a matter of settled practice, is good presumptive (and may in certain cases be virtually conclusive) evidence of what the correct legal interpretation is—a principle applied by the Court on several occasions".

34. In the *Alaska Boundary Case*, R.I.A.A., XV, 581 at pp. 532-4, the United States members (Elihu Root, Henry Cabot Lodge and George Turner), in their Opinion on the fifth question before the Arbitral Tribunal, made considerable use of official maps subsequent to the Treaty of 1825 in establishing their interpretation of certain provisions of that instrument.

35. The Chilean Government is thus following both a traditional and practical course in presenting map evidence as one aspect of the subsequent conduct of the parties to the 1881 Treaty. *Maps of an official provenance, either widely publicised or otherwise in use at an official level, confirming the Chilean view on the meaning of the Treaty include:*

(1) The map prepared by the Chilean Hydrographic Office and issued in 1881 (Ch. Mem. pp. 40-41, paras. 21-24; "Some Remarks . . .", pp. 18-22; Ch. Plates Nos. 13-19; Ch. C.M. p. 33, para. 57; p. 96, para. 62; pp. 123-124, paras. 66-69; Arg. Mem. Map 17; "Further Remarks . . .", pp. 17-20).

(2) The 1882 Argentine Official map (Ch. Plate No. 25; "Some Remarks . . .", pp. 27-28; Ch. Mem. p. 69, para. 2; Ch. C.M. p. 96, para. 62; p. 116, para. 36 B).

(3) Chilean Official School map, 1884 (Ch. Plate No. 128; "Further Remarks . . .", p. 37).

(4) "Lámina XXVII" from the *Atlas of the Republic of Argentina*, published in 1886 (Ch. Plate No. 34, "Some Remarks . . .", pp. 33-34; Ch. Mem. p. 62, para. 18; p. 69, para. 2; Ch. C.M. p. 96, para. 62; p. 116, para. 36 B; Arg. Mem. Map 18; "Further Remarks . . .", p. 21).

(5) Argentine map of 1888 (Ch. Plate No. 38; Arg. Mem. Map 20, "Some Remarks . . .", pp. 36-37; Ch. Mem. p. 62, para. 18; p. 69, para. 2; Ch. C.M. p. 96, para. 62; p. 116, para. 36 B; "Further Remarks . . .", p. 23. See also below paras. 101-105, on the official character of this map).

(6) Chilean Boundary Commission Map, attached to the Report of the Chilean Expert, dated 1890 (Ch. Plate No. 49; "Some Remarks . . .", p. 43; Ch. C.M. p. 49, para. 28; pp. 117-118, paras. 38-43).

(7) Argentine Census Map, published in 1897 (Ch. Plate No. 72; "Some Remarks . . .", p. 54; Ch. Mem. p. 86, para. 4; Ch. C.M. p. 116, para. 36 B).

(8) Map of Chile published in 1897 (Ch. Plate No. 74; "Some Remarks . . .", p. 54).

(9) Chilean Demarcation Sub-Commission map, *circa* 1897-98 (Ch. Plate No. 75; "Some Remarks . . .", p. 55; Ch. Mem. p. 77, para. 22; also Ch. Plate 187, and "Supplementary Remarks . . .").

(10) Argentine Hydrographic Department Chart, 1901 (Ch. Plate No. 131; "Further Remarks . . .", p. 40).

(11) Map approved by the Chilean Demarcation of Boundaries Office, published in 1904 (Ch. Plate No. 91; "Some Remarks . . .", p. 65).

(12) Argentine Ministry of Agriculture Map, 1904; (Ch. Plate No. 93; "Some Remarks . . .", p. 66; Ch. Mem. p. 86, para. 4; Ch. C.M. p. 116, para. 36 B; p. 140, para. 129).

(13) Chilean Map of 1904, revised and approved by the Director of the Office of Boundary Demarcation (Ch. Plate No. 94; "Some Remarks . . .", p. 66).

(14) Map published with approval of the Inspectorate for Lands and Colonisation of Chile, 1905 (Ch. Plate No. 97; "Some Remarks . . .", p. 68).

(15) Chilean Boundary Office Map, published in 1906 (Ch. Plate No. 99; "Some Remarks . . .", pp. 69-70).

(16) Maps published by the Chilean Land Measurement Office, 1911 (Ch. Plate No. 106; "Some Remarks . . .", p. 74).

(17) School Map of Chile, 1911 (Ch. Plate No. 107; "Some Remarks . . .", pp. 74-75).

(18) Chilean Land Concessions Map, 1911 (Ch. Plate No. 132; "Further Remarks . . .", p. 41).

(19) Map from the Argentine Official Year Book, 1912 (Ch. Plate No. 110; "Some Remarks . . .", p. 76; Ch. Mem. p. 94, para. 22; Ch. C.M. p. 116, para. 36 B; p. 140, para. 130).

(20) Map of Chilean Ministry for Development published in 1928 (Ch. Plate No. 122; "Some Remarks . . .", p. 81).

36. Of the twenty items listed in the previous paragraph (and counting Chilean Plates Nos. 13 to 19 as a unit) five maps relate to the period 1881-1889 (two of Chilean provenance; *three of Argentine provenance*); four maps relate to the decade 1890-1899 (three of Chilean provenance; *one of Argentine provenance*); six maps relate to the decade

1900-1909 (four of Chilean provenance; *two of Argentine provenance*); five maps relate to years within the span 1910-1928 (four of Chilean provenance; *one of Argentine provenance*).

It is submitted that there is a reasonable persistence and spread of official publications, both in terms of years and national provenance.

37. This collection of twenty *official maps* dating from 1881 to 1928 (including seven maps of Argentine provenance) which show Chile as sovereign over Picton, Lennox and Nueva is to be contrasted with the content of the 86 Plates annexed to the Argentine Counter-Memorial.

Among those 86 Plates there is none of Chilean provenance showing any of the islands as belonging to Argentina.

It is to be noted that the items therein published in the same 1881-1928 period, which *prima facie* have an official provenance, number only *thirteen*.¹ Among them *no map before 1889* shows the above mentioned islands as Argentine;² and before 1909 *only two* (Arg. C.M. Maps 23 and 31) *show those islands in accordance with the present Argentine contention*.³

38. Thus, of the thirteen maps identified as official and showing the three islands in dispute as Argentine in character, *only two items* antedate the diplomatic exchanges of 1904-1905 (on which see Ch. Mem. pp. 89-94, paras. 8-20; and the present Reply, Chapter III, paras. 103-111).

This factual recapitulation is not, as the Argentine Counter-Memorial suggests, an attempt to induce the jurist "to abdicate to the map-maker" (Arg. C.M. p. 432, para. 2). Its intention is to give the background of two questions which Argentina has yet to answer: if the Argentine Government always understood the allocation of territories effected in 1881 in the form it asserts in the present proceedings, how is it that *only two official maps of Argentina showed such a line before 1909? How is it possible that all the official maps published in both countries in the first eight years after the conclusion of the Treaty show the disputed islands as Chilean?*

39. Of the cartographic evidence exhibited by the Chilean Government, Plate 25 in the Chilean Atlas is of particular importance. This map unequivocally depicts the islands in dispute as under Chilean sovereignty. It is dated 1882 and was published as part of

¹ These thirteen maps are: Arg. C.M. Maps 19, 20, 23, 31, 42, 44, 57, 58, 61, 62, 68, 69, 70 and 72; it is to be noted that Maps 19 and 20 are from the same source.

² The "Pelizza Map" (Arg. C.M. Map 19), of course, does not qualify for inclusion because it does not show the three islands as Argentine in character. The particular case of this map is considered in detail below, paras. 117-139.

³ One of these two maps (the "Hoskold map", Arg. C.M. Map 31) might turn out not to be "official" after all. (See below, paras. 155-160; also "Supplementary Remarks . . ." with reference to that map).

an official publication of the Argentine Government in 1883 (see “Some Remarks . . .”, pp. 27-28). The inscription on the map states that it was “compiled on the basis of the most recent data”; and this, together with the coat of arms of the Argentine Republic above the inscription indicate that the map was specially prepared for the purpose and had an official provenance. Its official provenance in any case derives from its integration in a manual entitled “The Argentine Republic as a field for European Emigration” on its title page. The manual was prepared by Sr. Latzina, Director of the National Office of Statistics of Argentina. Moreover, Latzina was working under the direction of the Minister of the Interior: and in 1882 the Minister was Sr. Bernardo Irigoyen, one of the architects of the 1881 settlement (cf. Ch. Annexes Nos. 520, 521 and 522). The book and the map received extensive official distribution—which its purpose demanded—and was published in English, French, German, Italian and Spanish. The map itself has been found in the archives of a number of States. The Argentine Counter-Memorial (pp. 226-227) attempts to discount the official character of Chilean Plate 25: later in the present chapter (paras. 118-124) the Argentine Government’s assessment of the character of this map as “purely private” will be examined further (see also Chapter II, para. 160).

(c) *Contemporaneous practical interpretation by the Parties attested by other Governments*

40. “The interpretation placed upon a treaty provision at the time of the conclusion has been found to be important” in the opinion of Lord McNair, *The Law of Treaties*, 1961, p. 431. Lord McNair is in this passage referring to the contemporaneous practice of the contracting parties (see *ibid.*, pp. 424 sqq.). However, it is submitted that the attitude of third States has probative value, the quantum of which will be determined by the particular circumstances. When there is clear evidence of the view of responsible organs of third States, expressed contemporaneously, and in a disinterested context, such view is a form of reliable evidence.

41. The reliability of such evidence is enhanced considerably when the officials of the third State are known to have relied upon the contemporaneous reports and professions of one or more of the Contracting Parties. Two cartographic items provide this type of evidence in the present case.

42. The first of these is a section of a copy of British Admiralty Chart 786 reproduced in Plate 20 of the Chilean Atlas. This Chart has been submitted to the Court. On the back are the inscriptions: “Map to illustrate Boundary Treaty between Chile

and Argentine Republic"; and "As commd. by Señor Garcia Oct. 27. 1881 & procured from the Admiralty by the Librarian". This section of the Chart was placed in the volume of material in the Public Record Office in association with Lord Tenterden's minute relating his interview with Sr. Manuel R. Garcia, the Argentine Minister in London, on 27 October 1881. In the course of this interview Sr. Garcia presented to Lord Tenterden "a plan of the southern regions which includes the new boundary", see Sr. Garcia's report (Ch. Annex No. 46(a), p. 148a). The episode is examined in more detail in the Chilean Memorial, pp. 42-43, paras. 27-27(b); in "Some Remarks . . .", p. 23; and in the present Reply, Chapter II, paras. 139-140. This plan cannot now be found but Plate 20 in the Chilean Atlas is a graphical account of the understanding of the Treaty by responsible British officials at the time of the conclusion of the Treaty—which had been approved by the Argentine Congress on 22 October—on the basis of information presented by the Argentine Minister in London and immediately recorded in the British archives.

43. Map 10 included in the Atlas of the Argentine Counter-Memorial is a reproduction of a copy of British Admiralty Chart 789 contained in the Archives of the British Admiralty. The alignment shown on this chart by means of a pecked red line lacks all validity and is bizarre even by the standards of Argentine "oceanic" reasoning—since the straight line projected southwards is a meridian far to the west of Cape Horn, and the "division" involved would leave Navarino to Argentina. The *alignment* marked is heavily qualified and, indeed, virtually repudiated, by the *pencil notation* in the corner. This can be clearly discerned upon Ch. Plate 173. The notation refers to a circle drawn, also in pencil, round all the islands south of the Beagle Channel, which islands are wrongly coloured as Argentine. The notation states: "*It would appear from more recent inf. (F.O.) that this is Chilean*". This statement, which gives a provenance for its information (F.O. is the Foreign Office), makes clear that Arg. C.M. Map 10 supports the Chilean case. The source of the notation appears in the notation itself which reports: "Pencilled notation made by Hydr. in conversation with Sir E. Hertslet 28 Oct. 81". This item is thus annotated and dated the day following Lord Tenterden's meeting with the Argentine Minister in London and receipt of the plan presented by Sr. Garcia. The provenance of Chart 789 and the circumstances surrounding the annotated copy are examined further in Chapter II, para. 133, of this Reply and in the "Supplementary Remarks . . ." on Ch. Plate 173.

44. The cartographic items examined in the previous two paragraphs have considerable cogency, in particular because they have an identifiable association with the diplomatic process and the important, though routine, business of recording information for the use of the British Foreign Office. The recording was in both cases carried out by the Librarian of the Foreign Office, Sir E. Hertslet, in consultation with other responsible

officials. The cogency of such evidence stands in no need of support from legal principle. However, it is useful to recall, in another context, the concept in Common Law systems of “declarations [of deceased persons] in the course of duty” as *an exception* to the Rule excluding “hearsay” evidence. The standard English authority, *Cross on Evidence*, 4th ed., p. 469, reports the exception as follows:

“In criminal cases the oral or written statement of a deceased person made in pursuance of a duty to record or report his acts is admissible evidence of the truth of such contents of the statement as it was his duty to record or report, provided the record or report was made roughly contemporaneously with the doing of the act, and provided the declarant had no motive to misrepresent the facts”.¹

(iv) *Maps as Evidence of Acts of Jurisdiction*

45. The Court is respectfully reminded that the general approach of the Chilean Government to map evidence is to relate such evidence to the normal principles concerning sovereignty over territory. Consonant with this approach is the weighing of maps as part of the evidence of a pattern of acts of jurisdiction or administration (or the absence of these). Map evidence played such a role in the *Colombia-Venezuela Arbitration* (1891), British and Foreign State Papers, Vol. 83, p. 387 at p. 389; and in the Award in the *Rann of Kutch Case* (1968), Int. Legal Materials, Vol. 7 (1968), p. 633 at pp. 672-3.

46. It is clear that many of the items listed in para. 35 (above) are related to or form part of acts of jurisdiction and are therefore evidence of sovereignty *in confirmation of the Chilean understanding of the 1881 Treaty*. The evidence of the maps is simply a facet of the routine flow of Chilean administration in the area (see Ch. Mem., Chap. X and, in particular, p. 130, para. 12 sqq.).

(v) *Notoriety and Openness of Exercise of Sovereignty Evidenced by Maps*

47. It is a commonplace that an important proof of acts of sovereignty and *animus domini* is the openness and notoriety, the public character, of the exercise of sovereignty over territory. In the *Minquiers and Ecrehos Case* Judge Levi Carneiro (I.C.J. Reports, 1953, at p. 105), speaking of the evidence of maps, said:

“It may . . . constitute proof that the occupation or exercise of sovereignty was well known”.

¹ The same principle applies in civil cases, but in the United Kingdom the matter is now expressed in the Civil Evidence Act, 1968, section 4(1).

48. A number of maps, widely circulated, and especially Chile's 1881 Authoritative Map (Ch. Plates 13-19), gave notoriety to the Chilean understanding of the territorial settlement in the 1881 Treaty (Ch. Mem. pp. 40-41, paras. 21-23; pp. 42-43, paras. 25-27(b); pp. 61-63, paras. 15-19; p. 69, para. 2; pp. 85-87, paras. 1-5 (and, in particular, para. 4); pp. 94-95, para. 22; Ch. C.M. p. 25, para. 31; p. 33, paras. 56-57; pp. 47-48, paras. 24-25; pp. 95-96, para. 62; p. 111, para. 17; p. 116, para. 36B; pp. 123-5, paras. 65-73; "Some Remarks . . .", pp. 18-22.

49. The notoriety of the lines of the settlement illustrated with great clarity on Chile's 1881 Authoritative Map (Ch. Plates 13-19) requires emphasis. This map has an official provenance: all the slightly different versions agree in carrying an inscription to the effect that the map was published on the order of the Chilean Government. The map was published by the presses of the two most important Chilean newspapers of the time: "El Ferrocarril" (Ch. Plates 14 and 18) and "El Mercurio" (Ch. Plates 15 and 19). The "El Ferrocarril" map was published the day following exchange of ratifications of the Treaty. Other copies in circulation carry no reference to these newspapers, and were clearly distributed from official sources. Diplomatic representatives in Santiago used the map, whether put forth by "El Ferrocarril", or "El Mercurio", or independently of these presses, to inform their governments of the terms of the 1881 Treaty (see Ch. Plates 13, 14, 15 and 18). The map was also used by the Chilean Under-Secretary for Foreign Affairs to inform the British Minister in Santiago of the Treaty shortly after its ratification (see Ch. Plate 16). Moreover, the Chilean Hydrographic Office sent a copy of the map (Ch. Plate 17) in company with Hydrographic Notice No. 35, to the British Admiralty and the Hydrographic Offices of other powers, the United States included. A copy of the map was also received by the Royal Geographical Society in London and given appropriate publicity in that Society's publications (see Ch. Plate 19).

50. Other maps were in general circulation contemporaneously with Chile's 1881 Authoritative Map and also showing the allocation of territories with clarity. Chilean Plate 127 ("Further Remarks . . .", p. 36) reproduces an edition of the Seelstrang and Tourmente map of 1876 (Ch. Plate 8; "Some Remarks . . .", pp. 14-15). Chilean Plate 127, though dated 1876, is clearly an edition made to illustrate the 1881 settlement, since the territorial allocation is indicated by distinctive colouring. The islands in dispute are coloured blue, as Chilean territory. A revised edition of this same map appeared in 1884 (Ch. Plate 26; "Some Remarks . . .", pp. 28-29).

51. Another map in general circulation contemporaneously with the settlement is the map published by the Buenos Aires magazine "La Ilustración Argentina".¹ This map was published in No. 16 of the magazine, dated 10 November 1881 (Ch. Plate 175). It also existed in a special edition ("publicación particular") and in this form a copy was sent by Sr. Bernardo Irigoyen to the British Minister in Buenos Aires (see Ch. Plate 21; "Some Remarks . . ." pp. 24-25; and also Ch. Plate 175). The British Minister, Mr. Petre, forwarded the map to the Foreign Office as an Annex to his Note dated 20 December 1881 (Ch. Ann. No. 47, p. 149).

52. Finally, there is the Argentine official map of 1882 (Ch. Plate No. 25; "Some Remarks . . .", pp. 27-28). Its publication was specifically authorized and funded by Argentine Law No. 1205 (Ch. Annex No. 520). The map together with the manual on immigration were considered by the Argentine Government to be instruments of a major national policy for encouraging immigration. This is evidenced in two ways. First by the *Memorias* in which Señor Irigoyen, then Minister of Interior, explains the national importance of the project (Ch. Annexes Nos. 521 and 522). Secondly, by the numbers printed and distributed in four languages in a printing totalling 120,000 copies.

The significance of this 1882 official Argentine map as part of the subsequent practice of the Parties has been considered in para. 39 above (see also below paras. 123-124). However, it also provides evidence of the notoriety of the outcome of the 1881 boundary settlement. The map was necessarily given extensive international distribution, since the book and map were published in five languages and the object of the publication was to further official policy of fostering European emigration.

53. Quite apart from any question of the official character or otherwise of the various maps considered in paragraphs 48-52 above, they constitute significant and irrefutable evidence that the settlement of 1881 was widely known and publicised in both official and non-official media and that the effect of the settlement which had such notoriety and openness was to attribute the islands in dispute to Chile. It is as well to set out the basic elements in the publicity given by means of maps:

(a) By means of an official map, given official distribution: Chile's 1881 Authoritative Map (Ch. Plates Nos. 16 and 17);

(b) By means of an official map, given unofficial distribution: the "El Ferrocarril" and "El Mercurio" productions of Chile's 1881 Authoritative Map (Ch. Plates Nos. 13, 14, 15 and 18);

¹ Attempts to discredit the map from "La Ilustración Argentina", to be found in the Argentine Counter-Memorial (pp. 216-222, paras. 18-20), are refuted in Chapter II, paras. 141-147.

(c) By means of a privately published map which was an edition of a well-known map of Argentina, which was edited from time to time: the Seelstrang and Tourmente 1876 map, revised to illustrate the boundary settlement (Ch. Plate No. 127);

(d) By means of a small-scale map published in an illustrated magazine, "La Ilustración Argentina" (Ch. Plate 175);

(e) By means of a special edition ("publicación particular") of the map as published by "La Ilustración Argentina" (Ch. Plate No. 21);

(f) By means of the actions of representatives of foreign governments relying upon and sending to their principals copies of, these various maps above;

(g) By means of an Argentine official map given official distribution—the 1882 Map (Ch. Plate No. 25).

(vi) *Admissions and Acquiescence in the Form of Map Evidence*

54. In several adjudications maps have been accepted as admissions against interest and evidence of acquiescence when they were made public and given official approval: see the *Honduras Borders Award*, R.I.A.A., Vol. II, 1307 at pp. 1330-31, 1336, 1360-61; and the *Minquiers and Ecrehos Case*, I.C.J. Reports, 1953, p. 47 at pp. 66-67, 71. In the *Argentine-Chile Frontier Case Award*, H.M.S.O. 1966, pp. 66-68, arguments based upon estoppel or preclusion were held to fail on the evidence and were not ruled out as a matter of law.

55. In the *Minquiers* case the Court referred to a chart attached to a French Note of June 12, 1820. In the Note the Minquiers were stated to be "possédés par l'Angleterre". The chart indicated the Minquiers as being British. The Court (p. 71) observed:

"It is argued by the French Government that this admission cannot be invoked against it, as it was made in the course of negotiations which did not result in agreement. But it was not a proposal or concession made during negotiations, but a statement of facts transmitted to the Foreign Office by the French Ambassador, who did not express any reservation in respect thereof".

56. Several items representing Argentine official opinion contemporaneously with the conclusion of the 1881 Treaty, are presented in the Chilean case.

57. First, there is Admiralty Chart 786, reproduced as Chilean Plate 20. This has been considered in para. 42 above and is considered further (Chapter II, paras. 139-140 of this Reply). This chart has on the back the inscription "as communicated [commd.] by Señor Garcia Oct. 27, 1888 & procured from the Admiralty by the Librarian". The

representation of the 1881 settlement on this chart resulted from the information given to Lord Tenterden by Sr. Garcia, the Argentine Minister in London at an interview at the Foreign Office which was arranged *at the request of Sr. Garcia* (Arg. C.M. Ann. Nos. 46, 47, 48, 49, 51, pp. 169, 171, 173, 175, 179; Ch. Annex No. 46(a), p. 148a). The Admiralty Chart 786, with its contemporaneous recording of the information given by the Argentine Minister in London (three months after the signing of the Treaty) is cogent evidence of Argentine recognition that the 1881 Treaty allocated Picton, Lennox and Nueva to Chile.

58. Secondly, there is the variety of Argentine official maps published in the decades following the conclusion of the 1881 Treaty, which are chronicled in para. 35 above.¹ The general concordance of the official Argentine cartography is described in Section H below. For the present, it is necessary to point out that this map evidence is to be associated with the non-cartographic evidence of Argentine acquiescence and admissions against interest (Ch. C.M. p. 111, para. 17; p. 116, para. 36B).

(vii) *The Opinion of Authoritative Official Persons as a Form of Map Evidence*

59. Whilst the weight must vary according to the circumstances, most systems of law regard opinion evidence as admissible provided the evidence is that of a person with special skill or knowledge and relates to the sphere of the expertise concerned. (See Cross, *Evidence*, 4th ed. 1974, pp. 381-2; Wigmore, *A Treatise on the Anglo-American System of Evidence*, 3rd ed. 1940, VII. Chap. 67; Thayer, *A Preliminary Treatise on Evidence at the Common Law*, 1898, pp. 523-5).

60. It is the case that tribunals concerned with disputes as to sovereignty over territory have commonly accepted the evidence of maps with an official provenance as evidence of the views of governments and of political figures and officials with special knowledge as to political matters of fact.²

¹ For a discussion of their significance, see Ch. Mem. p. 5, para. 26; pp. 61-63, paras. 16-19; p. 65, para. 23; p. 69, paras. 2-3; p. 86, para. 4; p. 89, para. 8; p. 94, para. 22; Ch. C.M. pp. 95-96, para. 62; p. 111, para. 17; p. 116, para. 36B; pp. 123-4, paras. 65-69; p. 125, paras. 72-73; p. 140, paras. 128-130.

² Examples may be found in Judgments and Awards as follows: the *Boundary Case Between Honduras and Nicaragua*, R.I.A.A., Vol. XI, 101 at p. 114; the *Labrador Boundary Case*, 43 Times Law Reports 289 (1927), at pp. 298-99; the *Island of Palmas Case*, R.I.A.A., II, 829 at pp. 852-4, 859-60; the *Frontier Land Case*, I.C.J. Reports, 1959, p. 209 at p. 227 (reference to Belgian military staff maps); the *Temple Case*, I.C.J. Reports, 1962, p. 6 at pp. 27-29 (Thai official maps *apart from* the 'Annex I map'); and the *Rann of Kutch Case* (1968), International Legal Materials, Vol. VII (1968), p. 633 at pp. 683-4.

61. The weight of the evidence will be the greater when the statements reflected in the map evidence are made *ante litem motam*. In the *Labrador Boundary Case* (as cited above, at p. 299) the Judicial Committee of the Privy Council stated the following view:

“The maps here referred to, even when issued or accepted by departments of the Canadian Government, cannot be treated as admissions binding on that Government; for even if such an admission could be effectively made, the departments concerned are not shown to have had any authority to make it. But the fact that throughout a long series of years, and until the present dispute arose, all the maps issued in Canada either supported or were consistent with the claim now put forward by Newfoundland is of some value as showing the construction put upon the Orders in Council and statutes by persons of authority and by the general public in the Dominion”.

62. In the submission of the Chilean Government this category of admissible evidence would accommodate a proportion of the official maps listed above in paragraph 35, and would include *at the very least* those items published prior to the negotiations of 1904-5.

63. However, a number of other items are of considerable probative value as expressing the view of persons of the necessary knowledge and expertise with reference to political facts. One such class of map evidence takes the form of maps relied upon by the officials of third States, including maps annexed to the official reports of authoritative persons such as diplomatic representatives in Santiago and elsewhere.

64. Cartographic evidence of this type includes the following:

(1) The despatch and map of 2 July 1881 of the French Minister in Santiago, Baron d'Avril (Ch. Plate No. 12; Ch. Annexes Nos. 38(a) and (b), p. 99; “Some Remarks . . .”, pp. 17-18; Ch. Mem. p. 39, paras. 19-20; p. 61, para. 14; Ch. C.M. p. 60, para. 53; p. 95, para. 62).

65. (2) Copies of Chile's 1881 Authoritative Map sent to Governments by the diplomatic or consular representatives of France (Ch. Plate No. 13; Ch. Annex No. 43, p. 142a), Germany (Ch. Plate No. 14; Ch. Annex No. 44, p. 146), Switzerland (Ch. Plate No. 15; Ch. Annex No. 45, p. 147); Belgium (Ch. Plate No. 18; Ch. Annex No. 46(b), p. 148c), Italy (Ch. Annex No. 42(a), p. 142), Great Britain (Ch. Plate No. 16, Ch. Annex No. 46, p. 148). See further “Some Remarks . . .”, pp. 18-22; Ch. Mem. p. 40, paras. 21-22; p. 61, para. 15; Ch. C.M. p. 33, para. 57; pp. 60-61, para. 53; p. 95, para. 62; pp. 123-4, paras. 66-69. See also Ch. Plate No. 126 and “Further Remarks . . .”, p. 35.

(3) Map addressed to the Foreign Office on 20 December 1881 by George Petre, British Minister in Buenos Aires (Ch. Plate No. 21; Ch. Annex No. 47, p. 149; "Some Remarks . . .", pp. 24-25; Ch. Mem. p. 42, paras. 25-26; Ch. C.M. pp. 47-48, para. 25; p. 95, para. 62.

66. (4) The Admiralty Chart 786 (Ch. Plate No. 20; "Some Remarks . . .", p. 23) in which the opinion of the Admiralty was clearly accepted by the Foreign Office Librarian, Sir E. Herstlet, as a reliable record of the settlement to be included in his Archives.

67. (5) The pencilled notation on Chart 789 (Arg. C.M. Map 10; Ch. Plate 173) records the view of the Hydrographer of the British Admiralty: "It would appear from more recent information (F.O.) that *this is Chilean*". "This" refers to a circle which surrounds all the territories south of Isla Grande (see further "Supplementary Remarks . . ."; and Chapter II, para. 133, of this Reply).

68. (6) Of great probative value is the map sent by Sr. Irigoyen, the Minister involved in negotiating the 1881 Treaty, to the British Minister in Buenos Aires, Mr. Petre. This map is a special edition ("publicación particular") of the map published in "La Ilustración Argentina" on 10 November 1881. The copy sent to Mr. Petre by Sr. Irigoyen is reproduced as Ch. Plate No. 21 ("Some Remarks . . .", pp. 24-25). The map was annexed to the Note sent by the British Minister to the Foreign Office dated 20 December 1881 (Ch. Ann. No. 47). The episode is examined in the Chilean Memorial, p. 42, paras. 25-26, and Chapter II, paras. 144-147 of the present Reply. This map was sent to the British Minister by Irigoyen, who was then Foreign Minister, shortly after the exchange of ratifications of the Treaty and it shows the disputed islands as having been allocated to Chile. The Argentine Counter-Memorial mounts an attack upon Ch. Plate No. 21 which is repulsed elsewhere in this Reply (Chapter II, paras. 144-147). For the present, it is sufficient to make one point. The Argentine Counter-Memorial (pp. 218-219, para. 19) is concerned to establish that the map was a "private publication" and, further, that Sr. Irigoyen gave the map to Mr. Petre "on a *private basis*". *Even if it were the case* that the map was a "private publication", there can be no doubt that *the map represented the view of the Argentine Foreign Minister*, and thus *in terms of evidence* was the view of an authoritative official. Moreover, Sr. Irigoyen was not handing the item to a private collection, nor was he giving information on condition that it would go no further. He was giving information to the British Minister in Buenos Aires and he was giving the information unconditionally.

69. (7) The Argentine Official Map of 1882 (Ch. Plate No. 25; "Some Remarks . . .", pp. 27-28; above para. 39 and below, paras. 118-124) is so dated and appears

in a work by Sr. Francisco Latzina, Director of the National Office of Statistics of Argentina, published by the Argentine Government. The map was prepared for specific governmental purposes at a time when the Minister of the Interior was Sr. Bernardo Irigoyen. The map was specially compiled—as the inscription shows—the year after the conclusion of the Treaty and Sr. Irigoyen made special references to it in his *Memorias* to the Argentine Congress.

70. (8) The map annexed to the Report of the Hydrographer of the British Admiralty, 1918 (Ch. Plate No. 117; “Some Remarks . . .”, pp. 78-79; Ch. C.M. pp. 92-93, paras. 54-56).

(9) Index Chart, British Admiralty’s “South America Pilot” (Ch. Plate No. 138; “Further Remarks . . .”, p. 47).

(10) Index Chart, United States Hydrographic Office “Sailing Directions—South America” (Ch. Plate No. 138; “Further Remarks . . .”, p. 47).

(viii) *Maps as Evidence of Non-official Professional Opinion; Evidence of General Opinion or Repute*

71. The expert opinions of cartographers and other non-official persons may be admitted as evidence of political facts. Such evidence in the form of maps has been given a certain weight by tribunals concerned with disputes over sovereignty on a number of occasions.¹

72. In the *British Year Book of International Law*, Vol. 32 (1955-6), pp. 75-76, Sir Gerald Fitzmaurice expressed himself as follows:

“Both sides in the *Minquiers* case adduced evidence tending to show what was the view taken on the question of sovereignty by what might be called non-official but professional opinion—geographers, scientists, publishers of standard atlases, well-known authors, the evidence of maps, etc. Such considerations can never be conclusive. But they may furnish important evidence of general opinion or repute as to the existence of a certain state of fact, and *pro tanto*, therefore, may support the conclusion that that state of fact does actually exist”.

73. It follows that evidence of non-official professional opinion has a role to play, though such evidence is unlikely to be conclusive. However, it may happen that a

¹ See *Boundary Case Between Honduras and Nicaragua* (1906), R.I.A.A., Vol. XI, 101 at pp. 114-15; the *Labrador Boundary Case* (1927), Times Law Reports, Vol. 43, p. 289 at p. 298; *Island of Palmas Case*, R.I.A.A., II, 829 at pp. 852-3, 860-2.

proportion of professional experts, by reason of their intermittent employment for official commissions, may to a greater or lesser extent reflect official opinion on certain matters.

74. In the light of the considerations in the previous paragraphs, the wealth of non-official maps included in the Chilean Atlases can be given appropriate weight. Without producing a catalogue of the items (see "Some Remarks..."; Ch. Mem. pp. 69-70, paras. 2-3; p. 87, para. 5; p. 94, para. 22; and cf. also "Further Remarks...") certain items may be thought to have particular significance.

75. The items to be noted include the following: ¹

(1) The map compiled by Seelstrang and Tourmente in 1876, edited *circa* 1881 to show the 1881 territorial settlement (Ch. Plate No. 127; "Further Remarks...", p. 36); the same map, revised in 1884 (Ch. Plate No. 26; "Some Remarks...", pp. 28-29).

(2) Stieler's Hand-Atlas, Justus Perthes, Gotha; editions of 1881, 1889, 1907, 1912 (Ch. Plate No. 109; "Some Remarks...", pp. 75-76).

(3) Stanford's London Atlas, 1882 and 1889 (Ch. Plate No. 43; "Some Remarks...", p. 39).

(4) Map by the French geographer A. Pissis, printed between 1884 and 1885 (Ch. Plate No. 29; "Some Remarks...", p. 30).

(5) General Map of the Argentine Republic and Neighbouring Countries, 1886 (Ch. Plate No. 35; "Some Remarks...", p. 34; Ch. Mem. p. 69, para. 3).

This map is based upon the work of the explorer Dr. F. P. Moreno and Lieutenant-Colonel M. J. Olascoaga, Head of the Military Topographic Office of Argentina, two eminent experts. The alignment of the boundary on this map accords with the Chilean view as to the interpretation of the 1881 Treaty.

(6) Plate by Seelstrang, published in 1886 (Ch. Plate No. 34; "Some Remarks...", pp. 33-34; Arg. Mem. Map 18; "Further Remarks...", p. 21. Cf. Arg. Mem. Map 19; "Further Remarks...", p. 22).

(7) General Map of the Argentine Republic by Paz Soldán, 1887 (Ch. Plate No. 36; "Some Remarks...", pp. 34-35; and below, paras. 148-154).

(8) Geographical Atlas of the Argentine Republic, 1887, by Paz Soldán (Ch. Plate No. 37, , and . See "Some Remarks...", pp. 35-36; "Supplementary Remarks...", and below, paras. 148-154).

¹ Other individual maps and items from standard works are: Ch. Plates 22, 23, 24, 27, 28, 30, 31, 32, 39, 40, 41, 42, 44, 45, 46, 47, 50, 51, 52, 53, 56, 57, 58, 59, 60, 64, 65, 66, 67, 69, 70 (1897 ed.), 71, 73, 76, 77, 79, 80, 81, 82, 83, 85, 86, 87, 88, 89, 96, 98, 103, 104, 111, 112, 113, 115, 119, 120, 123, 135, 136, 137.

(9) *La Grande Encyclopédie*, 1888-90 (Ch. Plate No. 129; "Further Remarks . . .", p. 38).

(10) *Der Südliche Theil von Patagonien und Feuerland*, by Wagner and Debes, Leipzig 1890 (Ch. Plate 182 "Supplementary Remarks . . .").

(11) Map of Argentina by Dr. Brackebusch, 1891 (Ch. Plate No. 54; "Some Remarks . . .", pp. 45-46).

(12) *Commercial Map of South America* by J. G. Bartholomew, Edinburgh, 1894; 1st edition. Further editions: 1900, 1908, 1921, 1936 and 1940 (Ch. Plate 183; "Supplementary Remarks . . .").

(13) *Atlas of the Argentine Republic*, 1898 (Ch. Plate No. 78; "Some Remarks . . .", pp. 56-57).

(14) *The Holdich Map*, 1904 (Ch. Plate 92; "Some Remarks . . .", pp. 65-66; Ch. Mem. p. 87, para. 5).

(15) Map by the Argentine Engineer Norberto B. Cobos, 1911 (Ch. Plate No. 108; "Some Remarks . . .", p. 75).

(16) Map included in *Nuevo Diccionario Geográfico-Histórico de la República Argentina*. By Javier Marrazzo, 1921 (Ch. Plate 200; "Supplementary Remarks . . .").

(17) *New Universal Geographic Atlas*, Bouret, 1924 (Ch. Plate No. 121; "Some Remarks . . .", pp. 80-81).

76. The overall weight of the map evidence will be given a general appreciation in sections H, I and J of the present Chapter. The material set forth above is intended to assist the Tribunal in relating the considerable quantity of map evidence to the various legal categories and principles pertinent to the present dispute, and also to emphasize the perfectly natural diversity of forms the admissibility and relevance of map evidence may take.

F. PROTESTS AND MAPS

77. The Chilean Government has subjected the general position of the Argentine Counter-Memorial concerning the significance of protests to a critical analysis in Chapter III, section F. It is the case that the first protest relating to maps was the Chilean Note of 20 February 1931 (Ch. Annex No. 129, p. 314) regarding the publication of an official Argentine map showing Picton, Lennox and Nueva to be Argentine. The first Argentine protest to Chile regarding cartography is a Note of 24 November 1954 (Ch. Annex No. 186, p. 384).

78. In its Memorial the Argentine Government, in a brief reference to the question of protests in relation to maps, remarks:

“The fact that no protests or observations were made with regard to any of the maps is strong evidence that neither country attached any importance or relevance to any of these cartographic interpretations of the boundary line” (Arg. Mem. p. 226, para. 31).

This is a much too simple view of the probative value of the abundance and variety of cartographic items available in these proceedings.

In any case, the view of the Argentine Government, as evidenced by its pleadings, is that maps may have evidential significance whether they were protested or not: the vast proportion of items in the Argentine Atlas antedates the first Chilean protest of 1931.

79. It is evident that the attitude of the Parties at particular times toward maps is not by itself decisive of their relevance in a dispute, according to an objective and legal standard of appreciation.

The Argentine Government makes much of the answer given by the Chilean Undersecretary for Foreign Affairs to the British Minister in Santiago, in 1892, with reference to Popper's map (Arg. C.M. p. 436, note 11). Apparently, it has not occurred to the Argentine Government that this answer meant not only that the terms of the Treaty were unequivocal but, also, that for the Undersecretary, a private map was of no great significance in relation to the proper interpretation of the Treaty as evidenced by the official maps of both Parties.

For the fact is that from the conclusion of the 1881 Treaty until 1908 *the official maps* of Argentina were substantially concordant in showing Picton, Lennox and Nueva as under Chilean sovereignty: this concordance will be established in detail in sections H and I of the present Chapter. It follows that there was no official Argentine cartography of a kind calculated to call forth protest prior to 1908.

It is true that the British Minister in Santiago, when raising the question of “discrepancy of the maps” was specifically referring to an Argentine map of 1891; but that map was Popper's Map (Ch. Plate No. 55; “Some Remarks . . .”, pp. 46-47). This is clear since the British Minister refers to a Despatch dated 10 April 1892 from his colleague in Buenos Aires to the Foreign Office (See Ch. Annexes Nos. 61(b), p. 188(b) and 60(a), p. 187(a)). The map showed Picton and Nueva as Argentine. It had no official status, in any case; it did not purport to represent Argentine official opinion and, of course, its “boundary line” diverges considerably from the present Argentine claim.¹

¹ Cf. Arg. C.M., p. 468, para. 48 where the map is described as “a private map”.

80. It is the case that Chile made no protest prior to 1931 and then not again until 1942 (Ch. Annex No. 143, p. 331); whilst Argentina made no protest concerning maps as late as 1954.

There is, nevertheless, another point which needs to be emphasized.

Since Chile was in peaceful possession of Picton, Lennox and Nueva continuously after the conclusion of the 1881 Treaty, holding under that Treaty, there was no particular reason for a reservation of Chilean rights: after all, diplomatic exchanges relating to the boundary in the Beagle Channel region first took place only in 1904-5, and no Argentine protest of any kind occurred until 1915. On the other hand, *in the circumstances, especially after 1892, Argentina was at risk in failing to protest since Chile was in peaceful possession of the islands* (see Chapter III, para. 246), *holding by virtue of the 1881 Treaty*. As with Chilean acts of jurisdiction, so with official cartography, a passive policy on the part of Argentina could only be to her detriment, so far as her position in the present dispute is concerned.

G. THE BOUNDARY BETWEEN THE ATLANTIC AND PACIFIC OCEANS

81. Section B of Chapter XI of the Argentine Counter-Memorial (pp. 481-494) has the following title: "A striking example of cartographic chauvinism: the Chilean attempt to shift the boundary between the Atlantic and the Pacific Oceans". When the subject is developed, reference is made to a Chilean proposal at the Tenth Meeting of the IGGU in 1954 and reference is made to several charts which are described as "examples of Chilean cartographic chauvinism" (Arg. C.M. p. 486, para. 62). According to the Government of Argentina, all these elements "are but different guises of the same persistent purpose: to substract the South Atlantic Ocean from the Argentine jurisdiction, and to extend over it the Chilean jurisdiction (Arg. C.M. p. 490, para. 66).

82. It should be remembered that in its Memorial, the Government of Argentina had already referred to "Chilean innovations in ocean nomenclature" as a "stratagem". The accusation is now renewed and strengthened, as proven by the reference to "the remarkable attempt by Chile to take the mountain to Mahomet by shifting the universally accepted boundaries of the oceans in a desperate attempt to derive the desired result from the Boundary Treaty" (Arg. C.M. p. xiv). The Government of Chile had already dealt with this in its Counter-Memorial, by proving that the so-called Chilean "stratagem" had not even the merit of being original, for seven years before the Chilean proposal to the IGGU meeting, the Government of Argentina had formally proposed to the International Hydrographic Bureau (Monaco) that the limit of the Atlantic and the Pacific

should not be the meridian of Cape Horn, but the meridian of the Diego Ramirez Islands, a Chilean archipelago ("Further Remarks . . .", p. 79). Furthermore, it was proved that in 1952 Argentina rejected the meridian of Cape Horn as the line dividing the Atlantic and the Pacific (*ibid*).

83. The matter might have been left there, as the Government of Chile had already shown that the Argentine accusation had rebounded and, indeed, that it was Argentina which had tried "to take the mountain to Mahomet" . . . However, in view of the new accusations relating to the same matter, it is necessary to return to it. The Government of Chile does so with reluctance since the point lacks relevance to the controversy submitted to the Court.

84. First, as it has already been stated, the scientific identification of the Oceans is not a part of the case that Chile has submitted to the Court of Arbitration. Is it necessary to repeat that the Treaty of 1881 did not mention the Pacific Ocean? Is it necessary to recall that, as early as 1892, Señor Barros Arana, who was well aware of the negotiations which led to the Treaty, stated that it was beyond discussion that "all the islands situated south of Tierra del Fuego, whether east or west of Cape Horn's meridian, are the property of Chile" (Ch. Annex No. 61 (a), p. 188a)? The obvious consequence is that if a change of name of a sea, or an extension of the limits of a sea, could have any effect upon sovereignty over the Southern archipelagoes (which, of course, is not the case) the only country which could have an interest in a change would be Argentina. Now, as the Government of Chile has stated in its Counter-Memorial, the Government of Argentina was the first to suggest a displacement of the Atlantic Ocean. To borrow a sentence of the Argentine Counter-Memorial, was this "in a desperate attempt to derive the desired result from the Boundary Treaty"?

85. Whatever may be the case, it will be learned with some surprise that the first move was not made in Monaco's Hydrographic Bureau. Some years earlier, in 1947, *the technical services of Argentina were issuing maps where the Atlantic Sea was depicted reaching over one degree of longitude west of the Cape Horn meridian* (Ch. Plate 205). The whole island of Navarino could, by this simple means, be considered as an "Atlantic" island; the islands of Hoste, Wollaston, Evout, etc. . . . could be said to have acquired an "Atlantic frontage", and the Cape Horn frontier, "that heritage of the past", was left behind. With one stroke of the engraver's burin, the Argentine Government had erased "the only boundary line between the Atlantic and the Pacific Oceans, known to the whole world" (Arg. C.M. p. 483, note 81 at p. 484). The existence of these official Argentine maps, bearing the seal of its Military Geographical Institute was not mentioned by the

Argentine Counter-Memorial when referring to certain charts issued by the Chilean Navy in 1954 (Arg. C.M. p. 486, para. 62). On that account, the Government of Chile, though convinced that this matter is irrelevant to the case submitted to the Court, has thought it necessary to complete the cartographical background to these recent changes in nomenclature. Whatever one may think about them and about their scientific foundations, the fact remains that in all those changes, Argentina was a forerunner of Chile.

86. It is necessary to recall, by way of emphasis, the Chilean position as stated in the Counter-Memorial, namely, that:

“Neither charts nor any eventual changes in Oceanic toponymy can alter the effect of the 1881 Treaty. This Treaty...did not mention the Pacific Ocean and only referred to the Atlantic Ocean when allocating to Argentina *some of the islands*—not all of them—which ‘there may be on the Atlantic’ ” (“Further Remarks . . .”, p. 71).

The position thus accords with the stance taken by the Under-Secretary for Foreign Affairs of Chile in 1892 when he expressed the view, that, given the precise description of the possessions of the two countries in the Treaty, it was immaterial what geographers chose to publish on the subject. This opinion of the Chilean Under-Secretary appears to have been considered by Argentina as a “*trouvaille*”, for it is quoted twice in her Counter-Memorial (Arg. C.M. p. 436, note 11; p. 464, para. 44).

The paradox is that the Government of Argentina appears not to have realised that the Chilean Under-Secretary was expressing his view in reaction to matters brought to his attention by the British Government. As related above (para. 79), this views in fact referred to the changes which Julio Popper was introducing in Argentine cartography, for the purpose of showing as Argentine islands which the official maps of Chile and Argentina had consistently shown as Chilean in the years subsequent to the conclusion of the Treaty.¹

87. It is interesting to turn, at this juncture, to that part of Section B of Chapter XI of the Argentine Counter-Memorial entitled “iii) some significant antecedents” (Arg. C.M. pp. 490-494). There the Argentine Government refers to the “striking feature” which appears “in certain maps of Chilean origin”: the straight line drawn extending eastwards far beyond Cape San Pio.

“What is the idea behind this line?” wonders the Counter-Memorial, adding:

“In fact, this device makes no juridical sense at all, but it is very revealing as an attempt to instil an idea in the cartography: an image of a sort of ‘geopolitical’ oceanic boundary which

¹ The change did not pass unnoticed by the British Admiralty (see Ch. Plate 185 and “Supplementary Remarks . . .”).

would serve of itself to *separate* ¹ Argentina from the seas and lands (Antarctica and several islands) situated South of the Isla de los Estados and southeast end of the Isla Grande de Tierra del Fuego" (Arg. C.M. p. 491, para. 66).

88. As a general principle the Government of Chile has already recalled that, for Boggs, "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" (Ch. C.M. p. 103, note 1).

However, in respect of the negotiations of the Treaty which is to be interpreted, it is pertinent to recall also that the first map showing such a line was sent by Señor Barros Arana, Chilean Minister in Buenos Aires, to his Government, to illustrate graphically the compromise proposal made by the Argentine Foreign Minister, Señor Irigoyen, in July 1876 (Ch. Plate No. 8). The sense of the horizontal line of the map is clear: the *words* in which Irigoyen's proposal was couched did not mention a boundary line south of Tierra del Fuego which was to be divided by the Cape Espíritu Santo meridian line; but it is obvious that he intended that the Beagle Channel be the southernmost boundary between his country and Chile. Otherwise, he would not have allocated to Chile "all the other islands south of the Beagle Channel up to Cape Horn". Therefore, the red line drawn by Señor Barros Arana on the map attached to his 1876 dispatch, not only identified the Channel which both negotiators had in mind, but, also, it showed graphically the distribution of lands which Señor Irigoyen had proposed.

89. The same idea is found in the speech of Foreign Minister Alfonso to the House of Deputies of Chile in 1877 (Ch. Annex No. 392). When making available to the Chamber a map concerning Irigoyen's proposal of 1876, he stated that the red line on the map indicated

"...*los límites que habrían correspondido a las dos Repúblicas en el caso de haber sido aceptada aquella propuesta*".

"...*the limits* which would have applied to the two Republics had this proposal been accepted"² (Ch. Annex No. 392).

90. Contrary to what is stated in the Argentine Counter-Memorial (p. 120), such a form of showing the consequence of Irigoyen's proposal is in no sense "bizarre". The best evidence of this is that on the following occasion when the Beagle Channel line was mentioned—Señor Elizalde's proposal of 30 March 1878—the plan attached to that proposal represented the "límite de transacción" in the same manner (Ch. Plate No. 9,

¹ Emphasis in original.

² The Arg. C.M. p. 123, translates the words "límites" of the original Spanish as "boundaries", but this rendering misrepresents the words of Señor Alfonso. Had he meant a dividing line he would have used the word in the singular, as the line would be a common line.

again reproduced, now photographically, as Ch. Plate 171; and Ch. Ann. No. 29, p. 65). Of course, in Elizalde's map, there is another element of his definition of the "compromise boundary" which needs to be taken into account: he had defined the "límite" as running parallel to the latitude of 55° S "*until the Atlantic*". On the basis of his map, he would appear not to have conceived the Atlantic Ocean as washing the southern coast of Tierra del Fuego. Otherwise, his line—which was stated *to reach the Atlantic*—would not have been drawn so far eastwards.¹

But, as suggested above, it is more interesting to remark that the purported "cartographical device" which Chile would have introduced "with geopolitical intentions" was used by the Argentine Foreign Minister in 1878. No doubt, the impact of the accusation of the Argentine Government against Barros Arana's "bizarre red line" is somewhat weakened by this fact.

91. Perhaps in anticipation of such a conclusion, the authors of the Argentine Counter-Memorial looked for another "line of Chilean action" which appeared to them as a likely target. Thus the Government of Chile was accused of casting doubts upon the nomenclature of the Ocean stretching from Cape Horn to Isla de los Estados (Arg. C.M. pp. 491-494); and the Argentine Counter-Memorial examines the plan which Baron d'Avril sent to the French Government in 1878 to illustrate the dividing line intended to indicate the *modus vivendi* agreed by Chile and Argentina in December of that year (Ch. Ann. Nos. 32(a) and 32(b), p. 70; Ch. Plate No. 11). After mentioning the form in which Isla de los Estados is drawn on that map, the Argentine Counter-Memorial reads:

"... if the waters to the south of Isla de los Estados are Atlantic, how can it be explained that the southern coast of the Isla Grande de Tierra del Fuego is not bathed also by the Atlantic Ocean and therefore is placed under Argentine jurisdiction? ... This is the inexplicable—or intentional—contradiction involved in the map published by 'El Mercurio' and, in turn, by the *Chilean Memorial*" (Arg. C.M. p. 492, para. 66).

92. It is a pleasure to help the Government of Argentina to extricate itself from this difficulty, "a self-inflicted confusion" (Arg. C.M. p. 332, para. 1) which is the consequence of the premises of its reasoning.

The southern coast of the "Isla Grande" was not placed under Argentine jurisdiction in the 1878 sketch *precisely because it was considered to have been left under Chilean jurisdiction under the Fierro-Sarratea Treaty*. No one may dispute that the 1878 Treaty left under the jurisdiction of Chile "the coasts of the Strait of Magellan, *channels and adjacent islands*" (Ch. Ann. No. 31, p. 68 at p. 69). *Therefore, there is no question that*

¹ This might be considered to be additional evidence of the restricted sense which the words "costas del Atlántico" or "Atlántico" had at the time when the Treaty of 1881 was negotiated (see "Further Remarks ...", pp. 78-80).

both shores of the Beagle Channel were then left under the jurisdiction of Chile. Equally, all the islands which are adjacent to the Straits of Magellan were also included in the territories that were placed under Chilean jurisdiction. Of course, it is true that the Fierro-Sarratea Treaty left “the sea and coasts of the Atlantic Ocean and the adjacent islands” under the jurisdiction of Argentina and that would explain why Isla de los Estados was represented as under Argentine jurisdiction. But, at the same time, this sentence elucidates another point on which the Government of Chile has insisted all through the present proceedings: that the expression “sea and coasts of the Atlantic Ocean” did not include the area south of Tierra del Fuego.

93. With reference to this question Elizalde’s line has been mentioned above (para. 90). It may be recalled also that ten years after the 1881 Treaty, Popper referred to the sea between Staten Island, and Cape Horn, and extending “from the Beagle Channel to the Atlantic Ocean” as an “*Unnamed maritime extension*” to which he gave the name of MAR ARGENTINO (“Some Remarks . . .”, p. 46, also Ch. Plate No. 55). Also to be noted is Ch. Plate No. 125, an official Argentine Map with the same *mar argentino* “conception”, probably published towards the end of last century, according to the Argentine Counter-Memorial (p. 446, para. 24).

94. The remainder of Section B of Chapter XI of the Argentine Counter-Memorial does not appear to deserve further comments here. It is enough to recall that Chile does not need to shift oceans if only because the 1881 Treaty allocated the disputed islands to her without any reference to Oceans.

95. Whatever changes there may have occurred in the Oceanic nomenclature in modern charts or maps, Lennox, Picton, Nueva, and all the other islands from Staten Island to Cape Horn have always been shown as Chilean on all the Chilean maps published since 1881. The territorial allocation shown by the “authoritative map” issued in that year by the Government of Chile to illustrate the effect of the Treaty, has undergone no changes. Unfortunately for Argentina, the official cartography issued by the Government of Argentina, under the guidance of Señor Irigoyen in 1882, has passed through many changes which are illustrated by the consecutive maps which the Government of Argentina has successively to qualify as—or disqualify—as “official”. From the correct map (Ch. Plate 25) contained in the “official publication” of the Ministerio del Interior of Argentina—issued in 1883 when Señor Irigoyen was in charge of that portfolio—to the more recent Argentine maps, the gamut of boundary lines and, consequently, the different depictions of the 1881 territorial settlement, constitute the most effective rebuttal of the present Argentine claims.

H. THE WEIGHT OF MAP EVIDENCE: THE GENERAL CONCORDANCE OF THE OFFICIAL MAPS

(i) *The Atlas of the Argentine Counter-Memorial: the General Presentation*

96. Section C of Chapter XI of the Argentine Counter-Memorial (pp. 495-540) provides "an introduction" to the Argentine Atlas. In this part of its Reply the Government of Chile does not intend to deal individually with the Plates in the Argentine Atlas. For that purpose, the Court is respectfully referred to "Supplementary Remarks . . ." (the third volume of this Reply). For the present purpose, certain important major aspects of the Argentine charts and maps submitted with the Argentine Counter-Memorial, and of the cartography in general, will be examined.

97. The Argentine Atlas contains 86 plates. The first twelve correspond to maps published before the signature of the Treaty of 1881 and, in so far as they may be of some relevance to historical aspects of this case, are dealt with in Chapter IV of this Reply or in "Appendix C". Forty other plates relate to maps which were printed in the XXth Century; in other words, after the controversy had begun to "crystallize". Of the remaining plates, some correspond to successive issues of one general Atlas or, in cases, to printing made from the same original plates (cf. Arg. C.M. Maps 13 and 18; 30 and 35; 50 and 55). From this description it will be observed that once the contents of the Argentine Atlas are put in a correct chronological perspective, in the context of its relevance to the present case, its rather impressive bulk may be reduced to not unmanageable proportions. However, the comments which follow are not addressed to the bulk of the Atlas, but to other elements which need to be considered in relation to the controversy submitted to the Court.

98. The Government of Chile regrets that the technique employed in presenting the Plates of the Argentine Atlas is not helpful to a consideration of the cartographic evidence. For instance, in the Argentine Atlas, there are found some charts or maps which had already been reproduced in the Chilean Atlas and commented upon in the Chilean Memorial. By reproducing those plates again without reference to the first Chilean pleading, the impression is given that they constitute new elements in this case. This is not helpful to the study of the evidence. Such is the case of Ch. Plate No. 76 which, as stated in the Chilean Memorial, contains "four reproductions related to the expedition of Tierra del Fuego by Swedish explorer Otto Nordenskjöld". Special mention was made in the Chilean Memorial of the fact that in Nordenskjöld's map, published in the book "Fran

Eldslandet", the boundary line stopped near to the northeastern end of Navarino Island. ("Some Remarks . . .", p. 55). In view of this, it is interesting now to read the introduction of Plate 36 of the Argentine Atlas:

"*The Chilean Atlas, in Plate 76, presents copies of other maps as being 'connected with' the expedition led by Nordenskjöld; in those particular maps the boundary appears stretching along the Moat Channel . . .*" (Arg. C.M. p. 519).

Would the reader of this sentence realize that Plate 76 of the Chilean Atlas did include the same map from "Fran Eldslandet" which is copied in the Argentine Atlas?

99. Other examples of this "presentation" technique may be pointed out.

The Argentine Atlas contains a Map 45 and with reference to this the Argentine Counter-Memorial states that "Sr. Moreno apparently had no objections to authorizing the publication, under his name, of a later version of the Argentine map which had been published in 1902 . . ." (Arg. C.M., p. 524). Again, no reference is made to the fact that this map had been published in the Chilean Atlas (Ch. Plate No. 118) and commented upon in the Chilean Memorial ("Some Remarks . . .", p. 79). It is to be regretted that the Argentine Counter-Memorial did not mention that fact because, had it done so, it would have been easier to realize that *Sr. Moreno did have objections to authorizing the publication of this map under his name*. It was precisely in relation to this 1903 map, now reproduced by Argentina as Arg. C.M. Map 45, that he wrote that, though it bore his name, the line shown on it was drawn *contrary to his opinion* (Ch. Ann. No. 113, p. 286, at p. 287).

100. A further example is provided by Map 31 of the Argentine Counter-Memorial Atlas, which reproduces a map published under the name of Hoskold. The map had been reproduced as Ch. Plate No. 61 and commented upon ("Some Remarks . . .", pp. 48-49). Yet, when the Argentine map is introduced (Arg. C.M., p. 515) no reference is made to that fact and the date of the map is given as "1893", which is wrong.¹

All these cases appear to have increased the task of evaluating the cartographical evidence.

(ii) *The Argentine Counter-Memorial and the official maps*

101. In the Argentine Counter-Memorial, the question of the identification and probative value of the official maps, submitted as evidence by both Parties, is dealt with on the basis of changing criteria by the Argentine Government.

¹ Obviously the map must have been printed in 1894 or later because it contains a reference to a decree of 5 July 1894. (This date is also wrong in the Argentine Counter-Memorial).

The official maps exhibited by Chile are discredited on the grounds of their origin, their date, or their present condition. Often, some unfounded assertions and innuendoes have been added, so as to give a general picture of the Chilean cartographical evidence as being unreliable. In some cases, the allusion to the originals and the criticism of reproductions have been mixed and on more than one occasion the "manipulations" allegedly experienced by the originals through the years appear combined with attacks on the "not entirely faithful reproductions of the originals" or, even, on the colour of the ink being shown in a different shade (Arg. C.M., pp. 437-447 *passim*).

Some of these criticisms have already been dealt with; others are to be considered in other parts of this Reply. But it is of some interest to consider the position taken by the Government of Argentina in relation to the official Argentine maps which Chile has submitted as evidence.

102. It may be recalled that several of those maps, issued by the Government in Buenos Aires or by its offices and representatives abroad, had been submitted with the Chilean pleadings, to show the interpretation given to the Treaty by the Government of Argentina in the years immediately following its signing (Ch. Plates Nos. 25, 28, 38, 72, 93, 110 and 124); others of the same origin had been added to show the vagaries of the lines contained in them or different interpretations which contradicted previous maps or even the explicit terms of the Treaty. When endeavouring to explain those maps and the contradictory lines, the position of the Government of Argentina is far from being consistent. In some cases, maps which are evidently official are simply discarded on the basis, which is inconsistent with other positions adopted by Argentina, that these maps are "private".

103. That has been the criterion applied to the Argentine map of 1882 (Ch. Plate No. 25) which, as far as the Government of Chile is aware, is the first official map issued by the Government of Argentina after the signing of the Treaty. More will be said about this map; but it should be noticed here that the Argentine Counter-Memorial (pp. 226-227, para. 22) describes the map as "a purely private map", said to have been chosen by the publishers to print, on its *verso*, the information about emigration gathered by the high Argentine official who wrote the "official publication" mentioned by the Chilean Memorial (Ch. Mem. p. 69, para. 2). The map is said not to have been drawn by Latzina; it is described as not intended to show the boundary; and it is criticised in the sense that "it does not particularly commend itself owing to the somewhat rough imprecision of the tracing of the international boundaries".

It will be shown below (paras. 117-132) that when the Argentine Counter-Memorial (pp. 229-231, para. 23) refers to the so-called "Pelliza's map", these criteria are discarded totally, though, as will be seen, both maps have several things in common.

104. There is another striking case of denial of the official character of a map, in relation to a plate of the Chilean Atlas. It may be remembered that Ch. Plate No. 62 contained the reproduction of a plate which was presented by the Government of Argentina in its written pleading on the "Misiones" controversy, in 1894. It is now said that the tracing on this "undoubtedly does not represent the Argentine official point of view" (Arg. C.M., p. 225, para. 22). That the map shows a boundary line which is different from the one presently claimed by Argentina is obvious; but this simple rejection of that 1894 purported "boundary line" is far from explaining the reason why such a line was depicted in an Argentine pleading.

105. There are yet other curious examples. The maps issued by the Argentine Information Office in London (Ch. Plate No. 38; "Some Remarks . . .", pp. 36-37) are described as being "*not Argentine maps at all but British maps*, edited by Street and Co. *in London*". Obtained "on the spot", they are said to have been bought simply "to use the *verso* of the map to print the information" on Argentina (Arg. C.M. p. 228, para. 22). There is even a sarcastic rejection of the possibility advanced by the Chilean Memorial that one of these maps might have been intended by the Argentine authorities to correct an error of an earlier plate. The words of the Argentine Counter-Memorial in this respect deserve the honour of a quotation:

"One cannot but smile at the amusing hypothesis constructed by the "Remarks", according to which the competent authorities in Argentina would have received from London the first edition of the publication put out by the Information Office; they would have examined it forthwith and would have noticed, with horror, the 'mistake'—*in Argentina's favour, furthermore*—which it contained . . ." (Arg. C.M., p. 229, para. 22).

It is rather strange to see that the possibility of the Argentine Government correcting a mistake "*in Argentina's favour*" provokes a smile; but the important point is not that unusual reaction. It is that, when alluding to the so-called "Pelliza map" (Arg. C.M. Map 19), the fact that the map was not edited in Argentina does not seem to matter (see below, paras. 117 et seq.). For that 1888 map is declared to be official in spite of its having been engraved and printed *in Paris*. Apparently, the site of the printers' presses, at one side or another of the English Channel, has some mysterious bearing upon the criteria which are used in the Argentine Counter-Memorial.

106. The position, therefore, is far from being consistent; but its general pattern may be simply described: when an official Argentine map runs against the present position of the Government of Argentina, the map is rejected as "official"; when a map, no matter what its origin, is useful to the presentation of the Argentine claims, it is raised in its status as cartographic evidence. This Argentine tactic will be examined further in the paragraphs which follow.

(iii) *The General Concordance of Official Maps*

107. It is important to establish a conspectus of the official cartography in the case. From the time of the conclusion of the 1881 Treaty until 1887, there was no divergence in the cartography: in this seven year period there was a concordance of view on the part of the two Governments which was reflected both in their official maps and in other maps.¹

108. Chile's 1881 Authoritative Map (Ch. Plates No. 13-19), produced by the Chilean Hydrographic Office, was widely disseminated (see above, paras. 49 and 65). It was well-known in Buenos Aires. As recalled in the Chilean Counter-Memorial, Dr. Moreno was to write in 1895:

"I cannot forget that a few days after this document [the Treaty of 1881] was signed, a map of the Magellanic region arrived in Buenos Aires, issued by the Chilean Hydrographic Office, whose seal it bears, circulated by 'El Mercurio' of Valparaíso . . .²

. . . I remember that I made some efforts to procure the disqualification of this publication that was considered official on account of its origin, and that has served as a pattern for the dozens of maps that even now are sold in the book-stores of Buenos Aires and are in use in the schools of the Republic" (Ch. Ann: No. 364, p. 125).

109. This latter passage is proof that Argentina accepted Chile's interpretation of the 1881 Treaty, and certainly the map resulted in no reservation from the Argentine Government. This is a fact of particular significance in the period immediately after the conclusion of the Treaty. Moreover, in 1883 there was published the Argentine official map dated 1882 (Ch. Plate No. 25; and see paras. 39 and 52 above). The official character of this map is undoubted (Chapter II, para. 160; see further below, paras. 118-124). The period 1881 to 1888 also witnessed the publication of the Chilean Official School Map, 1884 (Ch. Plate No. 128); and the Atlas of the Republic of Argentina, 1886 (Ch. Plate No. 34).

110. In 1888 to 1890 there was the novel development in the form of the family of Lajouane plates: the maps of this period by Pelliza, Paz Soldán and Latzina or attributed to them.³ This episode will be examined below, and in the course of that analysis the Argentine characterization of the so-called "Pelliza's map" of 1888, as "official", will be examined in detail.

¹ With the exception of a map of Paz Soldán of 1885 (Arg. C.M. Map 17). This map is considered below, paras. 148-154. Like the official Misiones map of 1894 (see below, para. 113) this 1885 map shows a bizarre alignment bearing no relation to the 1881 Treaty and contrary to the Argentine position in the present dispute.

² Ch. Plates Nos. 15 and 19.

³ The late Lajouane editions of Paz Soldán maps (Arg. C.M. Maps 21 and 26) show a change of the boundary line in the Beagle Channel region. That "change" must be *un cas unique* in the history of cartography: *it took place some two years after the death of the author of the maps . . .* (see below paras. 153-154; also "Supplementary Remarks . . ." with reference to those maps).

111. Indeed, as stated above, the *official* Argentine cartography was substantially concordant from 1881 until 1908, when Arg. C.M. Map 57 was published. The very few exceptions to his concordance are of such a character that they do not detract from a concordance which spanned nearly thirty years: the exceptions, it will be found, contradict not only the Chilean view but also the present Argentine claims.

112. The first "exception" is probably not worth consideration as such. It consists of the 1887 edition (Ch. Plate No. 38; "Some Remarks . . .", pp. 36-37) of a "Map of the Argentine Republic" published by the Argentine Government Information Office established in London. This map shows a bizarre version of the territorial position, depicting Navarino, amongst other indisputably Chilean areas, as Argentine. The Map published by the same Office in 1888 (also on Ch. Plate No. 38) showed an alignment conforming to the provisions of the 1881 Treaty. In any case the alignment on the 1887 map does not correspond with the present Argentine claim.

113. The second possible "exception" consists of a map connected with Sr. Zeballos and included in the *Argentine Case* against Brazil in the Arbitration concerning the Territory of Misiones (Ch. Plate No. 62; "Some Remarks . . .", pp. 49-50). The *Case* was published in 1894. The alignment depicted on the map is a straightline sector, as a southward extension of the boundary along the Cape Espíritu Santo meridian. As such it corresponds neither to the Chilean view nor to the present Argentine claim. The map does not represent an interpretation of the 1881 Treaty but an essay of complete eccentricity. In any case the Argentine Counter-Memorial declares that the tracing on this map "does not represent the Argentine official point of view" (Arg. C.M., p. 225, para. 22); in other words, though it is a rather odd view of the matter, the Argentine Government does not accept the Misiones map as "official".

114. The third possible "exception" is *Map XIV* dated 1901 and attached to the Argentine Evidence in the 1898-1902 Arbitration (Ch. Plate No. 84; Arg. C.M. Map 42; "Some Remarks . . .", pp. 59-61). The alignment on this map corresponds neither to the position of Chile nor to the present Argentine claim: Lennox is depicted as Chilean, whilst Picton and Nueva are ascribed to Argentina. The Argentine Counter-Memorial remarks that Map XIV "evoked no observation, reservation or comment whatsoever" (Arg. C.M., pp. 471-472, para. 51) from the Chilean Government.

There are at least four coincident reasons for this lack of reaction. First, in the Argentine Evidence for the 1898-1902 Arbitration, there were several assertions in open contradiction to the boundary depicted on Map XIV. These assertions have been examined already in "Some Remarks . . .", pp. 60-61 (and see also this Reply at Chapter III,

para. 102, for one of the passages in issue). The existence of such contradictory assertions would considerably reduce the likelihood of a Chilean reservation. Secondly, the zone to the south of the Straits of Magellan was not in issue in the 1898-1902 Arbitration. Thirdly, since Chile was in possession of Picton, Lennox and Nueva, holding by virtue of the Treaty, it would be Argentina, and not Chile which would run risks in failing to protest at various junctures (see above, para. 80). After all, at the time of the 1898-1902 Arbitration there had been no diplomatic exchanges relating to the boundary line in the region of the Beagle Channel.

Furthermore, in its Counter-Memorial the Argentine Government suggests that Map XIV represented a "possible compromise solution" (Arg. C.M. p. 310, para. 52; cf. also p. 522). This remarkable hypothesis—about which no one had heard anything before 1974—finds no support whatever in the evidence.

Alas! The story does not end there. After the 1902 Award, the same "boundary line" of Map XIV was described by the Argentine Government as having been "*agreed upon Record of October 1st. 1898*", which appears to be a reference to a decision by the Experts (see Arg. C.M. Map No. 44).

Even Ariadne's clue of thread would have failed in helping Theseus to find his way out of such a labyrinth . . .

115. The Chilean Government hopes to have demonstrated the substantial concordance of the *official* Argentine cartography over the period 1881 to 1908. The "exceptions" are few in number and two of them depict a bizarre alignment. None of the three maps considered above (paras. 112-114) provides support for the present claim of the Argentine Government as represented on Map 27 of Volume III of the Argentine Memorial.

I. CARTOGRAPHIC NOVELTY OF 1888-1894: THE MAPS OF PELLIZA, LATZINA, PAZ SOLDÁN, AND HOSKOLD

(i) *A Brief Conspectus*

116. In its Memorial (pp. 85-87, paras 1-5) the Chilean Government has analysed the development of Argentine cartographic chauvinism in the period after 1888. Nearly all the items considered there—for example, the Popper map of 1891 (Ch. Plate 55)—were not official maps. The Chilean Government has elaborated its opinion (above, paras. 111-115) that there is a concordance of Argentine *official* cartography from 1881 to 1908 in favour of the Chilean position in the present dispute.

In its Counter-Memorial (Arg. C.M. pp. 229-233, para. 23; pp. 460-462, paras. 41-42; and pp. 466-467, para. 47) the Argentine Government places considerable reliance upon the co-called "Pelliza map" of 1888 (Arg. C.M. Maps 19 and 20). The Argentine Counter-Memorial is concerned (a) to establish that that map was *the first official Argentine map* involving interpretation of the 1881 Treaty; and (b) that that map had "a determining influence" on the cartographic work of others, and, in particular, the maps of Latzina, Paz Soldán and Hoskold.

In the paragraphs which follow the Chilean Government will first of all refute the contention that the "Pelliza map" of 1888 was official in character. Secondly, the evidence of Latzina and Paz Soldán *as a whole* will be given an extended evaluation in order to correct the account given in the Argentine Counter-Memorial.

(ii) *The so-called "Pelliza Map" of 1888*

117. The Chilean Government has demonstrated already (above, paras. 101-106) that the general position of the Argentine Government in respect of the official character of maps is closely related to the boundary depicted by the particular map. An example of this inconsistency deriving from tactical requirements is the item (Arg. C.M. Map 19) described by the Argentine Counter-Memorial as Pelliza's Map of 1888. The Argentine Government expresses the view:

"There is no doubt that this map is the first depiction officially recognized by the Argentine Government of the Argentina-Chile boundary line; the first that may be considered as an *official graphic interpretation of the 'Boundary Treaty'*." (Arg. C.M. p. 231, para. 23).¹

118. In order to place the Argentine view of the so-called "Pelliza map" in perspective, it is necessary to refer to the Argentine map printed as Ch. Plate No. 25, which for purposes of reference will be called "Latzina's map". The purpose is to establish the lack of consistency in the approach of the Argentine Government in regarding Latzina's map of 1882 as "private" but characterizing the "Pelliza map" of 1888 as "official".

119. The map of 1882 appeared one year later in an "official publication" widely distributed by the Government of Argentina immediately after the signing of the 1881 Treaty. This map was described in the first Chilean pleading as "one of the most important cartographic pieces of evidence concerning the interpretation which the Argentinian authorities attributed to the Treaty..." ("Some Remarks...", p. 27). The Argentine Counter-Memorial (p. 226) describes this map of 1882 as "a purely private map", and casts doubt upon its probative value.

¹ Emphasis in original.

120. In contrast, the Argentine Counter-Memorial (pp. 229-233, para. 23) claims that “Pelliza map” of 1888 (Arg. C.M. maps 19 and 20)—published seven years after the signing of the Treaty—is a landmark in Argentine cartography relating to boundaries. This map was included in a book called *Manual del Inmigrante en la República Argentina*, published in 1888. According to the Argentine Counter-Memorial, before that date no map was “official”:

“...during the early years of the Treaty, Argentine cartography was perforce lacking in any kind of official blessing” (Arg. C.M. p. 224, para. 22).¹

121. In view of the contrasting positions of the Parties in relation to the first cartographic official depiction of the boundary line determined by the Treaty, it appears to be advisable to deal with “Pelliza’s map” and to provide further information on the official publication of 1883 which contained the important Latzina map, an official Argentine production. That the booklet in which the 1882 map was issued was an “official publication” can hardly be disputed by the Argentine Government. A glance at Ch. Plate No. 25 will show that that booklet bears all the signs of an official publication from that Government.²

But the Argentine Counter-Memorial (p. 227) endeavours to draw a distinction between the “publication” (called by Argentina “Renseignements”) and the map therein inserted. While some value is attached by it to the material gathered by Senor Latzina, for the purposes of informing aliens about the advantages offered by Argentina as a field for emigration, the map is alluded to in rather disparaging terms. Thus it is said to be “a purely private map” and, on the basis of the name of the printing house where it was reproduced, it is ascribed to Alberto Larsch. “Apparently”—it is asserted—“this map was *probably* the only one available in Argentina” (sic!) and the publishers merely “elected to print this information on the *verso* of Alberto Larsch’s map” (Arg. C.M. p. 227, para. 22). If this were accepted, one would be led to believe that the map was a kind of wrapping paper for the “official publication” which the Government of Argentina had decided to distribute abroad.³

¹ Emphasis in original.

² Besides the Argentine coat of arms, care was taken to print on the frontispiece, in every language of the respective edition: “official publication”, “publication officielle”, “Amtliche Veröffentlichung”, and “Pubblicazione Ufficiale”.

³ The effective dissemination of the map at the highest diplomatic level is evidenced by a report by Prince Hohenlohe, then the German Envoy in Paris, dated 22 March 1884, to Chancellor Bismarck (see further “Some Remarks . . .”, p. 28).

It is even suggested that because the words "official publication" appear on the title page of the leaflet but not on the map, they do not apply to the map (Arg. C.M. p. 227, note 50).¹

The facts are precisely the opposite to what is narrated in the Argentine Counter-Memorial. This is evidenced, inter alia, by one of the leading writers of the Argentine newspaper "El Diario" who, on 10 February 1883, stated:

"We have had the opportunity of examining at leisure the work entrusted by the National Government to the industriousness of the Chief of the Statistical Bureau, Dr. Latzina, entitled 'MAPA GEOGRAFICO DE LA REPUBLICA ARGENTINA', compiled on the basis of the most recent data available.

This map is intended to be distributed widely in those European countries which are sources of emigrants, through an issue of 100.000 copies which has been ordered from the engravers-lithographers Stiller & Laase of this city.

.....
Dr. Latzina has applied all his well known industry to this work, so that the new map may be exhibited everywhere as a model of exactitude . . .

Since this issue of the map is designed specially to be circulated throughout Europe, its reverse shall be used to print the most recent statistical data concerning the country, its laws, its production, the advantages which it offers to the immigrant, etc. . . ." (See also Chapter II, para. 160).

122. As a point of principle, these assertions must be rejected in terms of the applicable rules of evidence. The mere fact that a map is not formally declared to be "official"—it is submitted—is not sufficient ground to deprive it of its official character which may be deduced from the concomitant circumstances. It is true that the case of each map must be considered individually to ascertain its evidential weight: but, certainly, the probative value of a map cannot be necessarily linked to the existence of a decree making it "official".

Furthermore, the allegation that Latzina, the author of the 1882 map "had nothing to do with the Ministry for Foreign Affairs" (Arg. C.M. p. 227, para. 50), which is said to be the only institution authorized to give an official interpretation of the Treaty, cannot be accepted. From a legal point of view, of course, any organ of the Executive Power may represent or engage the State. But, in the particular case of Latzina's map, it needs to be pointed out that the decree vesting in the Argentine Foreign Ministry the power of officially approving cartographical work was issued only in 1893, that is to say, a decade after the printing of the official publication written, on official orders, by Latzina who, at the time, was Chief of Argentina's National Statistics Bureau (see Arg. C.M. Ann. No. 58, p. 201).

¹ This criterion is not applied to "Pelliza map" in the case of which, also, the words "Publicación Oficial" are absent from the map.

123. In this connection there is an important fact which as noticed above, the Argentine Counter-Memorial does not mention: the book written by Latzina and its map were ordered to be printed and distributed abroad by the Argentine Minister of Interior, in 1883. And that office was then held by no other than Señor Bernardo de Irigoyen who had been transferred from the Ministry for Foreign Affairs to the Ministry of Interior shortly after the signing of the Treaty.

This is evidenced by the Report on the activities of the Ministry of Interior of Argentina for 1882, which Señor Irigoyen submitted to the Argentine Parliament. In the section of that "Report" dealing with "Publicaciones", the Report reads:

"Empezamos a hacer conocer en el Extranjero los atractivos que ofrece el País a la inmigración laboriosa"

El Mapa encargado al Dr. F. Latzina fue impreso el año anterior, y se distribuyó en Europa y América con excelentes resultados. Los datos que contiene han despertado viva atención, y los Representantes y Agentes de la República manifiestan la utilidad de generalizar aquella publicación y de hacer otras análogas."¹

"We have begun to make known abroad the inducement offered by the Country to hard-working immigrants"

The Map commissioned from Dr. F. Latzina was printed last year and distributed in Europe and in America with excellent results. The data which it contains have awakened a keen attention, and the Envoys and Agents of the Republic manifest the usefulness of spreading that interesting publication and of making others of the same kind" (Ch. Annex No. 521).

It is clear, therefore, not only that Latzina was ordered to prepare a map by the Ministry of Interior of Argentina. It is also clear that the portfolio under which the Latzina map was commissioned was then occupied by Señor Irigoyen, the Minister who had signed the boundary treaty with Chile some months previously.

124. It does not seem unreasonable to presume that "the most recent data" on which the map of Latzina is based emanated from the public authorities who ordered that map from him. It is a not unwarranted assumption that these authorities, particularly Señor Irigoyen, would not have allowed a map which was to be distributed in over one hundred thousand copies to display a line different from the line for which, according to the Argentine Counter-Memorial, the Argentine Minister had fought till the last moment. Obviously, Latzina's map of 1882 showed the boundary line recently agreed by Chile and Argentina in accordance with the interpretation then given to the Treaty by the Argentine authorities. The fact that this first official Argentine map showed an allocation of the

¹ "Memoria del Ministerio del Interior presentada al Honorable Congreso Nacional por el Dr. Don Bernardo de Irigoyen. Correspondiente al año de 1882." Buenos Aires. Imprenta de la Universidad de J.N. Klingelfuss, calle Venezuela 234 entre Perú y Chacabuco. MDCCCLXXXIII (at page CXX). See also the same "Memoria", for 1883 (Ch. Ann. Nos. 521 and 522).

Southern territories which coincided with "Chile's Authoritative map of 1881" and the subsequent Chilean maps should not pass unnoticed.

The Government of Argentina has taken pains to explain that the map which Señor Irigoyen, as Foreign Minister, sent to the British Minister in Buenos Aires, a few weeks after the ratification of the Treaty, did not show the interpretation given by him to the Treaty. That map, it may be unnecessary to recall, showed the principal islands in dispute as Chilean (Ch. Plate No. 21). How is it now to be explained that, two years after signing the Treaty, Señor Irigoyen was distributing abroad, and highly praising, this map of Latzina, the map that as Minister he had commissioned—a map which, according to the present claims of Argentina showed a wrong boundary line? It is obvious that the simple device of denying the official character of Latzina's map of 1882, and of asserting that it was "private" and was drawn by Alberto Larsch, cannot be considered a satisfactory explanation.

The copy of the map of "La Ilustración Argentina" which was sent by Señor Irigoyen in 1881 to the British Minister is, by itself, strong evidence in favour of the Chilean interpretation of the Treaty signed in that year. But, if any further evidence were needed about the interpretation which Señor Irigoyen gave to the boundary line established in the Treaty, it is to be found in the "official publication" which he himself, as Minister of Interior, caused to be printed and distributed by his office.

125. Having dealt with the map which is, after all, the true first official Argentine map to appear after the Treaty, it is necessary to consider now the so-called "Pelliza map" which, according to the Argentine Government, should occupy that position.

The legal approach adopted by the Argentine Government in assessing this type of evidence runs counter to legal principle and good sense. According to this approach, even if described as "official" or emanating from a State office, no map may be called "official" unless it is declared to be "official". In other words, for an interpretation to be "official", it must be so ordered by Decree. Such an approach would radically reduce the power of appreciation of a Court when examining the cartographic evidence, if the Court could only attach value to the maps which have been declared to be "official". Obviously, a Court must be allowed to make its own appreciation of each item of cartographic evidence.

126. The so-called "Pelliza map", claimed by Argentina to be the first "official" interpretation of the 1881 Treaty, *was issued seven years after the signing of that Treaty*, at a time when the Demarcation Convention (Ch. Annex No. 50) was concluded. In the submission of the Chilean Government this map lacks any probative value, when confronted with the strong evidence brought forward by Chile on the basis of the *travaux préparatoires* of the Treaty, the documents closely linked to the Treaty, and the contem-

porary maps emanating from Chile, Argentina and from third States (see, for instance, Ch. Plate No. 20: the 1881 British Admiralty map). Such cogent contemporaneous evidence cannot be overruled by latter maps.

127. In view of the significance attached to the “Pelliza map” by the Argentine Government, the Chilean Government has endeavoured to uncover all the facts relating to its sudden appearance in the Argentine cartography. First of all, it is useful to retell the story of the map as related in the Argentine Counter-Memorial (pp. 229-233, para. 23).

Around 1887—it is said—“it began to be realized in Argentina that it was necessary to put private cartography in order and to undertake the preparation of maps in which the representation of the Argentine-Chile boundary lines would bear an official character and which would be the graphic representation of the understanding of the Treaty adopted by the Government”,¹ Señor Mariano Pelliza was the man who “introduced the change in this field”. While occupying the position of Under-Secretary of State for Foreign Affairs, Señor Pelliza wrote the *Manual del Immigrante en la República Argentina*. The book was published in 1888, being adopted as an “official publication”, and it was chosen by Señor Pelliza and the Ministry for Foreign Affairs which had “acquired the rights to the work” to distribute “the first truly ‘official’ Argentine map”, “the first depiction officially recognized by the Argentine Government of the Argentine-Chilean boundary line” (Arg. C.M. p. 231, para. 23; and see also *ibid.*, p. 508).

128. It is only natural that after this story, the first inclination of the reader would be to wonder what references or indications the *Manual* might contain concerning this map. The result is rather disappointing. For, though the *Manual* includes information which spreads from the administrative jurisdiction of the Viceroy of Peru in colonial times to the price of an old horse (then rated between 40 and 60 francs), there is not one word about the map! Neither the Decree which ordered that the *Manual* be adopted as an official publication, nor the report from the Central Commission for Immigration which preceded it, have a single reference to it (see Arg. C.M. Ann. No. 56, p. 193 at pp. 194-195).¹ However, with reference to that map, the Argentine Counter-Memorial says:

“The Manual is provided with a ‘Mapa General de la República Argentina’ . . . at the head of which is printed the name of Sr. Pelliza, its author: accordingly, this time it is not a map borrowed from private cartography, but a map which originated, at least in respect of the determination of the tracing of the political boundaries, from the same author as that of the work

¹ No explanation is offered for this sudden though somewhat late urge.

¹ Señor Pelliza had apparently thought about the possibility of distributing his handbook together with the general map of the Republic, according to the letter he appears to have written to the Foreign Minister of Argentina in 1888 (not 1887 as claimed by the Argentine Counter-Memorial). Yet, no mention of the map is found in the *Manual*.

in which it was inserted, which confers on it an equally official character” (Arg. C.M. p. 230, para. 23).

The story ends with allegations of the influence which “Pelliza’s map” had, from that moment on, over Latzina, Paz Soldán, Hoskold, and others.

129. To complete its reference to the evidentiary value of the Pelliza map, the Argentine Counter-Memorial states that, with the approval of Hoskold’s map of 1894, “the official blessing” of the cartographic representation of the Treaty made by Sr. Pelliza in regard to the islands in dispute was “retroactively and authoritatively confirmed” (Arg. C.M. p. 233, para. 23).

130. The first issue requiring examination concerns the authorship of the “Pelliza map”. A glance at Plate 179 of the Atlas of this Reply will prove that Pelliza was not the author of the map inserted in his “Manual” (see “Supplementary Remarks . . .”). The fact is, furthermore, recognized by the Government of Argentina in another part of its Counter-Memorial: as it is explicitly stated, “Pelliza’s map”, together with others, derived from one base-map, printed and published by Erhard Brothers in Paris for the Buenos Aires publisher Felix Lajouane (see Arg. C.M. Maps 19, 20, 24 and 27, and Arg. C.M. p. 107, para. 21 and pp. 230-231, para. 23).¹ For this reason alone it is clear that Pelliza was not the author of the map attributed to him. To which it may be added that the appearance of the name PELLIZA at the head of the plate could also be explained by the fact that it is a very common practice for printers to place a superscription of that kind on a map or plate simply to indicate the work in which it is to be inserted.

Nevertheless, if Pelliza took as a base-map the early Lajouane map with a boundary showing the disputed islands as Chilean, on what grounds would he have decided to change that line?

No explanation is found in the Argentine Counter-Memorial and the point does not lack importance, considering that Señor Pelliza had been in office as Under-Secretary for Foreign Affairs from the time when the Treaty was negotiated.

131. Had he not, as Under-Secretary, seen the map of “La Ilustración Argentina” which was published to represent the southern boundaries “according to the Treaty of 23 July 1881”?

Had he not, as Under-Secretary, seen the dispatches from Señor Arroyo, Consul-

¹ Incidentally, it may be remarked that in the Lajouane “base map” the boundary showed Picton, Nueva and Lennox as Chilean, notwithstanding that “the last three letters of the word Beagle are clearly placed between Navarino and Picton” as the Argentine Counter-Memorial chose to put it (Arg. C.M. p. 107, para. 21).

General of Argentina in Santiago, the officer who had ratified the Treaty and must have reported upon the Chilean interpretation of 1881?

Did, indeed, the Argentine Consul in Santiago not send to his Government the Authoritative Map concerning the boundary treaty which no less than six representatives of third countries took care to send to their home Governments ("Some Remarks . . .", p. 22)? Had the Argentine Under-Secretary for Foreign Affairs not read the statement of the Chilean Foreign Minister, included in the printed Report to Congress which was distributed to the foreign Representatives in Santiago (Ch. Mem. p. 45, para. 32)?

Moreover, had Under-Secretary Pelliza not seen the 1881 map, issued by the Government of Chile to illustrate the Treaty, which is known to have arrived at Buenos Aires a few days after the Treaty was signed (Ch. Ann. No. 364, p. 125)? Did he not hear that Señor Moreno, geographical adviser to Señor Irigoyen in 1881, had specially brought to the attention of the Argentine authorities that Chilean Authoritative Map which Señor Moreno considered to be official "on account of its origin"? (Ibid). Could the Argentine Under-Secretary for Foreign Affairs ignore the fact that his former chief, promoted to Minister of Interior, had ordered the world-wide distribution of over one hundred thousand copies of a "publicación oficial" which contained a map showing the correct interpretation of the Treaty?

It would be very difficult to explain these strange circumstances, if the facts were as told in the Argentine Counter-Memorial.

132. Fortunately for the reputation of Señor Pelliza, there is a straightforward explanation. *According to information submitted by the Argentine Government only two years ago in their Memorial, Señor Pelliza was not the author of the boundary line shown upon the 1888 map which is attributed to him in the second written pleading of Argentina.* In the Argentine Memorial it is revealed that what is now described as the "tracing of the frontier line" was not drawn by him. *For the same line appeared in a map which must be previous to Pelliza's because the Argentine Memorial described it as "the first map published in Argentina showing the correct boundary according to the Treaty of 1881".* The map referred to in this quotation is Arg. Mem. Map 21 included in Volume III of the Argentine Memorial. This map, like Arg. C.M. Map 19, has the imprint "Felix Lajouane Editor Buenos Aires 1888". In its Memorial (Arg. Mem. pp. 223-224, para. 29) the Argentine Government characterises this map at some length—without a single reference to Pelliza. Yet according to the Argentine Counter-Memorial (pp. 229-230, para. 23; pp. 508-509) Sr. Pelliza was a person of importance. What does the Memorial have to say about Arg. Mem. Map No. 21? It states that it "was published in Buenos Aires in 1888 by Felix Lajouane". It is also stated that "there is nothing to indicate what sources were used in its compilation". "Pelliza's map" is thus not by Pelliza; "Pelliza's line" is not Pelliza's either.

133. It is now necessary to examine the precise qualifications of the alignment shown

on the so-called "Pelliza map" (Arg. C.M. Maps 19 and 20—the Lajouane maps).

134. The question of the line north of the Straits of Magellan is not in debate in these proceedings. However, it is to be noted that in the so-called "Pelliza map" it runs north of the 52°S line of latitude and that it reaches Cape Virgenes instead of Point Dungeness (Ch. Plate 189). For the purposes of this case, attention must be directed to the line south of the Straits.

From a point which is unnamed on the map, the line runs southwards as a meridian, reaching the Beagle Channel. From that point of Tierra del Fuego, it turns eastwards following *the north shore of the Channel* which makes of it one of the early depictions of the "dry coast" theory. But, at a certain point (unnamed but possibly located on the ground some seventeen miles east from the "turning point" of the interpretation given by Argentina to that line in 1973) the boundary curves towards the south, *running across the true Beagle Channel and dividing Picton Island*. This island, according to this interpretation, would have been divided in the same manner as the island of Tierra del Fuego: half Chilean, half Argentine. After this, the line proceeds towards Cape Horn. Unfortunately for future students of this controversy, the line ends on the very edge of the map, thereby preventing the determination of the point where it would have stopped, had its creator been given the scope (Figure No. 4).

Whoever examines the purported "Pelliza map" will learn with amazement that, in 1974, the Government of Argentina has chosen to describe such an alignment as a faithful representation of Irigoyen's proposal of 1876 (Arg. C.M. p. 231, para. 23) and of the Treaty he signed five years later. It is patent that the line described above does not represent either the proposal, the Treaty or even the line defended by that Government in these proceedings.

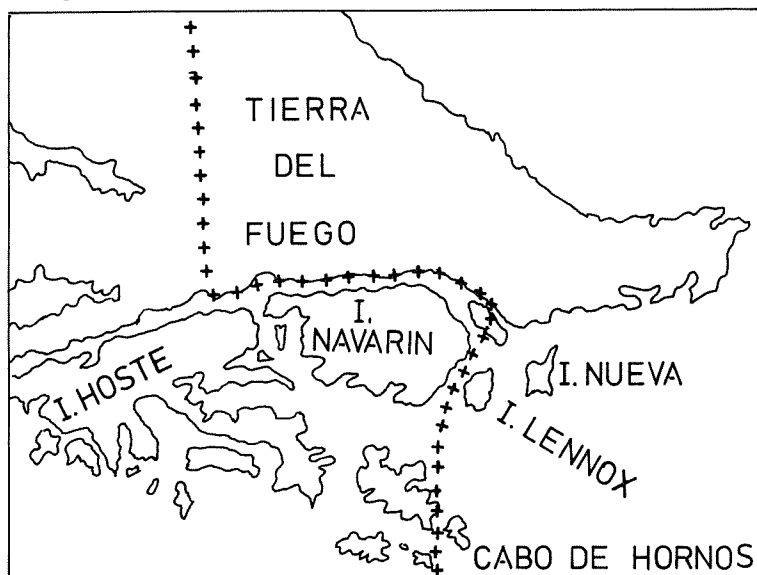


Figure 4. — The "Pelliza boundary line" (see Arg. C.M. Map 19).

135. The evident contradiction implied in the exhibition of "Pelliza's map" must have been noticed by those who wrote the Argentine Counter-Memorial, because they added:

"In the copy reproduced in these Plates, the line appears partially superimposed on Picton Island, but this is simply because of a printing defect" (Arg. C.M., p. 508).

Two questions naturally arise: did this "printing defect" not affect the depiction of the "dry coast"? And, more importantly, are there other copies, not reproduced in the Argentine Atlas, which are free of this purported "defect"?

The Government of Chile cannot answer the first question. As to the second, it has been noticed that, indeed, there are other copies of the "Pelliza map" which show a different line in the Channel: the "boundary line" is shown running in a short extension *over the northern coast of Navarino island* and, later abandoning that island, *goes again to divide Picton*, before proceeding southwards.¹

In spite of these facts, the explanation of the map in the Argentine Counter-Memorial continues in the following manner:

"The line was obviously intended to leave on the Argentine side of the boundary the Islands of Picton, Nueva and Lennox" (Arg. C.M. p. 508).

Why "obviously"? Is it to be believed that seven years after meditating on the true interpretation of the Treaty of 1881, the Government of Argentina decided to print and distribute *urbi et orbi* a map which, in its turn, needed to be interpreted?

Does there not exist the possibility that the "defect" of the printers consisted merely of displacing the line about 1.5 cm to the left of the map? If that was the case, their intention might have been to show the boundary line in the same manner as it was shown upon the first German map published by Justus Perthes (see Ch. Plate No. 23, in Dr. Petermann's *Mittheilungen* map). In other words, to show as Chilean all the southern islands down to Cape Horn, just as they were shown in the early Argentine maps. The directional sense of the "defect" does, indeed, require some explanation from the Government which has submitted this map.

136. Having considered the authorship of "Pelliza's map", the apparent origin of the "boundary line" attributed to Pelliza, the significance of the map as an enclosure in a "Handbook" for migrants, and the contradictions between the map and the present

¹ Such is the depiction of the "boundary line" on the copy of "Pelliza's map" which, without any explanation, was offered to the Société Géographique of Geneva, in 1890, by Mr. E. Weber (see Arg. C.M. p. 509; cf. also Ch. Plate 179).

position of Argentina, it remains to deal with the assertions of the Counter-Memorial which describe the 1888 map as "the first official cartographic interpretation of the Treaty".

137. Having in mind what was said above about Latzina's 1882 map, it is obvious that when the correct criteria and the rules of evidence are applied, the first official cartographic interpretation of the Treaty is contained in that 1882 map, issued by the Argentine Ministry of Interior under the instructions of Señor Irigoyen.

The arguments advanced by the Counter-Memorial about the nature of the booklet in which Latzina's map appeared must be rejected. For "Pelliza map" was also included in a handbook for migrants and, therefore, there is no reason to attach more importance to "Pelliza's map". The question will be clear if one compares the Argentine positions on the subject: it is argued that the map inserted in the official publication called "The Argentine Republic as a field for European Migration" must be discarded as an official interpretation of the Treaty *because of the contents of the book*. Yet, on the other hand, it is maintained that the map inserted in the official publication called "Manual para el Emigrante" written by Pelliza in 1888 must be considered as such an interpretation *in spite of the contents of the book*.

This is an extraordinary piece of logic. For if the Argentine criteria for "Pelliza's map" are applied to Latzina's map, it is the latter and not "Pelliza's" which is "the first official map" concerning the Treaty.

138. One final point. Some of the material included in the Argentine Counter-Memorial throws some doubts upon the probative value of "Pelliza's map" even within the logic of the Argentine pleading. Such is the case of the Presidential decree, dated 28 July 1893 (Arg. C.M. Ann. No. 58, p. 201 at p. 202).

It is interesting to read the actual text of this decree, because the reference in the Counter-Memorial gives a not entirely accurate description of its contents (cf. Arg. C.M. p. 232, para. 23). It must be recalled that the Argentine decree recited that it had been noticed that in books and geographical charts published in Argentina, the international boundaries were shown or depicted either with notorious errors or "with details not yet authorized by the demarcations which must follow the respective treaties" (Arg. C.M. Ann. No. 58, p. 201). The decree added that many of these publications had been received and promoted by means of official acts either taking them for the purpose of teaching or propaganda, or aiding them through subsidies from public funds. Clearly, those expressions would seem to apply, among other publications, to Pelliza's "Manual del Inmigrante" and the map inserted in it. Now, the decree ordered that, *as far as the boundaries of the Argentine Nation were concerned, geography works "already published or*

to be published in future” could not be “considered as officially approved” unless they are “accompanied, in each case, by a special statement from the Department of Foreign Affairs” (Arg. C.M. Ann. No. 58, p. 202).

Were Pelliza’s “Manual” and its map accompanied by a special statement from the Department of Foreign Affairs? The Government of Argentina has submitted no evidence on this point. Which leads to the conclusion that *according to the evidence submitted in these proceedings*, perhaps not even “Pelliza’s map” may be considered as “officially approved” by the Government of Argentina.

139. “Pelliza’s map” was not even mentioned in the Argentine Memorial, in 1973; but the Argentine Counter-Memorial endeavours to exhibit it as the key map for the cartographic interpretation of the Treaty. The Government of Chile hopes that the boundary line of that map, which was drawn by an unknown hand around 1888 and which is inconsistent with the 1881 Treaty and even with the present Argentine claim, will be approached by the Court with considerable reserve.

(iii) *The purported influence of “Pelliza’s map” on later cartography*

140. In its Counter-Memorial, the Argentine Government asserts that the publication of Pelliza’s Manual and General Map had “a determining influence on later cartography” (Arg. C.M. p. 231, para. 23). As evidence of this statement, some maps of Latzina, Paz Soldán and Hoskold are brought to the fore (Arg. C.M. pp. 231-233, para. 23). The Government of Chile considers it necessary to put the opinions of these geographers and the maps invoked by the Argentine Government in a proper perspective in order to assist the Court in the evaluation of the cartographic evidence.

(a) *The Evidence of Latzina*

141. Francisco Latzina, a well-known geographer, has been cited by the Chilean Memorial as a witness for the Chilean case in these proceedings (Ch. Mem. p. 69, para. 2; Ch. Plates Nos. 25 and 48; “Some Remarks . . .”, pp. 27 and 42). It has already been established (above, paras. 123-124) that, a few months after the signing of the Treaty, he was ordered by Minister of the Interior Don Bernardo de Irigoyen to compile a map. His map was inserted in an official publication issued by the Argentine Government and distributed abroad in 1883. This map showed as Chilean the islands of Picton, Nueva, Lennox, and all the others down to Cape Horn.

Some five years later, Señor Latzina published another book, his "Geografía de la República Argentina" (Buenos Aires, 1888). This work was highly praised and the Geographic Institute of Argentina granted to it the "Rivadavia Award". In this first edition of his "Geografía", Latzina inserted a new map which, again, showed the above mentioned islands as Chilean (Ch. Plate No. 48). It is clear, therefore, that in 1888 Señor Latzina had still not changed his opinion about the sovereignty of Chile over the islands in the region of the Beagle Channel.

142. As stated in the Chilean Memorial, two years later, without any explanation, a *French edition* of Latzina's work was published, with the information that the geographical section of it had been "enlarged and corrected". In the text itself there was no difference from the original 1888 text in so far as concerns the sovereignty of the islands presently in dispute; but the map attached to this French edition of his "Geografía" showed a *new boundary line* which depicted half of Picton as Argentine, together with Nueva, Lennox and Deceit Islands.

The Argentine Counter-Memorial declares that in that new map Latzina "adopted . . . the boundary line traced by Sr. Pelliza" (Arg. C.M. p. 231, para. 23). This, of course, is wrong. As stated two years ago by the Government of Argentina itself, the map inserted in Latzina's "Géographie" was *copied* from a map *published by Felix Lajouane* (see Arg. Mem. Map No. 21; and Arg. Mem. p. 224, para. 29). The Government of Argentina was right in 1973. The map inserted in the "Géographie"—as well as the purported "Pelliza map"—derives from one plate, engraved by Erhard Brothers, and edited by Felix Lajouane. Thus, whoever inserted in the "Géographie" a map with a boundary line which differed from the line shown in the previous maps of Latzina, was not following "Pelliza's line" but a line whose intellectual origin still needs to be found.

143. A mere glance at the maps will show that if anything is certain about *the map inserted in Latzina's "Géographie"* it is that it is not Latzina's. The assertion of the Argentine Counter-Memorial in the sense that Latzina was "its author" (p. 443, para. 16) is somewhat weakened in another part of the Counter-Memorial, where it is stated that it derived from the Erhard Brothers' "base-map" (Arg. C.M. p. 107, para. 21). Indeed, the style and lettering of the map, its contents, its scale, everything, show that the plate which appeared in the "Géographie" is nothing but an engraving made from the same plate used by Lajouane for Pelliza's map. The boundary line reaching Cabo Virgenes; the "dry coast" of Tierra del Fuego, the "printing defect" over Picton . . . all these characteristic "fingerprints" appear in the purported "Latzina's" 1889 map.

Who decided that this plate be inserted in the "Géographie"? Was this a consequence of the revision of Latzina's work entrusted to Dr. Don Amancio Alcorta, whose report still

is not available to the Government of Chile? ("Some Remarks . . .", p. 42). Was it a precondition of the huge order for 30,000 copies of the "Géographie" which Lajouane appears to have received from the Argentine Government? (Ibid).

The Government of Chile cannot answer those questions; but dares to think that further information from the Argentine Government might throw some light on this evidence submitted by the latter.

144. But the Government of Argentina has invoked yet another map which it considers to be an additional piece of evidence of the conversion of Latzina to Pelliza's "official interpretation": a "Carte de la République Argentine" which appeared in 1889 (Arg. C.M. Map 25). It is true that this "Carte" was inserted in a book which, in turn, is linked to Latzina's name. But, contrary to the assertion of the Argentine Counter-Memorial (p. 231, para. 33 and p. 467, para. 47), the book was not written by Señor Latzina but published under his editorship ("sous la direction de F. Latzina", reads the original frontispiece).

The author of the "Carte" is not mentioned in the plate which was, again, engraved by the Erhard Brothers, in Paris. Yet, in the Introduction to the book, Latzina thanks Dr. D. José Chavanne "a geographer of renown in the scientific world, for his generous help in the drawing of the maps". This suggests that the maps might have been drawn with the direct intervention of Dr. Chavanne¹; but Dr. Chavanne's "Mapa Físico de la República Argentina", which was published *one year later* in Buenos Aires, proves that he considered as Chilean Picton, Nueva and Lennox, together with all the other islands down to Cape Horn (Ch. Plate No. 50; "Some Remarks . . .", p. 44).

As for Latzina, it has already been shown that his purported "corrections" of the "Géographie" map of 1889 were not his but Lajouane's. This other "correction" would appear to require some additional explanation.

145. Perhaps such an explanation for the "Argentine" character of Picton, Nueva and the other Southern islands, may be, as shown on the "Carte", found in the very peculiar French rendering of Article 3 of the 1881 Treaty which is provided by the book in which the "Carte" is inserted:

Art. 3. — Dans la Terre de Feu, on tracera une ligne qui, partant du point appelé Cap de l'Espritu Santo au 52° 40' de latitude, se prolongera vers le Sud pour rejoindre le

Art. 3. — In Tierra del Fuego a line shall be drawn, which starting from the point called Cape Espritu Santo, in parallel 52° 40', shall be prolonged to the south in order

¹ Rightly, the Arg. C.M. states that this map of 1889 is "nearly identical to the map included in an Argentine catalogue" (Arg. C.M. Map 23), *a map also printed by Erhard*, whose author is unknown (see Chapter III, para. 110; see also "Supplementary Remarks . . .").

*méridien occidental de Greenwich, 68 degrés 34 minutes, jusqu'au canal de Beagle. La Terre de Feu ainsi divisée appartiendra au Chili, dans sa partie occidentale, et à la République Argentine dans sa partie orientale. Quant aux îles, elles appartiendront à la République Argentine: l'île de los Estados, les îlots qui l'entourent et les autres îles de l'Atlantique au sud de la Terre de Feu et des côtes orientales de la Patagonie; toutes les îles au sud du canal de Beagle jusqu'au Cap Horn et celles au nord de la Terre de Feu appartiendront au Chili.*¹

to join Greenwich's western meridian 68° 34', until Beagle Channel. Tierra del Fuego so divided shall belong to Chile, in its western part, and to Argentina on its eastern part. **As for the islands, there shall belong to the Argentine Republic: Staten Island, the islets which surround it and the other islands of the Atlantic to the south of Tierra del Fuego** and of the eastern coasts of Patagonia; all the islands south of Beagle Channel to Cape Horn and those north of Tierra del Fuego shall belong to Chile.

As it may be seen, the bizarre "boundary line" of the map appears to find some support in the odd allocation of the Southern territories which the French text conveys. Perhaps one might borrow a phrase coined by the Argentine Government: "a mistake cannot be neutralised by bringing untruths to its aid" (Arg. C.M. p. 92, para. 14).

146. But that would not be sufficient to dispose of the purported later interpretation of Latzina. Because *in the same book from which Argentine Map No. 25 has been selected, there are three other maps which show as Chilean the islands of Picton, Nueva and Lennox and all the others down to Cape Horn. One of them, even, carries the words "Canal Beagle" clearly written to the North of Nueva.* No doubt by an oversight, those three maps have not been printed in the Argentine Atlas; but the search for any reference to them in the Counter-Memorial of Argentina has proved equally fruitless.

The omission has a certain piquancy, coming from the same Government which has stated:

"Chile also keeps silent as to material particulars relating to certain maps (for instance, that within the same atlas or publication there are contradictory maps, out of which Chile selects only that which is favourable to its position while ignoring the rest)" (Arg. C.M., pp. 441-442, para. 14).

In view of this the Government of Chile has considered that the Court should also know of these three maps included in the same Argentine book which contained the "Carte" printed as Arg. C.M. Map 25. (See Ch. Plate 181).

147. In the light of the early Latzina testimony and the circumstances of his later "corrections", this would appear to dispose of the Argentine allegations concerning that

¹ "L'Agriculture et l'élevage dans la République Argentine... ouvrage publié sous la direction de F. Latzina". Paris, 1889 (p. 4).

reputable geographer; but, the further to prove that Latzina had not changed the opinion he had in 1882, it remains to recall that, as late as 1908, he had not included any of the three main disputed islands in his "Argentine Geographical Dictionary" or in its "Supplement" ("Some Remarks . . .", p. 43).

(b) *The Evidence of Paz Soldán*

148. An examination of the fresh cartographical material brought forward by the Argentine Counter-Memorial requires that something be said about Señor Mariano F. Paz Soldán, a renowned Peruvian geographer of the XIXth Century.

It will be remembered that in its Memorial the Government of Chile had published three maps from Paz Soldán (Ch. Plates Nos. 36 and 37). Both in the first volume of the Chilean Memorial (p. 85, para. 1) and in "Some Remarks . . ." (pp. 34-36) some comments were made concerning Paz Soldán and his maps. The Government of Argentina (Arg. C.M. p. 461, para. 42), now, criticises the Government of Chile for not including in its Atlas the maps which the Peruvian geographer published in 1885, adding that the Court should be made aware that in his 1885 *Diccionario Geográfico Estadístico Nacional Argentino*, Paz Soldán had published two maps concerning the Southern territories. One of these maps is reproduced in the Argentine Atlas (Arg. C.M. Map 17).

It is unnecessary to recall that the Chilean Atlas was expressly described as not being a complete compilation of the South American cartography and that it was meant to be an accompaniment to the Chilean Memorial; but the Argentine remarks are not particularly becoming to a Party which published 26 maps with its Memorial, addressed to a Party which published 125 plates with over 180 maps. It would be easy to retort that the Government of Argentina itself did not publish the 1885 Paz Soldán map with its Memorial and that, even now, one of his maps of that year has been left unpublished in the Argentine Atlas.¹ But that easy way out would not be enough. Paz Soldán's testimony, his *Diccionario*, his Atlases and his maps are, indeed, worthy of some additional comments in this Reply.

149. With reference to the *Diccionario*, the manner in which the Argentine Counter-Memorial presents it is somewhat disingenuous and calls for some corrections. The first point concerns the emotional position which Paz Soldán was in, in 1885, when writing his *Diccionario*. The initial words of the "Prologue" are most significant:

¹ This omission has been corrected. This other map of Paz Soldán, which is of some interest in view of the Argentine accusations, has been reproduced by the Government of Chile in its Third Atlas (Ch. Plate 176).

"Huyendo de la persecución de los enemigos de mi patria, llegué a Buenos Aires . . ." he begins ¹. It would not be expected that Paz Soldán in those days would be an impartial witness in relation to Chile. But the Government of Chile will not insist on this point, though its bearing on the contents of the *Diccionario* should not be underestimated. There are other aspects of the references to the *Diccionario* which need to be mentioned.

150. For instance, the Argentine Counter-Memorial (p. 462, para. 42) adds that in July 1884, Paz Soldán "handed his manuscript to the then Argentine Minister of the Interior, Dr. Bernardo de Irigoyen". This is simply not true. The very prologue of the *Diccionario* reveals that when writing to Irigoyen, in July 1884, Paz Soldán had only concluded *the draft of the first part of his book*.² Even several months later, when the Argentine Congress was requested for special funds to cover the cost of publishing the *Diccionario*, Paz Soldán had not yet completed his work. In their letter to Congress for that purpose, Roca and Irigoyen referred to the *Diccionario* as being "under preparation", stating that they trusted that "the work would be complete".

Therefore, it is not as certain as the Argentine Government would like one to believe that Roca and Irigoyen knew of the actual contents of the *Diccionario*, which, furthermore, it is recognized, "contains certain errors". But the Counter-Memorial adds: "...it was well received by Dr. Irigoyen, who did not believe it necessary to make any comments concerning Dr. Paz Soldán's interpretation of the Treaty of 1881 in regard to the area of Tierra del Fuego" (Arg. C.M., p. 462, para. 42).

151. Did Irigoyen know of the interpretation of the Treaty or of the maps which Paz Soldán appears to have "added" to his *Diccionario* as an afterthought?³

Whatever may be the case, the opinion of Paz Soldán quoted by the Argentine Counter-Memorial reads:

"...and shall belong to the Argentine Republic all the Islands and Territories which are to the East of said line" (meridian 68° 34') "and to Chile the Islands existing to the South of the Beagle Channel, as far as Cape Horn, and those which may be to the West of Tierra del Fuego; and since the Islands of *Navarino*, *Wallaston*, *la Hermita*, *Merschel*, *Lennox*, *Picton*, *Isla*

¹ "Escaping from the persecution by the enemies of my Fatherland I arrived at Buenos Aires . . ." For Paz Soldán, in those years, the "enemies" were, of course, the Chileans who were engaged in war against his country.

² "...I am pleased to inform Your Excellency, so that you may bring it to the knowledge of His Excellency the President of the Republic, that *I have concluded, in draft, the First Part of my work . . . Before making a final draft of the First Part of the Dictionary, and without prejudice to the continuation of my work, until bringing it to an end*, I wish to know what Your Excellency with His Excellency the President of the Republic, may decide upon the publication of the First Part, already concluded . . ." (*Diccionario* . . . , pp. IV and V).

³ That the maps were "added" at a later date is evidenced also in the *Prólogo*. After referring to the Dictionary, Paz Soldán writes: "I have considered it necessary to *add* ("agregar" in the original) *six maps* . . ." (p. VIII).

Nueva,¹ other minor islands and *part of Hoste*, are to the East of the meridian which is the boundary, it is evident that all those islands belong to Argentina" (Arg. C.M. p. 461, para. 42).

As related by the Argentine Counter-Memorial, elsewhere the *Diccionario* refers also to Navarino Island, in the following terms: "the largest portion of this Island should be Argentine, according to the spirit of the treaties" but "there are doubts which would be settled through diplomatic channels" (Arg. C.M. p. 462, para. 42).

A reading of this extravagant description of the southern boundary, and a look at his 1885 maps, are sufficient to realize that Paz Soldán was then under the effect of a double misconception. First, his Cape Espíritu Santo meridian line, prolonged south of the Beagle Channel, reveals that he had misread Article III of the Treaty which, as is known, stipulates that this meridian line stops when reaching the Channel. His allocation of territories to Argentina, *such as Navarino and "part of Hoste" and others which not even now the Government of Argentina denies to be Chilean*, reveals that he ignored that the Treaty allocated to Chile "all the islands south of the Channel down to Cape Horn".

152. But it is not only that: the depiction of the maps and the description above quoted are in contradiction also with his own conception of the geography of the area. When referring to the Beagle Channel, he said that it was formed on the North "by the large island of Tierra del Fuego"; and when referring to *Cape San Pio*, he was correctly appraising the extension of Beagle Channel. Thus he ought to have known only too well which were those "islands to the south" of it.

It is interesting to read his entry about Cape San Pio:

"Pio (San). A promontory—Tierra del Fuego—In the Northeastern part of Beagle Channel at 55° 3' 15" latitude and 66° 30' 30" longitude ("Diccionario", p. 380).

As authorities for this identification of Cape San Pio he mentions Bove and Fitzroy. Was this definition of Cape San Pio (which implied a very clear reference to the boundary with Chile) one of those points which Dr. Irigoyen did not believe it necessary to comment upon?

Though in this definition of Cape San Pio, Paz Soldán is right, his 1885 interpretation of the Treaty contradicts an express clause of the Treaty and, even, runs contrary to the maps included in the *Diccionario*. That it is also contrary to the present claims of the Government of Argentina cannot be disputed. For his "boundary line" does not follow the "Cape Horn meridian" but is parallel to it, some sixty miles to the west. The testimony of Paz Soldán, in 1885 is, therefore, absolutely useless for interpreting the Treaty and it is difficult to understand the purpose of the Argentine remark that Irigoyen "did not believe

¹ Emphasis given in Argentine Counter-Memorial to "Lennox, Picton, Isla Nueva".

it necessary to make any comments concerning Paz Soldán's interpretation of the Treaty . . ." (Arg. C.M. p. 462, para. 42).

153. But—as Professor Guerra had already observed in his well known book on the Beagle controversy—more significant is the position which Paz Soldán took in a map and in his Atlas which were both published in Argentina in 1887 (Ch. Plates Nos. 36 and 37).¹

There, the Peruvian geographer rectified his erroneous interpretation of 1885. This was done not only on the maps but, also, in the description of the boundary line in the region of Tierra del Fuego-Statens Island (see "Some Remarks . . .", pp. 34-36).

The Argentine Counter-Memorial relies on later maps from Paz Soldán (Arg. C.M. Maps Nos. 21 and 26) which—again—were printed by Lajouane, and engraved by the Erhard brothers. It appears to have forgotten that in the "Preliminary Words" of Paz Soldán's Atlas which correctly defined the boundary line, *Lajouane himself*, as Editor of the Atlas, had written that "a most expert American geographer" had participated in the preparation of the early maps, and that all the necessary corrections indicated by "masters who know Argentine geography profoundly" had been carried out before the maps were engraved (Ch. Plates Nos. 36 and 37; "Some Remarks . . .", pp. 34-36).

After such explicit statements from Paz Soldán and Lajouane, how could it be explained that Paz Soldán would, only some few months later, have again changed his interpretation of the boundary line in the region?

154. The explanation is painfully simple: the purported changes of Paz Soldán's view under the influence of Pelliza's map are nothing but an invention.

*Paz Soldán died in 1886, that is to say, two years before the appearance of Pelliza's map.*²

Therefore, all the later "Paz Soldán maps" can only show a scientific fraud carried out by Lajouane or with his connivance.

The Government of Chile is convinced that if the Government of Argentina had been acquainted with these facts it would not have relied on this apocryphal evidence.

(c) *The Enigmatic Hoskold Map of (circa) 1894*

155. The Argentine Counter-Memorial (p. 233, para. 23; p. 444, para. 18; p. 467; para. 47; pp. 515-516) places not a little reliance upon the *Mapa Topográfico de la*

¹ J. G. Guerra. "*La soberanía chilena . . .*", p. 140.

² José Pareja P.S. "Mariano Felipe Paz Soldán" (Biblioteca Hombres del Perú XXVI, Lima 1965). According to the author, a descendant from Señor Paz Soldán, the Peruvian geographer returned from Argentina in 1885 and died in Lima on 31 December 1886.

República Argentina published by Sr. Hoskold *circa* 1894 (Ch. Plate No. 61; Arg. Mem. Map 22; Arg. C.M. Map 31). This is represented (Arg. C.M. pp. 231, 233) as one of the maps influenced by the so-called "Pelliza map" (see above paras. 117 et seq.). It is stated that:

"This map had been approved by the Argentine Government and stamped by the International Boundaries Office of the Ministry of Foreign Affairs, which undoubtedly confers upon it an official character" (Arg. C.M. p. 467, para. 47).

156. This map depicts the islands of Picton, Lennox and Nueva by colouring as Argentine, and the reference in the superscription to a Decree of 1894 indicates that the map was published not earlier than 1894.¹ The submissions of the Chilean Government relating to this map are (a) that the allocation of territory shown is inconsistent with the 1881 Treaty; (b) that the map does not reflect the considered opinion of Sr. Hoskold himself; and (c) that the "official" character of the map is not supported by any evidence brought forward by the Argentine Government.

157. The first submission is borne out by the mass of evidence—documentary and cartographical—in the case supporting the Chilean interpretation of the 1881 Treaty.

158. The second submission is that the map published *circa* 1894 does not reflect Hoskold's own opinion. It may be recalled that the Chilean Memorial referred to two maps which it described as "connected" with the Argentine Engineer H. D. Hoskold (Ch. Plate No. 61, "Some Remarks . . .", pp.48-49). Attention was then drawn to the inexplicable change in Hoskold cartography: Picton, Nueva, Lennox and other islands, which were shown as Chilean in 1892, appeared as Argentine on his map of 1894. The Argentine Counter-Memorial (p. 444, para. 18) endeavours to by-pass this fact, by stating that the first map "was not prepared by Hoskold but by Andw. Reid, Sons & Co., Newcastle". Having thus converted into cartographers the printers and publishers of Hoskold's lecture, the Argentine Counter-Memorial makes no reference to other facts that may be useful for an understanding of Hoskold's opinion about the boundary line, and, additionally, in explaining the change referred to in the Chilean Memorial.

159. It may be safely asserted that the 1892 map was a correct representation of the opinion of Hoskold concerning the effect of the 1881 Treaty upon the southern territories. For such was the opinion of Hoskold five years later, in 1897. This is revealed in "The Scottish Geographical Magazine" of February 1897, which published an interesting work

¹ As above mentioned (this Chapter para. 100) 1893 is an erroneous date, attributed to the map by the Argentine Counter-Memorial. As far as the Government of Chile is aware, no copy of the original 1893 issue is known to exist.

by Hoskold who, at the time, occupied the position of Director-General of the National Department of Mines and Geology of the Argentine Republic. The work is entitled "Notes on the Geography of the Argentine Republic". Hoskold mentions there that the Geographical Institute of Buenos Aires had published a map where the boundary line traversed Beagle Channel to lat. $54^{\circ} 56' S$. and long. $67^{\circ} 18' W$, *curving southwards from this point "so as to include Picton Island, New Island, and Staten Island"*. This was, obviously, a reference to the cartography published by the Institute in the wake of Popper's arbitrary line (Ch. Mem. p. 85, para. 2; "Some Remarks . . .", pp. 46-47). That Hoskold rejected this novel interpretation contained in the second edition of the "Atlas" of the Institute is shown by the following part of his "Notes" (published as aforesaid):

"The Straits of Magellan territory was ceded to Chile by Treaty. *The remaining southern territory of the Republic* (i.e. Argentina) namely, part of Tierra del Fuego, commences at Espiritu Santo, in lat $52^{\circ} 40' S$. and long. $68^{\circ} 34' W$. From this point the dividing line between the Argentine and Chilean territory runs directly southward to Beagle Channel.

Beyond this, it proceeds eastward with many windings and then run northwards to Cape San Diego, in lat. $54^{\circ} 40' S$ and long. $65^{\circ} 7' W$." (that is to say, somewhere at the north end of the Strait of Le Maire).

Nothing could be further from the "Cape Horn frontier".

It is clear then that *even in 1897*, Hoskold gave a very restricted meaning to the territories assigned to Argentina by the Treaties with Chile. Evidently, in his opinion, as expressed in his lecture in 1892, Argentina was entitled to no land south of Tierra del Fuego.

160. The third submission of the Chilean Government concerning the Hoskold map of *circa* 1894 is that its official associations remain an enigma. In particular, the official "approval" referred to in the second Argentine pleading is not borne out by any evidence extant in these proceedings. Thus there is no information in the Argentine pleadings concerning the circumstances of the publication of the "*Mapa Topográfico*", *circa* 1894.

The Government of Argentina (Arg. C.M. p. 444, para. 18; p. 467, para. 47; p. 515) stresses the fact that it granted permission for the publication of the map; but still keeps silent about "the first proof of Hoskold's map" and "the corrections which the Boundary Office of the Argentine Republic introduced in the map" before permitting its publication (see "Some Remarks . . .", p. 49). It remains to recall that the Argentine Counter-Memorial repeats the information which appears in the Chilean Memorial concerning the "official approval" given to this map (cf. Arg. C.M. p. 444, para. 18). But it should be added that over one year ago, the Agent for Chile made a request to the Honourable Agent for Argentina for a copy of the "decree" said to have approved this 1894 Hoskold map. These circumstances were recalled in the Chilean Counter-Memorial

("Further Remarks . . .", p. 25). The position remains as it was then: the "decree" has yet to be produced.

161. This concludes the survey of the eccentric and belated development in the Argentine cartography in the period after 1888. The Chilean Government finds no reason to modify the conclusion set forth and elaborated above (paras. 107-115): there is a concordance of Argentine official cartography supporting the Chilean position, a concordance which spans the period 1881 to 1908.

J. THE COLLECTION OF ANOMALOUS AND VARIED LINES TRENDING SOUTHWARDS

162. There is one other aspect of the map evidence which is worthy of emphasis: those maps which do show a southward trending dividing line, contrary to the Chilean position in this case, show very substantial variations and inconsistencies. It is possible to conclude that, once the normal and sensible concept of the Beagle Channel, derived from the 1881 Treaty, is abandoned, all sorts of confusion and absurdity result. This in itself is a strong indication of the correctness of the concept of the Channel as a more or less rectilinear latitudinal concept base upon the words of the 1881 Treaty and the map evidence closely related to the conclusion of the Treaty.

163. The promiscuous collection of anomalous lines trending southwards from the correct latitudinal concept of the Beagle Channel can be classified in the following manner.

(1) *A straight line continuing directly southward as a prolongation of the longitudinal division of Tierra del Fuego.* The relevant maps are: *Ch. Plate No. 44* (Estrada, 1887); "Some Remarks . . .", p. 39; *Ch. Plate No. 62* (Argentine maps of 1893 and 1894); "Some Remarks . . .", pp. 49-50; *Ch. Plate No. 126* (the earlier Holleben map, 19 July 1881); "Further Remarks . . .", p. 35; *Arg. C.M. Map 17* (Paz Soldán, 1885); *Arg. C.M. Map 40* (Reinoso, 1900).

164. (2) *An undulating line continuing south, from the boundary in Tierra del Fuego, between Hoste and Navarino and then westward of the Hermite and Wollaston groups.* The relevant maps are: *Ch. Plate No. 38* (Argentine Information Office, 1887); "Some Remarks . . .", pp. 36-37; *Arg. Mem. Map 20* (the same item as *Ch. Plate No. 38*); "Further Remarks . . .", p. 23; *Arg. C.M. Map 15* (no line as such, Estevanez, 1885); *Arg. C.M. Map 16* (no line as such; Estevanez, 1885); *Arg. C.M. Map 18* (no line as such:

Atlas by Blackie and Son, 1886); Arg. C.M. *Map* 28 (Bartholomew, 1892); Arg. C.M. *Map* 29 (Bartholomew, 1893).

165. (3) *The "Popper line" of 1891:* through the Beagle Channel but departing from it to pass between Picton and Navarino, then between Lennox and Nueva and then due south. This line appears on the map produced by Julio Popper (*Ch. Plate No. 55*; Arg. Mem. *Map* 23; "Some Remarks . . .", pp. 46-47; *Ch. Mem.* pp. 85-86, paras. 1-3). The other relevant maps are: *Ch. Plate No. 63* (Argentine Geographical Institute, 1894); "Some Remarks . . .", pp. 50-51; *Ch. Plate No. 84* ("Argentine Report", 1901, *Map XIV*; the line does not extend as far south as the others); "Some Remarks . . .", pp. 59-61; "Further Remarks . . .", p. 26; Arg. Mem. *Map* 19 (Seelstrang map, 1893): "Further Remarks . . .", p. 22; Arg. Mem. *Map* 24 (as *Ch. Plate No. 84*, listed earlier). The "Popper line", or an approximation thereto, also appears on Arg. C.M. *Maps* 42, 43, 44, 45, 46, 48, 50, 51, 55, 66, and 71.

166. (4) *A line departing from the Beagle Channel, dividing Picton and Navarino, passing through Goree Road and winding casually south* to the eastern approaches of the Wollaston Islands. Such a line approximates to certain sectors of the line depicted on Arg. Mem. *Map* 27. The relevant maps are: *Ch. Plate No. 48* (the map of "Geographie" 1890); "Some Remarks . . .", pp. 42-43; Arg. Mem. *Map* 21 (published by Lajouane, 1889); "Further Remarks . . .", p. 24; Arg. C.M. *Map* 19 (the so-called Pelliza map, circa 1888); Arg. C.M. *Map* 21 (attributed to Paz Soldán, 1888); Arg. C.M. *Map* 22 (C.F. and A.H. Marichal, 1889); Arg. C.M. *Map* 23 (Argentine map of 1889); Arg. C.M. *Map* 24 (Latzina, 1889; and see *Ch. Plate No. 48*); Arg. C.M. *Map* 25 (Latzina, 1889); Arg. C.M. *Map* 26 (attributed to Paz Soldán, 1890); Arg. C.M. *Map* 27 (published by Lajouane, 1890), and Arg. C.M. *Map* 67 (Walle, 1912).

167. *There is a further version of this line which, after passing through the eastern part of the Wollaston group, passes further south and terminates in the Diego Ramirez Islands: see Arg. C.M. Maps 30 and 35.*

168. The Court is respectfully reminded that these maps showing southward trending lines of various kinds are *as a group* a minority of the maps produced in these proceedings. Moreover, the variations of line are very substantial indeed: the first version (cf. para. 163 above) slices through Hoste Island (5 maps); the second version (cf. para. 164 above) goes between Hoste and Navarino and west of the Wollaston group (7 maps); the third version (cf. para. 165 above) leaves only Lennox to Chile (16 maps); the fourth version (cf. paras. 166 and 167 above) goes through Goree Road and to the

eastern part of the Wollaston group (14 maps). Further variations of the line may be found: for example, Arg. C.M. Maps 56, 64, and 73.

169. The consequence is that, of all the maps offered by both the Chilean and Argentine Government, about *one tenth* show an alignment which departs from the conception of the boundary line in the Beagle Channel region which is upheld by the Chilean Memorial and Counter-Memorial. Only a part of them shows the territorial allocation effected in 1881 in accordance with the present Argentine claims. To evaluate this evidence, of course, the dates of the maps should be considered.

In any event, no map of Chilean provenance shows the disputed islands as Argentine.

The overall and inevitable conclusion is that once the straightforward latitudinal concept of the Beagle Channel boundary adopted in 1881 is discarded, it becomes impossible to find a sensible and consistent principle of division: hence, the assortment of bizarre and rootless southwards trending lines.

K. GENERAL CONCLUSIONS CONCERNING THE MAP EVIDENCE

170. The Chilean Government does not consider that it is profitable to attempt a summary of all the matters considered in this Chapter of the Reply. However, a statement of the principal conclusions relating to the cartography may be of assistance to the Court.

171. The Chilean Government's principal conclusions are as follows:

(i) The Chilean Government uses map evidence in relation to the general body of evidence and in particular and varied contexts. The charts and maps support and corroborate evidence of other kinds.

172. (ii) The evidential significance of cartographic items varies according to all the circumstances and in relation to the fact in issue: evaluation of map evidence cannot be based upon a few dogmatic generalities of the kind offered in the introduction to Chapter XI of the Argentine second pleading.

173. (iii) Maps are admissible in the present proceedings in the following ways:

(a) to prove geographical facts, including toponymy: for example, the maps of Fitzroy and Parker King (Ch. Plates Nos. 1-4).

(b) to prove the state of geographical knowledge at a particular period: for example, the Barros Arana map of 1876 (Ch. Plate No. 8) and the Elizalde map (Ch. Plate No. 9).

(c) as an aid to the interpretation of the 1881 Treaty in the form of the preparatory work of that Treaty: for example, the Barros Arana map of 1876 (Ch. Plate No. 8), and the Elizalde map (Ch. Plate No. 9).

(d) as evidence of the subsequent practice of the Parties to the 1881 Treaty and thence as good presumptive evidence of the correct legal interpretation of the Treaty: for example, Chile's 1881 Authoritative Map (Ch. Plates Nos. 13-19), and the Argentine official map of 1882 (Ch. Plate No. 25).

(e) as evidence of the contemporaneous practical interpretation of the 1881 Treaty by the Parties *as attested by the governments of third States*: for example, British Admiralty Chart 786 (Ch. Plate No. 20), and British Admiralty Chart 789 (Ch. Plate No. 173).

(f) as evidence of acts of jurisdiction and, consequently, as evidence of the exercise of sovereignty in confirmation of the Chilean understanding of the 1881 Treaty: for example, the map prepared by the Chilean Hydrographic Office in 1881 (Ch. Plates Nos. 13-19), and the Chilean Land Measurement Office Map of 1911 (Ch. Plate No. 106).

(g) as evidence of the openness and notoriety of the existence of sovereignty by Chile by virtue of the 1881 Treaty: for example, the widely distributed Chilean official map, published by the Hydrographic Office in 1881 (Ch. Plates Nos. 13-19), the editions of the map published in *La Ilustración Argentina* (Ch. Plates Nos. 21-175), and the official 1882 Argentine map (Ch. Plate No. 25).

(h) as evidence of admissions and acquiescence on the part of Argentina involving recognition that, according to the 1881 Treaty, Picton, Lennox and Nueva were Chilean: for example, Admiralty Chart 786 (Ch. Plate No. 20) with its contemporaneous inscription recording information given by the Argentine Minister in London to the British Foreign Office.

(i) as evidence of the opinion of authoritative official persons: for example, the despatch and map of Baron d'Avril (Ch. Plate No. 12) and the use of Chile's 1881 Authoritative Map by diplomatic agents to inform their principals of the Treaty of 1881 (above, para, 65).

(j) as evidence of non-official professional opinion; or as evidence of general opinion or repute: for example, the map of Seelstrang and Tourmente of 1876, edited to show the 1881 territorial settlement (Ch. Plate No. 127); as revised in 1884 (Ch. Plate No. 26).

174. (iv) Neither Chile nor Argentina was quick to protest against adverse cartography. However, the absence of protest could not in any event harm the Chilean position because:

(a) prior to 1908 there was no official Argentine cartography of a kind calculated to call forth protest; and

(b) Chile was in peaceful possession of the disputed islands continuously after 1881, by virtue of the Treaty, and therefore there was no particular reason for a reservation of Chilean rights.

175. (v) The general weight of the map evidence clearly favours the Chilean interpretation of the 1881 Treaty. In particular there is a complete concordance of view in the official maps of both Governments from 1881 until 1888. Furthermore, with certain very doubtful exceptions of the period 1888-1894, there is a substantial concordance of official Argentine maps between 1881 and 1908. The "exceptions" (Chap. IV, paras. 111-115 above) have little or no probative value and some of the maps concerned contradict the present Argentine position. In its Counter-Memorial the Argentine Government makes an attempt to adduce the so-called "Pelliza map" (Arg. C.M. Map 19) and a map attributed to Hoskold (Ch. Plate No. 61) as Argentine official maps (Arg. C.M. pp. 229-233, para. 23 and cf. above, paras. 125 et seq. and 155-160); but even if they were proven to be official, the fact would remain that the boundary line shown on those maps diverges from the line presently claimed by Argentina.

176. Thus the alignment shown on Arg. Mem. Map. 27 is contradicted by a great preponderance of map evidence, both official and private in provenance. This cartography bears out as clearly as possible the Chilean view that in the 1881 Treaty the territorial allocation south of Tierra del Fuego was based on a Beagle Channel understood as a latitudinal concept: a more or less rectilinear seaway, hugging the southern coast of Tierra del Fuego and running to the north of Picton and Nueva.

Chilean maps, including the 1881 Authoritative Map (Ch. Plates Nos. 13 to 19), showing such a principle of division were widely distributed and were available in Buenos Aires immediately after the conclusion of the Treaty. Until 1888, Argentine cartography, *both official and private*,¹ depicted the position concordantly. Indeed, Argentine *official* cartography did not diverge from the Chilean interpretation until 1908, apart from certain "exceptions" which contradict the present Argentine claim.

¹ The Paz Soldán map of 1885 (Arg. C.M. Map. 17) which appeared in a publication which "did not have an official character" (Arg. C.M. p. 506) constitutes a totally eccentric exception (cf. above, paras. 148-154) and is entirely inconsistent with the very terms of the Treaty and with the Argentine position in the present dispute.

CHAPTER V

GEOGRAPHICAL AND HISTORICAL POINTS: A REBUTTAL TO CHAPTER I OF THE ARGENTINE COUNTER MEMORIAL

INTRODUCTION

1. The Argentine Memorial maintained that for Fitz-Roy the eastern stretch of Beagle Channel was formed by what both countries have until now called "Paso Picton".¹

The rather strange theory, which has been refuted in full in the Chilean Counter-Memorial, looked for support to a number of explorations and maps of the period prior to the first voyage of the "Beagle" and to an analysis of the reports of the discoverers.

In the first Argentine pleading, this reasoning was represented as essential to the Argentine case. Now, in its Counter-Memorial, the Argentine Government has slightly changed its first approach. Although its description of Beagle Channel remains unaltered, it now affirms that, to understand properly the way of thinking of Señor Irigoyen and, indeed, to interpret the Treaty of 1881, the actual course of the Beagle Channel is "only of *relative importance*" (Arg. C.M. p. 102, para. 18).

Such a change in the Argentine approach might perhaps suggest that it is unnecessary to burden the Court with the study of certain historical and geographical aspects to which the Government of Argentina itself has devoted much time and effort. It might also be possible to confine the argument on this point to what has already been said in the previous Chilean pleadings.²

But it is necessary to deal once more with this matter, in view of the inaccuracies contained in the historical reconstruction undertaken by the Argentine Counter-Memorial and the unseemly manner in which the subject is treated therein.

In answer to what the Argentine Counter-Memorial disdainfully labels as Chile's "forensic geography", the Argentine Government has presented something which is neither coherent nor accurate, for it is factually wrong and it lacks even the elements of logic that are needed by its allegations.

¹ For the origin of the place-name "Paso Picton" (Picton Pass) and its survival up to the present day on Argentine maps see Ch. C.M. para. 43, p. 85 *et seq.*

² See, in particular, foreword to "Some Remarks . . ." and Ch. C.M. "Appendix B".

2. In the "Introduction" to the Argentine Counter-Memorial there is a summary of the contents of its first chapter in which it is pointed out that the first explorations of the southernmost part of America are important to establish the exact meaning of certain names and concepts.

The summary also purports to correct the "inadequacy of the treatment" given to these subjects in the Chilean Memorial, and to remedy its "grave deficiencies". Lastly the chapter itself deals with the so-called "fallacies of the British Hydrographer's attempt in 1918 to reconstruct the survey of Stokes in 1830".

3. The Government of Chile considers it necessary to answer the several questions raised in Chapter I of the Argentine Counter-Memorial and such is the objective of the present Chapter. This answer will be developed under four headings:

- A. Voyages prior to the discovery of the Beagle Channel;
- B. Toponymy;
- C. The voyages of the "Beagle" and the definition of the Channel given by its discoverers;
- D. The "geographical errors" said to be contained in the Chilean Memorial, and various additional comments.

Before developing these headings, it may be useful to point out that this Chapter is based on what has already been said in earlier Chilean pleadings. The position of Chile, as developed in those pleadings, remains unaltered.

A. VOYAGES PRIOR TO THE DISCOVERY OF THE BEAGLE CHANNEL

4. The first general observation is that, with reference to the voyages prior to the discovery of Beagle Channel, the approach of the Argentine Government is totally wrong. For it peruses a number of maps and opinions of mariners and map-makers on an *ex post facto* assumption, trying to prove that the existence of Beagle Channel was already known before the Channel was actually discovered. This absurd attempt is conducted on the lines revealed by the sub-title to paragraphs 2 to 6 of Chapter I of the Argentine Counter-Memorial: "The passage between Picton and Navarino as the only Eastern entrance to the Beagle Channel". The intention is to prove that thesis with a number of unconnected remarks of early mariners who neither knew of the islands which were at a much later date to be named Navarino and Picton, nor had the faintest notion of the existence of the channel discovered many years later.

5. The Argentine Counter-Memorial refers to a number of expeditions and maps—whilst omitting others which would have been of greater interest—and, finally, makes a rather strange assertion: that explorers and maps of old anticipated the location of the Eastern end of the Beagle Channel in Picton Pass, and thus allowed Fitz-Roy “to sail with relative assurance” (p. 3, para. 2).

6. What truth lies behind these assertions and what lies in the realm of fantasy will now be examined.

Immediately after the highly important discovery by Magellan of the Straits connecting the Mar del Norte with the Pacific, the European rivals of the Spanish Monarch tried to bypass the strict control which Spain intended to exert over the traffic and the trade in her huge Empire. To that end, those Powers sought routes that would enable them to reach the Mar del Sur outside the Spanish control. To this factor there needs to be added the fact that, from time to time, Spain was at war with other Nations, such as The Netherlands or England, a situation which gave rise to expeditions for the conquest of strongholds along the Pacific coast.

Thus expeditions set out, such as Drake's (1577-1580) which gathered some information on the existence of an Oceanic passage to the South of the Straits of Magellan, and Schouten's and Le Maire's which, in 1616, found the passage to the Mar del Sur, east of Tierra del Fuego, discovering Staten Island and Cape Horn.

On its turn, the news of the discovery of the “new Strait” (Le Maire's) induced the Spanish Crown to dispatch an expedition to the Southern part of the Continent, and the task was entrusted to Bartolomé García de Nodal and Gonzalo Nodal, two brothers, natives of Pontevedra. This Spanish expedition took place in 1618-1619.

The Argentine Counter-Memorial often mentions the Nodales voyages but does not assign any interest to it. Yet, it is perhaps one of the most interesting among those dispatched to the Cape Horn area before Cook's voyage.

After the Nodales, a large number of expeditions were sent out: some were of a military nature; some were exploratory; others had purposes which answer to a combination of interests, commercial and otherwise. In each of these expeditions, the area to the south of the Straits of Magellan was reconnoitered in so far as it could facilitate the difficult task of rounding Cape Horn.

The characteristics of this exceptionally wild region with its rough seas, powerful currents, strong varying winds, snows and mists, made it extremely difficult and dangerous in those days to spend time in secondary explorations close in to the shore. As M. Louis de Freycinet wrote:

“Quand on approche du Cape Horn, les terres paroissent fort découpées et offrent un

certain nombre d'îles et d'îlots, qui laissent entre eux des baies ou des canaux, dans les quels nous eussions bien désiré entrer, mais d'impérieux devoirs nous empêchèrent d'y pénétrer."¹

The aim of those early voyages was not fundamentally the survey of the inner waterways of the Southern archipelagoes. The vessels had other tasks and it was extremely difficult for them to sail in these regions. Only occasionally, when forced by weather conditions, did a ship take refuge between these numerous islands.

That is why, until early in the 19th Century, although cartographical and geographical knowledge of that part of America had made considerable progress, such knowledge remained very incomplete with regard to the inner waterways between Cape Horn and the Straits of Magellan, except for some sectors close to the latter. Many explorers have said as much and it is enough to quote only two of the more important ones.

James Cook, after his first voyage round Cape Horn (1768-1771) wrote, with reference to his map:

"In this chart I have laid down no land, nor trace out any shore but what I saw myself, and thus far it may be depended upon: *the bays and inlets, of which we saw only the openings, are not traced*. It can however scarcely be doubted, but that most, if not all of them, afford anchorage, wood and water."²

And Louis de Freycinet, who visited the region some forty years after Cook, wrote that:

"La connaissance que nous avons de la partie la plus australe de l'Amérique, est encore bien incomplète . . .

Cook, Malaspina et quelques autres navigateurs ont, avant nous, approché de ces côtes, et comme nous aussi ils ont laissé beaucoup à faire à leurs successeurs".³

This explains why the best maps published in the late 18th Century and early 19th Century show, for the lands to the South of Tierra del Fuego, no more than a few general features and a vague outline of the coast seen from some distance away.

It is, therefore, inconceivable for Argentina to attempt to draw, from antecedents of that sort, arguments for locating the Eastern end of a channel, the existence of which was then unknown, amid a number of islands either undiscovered as yet or incorrectly marked on the charts of the time.

¹ "Voyage autour du Monde" par M. Louis de Freycinet — Historique — tome II — troisième partie — Paris 1837, p. 1217.

² "An account of the Voyages undertaken by order of His Present Majesty for Making discoveries in the Southern Hemisphere", by John Hawkesworth, Vol. II, London MDCCLXXIII, p. 65.

³ Freycinet, op. cit. Navigation et Hydrographie, Première Partie, Paris 1826, p. 259 (see also King's opinion, quoted in para. 11 of this Chapter).

7. It is true, of course, that some navigators observed in the outer part of the mass of land visible in the distance, several openings, fissures and slopes indicating the existence of bays, islands, passages or channels; but they never appear to have explored them.

Thus, the Dutch expedition led by L'Hermite in 1623-1624, when in Nassau Bay, observed the existence of several islands and saw openings on the coasts that indicated possible passages starting from that Bay, and which were assumed by the leader of the expedition to communicate with the Straits of Magellan.¹ One of its vessels (the "Windhond") reached the vicinity of the island that Fitz-Roy later called Lennox.

In the middle of the 18th Century, Jorge Juan and Antonio de Ulloa spoke generally about islands, channels and narrow gaps in and around Tierra del Fuego² and this report was confirmed by M. de Freville in 1774³, by Cook in his first voyage⁴ and, later, by Freycinet with particular reference to the area lying close to Cape Horn.⁵

8. Among the early Spanish expeditions to this area, attention must be paid to the voyage of the Nodal brothers, as suggested above. Sent in the wake of the Dutch discovery of Cape Horn, they described as lying in the southeastern part of Tierra del Fuego an important stretch of water (named by them San Gonzalo Bay) by the entrance of which they saw an island, which received the same name, and which Cook was later to call "New"⁶. Alejandro Malaspina, in another voyage undertaken on orders from the Spanish Crown at the end of the 18th Century, reached three leagues off New Island, "observing successively the high lands to the interior that seemed to form various deep and sheltered bays".⁷

¹ "Chronological History of the Voyages and Discoveries in the South Sea or Pacific Ocean" by James Burney, London 1813, Vol. III, page 13: "...that the Tierra del Fuego is divided into many islands; and that to pass into the South Sea, it was not necessary to double Cape Horn; for that Nassau Bay might be entered from the East, leaving the cape to the South. That on every side he saw openings, bays, and gulfs, many of which went into the land as far as the view extended, whence it is to be presumed that there are passages from the great Bay, or rather the Gulf of Nassau, through which vessels might sail into the Strait of Magallanes" (see also Arg. C.M., p. 4, para. 3, note 4).

² "Relación Histórica del viaje a América Meridional hecho de orden de S. Magestad por don Jorge Juan... y don Antonio de Ulloa"—Second Part, Vol. IV, Madrid MDCCXLVIII, pp. 403 and 481.

³ "Histoire des nouvelles découvertes" par M. de Freville, Paris MDCCLXXIV, tome I, p. 5.

⁴ Op. cit. p. 65.

⁵ See note ¹, previous page.

⁶ "Relación del viaje que por orden de S. Mag. y acuerdo del Real Consejo de Indias hicieron los capitanes Bartolomé García de Nodal y Gonzalo de Nodal hermanos, naturales de Pontevedra, al descubrimiento del Estrecho nuevo de S. Vicente y reconocimiento del de Magallanes". Madrid, por Fernando Correa de Montenegro. 1621.

⁷ This is also referred to by the Arg. C.M. See Note (5) on p. 4. Also, Ch. Plate No. 155.

9. This well justified assumption that there existed a number of gulfs, bays, possible islands, and accordingly, sea passages between lands which on the horizon appeared as one solid land mass, spurred the imagination of map-makers who guessed where these features might be situated. Thus a host of fanciful sketches were produced. It is sufficient to note in the abundant collection of maps already submitted by both Parties in these proceedings the wide variety which existed¹; yet, it is on such a fantasy that Argentina now bases her arguments.

10. Not only was map-making complicated by the drawing of imaginary channels, but place names and the location of landmarks actually observed by navigators kept on being changed by map-makers, quite apart from the fact that, as often happened, the same landmark was given different names by different explorers, or on account of inaccurate coordinates, the same feature could appear twice on the same map. There are many examples of islands wandering around: the San Ildefonso islands, often confused with the Diego Ramirez group; the Evouts and Barnevelt islands. There are, also, islands which have their names changed: "San Gonzalo" of the Nodales map becomes "New" for Cook. On other occasions, the same feature creates a confusion: Cape Horn is often confused with the "False Cape Horn" which, in turn, was called Cabo de Udra by the Nodales.

A quick look at the old maps which have already been filed in this case will illustrate the above contentions. The so-called "synoptic chart" (Arg. C.M. Map 2) is a good example of that kind of fanciful cartography.

11. Accordingly, it is to be wondered how can the Argentine Counter-Memorial's assertion be taken seriously that earlier maps and expeditions enabled Fitz-Roy to "sail with relative assurance" (p. 3, para. 2). Or how can it suggest that, already in the 17th century, navigators had ascertained (no doubt thanks to a miraculous vision) that the totally unknown Picton Pass was the entrance to the then unknown channel which was to be discovered centuries later!

A quick reading of the "Narrative" is sufficient to realize how much care had to be taken to sail the sloop "Beagle" in view of the total inaccuracy of the charts for the southern region.

Captain King stated this most clearly in his lecture to the Royal Geographical Society of London. He said:

"The Southern coast of Tierra del Fuego, between Cape Good Success, the southern limit of Strait Le Maire, and Cape Pillar at the western end of the Strait of Magellanes, was very little known. Cook's voyage affords several useful notices of the coast between Cape Deseado and Christmas Sound, and the Dutch fleet under L'Hermite partially explored

¹ Argentine "Synoptic Chart" (sic) No. 2, Chilean Plates 146, 147, 148, 151 and 153.

the neighbourhood of Cape Horn: a confused chart of this coast, however, was the best that could be put together; and although Mr. Weddel has more recently published an account of the harbours and anchorages near Cape Horn and New Year Sound, yet little available benefit was derived from it, because these different navigators having confined their examinations to small portions of the coast, it was difficult to connect their respective plans, even on so small a scale as that of the general chart”.

Later, referring to information which had been gathered by Weddell from vessels in the seal trade, King said: “our charts cannot be said to have been much improved for the last fifty years”.¹

Fitz-Roy himself, on arriving in Lennox Cove on the 2nd May 1830, gave orders “to continue the survey of the coast from the east side on the head of Nassau Bay to the vicinity of New Island”. He knew already of the channel discovered by Murray yet he noted in his Journal:

“I could here trace no resemblance whatever to any published chart . . .”².

It is easy to see that the Argentine attempt to infer from those early maps and voyages that they showed that “the passage between Picton and Navarino is the only Eastern entrance to the Beagle Channel” has no grounds.

12. Having said this, the Government of Chile believes that some early expeditions deserve a more detailed analysis, either because of the erroneous version the Argentine pleadings gives concerning them, or because of their silence about them.

13. The Argentine Counter-Memorial begins by referring to the expedition of the Prince of Nassau’s fleet “under Schapenham” (sic)³, and believes that it can see, both in the chart as well as in the report on the voyage, that when the “Windhond” dropped anchor in a place which it named Goe Ree, and “discerned a channel to the north-north-east of the place where he was anchored: this entrance between Picton and Navarino was the expanse of water which Fitz-Roy was later to confirm as the eastern mouth of the Beagle Channel” (p. 3, para. 3). In support of this strange and prophetic assertion it transcribed the relevant paragraph from the expedition’s journal.

Besides the absurdity of supposing that the Dutch sailors of the 17th Century had some idea of an entrance to a channel of which they had no knowledge, an examination of Van Walbeeck’s map, the text of the journal of the Fleet, and the meaning of the term “Goe Ree” are sufficient to wreck the whole of the Argentine argument. In fact:

¹ Narrative Vol. I, pp. 563 and 564.

² Narrative Vol. I, p. 437.

³ The Admiral was Jacob l’Hermite; Schapenham had the rank of Rear-admiral (see Arg. C.M. para. 3, p. 3).

(a) the chart plots the "Windhond's" track in this area to the place where it anchored: now "Goree Road". The report itself (see the Arg. C.M. note 4, p. 4, para. 3) speaks of a *great channel* through which the ship sailed, "reaching thus the east of Cape Horn".

Later, according to the report, they *came out* of this channel, and dropped anchor "behind a cape, and behind an island, called Terhalten".¹ On dropping anchor, then, they were not in the channel, but "outside the forementioned Channel" ("buyten hetselve canael" reads the original Dutch text). It is clear, therefore, that the channel along which the "Windhond" sailed is the upper part of Nassau Bay.

The description is similar to the description given in the early 19th century: Weddell referred in his chart to this part of Nassau Bay as "a channel not accurately known".²

(b) The Argentine Memorial asserts that Schapenham, from the "Windhond's" anchorage behind a cape (which the Counter Memorial correctly identifies as the present "Punta Guanaco") "was also able to discern a channel, of indeterminate length and width, lying to the north and north-east of their anchorage. This channel was the commencement of the passage between Navarino and Picton" and it ends with the unexpected assertion that "thus we may look to Schapenham, and his crew of the 'Windhond' as the first discoverers of the Beagle Channel in 1624". (pp. 19-20, para. 5).

As acknowledged, the "Windhond" was anchored behind Punta Guanaco, but from that anchorage it could have no sight at all to the north, as it was blocked by the coast of Navarino itself and by Picton Island which, as recognised in the Argentine Counter-Memorial, appears as merged with the south coast of the large island of Tierra del Fuego when viewed from what is now called Goree Pass.³ To the north-east it could only see the stretch of water surrounding the island which Schapenham named.

Once more geography contradicts the Argentine position and, consequently, it is not surprising that it has proved impossible to find in the original report of the voyage of the Dutch fleet the reference in inverted commas given by the Argentine Counter-Memorial (see (b) above, and p. 5, para. 5, Arg. C.M.), regarding a supposed channel seen by Schapenham which lay to the "north-northeast".⁴

¹ The present Punta Guanaco and Lennox Island.

² Arg. Mem. Map No. 5.

³ The Argentine Counter-Memorial (p. 19, para. 5)—referring to what was seen by Schapenham—states: "it seems however that, apart from identifying Isla Lennox as an island, they were able to observe what they believed to be a part of the mainland to the north of where they lay at anchor in Paso Goree. The chart prepared by the Dutch confirms that this coast was in fact that of Picton, which lies so low on the horizon from Paso Goree that it appears to be part of the southern coast of Isla Grande itself". On p. 5, para. 5, the same concept is found: "the chart prepared by Schapenham's expedition confirms that the coast which he believed to be the mainland to the north of his anchorage in Goree Roads, was in fact the coast of Isla Picton, which seen from Paso Goree, seems to form part of the southern coast of Isla Grande".

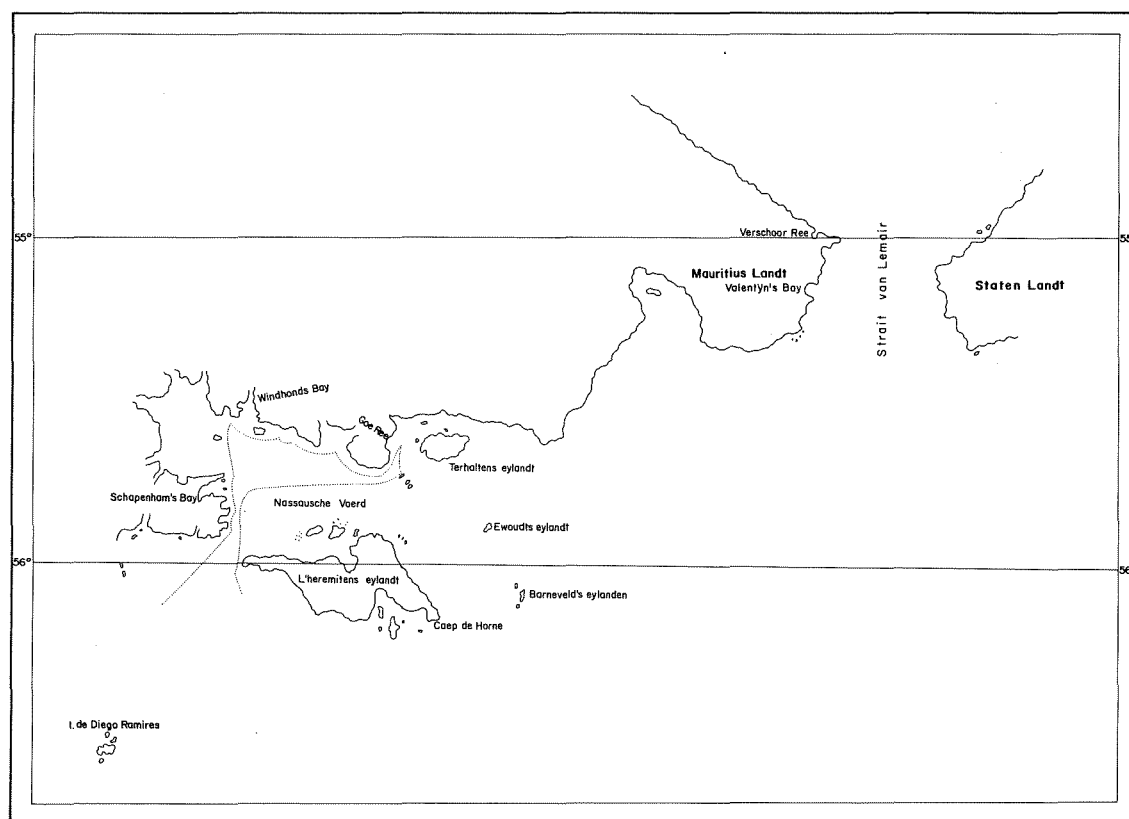
⁴ The only reference to cardinal points in this part of the original Diary, is that referring to the direction of the wind which permitted the "Windhond" to join the Fleet.

(c) The Argentine Counter Memorial's assertion that "Schapenham thus anticipated Fitz-Roy by correctly situating the true mouth of the "Beagle Channel, between Isla Picton and Isla Navarino" is equally unfounded (p. 5, para. 5). Apart from the chronological sleight of hand that such statement implies, it is sufficient to examine a good copy of the map of the expedition to establish that several likely entrances were plotted, which could have been channels or parts of islands; but only on the Northern, North-Western, and Western parts of Nassau Bay.¹

If one observes Van Walbeeck's map, as published by Burney in 1813,² one may see that at the bottom of Goe Ree no opening is marked (see Ch. Plate 165 and Figure No. 5).³

(d) Another possible reason for the erroneous Argentine evaluation could be that, having considered the "Windhond" "anchored in *Paso Goree*" (p. 5, para 5), the Dutch captain might have thought the vessel was anchored in a real "passage" or waterway. Such a construction would be erroneous, as will be shown later.

Fig. 5. — The discovery by the "Windhond" in 1624: J. van Walbeeck's map (See Ch. Plate 165).



¹ There is a distant echo of such an assertion in the instructions to the "Beagle" and its explorations from Orange Bay, in April 1830, as can be seen in "Appendix B" of the Chilean Counter-Memorial.

² Burney, op. cit., Vol. III.

³ Note that not all the sketches are on the same scale.

(e) Fitz-Roy's opinion of May 1830, on the general uselessness of the maps in that very region, has already been quoted (para 11 above). Captain King also gave an opinion on the old charts including that of the Dutch expedition to which Argentina pretends to attribute such a decisive importance in this case. He stated: "*a confused chart of this coast*, however, was the best that could be put together" (para. 11 above).

14. As already mentioned, the Argentine reconstruction of the early voyages to the Southern regions does not attribute a major importance to the voyage made by the brothers Bartolomé García Nodal and Gonzalo Nodal, from 1618 to 1619. Yet, this voyage deserves some more attention. Early in 1619 they sailed through the Strait of Le Maire, which they renamed "San Vicente"; they also gave names, among other points, to Cape "San Diego" and "Buen Suceso" Bay. From late January onwards, driven by winds and currents, they sailed in the region between Tierra del Fuego and Cape Horn, coming close to an island which their maps called afterwards "San Gonzalo". They also saw a deep bay in the South-eastern part of Tierra del Fuego, and, by the entrance of it the island to which they gave the same name, and a cape associated with the bay. Although the wording of the report makes the determination of the exact location of these landmarks somewhat difficult, the map in particular and a comparison of it with a more modern one enables one to assume that San Gonzalo Bay is the Eastern part of what now is known as Beagle Channel.

As can be seen on the annexed sketch (Figure No. 6), the Nodales' voyage chart drawn by their pilot Diego Ramirez (Ch. Plate 163) suggests that that waterway might extend much further westward, which turned out to be the case when the Beagle Channel was discovered.¹ The report on the voyage also refers to a "*source*" to the west.

15. It is clear that any conjecture regarding the channel now known as "Beagle Channel" based on those early expeditions, will find no foundation, except as suggested above in the Nodal brothers' expedition.

From another point of view, this Nodales voyage has some interest: San Gonzalo Bay, in the 18th century, was referred to as forming part of the territory of the Kingdom of Chile:

¹ The connection established by the Nodal brothers between "San Gonzalo" Island (the present Nueva Island), the south coast of the large island of Tierra del Fuego, and the stretch of water which now is the easternmost section of the Beagle Channel, is still shown on various later maps, even though, as has already been said, these features are sometimes erroneously located. Maps such as Plates 146, 148 and 153 in the Chilean Atlas may be consulted. There are a number of others, such as M. Bellin's map of 1756, and Guedeville's map of 1719, both published in Paris. In paragraph 8, on p. 9, the Argentine Memorial suggests that the Nodal brothers "San Gonzalo" island, and Cook's "New" may be the one and same island. Likewise in his "Diccionario Geográfico de Chile", published in 1924, the Chilean geographer Luis Riso-patrón, identified Nueva Island with the Nodal brothers "San Gonzalo Island" (p. 594), and Moat Bay with these navigators' "Gulf of San Gonzalo" (p. 558).

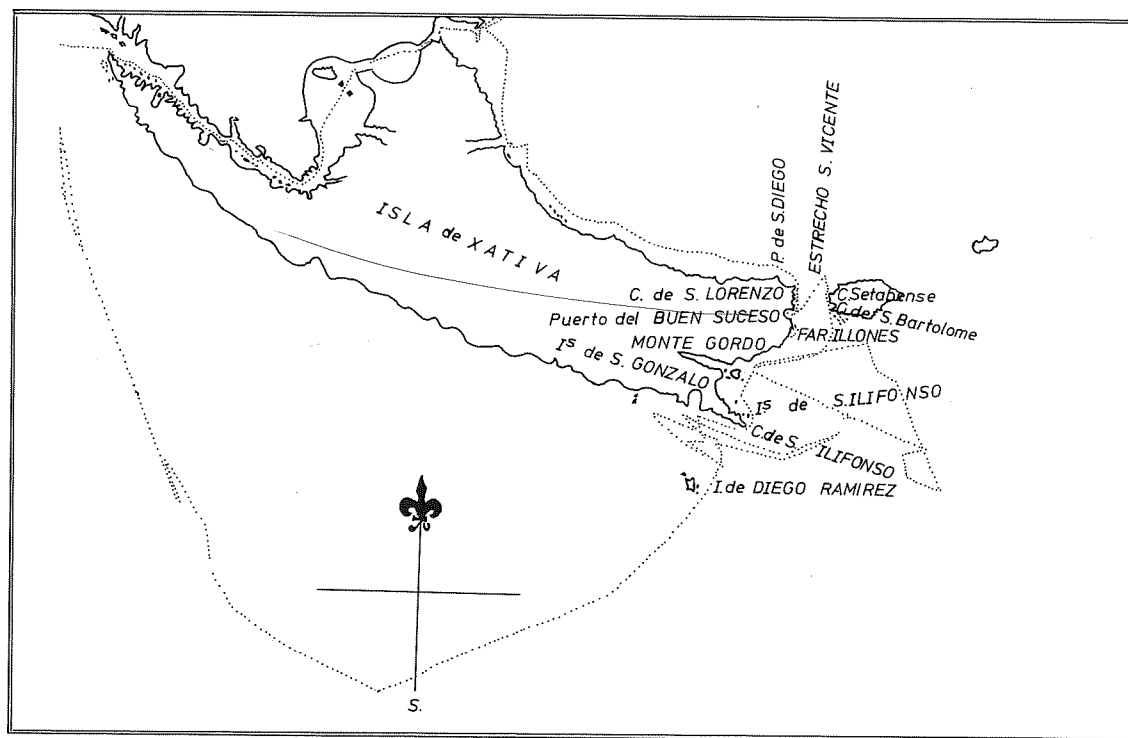


Fig. 6. — The Nodal brothers voyage. The region to the South of the Straits of Magellan in Diego Ramírez' manuscript map of 1621 (See Ch. Plate 163).

in 1761, the Governor and Captain General of Chile, don Manuel de Amat y Junient, promoted that year to the rank of Viceroy of Peru, submitted to the King of Spain, Carlos III, a "Geographical and Hydrographical History of the Kingdom of Chile...". In this document, which possibly served as the basis for part of the famous Cano Olmedilla map,¹ the Gulf of San Gonzalo is described as lying to the South of the coasts of Tierra del Fuego, and is included in the territory of Chile.²

16. These facts are not mentioned by the Argentine Counter-Memorial but a remarkable effort has been spent there attempting to prove that some of the supposed waterways of what it describes as the "synoptic Admiralty Chart CO 700" (Arg. C.M. Map No. 2) "must have suggested to Fitzroy that the access to a channel, then thought possibly to communicate with the Strait of Magellan, was to be found to the northwest of the stretch of sea lying between Isla Lennox and Isla Navarino" (p. 7, para. 6). Both in

¹ Ch. Atlas Plate No. 153.

² "Historia geográfica e hidrográfica con derrotero general correlativo al Plano de el Reyno de Chile que remite a nuestro Monarca el Señor Don Carlos III, que Dios guarde, Rey de las Españas y de las Indias, Su Gobernador y Capitán General Dn. Manuel de Amat y Junient (Revista de Historia y Geografía, Santiago, Vols. XLIX and LVIII).

relation to this chart and to other maps which the Argentine Counter-Memorial supposes were consulted by Fitz-Roy, it makes the incredible assertion that "the correctness of these charts in thus indicating the mouth of a channel was demonstrated when Fitzroy, with their help discovered the Beagle Channel and later entered it, in the 'Beagle', by that eastern mouth" (p. 7, para. 6). Such dogmatic statements fit better in the realm of science-fiction than in arbitral proceedings: cartography and geography are connected subjects and the early navigators, whose only wish was to survive the rounding of the dreaded Cape Horn, and who completely ignored what Argentina now attempts to ascribe to them, are presented as endowed with the power of prophesy.

This must have been clear enough to the Government of Argentina, because not a word is contained in the "Narrative" in support of the Argentine Counter-Memorial's assertion that Fitz-Roy, basing himself on early maps, ever supposed that a channel could be reached from Goree Road.

Everything proves the opposite, as will be seen below when the Government of Chile again refers to the explorations of the "Beagle".

The explorations ordered by Fitz-Roy, following Parkers King's detailed instructions, have absolutely nothing to do with the so-called "synoptic chart", nor with any other early contemporary maps, contrary to what is alleged by the Argentine Government.

17. The Government of Argentina asserted in *its Memorial* (p. 23, para. 10) that, on arriving in this area, Fitz-Roy carried only two maps of earlier expeditions¹: Captain Cook's map of his second voyage², and James Weddell's map.³

The Government of Chile is unaware of the source from which Argentina extracted such a limitative statement, so inconsistent with the efficiency shown by the British Admiralty when preparing King's expedition, but now the Argentine Counter-Memorial adds two other documents: the "synoptic chart" (to which it attributes the tentative date of 1800, which would, anyway, have been of little use to the "Beagle", given its numerous and serious errors) and the map of L'Hermite's expedition.

The assertions of the Argentine Counter-Memorial in this respect are groundless, for the maps available when the "Beagle's" voyage was being prepared, although imperfect, were far many more than Argentina would wish to suppose.

The Chilean Government believes that not only were there then available the maps and reports on the Dutch voyages (Le Maire and L'Hermite), on the Spanish voyages (the

¹ It is interesting to note that in his study entitled: "La controversia sobre el Canal Beagle", Buenos Aires, 1965, pp. 40, *et seq.*, the Argentine Admiral Ernesto Basilico refers to five maps that must have been available to Fitz-Roy, and yet he fails to mention the two British ones, which must certainly have been consulted, namely those of Arrowsmith of 1811, and Norie's of 1822.

² Arg. C.M. Map No. 1.

³ Arg. Mem. Map No. 5.

Nodal brothers), and on the two voyages of the famous British navigator James Cook, but also those of later date of the Spanish Navy (Malaspina¹ and Elizalde²), and the English maps of Aaron Arrowsmith of 1811³, of J. W. Norie of 1822⁴, and the report on Weddell's voyage of 1823-1824.

King himself in 1831, referred to the Spanish charts of Malaspina's voyages stating that they "vie with any contemporaneous production for accuracy and detail"; he is also known to have been acquainted with the Spanish general charts of the coast and of the Straits of Magellan by Córdova. Furthermore, in his lecture to the Royal Geographical Society he mentioned the works of Byron, Wallis, Carteret and Bouganville.

18. Moreover, the Argentine Counter-Memorial's observations on the three maps supposedly used by Fitz-Roy to navigate "with relative assurance" in this area, disagree with the opinions expressed by the discoverers themselves with reference to the charts drawn by the Dutch Fleet, by Cook and by Weddell. (see above paras. 6 and 11).

Again King said in 1831: "... little use can be made of the charts and plans that have been hitherto formed".

As regards Weddell's map, Captain King stated:

"and although Mr. Weddell has more recently published an account of the harbours and anchorages near Cape Horn and New Year sound, yet *little available benefit was derived from it ...*" (see above para. 11).

A distinguished Argentine Admiral has stated quite recently that references to the voyages prior to that of the *Beagle* "are completely irrelevant to the problem under consideration, since it is well-known that the discovery of the Beagle Channel occurred in April 1830".⁵ He is right.

¹ Ch. Plate No. 155.

² Arg. Mem. Map No. 4.

³ A. Arrowsmith's 1811 Map (Ch. Plate 164).

⁴ J. W. Norie's Chart of 1822 (Ch. Plate 166).

⁵ Almirante E. Basílico: "*Sobre el Canal Beagle y las islas litigiosas*", Buenos Aires 1974, p. 23. It would not be overdoing matters to observe that the Argentine Counter-Memorial is quite correct when, on referring to Schapenham's error in 1624, it says that from Goe Ree he saw Picton Island as forming part of the coast of Tierra del Fuego. However, if, as Argentina should have done, such a reasonable assertion be extended to *all* the cartography prior to the surveys of 1830, it would necessarily have reached the same conclusion as Admiral Basílico, since all the previous charts ignore the existence of the Beagle Channel and the accesses into the channel, as the navigators only described the overlapping masses of land, with just a few exceptions regarding one or another geographical feature.

19. Although the above would suffice to destroy the Argentine arguments based on voyages prior to the discovery of the Beagle Channel and to confirm the reasons of the Government of Chile for not burdening the Court with matters of so little relevance to this case, it seems proper to illustrate the preceding remarks with the aid of sketches of the main maps mentioned in the preceding paragraphs. These sketches are printed on the following pages (see Figures 7, 8, 9 and 10) and, with those inserted above (Walbeeck's and Nodal's), may prove helpful in clarifying certain aspects of toponymy which certainly differ from those which Argentina has tried to prove. At the same time, they illustrate the assertion that the chart of the area constructed by the "Beagle" in April-May 1830 (Ch. Plate No. 1) is an entirely original chart.

20. A mere glance at these sketches is sufficient to confirm fully the Chilean Government's previous remarks concerning cartography prior to the "Beagle's" first expedition:

(a) Although the knowledge of the geographical features and outlying hazards along the Cape Horn route continued improving, the inner group of islands was only occasionally and partially surveyed, and then only in a rather confused and contradictory manner.¹

(b) In the pre-"Beagle" maps, the coasts within this area were only roughly and vaguely traced, although Cook, Malaspina, Arrowsmith and Norie suggested not too inaccurately the existence of some openings or entrances which the "Beagle's" expedition would later reveal as being bays or waterways between islands that had hitherto, as the Argentine Counter-Memorial rightly asserts for the case of L'Hermite (p. 5, para. 5), been visually considered as being one solid mass of land.

(c) None of these famous charts, which were the most "modern" at the time of the "Beagle's" expedition, contains such a fanciful network of imaginary inner channels, as the so-called "synoptic chart" which has been submitted by Argentina. South of the Straits of Magellan, the only imaginary channel which subsisted until Fitz-Roy's days was the San Sebastian Channel, then supposed to connect the Atlantic with the Straits across the northern part of Tierra del Fuego.

¹ The Argentine Memorial (p. 23, para. 11) says: "thus by the time of the arrival of the Beagle in 1830, only the outer sea coast of Tierra del Fuego had been discovered; and of that, in the area of this dispute, only two islands had been identified: Lennox, named Terhalten in 1624, and Nueva, named by Cook in 1774. The eastern entrance of the Beagle Channel had been, very approximately, surmised." The first assertion is correct. As regards Terhalten and Nueva Islands, it must be pointed out that they had been discovered on separate occasions and, therefore, their cartographic representation was far from being clear, as, besides giving them a number of different locations, in some charts only one or the other appeared, but not both. Such is the case of Malaspina's chart, which includes Nueva only (Ch. Pl. 155) and Cook's, in which Terhalten (Lennox) seems not to be traced (Map 3, Arg. Mem.). This is possibly the reason for Fitz-Roy's so often quoted statement, on arriving at Lennox Cove: "I could here trace no resemblance whatever to any published chart . . ." (Narrative, Vol. I, p. 437). The Government of Chile trusts that it has already shown that the assertion that the charts prior to Fitz-Roy's voyage showed the eastern entrance of the Beagle Channel as Argentina understands it now is just mere imagination.

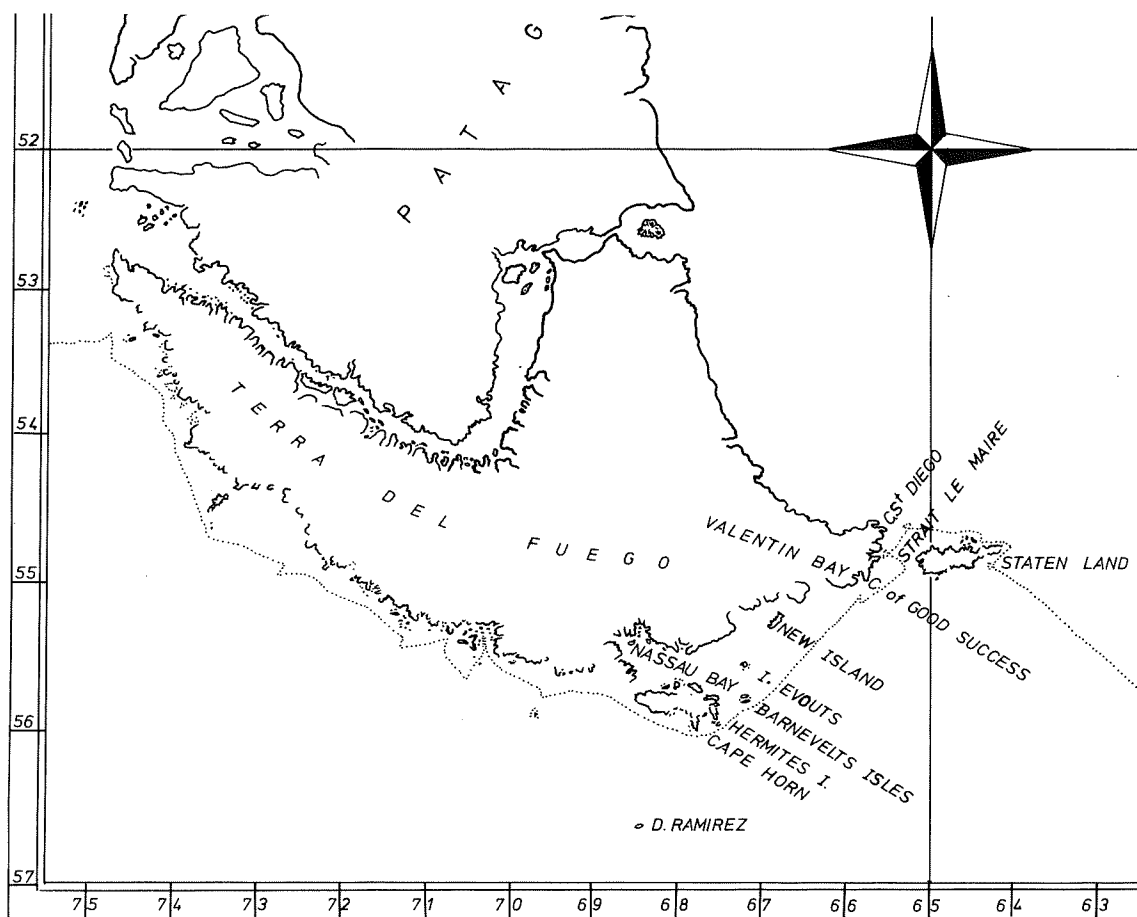


Fig. 7. — The Cape Horn Archipelago and Tierra del Fuego in Cook's map of 1775 (See Arg. Mem. Map 3).

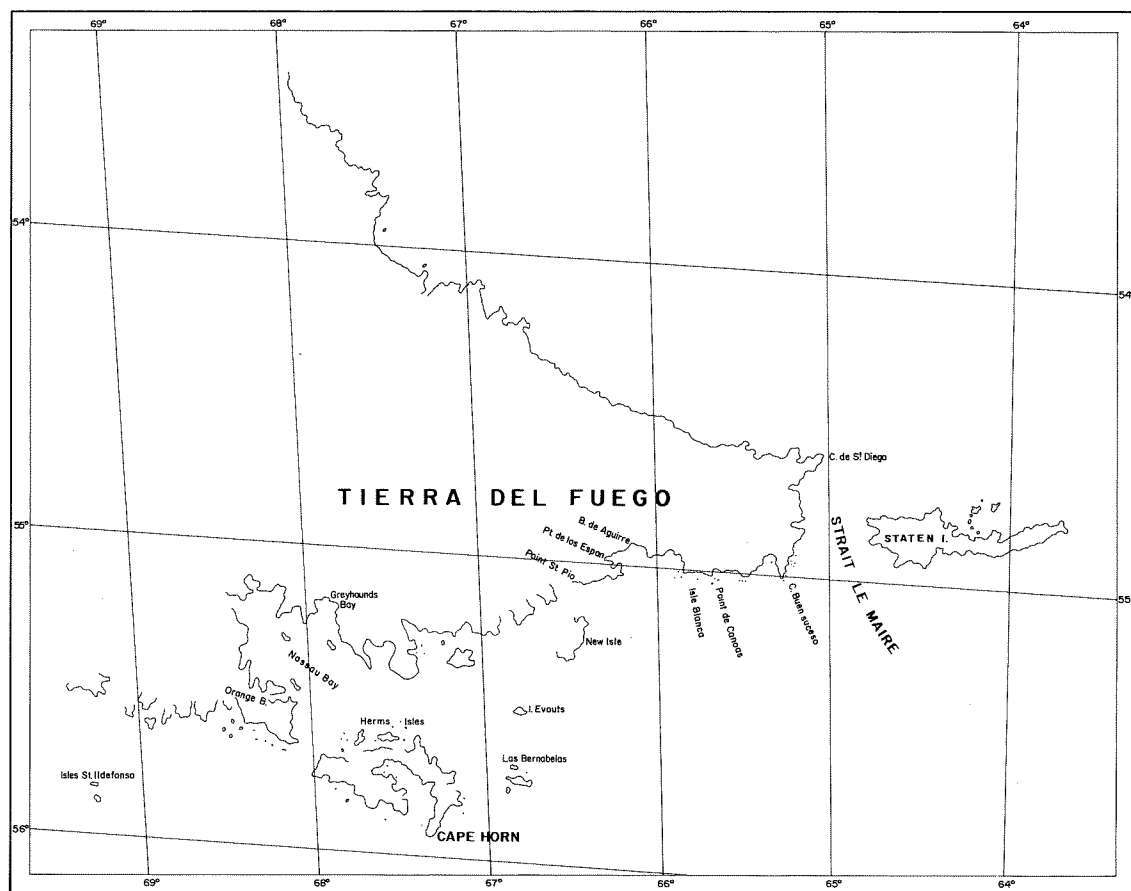


Fig. 9. — The Cape Horn Archipelago and Tierra del Fuego in A. Arrowsmith's map of 1811 (See Ch. Plate 164).

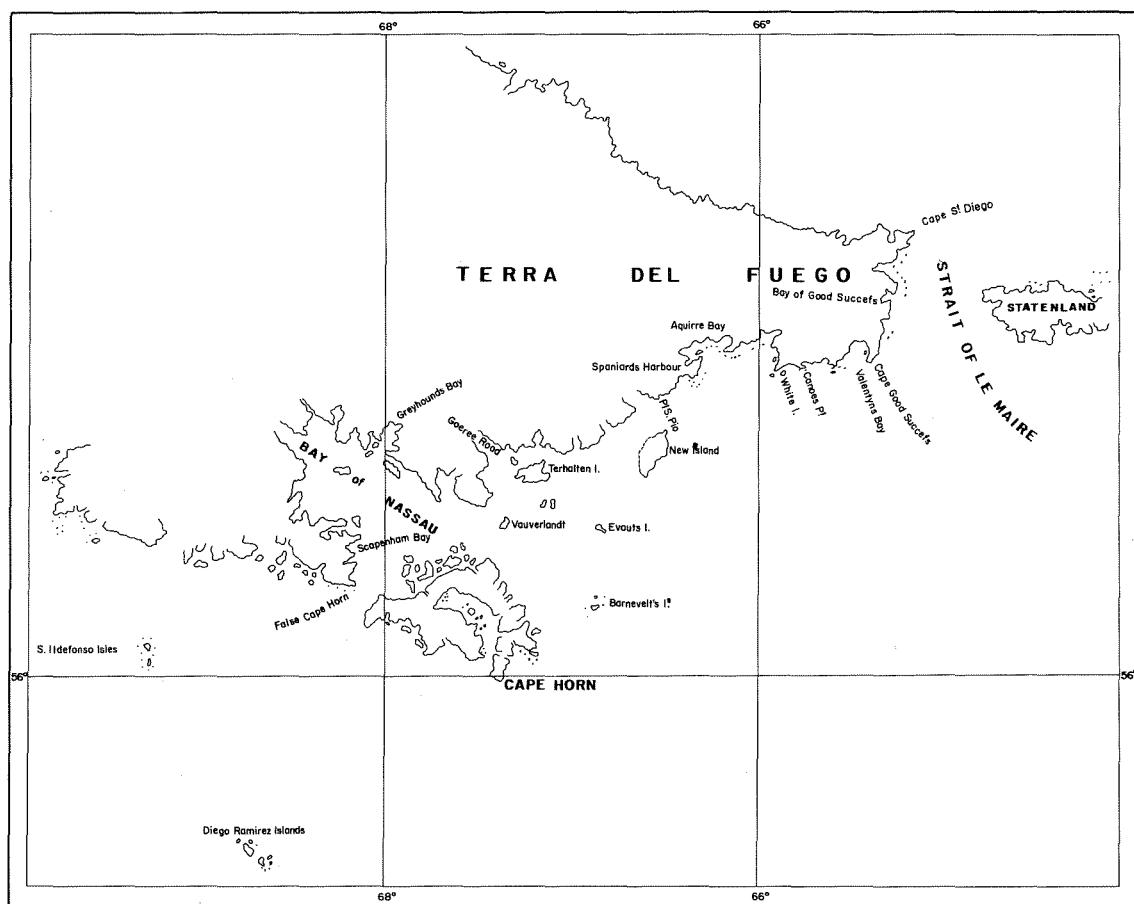


Fig. 10. — Pt. S. Pio and the Cape Horn Archipelago in Norie's map of 1822 (See Ch. Plate 166).

B. TOPONYMY

21. As regards the toponymy, a comparative study of these maps is of interest in some aspects, particularly with reference to Goeree Road, Nueva Island and Cape San Pio.

Goeree Road

22. On the chart of L'Hermite's expedition, the spot where the "Windhond" dropped anchor, "outside the channel" through which it had sailed, was named "Goe Ree", a term which in contemporary Dutch meant "Good Roads" or "Good Roadstead", and has absolutely nothing to do with the concept of a "passage" or "channel". As appears from the so-called "synoptic chart" (Arg. C.M. Map 2), this place-name was later changed to "Goree Roads", but it still indicated only a bay or a roadstead, for no channel was then known to exist. Something similar may be observed, but with variations in spelling, in Norie's chart of 1822. Neither Cook, nor Weddell, nor Arrowsmith, use this place-name.

It appears to be the case that, even before King's expedition, the original Dutch name was combined with the term "Road", which was added in the sense of *rada*.¹

Nueva Island and Cape San Pio

23. The Argentine Counter-Memorial exerts great efforts to "detach" Nueva Island from what the discoverers called the "Beagle Channel", and at the same time, it repeatedly insists that neither this island nor Cape San Pio were ever mentioned by navigators prior to King's expedition, in association with the mouth or the entrance of a channel, and that cartography completely ignored the latter (p. 3, para. 3; p. 7, para. 6).

These assertions are erroneous, as will be shown.

24. That early cartography must have ignored the Channel is too obvious: the Channel had not been discovered...

¹ According to the "Nathan Bailey Dictionary", 9th edition, Leipzig, 1796, "Road" means "grand chemin, route, *rade*; die Strasse, Landstrasse, *Reede*". The "Dictionnaire Anglais-Français et Français-Anglais abrégé" de Beyer, 25th edition "augmenté des termes et phrases de marine" (Paris 1815) says: "road or road-stead, Mar. *rade*". It is not unlikely that Schapenham used the name "Goe Ree" in remembrance of the Dutch port wherefrom the Fleet departed in 1623. (Cf. Arg. Mem. p. 19, para. 5.) No precise information is available as to the etymology of this toponym; it may have come from the advantages of that part of the Dutch coast as an anchorage.

But, also, the Argentine Counter-Memorial takes great pains to prove that Nueva Island . . . , is an island! On the basis of a great number of authors and many maps, it attempts to show that Nueva was described and represented as "a distinct landmark which rises separated from the high seas, opposite the southern coast of Isla Grande (the large island)" (p. 8, para. 7). A question spontaneously arises: Nueva being an island, as it is, how does Argentina believe that it should have been described?

The Government of Chile has already endeavoured to explain the slow evolution of the cartography for the Cape Horn area. After passing Staten Island, the sailing ships coming from the North sought the best route to round the Cape, trying to keep away from the wild and rocky coasts and masses of land which extended to Cape Horn since the winds, currents, and lack of reliable soundings, made it very dangerous to sail closer to the shore. The obvious route for these vessels, as indicated by Captain King ("Narrative" I, p. 465), was towards the S.S.W., from the Strait of Le Maire so as to arrive off the Cape and round it at some favourable moment. Thus the first landmarks described towards the West, after leaving behind the Strait of Le Maire, were the islands extending towards Cape Horn¹; the main ones being "San Gonzalo Island" (first seen by the Nodal brothers in 1619 and later renamed "Nueva" by Cook), the Evouts and the Barnevelt groups.

Contrary to what Argentina asserts, the relationship between Nueva Island with the nearby coasts of Tierra del Fuego and all the other southern islands down to Cape Horn, was noticed from the very beginning.

The Government of Chile has already mentioned the connection observed by the Nodal brothers between the island of "San Gonzalo" (Nueva) and Cape "San Gonzalo" which, although it is not marked on the maps of these navigators, would appear to be what was later to be called Cape San Pio or some other headland in the vicinity.²

At the end of the 18th Century, when navigators neared Nueva Island, they often described it in relation to the coast of a "Tierra del Fuego" which for them embraced a good part of what is now known as the Cape Horn archipelago. For instance, in the account

¹ The ships' tracks which were often shown on the charts of these early voyagers, indicate that they only sailed at some distance from the great southern archipelago. The following maps can be consulted: Arg. C.M. Map 1, and Ch. Plates—144, 149, 152, 155, 163 and 166. The strong winds pushed the ships further out to sea, once they had gone beyond the Le Maire Strait, and in such cases Cape Horn was approached through more southern regions, which makes it impossible to make out Nueva Island with any degree of certainty at least. That is why the Prince of Nassau's Fleet did not show it on its chart. (Plate 165 in the Chilean Atlas) and neither had it been described by the expeditions prior to Schouten's and Le Maire's (*Journal ou description du Merveilleux voyage de Guillaume Schouten . . . Amsterdam 1619—chez Harman Ianson*).

² In the account of the expedition, San Gonzalo Island is associated with the Cape of the same name situated at the entrance of San Gonzalo Bay. Although, as has already been explained, the information in the Nodal brothers' map and account is far from clear, the indications that they give coincide with others, which tend to confirm that San Gonzalo Bay was located opposite a Cape of the same name, i.e., as extending towards the west of Nueva Island and Cape San Pio. Thus in the famous map by Cano and Olmedilla—Ch. Atlas Plate 153—Cape San Gonzalo is situated opposite the "Islas Novelas"—which appear to be Nueva Island and the Augusto islet.

of the 1792 expeditions of the "San Pio",¹ Juan José Elizalde mentions Nueva Island with reference to various landmarks he had noted along the south coast of Tierra del Fuego; Louis de Freycinet does likewise in the narrative of his voyage of 1817 to 1820.²

And in cartography, starting from Malaspina's expedition (Ch. Atlas Pl. 155), Nueva Island is situated opposite San Pio Point in Tierra del Fuego (Arrowsmith map, Ch. Plate 164, and Norie's map, Ch. Plate 166).

25. A similar remark may be made on the basis of the "Beagle's" voyage of discovery in 1830. Nueva is often mentioned as a reference point for the whole area and not as disconnected from Tierra del Fuego and the other southern islands. The instructions given by Captain King to Fitz-Roy on the 18th November 1829³ refer to "the openings of New Year Sound and Nassau Bay, and the openings to the eastward of the latter as far as *New Island*", thereby linking with the island the land within which Beagle Channel was to be discovered. Later, when Fitz-Roy ordered surveys to be made from Lennox Cove, he once again used Nueva as a sort of survey pivot, for he sent Master Murray to explore the south coast of Tierra del Fuego to the east of that island, while he sent Stokes "to continue the survey of the coast from the east side of the head of Nassau Bay to the vicinity of *New Island*".⁴ And actually, when Stokes returned after his survey from the vicinity of Nueva westward along the coast of Tierra del Fuego, Fitz-Roy noted in his journal that the Midshipman had gone "a long way into the Channel first discovered by Mr. Murray, and having examined all the shores about *its eastern communication with the sea*".⁵

The Chart of 1829-30 (Ch. Plate 1) shows that the *Beagle Channel's only communication with the sea* was precisely this area between Cape San Pio and Nueva, because on that chart, which can be considered as the "cartographic birth" of the Beagle Channel, the stretch of water which was later to be named Picton Pass (Paso Picton), *is not*

¹ See Arg. Mem. Map 4. In the manuscript of "The Journal of Navigation and incidents, of the Corvette 'San Pio'" which can be found in the Naval Records in Madrid—Vol. I, Doc. 3, sheet 9 (reproduced in the "Boletín de la Academia Chilena de la Historia", year V, N. 10, 1st semester 1938) after a geographical feature situated on the south coast of the large island of Tierra del Fuego, a few miles to the west of Bahía Aguirre (at latitude 66° 10') which bears the name of "Punta San Pio", Nueva Island was also indicated and drawn on the map, although slightly displaced to the east.

² Louis de Freycinet—op. cit. p. 262—in "Navigation et Hydrographie" describes the island as "passablement élevée, et découpée sur ses bords; sa côte N.E. est boisée. La portion de la Terre de Feu qui est voisine, a un gisement général de l'E.N.E. à l'O.S.O., elle est haute, et l'on y remarque des couches de pierre blanche recouvertes en partie par de la mousse".

³ Narrative Vol. I, p. 560.

⁴ Narrative Vol. I, p. 437.

⁵ Narrative Vol. I, p. 449.

"a communication with the sea" as it only goes to a bay¹ which, in turn, communicates with the sea through *Richmond Pass*.

In spite of these facts, the Argentine Government insists that Map No. 27, entitled "*Part of Tierra del Fuego*" (and not "*Beagle Channel*") proves that Picton Pass represents the extreme end of Beagle Channel. This is, of course, wrong: the main purpose of that chart as shown by its comparison with other charts and as implied by its title, was to complete the survey of a part of Tierra del Fuego, which had been insufficiently studied during the first expedition of Fitz-Roy.

26. With the obvious intention of diminishing the value of Captain King's definition of the Beagle Channel—which is the only valid and sound one—the Argentine Counter-Memorial attempts to minimise what King wrote about the Channel extending eastward to Cape San Pio. The intention is clearly to reduce it to little more than a capricious creation of the leader of the expedition, with hardly any geographical or cartographical basis, and only mentioned by King because—it is alleged—he had no knowledge of the region, as he had not visited it personally.²

27. The Chilean Government has only two remarks to make in this respect.

First, neither King nor Fitz-Roy were the first to locate Cape San Pio where it stands, that is to say, to the west of Slogget Bay and opposite Nueva Island.

In 1792, though in a somewhat crude chart, Elizalde gave the name of "Punta San Pio" to a headland situated to the north-east of Nueva Island. After him, navigators and cartographers depicted that Cape with reasonable accuracy, a long time before the "Beagle's" first expedition, on the same spot where it has always been shown in maps up to the present day: opposite Nueva Island.

In 1798, Malaspina had already shown on his chart (Ch. Plate 155), with a fair degree of accuracy, the relationship between the Cape and Nueva Island; and the well-known British cartographer Aaron Arrowsmith³ did likewise on his 1811 map (Ch. Plate 164). Similarly, the hydrographer J. W. Norie followed the same standards in 1822

¹ Rather unfortunate is the citation of the Argentine Counter-Memorial (p. 11, para. 10, note 23), regarding an alleged annotation in Fitz-Roy's Diary for the 12th May 1830, as it is really an annotation from Master Murray's Diary. Were it to prove anything it would be precisely the contrary of what Argentina claims, as Master Murray again takes Nueva Island as a reference point to distinguish two sections of the south coast of the large island of Tierra del Fuego.

² The Argentine Counter-Memorial refers to the fact that Cape San Pio is not mentioned or drawn as the beginning of a channel which had not yet even been discovered! (see for example para. 3, p. 3; para. 4, p. 5, and para. 6, p. 7).

³ In his study on Cape San Pio published in "*Revista Chilena de Historia y Geografía*" (Vol. XLIX; No. 53, 1924) J. Guerra, lays stress on the friendship between Fitz-Roy and the Arrowsmith family. As is known, J. Arrowsmith in 1839 dedicated to Fitz-Roy his map of South America (Ch. Plate 167).

(Ch. Plate 166). King and Fitz-Roy were undoubtedly acquainted with these maps and did take them into consideration when the chart of 1829-30 was constructed.

Captain King's expedition made only one change in connection with this place-name, he raised its rank from "*Punta San Pio*" to "*Cape San Pio*", a very revealing indication of the importance which the discoverers of the Beagle Channel attached to this Cape when defining and mapping that Channel.¹

Thus, it cannot be said that it was King who created the association between "*San Pio*" (which had already been definitely located by cartographers) and Nueva Island.

From all these facts it is evident that when the Beagle Channel was discovered, the necessary elements for a precise and official definition already existed: Cape San Pio, because it was drawn on the charts, and opposite to it, Nueva Island, the visible southern shore of the Channel which had been found to be a straight waterway.

Contrary to what the Argentine Counter-Memorial suggests, the "Narrative" indicates quite accurately the coordinates for Cape San Pio.

28. To conclude this Section, the Government of Chile invites the Court's attention to the evident contradiction between what Argentina is upholding in this case, and the official Argentine documents. In order not to burden the Court with unnecessary details, the Government of Chile will only mention a few antecedents which prove the close geographical association established by navigators and cartographers between Nueva Island and Cape San Pio.

(a) On the majority of the maps of Argentine origin which truthfully evidence what was understood by the term Beagle Channel as used in the 1881 Treaty, Cape San Pio is correctly located, opposite Nueva Island, and between these points lies the eastern end of this Channel².

(b) In the cartography immediately following the surveys of the area made between 1899 and 1900 by the officers of the Argentine Navy's ironclad "*Almirante Brown*", the three corresponding maps are entitled: "*Tierra del Fuego—BEAGLE CHANNEL*"; and sheet No. III includes the section between Punta Navarro and "*Cape Pio*"³. And in an *allongement* to the right of the map (Arg. C.M. Map No. 39), a sector of the south coast of Tierra del Fuego has been drawn with the legend "*Cabo Pio*", and below, although

¹ A clear view of the *Cape*, can only be had if the channel is observed along its true course, that is either from the east or from the west along the coast of Tierra del Fuego, since from further down it is difficult to make it out owing to the many winding curves of this coast. Here is a further proof of the track followed by Stokes, in his explorations of May 1830, which will be examined later on.

² Maps of Argentine origin which correctly show Cape San Pio opposite Nueva Island, and which are included in the Chilean Atlas—Plates 22, 26 of 1879, 34-35-36-37-44-45-50-53-54-55 (Popper himself did not attempt any innovations) 64-78. A small number of other maps place the Cape further to the east, some distance to the N.E. of Nueva Island, which is obviously an error.

³ Arg. Atlas Maps 37, 38 and 39.

somewhat displaced eastwards, is traced a part of the north coast of Nueva Island, thus clearly showing that the Beagle Channel ends between these two geographical features.

(c) As has already been stated in the Chilean Memorial and Counter-Memorial, in its desire to divert the Beagle Channel from its true course, the Argentine Government has attempted, for some years to replace the eastern stretch of the Channel by a purported "Moat Channel", which obviously derived its name from Moat Bay; i.e. a bight of the Southern coast of Tierra del Fuego (cf. Ch. Ann. No. 122).

The absolute irrelevance of such a change to the legal issues of this case has already been shown in the previous Chilean pleadings. But, the Government of Chile refers again to it because Argentina, even when distorting the description of the Beagle Channel, maintains the close association between Cape San Pio and Nueva Island, and considers the latter, together with Picton Island, as the south shore of the so-called "Moat Channel".

In fact, in the 1917 Argentine "Sailing Directions", on page 358, it is stated that *Cape San Pio and Nueva Island*, "indicate the entrance to the Moat Channel". A similar statement is contained on page 45 of the 1945 "Sailing Directions", including even the distance between both these geographical features.¹ In the 1955 "Sailing Directions", on page 114, the so-called "Moat Channel" is defined in the following terms: "Moat Channel runs between the coast of Tierra del Fuego and Nueva and Picton Islands, and flows into the Beagle Channel to the N.W. of Picton Island. Its eastern end is defined as the line linking Cape San Pio with Punta Waller . . .". When, on page 115, it describes the islands to the south east of what these "Sailing Directions" erroneously call the Beagle Channel it says: "Nueva Island: It forms the southern extremity of the eastern end of Moat Channel, and is situated 7 miles to the South of Cape San Pio". Further on it adds: "Punta Waller: It is situated to the south and 7 miles from Cape San Pio, *the two of them* forming the eastern limit of the Moat Channel" ² .

And in the third edition of the Argentine "Sailing Directions" of 1962, the same concepts are repeated on pages 123 and 124 ³ .

The Argentine Counter-Memorial asserts that for Fitz-Roy Isla Nueva appeared "as a distinct feature standing separate in the open sea" (Arg. C.M. p. 8, para. 7); it says that the same island was for Cook "a geographical feature, distinct, separated from the coast, *certainly in no way forming the mouth of any channel*" (Arg. C.M. p. 9, para. 8); it adds that "the 'Narrative' confirms the independence of Isla Nueva from the Channel and its 'Atlantic characteristics'. The Counter-Memorial comes then to the conclusion: "thus

¹ República Argentina, Ministerio de Marina, "Derrotero Argentino", 2nd edition, Part III, Buenos Aires, 1917, *ibid.*, Part III, 1st edition, Buenos Aires, 1945.

² República Argentina, Ministerio de Marina, "Derrotero Argentino", Part III, 2nd edition, Buenos Aires, 1955.

³ República Argentina, Secretaría de Marina "Derrotero Argentino", Part III (3rd edition) Buenos Aires, 1962.

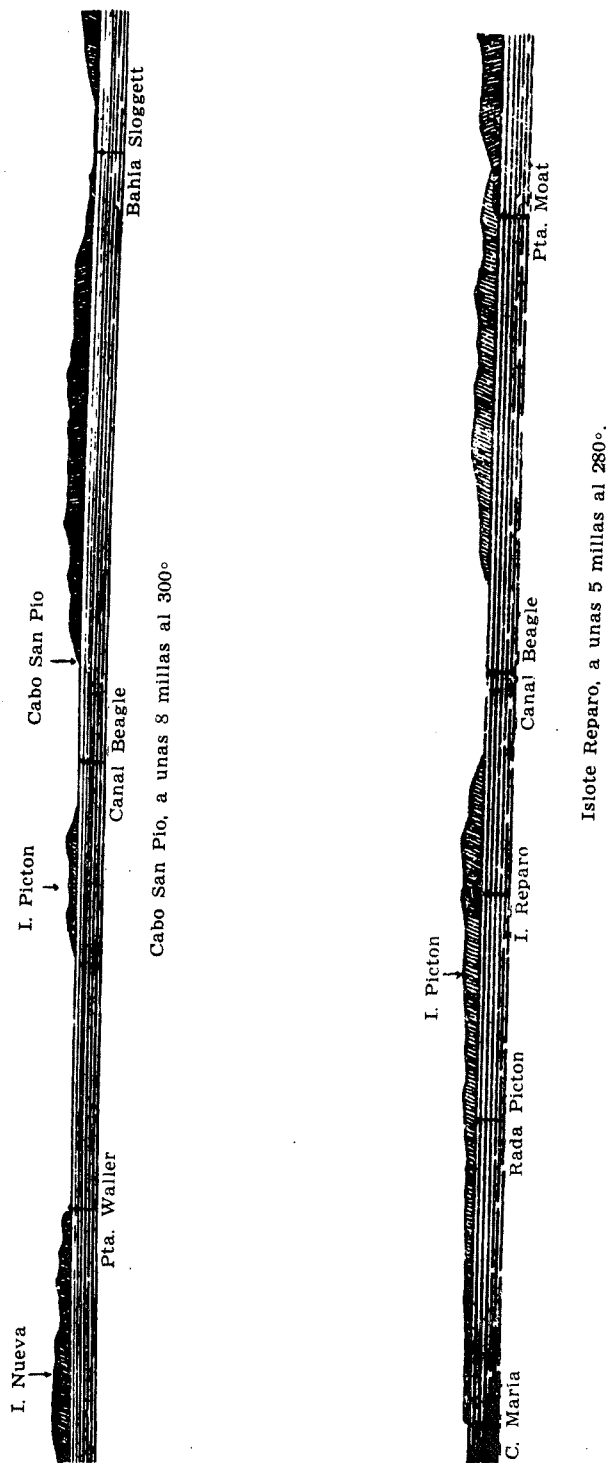


Fig. 11. — "Canal Beagle" as shown by a plate of the 1962 Argentine Navy "Derrotero"

the island's discoverer, Cook, as well as the explorers who observed it later, considered Nueva as an island in the open sea on the route from Strait Le Maire to Cape Horn; to the east of the archipelago of Tierra del Fuego and washed by the Atlantic Ocean". Therefore, the island which, according to other arguments of the Counter-Memorial, was allocated to Argentina in 1881 as a part of the so-called archipelago of Tierra del Fuego, now becomes an *island to the east of that archipelago*. But, that it is not the only important point. The fact is that, after having read, as it has been shown in the above quotations, about the "autonomous" character of the island, one finds that *Argentine documents mention it as the mouth of a channel in association with Cape San Pio*. In other words, Nueva Island, that "detached Atlantic feature", is recognized as what it is, the southern shore of a channel.

(d) In the last two above mentioned Argentine "Sailing Directions"¹, there are also some views which are of special interest and which are reproduced below. The first of these bears the caption: "Cape San Pio, seen from a distance of about 8 miles and at 300°", and on the right hand side it shows the southern coast of Tierra del Fuego, with Slogget Bay ending at Cape San Pio. On the left side is Nueva Island, with Punta Waller indicated thereon, and in the background is shown Picton Island. *Between these islands and Tierra del Fuego are printed the words: "Beagle Channel"!* (See Figure 11).

The second view, with the caption: "Reparo Islet, seen from a distance of 5 miles and at 280°", again shows, on the right hand side, the southern coast of Tierra del Fuego, with Punta Moat indicated thereon and with Picton Island to the left, where "C. Maria", "Rada Picton" and "I. Reparo" are also marked. *The arm of the sea between Picton Island and Tierra del Fuego is also labelled . . . "Beagle Channel"!*

29. Thus, even in the above mentioned "Sailing Directions", where an attempt is made to alter the true concept of the Beagle Channel for the purpose of annexing Chilean territory, the truth can still be found in the views which are inserted to help the navigators.

C. THE VOYAGES OF THE "BEAGLE" AND THE DEFINITION OF THE CHANNEL GIVEN BY ITS DISCOVERERS

30. The Argentine Counter-Memorial (Chapter I, paras. 11 et seq.) makes great efforts to explain that the discoverers of the Beagle Channel identified its final stretch with Paso Picton. In the same unseemly manner which characterizes the whole of the pleading, it speaks of "the striking inadequacy of the Chilean treatment of the history of the discovery

¹ P. 120 C of the "Derrotero" of 1955 (see above Note 51) and p. 116 of the 1962 "Derrotero" (see above Note 52).

of the Beagle Channel", and asserts that the Chilean Government has avoided dealing with the subject despite the fact that "the history of the discovery is the axis around which necessarily revolve all the geographical concepts under discussion, and it is, together with the documents and the cartography which resulted from both voyages, the *sine qua non* for an understanding of what was the 'Beagle Channel' for the negotiators of the Treaty of 1881; and which were the islands to the east of Tierra del Fuego, and which on the Atlantic" (Arg. C.M. p. 12, para. 11).¹

31. The Government of Chile most categorically rejects these charges. It has already given, in its Memorial, all the elements necessary for a proper understanding of the purposes and achievements of the expedition which discovered the Beagle Channel (pp. 9 to 17 paras. 8 to 31). After acquainting itself with the Argentine Memorial, the Chilean Government briefly and precisely refuted the errors therein contained in this respect, and an "Appendix B" with a detailed analysis of the voyages of the Beagle was also submitted (Chilean Counter-Memorial Chapter III, pp. 77 et seq., para. 30 et seq. and Appendix B).

32. The basic facts concerning the discovery of the Beagle Channel were thus emphasized by the Government of Chile from the very beginning. It begs the Court's indulgence for now reverting to the subject, because of Argentina's insistence on altering the course of history in the hope of altering the course of a channel.

33. The Beagle Channel was discovered during the "Beagle's" first expedition, from March to May 1830, as the result of several explorations. The first, in March, starting from the area of Christmas Sound², the next in April from Orange Bay, and the last in May, from Lennox Cove. Once all the material gathered in those explorations was assembled and collated, it was possible to determine the existence, the bearings, and the characteristics of the Channel. What remained to be done was a more thorough exploration of the two western arms, the course of which had been determined, but which required a more detailed survey. Fitz-Roy had, however, clearly realized that no communication towards the North existed in that part of the Channel. Similarly, it had already been established that no communication northwards existed in the sector of the Channel running eastward from Murray Narrows, in an almost straight line, into the open sea.

¹ In this paragraph, oddly enough, the Argentine Government once more lays emphasis on this aspect, although it will later lessen the importance it attaches to such arguments to stress the purported "Atlantic-Pacific" principle. See Arg. C.M., note 18, p. 102.

² The Argentine statement (p. 17, note 40) is correct, since early in March the "Beagle" was not anchored in Christmas Sound, but nearby in March Cove or Bay; but it is mistaken when it assumes that the Master had seen the channel from this point.

The surveys which led to the discovery of the Channel were thorough enough to enable Captain King to give the British Naval authorities, on his return, not only a description of this very unusual natural feature, but also to offer them, as early as 1831, several charts of the regions surveyed by the "Adventure" and the "Beagle". The charts are astonishingly accurate and compare favourably with modern charts.

This information also allowed Captain King to confirm his views and concepts, when he gave his lecture before the Royal Geographical Society of London, in April and May 1831.

The relevant documents and paragraphs in the "Narrative" have been repeatedly quoted so, for the sake of brevity, the Government of Chile will refrain from citing them anew. They may be consulted both in the Chilean Memorial and Counter-Memorial, and in the Argentine pleadings ¹.

34. The characteristics of the Channel discovered by the "Beagle", as described immediately after that expedition, are quite accurate and have been mentioned in the Chilean pleadings. The accuracy of the discoverers has been stressed by the Government of Chile. The Channel lies in an *almost* straight line in a general east-west direction; it stretches *from Cape San Pio* to Christmas Sound; it has only *one eastern mouth* giving on the open sea; that eastern mouth may be seen from the cliffs of Gable Island, in an East-Southeast direction, and the Channel is of a length of about 120 miles.

¹ The documents on which the official description of the Beagle Channel is based are the following:

(i) Captain Parker King's communication of 15 October 1830 to the British Admiralty, reproduced as Annex No. 1 (a) p. 1 (e) of the Chilean Memorial, in which it is stated that: "the most remarkable feature of this survey is a Channel leading in almost a direct line between Cape San Pio and Christmas Sound one part of which is within 25 miles of the bottom of the Admiralty Sound". On the margin to this sentence appears the note "Beagle Channel".

(ii) On 18 March 1831—according to the Argentine Memorial (Note 24, p. 36) Captain King forwarded two maps of the Beagle Channel to the Admiralty (which are included as Pl. 1 in the Chilean Atlas and Arg. Mem. Maps 6 and 7) in which the straightness of the Channel and its flowing into the open sea opposite Cape San Pio can be observed. On the chart of the eastern sector (Pl. 1, Chilean Atlas), the depths and the tides are shown for the eastern stretch of the Channel, which certainly is the one that extends along Tierra del Fuego, passing to the north of Picton and Nueva.

(iii) In perfect accord with these antecedents Captain King, who commanded the expedition, delivered his lecture to the Royal Geographical Society of London in April and May 1831, where he repeated: "The Beagle Channel, which extends from Christmas Sound to Cape San Pio, a distance of a hundred and twenty miles, with a course so direct that no points of the opposite shores cross and intercept a free view through; although its average breadth, which also is very parallel, is not much above a mile, and in some places is but a third of a mile across". ("Narrative" Vol. I, p. 580).

(iv) Captain King also produced a general map (Ch. Atlas Plate No. 2) which shows the whole of the Channel, with a certain indecision only as regards the inner coasts of the two western arms, the survey of which, as has already been said, was not completed in 1830.

These documents as has been shown in the relevant chapters of the Chilean pleadings fully concur with the opinions of Fitz-Roy, who was directly in charge of the exploration of that area, and they were in no way denied or invalidated, *either explicitly or tacitly*, by later official documents or by Captain Fitz-Roy.

35. That, briefly, is the story of the discovery of the Beagle Channel and the official definition given to it by Captain King, the head of the expedition which discovered it.

Argentina's efforts to "undermine" this well established truth, shatter to pieces before the clear facts and official texts. Furthermore, the Argentine Government should be more consistent with what it said in its own Memorial!

"... 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" (Arg. Mem. No. 43, p. 53).

36. During the "Beagle's" second voyage, nothing geographically new was discovered, in the eastern sector of the Channel, or regarding its general characteristics. No change was made of the definition given to this geographical feature at the time of its discovery. Fitz-Roy completed his studies with a detailed survey of the Channel's western arms, and the H.M.S. "Beagle" sailed the Channel for the first time, entering it through a lateral access—which in about 1900 Argentina named Picton Passage (Ch. Ann. No. 377, at p. 164). Fitz-Roy sailed along the Channel and left it through Murray Narrows.

The Argentine Memorial (p. 71, para. 54) is correct when, referring to the second voyage of the Beagle, it asserts:

"Fitz-Roy conducted no further surveys between Picton, Lennox, Nueva and Isla Grande. His manuscript chart prepared in 1831 with the help of Stokes, was, he believed, sufficient for future purposes. Further surveys were carried out in Paso Goree, probably because of the importance Fitz-Roy attributed to this as an anchorage, and also around Isla Gable and further west in the Channel".

As may be seen, Argentina clearly recognizes the lack of importance of the second voyage of the Beagle, in so far as the surveys of the area are concerned.

The learned opinion of the Hydrographer of the British Admiralty, J. P. Parry, in 1918, also confirms this:

"When leader of a subsequent expedition to the coast of South America, Captain Fitz-Roy navigated in the Channel which he had previously explored, *without adding to, or modifying, his original descriptions of its form and extent*".

"It is therefore unnecessary to examine all the references to the Beagle Channel contained in the Narrative of the second expedition, of 1831-1836; for such allusions are only inserted to make the narrative of events continuous, and no longer assist in giving a correct geographical definition to the waterway. The best proof of this assertion is contained in the fact that the descriptions of the Beagle Channel in the Sailing Directions drawn up on the results of the first, and of the second voyages, are identical" (Ch. Ann. No. 122, at p. 300).

37. The Argentine Government cannot ignore that the definition of the Channel given in official documents is, in itself, sufficient to destroy its hypothesis concerning what the discoverers understood by, and defined as, the Beagle Channel. For that reason, perhaps, it goes to great lengths to discredit that definition.

Thus, it claims that Captain King knew nothing about the region and improvised everything,¹ and goes on to assert that Captain Fitz-Roy disavowed and denied what King had said, in order to give his version of a Beagle Channel in the curious stepped manner, which is how the Argentine Government now presents it, basing its hypothesis, both on the 1832 British Sailing Directions, and on certain passages of the "Narrative" which refer to the Beagle's second voyage.

38. To support its arguments, the Government of Argentina has repeatedly made use of a sentence included in the British "Sailing Directions" to the effect that "to the North of Lennox Island is the eastern opening of the Beagle Channel". It has chosen to see there a repudiation of King's definition, by Fitz-Roy, and a new definition which would make the Channel run through what now is known as Picton Pass, a name of Argentine provenance (see Ch. C.M. p. 85, para. 43).

39. A few remarks will suffice to prove the weakness of these arguments:

(a) Although it is true that Fitz-Roy did write Section VII of the "Sailing Directions", wherein is found the sentence quoted above, it is equally true that Captain King was responsible for its publication, and it is evident that the "Directions" were the result of close collaboration between the two naval officers. This is obvious, furthermore, because King appended foot-notes to the section written by his subordinate.² There is absolutely no foundation for supposing that Fitz-Roy would have surreptitiously attempted to disavow the opinions and official texts that his superior officer had sent to the Admiralty under whose orders both acted. It is inconceivable that, in the event, Captain King would not have made it known.

(b) Quite simply, the truth about this often quoted sentence is what has already been explained in the Chilean pleadings (Ch. Mem. p. 14, para. 21; Ch. C.M. "Appendix B", p. 178). The reference to Lennox (the island as a whole, and not any particular point) can be understood either as indicating the magnetic North, or as a "general northerly direction", equivalent to saying: "further up" or something of the kind. Both fit in perfectly

¹ The most bitter antagonist of Captain King seems to be Admiral Basilio, who in his recent above-mentioned book "Sobre el Canal Beagle y las islas litigiosas" goes far as to assert that "everything that Captain King stated in his letter of 15 October 1830 and in his conference before the Royal Geographic Society of London regarding the Beagle Channel is absolutely without value because of its inaccuracy" (p. 38). And further on, he qualifies what was said by the leader of the expedition as "false" (p. 63), a notion which is repeated on p. 68, to conclude with the somewhat deformatory statement that "King spoke without knowing what he was saying" (p. 87). That, however, was certainly not the opinion that the Naval authorities had of this distinguished Royal Navy Officer, for when the Admiralty appointed him to command the expedition, they stated: "and from your conduct of the Surveys in New Holland" ("Narrative", Vol. I, p. XV). He was elected fellow of the Royal Geographical Society on 1824. In 1855 he became Rear-Admiral.

² Pp. 88, 100, 101, 102 and 106 of the "Sailing Directions".

with King's official definition of the Channel; the second is not rejected by Argentina (Arg. Mem. p. 58, para. 48; p. 102, para. 81).

The magnetic North interpretation is also plausible and the Government of Chile does not exclude it, either. It was accepted in 1918 by the Hydrographer of the British Admiralty, Mr. Parry.¹

Moreover, this interpretation is confirmed by the fact that the 1850 edition of the British Sailing Directions,² specifically state that "in this work the bearings are all magnetic except where marked as true". Now, since the sentence "to the North of Lennox Island is the eastern opening of the Beagle Channel", was also maintained, it is beyond question that, in this paragraph, the reference to the North has to be understood either as a reference to the Magnetic North, or else that it constitutes: "a generally northerly direction".³

Whatever may be the case the "Sailing Directions" attributed only minor importance to the Beagle Channel as a seaway for sailing ships deeming that further nautical instructions were unnecessary, the chart being sufficient to indicate the entrance.⁴

40. The Argentine arguments based on the second voyage of the Beagle, have been analysed in "Appendix B" of the Chilean Counter-Memorial. The Government of Chile will take up below only a few particular points, which still need to be considered.

41. Finally, as suggested above, Fitz-Roy could not have implicitly or indirectly disowned the official definition given by his commanding officer immediately after the discovery expedition. Had Fitz-Roy, at any time, believed that the Channel did not run "in an almost straight line" as far as Cape San Pio, but instead turned sharply to enter Picton Pass, he would have said so quite explicitly, either when he wrote Section VII of the 1832 Sailing Directions, or in the Narrative. And not only did he not do so, but on numerous occasions, he fully agreed in one way or another with King's definition, as has so often been mentioned in the analysis of the different passages of the "Narrative", which the Government of Chile has quoted.

The Hydrographer of the British Admiralty, expresses a similar opinion in his report of 1918 (Ch. Ann. No. 122).

¹ Chilean Counter-Memorial quotation on p. 88, Annex 122 Chil. Mem.

² Sailing Directions for South America—2nd edition.

³ The accusations made by a number of Argentine authors against the Hydrographic Department of the British Admiralty are completely unfounded. See in particular Admiral Basilico (op. cit.) "La controversia sobre el Canal Beagle", pp. 90 *et seq.* and the work already mentioned: "Sobre el Canal Beagle y las islas litigiosas", p. 14.

⁴ "Sailing Directions for the coast . . ." (1832), p. 100. When Fitz-Roy entered the Beagle Channel with his ship in May 1834, Darwin considered the fact as "a bold attempt"—Charles Darwin—"Journal of Researches . . .", London, 1890 (p. 239).

42. In Paragraphs 13 and following (page 13 et seq.), the Argentine Counter-Memorial refers to certain assertions contained in the Chilean Memorial in relation to the voyages of the Beagle.

This subject, which has already been dealt with by the Chilean Counter-Memorial particularly in its "Appendix B", has now been developed in an Appendix to this Reply ("Appendix C", at the end of this volume). Nevertheless, certain aspects must be considered here.¹

"The Beagle Channel crosses 'the whole length of the Fuegian Archipelago'"
(Argentine Counter-Memorial p. 13).

43. Argentina is right in asserting (at No. 13 p. 14 of Arg. C.M.) that "Fitz-Roy never contended or even suggested that the Beagle Channel extended across the whole length of the Fuegian Archipelago".

What both King and Fitz-Roy meant was that the western section of the Channel ended at Christmas Sound without flowing into the open sea. But that to the East, the Channel reaches as far as Cape San Pio, that is, "the outer sea".²

2*"The 'straightness' of the Channel"* (Argentine Counter-Memorial p. 17).

44. At paragraph 15, page 17, the Arg. C.M. goes to great length to prove that the Channel is not *absolutely straight*.

The Government of Chile will not waste time refuting this statement since it is evident that the straightness of the Channel, a fact upon which its discoverers so often insisted, is a geographical and not a geometrical concept. When Murray returned from his survey in April 1830, he spoke of a "straight Channel".³ In his letter to the Admiralty, of 15 October 1830 (Chilean Ann. 1a, p. 1e), Captain King spoke of a "Channel leading in an *almost direct line* between *Cape San Pio* and Christmas Sound . . .". In the 1829-30 charts (Ch. Plate No. 1 and Arg. Mem. Map 7), the amazing straightness of this remarkable natural feature is also noticeable. In his lecture of 1831, Captain King again stressed that the channel had "*a course so direct* that no points of the opposite shores cross or intercept a free view through . . .". And Fitz-Roy noted again, in his second expedition: "This singular canal-like passage *is almost straight* and of nearly a uniform width . . .".⁴

¹ To facilitate the reference to the Argentine Counter-Memorial, the developments that follow have been given, in each case, the title used by the Argentine Counter-Memorial.

² "Narrative", Vol. I, p. 429.

³ "Narrative", Vol. I, p. 429.

⁴ "Narrative", Vol. II, p. 202.

Darwin also recognised the fact when he stated that this was “a most remarkable feature in the Geography of this, or indeed of any other country”, and added “it is throughout *the greater part so extremely straight*, that the view, bounded on each side by a line of mountains, gradually becomes indistinct in the perspective” and he ended by comparing it to the famous Loch Ness in Scotland.¹

Finally, the charts published immediately after the two voyages of the Beagle clearly show this amazing straightness of the Channel, understood, of course, in the pertinent geographical sense.

The Chilean Government can understand the efforts made by the Government of Argentina to lessen the serious impact of such a collection of concordant documents and other material upon its present thesis. All of them are serious obstacles to the Argentine efforts to convert a straight Beagle Channel into a crooked channel flowing into Oglander Bay.

Had one of the discoverers, or those who prepared the cartography or the Sailing Directions immediately after the two voyages of the “Beagle”, understood that the Channel curved Southwards at almost a right angle—as Argentina submits—he would have said so. However, not only did no one say so, but in the official definition the eastern entrance was placed *at Cape San Pio*. Given the Channel’s straightness, and the fact that it runs parallel to the south coast of Tierra del Fuego, is it obvious that they understood Nueva Island to be the southern shore of the entrance.

That is how its discoverers understood it, and that is also how it was, undoubtedly, understood by those who negotiated and signed the Treaty of 1881. Such is, furthermore, the expert opinion of Mr. A. C. Bell, of the British Hydrographic Office, in his 1918 report to the Admiralty (Ch. C.M. p. 92, para. 54).

“The view from the clay cliffs” (Argentine Counter-Memorial p. 21).

“The only passage into the Channel” (Id. p. 23).

“Midshipman Stokes’ tracks between the 4 and 17 May 1830”.

“Inadequacy of the British Hydrographer’s attempted reconstruction” (Id. p. 24).

“Fitz-Roy’s return to the Beagle Channel in 1833-34.”

45. All these subjects, which have been dealt with in Chapter I of the Argentine Counter-Memorial are closely connected with the reconstruction of the British surveys made from May to March of 1830. Although the main themes have been clearly and systematically explained, in particular in Appendix B of the Ch. C.M., it has been judged expedient to deal with them once more in an Appendix, but not in the haphazard way of the Arg. C.M., but by analysing the details of the voyages of the “Beagle” and of her boats.

¹ “Narrative”, Vol. III, p. 237.

46. As regards the tracks of the surveys made during April and May 1830, the Government of Chile calls attention here to the serious error that in this respect is reflected in the Argentine reconstruction (Arg. C.M. Map 85).

The Government of Chile has already explained that the drawing in the charts of 1829-30, of the upper part of Nassau Bay and the eastern section of the Beagle Channel, was made possible exclusively by the explorations carried out during the months of March to May 1830. Previously, in so far as maps are concerned, little, not to say nothing, existed. The only map which showed anything of these inner areas, was that of the Dutch exploration of 1623-24, which Captain King considered to be "a confused chart of this coast", and Fitz-Roy, when arriving at Caleta Lennox stated he "could here trace no resemblance whatever to any published chart . . .".

In view of such indisputable facts, how can it be explained that the Argentine Government's "reconstruction" completely omits Midshipman Stokes' voyage to the southern part of Navarino Island, when carrying out Fitz-Roy's orders: "to continue the survey of the coast *from the east side of the head of Nassau Bay to the vicinity of New Island*"? ¹

Should the reconstruction attempted by Argentina be true, Stokes would not have performed an important part of his Captain's instructions, he would have left a gap not only in a part of Navarino (from Punta Harvey eastwards) but also in Goeree Road. Moreover, it would have been impossible to construct correctly the 1829-30 chart, since the April surveys would not have been "linked" with those made by Stokes in May 1830.

As will be seen in "Appendix C", the reconstruction of the tracks undertaken in Map 85 of the Argentine Atlas is erroneous, since it does not agree either with the material produced by the Channel's discoverers, nor with the assertions contained in the Argentine Memorial. ²

D. GEOGRAPHICAL ERRORS SAID TO BE CONTAINED IN THE CHILEAN MEMORIAL. VARIOUS ADDITIONAL COMMENTS

The Concept of "Cape Horn Archipelago"

47. The Chilean Memorial (p. 17, para. 32) pointed out that "all the islands and islets South of Tierra del Fuego form a large geographical entity" and it went on to explain in what way its various elements could be classified.

¹ "Narrative", Vol. I, p. 437.

² Plate 206 of the Atlas submitted with this Reply contains a reconstruction of the tracks of Murray and Stokes in April-May 1830, drawn on the chart which was prepared after their surveys.

With reference to Article 3 of the Treaty of 1881, which assigns to Chile "all the islands to the south of the Beagle Channel as far as Cape Horn", the Argentine Government has attempted to introduce a wholly arbitrary vertical division, which is contrary to geography and foreign to the Treaty: a division based on a purported boundary along the Cape Horn meridian.

With this purpose in mind, the Argentine Counter-Memorial enthusiastically attacks the above-mentioned Chilean statement, and even goes so far as to assert that "Chile has nearly invented, for obvious reasons of its own convenience in the present case, a 'large geographical entity located to the south of Tierra del Fuego' which the *Chilean Memorial* does not hesitate to call an 'Archipelago'" (p. 41, para. 33i).

48. The Government of Chile will not re-examine, in this chapter, the erroneous Argentine thesis on "the Cape Horn meridian" but will limit itself to proving the truth of the geographical assertions which the Argentine Counter-Memorial has criticized.

— The concept of "*Cape Horn Archipelago*" is far from being a Chilean invention: the Argentine Foreign Minister, Irigoyen, spoke—1875—of "Tierra del Fuego and *the islands of Cape Horn*" (Ch. C.M., Appendix A, page 168).

— Captain Martial dedicated a whole section of his book to the "Aspect général de l'archipel du Cap Horn". The distinguished French navigator who had defined Beagle Channel as running *to the north of Picton Island* ("Some remarks...", page 132) described also the Archipelago:

"L'archipel du Cap Horn comprend tout le groupe d'îles qui s'étend au sud du canal Beagle, du 55° parallèle environ jusqu'au Cap Horn; ...".¹

The Cape Horn Archipelago comprises the whole group of islands which extends to the south of Beagle Channel, from about the 55th parallel to Cape Horn.

— Some ten years later, the Argentine jurist, Sr. Varela who, it may be recalled, wrote a book on the boundary question based on the documents kept by the Argentine Foreign Ministry, drew a distinction between Tierra del Fuego and the Cape Horn archipelago when he referred to the "long litige qu'avait provoqué la propriété de la Patagonie Australe, le Détroit de Magellan, *l'île de la Terre de Feu, et l'Archipel qui se prolonge jusqu'au Cap Horn*".² A few pages further on, he again referred to "La Terre de feu, et les îles de *l'Archipel contigu*" (ibid., page 60).

— The eminent Argentine politician Don Estanislao Zeballos, well known for his devotion to geography and international politics, asserted in 1905 that: "*To the south of*

¹ L. F. Martial "Mission Scientifique du Cap Horn: 1882-1883 (Paris, 1888), Vol. I, p. 247 *et seq.*

² Varela, op. cit., Vol. I, p. 22.

Tierra del Fuego there exists an Archipelago of islands which runs from the Beagle Channel to the North as far as Cape Horn to the South".¹

— The British Admiralty Hydrographer, Rear-Admiral J. F. Parry, in his 1918 report writes "the Beagle Channel runs in an easterly and westerly direction along the 55th parallel of South latitude, *through the archipelago of islands lying between the mainland of Tierra del Fuego and Cape Horn*, and its existence was unknown until the early part of the 19th century" (Chilean Annex No. 122, page 299).

— Finally, several scientific sources to the same effect are included in Annex No. 382, Volume II of the Ch. C.M.² Many more could be added, for it is obvious to any geographer that the group of islands lying to the south of the Beagle Channel can be called an "Archipelago", precisely because it is a group of islands—without prejudice to the fact that, it has sometimes been referred to as forming part of a greater group made up of all the territory situated to the south of the Strait of Magellan. Of course, the Cape Horn archipelago may also be subdivided into smaller groups such as the Wollaston Islands and Hermite Islands group, or into single island units.

But research has proved unfruitful with reference to a "vertical division" of the Southern archipelagoes: no geographer has even suggested the division which the Government of Argentina has so lightly adopted for the purpose of its arguments.

49. The Argentine Government is undoubtedly aware of the very serious difficulty that geography represents for its thesis on the Cape Horn meridian, for, although it avoids approaching the subject openly, in some of the asides of the Arg. C.M., it makes odd remarks which furthermore are somewhat contradictory. Thus: at page 110, para. 23, it says that Navarino Island is "the last of the islands to be placed under Chilean sovereignty, because it is situated almost in its entirety on the 'Pacific' side". However, further on, at page 250, para. 11, (ii) it seems to regret such "generosity" when it asserts "...Chile cannot claim any point on the coast, whether on the mainland or an island, on the Atlantic;

¹ "Revista de Derecho, Historia y Letras", Vol. XX, p. 462: "El incidente de Límites con Chile", Buenos Aires 1905.

² The 1875-1889 edition of the British Encyclopedia (Ch. C.M. Annexes p. 185) refers to "south Fuegia" as "the islands of Hoste, Navarin, Gordon, Londonderry, Steward, Wollaston, and numerous islets disposed in triangular form with the base on Beagle Channel and the apex at the rocky headland of Cape Horn". The "Grande Encyclopédie", 1889 edition (Ch. C.M. Annexes p. 187) speaks of all the islands situated to the south of the Beagle Channel as belonging to Chile, and further on when discussing Tierra del Fuego, it says that "son côté méridional, assez uniforme aussi, est séparé par le canal du Beagle de l'archipel particulier de Horn". In his "Nouvelle Géographie Universelle" by Elysée Reclus published in 1893 (Ch. C.M. Annexes p. 191) he says "Tout l'Archipel d'îles qui se trouvent au sud du Beagle Channel appartient au Chili". The "Nouveau Dictionnaire de Géographie Universelle" published in Paris in 1894 (Ch. C.M. Annexes p. 192) says that the Argentinian Governorship of Santa Cruz is separated from "Des grandes îles chiliennes de l'Archipel du Cap Horn, Hoste, Navarino, etc.", by the Beagle Channel. Doctor Carl Martin in "Landeskunde von Chile" (Ch. C.M. Annexes p. 195) also calls the group of islands situated to the south of the Beagle Channel: "The Southern Archipelago".

it thus cannot claim sovereignty over the islands whose coastline, or at least outer coasts, clearly form part of the Atlantic coast and controls a stretch of Atlantic territorial waters”.

It is clear that according to the erroneous Argentine criteria, Chile could own neither Horn Island since its Eastern coast faces what Argentina calls the Atlantic (despite the fact that the Cape is specifically recognized as Chilean in Article 3 of the Treaty of 1881), nor the other islands cut in two by the Cape Horn meridian, thus denying even the Chilean sovereignty over the whole of Navarino.

As stated in the Chilean Counter-Memorial, Señor Basilico, an Argentine Admiral, has drawn attention to the consequences of the “Cape Horn meridian” theory.¹

50. The Argentine Counter-Memorial (p. 42, para. 33) makes a somewhat ingenious remark on the use by Captain King, in his lecture before the Royal Geographical Society of London in 1831, of the chart which was published in the Society’s journal, and which, newly engraved, was included in the Narrative.

It is impossible to determine with exactitude today which were the graphic means used by Captain King to illustrate his conference; but, the Argentine Government cannot deny that the chart published in the Society’s Journal, must have been concordant with the one which the text of his lecture reveals that he used, calling it “our Chart” (Narrative, Vol. I, p. 579).

51. Further, the Argentine Counter-Memorial (p. 42, para. 33) makes an observation on the average breadth of the Beagle Channel, in an attempt to diminish the value of Captain King’s assertion. It is obvious that the leader of the expedition, basing himself on reports and records submitted by his subordinate, Captain Fitz-Roy, made a general statement about the breadth of the Channel which was bound to be incomplete since the western arms of the recently discovered channel had not yet been fully surveyed. This exploration was the only specific task—in the Channel—reserved for the “Beagle’s” second voyage; in other words, it was accomplished several years after Captain King’s lecture.

The argument—often repeated in the Argentine pleadings—that Captain King’s descriptions of the Beagle Channel are devoid of any value because he himself was never in the Channel, is preposterous. It is obvious that whoever is in charge of an expedition

¹ “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”. Basilico “La Controversia sobre el Canal Beagle” Buenos Aires, 1962, p. 179 (Ch. C.M. p. 120, footnote).

cannot be expected to command, to explore and to survey. His duties are those of a leader of the task and his subordinates accomplish the work which he assigns to them but, it is he who is finally responsible to the respective authority for the work done. Applying the erroneous criterion that the Commanding Officer of the expedition could not express an opinion on the Beagle Channel because he had never been there himself, the Argentine Government should also conclude that Fitz-Roy would have been similarly prevented from expressing an opinion on *what Master Murray discovered in April 1830* and about the islands, passages and the *eastern entrance of the Channel, discovered by Stokes during his two voyages in May of that year*. For when Fitz-Roy prepared the chart of 1829-30, which was transmitted by King to the Admiralty, or when he worked on a part of the 1832 Sailing Directions, he had personally seen only a short section of the Beagle Channel, to the West of Murray Narrows.

52. The Argentine Counter-Memorial (p. 43, sub-para. vii) insists that section VII of the British Sailing Directions of 1832, was the work of Fitz-Roy. This is in principle true, but it must be added that he carried out that work jointly with Captain King, who is the author responsible for those "Sailing Directions", a fact which is, moreover, confirmed by the latter's footnotes in that section.¹

The Malvinas/Falkland Islands

53. In the Chilean Memorial (p. 20, para. 50) it is stated that: "The Malvinas or Falkland Islands are also on the Atlantic to the east of Tierra del Fuego and Patagonia, but no reference to them has been found in the material concerning the negotiations which led to the conclusion of the 1881 Treaty",

The Argentine Counter-Memorial (p. 44, sub-para. 33 x) has reacted rather strongly to this plain and objective assertion, by qualifying it as "intriguing if unsubtle". It does not deny the Chilean assertion; but takes great pains not to mention the Islands by name, and seems to see, in the allusion contained in the Chilean Memorial, an "implicit acknowledgement" that the sentence in Article III of the Treaty, which assigns islands to Argentina, must have "some meaning".

The Government of Chile regrets this reaction because its only intention, when referring to the Malvinas/Falklands Archipelago, was to furnish to the Court of Arbitration, as far as possible, all the elements that may have played a role in the inception of the 1881 Treaty.

¹ See first footnote to para. 39 above.

In its Memorial and Counter-Memorial, the Government of Chile has had an occasion to state that, in its view, the allocation of islands effected by Article III of the Treaty when mentioning the other islands "there may be on the Atlantic, to the east of Tierra del Fuego and of the eastern coasts of Patagonia"—was of a general nature:

"...the draftsmen of the Treaty proceeded, as much for Argentina as for Chile, to an abstract definition without concerning themselves with the concrete existence of numerous or important islands or islets." (Ch. C.M. p. 74, para. 25).

The intention was—it is submitted—to leave no margin for any discussion whatsoever.

This was, undoubtedly, the true meaning of this provision, which comes straight from the Irigoyen proposals of 1876.

What may have induced Irigoyen to use such an expression?

It is permissible to assume that he intended to serve simultaneously several objectives.

In the first place, the formula secured for Argentina all the islands and islets appurtenant to the littoral which the Treaty was to allocate to Argentina, including, of course, those which the Government of Argentina has so clearly marked on Map No. 84 of its Atlas.¹

These islands and islets may well be small or be far from the Straits of Magellan, but their importance was not trivial in 1881.

The Government of Argentina asserts that it was not necessary to mention such details in 1881; but the fact is that the Treaty did use the words which appear in Article III both in relation to *Patagonia* and *Tierra del Fuego*. Furthermore, it is also a fact that Irigoyen—in his 1876 proposal—had referred to the islets lying in the immediate vicinity of Staten Island. Why should he not have given the same attention to "the Patagonian Islands and islets" which, after all, were often mentioned in public documents of the time?²

¹ But omitting the "Veleros islets" situated along the coast of Tierra del Fuego to the N.E. of Cape Buen Suceso, and which can be seen on more detailed Argentine maps (which have not been submitted so far) and occasionally on maps which are already filed in this case, such as the Chilean Chart submitted by Argentina under No. 80, and the English map, Plate 100 in the Chilean Atlas. See the Argentine "Sailing Directions" of 1962, p. 82.

² The Argentine Counter-Memorial (p. 97, para. 16) asserts that "apart from Isla de los Estados and its islets, there is no island, nor even the slightest islet, to be found off the whole coast of Isla Grande". And, at p. 44, para. 33 x), it goes even further on saying that "it is only beyond 45° that such an islet is to be found, even on large-scale charts". Such assertions are contrary to what is stated on official Argentine documents, such as:

— Project of Law to fix the boundaries of the Argentine territories of 1871, the first article of which speaks of the "adjacent islands on the east" of the territory to the south of Rio Santa Cruz.

— Resolution issued with regard to the application filed by Julio Hasse, acting on behalf of the Banking House "Erianger y Cia.", dated 22 July 1872, authorising them to extract the guano "that is ready to be loaded, in the following islands: One situated at 50° 20' S. lat.; another at 50° 10'; another at 48° 45'; another at 48° 20' ...".

There may have also been a second objective in Irigoyen's mind: the future of the Malvinas/Falklands which, through the years, had been the subject of correspondence between Argentina, Great Britain and the United States of America and which had often been referred to as geographically linked to Patagonia and Staten Island.

Irigoyen, who was a very clever diplomat, certainly would have preferred not to insert in his compromise formula any direct reference to these islands, whilst discerning an obvious advantage in eliminating Chile from any dispute related to them. For the Argentine statesman may have thought that, later on, the Government of Chile could assert claims on the basis of old Spanish official documents. It must be remembered, for example, that in the 1761 report of the Governor of Chile, Don Manuel de Amat y Junient (see para. 15 above) the "Sebaldas" islands were mentioned as part of the territory falling under the jurisdiction of the Captaincy-General of Chile. Now, these "Sebalda" islands had been discovered by Sebald de Weert in 1599 and his description revealed that the islands were a part of the archipelago which, later on, was called Malvinas/Falklands.

54. When Article III of the Treaty assigns to Argentina "... the other islands there may be on the Atlantic", it restricts the general meaning of the phrase by adding: "*to the east of Tierra del Fuego and of the eastern coast of Patagonia*". As the latter ended at the Strait of Magellan, and the details concerning its boundaries had already been laid down in Article II, this sort of "returning north" in Article III calls for one's attention.

The Government of Argentina disposes of this fact by asserting that Irigoyen must have done it "out of abundant caution" (p. 98, note 36).

If he acted with this "abundant caution" for a number of small islands and outcrops of rocks, is it not equally logical that he would assume the same attitude so as to include the Malvinas/Falklands in the provision, the more so when, as has already been said, Spanish documents mentioned as Chilean some islands situated in its north-western extremity?

It is also to be noted that the reference "east of Tierra del Fuego and of the eastern coast of Patagonia" fits in exactly with the geographic position of the Malvinas/Falkland, for the Archipelago, as can be verified on any map, is situated opposite the eastern mouth of the Strait of Magellan; and the prolongation of the parallels at both its extremities reaches both the coasts of Tierra del Fuego to the South, and the coasts of Patagonia to the North.

The close association between the coasts of Patagonia and the Malvinas/Falkland is, also, clearly evidenced in a number of Argentine diplomatic notes, such as that signed by Minister Irigoyen himself on 23 August 1875 (Arg. C.M., Annex 7, p. 28) and that dated 30 June 1875 (Ch. Annex 17, p. 32).

55. The Government of Chile would desire, however, to recall a few remarks, some

of which arise from documents filed in this case by the Government of Argentina itself.

It is a fact that Argentina has considered, and considers Staten Island as a dependency of the Malvinas/Falkland, and most certainly that is the reason why she showed such tenacity in defending her sovereignty over that island, until obtaining it (Ch. C.M., p. 44, para. 17). This is verified by numerous documents such as the history of the so-called "Vernet Concession", to which Annex No. 9 of the Arg. Mem. refers; and by certain governmental acts which the Government of Argentina has filed in this case, one of which is the Decree of 19 May 1904 concerning the organisation of the National Territory. In accordance with this text (Arg. C.M., p. 424, para. 27) the department of Staten Island includes the islands of the same name and "*all the islands in the Atlantic which are under the legal sovereignty of the Argentine Republic*"¹. This is just a way of referring to the Malvinas/Falkland Islands, without actually naming them, as admitted by the geographer Latzina (Ch. C.M., p. 442, para. 127).

Furthermore, the well known Argentine Professor of International Law of the Universidad Nacional del Litoral, Señor Domingo Sabaté, who has thoroughly studied the Beagle Channel question, and written a book on the subject, asserts in his remarks upon Article III of the Treaty of 1881, that when the latter speaks of islands to the east of the eastern coasts of Patagonia it refers to the Malvinas/Falkland:

"The clearness of the allocation carried out by the Treaty does not allow to think the opposite. *When, afterwards, the article speaks of Islands to the east of the eastern coasts of Patagonia, it indicates Malvinas.*"²

56. As stated in the Chilean Memorial, when that pleading was written no reference to the Malvinas/Falkland had been found in the material concerning the negotiations which resulted in the conclusion of the 1881 Treaty.

Further research in the Chilean papers has thrown no further light on this matter. Nevertheless, some reference has been found in archives of third countries and it is not unlikely that, likewise, the Argentine Archives contain more specific information on it, in relation to the negotiation, the Congressional approval, or the interpretation, of the Treaty.

The Government of Chile regrets being unable further to assist the Court on this point.

57. Before concluding this chapter, the Government of Chile would like to make a few corrections and some additional comments of a hydrographic and geographic nature, in connection with other assertions made by the Government of Argentina in its Counter-Memorial.

¹ Emphasis in the original.

² Domingo Sabate Lichtschein: "La Soberanía Argentina sobre las islas Picton, Lennox y Nueva" (Buenos Aires 1959), p. 157.

Picton Pass

58. The Argentine Government repeatedly insists on the fact that Picton Pass could have been considered by Fitz-Roy as the true Beagle Channel, because, on two out of the three occasions when the Captain penetrated into said Channel, he sailed through that pass. The reason why, both in January 1833, and later in March 1834, Fitz-Roy used that route is simply because in both cases, he was taking his ship from the area to the South to anchor off the S.E. coast of Navarino, which he already knew offered safe anchorage. It is evident that the most direct *access*, from that area, to the Beagle Channel is through Picton Pass, but obviously this fact in no way modifies the nature of the Channel.

Both this Pass and Murray Narrows serve as side entrances into the Beagle Channel, but they can in no way be confused with the Channel itself.

59. The Argentine origin of the place-name "Picton Pass" has already been referred to by the Government of Chile (Ch. Mem., p. 85, para 44 et seq.). There is no need to insist on this particular point. Not only does it continue to be used in present-day Argentine maps—(see Arg. Mem. Maps 1 and 27), but also this concept has been maintained in Argentina's "Sailing Directions". For example, the 3rd edition of the "Sailing Directions" of 1962, Vol. I, p. 139, reads:

"Picton Pass: This is the passage which extends between Picton Island and Navarino Islands . . ." and it adds, "*to enter Picton Pass from the Beagle Channel . . .*" (see Ch. C.M. p. 88, para. 46).

60. The fact that Picton Pass was never considered as an integral part of the Beagle Channel, either by its discoverers or in subsequent basic cartography, is also evidenced by other factors:

— In the discoverers's chart of 1829-30 (Ch. Atlas, Plate 1) no name is given to that Pass. Fitz-Roy considered it as an "entrance to the Beagle Channel" and, in January 1833, he referred to "the northeast part of Navarino Island", clearly distinguishing the waters of that part from the "eastern arm of the Beagle Channel".¹ It is erroneous to assume, as the Argentine Government does, that because no name was given to this pass in the 1829-30 chart, it should be considered as the final section of the Beagle Channel (see Ch. C.M. p. 85, para. 44).

¹ "Narrative", Vol. II, pp. 127-128.— It is also interesting to note that, in accordance with the "Beagle's" log-book, it was only in the afternoon of 2nd May 1834, when the ship had already actually entered the Channel that Fitz-Roy said that they were sailing "westward through the Beagle Channel", which words fully agree with the notes in Wickham's log-book for the same day. And also Darwin ("Narrative", Vol. III, pp. 237-238), writes that on 19 January 1833, they entered "the eastern mouth of the channel" on reaching the islets off Point Eugenia. Lastly, it is curious to note that the Argentine Memorial, notwithstanding its erroneous thesis that Picton Pass is the Beagle Channel (para. 54, p. 71), referring to the "Beagle's" second voyage, says: "Fitz-Roy not only recognized the advantages of Paso Goree; that *the stretch of water between Navarino and Picton was the shortest and easiest passage into the inner part of the Beagle Channel*".

— In the discoverers's 1829-30 chart, only a few soundings are given in this area, two opposite Cape Rees and some on the N.W. part of Picton. Although the two dangerous rocks situated in the middle of the passage opposite that Cape are marked, no soundings were taken nor were any observations made for the shoals in the Northern part of Picton Pass. The true Beagle Channel, on the other hand, was the object of continuous soundings from Cape San Pio and Nueva Island to beyond Murray Narrows, as also appears from the 1829-30 chart (Ch. Plate No. 1).

— Likewise, as regards light-houses and beacons, there is only one, today in Picton Pass which indicates the entrance to Puerto Toro. To verify this fact it is sufficient to look at Chilean Chart D, appended to "Further Remarks..." (also filed by Argentina as Map 83 of its Atlas).

61. All the foregoing, proves beyond any shadow of a doubt, the line of conduct of cartographers and hydrographers and of both parties over the years. How can the Government of Argentina now claim that Picton Pass has, since 1881, been no less than the frontier between the two countries, when in fact its discoverers gave it only minor importance, hydrographic science has considered it as absolutely secondary for over a century and no reference to it is found in the statements of Argentine statesmen?

62. Finally, the reports of the Anglican missionaries and many maps (see, for instance, Ch. Plates 55 and 85 and Arg. C.M. Maps 51 and 74) show that the route usually followed for many years to reach Ushuaia from the Atlantic and vice-versa always went north of Nueva and Picton.¹ The use of that waterway, as it were, confirmed what by nature, by the discoverers, navigators, geographers, and the negotiators of the Treaty of 1881 was considered to be Beagle Channel.

Closing Remarks

63. The Government of Chile believes that the argumentative efforts of the Argentine Counter-Memorial fail to prove that the early explorers' reports and maps

¹ The Argentine Government's assertions that traffic along the coast of Tierra del Fuego is practically obstructed by the islets and rocks that make up the Becasses Islands group, but that, on the contrary, it is completely free and clear through Picton Pass, is wholly inaccurate. In fact, two tracks can be used in the true Channel: one to the north of those islands, and the other between these and Picton Island. Both are navigable and offer no danger.

This cannot be said of Picton Pass, in which are found not only the two rocks in its center opposite Cape Rees, but also a number of shoals and other obstacles in its upper reaches, which features have, oddly enough, been omitted in Maps 1 and 27 filed with the Argentine Memorial.

"Sailing Directions" now in use refer to the dangers for navigation of Picton Pass. So, the British "Sailing Directions" (1956 edition) mention "several dangers at the north-west entrance" and "two rocks, awash" which "lie close together near mid-channel, about 1 3/4 miles east-north-eastward of Cabo Rees" (p. 66). The Argentine "Derrotero" (3rd edition, 1962) refers to these two rocks as "particularly dangerous" and also warns against the shoals off the eastern coast of Navarino (pp. 137 and 139).

indicated the existence of the Channel which was to be discovered by H.M.S. "Beagle" in 1830. Consequently, such efforts are unable to prove that the discoverers of the Channel were led to the Channel by those reports and maps.

63. All the documents prove, on the contrary, that the discovery of the Channel was unexpected and that the charts which derive from the British surveys of the area are completely original in so far as they represent the Channel region. Obviously, the British Navy surveyor when drawing that cartography had recourse—and kept—the few names which corresponded the geographical reality that they had been able to observe, such as Cape San Pio, New Island, Cape Horn, etc.

65. The Government of Chile hopes to have proved that the discoverers of the Beagle Channel, when describing the Channel, had in mind the same waterway that Chile calls "Beagle Channel" and not the crooked channel which the Argentine Government, as recently as 1973, chose to call "Beagle".

66. This fact, of course, cannot modify the nature of the controversy submitted to arbitration by the Governments of Chile and Argentina. It is hardly necessary to recall that the controversy is not restricted to the characterization of one or more geographical features. Indeed, it concerns the identification of the intention of the Parties in 1881. However important the opinion of the discoverers of the Channel may be (and Chile has nothing to fear from it) it is submitted that it would be a wrong approach to consider the present dispute as exclusively related to facts which took place several decades before the signing of the Treaty.

As the Government of Chile put it in its Counter-Memorial:

"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' . . . the determination of this intention cannot be limited *a priori* to an examination of Fitz-Roy's understanding of the matter some thirty or forty years earlier" (Ch. C.M. p. 84, para. 40).

67. In other words, the search of *the intention of the Parties*, which is the task of the Court of Arbitration, cannot mean a search for *the intention of the explorer who discovered the Channel*, as claimed by the Argentine pleadings.

68. Fortunately—it is respectfully submitted—the Court does not face an alternative. The negotiators of the Treaty had the same conception of the Channel as the explorers who discovered it: that conception which the Government of Chile defends in these proceedings.

CHAPTER VI

CONCLUSION

1. As it stated in the Introduction to the present Reply (paras. 29-30), the Chilean Government was anxious to refute in detail the contentions and arguments contained in the Argentine Counter-Memorial, even though it was thereby led, on more than one occasion, to follow the opposing Party on to ground which is not that on which the present case is placed. The Chilean Government had before it an Argentine case which was almost entirely a new one, backed by a chain of argument that was involved and often difficult to follow, built of an unbroken series of suppositions, put together on bases that were in most cases imaginary. This explains why it has found itself compelled to enter upon developments which, it is aware, have sometimes been lengthy and tiresome. In a certain sense, the Chilean Government has thus seemed to be associated with the opposing Party in its attempt to obscure the dispute.

The time has come to put the matter straight once more. It is with that object that the Chilean Government would like—without however entering upon a fresh recapitulation of its case as a sequel to the facts set forth in its Memorial (Ch. Mem. pp. 175-176) and in its Counter-Memorial (Ch. C.M. pp. 147-151)—to recall a few of the fundamental elements of the present dispute.

2. The dispute submitted to arbitration concerns the sovereignty over the territories situated within the zone defined by the *Compromiso*. It does not relate to territories situated outside that zone, about which the Government of Chile does not accept any controversy whatsoever.

The dispute must be settled by way of the interpretation of the Treaty of 23 July 1881, and more particularly Articles II and III thereof.

3. So far as concerns Picton, Lennox and Nueva, and also the adjacent islands and islets, the Chilean Government is of opinion that:

(a) They do not belong to Argentina because they do not come within the concept of “la isla de los Estados, los islotes proximately inmediatos a ésta y las demás islas que haya sobre el Atlántico al Oriente de la Tierra del Fuego y costas orientales de la Patagonia”;

(b) They belong to Chile because they are comprised in the concept of “todas las islas al Sur del Canal Beagle hasta el Cabo de Hornos”, which confirms the general

allocation to Chile of all the territories situated to the south of the line described in Article II of the Treaty.

4. The ordinary meaning of the terms of the Treaty taken in their context is confirmed by the object and purpose of the Treaty as determined in particular by the preparatory work and the circumstances in which it was concluded.

5. The history of the Treaty is marked by the absolute continuity linking the Irigoyen-Barros Arana proposals of 1876, the "bases de arreglo" drafted by Sr. Valderrama on 3 June 1881 following on the agreement reached in the negotiations of April-May, and the Treaty signed on 23 July 1881. The whole chain of argument of the Argentine Counter-Memorial based on an alleged attempt by Sr. Valderrama to modify surreptitiously the text of the 1876 proposals, which attempt is said to have been defeated by Sr. Irigoyen in the course of secret negotiations conducted directly with the Chilean Government, is a pure and simple invention. From the proposals of 1876 to the Treaty of 1881 the line of descent is direct and unbroken.

6. The two Parties are agreed in considering that the interpretation of the 1876 proposals is essential for the interpretation of the 1881 Treaty. In the opinion of the Chilean Government those proposals had as their purpose to leave to Argentina the greater part of Patagonia, and to Chile, in addition to the Strait of Magellan the greater part of the territories to the south of the Straits. The attribution as compromise to Argentina of a few territories to the south of the Straits was limited to those territories enumerated in second and third Irigoyen proposals. The purpose of this was to give Argentina possession of an unbroken coast line from Patagonia to the south-eastern extremity of Tierra del Fuego¹ and Staten Island. The choice of the Beagle Channel as the frontier delimiting the few territories attributed to Argentina to the south of the Strait of Magellan was a natural consequence of the arrangement contemplated. That is the interpretation of the proposals of 1876 which follows from their very terms, from the general structure of the settlement they outlined, from the documents produced in the negotiations and from the maps which accompanied them.

7. Contrary to what is contended by the Argentine Counter-Memorial, the proposals of 1876 did not allocate the territories situated to the south of Tierra del Fuego according to their situation to the east or to the west of Cape Horn. They did not incorporate south of Tierra del Fuego a "vertical" frontier which was supposed to follow

¹ The expression "Tierra del Fuego" is of course to be understood in the sense in which it was used in Señor Irigoyen's proposals and in the 1881 Treaty, i.e. "Isla Grande".

more or less the meridian of Cape Horn, but a "horizontal" frontier which followed the Beagle Channel in a practically straight line from west to east.

8. In 1876 neither the Argentine Government nor the Chilean Government understood the formula for a settlement drawn up by Sr. Irigoyen and Sr. Barros Arana in the way the Argentine Government would like to interpret it today. The Chilean interpretation is clearly seen in Sr. Barros Arana's despatches of 5 and 10 July 1876. This interpretation was known to the Argentine Government and the latter did not at any moment in the negotiations attempt to contradict or to rectify it.

The efforts made by the Argentine Counter-Memorial to extricate itself from the facts thus established are based either on an improbable accumulation of hypotheses devoid of all proof, or on a distortion of the concepts as they were understood by the negotiators.

No more in 1876 than at any other time was there any agreement between the Parties on a distribution of the southern islands according to their situation with reference to a "Cape Horn frontier" of which neither the concept nor even the term ever had a place in the negotiations.

9. Having been rejected by the Chilean Government because they did not give Chile complete mastery over the whole of the Strait of Magellan, the proposals of 1876 were accepted by both Parties as bases for a settlement in May 1881, after negotiations conducted through the intermediary of the United States Ministers in the two capitals.

In the course of these negotiations, Chile had secured a modification of the frontier to the north of the Straits which gave it complete mastery over the latter, but it had had to abandon its opposition to the partition of Tierra del Fuego. The acceptance of the last two of the 1876 proposals had thus been the price Chile had had to pay in order to obtain a modification of the first proposal.

10. It is this new formula, based on the modification of the first proposal of 1876 and the confirmation of the other two, that the Chilean Minister Valderrama put into concrete form in his "bases de arreglo" of 3 June 1881. After further negotiations lasting about three weeks due to difficulties concerning the line of the Andes and the neutralisation of the Strait of Magellan, agreement between the two Parties was reached on 25-27 June; once the usual formalities were completed the Treaty was signed on 23 July 1881. It reproduced purely and simply the bases of 3 June (with the modifications on the two points mentioned), accompanied by a Preamble and final provisions. All the passages in the Argentine Counter-Memorial concerning a manoeuvre by Chile designed to modify the text of the third basis of 1876, secret negotiations on that text between

25 June and 23 July 1881, the re-establishment of the original text insisted upon by Sr. Irigoyen—these passages are completely without foundation.

11. Far from furnishing the demonstration of any common intention of the Parties concerning the distribution of the southern islands according to their situation on one side or the other of the meridian of Cape Horn, the Argentine Counter-Memorial reveals their fundamental and persistent disagreement on that point. That version of the facts, moreover, is itself inaccurate, for, no more than the Chilean Government, did the Argentine Government at any time during these lengthy negotiations put forward any formula for a distribution based on such a criterion.

12. The inaccuracy of the Argentine interpretation and the accuracy of the Chilean interpretation of the Treaty are evidenced by the documents relating to the negotiations. In this regard, special interest attached to the documents, cartographic or others, which prove how the two Governments conceived of the settlement which they were in course of working out.

The official Argentine documents confirm the significance of the absence of any reaction on the part of the Argentine Government to the official Chilean documents, that is to say, the fact that, on both sides of the Andes, the territorial settlement of 1881 was understood in identically the same way as far as the disputed islands are concerned. It was in the earlier part of the twentieth century that the Argentine Government started to put forward claims that did not correspond to the interpretation of the Treaty. These claims were moreover to undergo innumerable variations and the changes which occurred in the Argentine contentions from one pleading to another in the present case lead one to think that, a century after the conclusion of the Treaty, the Argentine view is perhaps not yet definitively fixed.

13. Finding it impossible to attach the "Atlantic-Pacific principle" to the Treaty itself, the Argentine Government tried to save it by making it an element of the *uti possidetis juris* principle of 1810 and then presenting this latter principle as forming an integral part of the Treaty. The Argentine Government was in consequence led to distort completely the meaning and scope of the Treaty. The territorial settlement of 1881 cannot be reduced to a confirmation of the legal situation of 1810. It embodies a "transacción", i.e. compromise, by which the Parties finally put an end to the difficulties to which the impossibility of determining the actual content of the *uti possidetis juris* of 1810 had given rise for many years. The Chilean Government, whilst convinced that the *uti possidetis juris* of 1810 would entail not only the admission of the sovereignty of Chile over the disputed islands, but also over Patagonia, considers that this question is entirely irrelevant.

It is not the *uti possidetis juris* of 1810 that determines the sovereignty over Picton, Lennox and Nueva, but the Treaty of 1881, and that alone.

14. The Argentine claims are thus seen to be based substantially on concepts of a geopolitical character which are foreign to the Treaty and which were introduced long after its conclusion. This explains why the Argentine Counter-Memorial now attaches only reduced importance to the Treaty as the exclusive source of the rights of the Parties in the regions to which it applies, and also to the terms of the Treaty and the geographical concepts it utilizes. The diminution of the importance attached to the notion of the Beagle Channel in the Counter-Memorial is a characteristic feature of this evolution of the Argentine case away from the Treaty and towards political doctrines that have no relation to it.

15. Both by the geographical range of its claims and by the arguments it advances in their support, the Argentine Government has profoundly changed the nature of its case. The Chilean Government respectfully begs the Court not to follow the course which the Counter-Memorial suggests to it, and which would lead to a revision of the Treaty of 1881 to bring it into line with the present claims of Argentina.

16. The Chilean interpretation of the Treaty is confirmed by individual items and patterns of evidence, of various kinds, in addition of the material establishing the form of the negotiations, and the circumstances of the conclusion of the Treaty, 1876-1881.

17. The subsequent practice of the Parties to the 1881 Treaty is to be appreciated in the light of a fact which the Argentine Government itself does not seriously attempt to dispute: the undisturbed public and routine flow of Chilean administration of Picton, Lennox and Nueva by virtue of the Treaty and under no other title from the time of the Treaty until the present day. No Argentine presence—no element of administration—has ever existed in those islands.

18. The Argentine Government utterly fails to produce evidence to rebut the material set forth in the Chilean Memorial which establishes a routine flow of administration in the islands after the Treaty. Moreover, the Argentine Government fails to meet the challenge presented by the evidence of Chilean decrees referring explicitly to the islands of Picton, Lennox and Nueva, in the years 1892-1914 (Ch. Mem. para. 196, p. 173). Attempts by the Argentine Counter-Memorial to reduce the weight of the evidence of Chilean administration take the self-defeating form of claiming that it was deficient rather than non-existent. Typical of Argentine argument is the complaint that

no postal service was provided in Picton and Nueva prior to 1905. However, in 1904, the residents of Picton and Nueva applied to the Chilean authorities for the creation of a Postal Agency on Picton. The outcome was that Chile established a postal administration. No Argentine Postal Agency has ever existed on the islands.

19. In face of open and persistent Chilean administration of Picton, Lennox and Nueva, the Argentine Government made no reservation of rights, no protest, until the Note of 8 March 1915: and this reservation only related to Picton and Nueva. This absence of protest is of particular significance since Chile was in peaceful and open possession of the islands, holding as sovereign, by virtue of the Treaty of 1881.

20. Belatedly, in its Counter-Memorial, the Argentine Government produces an artificial thesis that a dispute was "apparent" immediately after the Treaty of 1881 was concluded. This thesis is contradicted by a considerable weight of evidence in the form of documents, maps and acts of jurisdiction. In the first place, such a thesis is incompatible with the persistent Argentine epistolary lassitude and failure to make a reservation of rights until 1915—and then only in relation to *two* of the islands. There was a persistent and developing pattern of Chilean activity, including published decrees. The Argentine silence in face of this amounted to acquiescence in Chile's view of her rights under the 1881 Treaty.

21. In an inadequate attempt to reduce their difficulties in the case, the Argentine Government produces extremely artificial contentions to the effect that the sovereignty over the islands was in issue when the 1893 Protocol was concluded and also during the demarcation work of 1894-1895. These contentions are wholly contradicted by the evidence. The fact remains that prior to 1904 no diplomatic exchanges took place concerning the course of the boundary in the Beagle Channel area. No Argentine protest occurred until 1915 and the Argentine pleadings resort repeatedly to weak and ludicrous explanations of Argentine silence from 1881 until 1915. Of course, if it were true that a dispute concerning the boundary had existed long before 1905 or 1915, then Argentine silence would be *yet more adverse* to the Argentine case.

22. In spite of Argentine attempts to minimize the importance of map evidence in principle, and also to impugn individual items of cartography, map evidence is of paramount importance in the case. The Chilean Government's principal conclusions relating to the cartography are set out in Chapter IV (paras. 170-176) and the Court is respectfully asked to refer thereto.

23. The map evidence plays a normal and complementary role, together with the other documents, in establishing the interpretation of the 1881 Treaty. In particular, the maps form a part of the preparatory work of the Treaty and are also an important aspect of the subsequent practice of the Parties to the Treaty as an aid to its interpretation.

24. Of the several functions of the map evidence, one requires special emphasis. The map published by the Chilean Hydrographic Office in 1881, together with the editions of the map published in *La Ilustración Argentina* in 1881, constitute concordant and cogent evidence—since they were extensively distributed and were available in Buenos Aires—of the openness and notoriety of the Chilean interpretation of the 1881 Treaty. Yet they provoked no reservation indeed, no reaction of any kind, from the Argentine Government. It is also the case that in 1883, the first Argentine official map (dated 1882) was published and given the widest possible circulation: this map confirmed the Chilean interpretation of the 1881 Treaty in the clearest possible form.

25. From 1881 until 1908 there was a substantial concordance of view in the official maps of both Chile and Argentina. In the years immediately subsequent to the conclusion of the 1881 Treaty—until 1888 in fact—there was a concordance of both official and other cartography (with one totally eccentric exception: Arg. C.M. Map 17).

26. The cartography in general—and especially the maps associated with the negotiation of the Treaty (Ch. Plates 8 and 9)—bears out the Chilean view that in the Treaty the Beagle Channel was employed as a latitudinal concept based upon the geographical feature as a more or less rectilinear waterway, hugging the southern coast of Tierra del Fuego and lying to the North of Picton and Nueva. This latitudinal concept was a sensible means of allocating islands.

27. The Chilean interpretation of the Treaty was reflected from 1881 onwards in Chilean peaceful administration of Picton, Lennox and Nueva and concomitant Argentine acquiescence and inactivity. Even when diplomatic exchanges relating to the boundary began—the episodes of 1904-1905-1907 and 1915—the scope of the controversy was still indefinite.

28. In fact Argentine acknowledgement of and acquiescence in Chilean sovereignty had occurred before these tentative diplomatic exchanges began. The Court is respectfully referred to the material set out in abundance in Chapter X of the Chilean Memorial and especially the Chilean decrees there set out. This material must be taken in conjunction

with the general concordance of official cartography prior to 1908 and the absence of any Argentine protest prior to 1915.

29. In conclusion the Chilean Government would emphasize the general features of the Argentine presentation of the case: first, a failure to state a position until the second pleading; secondly, a failure to substantiate Argentine contentions by appropriate evidence; and, thirdly, a persistent resort to suggestion, insinuation, hypothesis and sheer repetition of hypotheses and suggestions, as a substitute for proof, when this was lacking. This type of presentation has brought needless areas of obscurity into the case. Moreover, it has placed the Chilean Government in the invidious position of proving the negative of several highly improbable propositions and constructions, put forward as based upon the evidence in the case, but in reality amounting to no more than unfounded assertions.

30. In contrast to the methods and tactics adopted by the Argentine Government in its first and second pleadings, the Chilean Government has in its pleadings presented its case on a straightforward basis. In the first place, starting with the Memorial, the elements of the Chilean case have been set out fully and in clear terms and have remained unaltered throughout the Counter-Memorial and the present Reply. Secondly, the Chilean arguments have been carefully related to the production of an abundance of items of positive evidence in the form of close textual reference to the 1881 Treaty, documents in general and cartographic evidence. The Chilean case is built upon a firm foundation of facts and documents. Thirdly, the Chilean Government *has presented a case*: it has not concentrated effort upon the denigration of the positions—for what they are worth—set up by the other Party. The Chilean case, founded upon the articulation of precise arguments and specific reference to appropriate evidence has its own strength: it is independent of the weaknesses and contradictions of the Argentine case.

SUBMISSIONS

31. For the reasons set out at length in the Chilean Memorial and Counter-Memorial, together with this Reply, and reserving the right to amend or supplement its request, the Government of Chile formally confirms the submissions presented at the conclusion of its Memorial and Counter-Memorial, and thus (i) maintains the request made in paragraph 3 at p. 176 of the Chilean Memorial; and (ii) renews the request of the Chilean Counter-Memorial (at p. 151) that the Court of Arbitration reject the requests made by the Government of Argentina at p. 446 of its Memorial and maintained at p. 541 of its Counter-Memorial.

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APPENDIX C

THE TRACKS OF THE "BEAGLE" AND HER BOATS

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The Chilean Memorial gave a brief summary (at pp. 11, 12 and 13) of the voyage of H.M.S. "Beagle" when the Channel that bears its name was discovered. It was deemed unnecessary to go into further details since the expedition's official documents, and in particular the definition given by Captain King, the leader of the expedition, are most clear and conclusive.

The Argentine Memorial's account of these voyages contains greater details, but it is incomplete, and partly inexact. It, thus, draws erroneous conclusions (p. 25 to 81, paras. 15 to 60).

On pages 83 to 93, paras. 39 to 57, of its Counter-Memorial, the Government of Chile felt it *was useful* to correct the Argentine approach to this matter. Moreover, in Appendix B, it presented a clear and simple synthesis of the essential facts concerning the voyages of the "Beagle" and that ship's boats.

The Argentine Counter-Memorial again deals with this subject in Chapter I, in particular on pages 21 to 39, paras. 18 to 32; and has added Map No. 85, where it gives its own interpretation of the development of Stokes' May 1830 survey.

Although, as has often been said, what substantially and directly interests the present case is to determine the intention of those who negotiated and signed the 1881 Treaty, the Government of Chile feels that it would be appropriate, even at the risk of taxing the Court's patience, to analyse, in greater detail, the historical and geographical aspects of the discoverers survey tracks, thereby eliminating a number of errors and omissions of the Argentine pleadings. As has been emphasized by the Government of Chile from the very start, a clear distinction must be made between the first voyage of the "Beagle" from 1826 to 1830, and the second voyage which took place from 1831 to 1836.

It was during the first of those voyages that the Beagle Channel was discovered; the second voyage added nothing substantially new to the knowledge of the region which interests the present case.

I. THE VOYAGE OF DISCOVERY—1826-1830

Reconstruction of the tracks

As it is well known, the Beagle Channel was discovered and explored between the months of March and May of 1830. It is interesting to attempt a reconstruction of the tracks of those voyages with the data available up to the present time.

In his book on the Beagle Channel question, Professor Guerra attempted to do so as early as 1917; but he limited himself to a part of Stokes' voyage, on the exclusive basis of the "Narrative", the maps included in it, and Chart No. 1373.

In 1918, the Admiralty Hydrographer attempted a similar task as shown in Annex No. 122, Vol. II of the Ch. Mem., and on plate 116 of the Atlas submitted by the Government of Chile.

"Appendix B" of the Ch. C.M. furnished all the basic data for a perfectly adequate reconstruction, but on that occasion it was not deemed necessary to do so on a chart, as the account is in itself sufficiently clear.

On its part, the Argentine Government has submitted—with its Counter-Memorial—a map containing its hypothesis concerning the voyages carried out by Stokes in May 1830 (Arg. C.M. Map No. 85).

In dealing with this subject the Argentine Government strongly criticizes what the Hydrographer said in this regard, in his 1918 Report to the Admiralty (Ch. Mem. Vol. II, Annex No. 122), and suggests that the Government of Chile indorses it in all its details. It seems necessary to point out that although the Chilean Government fully concurs with the British expert's reasonings and conclusions, this in no way stops it from feeling that, as regards the reconstruction of the tracks, it is possible to improve certain details, with the result, as will be seen, that such reasonings and conclusions will become even stronger.

Criteria required for a successful reconstruction

In the opinion of the Government of Chile, unless new antecedents come to light, the reconstruction of the tracks should be attempted taking into consideration the following data:

(a) The information contained in the "Narrative", and particularly the notes in the explorers' Journals, which must obviously be interpreted, in the light of the knowledge had at that time by the authors of such notes—a principle not always adhered to by the Argentine Government.

(b) The basic rules for the surveys of unknown shores, a technique which is indicated by Fitz-Roy himself in Annex 39, pages 202 to 208, in the Appendix to Volume II of the "Narrative".

Amongst these rules, one of the fundamental principles was a cross-reference to a number of partial surveys, and by joining them it was thus possible to obtain a maximum of fixed points related to other points already determined by trigonometrical means.¹

¹ "Narrative" . . . Vol. I, p. 417.

(c) The fair chart of 1829-30 (Ch. Plate No. 1), the soundings on which give an indication on the tracks of the boats, and where the details of the coasts, islets, and outcrops of rocks indicate either that the boat was in the vicinity, or that these geographical features had been observed from a shore at a sufficient height.

(d) The logs of the "Beagle", and those of its officers.¹ In addition to indicating the movements of the ship and her boats, these logs give information on the weather conditions and the prevailing winds; this information must be taken with certain reserves in relation with the position, for, in this region, there are marked differences between the micro-climates.

The Government of Chile has included in the Atlas submitted with this Reply a reconstruction of Stokes' and Murray's survey voyages, drawn on the 1829-30 chart. The explanations given below can be followed on Ch. Plate 206.

Surveys in March 1830

The first contact that the men of the "Beagle" had with the Channel occurred in the middle of March 1830 when Master Murray described what was later to be defined as the western mouth of its south-west arm. In this respect there are no discrepancies between the two Governments, with the exception of the intrascendental point indicated in the first footnote to para. 33, Chapter V of the present Reply.

It should be recalled that, the 1918 Admiralty reconstruction (Ch. Plate No. 116, C) shows with a slight error Master Murray's track during this first contact with the Beagle Channel: the line goes too deeply into the S.W. arm. The "Narrative" says (Vol. I, page 417) that the master "also saw a channel leading farther to the eastward than the eye-sight could reach, whose average width seemed to be about a mile" and the Hydrographer's reconstruction could indicate such a view, but Murray's boat appears not to have actually penetrated into the Channel.

Surveys in April of 1830

In April 1830, while the "Beagle" lay at anchor in Orange Bay, within Nassau Bay, Mr. Stokes and Master Murray made various surveys; their analyses have a more direct

¹ The mistakes in Master Murray's log are too frequent for this document to be used without certain reservations. Thus, for the 4th May, he does not mention Stokes' departure, and instead makes him leave on the 13th, which in fact is the date when Fitz-Roy returned on board; his log again makes a mistake as it enters his return on the 14th. Such inaccuracies are not to be wondered at, as Master Murray was away during these days and the entries must have been made by some not very zealous subordinate. Likewise, Midshipman Forsyth's log (regarding the second voyage only) also contains noticeable errors.

bearing on this matter. These voyages were generally described in "Appendix B", p. 175, of the Ch. C.M.

Master Murray's voyage

"The master went towards the head of Nassau Bay, and Mr. Stokes set out in the opposite direction" ("Narrative" . . . Vol. I, p. 427). Since Stokes was going toward Tekenika Sound, the "opposite direction" obviously meant that Murray was making for the south west-coast of what was later to be called Navarino Island. He penetrated a little into Windhond Bay (the name was given by L'Hermite's expedition; the bay is now known as Grandi Sound), gave accurate data about the coasts along a short stretch eastward, and took a quick glance at the entrance to Warren Bay (*the present Windhond Bay*), to return the way he came, possibly because he realized that the mountain chains prevented any communication towards the North. He entered Ponsonby Sound, and finally discovered a narrow passage which led him into a long channel which he followed eastward, finally reaching the clay cliffs, which the Arg. Mem. correctly identifies as "the western end of Gable Island" (p. 27, para. 17).

On Plate 206 of the Atlas attached to this Reply the probable track of the survey carried out by Master Murray is traced in blue.

Clay Cliffs

When Mr. Murray returned to the ship ("Narrative" . . . Vol. I, p. 429) and reported to Fitz-Roy, the latter noted in his Journal that "*from the clay cliffs*" the Master's view "was unbroken by any land in an E.S.E. direction" and he added "therefore he must have looked through an opening at the outer sea".

This is where the difficulties of the Argentine Government engender a chain of improbabilities: it becomes necessary to prevent Master Murray from climbing up these cliffs and it has to be proved that he only looked eastward from the boat; and then, if he did climb them after all, it has to be shown that he saw nothing at all; and then if he did see anything, he must be proven to have been mistaken when he reported to Fitz-Roy that his view "was unbroken by any land in an E.S.E. direction", and so the Captain could not possibly have reached the conclusion that "he must have looked through an opening at the outer sea" . . .

The Argentine Government spares no efforts to hold Master Murray in check and to minimize his ability as an observer and as a surveyor. The reason seems to be clear: the

above quoted passages show further Fitz-Roy's notion of the E.S.E. direction, and straightness of the Channel, a concept which he duly confirmed on many occasions and never rectified.

It is erroneous to uphold (Arg. Mem. p. 70 and Arg. C.M. p. 22, note 51) that Master Murray could not have accomplished the easy climb up to the cliff-tops (slightly more than 60 metres high) in circumstances that he was in charge of a difficult survey in a wholly unknown region. It was and is frequent and even necessary for explorers to climb heights to obtain a better view and locate reference points in the course of their surveys. The "Narrative" often mentions such climbs, for example those of Master Murray, in Vol. I, p. 446, near Slogget Bay on the 3rd of May,¹ in Spaniard Harbour on the 10th of that month (p. 447), and in Cape Buen Suceso on the 12th of May. (p. 448).²

The Argentine Counter-Memorial does not rely completely on the weakness that the Memorial attributed to Master Murray. Instead, it endeavours to base its allegation that he did not climb the clay cliffs on the fact that the first charts do not show Gable as an island. Such reasoning is probably wrong: the lie of the land and the narrowness of the channels which separate Gable from the coast of Tierra del Fuego make it highly improbable that the Master could have ascertained the fact that he was on an island, even after climbing the N. W. cliffs.

Furthermore, a long time seems to have elapsed before it was discovered that Gable was an island, for although Fitz-Roy himself was in the area in 1833 and 1834, the 1834 (1839) Chart included with the Narrative (Ch. Plate No. 3) and Admiralty Chart No. 1373 of 1841 (Ch. Plate No. 4) continued to show the island, as if it were a peninsula. Apparently, the first chart to show it as an island was that of the expedition of "La Romanche" in 1885 (Ch. Plate No. 33).

The Argentine argumentation against the clear text of the "Narrative" continues, for, accepting that Master Murray might have climbed the cliffs, the Argentine Government asserts that he could not have had a clear view eastward, as this would have been prevented by the mountains of Tierra del Fuego "sweeping accross the eastern horizon until they appear to merge into the mountains of north-eastern Navarino" (Arg. C.M. p. 22, para. 18). Then it adds that if he did see something it could not have been the outer sea, because it would have laid below the horizon, owing to the distance (ibid.).

This method of arguing suggests that the Argentine Government has verified that there actually exists a point on the cliff-tops from which one can descry an open space beyond Moat Bay, as the Arg. C.M. itself is careful to point out in note 53 p. 22.

¹ The Arg. C.M.—in its note 23 on p. 11—erroneously attributes this climb to Fitz-Roy on the 12th May 1830; whereas on that date the Captain happened to be a long way away from Cape Buen Suceso. The reference is taken from Master Murray's Journal.

² See also "Narrative", Vol. I, pp. 314 and 432.

According to the indication given in the “Beagle’s” log for the 10th—date on which Master Murray must have made his observations—the weather and the visibility were adequate.

Moreover, Fitz-Roy himself confirmed in his second voyage that Master Murray had stood on those very clay cliffs when he noted in his Journal, on the 20th of Janaury 1833 (“Narrative”, Vol. II, p. 203): “we passed the *clay cliffs* spoken of in the former volume, first *visited* by Mr. Murray”.

Finally, it is interesting to mention that for Admiral Basilico, who has carefully perused the technical data of the discovery, there is no doubt Master Murray did climb the clay cliffs and saw the outer sea, for he asserts: “so that after this long voyage as far as the clay cliffs of Gable, *Murray must have suspected the proximity of the ocean, and because of this he climbed the cliffs to see further and observe attentively, thus confirming the existence of an opening towards the outer sea*”.¹ And further on, with reference to the sentence in Fitz-Roy’s Journal, which the Argentine Government endeavours to deprive of all value, Admiral Basilico says: “Fitz-Roy wrote this, *knowing that Murray had looked E.S.E. from the cliffs of Gable, through an opening towards the outer sea*”.² And the bearing was true.³

On the basis of all these antecedents one may assert that from the very start Fitz-Roy considered that the channel discovered by the Master ran from Gable in a true E.S.E. direction, a concept which he did not modify, but appears to have confirmed, when the surveys were completed the following month.⁴ And this concept later led Captain King, the leader of the expedition, to the description of the Channel which he furnished to the Admiralty (Ch. Ann. No. 1 a).

Surveys made by Stokes in April of 1830

Whilst Master Murray was away on his voyage, Mr. Stokes went into Tekenika Sound, and on to Ponsonby Sound, and then he returned to the ship without finding a passage into New Year Sound.

The tracks of these voyages have not been drawn on the chart submitted with this Reply, as they bear no direct relationship with the Beagle Channel’s discovery.

¹ E. Basilico—“La controversia sobre el Canal Beagle” (pp. 40-41).

² Ibid. p. 48.

³ Ibid. p. 62, where one can read “The true E.S.E. direction passes freely (as does Murray’s bearing) along the north of Picton and reaches the opening which Fitz-Roy called Moat Bay, as can be seen on his 1834 chart”.

⁴ For the sake of brevity the Government of Chile shall not dwell on such odd assertions as those contained on p. 23, para. 19, of the Arg. C.M., where an attempt is made to relate the point from which it is surmised that Master Murray made observations in 1830 towards the east, with the soundings made years later.

Result of the April surveys

Once the explorations from Orange Bay came to an end, Fitz-Roy noted in his Journal, on the 15th April 1830, that Stokes' examinations "united to Mr. Murray's, almost completed the north and west part of Nassau Bay; and only the east side remained to be explored" ("Narrative", Vol. I, p. 430).

Voyage towards the area of Nueva Island

From Orange Bay the "Beagle" proceeded southwards, and then returned northwards and made careful observations on Cape Horn, on the Barneveldt and Evouts Islands, with a view to completing the surveys of part of the east side of Nassau Bay ("Narrative", Vol. I, pp. 430 *et seq.*). For the evening of the 2nd May 1830, the Captain's Journal states that: "In the afternoon we closed the shore near New Island, and were looking out sharply for banks and shoals, fancying, because the land looked lower, and the Nassau flat had shoal soundings, that we should find banks detached from the land". Further on, it says that they reached a "harbour in the evening"; but that they moved on from there towards a more sheltered spot behind some islets (*ibid.* pp. 436-437). Finally, the ship dropped anchor in what later was to be called Lennox Harbour by Fitz-Roy: "on the east side of a large island, to the west of New Island". ("Narrative", Vol. I p. 437).

The "Beagle" track during this voyage from Orange Bay is clearly shown on the 1829-30 chart (Ch. Plate No. 1).

It is interesting to stop for a moment, to ponder upon what Fitz-Roy could have seen when he approached the region of Nueva Island from the south and, also, at the time when the ship dropped anchor on the 2nd May, and how he could relate what he had seen both with the maps then available to him and with the western part of Nassau Bay which had already been explored.

The Arg. Mem. (p. 28, para 18) says that "during the afternoon, the 'Beagle' tacked to the north between two larger islands, the eastern of which they recognized as 'New Island' (Isla Nueva), so named by Captain Cook in 1774 . . . Soon after 5.0. p.m. they found a safe harbour on the western of the two islands where they anchored for the night. Fitz-Roy called this harbour 'Lennox', now Caleta Lennox, and gave this name also to the island".

It would be inexact to suppose any simultaneity in those facts, as the Argentine Counter-Memorial seems to imply. On his way northwards from the Evouts Islands, Fitz-Roy saw land masses, from which certain islets, later named Luff and Augustus islets, stood out. To the right of the latter he located an island which he could identify as Nueva, as it was

fairly accurately shown on some of the charts then available. Westwards, he could see an extensive coast, which appeared to be a part of the land observed by Murray during the April explorations: the present Navarino Island. He could also descry a number of islands situated in the western part of Nassau Bay.¹ Fitz-Roy is already in possession of information about the western part of that coast since it had been studied by Master Murray, who had, as has already been explained, in April, not only surveyed Windhond Bay (Seno Grandi), but gone as far as the western extremity of what the 1829-30 chart calls Warren Bay (now Windhond Bay). Fitz-Roy had so far been unable to observe the Goe Ree of l'Hermite's expedition or even correctly relate it with the place in which he was. Neither could he, immediately after dropping the anchor, establish whether the ship was next to an island.

From the "Beagle", looking north they could see behind some islets, certain land which had as a background the mountain chains of Tierra del Fuego. This land later turned out to be Picton Island.² Both the Arg. Mem. and the Arg. C.M. appear to agree on this point.³

The comparison of reality with the maps available, must have raised all kinds of doubts, for not only were the maps very incomplete but the navigators gave different positions for a single geographical accident, and whilst some charts showed only one island of some importance in the area where he had dropped anchor, others showed two. If, as the Argentine Government asserts, Fitz-Roy relied on the so-called "synoptic chart" (Arg. C.M. Map No. 2), this chart could only have contributed further to increasing the cartographical confusion.

The view which unfolded before him led the Captain to write down in his Journal the sentence which has so often been quoted: "I could here trace no resemblance whatever to any published chart".⁴ All he could identify with these charts was Nueva Island. But, thanks to Master Murray's reports of April, he knew also that northward of his present anchorage there was the straight Channel discovered by the Master, from a point of which (the clay cliffs,) the view "was unbroken by any land in an E.S.E. direction".⁵

¹ According to the "Narrative", Vol. I, p. 436, the weather was really fine on the 2nd May.

² On the chart of the Nodal brothers, Ch. Plate 163, , in the Third Atlas, and Fig. 6 on Chap. V, para. 14, the north and the east coast of Picton is depicted, but it was believed then that it was joined to the continent. A similar remark can be made for other maps.

³ Arg. Mem. p. 19, para. 5, and Arg. C.M. p. 5, para. 5.

⁴ "Narrative", Vol. I, p. 436 bottom, 437.

⁵ "Narrative", Vol. I, p. 429.

It is probable that it was these observations from the anchorage of the 2nd May that gave rise to the sentence in the 1832 Sailing Directions, so often referred to by the Argentine Government: "To the north of Lennox Island is the eastern opening of the Beagle Channel"; that is to say, this opening is "further up". This was absolutely correct for it agrees with the information given by Master Murray, on the 14th April immediately after the discovery of the Channel.

Therefore, Fitz-Roy also knew that between the long stretch of coast which he had observed extending from Windhond Bay towards the east, and the Channel in part explored and in part described by Master Murray, there existed a large mass of land and that is probably why, when he dropped anchor on the 2nd May and identified Nueva Island, he described the land lying to the west of him as "as large island".

Preparation for the surveys made in May

It was on the basis of all these antecedents, that Fitz-Roy had to prepare the surveys which were to be carried out.

In accordance with the instructions he had received from Captain King ("Narrative", Vol. I, p. 560 and Ch. C.M. Vol. I, Appendix B, p. 175) it was necessary for the surveys to go as far as the Le Maire Strait. This mission he entrusted to Master Murray.

Part of the northern and the eastern sections of Nassau Bay to the vicinity of Nueva Island still remained to be explored ("Narrative", Vol. I, pp. 430 and 437). This task he confided to Stokes.

Finally, the information furnished by Murray, when he returned to Orange Bay on the 14th April may have suggested to Fitz-Roy the possibility that Master Murray's remark: "westward of the passage by which he entered (Murray Narrow), was an opening to the northwest" ("Narrative", Vol. I, p. 429), might well mean the existence of a passage towards the sounds situated further north, the search for which was one of the main tasks that King had given him. Fitz-Roy took personal charge of this search.

Master Murray's surveys

Master Murray left on the 3rd May to study the coast of Tierra del Fuego, already partially surveyed by earlier expeditions. This voyage is sufficiently well documented in the "Narrative", for the first Volume contains long extracts from his Journal (pp. 446-449).

Both Parties agree that the findings of this voyage—as the Arg. Mem. asserts—"are not here relevant" (p. 47, para. 38 c). According to Murray's Journal he went along the southern and eastern coasts of Nueva Island, finally reaching Tierra del Fuego near Punta Jesse, that is, at the entrance to Bahia Sloggett.¹

¹ The Arg. Mem. says at p. 29, para. 19, that "his boat must have reached the south coast of Isla Grande in the vicinity of Bahia Sloggett". Admiral Basilico voices a similar opinion in his "Controversia sobre el Canal Beagle", p. 26, and his recent publication: "El Canal Beagle y las islas litigiosas", p. 30.

From there he proceeded as far as Cape Buen Suceso, from whence after enduring many difficulties, he returned to the "Beagle", surely along the shortest route, that is—along approximately the diagonal line which runs to the south of Nueva Island, and without making any further observations ("Narrative", Vol. I, pp. 448-49).

The Argentine Government supposes that the mission entrusted to Master Murray included a survey of Nueva Island.¹ There is no basis whatsoever for such an assertion. Neither Murray nor Stokes were given the task of making this survey, for Nueva Island was the only feature that Fitz-Roy had already identified with the help of the maps available to him. It is certain that the Captain limited himself to checking a few angles from Lennox Cove, and to the observations made separately by Murray and Stokes on passing along different sides of Nueva Island, and those carried out by the "Beagle" itself when it left its anchorage off Lennox. Because Fitz-Roy's expedition did not carry out a coordinated and complete survey of Nueva Island, the shape of the island was drawn defectively on the 1829-30 Chart, one of the very few defects in such a remarkable document. And even this error is explainable if, when Murray and Stokes returned to the ship, they superimposed the observations carried out separately from their boats, with the result that what is today known as Punta Waller was mistakenly identified with what is now known as Punta Orejas de Burro, thereby producing a shrinking in the breadth of the upper part of the island. This error was only noticed many years later.

Fitz-Roy's voyage

It has already been said that Fitz-Roy's main interest was to explore and ascertain whether there existed an interior passage leading to the north from the channel discovered by Master Murray. Hence his note in his Journal, of the 3rd May ("Narrative", Vol. I, p. 437) "I prepared for an excursion into *the interior passages* of this part of Tierra del Fuego". Then, on the 4th May—p. 438—he said: "I kept outside to the southwestward, *to make the most direct course towards the communication between Nassau Bay and the newly discovered passage or channel*". The Captain travelled so directly and so rapidly that by the first night, as recorded in his notes for the 4th and 5th (p. 438), he had covered a sufficient distance to reach and spend the night near a shingle beach very close to "Windhond" Bay (Grandi Sound). The Captain himself wrote in his Journal that "as time was too precious" none could be spent in dealing with the natives ("Narrative" Vol. I, p. 439). On the 7th he entered the Channel from Murray Narrows, and continued his surveys *towards the West*,

¹ Letter from the Argentine Agents to Professor Cahier, Registrar, dated 2 October 1974, delivered with Plate No. 86 of the Argentine Atlas.

without finding any passage leading to the north.¹ For the purpose of the present case, perhaps the one interesting point that needs to be stressed is that also in that section of the channel, Fitz-Roy drew attention to its straightness, and this concept was to continue being the true "leitmotiv" for all descriptions of, or references to, this curious natural feature. In his Journal, Fitz-Roy also drew attention to the fact that the channel presents little interest for sailing vessel.²

On his return Fitz-Roy landed for the night, on the 11th, to the south and near Murray Narrows and on the 12th, on a stony beach to the east of Windhond Bay (Grandi Sound). On the 13th, his party hunted guanacoës, and returned to the ship in the evening (pp. 444 and 445).

It seems clear, therefore, that the Captain only surveyed that part of the Beagle Channel along which they were sailing for the first time, namely to the west of Murray Narrows. Furthermore, he already had in his possession the surveys of the western stretch of the south coast of Navarino and Ponsonby Sound made by Murray from Orange Bay, and he well knew that Stokes was due to carry out "the survey of the coast from the east side of the head of Nassau Bay to the vicinity of New Island".

Therefore, the Argentine Memorial's assertion on p. 28, para. 19 that the Captain left on the 4th of May to investigate also: "the southern coast of Isla Navarino" is wholly unfounded. There is no evidence whatsoever for such an assertion nor does it agree with the purpose of this voyage of Fitz-Roy's or with the itinerary of his camp-sites and the distances covered within Nassau Bay.

The only passage

Finally, there is one point regarding this voyage of Fitz-Roy's which requires certain comments since, once again, the Argentine Counter-Memorial contains a mistaken interpretation.

On the 7th May 1830, when Fitz-Roy went through Murray Narrow, and saw the Beagle Channel for the first time, he noted in his journal: "The Murray Narrow is the only passage into the long channel which runs so nearly east and west" ("Narrative", Vol. I, p. 439).

The Argentine Government supposes that this assertion implied in the Captain's mind that "Picton Pass" *which was discovered subsequently*, along the eastern coasts of Navarino, was not properly speaking a "passage", but was to be looked upon as forming part of Beagle Channel.

¹ The opening descried by Master Murray "to the Northwest" is an inlet named Lapataia.

² "Narrative", Vol. I, p. 443.

Once again, the Argentine Government is mistaken, as a consequence of a chronological transposition. The truth is that Fitz-Roy only became aware of the existence of "Picton Pass" after his return to the ship and after being informed by Stokes about his surveys.¹ When he left on the 4th May and made his way in the direction of Murray Narrows and, likewise, when he returned along the same route and passed by a roadstead which he may have then identified as the "Goe Ree" of the Nassau Fleet, he did not know that from there it was also possible to enter the Channel, discovered by Master Murray, sailing to the NNW through a lateral passage.

Finally, the Argentine Government seems to forget, that Fitz-Roy himself, when he drew up his 1832 "Sailing Directions" and knew perfectly well the physical characteristics of the region wrote: "Nassau Bay *extends to the north and north-west into the Beagle Channel*. There is nothing to lead a vessel into *these openings . . .*" (p. 100), which agrees perfectly with reality.²

In Ch. Plate 206 of the Atlas attached to this Reply, the tracks of Fitz-Roy's voyages have not been drawn for, as has been seen, they furnish no useful elements for an interpretation of the May 1830 surveys of the region with which this case is particularly concerned.

Stokes' voyages in May 1830

The Captain's order to Stokes, as has often been pointed out was: "to continue the survey of the coast from the east side of the head of Nassau Bay to the vicinity of New Island". This implied that Stokes was to continue the survey of the southern coast of Navarino from where Master Murray had reached in his own surveys in April (Warren Bay), and explore the eastern part of this "large island", alongside which the ship was anchored, so as to link all these observations with Nueva Island.

It should be borne in mind that when the explorations began in May, the whole of the eastern part of the mainland situated to the south of the Channel discovered by Murray

¹ From a note in the "Beagle's" log—23 May 1830—it would be gathered that Fitz-Roy intended at the beginning to give the name of "Richmond Islands" to the group of Lennox and its islets, however the name was only used in the 1829-30 chart of "Richmond Road". This change of mind may have been caused by the information, furnished by Stokes, that the land masses which Fitz-Roy had seen from his anchorage on 2 May 1830 were composed of separate entities.

² In the 1962 Argentine "Sailing Directions", is explained that Nassau Bay communicates with the Beagle Channel along the N.W., through Ponsonby Sound and Murray Channel, and along the N.E. with Oglander Bay through Goree Road, thus maintaining what Fitz-Roy said in his 1832 Sailing Directions. Of course, for the above mentioned Argentine "Sailing Directions" the stretch of water which links Oglander Bay with the Beagle Channel is called Paso Picton, and does not form part of the Beagle Channel, as is being claimed in the present case (p. 144).

was an unexplored region, and there was no means of ascertaining with the aid of the available charts, whether the ship laid at anchor next to that large land mass, or alongside an island separated from it.

Stokes left on the 4th May "to the northward, to get to the mainland" ("Narrative", Vol. I, p. 438), for what he had to do, in the first place, was to try to locate the land alongside which his ship was lying, although his main mission continued being the survey "from the east side of the head of Nassau Bay to the vicinity of New Island".

It is known, and both parties are agreed on this point, that Stokes' voyage was interrupted because one member of his crew had broken a leg while hunting guanacoes. The Midshipman returned to the ship with the wounded man and left again immediately. This fact is mentioned in the "Narrative" (Vol. I, p. 445) but no dates are given. From the ship's log, it is known that Stokes returned on the 10th May, and left again early in the morning on the 11th, thus beginning what we shall call his second voyage.

If the 1829-30 chart is examined, it will be seen that in the course of his two voyages Stokes executed his orders most efficiently. His surveys cover an area from Warren Bay to the vicinity of New Island, and agree with the assertion that he was a long way into the channel first discovered by Mr. Murray and examined all the shores about its eastern communication with the sea.

It is submitted that the different data above mentioned and the 1829-1830 Chart make it possible to reconstruct the tracks of Stokes. The Government of Chile has endeavoured to make such a reconstruction and, on doing so, has confirmed its view about the erroneous Argentine reconstruction of those tracks.

A fundamental error in the Argentine interpretation

On p. 28, para. 19, the Arg. Mem. recognises that midshipman Stokes "was sent with 14 days' provisions to continue the survey of the coast from the east side of the head of Bahia Nassau (i.e. Punta Guanaco) to the vicinity of New Island". It could not have done otherwise, as it could not disregard the clear instructions given by Fitz-Roy, which not only indicated the field of action, but also told the midshipman in what order he was to proceed—"from the east side . . . to the vicinity . . .". Furthermore this instruction agreed, as been suggested above, with the need to link this survey with the one already made by Master Murray to the south of Navarino.

Nevertheless, the Arg. Mem., with no sound basis, limits this field of action by supposing that Stokes' task was to start at what was later to be called Punta Guanaco, that is from the S.E. extremity of Navarino Island only.

Such a limitation is erroneous. On the 3rd May, when Fitz-Roy issued his often quoted

orders, he ignored the existence of the geographical feature which would later be called Punta Guanaco, for, as already been seen, he had absolutely no observations at all for that part of the coast at that time.

In the Counter-Memorial, the Argentine Government goes even further in its misrepresentation of the task entrusted to Stokes. On drawing its Map No. 85, it supposed that on his first voyage he travelled northwards, and that on the second he also travelled towards the upper part. Thus, it totally disregards the instructions issued by Fitz-Roy to his subordinate¹ and, consequently, no trace is found in that "reconstruction" either of the surveys which were carried out from Warren Bay eastwards, or of the observations which the 1829-30 chart shows had been made within the area of Navarino, Picton and Lennox.

The Argentine Government appears to have forgotten what it wrote in its own Memorial. Both Punta Guanaco and the above mentioned regions are isolated without any explanation, and without showing how Stokes' surveys could be linked with Murray's earlier ones with the result that it would, therefore, have been impossible to compile the 1829-30 chart.

Moreover, the Argentine hypothesis, which makes Stokes travel northward on his first voyage, has failed to take into consideration one interesting and most revealing detail, which is contained in the 1829-30 chart, and which is the place-name: "Fracture Hill" located on Punta Harvey, and to which reference will be made hereinafter.

The reasons which have been given are sufficient to wholly discard the Argentine reconstruction of Stokes' first voyage, traced in green ink on its Map No. 85.

The tracks reconstruction in the 1918 Hydrographer's Report

Likewise, the British Hydrographer (map C of Ch. Plate 116) appears to have made a mistake in this regard. He attributed the survey of the true eastern mouth of the channel to Stokes' first voyage from the 4th May onwards, whereas, as will be seen, it was in the course of his second voyage that he travelled along the area extending from Cape San Pio and Nueva Island, to Gable Island. This does not affect the final conclusion about Stokes' surveys drawn by the Hydrographer which is absolutely correct.²

Reconstruction of Stokes' first voyage as it results from the documents

The general course followed by Stokes' boat on his first voyage has been traced in red ink on the Chilean Plate 206.

¹ Despite the fact that the Arg. C.M. quotes them on p. 24, para. 21.

² Professor Guerra make a similar mistake in his book. The error may be explained because he had no access to the original charts of 1829-30 or to the log-books of the "Beagle".

As has already been explained, he left the anchorage to make "to the northward, to get to the mainland" ("Narrative", Vol. I, p. 428), that is in the direction of the land masses (Picton) which could be distinguished towards the north and which supposedly formed part of the large geographical entity lying to the south of the channel discovered by Master Murray. The soundings indicate the track he followed as he went past the N.E. extremity of Lennox Island. From there, for the first time, the midshipman may have seen the stretch of water which would make up Oglander Bay and Picton Pass. He had not yet been able to discern "Goe Ree". As he faced the wide extension of water opening out before him towards the N.N.W., he descried a cape (Cape Rees) in the distance, and proceeded in that direction. As he made towards Cape Rees he could observe a good part of the western coast of what would later be known as Picton Island, but without any great accuracy as regards its S.W. extremity (area of Cabo María). Close to Cape Rees, he noted the two dangerous rocks in the centre of the passageway and took two soundings opposite this Cape. According to Fitz-Roy's log, the weather was fine on that day (May 4). As Stokes went towards Cape Rees he realized that to the south lay an exit towards Nassau Bay, which would enable him to go to Warren Bay without his having need of returning to the ship. Now, he knew that the "Beagle" was anchored to the east of an island, perhaps Van Walbeeck's "Terhalten". He then went southwards along the coast of Navarino, making a number of soundings; he also drew that coast (with many details) and marked two anchorage places off that coast; he also observed the western side of Terhalten Island (Lennox Island) and continued westward until he reached Point Harvey. Judging from Fitz-Roy's log, the weather was getting worse and on the 9th May conditions were very bad. In these circumstances, the crew members went hunting for guanaco¹ and that was when the sailor broke his leg ("Narrative", Vol. I, p. 445). There is reason to believe that this happened in the area of Punta Harvey; the name "Fracture Hill", given to a nearby feature makes this most likely. Having completed the linking of his surveys with that carried out by Master Murray in April, Stokes returned to the ship with the wounded man, and passed to the south of Lennox. He had a favourable wind from the S.W.—and so ended his first voyage in May.

The errors in the Argentine reconstruction of this first voyage

The reconstruction attempted by the Government of Argentina is, as has already been explained, unacceptable. The "mainland" is conceived as applying to the southern coast of the large island of Tierra del Fuego, despite the fact that both in its Memorial and

¹ Hunting for Guanaco¹ was not only a sport, but was recommended by Captain King to improve the food supply, as recorded in Vol. I of the "Narrative", p. 557. Hence, frequent references to such hunting excursions in the accounts of this expedition, with results duly recorded. "Narrative", Vol. I, p. 445. and footnote, p. 445, p. 449. "Game Book", p. 586.

Counter-Memorial it had correctly explained that Fitz-Roy did not hesitate in applying the term "mainland" to the land masses which he saw immediately to the north of the ship and which turned out to be Picton Island. Argentina confuses the direction taken by the boat when it left, which indeed is "to the northward" with the area to which Stokes must go in order to begin his surveys, and this was—as has often been said—the region of Warren Bay to the west of the "Beagle's" anchorage.¹

The Government of Argentina may have been induced to suggest that Stokes had failed to complete his mission surveying the coasts from Warren Bay because it was necessary for it to explain the direction of the soundings and surveys which on the 1829-30 chart appear as extending from the area of Cape San Pio and Nueva Island to Gable; as well as the tasks accomplished along the eastern side of Picton. If it did not use a number of these soundings and surveys, attributing them to the midshipman's first voyage, it would be virtually impossible for the Argentine Government to uphold its erroneous thesis that he thoroughly travelled along Picton Pass in the course of his second voyage. Faced with such a dilemma, it has preferred to forget Fitz-Roy's instructions to Stokes, and fails to establish any possible link between the April surveys and the new ones just carried out.

In the Argentine reconstruction of the midshipman's voyage from the 4th to the 10th May, there are, moreover, several other errors regarding the area through which he travelled. Reference to them shall be made below.

Stokes second voyage

As has been seen, Stokes left early on the morning of the 11th May. According to Fitz-Roy's log, a wind from the N.W. blew practically all day.

Having Stokes already finished his survey in Nassau Bay, located Terhalten (Lennox) Island and discovered the existence of what would later be known as Picton Pass, the midshipman then sailed N.E. in order to link his surveys with those of Master Murray in the area of Slogget Bay. His course is traced in green ink, on Chilean Plate 206).²

¹ It would also be a mistake to claim that, on the 4th May, Fitz-Roy made for an area situated to the S.W. of the ship's anchorage, because he said in his log-book ("Narrative", Vol. I, p. 438): "I kept outside to the south-westward . . .", taking into account that his goal was Murray Narrow situated to the N.W. in relation to his point of departure.

² In Master Murray's log Stokes' second departure is wrongly entered for the 13th May (see Arg. Mem. p. 67) with the statement that he went "to the west . . .". From this reference the Arg. Mem. endeavours to deduce that Stokes, in Master Murray's opinion, "steered to the *westward*, i.e. a generally westward direction towards Navarino and the passage between that island and Picton" (Arg. C.M. p. 68, para. 52).

There is no doubt that the general direction of the Midshipman's second exploration was towards the true West, for he had to explore the stretch of the Channel discovered by Murray as far as the point the latter had reached in April, or else, as far as Gable. But it can in no way whatsoever be deduced from the indications of the general purport of this survey that Stokes had entered the Channel through Picton Pass.

He took soundings at regular intervals as far as a point opposite Punta Jesse, then sailed westward along the Beagle Channel. This enabled him to confirm the accuracy of the observations made in April by Master Murray from the clay cliffs of Gable and also the reason why the Captain deduced that Murray "must have looked through an opening at the outer sea". The soundings show the boat's general forward movement but, as in the case of other stretches, this does not by any means exclude the possibility of deviations towards the coast. On the contrary there are details which prove that between two soundings the boat gradually moved some distance away from the rigid line which links them. Thus, numerous rocks are marked in the area of Cape San Pio; the coast of Tierra del Fuego, towards the west, is carefully drawn and even a small outcrop of rock on the same meridian as Reparo Islet (Moat anchorage) is shown. Further on, very close to this coast is traced the small islet (now "Marchant") situated to the N.E. of Woodcock Islands (Becasses). It is very probable that observations were made and bearings were taken from some height along that part of the coast of Tierra del Fuego as it is particularly appropriate for such a task. The track would have made it possible to observe Moat Bay, whence it leads on to Woodcock Islands (now "Becasses"), all three of which are shown in detail, to continue towards Pt. Gilbert (the present "Pta. Ganado"). If there is a particularly good observation point in this area, it is precisely the high grounds in the N.W. part of Picton Island. From that point the whole region can be seen, and there is good reason to believe that this was one of the many observation points for this survey. These heights are readily accessible, they afford an excellent view over the whole area; the N.E. coast of Navarino and the W. and S.W. coasts of Picton Island can be observed.

The Government of Chile believes that bearings were taken from that point and drawings made of what is now known as Picton Pass without Stokes' thinking it was necessary to travel through all of it, as suggested by the Argentine reconstruction. A detailed examination of the 1829-30 chart confirms this.

In fact, the extreme N.W. coast of Picton was surveyed most thoroughly as far as Jorge Islet. At the same time the Hermanos Islets were located and many soundings taken thereabouts. The west coast of Picton seems to have been drawn from some distance away as it contains fewer details, and there is also an error on considering a small peninsula as an islet to the N.E. of the rocks lying in the centre of the Pass. Likewise, the tracing near Cape Maria is quite deficient. It is true that other small islets have been marked, but these could also have been observed by Stokes from a height on Picton Island, or during his first voyage to Cape Rees.

As regards the N.E. coast of Navarino the tracing on the 1829-30 chart is not very accurate, for it shows a cape ("Cape James") which does not exist, and a little below is shown a deep sound whereas it is only a beautiful little cove. Furthermore, the cove now known as "Puerto Toro" is inaccurately placed.

Returning to the boat's tracks, after visiting the N.W. extremity of Picton Island, Stokes made for Punta Eugenia, surveying the islets Solitario and Snipe on the way. At Punta Eugenia he made a careful survey of a pretty group of small islands¹ and then continued westward along the Beagle Channel until he reached Gable Island, thus linking his survey with the survey made by Master Murray in April.

From there he appears to have returned eastward along the southern coast of Tierra del Fuego, where he made a very thorough survey of the coast, for he was able to locate small islets in its immediate vicinity, such as Alvina situated to the N.N.W. of Snipe. Following this course, he passed to the north of Snipe and Woodcock Islands and he then went down vertically to Lennox Cove, passing by Reparo Islet, which was also drawn with its neighbouring rocks.

Thus ended Stokes' second voyage, and on the 17th May Fitz-Roy noted very accurately in his log: "Mr. Stokes also returned, having been a long way into the channel first discovered by Mr. Murray, *and having examined all the shores about its eastern communication with the sea*" ("Narrative", Vol. I, p. 449).

Further errors in the Argentine reconstruction

As has been explained, the Argentine Government's hypothesis is unacceptable for it reconstructs Stokes first voyage along a part of what would be the track he followed during his second voyage. But also, in doing so, it incurs in serious omissions for it fails to cover all the soundings plotted by the midshipman, disregarding those taken from Lennox Cove to the vicinity of Punta Jesse.

It also contains a number of unfounded or erroneous assertions: the Arg. C.M. (p. 28, para. 22) says that, on the 1829-30 chart, "*there is evidence [?] of a very detailed survey of the north-east coast of Navarino from Cape Rees, and especially of Puerto Toro (Portrait Cove)*"² and Puerto Eugenia, Cutfinger Cove, Islas Barlovento and Islotes Eugenia; rocks and shallow water are indicated and also a sandbank". And in paragraph 23, it is asserted that: "on the other hand it is evident that the south coast of Isla Grande is depicted in this chart merely as it was observed from the boat, since no soundings, banks or rocks are indicated". It adds that Stokes evidently: "was clear as to the purport of his orders: he *concentrated on the coast of Navarino and in the passage between*

¹ Which Darwin admired during his voyage in 1833—"Narrative", Vol. III, p. 238.

² On 19 February 1974, the Agent for Chile wrote to the Argentine Agent requesting a copy of the "document" on the purported "*survey of Puerto Toro* by Stokes in 1830". On 26 April 1974, the Agent for Argentina answered that no such "document" had been mentioned by the Argentine Memorial and limited himself to quote the original assertion that Puerto Toro had been "*surveyed by Stokes in 1830*" . . . No source for such a statement has been yet furnished.

this island and Picton [?], undoubtedly because he believed that that was the eastern entrance to the Beagle Channel” and continues: “The aforementioned Chart shows a very detailed survey of *the water near the northern coast of Navarino and of that coast and its harbours*¹, because Stokes thought it far more useful to provide details of *the normal route of a ship* [?] entering the channel *through what he considered to be the eastern mouth of the channel, i.e., the arm of sea between Picton and Navarino*² and its prolongation to the southward, than to provide details of waters and coasts near and off the southern coast of Isla Grande, which coast he did not consider would be approached by a ship sailing towards the central section of the Channel”. (Arg. C.M. pp. 28-29, para. 23).

Such assertions are astonishing for a few true facts are intermingled with a number of sweeping statements. The result is, of course, an erroneous conclusion.

It is not necessary to go into any details for—it is hoped—the preceding pages give a plausible explanation of the known facts concerning Stokes tracks, and these facts will wholly deprive the above quoted Argentine assertions of all value. However, reference to certain points must be made:

(a) the existence of soundings from Pt. Jesse westward and the detailed drawing of the coast of Tierra del Fuego clearly indicate that the whole eastern section of the Beagle Channel was carefully surveyed;

(b) on the other hand, in what is known as Picton Pass, there are only two soundings opposite Cape Rees³ and *none towards the north* (for those which are next to the N.W. coast of Picton do not properly belong to the Pass), nor are the dangerous shoals in the upper part of Picton Pass shown. Perhaps the amazing assertion of the Argentine Counter-Memorial may be explained if instead of the 1829-30 chart its authors were studying maps 1 and 27 of the Argentine Memorial, on which all the obstacles in Picton Pass have disappeared, including the two dangerous rocks situated in its centre opposite Cape Rees, observed by Stokes during his first voyage. Only so, the purported “survey” of Picton Pass by Stokes could have been considered to be “very detailed” . . .

(c) the Argentine Government’s assertion that Stokes had orders to study Picton Pass because it was believed to be the eastern entrance to the Beagle Channel has no documentary support and conflicts with all the texts of the “Narrative”, which have been quoted and analysed above. There is nothing there to support such a rash assertion, and moreover, should a careful examination of the 1829-30 chart be made, an exactly opposite conclusion can be drawn. The truth which may be ascertained from the evidence is that Stokes carried out his survey in accordance with the rectilinear nature of the Channel,

¹ Emphasis in original.

² Emphasis in original.

³ Those two indications in the 1829-30 Chart did not appear in the first edition of Chart 1343 of the Admiralty (Ch. Plates No. 4 and No. 105) nor in the following.

which he could observe from near Cape San Pio, thus confirming and completing the information given to Fitz-Roy by Master Murray immediately after its discovery in April of that year;

(d) the assertions of the Argentine *Counter-Memorial* disagree, moreover, with what is said in the Argentine *Memorial*, which states with much more objectivity: "*it is impossible to establish conclusively from which side of Picton Stokes had been 'a long way into the channel'*", although it does attempt to make him go through Picton Pass following a very inadequate process of reasoning, based on the probable duration of the voyage. (Arg. Mem. page 69, para. 53).

The Government of Chile categorically rejects the reconstruction of Stokes' tracks made by the Argentine Government and believes that its own reconstruction is the only one which is concordant with the evidence.

The conclusions reached by the Admiralty Hydrographer in 1918 concur perfectly with what has been stated above. The minor corrections which the Government of Chile has made to his reconstruction of the 1830 tracks do not affect in the least the conclusions which that distinguished expert reached on the points covered by his 1918 Report (Ch. Ann. 122).

II. THE SECOND EXPEDITION OF THE "BEAGLE" (1831-1836)

What has to be said about the "Beagle's" second expedition is of little interest in the present dispute; what has been explained in the Chilean Memorial and Counter-Memorial, especially in "Appendix B" of the latter is sufficient for its case. It was not without reason that the British Hydrographer attributed so little importance to this voyage, in his report of 1918.

In its Counter-Memorial, the Argentine Government emphasizes certain facts regarding the second voyage, and from these facts it endeavours to prove the existence of a tacit correction by Fitz-Roy of the official definition of the Beagle Channel, which King had given immediately after its discovery.

As there is no need to repeat the analysis of the second voyage, given in its earlier pleadings, the Government of Chile will now only make a few comments on the main points upon which the Argentine Government attempts to base its erroneous thesis.

Course followed by the "Beagle" in December 1832

As recorded in the "Narrative" (Vol. II, pp. 122 *et seq.*) Fitz-Roy left Buen Suceso Bay heading southward with the intention of making for Christmas Sound. He anchored off

the eastern coast of Hermite Island, and for fifteen days he struggled to make his way towards the west. Fitz-Roy wrote on the 31st December:

“My purpose was to land York Minster and Fueguia Basket among their own people, near March Harbour, and return eastward through the Beagle Channel, landing Jemmy Button also with his tribe, the Tekeenica. Part of Whaleboat Sound *and the western arms of the Beagle Channel were to be surveyed*; and by this scheme I proposed to combine both objects”.

Poor weather conditions prevented him from carrying out this intention. He was, finally forced to give up entering the Beagle Channel from Christmas Sound, “and next morning (14th) crossed Nassau Bay in search of a convenient harbour near the Beagle Channel. Having found so much difficulty in getting to the westward by the open sea, I decided to employ boats in the interior passages, and leave the Beagle at a secure anchorage”. The bad weather continued, hindering his plans; he dropped anchor in Windhond Bay, but was unable to sail towards the “head or north-west corner of Nassau Bay”, as the winds were against him, “*and at last obliged me to bear up for Goree Road*; one of the most spacious, accessible, and safe *anchorages* in these regions” (p. 127).

The Argentine Memorial says (p. 71, para. 54): “Fitz-Roy not only recognised the advantages of Paso Goree, but was also satisfied from Stokes’ reports that the stretch of water between Navarino and Picton was the shortest and easiest passage into the inner part of the Beagle Channel”.

The Arg. Mem. is quite right when it describes Picton Pass as a “stretch of water between Navarino and Picton”, and looks upon it as being: “a passage into the inner part” of the Beagle Channel. But it is mistaken when it tries to imply that Captain Fitz-Roy—in the course of the voyage in question—had made for Picton Pass because he considered it as part of the said Channel. From the paragraphs quoted above it is clear that if he arrived in this area it was because he was “at last obliged”; and that he was looking for a good anchorage.

If the Argentine Government had paid closer attention to the Captain’s Journal, it would have found out that on the 18th (“Narrative”, Vol. II, p. 127) he stated: “My intention was to go *round the north-east part of Navarin Island, along the eastern arm of the Beagle Channel*, through Murray Narrow . . .”. It is evident, therefore, that as far as Fitz-Roy was concerned *the north-east coast of Navarino was not the Beagle Channel, but only a “passage” into the Channel*.

The entrance into the Beagle Channel on the 19th January 1833

On the 19th January, Fitz-Roy left the ship in Goree Road, and went up with the boats along Picton Pass, and reached Cutfinger Cove (Puerto Eugenia) (“Narrative”, Vol. II, p. 202).

Charles Darwin, who was also a member of the expedition noted in his diary, for that day: "In the afternoon *we entered the eastern mouth of the channel, and shortly afterwards found a snug little cove, concealed by some surrounding islets*" ("Narrative", Vol. III, p. 238).

Once Cutfinger is identified (and both Parties are agreed on this¹) it is sufficient to cast a glance on a chart to see that the members of the group believed they would be entering the Channel once they had left the upper part of Picton Pass.

With regard to this voyage, there are other remarks of interest which have a meaning wholly inconsistent with the one which the Argentine Government gives them.

In Cutfinger, or, in other words, when already in the Channel, Fitz-Roy was marvelled by the magnificent landscape. Speaking of the mountains behind him and the chain ahead of him in Tierra del Fuego, he said: "and to the westward we saw an immense canal, looking like a work of gigantic art, extending between parallel ranges of mountains. This singular canal-like passage *is almost straight and of nearly an uniform width* (over-looking minute details) *for one hundred and twenty miles*" (ibid. Vol. II, p. 202).

It is sufficient to compare this statement with the official definition given by Captain King immediately after the discoveries, to see that they fit perfectly.

It is true, as the Argentine Government points out that Fitz-Roy's view of the Channel, from his point of observation, was towards the west: but it does not necessarily follow from the text that his next observation on the straightness of the Channel, be limited in the same direction. If Fitz-Roy, who had entered the Channel through Picton Pass, had considered that the Pass was part of the Channel, he would certainly have mentioned it, thus modifying the concept about the course determined by Master Murray in April. On the contrary, Fitz-Roy again emphasized the straightness of the Channel.

Besides this, Darwin, when he beheld this spectacle, which was new to him also, wrote down in his diary on the same day—15 January 1833—the often quoted sentence in which he also refers to a distance of 120 miles and the remarkable straightness of the Channel.²

Thus, all these statements and the official definition of the Channel given by Captain King agree perfectly.

In view of these facts, how can it be stated that, in the course of his second voyage, Fitz-Roy disavowed, or corrected what had been said by his superior officer immediately after the 1830 discoveries?

¹ Arg. C.M., p. 31, para. 26.

² "Narrative", Vol. III, p. 238.

The "Beagle's" tasks in 1833

As regards the Argentine Government's arguments concerning the chart sent by Fitz-Roy from Montevideo on 9 May 1833, on which he said he had completed his exploration of the Beagle Channel, this in no way changes what the Government of Chile has asserted. It is a fact that he completed the surveys by adding those of the two western arms which were still lacking, and that he carried out a few other observations, in particular in the central area of the Channel.¹

During the ship's sojourn in Goree Road, a careful survey of that roadstead was carried out.²

The "Beagle's" entrance into the Channel in March 1834

The Argentine written pleadings attach great importance to the "Beagle's" voyage of February to March 1834, for that Government believes that it can find, among a number of details of insignificant and minor nature, a sufficient basis to suggest that Fitz-Roy disavowed the official description given to the Channel immediately after its discovery by the Head of the Expedition.

This matter has been analysed in sufficient detail in "Appendix B" of the Chilean Counter-Memorial, and thus spares any further comments. It is odd that the Argentine Government should confuse a ship's first entrance into the Beagle Channel with the discovery of this Channel. The former is an undoubted sailing feat; the latter constitutes an essential factor for the geographic science which might have some relevance for the present case. The explanation as to why the ship entered the Channel through Picton Pass is simple: she came from the Wollaston islands.

Chart No. 27

The Argentine Government lays a great deal of emphasis on a Chart sent by Fitz-Roy to the Hydrographer at the end of 1834, with the title: "Part of Tierra del Fuego". It has already been made quite clear, in a number of paragraphs in the Chilean pleadings, that this chart by no means claims to show the whole of the Channel, for its purpose was

¹ Arg. Mem., p. 71, para. No. 54.

² Chart No. 1321: "Tierra del Fuego-Goree Road by the officers of H.M.S. Beagle 1834" (J. Lort Stokes Collection, Greenwich Maritime Museum).

to complete the western reaches of the Channel. Although a few minor details have been added in other sections, it does not include the eastern part for the very reason indicated by the Argentine Memorial on page 71, para. 54: "Fitz-Roy conducted no further surveys between Picton, Lennox, Nueva and Isla Grande. *His manuscript chart*, prepared in 1831 with the help of Stokes, *was, he believed, sufficient for future purposes*".

The one interesting feature that this map added for the eastern area (Arg. Mem. Map 8) was an indication of some shoals situated at the northern entrance to Picton Pass, and which together with a number of islets already located on the 1829-30 Chart, clearly evidence that it is not as safe to navigate in Picton Pass as it is in the true eastern part of the Channel: to the north or to the south of Woodcock ("Becasses") Islands.¹

Stokes and "Portrait Cove"

In order to strengthen its arguments concerning the location of Portrait Cove, and at the same time to support its hypothesis that Stokes made a careful survey of Picton Pass in May 1830, (Arg. Mem. p. 73, para. 56; Arg. C.M. p. 27, para. 22) the Argentine Government asserts that the Midshipman made a survey of the cove now known as Puerto Toro, immediately to the north of Cape Rees.

As indicated above, the Argentine Government has been unable to produce any evidence in support of this "purported survey" of Puerto Toro; but, in general, the argument is most unfortunate.

It is sufficient to read the "Narrative" to note that when in February 1834 Fitz-Roy was looking for a place to get in a supply of water and wood, he knew nothing about this anchorage, and the proof is that he first dropped anchor next to the S.E. coast of Navarino, some two miles or so below Cape Rees.² The next day he moved on in search of a more

¹ "Sailing Directions" now in use refer to the dangers for navigation of Picton Pass. So, the British "Sailing Directions" (1956 edition) mention "several dangers at the north-west entrance" and "two rocks, awash" which "lie close together near mid-channel, about 1¾ miles east-north-eastward of Cabo Rees" (p. 66). The Argentine "Derrotero" (3rd edition, 1962) refers to these two rocks as "particularly dangerous" and also warns against the shoals of the eastern coast of Navarino (pp. 137 and 139).

² The exact position of the ship is given in Fitz-Roy's log, whereas the one calculated by Admiral Basilico on page 79 of his work "La Controversia sobre el Canal Beagle", is erroneous, as it is based on the very deficient log of Midshipman Forsyth.

suitable anchorage, travelling a certain distance northward,¹ arriving at a cove. It is obvious that if he had a survey of Stokes available, as the Argentine Government asserts without a shred of evidence, he would have directly gone there.

As has been explained above, Stokes did not make a survey of the coasts to the north of Cape Rees when he arrived there on 4 May 1830 in the course of a preliminary exploration. It was only later, during his second voyage, and probably from a height on the N.W. part of Picton, that he drew the N.E. coast of Navarino.

As regards the alleged identification of Portrait Cove with the present Puerto Toro, the Government of Chile refers to what has already been said in "Appendix B" of its Counter-Memorial.

Briefly put, and as has been set forth in earlier pleadings filed by Chile, the arguments put forward by Argentina to explain the voyages of the "Beagle" and her boats and deduce therefrom the discoverers' conception of the Channel, are erroneous, apart from being confused. They fully fail to give any backing to the alleged disavowal by Captain Fitz-Roy of Captain King's official definition of the Beagle Channel.

The Government of Chile hopes to have shown that the reconstruction of the tracks that it has drawn on the discoverers' Chart (Ch. Plate 206) is the result of an objective appraisal of the evidence.

¹ It is interesting to see the effort of the Argentine Government to have the "Beagle" arrive no further than what is today Puerto Toro. In his often quoted work, Admiral Basilico deduces, on page 79, from Forsyth's erroneous log, an erroneous position for the 27th February. He placed the ship further south than it was in fact, according to Fitz-Roy's log (about two miles south of the centre of Cape Rees). By making the ship start from that point, and after careful calculations, with the apparent intention that the "Beagle" should not travel too far to the north, the Admiral comes to the conclusion that she must have gone forward six miles, measured in a straight line in that direction.

In fact, if the "Beagle" is placed in its correct position, very close to Cape Rees, it is evident that these six miles take it a good deal further up than the present position of Puerto Toro. Conscious of this difficulty, the Argentine Memorial (p. 73, para. 56), says only that on the 28 February the "Beagle" "travelled only from 3 to 6 miles (as measured in a straight line) . . .".

The estimate concerning the six miles is a very questionable matter and it is most probable that the distance be about 10 miles, which would have taken the ship to any of the coves along the upper part of the coast and North-Eastern extremity of Navarino.

The study of the abstruse reckonings which are brought into play by the Argentine Government lead only to a confirmation of the opinion of the most distinguished Navy surveyor of Argentina, José Maria Sobral, to the effect that it is impossible "to prove beyond doubt which is Portrait Cove" (Ch. C.M. p. 180). Moreover, as the Chilean Government hopes to have shown in "Appendix B" of its Counter-Memorial, the actual position of that cove, erased from the nautical charts as early as 1841, is wholly irrelevant to the issues in the present case.

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