Declaración de Nulidad Argentina al Laudo de su Majestad Británica de 1977 (25/01/1978) en inglés

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note from the minister for foreign affairs of the argentine republic to the ambassador of chile in argentina*

Buenos Aires, 25 January 1978 Sir,

I am pleased to inform you, on express instructions from my Government, that the Government of the Argentine Republic, after carefully studying the arbitral Award by Her Britannic Majesty on the Beagle Channel dispute, has decided to declare the Arbitrator's decision irrevocably null and void under international law.

My Government's declaration is contained in the attached document.

The Argentine Republic does not therefore consider itself bound to comply with the arbitral Decision and, consequently, wishes to inform you that it does not and will not recognize the validity of any title that the Republic of Chile may invoke on the basis of the arbitral Award, in order to arrogate to itself sovereign rights over any territory or maritime area.

My Government believes that it is not in the interest of our two Republics to see the quality of our relations impaired by an arbitral decision issued in violation of international law. For this reason, I wish also to advise you that the Argentine Government feels that the most suitable course for finding permanent and definitive solutions, and that most in keeping with our history, is to negotiate bilaterally all the jurisdictional differences between the two countries, as the recent meeting of the Presidents of the two nations, held in the city of Mendoza, demonstrated.

Accept, Sir, the renewed assurances of my highest consideration.

6scar Antonio Montes Vice-Admiral

His Excellency Mr. Rene Rojas Galdames Ambassador Extraordinary and Plenipotentiary Embassy of the Republic of Chile Buenos Aires

Declaration of Nullity

On 2 May 1977, the Argentine Government was notified of the arbitral Award issued by Her Britannic Majesty, in the dispute between the Argentine Republic and the Republic of Chile concerning the Beagle Channel region, pursuant to the Agreement for Arbitration (Compromiso) of 22 July 1971.

In compliance with the aforesaid Arbitration Agreement, a special Court of Arbitration comprising five current members of the International Court of Justice was entrusted with investigating and ruling on the dispute.

The Decision of this special Court could only be ratified or rejected by Her Britannic Majesty, as formal Arbitrator, as provided in the General Treaty of Arbitration of 1902. Her function was therefore limited to those two alternatives, with no possibility of modifying any aspect of the Decision of the special Court.

The Argentine Government has analysed this Decision thoroughly in the light of the international norms applicable to the procedural and substantive aspects of the dispute. The aforementioned norms are contained in the General Treaty of Arbitration of 1902 and the Agreement for Arbitration reached in 1971.

These legal instruments set down certain requirements which the Decision of the special Court must meet. For instance, the Arbitration Agreement limits the Decision to the geographical area specifically submitted to arbitration (art. I, paras. (l)-(4)), beyond which the Court had no jurisdiction. Furthermore, the 1902 Treaty (art. IX) and the Arbitration Agreement (art. XII (2)) establish that the Decision must rule on each point in dispute, stating the reasons for each ruling. Both agreements also establish that the dispute must be decided in accordance with the principles of international law (art. VIII of the 1902 Treaty and art. I (7) of the Arbitration Agreement). This means that the special Court should have applied the general rules of international law, to both the substance and the procedure, where they were not specifically mentioned in the aforesaid agreements.

From its analysis, the Argentine Government has found that the Decision of the special Court has many serious flaws and has concluded that the Decision was handed down in violation of the international norms to which the Court should have adhered in its task. The Decision

and the resulting Award by Her Britannic Majesty are therefore null and void, since they do not meet the requirements for being considered valid under international law.

The flaws in the arbitral Decision are of different kinds, but are closely linked and have a bearing on each other such as to impair the main arguments on which the operative part of the Decision is based.

These flaws can be grouped into the following six categories:

A) Distortion of the Argentine arguments

In several instances, the Decision describes as an Argentine argument something which the Argentine Republic never claimed to the Court of Arbitration, and then rules on this distorted version. This method of distorting a claim and then deciding, not on the real argument but on what the Court says the Argentine Republic claimed, is used even in the consideration of one of Argentina’s main contentions.

Thus, Argentina claimed that the eastern end of the Beagle Channel, on the delineation of which the settlement of the dispute largely depends, is, according to the documents drawn up by the discoverers and early explorers of the Channel, situated to the north of Lennox Island, between Picton and Navarino Islands.

The Court of Arbitration, on the other hand, affirms that Argentina claimed as the "real eastern course" one that "departs from the latter's previous general west-east direction and describes what gradually grows into almost a right-angled turn, to pass south and west of Picton Island, between it and Navarino Island, and thence between the latter and Lennox Island in what has become a general north-south direction or even (when abreast of Lennox Island) a south-westerly one, reaching the sea between Punta Maria on that island and Punta Guanaco on Navarino" (emphasis added) (para. 4 of the Decision).

This serious distortion of the Argentine position, which ignores the real arguments submitted on the issue, arises again in other parts of the Decision (paras. 51 and 93), influences the entire reasoning of the Court of Arbitration and affects its conclusions on the meaning of the term "Beagle Channel" in the Boundary Treaty of 1881.

The most serious consequences of this distortion appear in paragraphs 93 and 96 of the Decision, where the Court, after discarding other methods as inadequate, seeks to determine what constitutes the Channel of the 1881 Treaty purely by analysing the terms of that Treaty.

In this part of the Decision, the Court rejects the idea of the Channel which it itself attributes to Argentina, asserting that the Treaty could not possibly have used the expression "to the south of the Beagle Channel" to refer to a Channel that, at a given point in its course, bends southwards and continues for a long stretch in a north-south direction.

This conclusion rests entirely on ridiculing the Argentine argument, something which is possible only because the Court had previously distorted that argument.

It is difficult to conceive of a more serious error than that of mistakenly attributing a substantive claim to one of the Parties.

The court also distorts the Argentine position by attributing to Argentina an argument that it never advanced, on the broad meaning of the term "Tierra del Fuego", and ignoring the arguments it actually presented (para. 57), and by stating that Argentina regarded the Picton, Nueva and Lennox Islands as an indivisible whole (para. 7 (c)).

These are just some of the more blatant examples of the Court's practice of ruling not on what the Parties to the dispute actually argued but on its own distorted versions of those arguments.

B) Opinion on disputed issues not submitted to arbitration

The Court gives its opinion on issues not submitted to arbitration and outside its jurisdiction. For instance, it became clear during the arbitration that a dispute existed between Argentina and Chile over the islands south of the "Hammer", namely, south of the area subject to arbitration (Terhalten, Sesambre, Evout, Barnevelt, etc.), which therefore lay outside the Court's jurisdiction. The Court, however, rules on the status of those islands in some passages of its Decision.

For instance, in paragraph 60 (2 bis), in denying the applicability of the Atlantic-Pacific principle of the "Islands clause" of article III of the 1881 Treaty, the Court says that the Treaty awarded Chile all the islands south of the Beagle Channel, whether east or west of Cape Horn, thereby including the islands to the south of the "Hammer". Again, in paragraph 96, in rejecting the concept of the Beagle Channel erroneously attributed to Argentina, it adds a sentence which implicitly condemns Argentina's claim to the southern islands.

It also became clear during the arbitral proceedings that another dispute exists between the Parties concerning the eastern end of the Straits of Magellan. Chile maintains that it has jurisdiction over the entire length of the Straits, while Argentina contends that the eastern boundary of the Straits is formed by a line running from Cape Virgenes to Cape Esprritu Santo and that Cape Dungeness is inside the Straits, with the result that part of the eastern end of the Straits belongs to Argentina. The Court of Arbitration states, in paragraph 31 of its Decision, that the 1881 Treaty gave Chile exclusive control over the Straits of Magellan and, in paragraph 24, says that Cape Dungeness is on the Atlantic, thereby ruling on another question that was outside its competence.

C) Contradictions in the reasoning of the Court

Another defect of the arbitral Decision is its contradictions. It is an elementary principle that something cannot be simultaneously affirmed and denied of somebody or something. This is a contradiction and all contradictions are necessarily false. It is also a rule of formal logic that a contradiction cannot be included among the premises of a reasoning,

otherwise any conclusion, no matter how absurd, can then be drawn from that reasoning.

These principles govern the validity of all human reasoning, which naturally includes legal thinking. However, the Court of Arbitration seems to ignore these basic principles and repeatedly contradicts itself, in the process reaching groundless conclusions.

In the first place, the Award manifests an extremely serious logical and juridical contradiction in its treatment of the question of the islands of the Channel. With respect to the section of the Channel extending from Lapataia to Snipe, the Court considers the islands situated there to be "in the Channel" (and not to the south of it). It says that the 1881 Treaty did not attribute them to either Party and that they must therefore be divided between the two countries. For the "external" part of the Channel, and out of the various possibilities that exist, the Court limits itself to considering that the Channel has two arms: the "Chilean" arm, up to Cape San Pio and even beyond, and the "Argentine" arm, through the Goree and Picton Passes (it has already been seen above, in point A, that the latter is a distortion of the Argentine argument). As a result, Picton, Nueva and Lennox Islands are also in the Channel. One might ask why, in this case, the Court did not distribute them in accordance with the principle of "appurtenance" (accession, contiguity or adjacency) that it applied to the other islands of the Channel.

The answer is that the Court does not accept the possibility of applying this regime to Picton, Lennox and Nueva Islands because it says prima facie all the territories in dispute must be considered to have been covered by an express clause of the 1881 Treaty since the only alternative would have been a total failure of the Treaty. This contradicts the approach taken to the problem of the islands in the Channel, which, as stated earlier, the Court asserts do not fall within any specific attribution (paras. 98 (c) and 106). As a result of this contradiction, the Court divides the Beagle Channel, as defined by the Court itself, into two sections subject to different legal regimes, without supplying any justification for this.

Other examples can be mentioned:

In paragraph 66 (3), on the subject of the interpretation of the 1881 Treaty, the Decision considers that the "speech" by Bernardo de Irigoyen in 1881 and the "speech" by Melquiades Valderrama, in so far as they relate to the islands in dispute, are diametrically opposed and must both be rejected as cancelling each other out. But, in paragraph 130, in dealing with the confirmation material subsequent to the Treaty, the Court rejects Bernardo de Irigoyen's speech as insufficient to prove Argentina's arguments while accepting Valderrama's speech as clear evidence for Chile's interpretation of the Treaty.

In paragraphs 14 and 24, the arbitral Decision includes the entire Tierra del Fuego archipelago among the areas in dispute before 1881 and covered by the Boundary Treaty. In paragraph 101, however, in order to avoid the problem of interpretation created by the islands to the west of

Tierra del Fuego, the Court decides to consider those islands as not being part of the boundary dispute prior to 1881 and therefore not covered by the Treaty.

D) Flaws of interpretation

Any judge to whom a dispute is submitted must interpret the legal norms applicable to the case. Interpretation of the law is a function regulated by the legal system. The interpreter has limits within which he can define the precise content of the legal norm he is interpreting. The law also tells him what methods to use for his interpretation. To this end, the Vienna Convention on the Law of Treaties has codified some customary norms on the subject and has even established a certain order of precedence among them.

Interpretation is thus a function determined and regulated by international law and not a task left simply to the discretion or whim of the judge. He is not allowed to overstep the established limits, for then he would not be interpreting the law but revising it. As stated by the

International Court of Justice in a well-known passage of its advisory opinion on the interpretation of peace treaties (ICJ Reports, 1950), "the Court's function is to interpret treaties, not revise them".

The arbitral Decision is based mainly on the text of the 1881 Treaty. This being so, the Court should have been guided in its interpretation by, among other rules, those known as "appeal to context" and "useful effect". The Court ignores these rules, particularly the second one, with the result that the Treaty, instead of being "intepreted", is amended and adapted in a manner that contradicts its letter and spirit.

Thus, for instance, in deciding in paragraph 101 that the islands west of Tierra del Fuego were not considered part of the boundary dispute prior to 1881 and therefore were not covered by the Treaty, the Decision leaves a specific term of article III of that instrument without useful effect.

A good deal of article 1 of the Treaty is also left without useful effect, since it refers to areas that, according to the Decision, were not part of the boundary questions.

The Court also rejects, in paragraph 65, the Argentine contention that by the clause "and the other islands there may be on the Atlantic", article III of the Treaty attributed to Argentina, Picton, Nueva and Lennox Islands among others. Having set aside this interpretation, the Court, in violation of the rule of useful effect, does not explain which islands—if not Nueva, Picton and Lennox Islands—the Treaty attributed to Argentina by that clause.

Likewise, the words "up to Cape Horn" in article III of the Treaty lose all meaning and the clause attributing islands to Chile is interpreted as if the only condition for attribution is the fact that they are "to the south of Beagle Channel".

In interpreting article II of the Boundary Treaty, the Decision asserts that this clause attributed to Argentina the whole of Patagonia up to the Rio Negro, a conclusion not borne out by the text of the Treaty, which refers to neither Patagonia nor the Rio Negro. Furthermore, it leaves without useful effect or makes redundant a good deal of the sphere of appication of article I, which defines the boundary from north to south as far as the 52nd parallel of latitude.

Moreover, in interpreting the text of article III of the Treaty, the Court creates as an element of the delimitation the concept of the southern coast of Isla Grande, thus in effect revising the Treaty since that concept is found neither in the text of the Treaty, nor in the travaux preparatoires, and was not put forward by either Party.

E) Geographical and historical errors

In addition to the flaws already mentioned, the Decision contains erroneous assertions as to facts which affect its motivation, its operative part or both.

Some of these errors are geographical. For instance, in paragraphs 100 and 101, it is said the Stewart, O'Brien and Londonderry islands are south of the north-west arm of the Beagle Channel. Actually, these islands have no relationship to the Channel, they lie outside it and even to the north of its general direction. In paragraph 14, the Decision invents a "Cape Horn archipelago", extending to the south, south-west and west of the Isla Grande, as something distinct from the Tierra del Fuego archipelago.

It should also be mentioned that the maritime boundary-line traced by the Court of Arbitration on the chart attached to the Award is flawed by inaccuracies and technical errors that make it unreliable.

Other errors are historical. The Court of Arbitration makes some assertions in this area that correspond neither to reality nor to the evidence offered, and also do not seem to be the result of independent research by the Court itself. For example, it asserts that Chile, throughout the boundary dispute prior to 1881, always claimed sovereignty over the whole of Patagonia up to the Rio Negro (para. 13); that the islands to the west of the Tierra del Fuego archipelago were not in dispute and were not covered by the Boundary Treaty (para. 101); that there are documents relating to the discovery and early exploration of the Beagle Channel that show the southern arm, defined by the Court itself as including Goree Pass between Lennox and Navarino Islands (paras. 87 and 4), to be the real eastern course of the Channel; and that, for the 1876-1881 negotiators, the Atlantic Ocean went only as far as Staten Island (para. 65 (e)).

This last position taken by the Court combines with its assertion as to the inapplicability of the Atlantic principle in the clause on attribution of islands “on the Atlantic” to Argentina, in article III of the Treaty (para. 66 (2) (b)). This assertion itself embodies a clear contradiction.

This limitation of the validity of the Atlantic principle also embodies a geographical error, since it ignores the opinion of the international scientific community (International Hydrographic Bureau, 1919) which defined Cape Horn as the point marking the boundary between the Atlantic and Pacific Oceans.

In setting aside the question of the division between the oceans in connection with the traditional boundary between the two countries (Cape Horn), the Award ignores the guiding principle that governed the jurisdictional division between Argentina and Chile even before their independence and that was later formalized in various instruments, in particular the 1881 Treaty, the 1893 Protocol and the 1902 Act clarifying the agreements on arbitration and arms limitation.

In the same order of ideas, in dealing with the Argentine argument upholding the Atlantic-Pacific principle, the Court commits another serious historical error when it analyses the scope of the 1893 Protocol (paras. 73-78). Argentina maintained that since the Protocol supplemented and clarified the 1881 Treaty, it was an authentic interpretation of the Treaty. Since the second sentence of article 2 of the Protocol says:

“… it being understood that, by virtue of the provisions of the 1881 Treaty, the sovereignty of each State over its respective coastline is absolute, with the result that Chile cannot lay claim to any point towards the Atlantic and the Argentine Republic cannot lay claim to any point towards the Pacific”,

the Atlantic-Pacific principle contained in the 1881 Treaty is thus confirmed and is, as such, applicable to the current dispute. Argentina also maintained that the Protocol introduced modifications to the Treaty as regards two specific sections of the border where demarcation difficulties had arisen up until that point, and that it did so in application of the general principle of respect for the absolute sovereignty of each State over its respective coastline. The Court, however, asserts that the scope of the Protocol lies outside the Treaty as such, in date as well as in substance. This is a basic error of law, for the 1893 Protocol was always considered by both Parties—without prejudice to their differences as to its scope—as a treaty specifically amending and interpreting the 1881 Treaty, as is clear from its text, its object and its purpose. The Court then immediately contradicts itself by acknowledging in subsequent paragraphs that the Protocol did indeed refer to the 1881 Treaty.

The Court commits other equally serious errors when it describes the Protocol as simply a demarcation instrument and asserts that it bore no relation to the Beagle Channel region or the islands in dispute and could not have done so because the 1881 Treaty did not provide for any demarcation of this region.

The Court is mistaken as to the nature of the Protocol, for the Protocol did not only lay down demarcation procedures, but also included important delimitation provisions which went so far as to alter the boundary set by the 1881 Treaty.

F) Lack of balance in evaluating the arguments and evidence

submitted by each Party

The Award does not give equal treatment to the arguments and evidence submitted by the two Parties. It does not give objective consideration to all the important points of the controversy over the interpretation of the Treaty, which might have influenced the outcome. It ignores background material to the case which provides specific relevant insights into the situation under examination and overlooks, particularly as regards later conduct, the actual historical context of the dispute, basing itself on general guidelines or critera derived from a modern reconstruction of that conduct. The consequences of this lack of balance are particularly serious since the Court does not arrive at a clear-cut conclusion in favour of the Chilean interpretation, but simply prefers it over the Argentine interpretation, after weighing the cumulative weaknesses of each Party's position. The scale is thus tipped in favour of the Chilean interpretation, after ignoring or distorting the Argentine arguments, ignoring important evidence, committing errors of fact, etc.

The Court's attitude of systematic partiality towards Chile and against Argentina is evident throughout the Award, but is particularly noticeable in part II, chapters III, "The Boundary Treaty of 1881" and IV, "Corroborative or Confirmatory Incidents and Material", above all when it decides on what really constitutes the Beagle Channel, on the meaning of the concept of "Atlantic Ocean", or on the relative value of the written and oral statements of the negotiators of the 1881 Treaty.

This lack of balance is also evident when the Court fails to consider important Argentine arguments and ignores the evidence that corroborates them. This is particularly true on the issue of the attitude of the Parties with respect to cartography, the broad meaning of the concept "Tierra del Fuego" in the "Islands clause" of article III, and the official acknowledgement by both Parties of the existence of an unresolved demarcation issue in the region in dispute.

The foregoing list of flaws is in no way exhaustive. Even so, those mentioned here are sufficient to demonstrate the abuse of power, the flagrant errors and the violation of essential legal rules committed by the Court of Arbitration as regards both legal substance and procedures.

Therefore, and by virtue of the aforesaid, the Government of the Republic of Argentina declares that, given of the manifest nullity of the Decision of the Court of Arbitration and of the Award by Her Britannic Majesty which is its consequence, it does not consider itself bound

to abide by it.

Buenos Aires, 25 January 1978

note from the minister for foreign affairs of the republic of chile to the ambassador of argentina*

Santiago, 26 January 1978 Sir,

I have the honour of replying to the Note which the Minister for Foreign Affairs of the Argentine Republic delivered yesterday to the Ambassador of Chile in Buenos Aires concerning the arbitral Award by Her Britannic Majesty on the controversy in the Beagle Canal region.

The Notes states that your Government, after carefully studying the Award, "has decided to declare the Arbitrator's decision irrevocably insuperably null and void" and attaches, to this end, a lengthy document entitled "Declaration of Nullity". It adds that the Argentine Republic "will not recognize the validity of any title that the Republic of Chile may invoke, on the basis of the arbitral Award, in order to arrogate to itself sovereign rights over any territory or maritime area".

The aforesaid Note also states that, in order not to see "the quality" of the relations between the two Republics impaired "by an arbitral decision issued in violation of international law", the most suitable course for finding permanent and definitive solutions, and that most in keeping with our history, "is to negotiate bilaterally all the jurisdictional differences between the two countries, as the recent meeting of the Presidents of the two nations, held in the city of Mendoza, demonstrated".

My Government categorically rejects the strange "Declaration of Nullity" which the Note contains. This rejection is based on elementary norms of international law, as I indicate in the "Official Declaration" a copy of which accompanies this Note.**

Without prejudice to the foregoing, my Government will in due course issue the necessary reply to the factual and legal assertions contained in the "Declaration of Nullity".

Nevertheless, it is my duty to advise you that, contrary to the assertions in the aforementioned Note, my country's clear rights and indisputable sovereignty over the territories and maritime areas of the southern region are based on uncontestable titles emanating not only from binding treaties between the Republic of Chile and the Republic of Argentina but also from the arbitral Award which confirms and recognizes them fully.

Those rights and that sovereignty will continue to be exercised in conformity with such titles.

My Government acknowledges your Government's well- intentioned proposal to "negotiate bilaterally", but I must reiterate very

emphatically that such negotiations could never touch on—as they never touched on in the past—questions already resolved by Her Britannic Majesty's Award. You are well aware that the Government of Chile expressed its full acceptance of the Award of 2 May 1977 and has complied with it fully.

With regard to any delimitation of maritime areas beyond what has already been settled by the Arbitrator, Chile's firm, unchanging position does not alter my Government's willingness to arrive at a direct understanding in conformity with international law. In saying this, I wish to state for the record that if up to now it has not been possible to reach such an understanding, it is because your Government has persistently intimated that it would refuse to comply with the British Award—an attitude that culminated in the recent "Declaration of Nullity"—and because it has refused to recognize Chilean sovereignty over all the islands to the south of the Beagle Canal up to Cape Horn, in open violation of express provisions of the 1881 Boundary Treaty.

Lastly, notwithstanding its willingness to resolve, wherever possible through direct agreement, all issues relating to maritime boundaries, my Government reiterates that if this is not achieved at the initiative of the Presidents of the two Republics, the time will have come to proceed as ordered by the Treaty on the Judicial Settlement of Disputes signed in 1972, as I stated in the Note which I sent to the Foreign Minister of Argentina on 10 January of this year. Accordingly, my Government maintains and repeats the invitation, extended to your Government at that time, to establish, by mutual consent and in conformity with article IV of that Treaty, the points, questions or differences on which the International Court of Justice will have to rule.

I am confident that your Government will not reject this call to implement, by common accord, the judicial settlement procedure set forth in a Treaty that resulted from a well-intentioned Argentine proposal.

Allow me to take this opportunity to convey to you the renewed assurances of my highest and most distinguished consideration.

Patricio Carvajal Prado

Vice-Admiral

Minister for Foreign Affairs of Chile

His Excellency Mr. Hugo Mario Miatello Ambassador of the Argentine Republic Santiago