







**ARGENTINE-CHILE FRONTIER CASE  
COURT OF ARBITRATION**

**VOLUME 1**

**MEMORIAL of the GOVERNMENT of CHILE**

**1965**



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## COURT OF ARBITRATION

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1965



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ARGENTINE - CHILE FRONTIER CASE  
MEMORIAL OF THE GOVERNMENT OF CHILE

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## G L O S S A R Y

Arroyo Lopez = a stream flowing into the River Encuentro from the south.

Arroyo Mallines = a stream feeding the Arroyo Lopez.

Award Map = The map, substantially identical with the "Second Argentine Map" (q.v.), on which the Tribunal delineated the boundary between Posts 16 and 17.

California = comprises the area south of the River Encuentro, both banks of the Arroyo Lopez and Arroyo Mallines, both banks of the curve made by the Engaño/Salto round the Cerro Campana, the Valle Hondo, Las Horquetas and the Valle Norte.

California Valley = (i) usually limited to the valley stretching southwards on both sides of the Arroyo Lopez and the Arroyo Mallines from the point of junction between those streams and the Rio Encuentro to the small pass which separates the basin of the Arroyo Lopez and the Arroyo Mallines from the basin of the Rio Engaño/Salto/Tigre.

= (ii) sometimes used in documents as the equivalent of "California", (q.v.)

Cédula de identidad = identity card.

Compromiso = Agreement for Arbitration determined by Her Majesty's Government on 1 April 1965.

Cordillera = mountain range.



Glossary

Falso Engaño = (i) name given on some Argentine maps to the major channel (q.v.)

= (ii) name given occasionally on some Chilean maps to the minor channels (q.v.)

Fiscal veranadas = state-owned summer grazing lands.

Hectare (has.) = 10,000 square metres.

Land Tax Map = Map showing the division of landholdings in California for the purposes of the official register of land tax. (CH. 29).

Land Tax Roll = the volume containing a list of landholdings and taxpayers compiled for land tax purposes. Each holding is given a serial number.

Major channel = the River Encuentro from its source on the western slopes of the Pica de la Virgen to the point at which it is joined by the Arroyo Lopez or minor channel.

Mejoras = those rights of a settler arising from his occupation and improvement of a particular plot of land prior to his acquiring a provisional title thereto. The sale of "mejoras" sometimes conveys the settler's right to obtain in due course a definitive title over the plot.

Minor channel = the Arroyo Mallines to its junction with the Arroyo Lopez and thence the Arroyo

Lopez to its junction with the River Encuentro.

Morro = a bluff, outcropping or small hill.

Orden de radicación = order containing an official verification of possession.

Parte = official report of an incident, prepared by Carabineros.

Radicación = official verification of possession.

See also "solicita radicación".

Relevant sector = the sector of the boundary between Posts 16 and 17.

The Report = the Report of the Tribunal, 19 November 1902.

"Second Argentine Map" = Sheet 3 of Map XVIII, published as an annex to the Short Reply of the Government of Argentina, 1902.

Solicita radicación = heading to a document containing a petition by a settler for official recognition of the settler's occupation of a plot of land.

"The 1902 Arbitration Treaty" = General Treaty of Arbitration signed between Chile and Argentina, 28 May 1902.

The 1902 Award = the Award signed by H.M. King Edward VII on 20 November 1902.

Glossary

Note on family names

In Chile, as in other countries with a Spanish background, it is common to add the mother's family name after the father's family name. For ease of reference, therefore, the father's family name of individuals, especially those mentioned in Part II has been underlined.



## INTRODUCTION

1. This is the Memorial of the Government of the Republic of Chile filed pursuant to Order No. 1 made by the Court of Arbitration on 20 May 1965.

2. The Memorial begins, after the present Introduction, with a summary statement of the Chilean contentions regarding the basis of the Arbitration and the correct boundary line between Posts 16 and 17, and continues with the statement of the Chilean Case in five parts, as follows:

Part I sets out the basis of the present Arbitration. It covers the 1902 Arbitration, the Report of the Tribunal and the Award, the implementation of the Award, the geographical error, its origin, discovery and consequences.

Part II sets out the Chilean contentions as to the correct boundary line based upon the proper interpretation and the fulfilment of the 1902 Award.

Part III deals with the question of "the extent, if any, that the course of the boundary between the territories of the Parties in the Sector between boundary posts 16 and 17 has remained unsettled since the 1902 Award" and with the legal significance of Minute 55 of the Chilean-Argentine Mixed Boundary Commission.

Part IV sets out the events and diplomatic correspondence of the period between Chile's rejection of the resolutions and proposals recorded in Minute 55 and the submission of the dispute to the arbitration of Her Majesty's Government.

Part V contains the contentions and Submission of the Government of Chile.

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3. The Court of Arbitration was established by Her Britannic Majesty's Government pursuant to the terms of a General Treaty of Arbitration signed between the Republic of Chile and the Argentine Republic at Santiago on 28 May 1902 (hereinafter called "the 1902 Arbitration Treaty").<sup>1</sup> By Article III of the said Treaty the Parties agreed to nominate the British Government as Arbiter of disputes arising between them. By a note dated 22 June 1903 the British Government informed the Government of Chile of their acceptance of this nomination.

4. By a note dated 15 September 1964,<sup>2</sup> addressed to the Rt. Hon. R. A. Butler, Her Majesty's Principal Secretary of State for Foreign Affairs, the Chilean Ambassador in London, on behalf of the Government of the Republic of Chile, informed the British Government that a dispute had arisen between Chile and the Argentine Republic concerning part of the Arbitral Award rendered by His Majesty King

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1 Annex No. 15

2 Annex No. 120

Edward VII on 20 November 1902 (hereinafter sometimes referred to as "the 1902 Award").<sup>1</sup> The said note indicated the general character of the dispute and requested the British Government to assume the functions of Arbitrator in respect thereof.

5. By a memorandum delivered on 20 October 1964<sup>2</sup> to the Chilean Ambassador in London, the Foreign Office enquired whether the points, questions or differences involved in the controversy referred to in the note from the Chilean Ambassador of 15 September 1964 had been determined by the Governments of Chile and Argentine or whether Article V (which empowers the Arbiter to determine the Agreement of Arbitration in default of agreement between the parties) of the 1902 Arbitration Treaty should be regarded as being in operation by reason of the default of agreement in the matter between the two Governments. A similar enquiry was addressed to the Government of Argentina.

6. By a memorandum delivered on 2 November 1964<sup>3</sup> the Ambassador of Chile confirmed that the Parties to the dispute were not in agreement on the points, questions or differences involved in the controversy and that therefore Article V of the 1902 Arbitration

- 
1. Annex No. 27
  2. Annex No. 122
  3. Annex No. 123



Introduction Treaty was in operation. By a note dated 25 November 1964,<sup>1</sup> the Ambassador of Argentina also stated that Article V of the said Treaty was in operation.

7. On 1 April 1965 the Government of the United Kingdom, having previously appointed the present Court of Arbitration, determined an Agreement for Arbitration (Compromiso) of a Controversy between the Argentine Republic and the Republic of Chile.<sup>2</sup> By Article I of the said Agreement, the Court of Arbitration was directed to consider the following question and report to Her Majesty's Government its conclusions thereon:

"To the extent, if any, that the course of the boundary between the territories of the Parties in the sector between boundary posts 16 and 17 has remained unsettled since the 1902 Award, what, on the proper interpretation and fulfilment of that Award, is the course of the boundary in that Sector?"

(The sector between boundary posts 16 and 17 will hereinafter be referred to as "the relevant sector".) Article I provided further that the formulation of the above question shall be without prejudice to any burden of proof.

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1. Annex No. 124

2. Annex No. 125

8. The Government of Chile desires to take this opportunity of expressing its deepest appreciation of the willingness of Her Majesty's Government both to perform the functions of Arbiter thus placed upon them and to appoint the present Court of Arbitration to report on the questions in issue. Nor is the Government of Chile likely to be alone in declaring its gratitude for this helpful action. The successful solution of the present controversy will stand as an important contribution to the pacific settlement of international disputes and will undoubtedly be recognised and welcomed as such by States generally.

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SUMMARY STATEMENT OF THE CHILEAN CONTENTIONS  
ON PARTS ONE AND TWO

1. By an Agreement between the Governments of Chile and the Argentine Republic signed on 17th April 1896,<sup>1</sup> the Parties agreed to submit to the arbitration of Her Britannic Majesty's Government any disputes arising in connection with the fixing of the boundary marks in the Cordilleras of the Andes to the south of 26°52'45". Disputes arose over certain sections of the boundary and were submitted to the British Government in 1898. H.M. Queen Victoria appointed a Tribunal to examine, consider and report on the disputes. This Tribunal reported on 19 November 1902<sup>2</sup> (which report will hereinafter be called "the Report" or "the 1902 Report") and a formal Award signed by H.M. King Edward VII was given on 20 November 1902<sup>3</sup>.

2. The present dispute, which involves only a small sector of the boundary established by the 1902 Award and Report, arises out of the inadequate and erroneous cartography available at that time in respect of that sector.

- 
1. Annex No. 5
  2. Annex No. 26
  3. Annex No. 27

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3. According to the Award, the course of the frontier in the relevant sector was to be as follows:

"Article III

From Perez Rosales Pass near the north of Lake Nahuel Huapi, to the vicinity of Lake Viedma, the boundary shall pass by Mount Tronador, and thence to the River Palena by the lines of water-parting determined by certain obligatory points which we have fixed upon the Rivers Manso, Puelo, Fetaleufu, and Palena (or Carrenleufu); awarding to Argentina the upper basins of those rivers above the points which we have fixed, including the Valleys of Villegas, Neuvo, Cholila, Colonia de 16 Octubre, Frio, Huemules, and Corcovado; and to Chile the lower basins below those points. From the fixed point on the River Palena, the boundary shall follow the River Encuentro to the peak called the Virgen, and thence to the line which we have fixed crossing Lake General Paz and thence by the line of water-parting determined by the point which we have fixed upon the River Pico ..." (underlining added).

Article V of the Award states that

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

4. The description of the line between Posts 16 and 17 given in the Report of the Tribunal is as follows:

"Crossing the Fetaleufu River at this point, it shall follow the lofty water-parting separating the upper basins of the Fetaleufu and of the Palena (or Carrenleufu or Corcovado) above a point in longitude  $71^{\circ}47'W.$ , from the lower basins of the same rivers. This water-

parting belongs to the Cordillera in which are situated Cerro Conico and Cerro Serrucho, and crosses the Cordon de las Tobas. Crossing the Palena at this point, opposite the junction of the River Encuentro, it shall then follow the Encuentro along the course of its western branch to its source on the western slopes of Cerro Virgen. Ascending to that peak, it shall then follow the local waterparting southwards to the northern shore of Lago General Paz at a point where the Lake narrows, in longitude 71°41'30"W.

The boundary shall then cross the Lake by the shortest line, and from the point where it touches the southern shore it shall follow the local water-parting southwards, which conducts it to the summit of the high mountain mass indicated by the Cerro Botella Oeste (1,890 m.), and from the peak shall descend to the Rio Pico by the shortest local water-parting." (Underlining added).

5. The map on which the Tribunal delineated the boundary<sup>1</sup> in this sector (hereinafter called "the Award Map") contains a representation of the River Encuentro which shows it as running in an approximately northerly direction from its source on the western side of a mountain bearing the name "C.d.l. Virgen" to its junction with the River Palena. The "C.d.l. Virgen" is the Cerro de la Virgen, which will hereinafter be called the "Cerro Virgen".

6. The map thus used by the Tribunal was virtually a reprint of one prepared by the Argentine Government, probably in the course of the summer

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1 Map No. CH.13.

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(European) of 1902<sup>1</sup>. The precise date on which the map came into the hands of the Tribunal cannot be clearly deduced from the records and there is some doubt as to whether it was ever formally transmitted by the Tribunal to the Government of Chile. But be that as it may, it is clear that the map was adopted without change by the Tribunal. However, unknown both to the Tribunal and to the Government of Chile at that time, the geographical truth of the matter was that the line of the River Encuentro was not as represented on the map. The river does not rise upon the Cerro Virgen nor flow in a generally northwards direction. It rises, in fact, upon the western side of another mountain, which has come to be called the Pico de la Virgen and runs in a generally north-westerly direction. The Pico de la Virgen is located in a range of mountains quite distinct from, parallel to and to the east of the lesser range in which the Cerro Virgen is situate. Also, it so happens that the map thus used by the Tribunal fails to represent adequately the important material fact that the easterly range containing the Pico de la Virgen is in truth a significantly longer and higher range than that of which the Cerro Virgen forms part.

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1 Map No. CH.12.B. It is headed "Sheet 3 of Map XVIII" and will hereinafter be referred to as "the Second Argentine Map".

7. One cause of the error, and of the failure to detect it at the time, no doubt lies in the fact that this particular region was then largely unexplored. It is clear, therefore, that the Tribunal described the boundary in this section without knowledge of all the true geographical facts. About this the Parties to this arbitration can hardly be in dispute.

8. In all the circumstances, it is clearly impossible to draw a boundary line which connects all the geographical features named in the Award and the Report in the manner therein stated.

9. It is in this situation that the present Court of Arbitration is directed by the Compromiso to determine what, on the proper interpretation and fulfilment of the 1902 Award, is the course of the boundary in the sector between Posts 16 and 17. No issue is raised, therefore, upon the location of Posts 16 and 17 themselves or upon the interpretation and fulfilment of the 1902 Award in any other respect.

10. The Government of Chile will contend that upon a proper interpretation and fulfilment of the 1902 Award the course of the boundary in the relevant sector should follow the true course of the River Encuentro from its junction with the River Palena, upstream to its source on the western slopes

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of the Pico de la Virgen, as marked in the Chilean Carta Preliminar; and then from the peak above that source follow the line of local water-parting southwards to Post 17, again as marked on the Carta Preliminar.<sup>1</sup>

11. This contention rests upon the following bases:

(i) The discharge by the Court of its task of interpretation calls for consideration of the principles which the Tribunal and the Arbitrator followed in 1902.

(ii) As will be shown, the line defined by the Report and the Award represented a compromise between an essentially orographical frontier (for which the Argentine contended) and a hydrographical frontier (for which Chile contended). In general, the Report and the Award aimed at constructing a line which followed with reasonable geographical continuity the line of an elevated watershed; and this was the dominating consideration. This was matched also by a concern, on the occasions when it proved necessary to cross a river, to ensure that thereafter the boundary line respected the integrity of the basins of the tributaries of that river. Consequently, the boundary line was not permitted to cut any

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1 See Map No. CH.26



tributary of that river in such a way as to bring within the territory of a Party waters which did not flow into the main river at a point within the territory of that Party. Supplementary factors determining the outcome of the compromise included consideration of the nature and extent of the occupation of any given area by the nationals or dependents of one Party or the other; assessment of the relative values of the areas to be awarded to each Party; and strategical considerations. These are the principles which have, in such degree as may be appropriate, to be applied to the interpretation of the Award and the Report.

(iii) Furthermore, the 1881 Boundary Treaty in its description of the boundary proceeds from North to South. This sequence was followed by the Tribunal. Therefore when interpreting the language of the Tribunal, it is necessary to follow the same directional approach.

(iv) In drawing the boundary line, the Arbitrator and Tribunal found it necessary to cut a number of transverse rivers, i.e. rivers running essentially from east to west. In approaching from the north the definition of the line in the Palena area, the Arbitrator and Tribunal were obliged, in

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seeking to follow an elevated watershed with geographical continuity, to cut four main rivers, the Manso, Puelo, Fetaleufu and the Palena itself. This was unavoidable because they were not prepared in this area to accept the Chilean claim that the boundary should follow the more easterly line of the continental water divide. They were also anxious to recognise what then appeared to them as existing Argentinian settlement west of the continental water divide. In consequence the basins of these four rivers were divided at fixed points and the boundary line from Post 15 southwards followed the local water-parting determined by these points. In approaching the Palena, this line followed in part the Cordillera containing the Cerro Conico and Cerro Serrucho, and crossed the Cordon de las Tobas.

(v) It was then necessary to select a fixed point on the Palena at which the line would cross it and divide it into an upper and lower basin, of which the upper part would belong to the Argentine and the lower to Chile. The point selected (and in due course numbered 16 in the demarcation) was where the Encuentro joined the Palena. The reasons for selecting this point seem to have been the following. What were assumed to be the limits of existing Argentine settlement excluded a point further to the

east. The Encuentro was known as the only named tributary of significance to join the Palena from the South in that area. The available maps suggested that the line of the Encuentro would lead within a relatively short distance to an elevated watershed, which could in its turn be followed to the next fixed point on the north shore of Lake General Paz (Post 17). Moreover, the maps also indicated that a line so constructed would not violate the principle of the integrity of tributary river basins (save, obviously, where the line of the boundary actually followed the course of a tributary).

(vi) From all this it is clear that the precise line of the Encuentro was not an essential element in the Report and Award. What mattered was that it should be possible by following the Encuentro to reach an elevated watershed and with geographical continuity run southwards along it to the next fixed point.

(vii) Although there is dispute between the Parties about what is the upper section of the River Encuentro, the Government of Chile maintains that the correct boundary is represented only by the river which has its source on the western slopes of the Pico de la Virgen. This is the sole alternative which accords with both the terms and principles of the 1902

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Award and Report and the objective scientific evidence. The fact that this river does not lead to the western slopes of the Cerro Virgen is irrelevant. In the view of the Government of Chile the reference to the Cerro Virgen was quite incidental to the reference to the source of the Encuentro; and was accordingly subordinate to, and could not have been intended to override, the latter.

(viii) Once the course of the Encuentro is established, the task of drawing a line from the peak above its source, following the local water-parting, is relatively simple.

(ix) The Parties have effectively fulfilled the Award on this basis for half a century, from 1902 until the question was put in dispute in 1952. In 1913-1914, Argentina, in diplomatic correspondence with Chile, took the position that Post 16 had been wrongly placed because the river which joined the Palena at that point was not the Encuentro. At that time, the Argentine Government appears to have been aware that the river which did join the Palena at Post 16 did not have its source on the western slopes of the Cerro Virgen. The Chilean Government adopted the position that Post 16 had been conclusively fixed by the demarcation - a stand which clearly implied that the boundary line followed the river which there

joined the Palena, whatever its precise direction. The Argentine Government did not thereafter, by word, note or deed, challenge the Chilean position until 1952. In the meantime, in the belief that the whole of California was Chilean territory, Chilean settlements there developed apace; and the area was for all purposes, including governmental activity, treated as remaining an integral part of Chilean territory. The record shows, in consequence, uninterrupted occupation and control of the area by Chile, undisputed for fifty years. This action by Chile and acquiescence by the Argentine may be looked at in two ways. In the first place, it constitutes conduct of the parties to which reference may be made as an aid in interpreting the legal instrument which governs relations between them. Secondly, it precludes or estops Argentina from contending that the line of the Encuentro is in fact anything other than Chile treated it as being in the period subsequent to the Award and particularly after the correspondence of 1913-1914.

(x) The present Court should also, when determining the boundary between Posts 16 and 17, pay regard to the extent of Chilean occupation in the area.

Summary  
Statement  
of Chilean  
Contentions  
on Parts  
one and two

THE BACKGROUND OF THE 1902 ARBITRATION

1. It is necessary, first, to refer to the various instruments and events on the basis of which the arbitration leading up to the 1902 Award took place.

2. Treaty of 1856. The boundary between Chile and Argentina is one of the longest in the world. While both nations were under the rule of Spain there was no great interest in establishing a clear and precise frontier line. Moreover, during the first decades after the process of liberation began in 1810, the endeavours of both countries were concentrated upon the tasks of consolidating self-government and internal administration. Consequently, little, if any, attention was paid to the necessity of settling the frontier line until boundary difficulties actually began to arise between them. By a Treaty of Peace, Friendship and Navigation signed on 30 August 1855, and which became effective on 3 April 1856,<sup>1</sup> the two countries acknowledged inter alia, in Article 39, that their respective territories should be

"... those they possessed as such at the time of separating from the Spanish dominion in the year 1810 ..."

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

"to postpone the questions which may have arisen, or may arise regarding this matter, in order to discuss them later on in a peaceful and amicable manner, without ever resorting to violent measures, and in the event of not arriving at a complete arrangement, to submit the decision to the arbitration of a friendly nation."

3. Treaty of 1881. Although both nations had thus agreed on the principle of "uti possidetis of 1810", they did not immediately reach agreement on the actual geographical application of the principle. The land and marine areas affected by their disagreement, and over which Chile believes she had good right and title were Patagonia, the Magellan Straits, the Great Island of Tierra del Fuego and neighbouring islands. Those differences were in due course settled by the Boundary Treaty of 23 July 1881,<sup>1</sup> which did not in fact apply the principle of uti possidetis of 1810. It was, instead, a compromise, to acceptance of which Chile was led mainly by reason of her continuing engagement in war on her northern borders. Under the Treaty, Argentina gained the vast and rich lands of the bulk of Patagonia, leaving Chile only a narrow strip in the west. Chilean sovereignty over the Magellan Straits and the territories and islands south of the Straits

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1 Annex No. 2.

was confirmed, subject to some exceptions in favour of Argentina. The latter received, under Article 3, nearly half of the Great Island of Tierra del Fuego and some adjacent islands which were specifically mentioned.

Part One

4. The precise terms in which the 1881 Treaty laid down the boundary were as follows:

"... from north to south, as far as the 52nd parallel of latitude, the Cordillera de los Andes. The boundary-line shall run in that extent over the highest summits of the said Cordilleras which divide the waters, and shall pass between the sources (of streams) flowing down to either side. The difficulties that might arise owing to the existence of certain valleys formed by the bifurcation of the Cordillera, and where the water-divide should not be clear, shall be amicably settled by two Experts, appointed one by each party. Should these fail to agree, a third Expert, selected by both Governments, will be called in to decide them ..."

5. In addition, Article 6 of the Treaty provided as follows:

"The Governments of Chile and the Argentine Republic shall perpetually exercise full dominion over the territories which respectively belong to them according to the present arrangement.

Any question which may unhappily arise between the two countries, be it on account of the present Arrangement, or be it from any other cause whatsoever, shall be submitted to the decision of a friendly Power; but, in any case, the boundary specified in the present Agreement will remain as the immovable one between the two countries."



6. Convention of 1888. On 20 August 1888, the Parties signed a convention for the implementation of the Treaty of 1881.<sup>1</sup> Article VI provided that if the experts appointed by each party to carry out the demarcation

"should not come to an agreement upon any point in the fixing of the boundaries or upon any other question whatever, they shall communicate immediately with their governments, so that the latter may proceed to appoint the third party who is to settle the difference according to the Boundary Treaty of 1881."

7. Protocol of 1893. A Protocol to the Boundary Treaty of 1881 was signed on 1 May 1893.<sup>2</sup> Although this referred in its preamble to consideration by the parties of "the actual state of the work of the experts", it does not appear that the experts had done any work in the area of the relevant sector; and this preambular statement is, therefore, of no present significance.

8. The principal relevant provision of the Protocol is Article 1. It recites the terms of Article 1 of the Treaty of 1881 (as cited above) and continues:

"... The experts and the subcommissions shall hold this principle as the invariable rule in their proceedings.

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1 Annex No. 3.

2 Annex No. 4.

Consequently there shall be held as perpetually belonging to the Argentine Republic and as under its absolute dominion all the lands and all the waters, to wit; lakes, lagoons, rivers and parts of rivers, brooks, springs lying to the east of the line of the highest summits of the Cordillera de los Andes which divide the waters; and, as the property and under the absolute dominion of Chile, all the lands and all the waters, to wit: lakes, lagoons, rivers and parts of rivers, brooks, springs lying to the west of the highest summits of the Cordillera de los Andes which divide the waters."

9. Treaty of 1896. The Treaty of 17 April 1896,<sup>1</sup> to which reference has already been made, contains no additional relevant substantive provisions as to the line of the frontier. It states, however, in the Preamble that the two Governments "are desirous to facilitate the loyal execution of the existing Treaties". The material provisions of the Treaty are to be found in Article 2. This provides, first, that disputes will be submitted for adjudication to Her Britannic Majesty's Government. Secondly, the Article gives express guidance as to the law to be applied by the arbitrator: "the strict application in such cases of the provisions of the said Treaty and Protocol ...", i.e. the Treaty of 1881 and the Protocol of 1893.

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1 Annex No. 5.

CHAPTER II

THE SUBMISSION OF THE DISPUTE  
TO ARBITRATION IN 1898

10. In due course, as contemplated in the instruments set out in the preceding section, the Parties nominated their commissioners who each proceeded to put forward separate proposals for the line of the frontier. By the summer of 1898 it was clear that the Commissioners could not agree in respect of certain substantial sectors of the boundary. In September 1898 a series of meetings took place in Santiago between the Chilean Minister of Foreign Affairs and the Argentine Minister. The outcome of these meetings is recorded in four Minutes dated respectively 15, 17, 22 and 22 September 1898.<sup>1</sup> For the present purposes, however, only the Third and Fourth Minutes are relevant.

11. The Third Minute records, in paragraph 2, the details in which the lines of the Commissioners of the two States coincide. In paragraph 3 the Minute records the points and sections in which the lines of the two Commissioners do not coincide. Each Commissioner had drawn a line, various points on which were marked by numbers in serial order. The

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<sup>1</sup> The texts of these Minutes are set out in Annex No. 6.

Minute identifies, inter alia, the part of the Chilean line between Nos. 271 and 330 and the part of the Argentine line between Nos. 282 and 303 as differing from each other. These lines will be found marked on the Argentine Map V (Map No. CH10). From this map it will be seen that the area now in dispute was flanked on the East by Nos. 298 to 303 of the Chilean line and on the West by Nos. 289 to 295 of the Argentine line. It was, therefore, an area in which the Commissioners were not agreed upon the line of demarcation.

12. The Third Minute then continues as follows:

"In view of the foregoing contradictory declarations, which produce a question that the Arbitrator alone can decide, and it not having been possible to arrive at any direct arrangement, the Minister of Foreign Affairs of Chile and the Envoy Extraordinary and Minister Plenipotentiary of the Argentine Republic agreed, in the name of their respective Governments, to transmit to that of Her Britannic Majesty a copy of the present Minutes, of the Minutes read of the Commissioners, and of the International Treaties and Agreements existing, so that, in accordance with the second basis of the Agreement of the 17th April, 1896, it may decide the differences above recorded."

13. The Fourth Minute merely records the agreement of the Chilean Foreign Minister and of the Argentine Minister that the other Minutes should be forwarded to the British Government.

14. By a note dated 23 November 1898<sup>1</sup> from the Chilean Minister in London to the Marquis of Salisbury, the Chilean Government informed the British Government of the existence of disagreement between Chile and Argentina and requested the British Government to act as arbitrator. The receipt of this note was acknowledged by Lord Salisbury by a note dated 28 November 1898<sup>2</sup>. The Argentine Minister in London also addressed a note to the Marquis of Salisbury on 23 November 1898,<sup>3</sup> which though differing in content from the Chilean note of the same date, was to the same effect.

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1 Annex No. 7.

2 Annex No. 9

3 Annex No. 8.

THE ISSUES IN THE ARBITRATION

A. The general issue

15. The general issue between the Parties in the 1902 Arbitration was essentially as to the interpretation to be placed upon the definition of the boundary given in the Treaty of 1881:

"the boundary line shall run ... over the highest summits of the said cordilleras which divide the waters, and shall pass between the sources (of streams) flowing down to either side."

The Arbitral Tribunal stated the issue in paragraph 10 of its Report as follows:

"the Argentine Government contended that the boundary contemplated was to be essentially an orographical frontier determined by the highest summits of the Cordillera of the Andes; while the Chilean Government maintained that the definition found in the Treaty and Protocols could only be satisfied by a hydrographical line forming the waterparting between the Atlantic and Pacific Oceans, leaving the basins of all rivers discharging into the former within the coast-line of Argentina, to Argentina; and the basins of all rivers discharging into the Pacific within the Chilean coast-line, to Chile."

16. The Tribunal continued its statement of the division between the parties in the following terms:

"11. We recognised at an early stage of our investigations that, in the abstract, a cardinal difference existed between these two contentions. An orographical boundary

may be indeterminate if the individual summits along which it passes are not fully specified; whereas a hydrographical line, from the moment that the basins are indicated, admits of delimitation upon the ground.

12. That the orographical and hydrographical lines should have been accepted as coincident over such a long section of the frontier as that which extends from the San Francisco Pass to the Perez Rosales Pass (with the exception of the basin of Lake Lacar), may not improbably have given rise to the expectation that the same result would be attained without difficulty in the more southern part of the continent, which, at the date of the Treaty of 1881, was but imperfectly explored.

13. The explorations and surveys which have lately been carried out by Argentine and Chilean geographers have, however, demonstrated that the configuration of the Cordillera of the Andes between the latitudes of 41° south and 52° south, i.e. in the tract in which the divergencies of opinion have mainly arisen, does not present the same continuities of elevation, and coincidences of orographical and hydrographical lines, which characterise the more temperate and better known section.

14. In the southern region the number of prominent peaks is greater, they are more widely scattered, and transverse valleys through which rivers flow into the Pacific are numerous. The line of continental water-parting occasionally follows the high mountains, but frequently lies to the eastward of the highest summits of the Andes, and is often found at comparatively low elevations in the direction of the Argentine pampas.

15. In short, the orographical and hydrographical lines are frequently irreconcilable; neither fully conforms to the spirit of the Agreements which we are called upon to interpret. It has been made clear by the investigation carried out by our Technical Commission that the terms of the Treaty and Protocols are inapplicable to the geographical conditions of the country to which they refer. We are unanimous in considering the wording of the Agreements as ambiguous, and susceptible of the diverse and antagonistic interpretations placed upon them by the

17. The consequence of this divergency of interpretation between the two Parties was that each proposed a distinct boundary line, the details of which were set out in the Minutes of the Experts, as confirmed in the Minutes of the Santiago Conference of September 1898 (see Chapter II above). For the purposes of the present arbitration it is unnecessary to examine further the attitudes of the parties as regards the boundary to the north and south of the latitudes represented by Posts 16 and 17.

B. The issue in the area of the relevant sector

18. Indeed, it is hardly necessary to examine more closely the position in 1898-1902 of the Parties as regards the line between the latitudes represented by Posts 16 and 17. This is so because in that area the line suggested by each Party was simply a continuation of the longer line of the whole frontier determined by reference to their respective general positions. Neither Party's line was adjusted by reference to the special features of the area of the relevant sector, though, of course, the geographical features of the mountains to the west and of the water divide to the east of that area were extensively described by the Argentine and Chilean Governments respectively. As already indicated, the Chilean line ran to the east of the line laid down in



the 1902 Award - that is to say, it followed the line of the continental water-parting which itself lay east of the Palena/Corcovado/Carrenleufu river. The Argentine line ran to the west of the line in the Award, following a line drawn through the summits of a series of mountains bearing on the Argentine Map (Map CH.10) the names, Co. Blanco, Co. Serrano, Co. Morro and Co. Maldonado.

19. Nor did either Party describe or discuss in any detail the features of the area of the relevant sector. For example, no mention was made in the Argentine pleadings of the River Encuentro or of the Cerro Virgen.<sup>1</sup> The Chilean Statement referred once to the River del Encuentro, but in a quite incidental manner, when describing one of three narrows of the River Palena, said to be "6 Kilometres above the junction of the River del Encuentro".<sup>2</sup> Apart from that, the Chilean Statement said nothing about this area except to observe that

"it must be borne in mind that, as a matter of fact, of all the vast mountainous zone comprised between parallels 43° 40' and 44° and between the sea and the upper valley of the River Carrenleufu, nothing is known beyond the existence of half-a-dozen prominent summits ...."<sup>3</sup>

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1 See Argentine Evidence (1900), ch. XXIII, especially section 4, p. 835 et seq.

2 Chilean Statement (1902), Vol. IV, Ch. XXXVII, at p. 1353.

3 Ibid., p. 1354.

THE COURSE OF THE 1902 ARBITRATION

20. In this Chapter the Government of Chile sets out, in so far as it is possible to do so on the basis of the records available to it, the various events and developments subsequent to the institution of the arbitral proceedings and leading up to the formulation of the Report and the Award. This narrative is important for three reasons:

(i) it shows that the Tribunal regarded a procedure of demarcation by British commissioners as a necessary part of the solution which was to be provided for the Parties;

(ii) it assists by showing how the error in cartography leading to the present arbitration arose; and

(iii) it demonstrates the dominant role played by Sir Thomas Holdich in the process of framing the Report and Award and thus shows that it is proper to look in his reports and recommendations for evidence of the true intention behind the words and phrases which appear in the Report and the Award.

21. The institution of proceedings. As indicated in the preceding section, the proceedings in the 1902 Arbitration were instituted by the notes

sent separately to the Marquis of Salisbury by the Chilean and Argentinian Ministers in London on 23 November 1898.

22. The note of the Chilean Minister was accompanied by a copy of the Minutes drawn up by the Experts and at the Conference in Santiago in September 1898, and also by a map.

23. The note of the Argentinian Minister explained that no supporting documents were enclosed with it because the Argentine Government had not yet finished preparing them. With a further note dated 17 January 1899 addressed to the Marquis of Salisbury, the Argentine Minister forwarded two volumes of documents, containing the relevant Treaties and Minutes, together with a map, in three sheets, prepared by Dr. Francisco P. Moreno, the expert of the Argentine Republic.

24. Meetings of the Tribunal. Shortly thereafter, Her Majesty the Queen appointed a Tribunal to pronounce upon the points of controversy between the Parties. The President of the Tribunal was the Right Honourable Lord Macnaghten and the two other members were Major-General Sir John C. Ardagh (Director of Military Intelligence) and Colonel Sir Thomas Hungerford Holdich (Vice-President of the Royal Geographical Society). The Tribunal met for

the first time on 27 March 1899 without the parties. It noted the receipt of the documents referred to above (to which the Chilean Government had in the meantime added a memorandum on certain aspects of the boundary question); and it decided to commence the proceedings by hearing any oral statements which the Parties might wish to make.

25. The second and third meetings of the Tribunal took place on 8 and 9 May 1899 when an oral statement was made on behalf of Chile. The fourth meeting took place on 11 May 1899, when an oral statement was made on behalf of the Argentine.

26. The Tribunal met again, without the Parties, on 6 July 1899 and approved the minutes of the second, third and fourth meetings.

27. The sixth meeting of the Tribunal took place on 26 June 1900, when it was noted that the first two volumes of the printed statement of the Argentine evidence had been received.

28. Between the sixth meeting and the seventh meetings of the Tribunal (which took place more than two years later, on 1 August 1902) the remaining volumes of the Argentine case and whole of the Chilean reply to the Argentine statement were presented to the Tribunal.

29. The Technical Commission. In addition, a Technical Commission, under Sir Thomas Holdich, one of the members of the Tribunal, examined on the ground the whole of the frontier line. This was done in pursuance of the provision in Article II of the 1896 Treaty that there should be a "previous examination of the locality by a Commission to be named by the Arbitrator". The genuine need for a survey was also explained in a memorandum dated 26 December 1901 submitted to the Foreign Office by Sir John Ardagh.<sup>1</sup> The Technical Commission left England on 31 January 1902 and returned on 26 July 1902. The Commission was divided into three groups for the purpose of examining the frontier: Captain Robertson and Captain Thompson took the southern section; Captain Dickson took the northern section; and Sir Thomas Holdich and his son, Lt. Holdich, took the part which comprises the relevant sector.<sup>2</sup> On 30 April 1902 Sir Thomas, being by then somewhere in the region of the "Valley of the 16th of October",<sup>3</sup> sent a cable home to inform Lord Macnaghten that he

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1 F.O. 16/356, p. 371; Annex No. 11.A

2 Narrative Report of the Chile-Argentine Boundary Commission, (F.O.16/360). Annex No. 18

3 See Narrative Report; Annex No. 18.

could

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"complete geographical examination sufficient to arbitrate for general line of boundary by end of June, but insufficient for details of demarcation in some parts".

He recommended that

"Chile and Argentine Legations should be informed that arbitration defining general line is possible as soon as tribunal can meet after my return but that joint commission for placing boundary marks will certainly be necessary subsequently with two British Officers as referees for certain short spaces."<sup>1</sup>

30. The Narrative Report. Upon his return Sir Thomas prepared a Narrative Report of the Commission. The manuscript text of this Report is to be found in the Foreign Office archives in the Public Record Office, vol. F.O.16/360, from which it appears that the Report was formally forwarded by the Secretary of the Boundary Commission to the Secretary of the Tribunal under cover of a letter dated 7 August 1902, i.e. some six days after the Seventh Meeting of the Tribunal. In fact, however, it appears from a letter from Sir Thomas Holdich to the Permanent Under-Secretary of State for Foreign Affairs, dated 28 July 1902,<sup>2</sup> that the Report had already been shown to Sir John Ardagh, one of the other two

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1 F.O. 16/360. Text in Annex No. 12.

2 Annex No. 17.

members of the Tribunal. Indeed it is likely that Lord Macnaghten also saw it before 1 August.

31. The "draft definition" of the boundary.

Sir Thomas also prepared a number of other documents of great importance. The manuscript texts of all of these can be found in F.O.16/360. The first which may be mentioned (because it is the first to follow the Narrative Report in the bound volume of archives) is a document which bears no title, date or signature but which begins with the words;

"(It should be noted that in the subjoined definition of the boundary all co-ordinate values expressed in terms of Latitude and Longitude are approximate only.)"

32. It contains a description of the boundary which is very similar, though not identical, in form and content to the detailed definition of the boundary which appears in the Report of the Tribunal.<sup>1</sup>

33. Some clue to its origin may perhaps be found in the Minutes of the Seventh Meeting of the Tribunal:

"Sir T. Holdich presented to the Tribunal a preliminary verbal description of a line of frontier proposed as a basis of settlement, which, after some discussion, was agreed to, and he was requested to draft a detailed description of the line

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1 The text is printed in Annex No. 23.

together with the maps required to illustrate it."

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34. It is probable, therefore, that the document in question is either Sir T. Holdich's preliminary verbal description of the line to the Tribunal, or it represents his draft of the detailed description which he was requested by the Tribunal to prepare. For convenience, this document will hereinafter be called "the Holdich draft definition of the boundary".

35. That it may be the first of these alternatives is perhaps suggested by the following letter written on 1 August, 1902, by Sir Thomas Holdich to Mr. Villiers at the Foreign Office.

"The Tribunal meets to-day at 3 at Sir John Ardagh's house (113, Queen's Gate) to consider the evidence presented by the Boundary Commission. Practically this meeting will determine the line of the boundary. Sir John Ardagh and I have come to an agreement and it only remains to obtain Lord Macnaghten's assent. Lord M. leaves to-night for Ireland and will not return before Sir John leaves for S. Africa. But we shall, practically, have finished the arbitration by this evening ..."<sup>1</sup>

36. "Geographical conditions of Patagonia"

The Holdich draft definition of the boundary is followed in F.O.16/360 by a document entitled "Geographical Conditions of Patagonia - General

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1 F.O.16/357, p. 258. Text in Annex No. 23A.



Description", hereinafter called "Holdich's 'Geographical Conditions' ").<sup>1</sup>

37. "Summary of Conclusions". There then follows a brief untitled document, unsigned, but expressed in the first person and almost without doubt prepared by Sir Thomas. This contains a summary of Sir Thomas's conclusions so far as they affect or supplement the evidence already laid before the Tribunal (and will hereinafter be called "Holdich's 'Summary of Conclusions' ").<sup>2</sup>

38. "Conditions other than geographical". Following immediately upon the document just mentioned, there is in the volume a paper, unsigned and undated, headed "Conditions other than geographical which must affect the decision of the Tribunal". This is also expressed in the first person, and can confidently be surmised to be Sir Thomas's work. It will hereinafter be called "Holdich's 'Conditions other than geographical' ".<sup>3</sup>

39. Dickson's Report. The next item in the volume is Lt. Dickson's Report on the area which he had been detailed to examine; and later in the volume

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1 Text in Annex No. 19.

2 Text in Annex No. 20.

3 Text in Annex No. 21.

there appear the reports of Captain Robertson and Captain Thomson, who constituted the third division of the Boundary Commission. The existence of separate and distinct reports by these officers on their own work serves to confirm the probability that the other documents are the work of Sir Thomas.

40. The Holdich "Introduction" After Lt. Dickson's Report, the volume contains three foolscap sheets, which appear to form the introduction to the Holdich draft definition of the boundary, and will hereinafter be called "the Holdich Introduction".<sup>1</sup>

41. The order in which these documents are bound up in F.O.16/360 probably cannot be taken as conclusive of their logical or chronological order. The pages are unnumbered; and it seems likely that the correct order of the documents is that in which they are printed in the Annexes to the present Memorial, i.e. taking the Narrative Report, the 'Geographical Conditions', the 'Summary of Conclusions' and the 'Conditions other than Geographical' as the necessary preface to the recommendations, which consist of the 'Introduction' and the 'Draft definition of the boundary'.

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<sup>1</sup> Text in Annex No. 22.

42. In any event, regardless of the correct order in which these documents should be read, it seems clear beyond any reasonable doubt that they were composed by Sir Thomas Holdich, that they were before the other members of the Tribunal during the period between the Seventh and Eighth Meeting of the Tribunal (i.e. between August 1 and November 10, 1902, when the draft Report was considered and amended), and that they formed the basis of the Tribunal's Report.<sup>1</sup>

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- 1 The conclusion as to the authorship of the documents is confirmed by the letter of 7 August, 1902 (Annex No. 24) from the Secretary of the Boundary Commission to the Secretary of the Tribunal, with which the former forwarded, for favour of printing, certain documents which he lists:

One narrative Report by Sir T. Holdich;  
Two General Reports by Lt. Dickson;  
One Geographic Report by Sir T. Holdich;  
One Geographic Report, incomplete, by Capt. Robertson;  
One introductory memorandum, on a Proposed line of boundary by Sir T. Holdich.

The letter also stated that there are to follow:

A narrative report by Capt. Robertson;  
Appendices to Capt. Robertson's geographic report;  
Various photographic illustrations;  
and the final specification of the boundary as awarded by H.M.'s Tribunal, if this is ordered to be printed.

None of the documents seems to have been printed, but they are to be found in the volume of the Foreign Office archives F.O.16/360, to which reference has already been made. They immediately follow in that volume the Narrative Report of Sir T. Holdich.

of Map XVIII. During the period subsequent to his return from South America Sir Thomas appears also to have been in contact with Dr. Moreno, the Argentine geographical expert, who was then preparing further maps for submission to the Tribunal. On 8 August 1902 Sir Thomas wrote to Mr. Villiers at the Foreign Office saying that

"... the maps under preparation by Dr. Moreno are well advanced. He submits them to me from time to time for approval ...."<sup>1</sup>

44. It would appear, indeed, that Sir Thomas had seen at least some of the new Argentine maps even before he produced "the draft definition of the boundary" (paragraphs 31-35 above). There are, for example, in the ninth sub-paragraph of paragraph 22 of that draft two specific references to "Arg. Map XVIII, Sheet 5", which was in fact one of the additional maps filed by Argentina in the latter stages of the proceedings. (See paragraphs 45 and 46 below). Moreover, in the sixth sub-paragraph of the same paragraph 22, when describing the section of the line now in dispute, he refers

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1 F.O. 16/357, p. 279. Annex No. 25.

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to the "Cerro Virgen". Although Sir Thomas gives no map reference in this connection, he must have had a sight of what subsequently became Sheet 3 of Argentine Map XVIII<sup>1</sup> (which was adopted in this sector as the Arbitral Map and as the Boundary Map E), for there is no other map on which this feature is named.

45. Further written pleadings. On 20 September 1902 the Argentine Government submitted its final written pleading, which was described as a "Short Reply"; and at some date (unknown) the Argentine Government delivered some or all of the maps which Dr. Moreno had been preparing. It is these maps, some preliminary version of which Sir Thomas would seem to have seen at an earlier date, that he appears to have had before him when reducing into writing his proposals concerning the boundary - at least in the relevant sector.

46. The Government of Chile received the Argentinian "Short Reply" on 6 October 1902 and produced an Answer to it on 27 October 1902. This Answer dealt only with the submissions in the

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1 See Map No. CH.12B.

"Short Reply". No comment was made on the Argentine maps and the Chilean Minister expressly stated, in the note under cover of which the Answer was forwarded, that he was unable to refer to the maps because he had not yet received them. As to these, it appears that three sheets of Map 18 were sent to the Chilean Legation on 27 October 1902 under cover of a letter stating that two more sheets would follow. But the Government of Chile can trace no papers either in its own or in the British archives to show that it ever received before the date of the Award a copy of the relevant sheet 3 of the Argentine map. Certainly, even if a copy were received, the Government of Chile had no opportunity to comment upon it.

47. On 10 November 1902 the Tribunal held its eighth meeting, when the draft Report was considered and amended. On the same day, the Secretary of State for Foreign Affairs, Lord Lansdowne, forwarded to His Majesty the King a copy of the Report and a draft of the Award. The Report was stated to be "intended to serve as an annex to the Award".<sup>1</sup> At the ninth meeting, on 19 November 1902, the Report of the Tribunal to

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1 F.O. 16/357, p. 441. Annex No. 25.A.

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His Majesty the King, together with the accompanying maps, were approved and signed. On 20 November 1902 the Award was signed, and on 25 November 1902 the Award and the Report were delivered to the Parties.

THE REPORT AND THE AWARDA. The Report

48. The relevant part of the Report is to be found in paragraph 22:

"Crossing the Fetaleufu River at this point it shall follow the lofty water-parting separating the upper basins of the Fetaleufu and of the Palena (or Carrenleufu or Corcovado) above a point in longitude 71°47'W., from the lower basins of the same rivers. This water-parting belongs to the Cordillera in which are situated Cerro Conico and Cerro Serrucho, and crosses the Cordon de las Tobas. Crossing the Palena at this point, opposite the junction of the River Encuentro, it shall then follow the Encuentro along the course of its western branch to its source on the western slopes of Cerro Virgen. Ascending to that peak, it shall then follow the local water-parting southwards to the northern shore of Lago General Paz at a point where the Lake narrows, in longitude 71°41'30"W.

The boundary shall then cross the Lake by the shortest line, and from the point where it touches the southern shore it shall follow the local water-parting southwards, which conducts it to the summit of the high mountain mass indicated by the Cerro Botella Oeste (1,890 m.), and from that Peak shall descend to the Rio Pico by the shortest local water-parting." (underlining added).

B. The Award

49. In so far as it is material to the present case, the Award provided in Article III as follows:

"From Perez Rosales Pass near the north of Lake Nahuel Huapi, to the vicinity of Lake Viedma, the boundary shall pass by Mount Tronador, and thence to the River Palena, by the lines of water-parting determined by certain obligatory points which we have fixed upon the Rivers Manso, Puelo, Fetaleufu,



and Palena (or Carrenleufu); awarding to Argentina the upper basins of those rivers above the points which we have fixed, including the Valleys of Villegas, Nuevo, Cholila, Colonia de 16 Octubre, Frio, Huemules, and Corcovado; and to Chile the lower basins below those points. From the fixed point on the River Palena, the boundary shall follow the River Encuentro to the peak called the Virgen, and thence to the line which we have fixed crossing Lake General Paz and thence by the line of water-parting determined by the point which we have fixed upon the River Pico ..." (underlining added).

Article V of the Award states that

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

C. The principles underlying the Report and the Award

1. The Report and the Award as a Compromise

50. It is necessary first to observe that the terms of the Report and the Award in truth represent a broad rather than a purely literal interpretation of the Treaty of 1881 and the Protocol of 1893. This only partly appears from the terms of the Report itself, of which Paragraphs 16 and 17 read as follows:

"16. Confronted by these divergent contentions we have, after the most careful consideration, concluded that the question submitted to us is not simply that of deciding which of the two alternative lines is right or wrong, but rather to determine - within the limits defined by the extreme claims on both sides - the precise boundary-line which, in our opinion, would best interpret the intention of the diplomatic instruments submitted to our consideration.

"17. We have abstained, therefore, from pronouncing judgment upon the respective contentions which have been laid before us with so much skill and earnestness,<sup>1</sup> and we confine ourselves to the pronouncements of our opinions and recommendations on the delimitation of the boundary, adding that in our view the actual demarcation should be carried out in the presence of officers deputed for that purpose by the Arbitrating Power in the ensuing summer season in South America."

51. On their face, there is little in these paragraphs to suggest a departure from the terms of the Treaty of 1881 and its stipulation that

"the boundary line shall run ... over the highest summits of the said Cordilleras which divide the waters and shall pass between the sources of streams flowing down to either side ..."

If the Report had to be read on its own, it would, in order to assess its true character, be necessary to compare closely the line prescribed in it with the rival contentions of the parties; and it would then become apparent that in numerous important respects the line drawn represented a compromise between the positions of the parties that could not be warranted by reference to the strict terms of the Treaty of 1881. (no doubt a major reason for this was the fact, as stated in paragraph 15 of the Report, that "the terms of the Treaty and Protocols are inapplicable to the geographical conditions of the country to which they refer".) However, it is in fact unnecessary to carry

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1 See section A of Chapter III above, paragraphs 15-17.

out a detailed comparison of this kind, because the documents of the Arbitration Tribunal establish explicitly what can otherwise only be implied from the Report.

52. Reference may first be made to the terms of the Memorandum of Sir John Ardagh of 26 December 1901,<sup>1</sup> in which he explained the necessity for sending out a survey party. In the course of the Memorandum he said:

"It may be as well to recall that the cardinal divergence between Chili and Argentina is in the abstract very simple and absolutely irreconcilable. The Chileans claim the continental water parting of the South American continent as the boundary:- i.e. that the basin of all waters which flow into the Pacific shall be Chilean; and the basins of all waters which flow into the Atlantic shall be Argentine. Argentina on the other hand claims that the main range of the Andes, as defined by the highest mountains shall be the boundary, irrespective of the fact that it is broken through by many rivers whose sources lie to the eastward, i.e. on the Atlantic side of the highest mountains. They claim in short a visible frontier in the snow clad peaks of the Andes. In the best known portion of the frontier it so happens that the main mountain range is also the water parting between the Atlantic and Pacific, and there was little or no room for dispute for many hundreds of miles. The language employed by the negotiators in their definition of the frontier - though applicable to this portion of the boundary, through the actual but comparatively rare coincidence of water-parting and main range; is in reality technically obscure and ambiguous when the attempt is made to apply it to the portion now under arbitration, where the water-parting and the main peaks rarely coincide. Whether the formula used in the treaty was adopted in a mutual belief

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1 F.O. 16/356, p.371. Annex No. 11A.

that the water-parting and the main range, must, in the nature of things, be identical in the unexplored regions, as they had proved to be in the well known parts of the Andes: - or whether each party shut its eyes to the absolute incompatibility of the language used, with the ordinary varieties of configuration to be met with in other parts of the world: - or whether they really understood the technical phrases which they used, will probably remain uncertain. The fact is, that they agreed to an illogical and ambiguous wording, which each party interprets in its own way; and that the extreme interpretations diverge very widely; and would - neither of them - form throughout a really good and fair solution. It seems to me to be a case for compromise, an extremely difficult case I admit, but yet one in which impartial friends of both sides may succeed in discovering a practical solution."

(Underlining added).

53. In addition, there are a number of significant documents in this connection which emanate from Sir T. Holdich, to the existence of which reference has already been made.<sup>1</sup>

54. There are to be found, in the first place, a number of statements in the Narrative Report which indicate that representatives of both Parties had led Sir Thomas Holdich to conclude that a compromise settlement would be acceptable.

55. Speaking of his visit to Buenos Aires in February, 1902, Sir Thomas said:

"... I was quite satisfied before I left that place that an earnest and sincere wish to have the Boundary Question settled as speedily as possible was shared by the Government and by all leading members of the Argentine community; and that even if considerable concessions to the

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1 See above, Chapter IV, Paras. 30-41.

Chilean claim should be demanded by the Tribunal the decision would still be welcome provided that an end were put to the almost inconceivable disruption of public business and the unnecessary drain on the public treasury which is caused by the boundary agitation."<sup>1</sup>

56. Later, in the Narrative Report, Sir Thomas wrote of his visit to Santiago and Valparaiso in the following terms:

"I found an opportunity, however, of privately ascertaining the views of some of the leading Chilean Ministers on the subject of a compromise, and before I left Valparaiso on the night of the 5th March to embark on the cruiser 'Ministro Zenteno' I received privately a communication from the President which practically confirmed the opinion which I had already formed that in Chile, as in Argentina, the desire for a speedy settlement of the Boundary Question was so definite and sincere that any reasonable concession would be admitted in order to secure it. This was all that was necessary in order to decide a programme of field-work for the Commission which should enable me to lay before the Tribunal a definite suggestion for a line of compromise, without sacrificing time in the attempt to follow out in field detail the geographical conditions of each of the boundaries claimed."<sup>2</sup>

57. At the end of his 'Summary of Conclusions' Sir Thomas said:

"My observations on the whole tend to confirm the expert evidence, and point to the conclusion that both lines deflect seriously from these geographical conditions which are aimed at by the treaties; and, further, that no line can be indicated which will, in all respects, fulfil those conditions."

58. In the document here called "Conditions

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1 Narrative Report, Annex No. 18.

2 Annex No. 18

other than geographical", Sir Thomas referred twice to the idea of compromise. In the very first sentence he said:

"The consideration of the geographical conditions, or physical configuration, of the area in dispute, therefore, points to a compromise as the only reasonable solution of the difficult problem of the boundary, and it seems to me that the reconcileable nature of the terms of the treaties and of the protocols themselves points to the same conclusion".

59. Later in the same paragraph he said:

"... we are therefore forced as much by the interpretation of the treaties themselves as by the structural disposition of ranges and valleys into a boundary of compromise which shall combine as far as possible the conditions of an elevated watershed with geographical continuity."<sup>1</sup>

(Underlining added)

60. Again, in the document in this Memorial referred to as "the Holdich Introduction", Sir Thomas said:

"In proposing a definite line of boundary for the consideration of H.M.'s Tribunal, I have been guided by the following considerations: ...

(2) In effecting a compromise, therefore, I should propose to assign to Chile all that is possible towards such a proportion of the territory as will be of equal value with that retained by Argentina ..."<sup>2</sup>

61. He concluded the same document with this paragraph:

"In the absence of any conflicting conditions

1 'Conditions other than geographical', Annex No. 21

2 Annex No. 22

or claims which would support a strong reason to the contrary - therefore - this appears to me to be an area well suited to a fair territorial compromise and I beg to suggest the following as fulfilling all the requirements of Arbitration."<sup>1</sup>

62. The general effect of these various references to the writings of Sir John Ardagh and of Sir Thomas Holdich is to show plainly that the two technically qualified members of the Tribunal had it clearly in mind, when approaching the problem, that the solution was to be a compromise between the positions of the two Parties. As can be seen, particularly from Sir Thomas's comments, the compromise was in fact to fall into two parts. First, there was to be a compromise as to the way in which the provisions of the 1881 Treaty were to be interpreted; and, second, there was to be a compromise as between the competing interests and claims of the two Parties. The particular factors governing the latter element in the compromise are set out in the next following section of this Chapter.

2. The factors governing the compromise between the interest and claims of the Parties.

63. It is possible, upon analysis of the Report, of the Award and of the preparatory documents

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1 Annex No. 22.

from the hand of Sir Thomas Holdich, to identify in broad terms the criteria which Sir Thomas employed when proposing the line of the frontier in any particular sector.

64. It appears, in the first place, that the dominating consideration pervading the delimitation of the boundary was the intention that the line should 'combine as far as possible the conditions of an elevated watershed with geographical continuity'.

This is evident from the following analysis of the boundary line between the Pass of Perez Rosales (41°05'S) to the north, and Mount Fitz Roy (49°16'S) to the south (excluding the territory of Ultima Esperanza):

| <u>Elements which make up the line</u>                                     | <u>Kms.</u>           |
|--|-----------------------|
| Continental watershed  | 588.00                |
| Principal watersheds   | 291.20                |
| Secondary watersheds   | 444.40                |
| Watersheds of the third order  | <u>114.15</u>         |
| Total watershed lines:   | 1437.75               |
| Water courses  | 144.25                |
| Straight lines across lakes  | 80.75                 |
| Straight lines across land   | 1.00                  |
| Total length of line<br>from Pass of Perez<br>Rosales to Mount Fitz<br>Roy | <u><u>1663.75</u></u> |



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Thus the frontier line follows a watershed for some 86% of its length. If the area from Mount Fitz Roy to 52°S were considered, the proportion of watershed line would be much higher.

65. A second consideration, which clearly assumes great importance in the delimitation of the boundary, is that of maintaining, so far as possible, the integrity of river basins (except, of course where the boundary actually follows the line of a river). Indeed, this is clearly implicit in the application of the watershed system since this recognizes that the boundary should lie above, and should not cut, any identifiable river system. However, the same principle is also applied in detail to subsidiary, or tributary, river systems in the same way as it is to principal river systems. This is especially apparent when regard is had to the clarity with which the text of the Award (see, especially, paragraph 1 of Article III) explains that the effect of adopting the obligatory points on the four named rivers is to award to Argentine the upper and to Chile the lower basins of these rivers. Thus, when, in nine cases, it proved necessary to abandon a high watershed, and to cut a principal river, even then care was taken in seven of these cases to ensure that thereafter the boundary should not divide

any tributary system which flows into that principal river.<sup>1</sup> In other words, the effect of crossing a river is arbitrarily to divide the river at that point into an upper river and a lower river, each with its own tributary system, of which one belongs to one Party and one to the other Party. When a tributary of that river flows into a particular sector (whether upper or lower) then the boundary line is so defined that the whole basin of that tributary falls within the territory of the Party to which that sector belongs. The division of a river and then also of its tributary systems is deliberately avoided.

66. In addition to these two principal considerations which permeate the whole of the Report and the Award, Sir Thomas specifically referred to the following three factors: (i) the value of the property to be divided; (ii) present occupation; and (iii) strategic considerations.

67. (i) As to the factor of the value of the property, it appears that Sir Thomas concluded that it was not one to which he could give much relevant effect. He found that nearly all the valuable tracts were concentrated about the eastern outermost ridges of the Andes and that that fact rendered it

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1. The remaining two cases are of minor importance. They relate to the River Vizcachas and the Arroyo Guillermo, whose basins were divided on the basis of occupation at the time of the Award.

exceedingly difficult to define, on any assumption of economic productiveness, an equitable division of property which could be represented by a central line.

68. (ii) In assessing the importance of the occupation of land, Sir Thomas said that

"it is only where considerable communities ... are distinctly affiliated by race and tradition, or by natural facility of intercourse, with either one Republic or the other that the Tribunal need be concerned with the claims to which it would give rise."<sup>1</sup>

He concluded that

"it will certainly ensure a more satisfactory adjustment of the boundary and acceptance of the decision of the Tribunal if as far as possible the districts which are held by colonists with distinctly Argentine or Chilean derivation should be awarded to Argentina or to Chile as the case may be."<sup>2</sup>

69. In this connection, reference may also be made to a passage in a letter dated 1st May 1902,<sup>3</sup> from Dr. Hans Steffen, the Chilean expert who accompanied Sir Thomas Holdich in his investigation in 1902,<sup>4</sup> to the Chilean Minister of Foreign Affairs. The letter, which was written from the Colony of 16th October, does

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1 "Conditions other than geographical", Annex No. 21

2 Ibid

3 This letter is taken from the archives of the Chilean Ministry of Foreign Affairs. Apart from the passage quoted below, this letter contains nothing which appears to be relevant to the present case; and therefore it has not been thought necessary to attach the full text as an Annex. However, the original text and a translation are available if the Court or the Argentine Agent wishes to see them.

4 See Annex No. 18.

not deal with the area at present in dispute, but is valuable nevertheless as confirming the concern which Sir Thomas had with the degree of occupation of the territories involved. Dr. Steffen said:

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"It is evident that the English Delegate - as he did in Ultima Esperanza - attributes great importance to the occupation of the disputed territory, as he is in the habit of carefully taking note of the nationality of the colonists, their title to the property, the construction of houses, and the work they carry out in the land, the markets where they buy their provisions and sell their products, the roads they use when travelling, etc."

70. (iii) Sir Thomas referred to the element of strategy in the following terms:

"Strategically considered, the boundary should be, as far as possible, a solid barrier to interference on either side. Indeed, the only expression of opinion on the subject of the boundary which I have heard strongly advanced on both sides is the necessity for a formidable natural barrier which may prove a physical obstacle to aggression. This is, however, opposed altogether to the theory of the continental divide as the dividing line, and certainly tends to throw the boundary westward into the mountains (rugged and impassable, although they contain no continuous main chain of water-parting) of the Western Cordillera."<sup>1</sup>

3. The application of the factors

71. The precise manner in which the various factors enumerated above played a role in the determination of the boundary line between Posts 16 and 17 must largely remain a matter of conjecture. The closest express indication of Sir Thomas' intentions

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1 "Conditions other than geographical", Annex No. 21

is to be found in the following passage in the "Holdich Introduction."

"In effecting a compromise, therefore, I should propose to assign to Chile all that is possible towards such a proportion of territory as will be of equal value with that retained by Argentina, respecting to the utmost the claims of all colonists or settlers who are affiliated with the Chilean Government. Strategic considerations, as well as those referring to occupation, point to only one way in which anything like a satisfactory compromise of this nature can be effected, and that is, shortly, to assign to Chile as much as possible in the southern districts and to leave to Argentina lands which she has effectively occupied in the north. In other words, to allow Chile to retain possession of the grass uplands and forests of the regions of Ultima Esperanza and to assign to Argentina the valleys of 'the 16th of October' and Cholila. These are the two districts which are of really serious importance as possessing the greatest facilities for economic development and it is fortunate that the great mass of Chilean or of Argentine colonization within the disputed area gravitates towards these two districts respectively. Beyond these two districts there are others of minor importance amongst which an equal distribution of value will be attempted but the adjustment of the line as a whole should be regarded as being framed in these two most important features of it."<sup>1</sup>

72. Beyond this, it is only possible to compare what Sir Thomas actually stipulated as regards the sector between Posts 16 and 17 with the considerations examined above.

73. The elevated watershed and geographical continuity. It is clear that, save where he followed

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1 Annex No. 22

the course of the Encuentro, Sir Thomas was adhering in the whole of the relevant section to the principle of the elevated watershed. Yet, even in this instance the sole function of the Encuentro is to provide a connection, the element of geographical continuity, between "the lofty water-parting" which forms the line between Posts 15 and 16 and "the local water-parting" which was intended to form a substantial part of the line between Posts 16 and 17.

74. The integrity of river basins. Equally, it is evident that Sir Thomas intended to respect the principle of the integrity of river basins and of the basins of tributaries (save, as already stated, where the boundary actually follows the line of a river). It is important to note that Boundary Map E shows the Lagunas del Engaño as flowing into what is named on that map as the Rio Engaño and that river as flowing into the Encuentro. The line proposed by Sir Thomas does not cut the river system flowing out of the Lasgunas del Engaño. Equally, Sir Thomas' line as marked on Map E did not cut any river system flowing into the Palena below Post 16. All this is understandable as being fully consistent with the principle followed by Sir Thomas elsewhere. And the Government of Chile considers that this is a feature of the problem which must particularly be borne in mind when seeking to give

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effect to the principles of the 1902 Report and Award. No line should be adopted which has the effect of dividing the system of waters flowing into the Palena below Post 16. The Court is invited to find that if Sir Thomas had known the true facts (that the Engaño does not flow into the Encuentro, but through the Salto/Tigre, and joins the Palena below Post 16) he would, considering that the Lagunas del Engaño form part of the basin of a tributary joining the Palena below the fixed point, have drawn the boundary line in such a way as to bring within Chilean Territory the whole of the river system flowing from the Lagunas del Engaño.

75. Value. So far as the relative value of the areas allocated to the Parties is concerned there is no direct evidence that in the sector between Posts 16 and 17, it was a factor of major importance. Nonetheless, it may have had some bearing. It is known - on the basis of the passage from his introduction quoted in paragraph 71 above - that Sir Thomas regarded the major adjustment of the boundary by reference to value was achieved by the Award to Chile of the

grass uplands and forests of the regions of Ultima Esperanza and the assignment to Argentina of the valleys of the 16th October and Cholila. In the same passage Sir Thomas spoke of other districts of minor importance "amongst which an equal distribution of value will be attempted". The likelihood is that he placed the area of the Corcovado Valley in this category. Yet the fact remains that he awarded this rich valley to Argentina<sup>1</sup> -an award which, if based on the principle of equal distribution, suggests that in interpreting the extent of the zone which he awarded to Chile, a liberal approach should be adopted, rather than a restrictive one, in an attempt to match, on the Chilean side, the ample value of the area granted to Argentina.

76. Occupation. Looking as a whole at the area comprised by the Cordon de las Virgenes, the two main valleys which flank it on east and west

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1 "A more promising field for a settler (always remembering the one great drawback of communications) could hardly be conceived than this valley of the Carrenleufu with its Huemules affluent. Not only was there a promise of excellent grazing for cattle, but it was clearly a good field for agricultural experiments". (The countries of the King's Award, p. 365).



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respectively (the Corcovado/Carrenleufu Valley and the California Valley), and the minor range which contains the Cerro Virgen, it might well be thought that in 1902, even allowing for the fact that the Chilean claim to the continental water divide to the east of the Corcovado/ Carrenleufu was not recognised, the boundary should have followed the line of the water-parting either between the Encuentro and the Arroyo Cajon or between the Cajon and the stream which runs into the Carrenleufu opposite Day; and it could then have continued along the Cordon de las Virgenes until eventually it reached Post 17. This would have been more in accord with the principle of following watersheds wherever possible; and it would have been a better strategical frontier. Why then, did Sir Thomas move the boundary westwards and choose the line of the Encuentro?

77. The probable answer would seem to be that he had observed the settlements at Steincamp and Day, on the right bank of the Carrenleufu and the settlements at Illin and Figueroa on the left bank. These appeared to Sir Thomas to be Argentine settlements of an agricultural character, deriving their main support

from the raising of cattle. To have selected either of the two possible lines mentioned above would have been to reduce the area available to them for cattle grazing. So he sought a readily identifiable line, namely, a river (which from the point of view of cattle raising is much more practical than a water-parting); and the river he selected was the first considerable river capable of being identified west of those settlements.

78. This being so, it can be seen that the precise direction in which the Encuentro runs was not really a determining consideration. What mattered was that there should be a line which, running in an approximately southwards direction, could be made with proper regard for geographical continuity to lead to an elevated watershed and thence to run to Post 17.

79. Strategy. As suggested above, if the area is looked at in the light of knowledge possessed to-day, it is not easy to see why Sir Thomas did not designate the Cordon de las Virgenes as part of the boundary. It is in fact a higher and more continuous range than any that lie west of it. But on the evidence before him,

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it is understandable that Sir Thomas did not appreciate that; for it is a significant feature of the Second Argentine Map that, while it purports to show in some detail the region surrounding the supposed course of the Encuentro, it virtually ignores the topography to the east and thus excludes the evidence of an intervening range. Consequently, it is questionable whether Sir Thomas was in a position to assess the relative merits of the mountain ranges from a strategical point of view.

THE DEMARCATION

80. The Award was followed by a demarcation procedure which was carried out during the South America summer of 1902-1903. The necessity for this latter process to complete and render effective the work of the Tribunal, and which might in effect be regarded as the second stage of the arbitration, had been realised at a relatively early point in the proceedings. On 26 December 1901 Sir John Ardagh had stated in a Memorandum:

"... I also conclude that neither Chili nor Argentina will be content with a mere written judgment, and that both will expect H.M.G. not only to make an award but to execute the delimitation by a British Survey party"  
(underlining added).<sup>1</sup>

Again, on 30 April 1902, Sir Thomas Holdich had cabled back to London:

"Inform McNaghten can complete geographical examination sufficient to arbitrate for general line of boundary by end of June but insufficient for details of demarcation in some parts. Recommend that Chile and Argentina legations should be informed that arbitration defining general line is possible as soon as tribunal can meet after my return but that joint commission for placing boundary marks will certainly be necessary subsequently with two British Officers as referees for certain short spaces ..." (underlining added).<sup>2</sup>

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1 Annex No. 11A

2 Annex No. 12

81. Upon the instructions of Lord Macnaghten this telegram was forwarded to the Foreign Office by the Secretary of the Tribunal on 3 May 1902. In his covering letter the Secretary said:

"... Upon his (Sir Thomas Holdich's) return, the Arbitration Tribunal will be in a position to complete their deliberations, and their decision as to the general line of the boundary will probably be pronounced during the autumn.

I am, however, at the same time to request that you will be good enough to inform Lord Lansdowne that the Tribunal will, in all probability, not be able to define the exact frontier line with such a degree of minute precision in all its points that a survey party or joint commission could be reasonably expected to place the necessary boundary marks on the ground, without any possibility of a mutual misunderstanding and, as the Arbitration Tribunal conceives it to be their function, not only to deliver a formal expression of opinion, but also to take all possible steps that may conduce to the early and final settlement of the frontier question, it is in contemplation to propose that the actual demarcation of the boundary should be carried out by a joint commission of the Republics with two British Officers as referees, to whom all disputed points would be referred and whose decision would be accepted by both parties as absolutely final and binding ..."  
(underlining added).

Lord Macnaghten's views were then passed on by the Foreign Office to the British Ministers in Santiago and Buenos Aires, by letters of 13 May 1902.<sup>1</sup>

82. In the meantime, the Governments of Chile

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1 Annex No. 14

and Argentina had, it seems, been thinking along similar lines. On 28 May 1902 they concluded a Protocol on the Placing of Boundary Marks in which they agreed "to invite the Arbiter to nominate a Commission to fix, on the spot, the boundary marks which shall be determined by the Award" (underlining added).<sup>1</sup>

83. Lord Macnaghten's and Sir Thomas Holdich's reservations about the precision of their definition (as just stated) were confirmed in the Report of the Tribunal. This states, in paragraph 17, that

"... We confine ourselves to the pronouncement of our opinions and recommendations on the delimitation of the boundary, adding that in our view the actual demarcation should be carried out in the presence of officers deputed for that purpose by the Arbitrating Power, in the coming summer season in South America."

This general sense of reservation about the accuracy and immediate applicability of the line described in the Report is confirmed in the footnote to paragraph 19 of the Report which states:

"All co-ordinate values expressed in terms of latitude and longitude are approximate only, and refer to the Maps attached to this Report." (underlining added).

84. In pursuance of the terms of the Protocol, Sir Thomas Holdich was, soon after the publication of

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1 Annex No. 16

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the Report and Award, appointed His Britannic Majesty's Commissioner for the Demarcation of the Chile-Argentine Boundary. The officers engaged on demarcation duty with the Commission were for the most part those who had participated in the survey of the disputed area prior to the Award, and included Capt. Dickson, Capt. Thompson and Capt. Robertson.<sup>1</sup>

85. The basis of the activities of the Demarcation Commission was set out in a letter dated 29 December 1902 from Sir Thomas Holdich to Dr. Luis Drago, the Minister for Foreign Affairs of Argentina.<sup>2</sup> Sir Thomas stated that the arrangements had been agreed upon between himself and the Argentine Expert (Dr. F.P. Moreno) and the Chilean Expert (Sr. A. Bertrand); that it had been agreed that "each British Officer should be accompanied by one or more representatives from each Republic who would be responsible for the surveying necessary to determine the position of the pillars..."; and that "the British Officer in charge will be in absolute command of the party, and the final referee in cases of dispute." (Underlining added).

86. In addition, Sir Thomas issued "General Directions" to the Officers in charge of the various

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1 See letter of 30 June 1903 from Sir T. Holdich to the Under Secretary of State, Foreign Office, Annex No. 30

2 Annex No. 27.A

sections of demarcation.<sup>1</sup> In those he said, in  
paragraph 6:

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"The duty of the British Officers is to superintend the alignment of the pillars, or boundary marks, in those parts of the boundary indicated by the Tribunal, and to decide in cases of uncertainty where such boundary marks are to be placed. Only in cases of very grave discrepancy will it be necessary to appeal to the decision of the Commissioner."  
(underlining added).

87. The actual demarcation of the relevant section was undertaken by Captain Dickson. Sir Thomas Holdich referred to this section in his letter of 30 June 1903, as follows:

"... Farther south, between Lakes Nahuel Huapi and General Paz, Captain Dickson encountered many difficulties. The points he had to reach are remote and difficult of access. Dense forest had to be cut through and clearings made for pillar sites. He found that it was by no means easy to identify the River Encuentro (an important feature in the demarcation) so buried is it in the midst of wild untrodden mountain solitudes and so difficult to reach. He succeeded however in placing all the pillars included in the terms of the Award..."<sup>2</sup>  
(underlining added).

88. Those passages in Captain Dickson's own Report which bear on the matter now in dispute also bear extended quotation.

"March 2nd (1903). - Left camp at Steincamps, and with Señor Barrios and some peons rode down to what we then supposed was Rio Encuentro and met Señor Soot. The country we passed through

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1 Annex No. 27.B

2 Annex No. 30



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was full of short thick bush and bamboo and very broken; we had to cross the Rio Palena twice, at rather dangerous fords. The reputed Rio Encuentro proved to be a small stream, but they told me all streams were "Rio" to the Chilotes, by whom they were named. None of the Engineers or peons knew the country and Steincamp maintained that it was the Rio Encuentro. Anyhow, both Señors Soot (Argentine) and Barrios (Chili) were quite in accord that it was the proper place and no one suspected that it was not. It was not marked on the maps that I had with me, and so I placed the pillar on the north bank of the Palena and opposite to the junction of this supposed Rio Encuentro. I took bearings, etc., and then returned to camp ... (O)n February 25th, in expectation of completing my section soon, I had sent a messenger to Captain Thompson, asking him to send me plans of Lago Paz so I might assist him. ...

March 9th - ... In evening messenger arrived from Captain Thompson with plans, etc. From these I found that the Rio Encuentro pillar was probably placed wrong, so I despatched Señor Soot with men and a canvas boat to the Rio Palena with orders to cut a road along the river to the west and explore for another river and continue making the road till I came to him ...

March 12th - Set out (from camp on east shore of Lake General Paz) to get back to Rio Encuentro and camped at Casa Vargas.

March 13th - Arrived at Casa Steincamps, in Valley Corcovado, found that Soot was down the river working hard at cutting a road through the forest and undergrowth, but had not reached any river yet.

March 14th - Went down river with Señor Frey and overtook Soot, and worked on road cutting. In the evening we hit on a large river several miles further West than first Rio Encuentro. This both Barrios and myself were convinced must be the Rio Encuentro; but Señor Frey (Argentine) thought there might be another river (which would, in his estimation, be the Rio Encuentro) at the eastern foot of a

Ridge of high peaks, which he reckoned to be some three or four miles away, but which Barrios and myself placed at 15 to 20 miles; so that I sent Señor Frey with some peons to find out if they could reach this ridge of peaks, while I myself returned to camp at Steincamps.

March 15th - Went down to Rio Encuentro II and made a bivouac, and prepared to place the pillar there next day. In the evening Señor Frey returned, and said he had been unable to reach the ridge of peaks (the peons with him declared that it was 20 miles away); also that he believed that, after all, this river must be the Rio Encuentro. The maps of this region were found to be useless for the purpose of identifying any point, as they were only made up from a hurried report, and none of the minor features were shown. However, there can be no doubt whatever that this river is the true River Encuentro, as there is no room for the basin of any other river, or even for any small stream (as can be seen from the map of the Lago Paz region) between the turn of the Rio Palena at Steincamps and any other Rio Encuentro further west, supposing it existed.

March 16th - Crossed the Rio Palena and placed the pillar on a steep slope of a large "Morro", opposite the "Thalweg" of the Rio Encuentro; then climbed to the summit<sup>1</sup> of the "Morro" and took photos and bearings<sup>1</sup> before returning to the general camp at Steincamps..."  
(Underlining added)

89. The bearings to which Captain Dickson referred in his Report under 16 March are to be found annexed to the Report in a "Tabular Statement of Boundary Pillars erected in the Chile-Argentine Boundary

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<sup>1</sup> See Map CH.15

by the British Delimitation Commission". The relevant entry appears on pp. 30 and 31 under the heading "Rio Encuentro".<sup>1</sup> This is accompanied by a note that "These bearings are taken from a point 400 yards distant from pillar and about 1000 feet higher". The pillar is given the serial number 16 and is stated to have been erected on 16 March 1903. The geographical co-ordinates are stated to be  $71^{\circ}47'30''$  W. Longitude and  $43^{\circ}36'12''$  S. Latitude. In describing the site, Captain Dickson said: "... This point is directly opposite the junction of the Rio Encuentro with the Rio Palena or Corcovado or Carrenleufu...". In his "Remarks" he observed: "The map of this region is very inaccurate being prepared from an itinerary report. None of the engineers with me knew the country or the names of points etc., never having been in the district before". And in the Remarks attached to the bearings of Post 17 he added: "The map of this region is very bad and is only useful as a rough general sketch of the country". It may be noted that the co-ordinate values which Captain Dickson attached to Post 16 are inaccurate. This is easily explained because, as Captain Dickson himself notes at the end of the Tabular Statement: "The geographical co-ordinates are

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1 Annex No. 29

measured from the illustrative maps and are approximate only". Since the maps, as will presently be more fully developed, were inaccurate, it follows that the coordinates were also inaccurate. The correct ones are 71<sup>o</sup>44'46" W. and 43<sup>o</sup>35'08" S.

90. The circumstances in which Capt. Dickson came to place Post 16 in the wrong location on 2 March are clearly explained in a Memorandum which the Chilean Government delivered to the Argentine Government on 26 December 1913. The occasion of this Memorandum is referred to in paragraph 91 below and again more fully in Chapter VIII as well as in Section E of Chapter IV of Part II of this Memorial. In this Memorandum, the Chilean Government said:

"In the report of the Engineer Señor Carlos A. Barrios who accompanied Captain Dickson, one reads: 'On the 10th and 11th days the Boundary Posts of the said lake (General Paz) were put in place; the plan of the region of the Palena to the South having arrived, requested from Captain Thompson, it was seen that the Palena Boundary Post was placed about 5 km. to the east of the River Encuentro; this error arose from the fact that the data supplied by the plan which Captain Dickson carried was deficient inasmuch as it extended only from the River Palena to the north. On the 16th, the Palena Boundary Post was rectified, and this completed the demarcation, Captain Dickson starting out on the return journey on 21 March'."<sup>1</sup>

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1 See Annex No. 33

91. The effect of Captain Dickson's activities was thus to complete the work of the Tribunal by fixing conclusively on the ground the location of Post 16. In so doing, he also established in a manner binding upon the Parties that the river joining the Palena at that point was the Encuentro within the meaning of the Report and the Award. It is true that in 1913-1914 there was some disposition on the part of Argentina to revert to the question. There was, in those years, a short exchange of correspondence between the two Governments on the subject.<sup>1</sup> More detailed reference will presently be made to these notes. Briefly the Argentine Government questioned the correctness of the location of Point 16, while the Chilean Government maintained that it was correctly situated. Thereupon the Argentine Government appears to have dropped the matter. And in the years subsequent to 1914 the Chilean Government proceeded on the basis that the Argentine Government had acquiesced in its view of the matter and treated the whole area to the west of the line of the Chilean submission as Chilean territory.

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1 See Annexes Nos. 32-33-34-35

THE GEOGRAPHICAL ERROR

92. The subsequent disagreement between Chile and Argentine which has given rise to the present arbitration can be traced directly to an error in the principal map attached to the Report, coupled with the general lack of knowledge at that time of the disputed area. The consequence of this error is that, although the points at which Posts 16 and 17 are now situated were authoritatively described in the Award and conclusively established by the demarcation process, it is not now in fact possible to connect those two posts by a line constructed by reference to all the nomenclature used in the Award and the Report.

93. The Report contemplates the boundary as following, first a river line, namely, the course of the Encuentro, from Post 16, along its western branch, to its source on the western slopes of the Cerro Virgen; and connecting there immediately with the line of the local waterparting to Post 17. In fact, however, if one follows the River Encuentro from Post 16 to its true source, one does not reach the western slopes of the Cerro Virgen; and the same is true if one follows the River Encuentro along a channel which, so the Argentine Government now contends, constitutes that river. Equally,

it is impossible to trace any river from a source on the western slopes of the Cerro Virgen to a junction with the Palena at Post 16.

94. In order to appreciate to the full the nature and consequence of this error, it is necessary to consider more closely how it came about and what the Tribunal (and, in particular, Sir Thomas Holdich) must be deemed to have intended when they used the words they did. For this purpose, it is not necessary to examine in detail the state of geographical knowledge about the Encuentro in 1902. This is dealt with in the Note at the end of the present Chapter. Suffice it to say for present purposes that, at the time of the Award, the Tribunal really knew nothing more about the Encuentro than the following: that there was a river of that name; that it joined the Palena on its southern side somewhere below (to the west) of the great westward bend of the Palena; and that it was the first named river of substance flowing into the southern side of the Palena westward of what the Tribunal understood to be the western limit of Argentine settlement.

95. Sir Thomas had this information before him in the form of the first Argentine map and Chilean map, both laid before the Tribunal before his first visit to the frontier region. The Argentine Map shows three principal rivers flowing into the Palena after

it has turned west: the first is unnamed; the second is called the Encuentro; and the third, further to the west, is called the Salto. The Encuentro on this map is represented as joining the Palena slightly to the east of its true junction, but the general direction of its course is towards the Cerro Central, in the principal range lying just to the west of the great curve of the Palena. The Chilean map is not dissimilar, though, in its general placing of the Palena and its tributaries in this area, it varies from the Argentine map by several minutes of longitude and latitude.

96. Accordingly, the task before Sir Thomas in the relevant sector was to determine the southward continuation of the boundary which, after crossing the Futaleufu to the north, had followed the watershed dividing the upper and lower basins first of that river and then of the Palena. Such evidence as there is suggests that Sir Thomas had, even before his return to England, or at any rate very soon thereafter, formed the view, on the basis of the information he had obtained, that the proper continuation of the boundary would be to cross the Palena at the identifiable spot represented by the junction with it of the Encuentro and then to follow that river as the southward continuation of the line of division of upper and lower basins of the Palena. This approach to the definition



of the boundary in the sectors to the immediate north and south of the Palena shines strongly through the relevant paragraphs of the Report and Award.

97. But by the time that Sir Thomas came to give verbal expression to his intention to use the Encuentro as the line of the boundary, he appears to have been led to understand:

(i) that the Encuentro had its sources on the Cerro Virgen, a mountain in what may have appeared to him to be a principal range to the west of the range round which the Palena curves as it flows northwards and then westwards from Lake General Paz; and

(ii) that the waters of the Engaño Lakes system drained into the Palena through the Encuentro.

In these two respects Sir Thomas was wrong - as is now known and as seems likely to have been known in Argentinian official quarters as early as 1903 or 1907.

98. The real source of the error lies in the map which was adopted as the Arbitral Map<sup>1</sup> and which was used also as the Demarcation Map (Boundary Map E).<sup>2</sup> This is the same map as was presented by Argentina at a late stage in the 1902 proceedings

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1 Map No. CH 13

2 Map No. CH 14.B

under the title "Argentine Map XVIII, Sheet 3" and which is called in this Memorial "the second Argentine Map" to distinguish it from the first Argentine map, just referred to. (See paragraphs 43-46 above).

99. This Second Argentine Map represents matters somewhat differently from the earlier maps. True, there are again the three main rivers in this section of the Palena: to the east, an unnamed river rising on the slopes of the Cerro Herrero and the Cerro Central; to the west, the Salto; and between them a river bearing the name Encuentro and dotted in its lowest section. But the river so named is represented, for the first time, as having its sources on the Cerro Virgen; and it is the first time, too, that the Cerro Virgen appears as such on a map; and, equally, it is the first time that the Cerro Virgen is given such prominence and in a manner which creates the impression that the range of which it forms part is the dominant range in the area.

100. It is by reference to the details which appeared on this map that Sir Thomas put into words, the description of the line which he conceived the boundary should follow - a line upon the basic elements of which he had already independently decided. There is nothing to shew that it was the Second Argentine Map which decided him upon the use of the Encuentro for

determining the boundary in this area. Furthermore it is clear from the caveat to the Report that he appreciated that the map might be inaccurate and that the longitudes and latitudes there used were approximate only.

101. In short, the origin of the error lay in the attempt to spell out, by reference to an inaccurate map, the details of the general line of the Encuentro which had already been adopted as the basic feature of the boundary in the relevant section. That Sir Thomas should, in all the circumstances, have used the Second Argentine Map is understandable and reasonable. It was the most recent map of the area; and he had independently of this particular map come to think well of Argentinian map making. He cannot be blamed for the fact that in this instance his confidence was misplaced.

102. At this remove of time and on the information at present available, it is not possible to say what Dr. Moreno, the Argentine Geographical expert who prepared the Second Argentine Map, had in mind when introducing the changes between that Map and the First Argentine Map. No indication has been found of the information, in the way, for example, of new survey material, on the basis of which the alterations could be justified. On one interpretation, Dr. Moreno

may have been seeking to depict the Encuentro as a third main river lying between the true Encuentro (as now known) and the Salto. In that case, he created a "ghost river", for no such additional tributary exists. On another and more likely approach, it may be that the river called Encuentro on this Second Map is not a ghost river, but is simply the Encuentro which, in some so far unexplained way, has not only drifted westwards down the Palena but has also slipped its source westwards from one range to another.

103. But whichever view is adopted, it is clear that this Second Map is, in relation to the characteristics and location of the true Encuentro, as known today, quite inaccurate. It places the point of junction with the Palena some 4' to 5' of longitude west of the true point of junction. It attributes to the river two branches; one consisting of the so-called River Engaño, which is represented as draining the Engaño lakes by a relatively straight north-westerly course flowing into the second branch from the south-east; the other consisting of a river having its sources on the Cerro Virgen.<sup>1</sup> The truth,

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1. Apart from the errors in the Second Argentine Map there were one or two significant omissions. In particular the indication in the first Argentine map of the height of the Cerro Central disappears. So do the references to the Cerro Fierro and Cerro Herrero, though these are to be found at the foot of the map of the next section to the north, Sheet 2.

Part One      by contrast, is that the Engaño Lakes drain through the Engaño into the Salto and thus into the Palena at a point below the junction of the Encuentro; while the Encuentro which joins the Palena at Post 16 has its source on the western slopes of the Pico de la Virgen, in the main range just west of the great Palena curve. The present Court cannot, in the submission of the Government of Chile, allow its interpretation of the relevant parts of the 1902 Award to be controlled by words which were inspired by a map so heavily marred by error.

104. The first explorations of the area of the Palena appear to have been made in 1885 and 1886-1887 by a Chilean Captain, Serrano Montaner, and in 1885 and 1887-88 by an Argentinian Colonel, Luis Fontana. These expeditions were restricted to the course of the Palena, and did not penetrate into the area surrounded by the great curve of the river. Captain Serrano prepared in 1885 a map of the Palena from the sea so far as the first rapids of the river - a point which is well below the junction of the Encuentro and the Palena; and this map is, therefore, of no present help.

105. In December 1893 a Chilean expedition under the leadership of Dr. Steffen began an exploration of the sources of the Palena. On 6 February 1894 the two parties into which this expedition had divided, one working along the river from Valley of the 16th October and the other from its mouth, met near the mouth of a tributary to which they afterwards gave the name of the River del Encuentro, to commemorate the fact that it was in the vicinity of that place that the meeting occurred.

106. A map produced under the names of Dr. Steffen and Señor Fischer as a result of this expedition is reproduced as Map No. CH.1. It bears a rough indication of the course of the Encuentro which shows no division into branches. Another map prepared by

Mr. Fischer, based on the same expedition, is reproduced as Map No. CH.2. It too shows the course of the Encuentro, though running in a more southerly direction than in Map No. CH.1. The area containing the source of the Encuentro, as well as of the River Salto, another tributary of the Palena, joining it some 30 kilometres to the west, is marked as "unexplored".

107. In 1895 an Argentinian expert, Señor Eleazor Garzón published an article entitled "Some Observations on the Ground in the Southern Territories" in which he offers some description of the Palena and of the area surrounded by it. This article contained the results of an expedition conducted by himself and Engineer P. Ezcurra in the same year. But with the exception of a reference to two small lakes said to have been discovered by Señor Ezcurra, the article in fact contains no detailed description of the disputed area. The lakes mentioned were, it would seem, two out of the four lakes which now bear the names Redonda, Engaño, Berta and Blanca; and even as regards these Señor Ezcurra was unable to explore them sufficiently to determine where their waters flowed. Moreover, writing in 1895, Señor Garzón appeared to contemplate only two possibilities in this connection: one was that the waters flowed into Lake General Paz; the other was that they joined direct with the Carrenleufu before it became

the Corcovado. He does not appear to have considered the possibility that these waters flowed in a north-westerly direction from the Engaño lakes and eventually join the Palena very much further down its course than the point on the map at which it changes its name from Corcovado.

108. A map prepared by Engineer Ezcurra on the basis of this expedition is reproduced as Map No. CH.3. The two small lakes mentioned above are marked on it. They are connected by a dotted line, which presumably represents a surmise, with an unnamed tributary of the Carrenleufu (Palena).

109. In 1895 the Argentine Geographical Institute also produced a map,<sup>1</sup> which was subsequently submitted by Chile to the 1902 Arbitration Tribunal, which reproduces the details of Engineer Ezcurra's map.

110. Another Argentinian expert, Señor Francisco Moreno reported in 1897 on his own explorations in the areas of Neuquen, Rio Negro, Chubut and Santa Cruz. He too speaks of visiting the small lakes, and mentions that there are three of them. He does not consider the direction in which their waters flowed and does not appear to have followed their flow into the valley of Las Horquetas.

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1. Plano demostrativo de la Cordillera de los Andes, 1895. From Boletin del Instituto Geografico Argentino, Vol. XVI, 1 (1895). Map No. CH.4.



111. He refers to the existence of the River Encuentro when describing the work of one of his party, Señor Waag, who on 31 March, 1896 was able to reach the Encuentro after a tiring march from Steinkamp. Waag reported that he was able to reconnoitre the region for some ten kilometres to the West, but no mention is made of any attempt to follow the course of the Encuentro or to penetrate southwards from the river at that point.

112. A map accompanying Moreno's book is reproduced as Map No. CH.5. It shows the three small lakes referred to in the book, but marks the area to the west, north west and north of the lakes as unexplored. A small line, running in an easterly direction, which may represent the Encuentro, appears on the map at approximately the spot where the Encuentro joins the Palena.

113. It can thus be seen that prior to the commencement of the proceedings leading up to the 1902 Award no explorer had actually followed the course of Encuentro; no one had suggested that it had a western, or indeed more than one, branch; no one had identified a mountain by the name of Cerro Virgen; and no one had suggested that the Encuentro had its source on the western slopes of that mountain.

114. Chilean exploration of the region surrounded by and lying to the west of the Palena was not

carried further before the institution of arbitration proceedings, save for a journey, made in January, February and March 1898, by Don Alejandro Bertrand, the technical head of the Chilean Boundaries Commission, which passed close to the Palena. However, his route ran on the eastern side of the river.

115. The following maps illustrate the Chilean position in 1898:

- The general line of the frontier, in small scale:

Map No. CH.8 showing the route of Bertrand's expedition 1898;

- The detailed line of the frontier, in large scale between  $43^{\circ}30'$  and  $44^{\circ}0'$ :

Map No. CH.9 presented by Chile to the Tribunal, 1901.

116. In short, as a consequence of the Chilean claim in the proceedings leading up to the 1902 Award that the boundary was the continental water divide - a line which runs to the east of the Palena basin - the inaccessible areas of the region now in dispute did not need to be, and were not, explored.

117. Similarly, Argentine explorers seem to have left the area untouched. In the same way as Chilean attention was centred on the continental water divide line to the east, so Argentine concentration was upon an alleged line of high peaks passing west of the area now

in dispute. The Argentine position was stated formally and in detail at a meeting of the Chilean and Argentine experts held in Santiago on September 3, 1898, and is illustrated in detail in Map No. CH.6, which accompanied the Argentine Evidence in the Arbitral Proceedings. An expedition of the Argentine Boundaries Commission for the exploration and survey of the disputed zones between Lat.  $41^{\circ}$  and  $52^{\circ}$ S, claimed to have passed westward down the Palena but did not claim to have entered the unexplored area in question. (See Map No. CH.11.). At the same time, it is interesting to observe that in this map, which is described as "Sketch of the principal routes traversed by the Argentine Boundaries Commission", the system of rivers flowing from the Lakes Engaño is marked in in some detail, though their eventual junction with the Palena is not clearly specified.

118. It is pertinent to refer again in this connection to the following passage in the Chilean reply to the Argentine Evidence:

"But, generally, it must be borne in mind that, as a matter of fact, of all the vast mountainous zone comprised between parallels  $43^{\circ}40'$  and  $44^{\circ}$  and between the sea and the upper valley of the River Carrenleufu, nothing is known beyond the existence of half-a-dozen prominent summits, - the extent, mutual connection, direction and height of the different ranges, in a word, all the features which should be taken together into account in determining the orographical "main chain" in a mountain system, being completely unknown."<sup>1</sup>

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1. Chilean Statement (1902, Vol. IV, Ch. XXXVII, at p.1354.

And attention may be drawn to the remark which Captain Dickson added to the Tabular Statement of Boundary Pillars erected on the Chile-Argentine Boundary by the British Delimitation Commission, 1903. Against the entry for Post 16 he said:

"The map of this region is very inaccurate being prepared from an itinerary report. None of the engineers with me knew the country or the names of points, etc., never having been in the district before."<sup>1</sup>

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1. Annex No. 29.

THE DISCOVERY AND CONSEQUENCES OF THE ERROR

119. The Chilean Government became aware only very gradually and at a relatively late date of the error described above. Although there were Chilean settlers in California as early as 1910, as well as considerable administrative activity connected with the area, with Palena as its base, from 1929 onwards, the fact remains that the central organs of government in Chile came to appreciate the existence of a problem in the area only some years after the commencement of the work of the Mixed Commission established in 1941. In all the circumstances, this delay is hardly surprising. There had been no friction in the area of a kind which would lead to detailed consideration of the frontier. The area was, and remains, remote, and till recently accessible by road from Chile only during the summer months.

120. The Argentine Government, on the other hand, was conscious from an early date that all was not right with the boundary as drawn on the Award Map in the sector between Posts 16 and 17. It will be recalled that in his report of 1 June, 1903<sup>1</sup> Captain Dickson had stated that the Argentinian observer in the demarcation

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1. Annex 28, and see paragraph 88 above.

process, Señor Frey, had at first thought that the Encuentro was at the eastern foot of a ridge of high peaks to the west of what is now Post 16, but that after trying to reach the ridge, he had returned and declared that he believed that, after all, the river at Post 16 must be the Encuentro. Nonetheless, on November 9, 1903,<sup>1</sup> the same Señor Frey wrote a letter which attracted official notice and adoption in which he said that Post 16 must be wrongly placed since the river which joined the Palena there had no connection with the Lagunas del Engaño (contrary to what was supposed according to the current maps to be true of the Encuentro) and could not therefore be the Encuentro. He added that the result of maintaining the river which joined the Palena at Post 16 as the beginning of this sector of the boundary line would be a line which would place the whole of the Engaño basin (including the Lakes) in Chilean territory. This letter from Señor Frey was subsequently published, in 1908, in an official publication, La Frontera Argentino-Chilena, Demarcacion General 1894-1906, produced by the Argentine Government Oficina de Limites Internacionales.<sup>2</sup>

121. Furthermore, on 17 June 1907 Señor Luis A. Alvarez prepared in Buenos Aires a sketch map,<sup>3</sup> which

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1. Annex No. 31.

2. Vol. I, p. 228 et seq.

3. See Map No. CH.18.

Par One

appears in the official Argentine publication above referred to, in which he clearly depicts Post 16 as being placed at the junction of the Palena and a river which in all significant detail resembles the Encuentro, but is given no name. At the same time, another river, joining the Palena some kilometres downstream and appearing to have its source on the Cerro Virgen is given the name "Rio Encuentro". It is thus obvious that Señor Alvarez in 1907 was quite aware that the river which joined the Palena at Post 16 did not have its source on the Cerro Virgen and, equally, that the river which had its source on the western slope of the Cerro Virgen must join the Palena some distance downstream from Post 16. This representation of the position was repeated in an official Argentine map published in 1907 by the Argentine International Boundary Office,<sup>1</sup> which, in addition, goes so far as to mark the boundary as running through the point of junction of this so-called Encuentro and the Palena and thus as by-passing Post 16. The same representation of the frontier appears in the Argentine map of 1928, corrected in 1939, prepared by the Military Geographical Institute<sup>2</sup>, though with the significant difference that the marking of Post 16 disappears completely, despite the fact that

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1. See Map No. CH.17

2. See Map No. CH.19

Posts 15 and 17 are still marked.

Part One

122. It is significant too that in 1907 the Argentine Government appears to have taken the possibility of error in this area sufficiently seriously to open a file in the Ministry of Foreign Affairs entitled "Concerning the location of the River Encuentro". Needless to say, the Government of Chile has not seen this file, but its existence was ascertained from the Annual Report of the Argentinian Ministry of Foreign Affairs for 1917,<sup>1</sup> by which year the file is stated to have consisted of 58 folios and an index page.

123. By 1913 the Argentine Government was moved to take its concern one step further. On 9 December, 1913 the Argentine Legation in Santiago left a memorandum<sup>2</sup> with the Chilean Government in which it alleged that the landmark for Post 16 was wrongly located. In a paragraph of very great significance the Memorandum said:

"This boundary post is not on the spot indicated in the Arbitral Award, i.e. opposite the mouth of the River Encuentro, but further to the east of this point, opposite the mouth of a different river which has its source in the neighbourhood of the Cerro Herrero, and because of this the frontier line deviates from its true direction both to the north and to the south of the rio Carrenleufu or Corcovado, and it is impossible for the dividing line to pass through the Pico Virgen /sic/ <sup>3</sup> which was expressly

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1. Memoria del Ministro de Relaciones Exteriores y Culto de la Republica Argentina, 1917, p.806.

2. For full text, see Annex No. 32.

3. Clearly a reference to the Cerro Virgen.



pointed out as a frontier point in the Award, and for it to continue from there southwards through the other points indicated in the Award."

124. The Chilean Government in its reply of 26 December 1913<sup>1</sup> disagreed with the Argentinian contention. The reply referred to the circumstances in which the Post 16 was located<sup>2</sup> and concluded that the Post was properly placed. By a further note of 26 January, 1914<sup>3</sup> the Argentine Government sought to record an agreement between the two governments that each government would nominate an expert to examine the location of Post 16, and if the two experts could not agree as to its proper location they would inform and report to their respective offices. On 17 June, 1914,<sup>4</sup> the Chilean Government replied that "it would not object to sending an expert there again", but thought it preferable that the experts should report individually to their governments rather than submit a common report. The initiative was thus left clearly with the Argentine Government to move that the experts be sent; but nothing more was done, and the calendar of correspondence between the governments on the subject of Post 16 and the River Encuentro remains blank until the activities of the Mixed Commission in the years subsequent to 1942.

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1. Annex No. 33

2. See paragraph 90 above.

3. Annex No. 34

4. Annex No. 35

125. The nature of the error being such as is described above, the meaning of the relevant passages of the Award and Report can only be settled by agreement between the Parties or by the decision of a competent tribunal. There being no agreement between the Parties regarding the interpretation of the Award and Report, and the matter having been referred to arbitration, the task of resolving the difficulty now lies with the Court, whose function is determined by the Agreement for Arbitration.

126. The Court is directed to report on "what, on the proper interpretation and fulfilment of [the 1902] Award, is the course of the boundary" in the sector between Posts 16 and 17. Thus, by an instrument laying down rules of law binding upon the Court and the Parties, it is made plain that (i) the validity of the 1902 Award and Report remains unaffected by the error; (ii) no issue arises upon the location of Posts 16 and 17; (iii) the only part of the boundary with which the Court is concerned is that relating to the sector between Posts 16 and 17; and (iv) the settlement of the boundary is to be determined upon the basis of a proper interpretation and fulfilment

Part One of the 1902 Award.

PART TWO

THE CHILEAN SUBMISSION AS TO THE

CORRECT BOUNDARY

INTRODUCTION

1. Having set out in Part One of this Memorial the nature and origin of the present dispute, the Government of Chile now proposes, in this part of the Memorial, to place before the Court its own submissions as to what, on the proper interpretation and fulfilment of the 1902 Award is the course of the boundary in the Sector between posts 16 and 17.

2. The Court should, it is submitted approach the question on the basis of the principles applied by the 1902 Tribunal and should report on the course of the boundary in the sector between Posts 16 and 17 in the light of the facts as they are now known.

3. The Government of Chile does not apprehend that there will be any dispute of significance between the Parties as to the aids which the Court may invoke in discharging its task of interpretation. It is taken for granted that in general the principles of interpretation of a judicial award are the same as those for any other legal instrument; and that, in consequence, the Court will read the Award as a whole, with a view to determining its general purport and meaning, will refrain from attributing to words or phrases a meaning which would not be in conformity with the paramount purposes and principles of the Award, and will have regard to the facts and documents leading up to the Award as assisting towards an understanding of the intention of the draftsmen.

CHAPTER II

THE PRECISE SUBMISSION OF THE GOVERNMENT

OF CHILE

4. In the submission of the Government of Chile the course of the boundary under the 1902 Award is, in the sector between Posts 16 and 17, as follows:

5. Starting from Post 16, the boundary follows the River Encuentro upstream from its junction with the Palena to the point, at approximately  $43^{\circ}30'30''$  South, where it changes its general north to south direction to one from west to east, and then continues to follow the river in an easterly direction to its source on the western slopes of the Pico de la Virgen a mountain of some 2100 m. height situate towards the northern end of the cordon of high mountains comprising Co. Central and Co. Condor, named Cordon de las Virgenes. From this Peak the line follows the local waterparting southwards to Post 17: that is to say, the line is projected southwards along the water divide touching the highest summits of the cordon, of which the heights are 1970 m., 2100 m., 1940 m., and 1930 m. From the last of these heights the line continues along the said Cordon de las Virgenes following the high summits, then circling the

Lagunas del Engaño (i.e. Lakes Engaño, Redonda Berta and Blanca, crossing between them and Lake Huacho, then taking an orientation to the west through heights of 1776, 1800, 1760 and 1770 metres; and finally turning south to Post 17.<sup>1</sup>

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6. The Government of Chile will contend that the line of boundary set out above represents a proper interpretation and fulfilment of the 1902 Award. Accordingly, the Government of Chile will develop its case on each of these aspects of the matter (interpretation and fulfilment) in the two Chapters which follow.

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1. See Map No. CH 26 for the line described above.

CHAPTER III

FIRST: THE INTERPRETATION OF THE  
AWARD AND REPORT

7. In approaching the interpretation of the 1902 Award and Report, it may first be helpful to re-state summarily the general position of the Government of Chile on the effect of the relevant words used in those instruments.

8. The submission of the Government of Chile starts from the proposition that the River Encuentro is the river which joins the Palena at Post 16. This proposition cannot be a matter for argument in this case. This river has its source on the western slopes of the Pico de la Virgen, a summit in the range known as the Cordon de las Virgenes. At a point some 20 km. from its source and 9 km. from its junction with the Palena, the Encuentro is joined by the Arroyo Lopez, which is itself joined from the south by the Arroyo Mallines.

9. The identification of the Encuentro in these terms is believed by the Government of Chile to coincide not only with the objective requirements of the situation but also with Sir Thomas Holdich's intention to adopt the line of a river which would lead him directly to an elevated



watershed connected to Post 17. No other definition of the Encuentro would secure the fulfilment of this intention. Certainly the Argentinian suggestion that the Arroyo Mallines (a tributary of a tributary) is the Encuentro does not, for the upper reaches of the Arroyo Mallines expire in the Cordon de los Morros at a relatively low altitude and can only be connected with the local water-parting which runs south from the Cerro Virgen by an arbitrary line which itself follows no waterparting for a great part of its length. Any such line would also cut off the lower reaches of the Engaño or Salto River (which are part of the basin of the Palena below Post 16), from their source in the Lagunas del Engaño.

10. It can be seen from this summary that the Chilean interpretation of the definition of the boundary line is based upon an analysis which divides that definition into two parts, one principal, the other dependent. The main part relates to the words "the River Encuentro", for the reference to this river in the Award and Report constitutes the first and determinative element in the description of the boundary between Posts 16 and 17. Once the line of that river has been traced to its source, one comes to the dependent part of the argument - the part covering the words which describe the section of the boundary

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running onwards from the source of the Encuentro to Post 17. This part is "dependent" because, of course, it depends upon its starting point which can be none other than the source of the Encuentro, wherever that may be.

(A) THE PRINCIPAL PART OF THE DEFINITION -  
"THE ENCUESTRO"

11. In identifying the River Encuentro there are in theory two distinct problems: (1) that of finding which of the rivers running into the Palena from the South properly bears that name; and (2) that of identifying the geographical features of the river so found.

(1) Identifying the Encuentro at its junction with the Palena

12. In the present arbitration, there can in fact be no question as to which of the rivers flowing into the Palena from the South is the Encuentro. Post 16 is fixed and is not open to controversy. By definition it is placed opposite the junction of the Encuentro with the Palena. Accordingly, it is an indisputable fact that the river which flows into the Palena opposite Post 16 is the Encuentro.

13. The question which arises in connection with the Encuentro is, therefore, really one of identifying its true body.

(2) The lower section of the Encuentro

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14. The geographical facts are as follows: when one traces the Encuentro upstream from its junction with the Palena one finds that there is a single unmistakable water course which runs first east from the Palena for 3 kms. and then turns south to run, again in undivided form, for another 6 kms.

15. That this whole stretch of water can properly be called "the Encuentro" there is really no doubt; and for convenience this section will hereinafter be called "the lower section".

(3) The differences between the Parties.

16. The differences between the Parties arise at the point where the Encuentro flowing from its source on the western slopes of the Pico de la Virgen is joined from the south by the Arroyo Lopez. In its upper reaches the Arroyo Lopez flows from the east, and then turns north. At the point at which it turns it is fed by another stream, the Arroyo Mallines. This flows from its source in a westerly direction and then turns northwards to join the Arroyo Lopez. The Chilean position, for the reasons already given - notably because the Encuentro is the only river which, finding its source on a high mountain,

provides a direct and continuous line to a local waterparting leading to Post 17. - is that the Encuentro (within the meaning and intention of the 1902 Award) is the river which has its source on the western slopes of the Pico de la Virgen. The Argentinian contention appears to be that the Encuentro consists, first of the lower section, then of part of the Arroyo Lopez and finally, from the point where the Arroyo Lopez is fed by the Arroyo Mallines, of this latter stream. For convenience of reference in the pages which follow, the upper part of the Encuentro, according to the Chilean contention, will be called "the major channel" and the upper part of the Encuentro according to the Argentinian contention will be called "the minor channel". "Channel" is adopted here as a neutral word, and is not intended to place upon a footing of equality the two watercourses representing the opposing positions.

17. These divergent positions are reflected in the maps emanating from the authorities of each State. Thus the Chilean Carta Preliminar attaches the name "Rio Encuentro" to the whole river comprising the lower section and the major channel; and the names "Arroyo Mallines and Arroyo Lopez" to the minor channel. On the other hand, so far as Argentina is

concerned, Sheet 77, "Esquel"<sup>1</sup>, of the map prepared in 1959 by the Argentine Military Geographic Institute gives the name "Rio Encuentro" to the lower section plus the minor channel and gives to the major channel the name "Falso Engaño".

(4) The Grounds of the Chilean contention

18. There are three principal grounds on which the Government of Chile supports its contention as to the proper identification of the Encuentro.

(a) The intentions of Sir Thomas Holdich

19. First, as already indicated, there can be little doubt that Sir Thomas Holdich was seeking in this sector to find a river which could provide a clearly identifiable line leading to a high mountain whose peak would be on a local waterparting which could be immediately followed to the next fixed point. It is equally clear that only according to the Chilean definition of the Encuentro can such a line be expressed in terms of the course of that river (as is required by the Award).

20. It is irrelevant, the Government of Chile submits, to say that Sir Thomas Holdich assumed that the line of the Encuentro led to the Cerro Virgen. The assumption was simply erroneous because the map on which it was based was in this respect quite wrong.

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1 Map No. CH.25

21. As can be seen from the Note to Chapter VII of Part I above, where detailed reference is made to the state of geographical knowledge about this area in 1902, little was known about the Encuentro except that a fairly considerable river of that name joined the Palena from the south.

22. It should be borne in mind too that Sir Thomas never actually saw either the junction of the Palena and the Encuentro or the lie of the land through which he supposed the Encuentro to flow. The Narrative Report of his survey journey shows that Sir Thomas never penetrated the valley of the Palena westward of the point where the river changes direction from north to west. Moving southwards from the Colony of the 16th October, Sir Thomas crossed the Huemules River at Day's farm and then continued southwards along the valley of the Corcovado to Vargas. As Sir Thomas said in his Narrative Report, "we were forced to the Eastward by the great transverse Cordillera which encloses Lake General Paz". Thus, at no point does Sir Thomas appear to have been further west than Day's farm (which is 24 kms. east of the junction of the Encuentro with the Palena); nor does he seem ever to have moved from the eastern side of the valley of the Corcovado. Nor is it likely that he could have seen the valley of California at all from any point on

his journey from the Colony of the 16th October to Day's settlement; and from that point southwards his view would have been blocked by the cordon comprising Co. Fierro, Co. Herrero and Co. Central (as they then appeared on the maps available to him). At best, his visual impression of the area could hardly have been better than that which appears in the photograph included as Plate LXXVI in the Argentine Evidence to the 1902 Tribunal; and this is manifestly inadequate as a basis for forming any opinion on the nature or direction of the Encuentro. Even Capt. Dickson, it will be recalled, when he stood on the morro above Post 16, within a few hundred metres of the junction of the Encuentro and the Palena, and only a few kilometres from the point at which the Encuentro bends away to the East, failed to perceive the true direction of the river - for he made no comment upon the error in the map (except, of course, his general observation that the maps of this region were useless for the purpose of identifying any point).<sup>1</sup>

23. It might, perhaps, have mattered less if Sir Thomas had been able to use, as a substitute for first-hand knowledge, a reliable map of the area. But, as has been shown in Chapter VII of Part I above, no such map existed. True there were a number of maps

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<sup>1</sup> See the entry in the Dickson Report for 15 March 1903, Annex No. 28

on which the River Encuentro was marked; but none of them showed it accurately. Even on the map which Sir Thomas used for the delineation of the line namely, the Second Argentine Map, the lower reaches of the Encuentro appear as dotted line and were, possibly, regarded as somewhat uncertain.

24. In the light of this fundamentally defective knowledge of the river, what can be said about Sir Thomas's intentions in this regard? Clearly, he meant to use the river which he knew existed and which he understood to be called the Encuentro as part of the boundary line. But the question remains, did Sir Thomas intend the boundary to follow the line of the Encuentro as drawn (presumably by him) on the Award Map, regardless of the fact that a line leading to an elevated watershed with geographical continuity to Post 17 would follow a different route?

25. The Government of Chile submits that this question must be answered in the negative. There is nothing whatsoever in present knowledge of the circumstances of the Award to suggest that Sir Thomas attached some special importance to the exact line as drawn by him on the map. What he was concerned to do was to establish a boundary on the basis of the principles which have already



been set out in Section C.2 of Chapter V of Part I above. (para 63 et seq.) The line of the Encuentro was selected by him, as already suggested, because it constituted the first convenient named landmark west of Steinkamp and Illin which enabled existing Argentinian colonization (as he believed it to be) to be protected without unduly infringing upon reasonable Chilean claims. Moreover, so Sir Thomas thought, it ran directly to an elevated watershed and divided no river basins. But whether the line of the Encuentro ran due south, or south then east and then south, was not a matter of importance. The essential point was that there should be a line; that it should be readily identifiable; and that it should lead directly to a high mountain connected by an elevated watershed with Post 17. It is, so the Government of Chile submits, virtually inescapable that what Sir Thomas intended was not the line of the Encuentro as he might have been led to visualise it by the Second Argentine Map, but the line of that river as it might actually run to a high watershed with geographical continuity to Post 17.

26. This is largely borne out by the passage in Sir Thomas's letter of 30 June 1903<sup>1</sup>

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1 Annex No. 30

(cited above in Part I, paragraph 87), when he observed that "it was by no means easy to identify the Encuentro (an important feature in the demarcation) so buried is it in the midst of wild untrodden mountain solitudes and so difficult to reach". This confirms that it is only the true line of the Encuentro, wherever it ran, that mattered, because this line was expected to lead to an elevated watershed about whose subsequent course there could then be no issue.

27. So much then, for the first ground which supports the Chilean contention that the Encuentro referred to in the Award must be equated with the Encuentro as described above; it is only by such an equation that the purpose and intent of Sir Thomas Holdich, as the principal draftsman of the line, can be adequately met.

(b) The physical characteristics of the Encuentro

28. The Government of Chile turns, accordingly, to the second ground on which it supports the contention just mentioned. This is that an objective assessment of the geographical characteristics of the two channels which run into the lower section of the Encuentro must lead to the conclusion that the degree of continuity and identity between the major channel and the lower section is such that they must be regarded

as constituting the Encuentro, as against a combination of the lower section and the minor channel.

29. Having regard to the inaccuracy of the Second Argentine Map, the lack of any complete description of the river at that time, and the absence of any other pertinent contemporary material, one is obliged to have recourse to other tests. The first is to ascertain which of the two channels possesses more fully the physical characteristics of a main stream so as to justify treating it as the continuation of the lower section.

30. In the submission of the Government of Chile, a variety of physical characteristics show clearly that the proper continuation of the Encuentro is along the major and not the minor channel.

31. The first factor is that the length and size of the major channel, together with the area which it drains, are significantly greater than the comparable features of the minor channel. This is shown clearly by the comparative figures cited below:

|                      | <u>Major channel</u>                                | <u>Minor Channel</u>   |
|----------------------|---|--|
| <u>Length</u>        | (from junction with Arroyo Lopez to source) 20 kms. | (from junction with Encuentro to source of Arroyo Mallines) 9 kms. |
| <u>Drainage area</u> | 86 square kilometres                                | 55 square kilometres   |

32. As can be observed from the maps which are appended hereto, the elevation to which the major channel rises is notably greater than that of the minor channel. The Arroyo Lopez, which in its lower section constitutes the minor channel, cannot be traced beyond a height of about 1,300 m., and the Arroyo Mallines, which flows into the Arroyo Lopez, cannot be traced beyond a height of 1,000 m. In both cases the stream disappears into grass. The major channel, by contrast, can be traced right back up the western slopes of the Pico Virgen to a height of nearly 2,000 m.

38. The second feature which shows that the major channel is a distinctly larger water-course than the minor channel is that it discharges almost double the quantity of water at the point of junction than does the minor channel. This is strikingly shown by the details of the limnometric report which appears as Annex No. 126. As stated in the report, the conclusion to be drawn from the measurements appended to the report is that the major channel provides 68% of the total volume of water in the lower section and the minor section provides only 32%.

34. Thirdly, regard should be had to the similarity of the alluvial deposits of the major channel

and those of the lower section. Both share the same coarseness of alluvial deposit, due to the fact that larger blocks of rock have been carried down by the greater volume of water in the major channel, a feature which is naturally continued in the lower section of the river. By contrast (a contrast which is clearly visible at the junction of the two channels), the bed of the minor channel is composed of much finer material, due to the relatively small volume of water it has contained.

35. Fourthly, for the greater part of its length the major channel shares the characteristic of the lower section of running through a canyon or ravine in the manner typical of a river in a high cordillera region; whereas the minor channel meanders through relatively shallow streams in the floor of the valley.

(c) Treatment of the major channel as the boundary.

36. A second test which may properly be employed for determining the true course of the Encuentro is that of the attitude and conduct of both the inhabitants of the immediate area and the local Chilean authorities. It is, so the Government of Chile believes, of considerable significance that the local inhabitants, knowing as they did that the boundary with Argentina was the Encuentro, had no

hesitation in developing both sides of the minor channel, but never crossed the major channel into what, on the present Chilean contention, is undoubtedly Argentinian soil. This can, it is believed, be properly regarded as evidence that the local people regarded the major channel as the boundary river. The shrewd common sense of the peasant no doubt led them to find it scarcely credible that the boundary should divide the California Valley.

37. It is also relevant to refer to the sketch maps prepared by Chilean Government surveyors in connection with grants of land titles in the disputed area. Four such maps have been traced (Documents 69, 74, 76 and 126 ).<sup>1</sup> Three of them are small sketch maps illustrating the area of single landholdings. They are all dated 1947 and were prepared by Ernesto Carvajal R. The fourth map, which is a larger one, illustrates the landholdings in the whole of the Rio Encuentro area. It was drawn in 1950 on the basis of data collected by Sr. Carvajal in 1947.<sup>2</sup> All four maps show:

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1. These will be found in the Volume of Additional Documents. See note to para. 49 below.
  2. The underlining of Nos. 14, 15, 17, 18, 19 and 20 in the list in the top right hand corner of this map, together with the figure of 2,082.3 Has., was added, it is believed sometime after 1950, possibly in 1955.

Extracts of the original field notebooks containing the data collected by Sr. Carvajal have been photographed and appear as Doc. No. 127. These notebooks are being deposited with the Registrar for the use of the Court if it so desires.

(i) the minor channel bearing the name "Arroyo Falso Engano" (instead of the usual names Arroyo Lopez and Arroyo Mallines), in contrast with the lower section which bears the name "Rio Encuentro"; and

(ii) Chilean occupation extending to the eastern side of the minor channel. One of the small maps and the large map show the lower section of the Encuentro as clearly as substantially larger watercourse than the minor channel - as is, indeed, reflected in the fact that one is called 'Rio' and the other 'Arroyo' - and as continuing towards its source beyond the point at which it is joined by the minor channel. In addition, the words "Republica Argentina" as indicating Argentine territory appear only in the top right hand part of both these maps and represent only the area east of the lower section and north of the major channel.

(5) The "western branch" - a reference without meaning.

38. It is at this point convenient to advert briefly to the phrase which appears in the Report as qualifying the reference to the River Encuentro:

"... Along the course of its western branch...". Do these words in any way affect the general contention advanced in this section that the boundary must follow the major channel? The Government of Chile believes that the answer is No, and for the following reasons:

39. (i) First, the reference to "the western branch" must be looked at in the context of the Award map.

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It has already been indicated that the river marked on that map as the "Encuentro" was not, and could not be the true Encuentro, either because the latter lay further to the east and the river marked as "Encuentro" was a fiction, or because the course of the Encuentro as marked on that map diverged so fundamentally from that of the real river. Clearly, in these circumstances, a verbal reference to "the western branch" of the river shown on the map can have no value. This does not in any degree affect the principle which led Sir Thomas to select a river line or the fact that Sir Thomas chose the Encuentro as that line.

40. (ii) Once it is established that (a) the river which the Arbitrator intended to follow is one which led directly to an elevated watershed having geographical continuity to the next fixed point, and (b) the major channel fulfils this intention and (c) there is no other branch of the Encuentro which fulfils this intention, then the question of the Western branch ceases to have any relevance.

41. (iii) In any event, the Government of Argentina has by its own action shown that it attaches no importance to the reference to the western branch.

(a) In this connection, reference may again be made to the Argentine Note of 9 December 1913<sup>1</sup>

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1. Annex No. 32.



The reason given by the Argentine Government in this Note for its contention that the river opposite Post 16 was not the Encuentro was that it has its source in the neighbourhood of the Cerro Herrero, not on the western slopes of the Cerro Virgen. No reference was made in the Note to the fact that the river opposite Post 16 had no western branch and could not for that reason be the Encuentro; and it seems clear that the "western branch" was not regarded as a factor of significance.

(b) Furthermore, upon examination of the map which the Argentine Government had used as the main cartographic support for its case since 1955, namely the Mixed Commission map, it will be seen that even there the Encuentro has no western branch, and cannot have one. For the name Encuentro is given exclusively to the minor channel; and the name Falso Engaño was given to the major channel. For the map to have been fully consistent with the wording of the Award, it would have been necessary to give the name Encuentro to both the minor channel and the major channel, and then to have traced the boundary line along the minor channel as representing the more westerly of the two branches of the river. The fact that this was not done suggests very strongly that in 1955 the concept of "the western branch" was not one which struck the Argentinian authorities as having, in all the circumstances, any applicability.

B. THE DEPENDENT PART OF THE DESCRIPTION

42. As indicated above, the controlling part of the definition of the boundary between Posts 16 and 17 is the reference to the River Encuentro; and, as elaborated in the preceding section, that reference must be read as meaning the lower section continued along the major channel. It is now necessary to consider the effect of the other words which complete the description of the line leading to the next fixed point. The Award continues:

"to the peak called the Virgen, and thence to the line which we have fixed crossing Lake General Paz ..."

The Report continues:

"... to its source on the Western slopes of Cerro Virgen. Ascending to that peak, it shall then follow the local waterparting southwards to the northern shore of Lago General Paz ..."

43. The dependence of this part of the definition upon the correct line of the Encuentro is evident. For it is clear that between Posts 16 and 17 the Arbitrator contemplated a boundary line consisting of two sections: a river section and a waterparting section - the point of junction between the two being the mountain in the water-divide where the named river had its source. And it is not possible to find the correct waterparting until the source of the correct river is identified. Once this is done,

however, the identification of the waterdivide line is virtually automatic. It is manifest that once the proper course of the Encuentro has been marked and its source found on the western slope of the Pico de la Virgen, that is effectively the answer to the question put to the Court upon the proper course of the boundary between Posts 16 and 17. The tracing of the waterdivide line upon the basis of accurate knowledge of the topography now available can be found on Map No. CH.26.

44. The only matter which calls for some comment, though, is the specific reference in the Award and the Report to the Cerro Virgen. Does this, it may be asked, convert the Cerro Virgen into an essential point in the boundary line in this sector? There are, it is submitted, two principal reasons for giving a negative answer to this question.

45. First, it must be recalled that the Court is concerned now with the construction of a line rather than with the identification of points. Indeed, the Court is specifically asked "... what ... is the course of the boundary?" Consequently, the Court must be governed by the lines which it finds as representing the true intent of the Award. If the point of intersection of those lines does not coincide with a named place apparently intended by the

Award to represent the meeting of those two lines, then the name of the place referred to must be treated as subordinate to the function which naming that place was intended to serve. Here, what matters is the intersection of the river-line and the water-divide line; not the naming of the place of intersection as the Cerro Virgen. This is but another illustration of the generally accepted principle of construction that when a text contains mutually inconsistent or contradictory provisions, the dominant or essential words override the secondary or subordinate words.

46. Secondly, it is in any event clear that the reference to the Cerro Virgen should not, in all the circumstances, be taken at its face value. It has already been pointed out, in the section dealing with the factors which led Sir Thomas to select the line which he did between Posts 16 and 17, that Sir Thomas was concerned to find his way to an elevated watershed with geographical continuity to Post 17, as was to some extent required by the reference in the 1881 Treaty to "the highest summits of the Cordilleras (of the Andes) which divide the waters". And, again as indicated above, it so happens that the maps (principally the Second Argentine Map) on which Sir Thomas worked, and by reference to which he

gave verbal description to the line, went through a process of evolution which tended to shift in a westward direction the line of the highest mountains. As a matter of fact, in this particular sector, the Second Argentine Map, which was used by the Tribunal, deleted the references to some of the names and all of the heights of the high mountains forming the Cordon de las Virgenes which were depicted in the previous Argentinian maps and replaced it by a blank area bearing the word 'Nevados' (snowy mountains), crossed by the word 'Central'<sup>1</sup>. In consequence, Sir Thomas may well have been led to believe that the Cerro Virgen formed part of a range which had greater significance as a local waterdivide than the Cordon de las Virgenes. In fact, if Sir Thomas held such

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1. Direct comparison of the Award map and of the Second Argentine Map (which, it will be recalled is the term of reference for Sheet 3 of Argentine Map XVIII) shows that the two, though closely identical in all major aspects, are not completely identical. The Award Map contains some additional contouring and two additional names of mountains in the area just east of the Encuentro and south of the Palena. The explanation of this, however, is that these details appear in the bottom part of Sheet 2 of the Second Argentine Map; and when Sheets 2 and 3 were pasted together to form the Award Map, which is a continuous chain of sheets, there was an overlap between the bottom of Sheet 2 and the top of Sheet 3. It is this overlap which is reflected in the additional detail in the Award Map. The detail does not appear in the Demarcation Map, which, once again, consists of separate sheets. (See Maps Nos. CH.12A, CH.12B, CH.13, CH.14A and CH.14B).

a belief, as seems probable, it was misconceived. The lesser range of which the Cerro Virgen forms part is markedly inferior to the Cordon de las Virgenes in height and in length along its main north-south axis. Moreover, the former range has little significance as a watershed in that it is only a source of minor streams which themselves are no more than tributaries of tributaries of the Engaño/Salto, in contrast with the Cordon de las Virgenes which is the direct source of a large number of main tributaries of the major river - the Palena.

47. Had Sir Thomas correctly appreciated the relative importance of the two ranges as waterdivides it would seem more consistent with the principles which he stated and otherwise normally followed to have mentioned the more easterly cordon. Presumably, he was inclined to refer to the Cerro de la Virgen because the map led him to believe that the Encuentro ran in that direction; had he known that the Encuentro chosen by him as a frontier rose on the eastern cordon, he would have referred to a specific mountain in that range as the point, above the source of the Encuentro, from which the waterparting should run southwards.

C. CONCLUSION: CONSISTENCY OF THE CHILEAN  
SUBMISSIONS WITH THE PRINCIPLES OF THE  
AWARD

48. In concluding this Chapter, it may be added that the submissions here made as to the proper course of the boundary between Posts 16 and 17 are fully consistent with the principles on which the 1902 Award and Report were founded. It is clear that only by making the Encuentro follow the course of the lower section and the major channel is it possible in this sector to reach an elevated watershed with geographical continuity leading to Post 17. Moreover, it is only by continuation of this line along the watershed of the Cordon de las Virgenes to Post 17 that it is possible to respect the integrity of the river basin of the tributaries of the Palena joining it below Post 16. Again, the consequence that the area of the relevant sector would thus remain as Chilean territory would fully conform with Sir Thomas's concepts of the relevance of occupation, value and strategy. The boundary line drawn in accordance with the Chilean interpretation encloses, as will be seen, a region inhabited by an overwhelmingly Chilean population. It is unthinkable that considerations of value could tilt the balance in favour of transfer of the whole or any part of this region to Argentina, having regard to the immense value of the lands just to the east, between the Palena and the line of the original Chilean claim (namely, the continental water divide),

which were awarded to Argentina in 1902 and which must be regarded as having satisfied all Argentine claims on that score. Finally, it is apparent from a glance at the map that in so far as considerations of strategy can have any current importance, they are as well, if not better, served by the line of the Chilean submission as they are by the line for which Argentina contends.



SECOND: THE FULFILMENT OF THE AWARD

49. The Court has been asked to report as to what "on a proper interpretation and fulfilment" of the 1902 Award is the course of the boundary in the relevant sector. In the preceding Chapter of this Memorial the Government of Chile has developed its case as to the proper interpretation of the Award. It will, in this Chapter, present to the Court the outlines<sup>1</sup> of the material on the basis of which the Court can consider the question of the fulfilment of the Award by the Parties and now by the Court. For it seems clear that the Court will wish to take into

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1 The Government of Chile has encountered some difficulty in tracing all the materials illustrating Chilean activity in, and in relation to, the disputed area. Accordingly, the Chilean Government has gathered together in a volume distinct from that containing the Annexes, photocopies and translations of the additional documents which are referred to in this Chapter. The papers in this volume will be cited as "Document No. ". The originals of these documents will be made available for inspection, if required. Apart from these documents, the Chilean Government is also obliged to reserve its right to seek the leave of the Court to file supplementary material relating to the matters dealt with in this Chapter.

consideration, recognise and give effect to the conditions of fact which have developed in and in relation to the area of the relevant sector since the date of the Award and as they exist to-day.

50. For this purpose the area which the Court will wish to consider is that generally known at "California". By this the Government of Chile understands, in accordance with the meaning which for many years has generally been given to that name by both the settlers and the governmental authorities, the populated area as shewn in Map No. CH.27 consisting of the area south of the River Encuentro, both banks of the Arroyo Lopez and Arroyo Mallines, both banks of the curve made by the Engaño/Salto round the Cerro Campana (as marked on that map), the Valle Hondo, Las Horquetas and the Valle Norte.<sup>1</sup>

51. The material which follows will be arranged under five headings to show:

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1 It should be borne in mind that in many documents emanating from the settlers and governmental authorities the area thus described as "California" is called "the California Valley". Sometimes also the names "California" or "California Valley" are used in the documents in the more restricted sense of the locality consisting of the land on the banks of the Arroyo Lopez and Arroyo Mallines together with the land on both banks of the curve made by the Engaño/Salto round the Cerro Campana.

- (A) The development and extent of Chilean settlement in California;
- (B) The identification with Chile of the settlers of this area;
- (C) The extent of Chilean governmental activity in the locality;
- (D) The absence of any comparable local Argentinian activity; and
- (E) Chilean activity at the intergovernmental level.

A. CHILEAN SETTLEMENT IN CALIFORNIA

(1) General background to colonization in the Palena region.

52. It may be convenient, by way of setting the historical framework, to refer first to the extent of colonization in the Palena region in the period prior to the 1902 Award. At that time the region would appear to have been uninhabited. The valleys and mountain ridges situated in the middle sections of the River Palena, downstream from the actual site of Post 16, had not, so far as is known, any indigenous population. Groups of Indians may possibly have begun to appear in the region from the zone of the upper Palena, but certainly very sporadically, as this part was not populated by the animals which constituted the food of the aborigines: guanacos (wild

llamas), ostriches, wild cattle etc.<sup>1</sup> This lack of penetration into the area is perfectly understandable, because the ridges of the Andes system, through which the River Palena turns towards the west in search of an outlet to the sea, constitute a natural division between the eastern region characterised by wide and beautiful valleys, with a less rainy climate and, in consequence, with sparser forest and more prairie, and the western region, of mountains covered with thick vegetation and subject to a much heavier rainfall. The line of division between these two zones can be found slightly to the east of the Paso Serrano area, which itself lies upstream from Post 16.

53. Nor, before 1894 do there appear to have been any non-Indian inhabitants in this region, even to the east of the "Paso Serrano", mentioned above. If, further north (in Cholila and the Valley of 16 October etc.) groups of colonists had settled somewhat earlier, they would not appear at that time to have reached the upper part of the River Palena. This may be gathered from the reports of the first explorations of the region made by Chile, undertaken by Ramon Serrano Montaner and by the group headed by

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1 See the reports of early travellers such as Captain G.C. Musters, At Home with the Patagonians (London, 1871).

Dr. Juan Steffen in 1894.<sup>1</sup> These travellers make no reference to inhabitants, and only mention primitive shelters, already abandoned, erected by gold-miners, mainly English and American, some of whom participated in the Steffen expedition of 1894.

54. Towards the end of the nineteenth century, there are indications of the arrival of the first settlers in the upper Palena region. Although the precise history of their movement to this part of Patagonia is not known, it would seem to have been broadly along the following lines: from the Pacific by way of Lonquimay (latitude  $38^{\circ}40'$ ), and later through Villarrica (latitude  $39^{\circ}35'$ ), there were routes which, crossing the zone of Lake Nahuel Huapi (latitude  $41^{\circ}$ ), continued along the eastern slope of that part of the Andes Cordillera and gave access to the fertile valleys of Villegas, Nuevo, Cholila, the 16th of October, Frio, Huemules and Carrenleufu. These had been the principal routes followed by the Indians and to a large extent by Captain Musters. While access to these areas was also possible from the east, through the plains, it would appear that the routes customarily followed were those indicated above.

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1 See Note on the State of Geographical Knowledge in 1902, at the end of Chapter VII of Part I (para. 104 et seq.)

55. The colonization of these valleys was made, therefore, in part by settlers coming from other areas of Chile and in part by those from Argentina. Under the protection of the Argentine Government, Welsh immigrants formed the Colony of the 16th of October whose existence had such a decisive influence on the granting of those regions to the Argentine Republic in the 1902 Award. At the same time, it must be borne in mind that there was also in existence a nucleus of Chilean settlers, as was recognized by Sir Thomas Holdich during his visit of enquiry in 1902. It is likewise of interest to observe that for trading purposes these same colonies in the valleys north of the upper Palena used the customary route leading to the Pacific through Villarrica and Lonquimay.<sup>1</sup> The existence, in the regions assigned to Argentina by the 1902 Award, of groups of Chilean settlers was also confirmed some years later, in the work of Bailey Willis, El Norte

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1 See the report dated 15 December 1901 prepared by the Secretary of the British Legation in Buenos Aires, the Hon. E. Scott where, writing of this area, he said: "Most of the farmers are in a small way of business and sell their stock to their Chilean neighbours ... The larger stock owners drive their animals over the Andes to Chile ... The market is ... a risky one, and they only patronise it because there is no other." The report is more fully cited in Chilean Statement during the 1902 Arbitration, Vol. IV, pp. 1590-1591.

containing the reports of a commission formed by the Argentine Ministry of Public Works in 1913, for the purpose of studying the hydrology of the whole zone. This work states<sup>1</sup> that there were many Chilean settlers established to the south of Lake Nahuel Huapi and immediately to the east of the frontier line fixed by the 1902 Award.

56. From the material at present available, it would appear that it was only after the exploration of Dr. Steffen in 1894 that settlers arrived in the upper Palena, probably from the more northerly colonies referred to above. There is mention of a settler named Steinkamp; and in maps of that time the names of Illin and Day also appear near his. It is worth emphasizing that in April 1902, when Sir Thomas Holdich visited the area, he was accompanied by the Chilean expert Señor Steffen who in his reports of the journey<sup>2</sup> says that Steinkamp was the settler living furthest to the west and owned cattle which grazed in the upper valley of the Palena - that is to say, above the point where the river penetrated the mountain range through which it follows its route to the Pacific. And it is under-

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1 See p. 295 of the Spanish edition.

2 Edition of 1909, in Spanish, Vol. II, p. 516.

standable that Steinkamp was confined to that zone because, as already indicated, the downstream regions below the point where the river pierced the higher mountain chains of the Andean system, were densely vegetated, very rugged, uninviting for cattle and nearly impenetrable by explorers.

57. At about the same time other settlers must have arrived at the upper Palena, since they are referred to in the Argentine maps of that time. But no details of their history are available, and in any case they would seem to have little bearing on the problem now before the Court.

58. There is no record of any settlers having penetrated California by the time of the Award, though there are accounts of the presence of the Chilean, Juan Antonio Balboa Arteaga, of whom more will be said later.

(2) The first Chilean settlers in California 1902-1917.

59. Closely connected with the development of Chilean activity in California after 1902 is the fact that in 1889 a colony had been founded at the mouth of the River Palena. The settlers were given land situated on the island of Los Leones and a promise of the grant of holdings in the valley inland. From here it seems probable that settlement



advanced towards the upper parts of the Rivers Yelcho, Futaleufu and Palena.<sup>1</sup>

Part Two

60. One of the first signs of growing interest in the area was the grant of a number of concessions covering enormous acreages and comprising at least part of the area of the relevant sector.

(i) The first of these, the so-called Campelo concession, was granted on 8 October 1902 and comprised public land between the Rivers Yelcho and Palena.<sup>2</sup>

This included 6,000 hectares in the valley of the River Encuentro.<sup>3</sup>

(ii) The Campelo concession was followed by the grant to Frank Lumley on 17 June 1903 of a concession<sup>4</sup> for a period of twenty years in respect of the fiscal lands comprised within the following boundaries: north, the River Palena; south, the parallel, 44°20';

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1 For a modern account of this movement and for much relevant geographical information, see Gilbert J. Butland, Human Geography of Southern Chile (London, 1957), pp. 75-83 and 117-130.

2 See copy of Chilean Decree No. 1209 granting concession to Jose Campelo, Doc. No. 1.

3 See extract from "Memoria de la Inspeccion General de Tierras y Colonizacion", dated 1903, p. 64, where the valley of River Encuentro appears included in the Campelo concession, Doc. No. 2.

4 See copy of Chilean Decree No. 763, of 17 June 1903, granting concession to Señor Frank Lumley, Doc. No. 3.

east, the boundary with the Argentine Republic; and west, the Moraleda channel. The concessionaire undertook inter alia to establish during the first three years of the concession twenty families of the Saxon race.

61. Both Campelo and Lumley were authorized to transfer their rights to the Sociedad Industrial y Ganadera Yelcho Palena. This company (formed after the 1902 Award) used the land included in these concessions till 1920.

62. As already stated, these concessions covered a very large territory. The principal valleys of the Campelo concession, for example, alone amounted to somewhat over 1,000 square kilometres. While the concessionaires no doubt carried on some colonizing activities within the regions allotted to them, there is no evidence that their action extended to the minor valleys such as was, at that time, the valley of the Encuentro. It is reasonable to assume that their effort was concentrated principally on the zones nearer the Pacific, until such time as routes were opened to the eastern regions.

63. Nevertheless, even apart from the concessions, Chileans were beginning to establish themselves in California. However, most of these pioneers did not come from the Pacific but instead

from the region further east. Juan Antonio Balboa Arteaga - a Chilean from the Province of Cautín who had previously worked near Lake General Paz - began a few years after the Award (1906?) to utilize as pasture land for his cattle the region of the Hondo Valley and Las Horquetas. "Las Pampitas" is also mentioned by one of his relatives, who is still alive, as one of the places where he farmed.<sup>1</sup> About 1913 he settled in California and occupied an extensive area around the Valle Hondo and the curve of the Engaño. One statement records that Balboa "was almost always in the field looking after the cattle. There were then few settlers in that place and all the area was without fences. He would be away from home for long periods and would again return". One day in about 1932 he left California for good and moved to Rio Cisnes.<sup>2, 3, 4.</sup>

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1. See statement under oath made by Uberlinda Barriga Troncoso, viuda de Balboa, at Palena on 7 October 1965. (Doc. No. 4)

2. See sworn statement of Gumercinda Castillo Marin, viuda de Bravo, made at Palena on 8 October 1965 (Doc. No. 5)

3. The following names of Chileans are mentioned by persons, still alive, who knew the area forty years ago: Francisco Calderon, Pablo Carrillo, Fortunato Saez, German Vásquez, and Demetrio Cardenas. (See statement under oath made by Elizardo Casanova Delgado, on 7 October 1965, at Palena. (Doc. No. 6).)

4. No documentary evidence has been found of the place of birth of Juan Antonio Balboa Arteaga. However, on 19 December 1936 he presented to the competent Chilean Internal Revenue Office a "Declaration" signed by him in connection with the assessment of the value of his land for tax purposes. The land was described as "California", situate "27 km. south of Palena village". (See Document No. 7). Balboa had probably already been assessed for tax at least once, since his name appears on the Assessment Roll for Land Tax dated 24 October 1936. (See Document No. 8).

64. Juan Antonio Balboa Arteaga was joined in about 1928 by his younger cousin Bartolomé Segundo Balboa Sandoval, born in Lautaro (Chile)<sup>1</sup>. Bartolomé Balboa built his home on the plot of the elder Balboa, on the southern banks of the Engaño/Salto, near what to-day is known as Cerro Campana. Bartolomé married, on 27 April 1930, in Rio Pico (Argentina). The newly wed couple came to Balboa's home in California. His widow, still alive, states under oath:

"On 4 May 1930, my husband and I came to live to his home, having left Lake General Paz where my parents were living. We came on horse back, passing through places which were already known as Chilean places and whose names I remember: Los Laquitos, Casa de Piedra, Casa de Canogas, where we spent a night, Las Horquetas, Las Pampitas and California".<sup>2</sup>

Bartolomé and his family stayed in California until 1936, when they left the valley "because it was too snowy and we had lost many animals through the winters, on account of the snow". They moved to Palena where they lived for three years and later they went on to Puerto Ramírez. From 1948 to 1954 Balboa was in charge of postal service between Puerto Ramírez and Palena. He died on 17 January 1954 and his death was registered at Palena.<sup>3</sup>

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1 See Doc. No. 9

2 See Doc. No. 4

3 See sworn statement made by Elizardo Casanove Belgado, at Palena on 9 October 1965 (Doc. No. 6), and certificate issued by the Acting Chief of Ancud's Postal Area, dated 6 October 1965. (Doc. No.10).

65. In the meantime, the 1902 Award had had some effect upon those groups of Chilean settlers who, having previously established themselves in the more easterly area between the line of the Continental waterdivide (which they believed to be the Chilean boundary) and the line actually determined by the 1902 Award, thus found themselves occupying land on territory assigned to Argentina.

66. Some of these settlers stayed in Argentina, with the consequence that today it is possible to trace the existence of families of Chilean origin in the region east of the area of the relevant sector. Others moved west, looking for new Chilean territory in which to settle.<sup>1</sup> These two Chilean

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1 Even before the Award, a law had been approved in Chile, authorizing the President of the Republic to grant free land (up to 80 Has. per family head, plus up to 40 Has. for each son over 16) to "Chileans who, having established themselves as settlers in territory of the Argentine Republic may have returned or would return to the country Chile". Law No. 380, dated 14 September 1896 (Chilean Diario Oficial of 21 September 1896).

The provinces mentioned by that law were those of Cautín, Malleco and Valdivia; but new legislation (without special reference to Chileans coming from Argentina) mentioned as provinces open to colonization those of Cautin, Malleco, Valdivia, Llanquihue, and Chiloe. Law No. 994 of 13 January 1898 (Chilean Diario Oficial of 19 January 1898).

The authorization of the President of the Republic to grant free titles to Chileans returning from Argentina has been renewed in other laws and decrees, where they are accorded a privileged position compared to other settlers. See, for instance, Decree No. 311 dated 24 February 1937.

streams, one of which came from territory placed by the 1902 Award under Argentine jurisdiction, and the other, already referred to, and which came from other regions by the routes from the Pacific, constitute the principal elements in the exploration and exploitation of the valleys recognised as belonging to Chile in this area by the 1902 Award.

67. The data on the early colonization in these parts is incomplete; and understandably so. The inhabitants lived in somewhat primitive conditions and great poverty. The arm of Government could scarcely stretch to such remote regions during that period. The colonization system itself applied by Chile<sup>1</sup> - to which reference will be made later - did not oblige the settlers to act within a framework of official action by the Government. In addition, it must be borne in mind that a search for relevant documents relating to a period over half a century ago is not easy in the southern zone of Chile. Generally, documentation is not centralised in the capital, and the local archives have been lost or damaged as a result of fire, earthquakes, storm and tidal waves - tribulations to which southern Chile has been subjected with painful frequency.

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1 See also footnote to para. 66.

68. Nonetheless, it has been possible to assemble a quantity of relevant and helpful material. The major part of it consists of official documents, the texts of which are reproduced in the volume of Additional Documents accompanying this Memorial. These are to some extent supplemented by documents containing the recollection of the inhabitants of the area, some of whom were still children when their parents came to the California Valley.

69. The first date mentioned by some of the settlers is that of 1910, when Juan Fortunato Saez Figueroa (a Chilean born in Valdivia in 1885) established himself in the Valley. He spent the rest of his life there and died in 1936 and was buried in the cemetery of Palena (Chile). His death was recorded in the Civil Registry of Futaleufu (Chile).<sup>1</sup>

70. In 1911 Pablo Carrillo Lavoz (Chilean, born at Valdivia) and Dorila Saez Figueroa (Juan Fortunato's sister) established themselves in the California Valley and remained in the area until their deaths in 1940 and 1932 respectively. Both were buried in the cemetery of Palena (Chile) and

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1 See the declaration, dated 31 March 1965, by his son, Juan Bautista Saez Steincamp. Doc. No. 11.

their deaths were recorded at Futaleufu (Chile).<sup>1</sup>

71. In that same year 1911, two other Chileans, Transito Diaz Carrasco and his brother Eleodoro also established themselves in the Valley.<sup>2</sup>

72. In 1913 there were further changes in the extreme south of California, when Bartolomé Balboa, also a Chilean, went to live there, as has already been indicated in para. 64 of this Part.

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1 The birth-place of Pablo Carrillo Lavoz appears in the certificate of registration of his death (Doc. No. 12). This certificate, issued in Futaleufu (Chile) on 2 May 1957, states that his death took place in Palena on 3 September 1940 and was registered on 5 September 1940 at the Civil Registry of Futaleufu.

See also the certificate issued by señor Alberto C. Zeni, Acting Justice of the Peace of Gobernador Costa (Chubut, Argentina) on 19 June 1961 which records a previous certificate, dated 26 January 1911, in which Pablo Carrillo and Dorila Saez were referred to as Chileans by the then Acting Justice of the Peace of the Colonia General San Martin, National Territory of Chubut. (Doc. No. 13).

See also the declaration, dated 23 May 1961, by Transito Diaz and Florindo Ramirez where it is stated that Pablo Carrillo Lavoz arrived at California in 1911. (Doc. No. 14).

2 See the declaration dated 23 May 1961, referred to above, Doc. No. 14, where Transito Diaz Carrasco declares himself to be a Chilean and to have settled in the region in 1911. Eleodoro Diaz Carrasco was born in Canete (Province of Aranco, Chile) on 14 July 1885. His birth was registered on 26 August 1885. See Doc. No. 15.



73. In about 1915, Lucas Lopez Saez (Chilean) established himself in the Valley and remained there until his death on 8 July 1938. He was buried in the cemetery of Palena and his death was recorded in Futaleufu (Chile).<sup>1</sup>

74. Some time before 1917 Tomas Videla Catalan (Chilean) also arrived in the area.<sup>2</sup>

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- 1 See the declaration by his son Simon Lopez Delgado (Chilean), dated 23 March 1965. Doc. No. 16.
  - 2 The nationality of Tomas Videla Catalan is evidenced by a document headed "Solicita Radicacion" (request for recognition of occupation) relating to a plot of land in California, presented on 6 June 1949 to the Puerto Montt "Oficina de Tierras" where he appears as Chilean. (Doc. No. 17).

Tomas Videla Catalan had several children by his common-law wife, Maria Peñaipil, also a Chilean, born in Pitrufulquen (Province of Cautin). (The death certificate of Maria Peñaipil is Doc. No. 18).

The likely date of the arrival of Tomas in California may be inferred from a birth certificate issued by the Civil Registrar of Palena on 16 June 1954 in respect of the birth of his son, Agustin Videla Peñaipil. The son's place and date of birth are stated as Palena and 28 August 1917. (Doc. No. 19). The fact that the son's birth was not registered until he was 37 years old is of no particular significance. Probably no official occasion for proving birth had previously arisen.

(3) The present residents of California<sup>1</sup>

75. All the inhabitants of California in or about February 1965 are listed in Doc. No. 21 which also contains biographical notes.

76. In this section of the Memorial these families will be more particularly described. Reference will first be made to the "landholders", that is to say, heads of family who in accordance with the Chilean system of colonization have rights as landholders. In the second place, reference will be made to other heads of family who live on some of the landholdings mentioned above, but who do not have rights as landholders. (They will be called "non-landholders").

77. (a) Landholders

The order of landholders listed below is the chronological order of the date of their arrival in California.

- (i) Simon Lopez Delgado, Chilean, born in Chaiten (Chile) in 1904, son of Lucas Lopez Saez (see above para. 73), arrived in the California Valley with his father in about 1915. His farm is known as "Las Raices" and

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1. Reference to the Sketch (Doc. No. 20) may facilitate the consideration of para. 75 et seq.

- appears in the Land Tax Roll as No. 104-16<sup>1</sup>.
- (ii) José Onofre Anabalon Vega, Chilean, was born at Quitratue (Chile) on 9 August 1909. He arrived in the California Valley in 1931. He is married to a daughter of Pablo Carrillo Lavo and Dorila Saez Figueroa. (See above para.70). He lives at present at "Las Pampitas", (Land Tax Roll 104-29), having obtained his rights from the Chilean settler Domingo Lafuente Inostroza<sup>2</sup>
- (iii) Adeodato Mera Gomez, Chilean, was born at Palena on 14 November 1925. He settled in the California Valley in around 1931. He lives at "Las Pampas", a plot of land which is registered under No.104-9 of the Land Tax Roll. The family of his grandfather lived in the Province of Valdivia, Chile,

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1 See declaration made by Simon Lopez on 23 March 1965 (Doc. No. 16); certificate given by Captain José Barroso Gutierrez, on 5 April 1957 where it is stated that Lopez has lived in the Valley for forty five years (Doc. No.22); and Map No. CH.29 "Division of Landholdings for purposes of the official register of land tax" (hereinafter referred to as "Land Tax Map").

2 See certificate given by Captain Jose Barroso Gutierrez, dated 9 April 1957 (Doc. No. 23); agreement for transfer signed by Anabalon and Lafuente before Carlos Strickler, Civil Registrar acting as Notary, dated 25 January 1954 (Doc. No.24).

Lafuente died at Esquel (Argentina) on 13 September 1959. In his death certificate, issued by the Argentinian Civil Registrar Hipolito Martin, on 21 September 1959, he is referred to as Chilean (Doc. No.25).

See also Land Tax Map.

before 1900: His uncle Aristeo Mera Velazquez, who now lives with him, was born at San José de la Mariquina (Province of Valdivia, Chile) on 20 February 1893. The land which he occupies at present was previously occupied by Juan Antonio Balboa Arteaga (para.63).

When Balboa abandoned it, it was occupied by Carlos Mera, father of Adeodato<sup>1</sup>.

- (iv) Aladino Carrillo Saez, Chilean, was born on 4 September 1932 after his father settled on the Valley. His parents are Pablo Carrillo Lavoz and Dorila Saez Figueroa, whose arrival in the California Valley has already been mentioned (para. 70). His birth was registered at Futaleufu (Chile) on 4 October 1932. He occupies jointly with his brother the farm known as "Los Cerrillos" which appears as No. 104-4 in the Land Tax Roll<sup>2</sup>.
- (v) Florindo Carrillo Saez, Chilean, was born in the California Valley on 29 November 1931. His birth was registered at the Civil Registry

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1 See certificate given by Capt. José Barroso, dated 16 April 1957. (Doc.No.26); statement for land evaluation, presented by Carlos Mera to the local office for internal revenue, on 25 October 1950. (Doc. No.27); and Land Tax Map.

2 See birth certificate given by the Civil Registrar of Futaleufu, on 2 September 1953, (Doc. No.28); and Land Tax Map.

There are also at least three sisters of Aladino Carrillo who also succeeded Pablo Carrillo in his rights to the Land.

- of Futaleufu (Chile) on 26 January 1932. His parents are Pablo Carrillo Lavoz and Dorila Saez Figueroa (para. 70 above). He occupies jointly with his brother the farm known as "Los Cerrillos". (Land Tax Roll No. 104-4).<sup>1</sup>
- (vi) Agustin Videla Peñaipil was born in Palena on 28 August 1917. His parents are Tomas Videla Catalan and Maria Peñaipil (para. 74). He has lived in the California Valley since 1938. He resides now on "Lomas Bajas". This farm appears as No. 104-55 in the Land Tax Roll.<sup>2</sup>
- (vii) The heirs of Guillermo Parada Vergara. Señor Parada was a Chilean, born at Lonquimay (Province of Malleco, Chile) about 1903. He arrived in the area in 1940. In 1942 he bought the "mejoras" of a farm which had been occupied by Carlos Vargas, west of the lower section of the Rio Encuentro and the minor channel. Sometime before 1947 he applied to the Chilean Ministry for Lands and Colonization (Office of Coyhaique) for the grant of a "provisional title". He died on 5 November 1960 and his family inherited his rights. The farm, "Sierra Brava", appears in the 1965

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1 See birth certificate issued by the Civil Registrar of Futaleufu, on 2 September 1953. (Doc. No. 29). For his sisters, see footnote to entry of Aladino Carrillo Saez. (Fn. 2 on previous page).

2 See marriage certificate given by the Civil Registrar of Alto Palena, dated 15 March 1965 (Doc. No. 30). See also the petition for a permit of occupation and provisional title presented by Agustin Videla Peñaipil on 19 March 1957 to the Director of Lands and National Property (Doc. No. 31).

Land Tax Roll as No. 104-1<sup>(1)</sup>

(viii) Juan Hernandez Barriga, Chilean, was born at Curacautin (Province of Malleco, Chile) on 24 June 1908. Hernandez arrived in the California Valley in 1940. He settled on a plot of land over which Adelina Toledo had a prior right of occupation. After he was notified by Chilean authorities that he could not remain on Adelina Toledo's land, he moved to "Las Horquetas", Valle Norte. In 1957 he requested an authorization to occupy the plot of land on which he had then chosen to settle. His farm appears as "Las Horquetas", Land Tax Roll No. 104-7.<sup>2</sup>

(ix) Juan Vicente Contreras Quintana, Chilean, born in Temuco (Province of Cautin, Chile) on 11 November 1911. He arrived in the California Valley in 1942. His farm is known as "El Engaño", Land Tax Roll No. 104-6. He acquired his rights to this land from Manuel Morales Alfaro. The latter, in his turn, had bought the land from Juan Fortunato Saez Figueroa, the original settler, to whom reference is made in paragraph 69.<sup>3</sup>

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(1) See death certificate issued by the Registrar of Alto Palena, on 19 April 1961. (Doc. No. 32.)

2 See "Request for authorization to occupy" presented by Juan Hernandez Barriga to the Director of Lands and National Property on 22 March 1957. (Doc. No. 33). See also Land Tax Map.

3 See certificate given by Captain Jose Barroso on 24 April 1957. (Doc. No. 34); request presented by Contreras to the Director of Lands and National Property on 19 March 1957 (Doc. No. 35); and the Land Tax Map.

- (x) Carlos Lillo Fuentes (or de la Fuente), Chilean, was born at Victoria (Province of Cautin, Chile) on 1 July 1906 and arrived in the California Valley in about 1942. He lives at present on the farm known as "San Antonio", of which the Land Tax Roll number is No. 103-7.<sup>1</sup>
- (xi) Nolfra Carrasco de Jaramillo, Chilean, was born at Lumaco (Province of Malleco, Chile) on 12 June 1901. She has lived in the Valley of California since about 1944. At present she lives on the farm known as "San José", registered as No. 104-5 in the Land Tax Roll.<sup>2</sup>
- (xii) Adelina Toledo Cofre, Chilean, was born at Futaleufu (Chile) on 3 March 1930. She has lived in the California Valley since 1944 and occupies at present the plot known as

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- 1 See birth certificate issued by the Civil Registrar of Victoria (Chile) on 21 September 1932 (Doc. No. 36); document headed "Solicita Radicacion" (Request for recognition of occupation) presented on 12 August 1947 to the Office of Lands, Coyhaique (Chile), (Doc. No. 37).
- 2 See document headed "Solicita Radicacion" presented by her husband Evaristo Jaramillo Mera to the Office of Lands, Coyhaique (Chile) on 12 August 1947 (Doc. No. 38); document headed "Acta de Radicacion" (Doc. No. 39); death certificate of her husband issued by the Civil Registrar of Futaleufu (Chile) on 19 January 1954 (Doc. No. 40); document headed "Solicita Titulo Gratuito" (Request for a gratuitous title) presented by her (Doc. No. 41) and Receipt for payment in connection with landholding in Department of Palena dated 22 January 1953 (Doc. No. 42) See also Land Tax Map.

- "El Maiten", Land Tax Roll No. 104-17.<sup>1</sup>
- (xiii) Roberto Cid Matus, Chilean, was born at Temuco, Chile, on 13 April 1891. He arrived in the California Valley in 1949. He lives at present on the farm "Piedras Blancas", Land Tax Roll No. 104-3.<sup>2</sup>
- (xiv) Alfredo Foitzick Moncada, Chilean, was born at Trumao (Province of Valdivia, Chile) on 18 February 1917. He arrived in the California Valley in 1951 and at present occupies the plot known as "California", registered as No. 104-53 in the Land Tax Roll. He also occupies a small plot known as "Costa Rio Encuentro", registered under No. 103-28 of the same Roll.<sup>3</sup>

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- 1 See birth certificate given by the Civil Registry of Futaleufu (Chile) on 14 September 1953. (Doc. No. 43). See "request for authorization to occupy", presented by her to the General Director of Lands and Colonization on 13 March 1956. (Doc. No. 44). See certificate given by Capt. José Barroso Gutierrez, dated 12 February 1957, especially in respect of her association with Dionisio Ovalle Silva (Doc. No. 45). See also Land Tax Map.
- 2 The birth of Roberto Cid Matus was registered in Temuco on 24 October 1896. See certificate given by the General Civil Registry on 14 September 1965. (Doc. No. 46). See the "request for authorization of occupation and provisional title", presented by him on 19 March 1957 to the Director of Lands and National Property (Doc. No. 47); and see Land Tax Map.
- 3 See birth certificate, given on 14 September 1965 issued by the General Archives of Civil Registry, stating that the birth was registered at La Union (Province of Valdivia, Chile) on 26 February 1917, (Doc. No. 48). See also certificate given by Capt. José Barroso on 18 April 1957. (Doc. No. 49); and the Land Tax Map.



- (xv) Julian Soto Cardenas, Chilean, was born at Potrono de Malo (Province of Osorno, Chile) on 3 January 1900. He arrived in the California Valley in about 1951. His farm is known as "Los Lirios" and appears as No. 104-41 in the Land Tax Roll. The land he occupies was previously occupied by Juan Bautista and Floriano Saez Steinkamp.<sup>1</sup>
- (xvi) Amelia Morales Catrilaf, was born at Trevelin (Argentina) on 12 October 1908. She arrived in Chile in about 1953, where she made her home with Leandro Videla Peñaipil, Chilean. She succeeded to his rights over a property in the California Valley known as "Porvenir", and which appears as No. 104-40 in the Land Tax Roll.<sup>2</sup>
- (xvii) Dionisio Videla Peñaipil was born at Epuyen (Argentina) on 10 June 1921, the son of Tomas Videla Catalan, Chilean (para. 74). He married Deonilda Jaramillo Jaramillo, the daughter of Chilean parents. Videla lives at present on the farm "Quemado Grande", Land Tax Roll No. 104-18.<sup>3</sup>

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- 1 See statement for assessment of the land made by Floriano Saez Estencam (sic) on 27 March 1937 to the competent Internal Revenue Office (Doc. No. 50). See also the Land Tax Map.
- 2 See death certificate of Leandro Videla Peñaipil issued by the Civil Registrar of Palena on 26 September 1965 (Doc. No. 51); See para. 89(v); see also Land Tax Map.
- 3 Dionisio Videla married before the Chilean Palena Civil Registrar on 9 July 1955 (See Doc. No.52). He declared himself to be a Chilean in an application for a gratuitous title over "El Azul" which he presented to the Office of Lands and National Property of Puerto Montt (Chile) on 29 September 1964. (See Doc. No.53). The births of his wife and his children Isaul Humberto, Anita Isabel and José Dionisio were registered at the Palena Civil Registry. See the Land Tax Map.

(xviii) Felix Galilea Martinez was born in Spain. He arrived in Chile in 1931 and obtained Chilean nationality on 3 January 1957. He now occupies the farm known as "La Estrella", No. 104-13 on the Land Tax Roll, which was previously occupied by Juan de Dios Bravo Maraboli.<sup>1</sup>

78. (b) Non-landholders

- (i) Alfredo Jaramillo Carrasco, Chilean, was born in the California Valley on 31 May 1930. He was the son of Evaristo Jaramillo Mera and Nolfia Carrasco Baeza (para. 77 (xi)). His birth was registered at the Civil Registry of Palena (Chile) on 19 November 1952.<sup>2</sup> He lives at "San José", his mother's farm.
- (ii) Alberto Jaramillo Carrasco, Chilean, was born in the California Valley on 25 June 1931. He is the son of Evaristo Jaramillo Mera and Nolfia Carrasco Baeza (para. 77 (xi)). His birth was registered at the Civil Registry of Palena (Chile) on 19 November 1952. He lives at San José", his mother's farm.<sup>3</sup>
- (iii) Dionildo Saez Velasquez, Chilean, is the son of Juan Fortunato Saez Figueroa and Lucinda Velasquez (para. 69). His birth was registered at the Civil Registry of Futaleufu (Chile). At present he lives on "El Maiten",

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1 See deed of sale and transfer of "occupation rights" made at Puerto Montt (Chile) between Juan Bravo Maraboli and Felix Galilea Martinez, dated 26 March 1955. (Doc. No. 54.)

2 See copy of birth certificate dated 17 March 1965. (Doc. No. 55).

3 See copy of birth certificate dated 17 March 1965. (Doc. No. 56),

- property of Adelina Toledo Cofre (para. 77 (xii))<sup>1</sup>
- (iv) Claudio Anabalon Carrillo, Chilean, son of José Onofre Anabalon Vega and Viviana Carrillo Saez (para. 77 (ii)), was born on 16 January 1939.<sup>2</sup> His birth was registered at Futaleufu. He now lives with his father on "Las Pampitas".
- (v) Eulogio Videla Peñaipil, Chilean, son of Tomas Videla Catalan and Maria Peñaipil (para. 74), was born at Palena, "El Encuentro" section, on 13 September 1918. His birth was registered at Palena (Chile) on 6 July 1959. He now lives on "Los Cerrillos" with his brothers-in-law. (para. 77 (iv),(v)).<sup>3</sup>
- (vi) Delmiro Saez Steinkamp, son of Juan Fortunato Saez Figueroa (see above para. 69), lives at present on the "El Maiten" property of Adelina Toledo (para. 77 (xii)).
- (vii) Julian Bravo Castillo, son of Juan de Dios Bravo Maraboli, Chilean, and Gumercinda Castillo Marin, was born at Lago General Paz, Chubut (Argentina), on 4 November 1931. He came into Chile with his parents in about 1932. He lives at present on his mother-in-law's

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1 See copy of birth certificate issued on 14 September 1965. (Doc. No. 57).

2 See copy of birth certificate issued by the General Archives of the Chilean Civil Registry on 7 October 1965 (Doc. No. 58).

3 See copy of birth certificate given by the General Archives of Chilean Civil Registry on 1 April 1965. (Doc. No. 59).

- property "San José". (para. 77 (xi))<sup>1</sup>.
- (viii) Santiago Herrera Pedrero, Chilean, was born at Contulmo (Chile) on 21 September 1909. He arrived in the California Valley about 1960. He lives at the farm of Adelina Toledo. (para. 77 (xii)).<sup>2</sup>
- (ix) Pablo Peña Arancibia, Chilean, was born at San José de la Mariquina (Province of Valdivia, Chile). He arrived at the Valley in 1960. He now lives on the farm "Piedras Blancas" of Roberto Cid Matus (para. 77 (xiii)).<sup>3</sup>
- (x) Matias Segura Valeria, Chilean, was born at La Union (Chile), on 3 February 1934. He now lives on "Piedras Blancas", the farm of Roberto Cid Matus. (para. 77 (xiii)).
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- 1 See petition for "authorization to occupy" presented by his father, Juan de Dios Bravo Maraboli, to the General Direction of Lands and Colonization on 23 May 1950. (Doc. No. 60).
- 2 See birth certificate issued by the Civil Registry of Contulmo, (Canete, Chile) on 9 October 1965. (Doc. No. 61).
- 3 See birth certificate issued by the General Archives of the Civil Registry (issued on 14 September 1965) as evidence that he was born on 1 July 1910. (Doc. No. 62).

- (xi) Eliseo Cid Leiva, was born at Lonquimay (Chile), on 25 October 1929. He arrived in California Valley in 1963, and now lives at his mother-in-law's farm "Porvenir" (para. 77 (xvi)).<sup>1</sup>
- (xii) José David Herrera Jara, Chilean, was born on 26 June 1941, at Huacamalal (Province of Osorno, Chile). He arrived in the California Valley some time before 1962. He now lives on the farm of Adelina Toledo, his mother-in-law. (para. 77 (xii)).<sup>2</sup>

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1 See birth certificate issued by the General Archives of the Civil Registry on 7 October 1965. (Doc. No. 63).

2 See birth certificate issued by the General Archives of the Civil Registry on 7 October 1965. (Doc. No. 64).

(4) Former Chilean residents of California  
who have moved to neighbouring parts of  
Chile.

79. Mention may also be made of a number of Chileans, who having once lived in California have now left it for good and have settled in other parts of the Palena Department. Sometimes, it is their children or their relatives who live in those nearby areas. Such is the case, for instance, of Herminio Rivera Iribarra<sup>1</sup> who, with his brother Pedro Rivera Iribarra, occupied land on "Las Horquetas" probably from before 1935, and certainly from 1943, to 1959, when the Argentine Gendarmerie, having entered the valley in spite of Chilean protests, harassed them till they were compelled to leave. The said Herminio Rivera today has a plot of land in the lower section of the Salto or Tigre River, and another of his brothers (Anastasio Rivera) lives near him. (In the Land Tax rolls they appear, respectively, as Nos. 104-31 and 104-33).<sup>2</sup>

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1. This name (the mother's family name) appears also as Ibarra and Iribarren.
  2. See death certificate of Pedro Rivera issued by the Civil Registry Archives on 26 October 1965 (Doc. No. 65); birth certificate of Herminio Rivera, issued by the same officer on the same date (Doc. No. 66); resolution granting Pedro Rivera authorization of provisional occupation, dated 11 March 1957 (Doc. No. 67).

(5) Territorial extent of Chilean settlement  
in California.

Part Two

80. The location of the various farms occupied by Chileans in California can be found on Maps CH. 27 and CH. 29<sup>1</sup>. As can there be seen, these farms cover lands spread over the whole of that area.

81. In addition, six settlers have the use of so-called "fiscal veranadas" or State-owned summer grazing lands in the Valle Hondo, Las Horquetas and Los Laguitos. They are Adeodato Mera, Alfredo Foitzick, Dionildo Saez, Onofre Anabalon, Agustin Videla and Dionisio Videla. References also have been found to use of these veranadas by Juan Antonio Balboa Arteaga and Bartolome Balboa Sandoval (paras. 63 and 64 above). Chilean settlers of adjacent areas have also used these veranadas; e.g. Sulustiano Ojeda and Osvaldo Schilling<sup>2</sup>.

82. The significant feature of the territorial range of Chilean activity in this area is that while it treats the whole of California as an

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1. See also Doc. No. 20 (Sketch).

2. See also list of users of Veranadas prepared by Major José Barroso Gutierrez on 20 September 1964 (Doc. No. 68)  
In addition, in the summer, the settlers in California tend to let their cattle graze wherever they can in the adjacent cordillera.

undivided unit, it respects the River Encuentro (the major channel) as the international boundary. In this fact may be found clear evidence that having a real restrictive effect upon the activities of the local inhabitants was the belief that the international boundary followed the major channel.

B. EVIDENCE OF THE CHILEAN IDENTIFICATION  
OF THE RESIDENTS OF CALIFORNIA.

83. The evidence of identification between the residents of California and other parts of Chile runs through all the facets of activity in an agricultural community. In some respects, of course, this evidence will be found in the acts of the Chilean governmental authorities. Consequently, the heads of evidence listed below with explanatory comments should not be read as constituting an exclusive list but should be considered in conjunction with the material which appears in Section C below.

(1) Land titles

84. It will be convenient to preface the details relating to the grant of land titles by a brief explanation of the system by which title to rural property can be obtained in Chile in regions such as California. The starting point is that land without a private owner belongs to the State. In 1900, the State registered for the first time as fiscal land,



i.e. as public property belonging to the State, all the land at present forming the department of Palena.

85. In order to stimulate the full utilization of the land, the State has encouraged settlement of public lands by various means. One technique has been to grant concessions, as was done in the cases of Campelo and Lumley. Another has been to sell the land. The third, which has been utilised in the California area since the termination of the applicable concessions, has been to convey a gratuitous title to an occupier of the land who has been in peaceful possession of it for a fixed number of years.<sup>1</sup>

86. The normal process leading up to the acquisition of title in this way is for the prospective occupant to obtain a permit to occupy the land. Generally, after a number of years this occupation is allowed to ripen into provisional ownership and this, in due course, is replaced by definitive title. However, the normal process is sometimes not fully observed; and it is not unusual for a settler to work hard for a number of years without an occupation permit, a situation which is respected by the authorities

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1 Several legal texts have been applied to this matter. The text now in force is "Regulations for Agrarian Reform" (R.R.A.15) of 1963.

and private individuals, and which is often considered as a basis for the granting of the title.<sup>1</sup>

87. It is apparent that during the period in which title to land is maturing problems of succession and transfer can arise. Because there is no legal title to the land, the formalities usually applied in Chile to the transfer of rights of ownership in land do not apply in these cases. Nonetheless, local farmers normally transfer, and recognise the transferability of, "mejoras" (improvements), conveying with them the right to obtain in due course a definitive title. Though the law requires prior official consent to such transfers, it is often not obtained but the transfers are nevertheless recognized.<sup>2</sup>

88. "Veranadas" are not normally the object of grants of title, but only of leases or concessions. However, here, as in relation to land, the Government often tolerates the use of these areas on the basis simply of knowledge by the local authorities.

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1 Even if the title sought was "gratuitous", the procedure for obtaining it involved until 1960, relatively expensive payments for the stamping of documents.

2 For many years the transfer of "mejoras" was subject to a high tax; in some cases reaching 20%.

89. All eighteen persons listed in the previous section as "landholders" have applied for and received occupation permits. However, it has been possible to trace only the applications (or similar and related documents) listed below as being made before or in the year 1955:

- i. Onofre Anabalon Vega (para. 77, ii) requested his "radicacion" on a plot of land which he was then occupying.<sup>1</sup> In August 1947 the plot was surveyed and a sketch map prepared.<sup>2</sup> The Chilean Ministry of Lands and Colonization issued order No. 10810 on 29 August 1949, authorizing his "Radicacion".<sup>3</sup> This took place on 16 November 1949 and a Minute was drawn up before the Head of the Aysen office of the Ministry.<sup>4</sup> Señor Anabalon had paid on 9 February 1948, \$300 as tax, at the local tax office in Achao (Chile).<sup>5</sup>
- ii. Suc. Pablo Carrillo Lavoz (para. 70). Pablo Carrillo Lavoz died in 1940. On 12 August 1947 his family petitioned for "radicacion"

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- 1 The application has not yet come to hand.
  - 2 See map (Doc. No. 69). Attention is drawn to the name "Arroyo Falso Engano" which is given to the minor channel.
  - 3 See order No. 10810 (Doc. No. 70).
  - 4 See minute dated 16 November 1949 (Doc. No. 71).
  - 5 See receipt for tax (Doc. No. 72).

(i.e. the official verification of possession by Carrillo).<sup>1</sup> Rosario Carrillo Saez, who who declared that he had Chilean Identity Card No. 6127 from Palena, acted on their behalf. A Government surveyor from the Ministry of Lands, Ernesto Carvajal, visited the site and made a sketch map of the plot of land.<sup>2</sup> The petition was accepted on 3 January 1951.<sup>3</sup>

iii. Juan Guillermo Parada Vergara has since 1942 occupied a plot of land west of the lower section of the Rio Encuentro and of the minor channel. In August 1947, Chilean surveyor Ernesto Carvajal sent to the area, drew a map of the plot which Sr. Parada was occupying.<sup>4</sup> On 5 November 1947 Señor Parada paid the sum of \$300 to the tax collector's office in Achao (Chile) to obtain provisional title in respect of that plot.<sup>5</sup>

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1 See Doc. No. 73 (Petition).

2 See Doc. No. 74 (Map). Attention is drawn to the words "Arroyo Falso Engaño" which appear attributed to Arroyo Lopez.

3 See Doc. No. 75.

4 See map dated August 1947 (Doc. No. 76). It may be noted that the minor channel on this map is given the name Arroyo Falso Engaño and is shown as being a stream distinct from, smaller than, and tributary to, the lower section of the Encuentro and the major channel. Only the area in the north-east section of the map, north of the projection of the major channel is marked as being "Republica Argentina".

5 See receipt for payment of tax (Doc. No. 77).

A request for permission to occupy the plot was formally presented on 25 October 1951 to the Land Survey Department of Coyhaique (Chile).<sup>1</sup>

- iv. On 12 August 1947 Dionisio Ovalle Silva presented a request for occupation of a plot of land east of the plot then occupied by Guillermo Parada<sup>2</sup> (para. 77, vii). On 22 August 1950 the Head of the competent office for Lands and Colonization, señor Guillermo Munoz Mena, sent a favourable report on the petition to the Head of the Land Survey Office of Temuco.<sup>3</sup> On 17 May 1951 the Under-Secretary for Lands and Colonization authorized the General Direction of Lands and Colonization to proceed to the "radicacion" of señor Ovalle.<sup>4</sup> Señor Ovalle died in 1947, while his request was pending. Eventually Adelina Toledo was "radicada" on his plot, and lives there now. (para. 77, xii).
- v. On 23 May 1950 Leandro Videla Peñaipil applied for "radicacion" to the General Direction for Lands and Colonization. Señor Videla having died, the "radicacion" was granted to his common-law wife Amelia Morales

- 1 See petition (Doc. No. 78).
- 2 See request (Doc. No. 79).
- 3 See Note No. 927, dated 22 August 1950 (Doc. No. 80).
- 4 Order No. 5466. See "Orden de Radicacion" dated 17 May 1951 (Doc. No. 81).

Catrilaf (para. 77, xvi).<sup>1</sup>

vi. On 24 October 1952 Juan Hernandez Barriga (para. 77, viii), presented a "petition for protection" to the District Inspector of Palena, Dept. de Quinchao (Chile).<sup>2</sup> According to his application, Hernandez, together with Dionisio Ovalle, had been occupying a plot of land since 1944. As stated above (para. 89, iv) señor Ovalle was succeeded in the occupation of the land by Adelina Toledo. Señor Hernandez, claiming that he alone had worked on the plot from 1948 to 1951, protested against the actions of Adelina Toledo and requested "protection and justice". The Inspector certified that what Hernandez declared was true and that Hernandez had been recognized as a settler since 1944. On 19 December 1952 the petition of Hernandez was referred by the Minister for Lands and Colonization to the Director General for Lands. (On 18 March 1957 Hernandez desisted from his presentation, with the purpose of not losing his right to request a separate plot of 600 hectares)<sup>3</sup>.

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- 1 See original document, application for "radicacion" signed by Leandro Videla. (Doc. No. 82).
  - 2 See original letter of request for "protection" (Doc. No. 83).
  - 3 See endorsement at the foot of the reverse side of Document No. 83.

vii. On 27 April 1955 Felix Galilea Martinez presented a request to the Minister for Lands and Colonization asking that the transfer of "rights and actions" he had bought<sup>1</sup> from Juan Bravo Maraboli be recognized.<sup>2</sup> He also requested that his application be filed in the file of "radicacion" of Juan Bravo Maraboli, and that the radicacion should be granted to him (Galilea) instead. The tax on the transfer was paid on 9 September 1957.<sup>3</sup>

90. In 1957 Agustin Videla Peñaipil, Pedro Rivera Irribarra, Roberto Cid Matus, Juan Hernandez Barriga and Vicente Contreras Quintana all applied to the competent Chilean authorities for their "radicacion".<sup>4</sup> On 29 September 1964 Dionisio Videla Peñaipil also requested his "radicacion".<sup>5</sup>

91. Only two final titles of ownership have been granted in the California Valley to Carlos Lillo Fuentes and the family of Evaristo Jaramillo Mera (Nolfa Carrasco, widow of Jaramillo and her children:

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1 See Doc. No. 54.

2 See original of request of Felix Galilea (Doc. No. 85).

3 See receipt for tax on transfer in the name of Juan Bravo M. (Doc. No. 86).

4 See Docs. Nos. 31, 67, 47, 33 and 35.

5 See Doc. No. 53.

Guillermina, Rosalia, Elcira, Evaristo, Enrique, Alfredo, Alberto and Alejandrina). (para. 77, xi).<sup>1</sup>

(2) Land tax

92. Under the Chilean tax law, land tax must be paid not only in respect of property owned by the taxpayer but also in respect of any Government land set aside for colonization which is actually occupied by the taxpayer.<sup>2</sup> Inscription upon the "Land Tax Rolls" is normally done by the owner himself, but if he fails to act, it may be done by the Internal Revenue Office.

93. The Government of Chile is placing in evidence a copy of the "Roll of Land Property - 1965" relating to the commune of Palena, within which the area of California is for all administrative purposes at present included.<sup>3</sup> In addition, in order to give a fuller picture of the development of the process of land tax collection in this area there are placed also in evidence the assessment roll used in Yelcho (Province

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1 See public deed containing text of Decree No. 1107 (Doc. No. 87) and public deed containing text of Decree No. 342 (Doc. No. 88).

2 For examples of statements made by settlers in connection with the payment of Land Tax, see Docs. Nos. 7, 27 and 50. See also Docs. Nos. 89 (26 March 1937), 90 (9 December 1936), 91 (1950), 92 (3 October 1950) and 93 (28 October 1950)

3 "Rol Palena 1965" (Doc. No. 94). This roll is a part of the Roll covering the whole country.



of Chiloe) 1936,<sup>1</sup> the roll of Yelcho 1938,<sup>2</sup> and the assessment roll of Achao and Yelcho 1945,<sup>3</sup> in which the lands of this area were included in previous years. In all these rolls, the entries which have been underlined in red show land in California.

94. On the basis of these rolls and other available information a Schedule has been prepared showing the tax history of the present plots of land. In some cases it has been possible to trace them as far back as the 1925 Roll.

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- 1 "Direccion General de Impuestos Internos. Rol de Avaluos de la Comuna de Yelcho". Castro, 24 October 1936 (Doc. No. 8).
  - 2 "Direccion General de Impuestos Internos. Rol de Avaluos de la Comuna de Yelcho (Provincia de Chiloe), vigente desde el 1<sup>o</sup> de Enero de 1938" (Doc. No. 95).
  - 3 "Direccion General de Impuestos Internos. Rol de Avaluos de la Agrupacion Comunal de Achao y Yelcho, vigente desde el 1<sup>o</sup> de Enero de 1945". (Doc. No. 96).

THE PLOTS OF LAND IN CALIFORNIA, ACCORDING TO THE CHILEAN LAND TAX ROLLS SINCE 1925

(with reference to present and former "landholders")

| Present<br>"landholder"                                   | <u>Roll</u><br>1965 | <u>Roll</u><br>1962   | <u>Roll</u><br>1957 | <u>Roll</u><br>1952           | <u>Roll</u><br>1945 | <u>Roll</u><br>1938       | <u>Roll</u><br>1925                                      |
|---|---------------------|---|---------------------|-------------------------------|---------------------|---------------------------|--|
| <u>Carlos Lillo F.</u><br>(para. 77, x)                   | 103-7               | 103-7   | 89-7                | 787                           | 735                 | 112                       | 16   |
| <u>Felix Galilea</u><br>(para. 77, xviii)                 | 103-13              | 103-13  | 89-13               | 716                           | 722                 | 136 and 177               |  |
|   |                     |   |                     | <u>Juan</u><br><u>Bravo M</u> | (the same)          | (the same)                |  |
| <u>Alfredo Foitzick</u><br>(para. 77, xiv)                | 103-28              | (This plot was included in previous rolls in what is<br>at present 104-1) |                     |                               |                     |                           |  |
| <u>Suc. Guillermo</u><br><u>Parada</u><br>(para. 77, vii) | 104-1               | 104-1   | 90-1                | 813                           | 797                 | 167<br>(Carlos<br>Vargas) | 37 and 33<br>(Carlos Figueroa<br>and Andrea<br>Figueroa) |
| <u>Roberto Cid M.</u><br>(para. 77, xiii)                 | 104-3               | 104-3   | 90-3                | 730                           | -                   | -                         | -  |

2.

| Present<br>"landholder"  | <u>Roll</u><br>1965 | <u>Roll</u><br>1962 | <u>Roll</u><br>1957 | <u>Roll</u><br>1952 | <u>Roll</u><br>1945        | <u>Roll</u><br>1938         | <u>Roll</u><br>1925                       |
|--|---------------------|---------------------|---------------------|---------------------|----------------------------|-----------------------------|---|
| <u>Florindo y</u><br><u>Aldino Carrillo</u><br>S.<br>(Suc. Pablo<br>Carrillo Lavoz.)<br>(para. 77, iv & v) | 104-4               | 104-4               | 90-4                | 727                 | 735                        | 112                         | 16  |
| <u>Nolfa Carrasco</u><br>de J.<br>(para. 77, xi)   | 104-5               | 104-5               | 90-5                | 725                 | 781<br>(Simon<br>Lopez)    | 138<br>(the same)           | 49<br>(the same)                          |
| <u>Vicente</u><br><u>Contreras</u><br>(para. 77, ix)   | 104-6               | 104-6               | 90-6                | 731                 | 745                        | 141<br>(Manuel<br>(Morales) | 79<br>(Fortunato<br>Figueroa) <u>Saez</u> |
| <u>Juan Hernandez</u><br>B.<br>(para. 77, viii)  | 104-7               | 104-7               | 90-7                | 764<br>(State)      | 761<br>(Rujo<br>Flores R.) | -                           | -   |

165.

3.

| Present   | <u>Roll</u> | <u>Roll</u> | <u>Roll</u> | <u>Roll</u> | <u>Roll</u>             | <u>Roll</u>             | <u>Roll</u>                        |
|---|-------------|-------------|-------------|-------------|-------------------------|-------------------------|------------------------------------|
| "landholder"  | <u>1965</u> | <u>1962</u> | <u>1957</u> | <u>1952</u> | <u>1945</u>             | <u>1938</u>             | <u>1925</u>                        |
| <u>Adeoto Mera</u><br>(para. 77, iii)                         | 104-9       | 104-9       | 90-9        | 790         | 784<br>(Carlos Mera)    | 104<br>(Juan A. Balboa) | 9<br>(the same)                    |
| <u>Simon Lopez</u><br>(para. 77, i)                           | 104-16      | 104-17      | 90-17       | 789         | 781                     | 138                     | 49                                 |
| <u>Adelina Toledo</u><br>(Dionisio Ovalle)<br>(para. 77, xii) | 104-17      | 104-18      | 90-18       | 803         | 745<br>(Manuel Morales) | 141<br>(Manuel Morales) | 79<br>(J. Fortunato Saez Figueroa) |
| <u>Dionisio Videla</u><br>(para. 77, xvii)                    | 104-18      | 104-19      | 90-19       | 869         | 841<br>(Tomas Videla)   | 160<br>(Floriano Saez)  | -                                  |
| <u>Pedro Rivera</u><br>(para. 79)                             | 104-19      | 104-20      | 90-20       | 838         | -                       | -                       | -                                  |
| <u>Onofre Anabalon</u><br>(para. 77 ii)                       | 104-29      | 104-30      | 90-30       | 704         | 736                     | 187                     | -                                  |

167.

|   | <u>Roll</u><br>1965 | <u>Roll</u><br>1962 | <u>Roll</u><br>1957 | 4.<br><u>Roll</u><br>1952 | <u>Roll</u><br>1945 | <u>Roll</u><br>1938         | <u>Roll</u><br>1925 |
|---|---------------------|---------------------|---------------------|---------------------------|---------------------|-----------------------------|---------------------|
| Present<br>"landholder"   |                     |                     |                     |                           |                     |                             |                     |
| <u>Amelia</u><br><u>Morales</u><br>(Leandro<br>Videla)<br>(para. 77, xvi) | 104-40              | 104-41              | 90-41               | 868                       | 842                 | 160<br>(Floriano<br>Saez S) | -                   |
| <u>Julian Soto</u><br>o <u>Bautista</u><br><u>Saez</u><br>(para. 77, xv)  | 104-41              | 104-42              | 90-42               | ?                         | ?                   | 160<br>(Floriano<br>Saez S) |                     |
| <u>Alfredo</u><br><u>Foitzick</u> (1)<br>(para. 77, xiv)                  | 104-53(1)           |                     |                     |                           |                     |                             |                     |
| <u>Agustin Videla</u><br>(para. 77, vi)<br>(1)                            | 104-55(1)           |                     |                     |                           |                     |                             |                     |

(1) About these plots, which were registered only on the 1965 roll, see certificate issued by the General Director of Internal Revenue where he states that occupation may have begun on an early date (Doc. No. 97).

95. The Schedule shows that before 1937 no less than eight plots from California were included in the Chilean rolls. This can be gathered from the Roll of 1925 as amended. (See the plots now numbered as 103-7, 104-1, 104-4, 104-5, 104-6, 104-9, 104-16 and 104-17).<sup>1</sup>

96. At least eleven plots were included in the 1937 Roll (See 1965 Roll Nos. 103-7, 103-13, 104-1, 104-4, 104-5, 104-6, 104-9, 104-16, 104-17, 104-18, 104-40 and 104-41). In at least twelve cases plots were included in the roll in force from 1945 to 1952: (See present Nos. 103-7, 103-13, 104-1, 104-4, 104-5, 104-6, 104-7, 104-9, 104-16, 104-17, 104-18 and 104-40).<sup>2</sup> Finally, the roll of 1952 shows that taxes were paid to Chilean authorities in respect of fifteen plots of land in California: (See present Nos. 103-7, 103-13, 104-1, 104-3, 104-4, 104-5, 104-6, 104-7, 104-9, 104-16, 104-17, 104-18, 104-19, 104-29 and 104-40).<sup>3</sup>

97. The Schedule also shows that all the plots in California are at present included in the Chilean Land Tax Roll and that the payment of land taxes has been demanded up to and including the first

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- 1 It is possible that taxes were also paid before 1937 on other plots; but it has not yet been possible to find documentary evidence of this.
  - 2 In another case (No. 104-29) taxes seem to have been paid by former settler Efrain Carrillo.
  - 3 The 1952 Roll was in force until 1957, when a new roll was prepared for the whole country. It has not been considered necessary to refer to the land tax situation after that year, apart from the column of entries in the Schedule under the head "Current roll".

half of 1965.<sup>1</sup>

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98. As additional evidence of tax payments to the Chilean authorities by landholders in California, five receipts for payment of taxes by such landholders are presented:

- i. On 7 December 1944 the local treasury of Achao received from Fortunato Saez a payment of \$198 (\$79 for taxes and \$119 for "penal interest" as a result of delay in payment) corresponding to twelve shares of territorial taxes from the first half of 1929 to the first half of 1932. Reference is made in the receipt to No. 141 of the Land Tax Roll. This corresponds to the Land Roll of 1937 and to the lot of Vicente Contreras (para. 77, ix).<sup>2</sup>
- ii. On 28 April 1951 the local treasury of Yelcho (Achao, Chile) received from Lucas Lopez Saez (para. 73) the payment of \$740, in connection with plot "Las Raices" (No. 138 in the 1937 Roll), to cover taxes from the second half of 1932 to 1946.<sup>3</sup>
- iii. On 9 August 1952 the local treasury of Yelcho (Achao, Chile) received from Pablo Carrillo

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1 See certificate dated 6 October 1965, given by the Chilean Treasurer General (Doc. No. 98).

2 "Recibo Especial" No. 76, dated 7 December 1944, given by Tesoreria Comunal de Achao (Doc. No. 99).

3 See "Comprobante de Pago Acumulado", dated 28 April 1951, No. 808 given by Tesoreria Comunal de Achao (Doc. No. 100).

Lavoz ("Cerrillos", No. 735 in the 1945 Roll) the payment of \$2,993 corresponding to taxes from 1943 to 1951.<sup>1</sup>

- iv. On 24 December 1952, a payment of the sum of \$1,285 for land tax was made in respect of the plot called "El Tusano" which appeared under the name of Manuel Morales Alfaro. The payment was made with reference to taxes which were due from the second half of 1932 to 1946. The roll number mentioned in the receipt is 141, which in the 1937 Roll corresponds to the present plot of Vicente Contreras.<sup>2</sup>
- v. On 24 December 1952 the payment of \$2,063 for land tax was made for the plot "El Tusano" which appeared under the name of Manuel Morales Alfaro. The payment refers to taxes due from 1947 to 1951. The roll number mentioned in the receipt is 745, which in the 1945 Roll corresponds to the present plot of Vicente Contreras.<sup>3</sup>

(3) Police registration

99. According to Chilean law, settlers are

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- 1 See "Comprobante de Pago Acumulado", dated 9 August 1952, No. 1588, given by Tesoreria Comunal de Achao (Doc. No. 101).
- 2 See "Comprobante de Pago Acumulado" No. 809, dated 24 December 1952, given by the Chilean Treasury Achao Office. (Doc. No. 102).
- 3 See "Comprobante de Pago Acumulado" No. 1593, dated 24 December 1952, given by the Chilean Treasury Achao Office (Doc. No. 103).



required to be registered in the police registers in order to obtain their "cedula de Identidad" (identity cards). The following inhabitants of California have been so registered. (The number of their identity cards and the place and date of issued at the request of the holder have been added).<sup>1</sup>

|  |                              |          |
|--|------------------------------|----------|
| <u>LOPEZ DELGADO,</u><br>SIMON             | Carnet No 3793 Achao         | 13- 8-45 |
| <u>VIDELA PENAIPII,</u><br>AGUSTIN         | Carnet No 6189 Palena        | 18-12-43 |
| <u>CID MATUS, ROBERTO</u>                  | Carnet No 11019 Palena       | 16-11-55 |
| <u>CARRILLO SAEZ,</u><br>FLORINDO          | Carnet No 5050 Achao         | 3-12-46  |
| <u>ANABALON VEGA,</u><br>JOSE ONOFRE       | Carnet No 6131 Palena        | 16-12-43 |
| <u>HERNANDEZ BARRIGA,</u><br>JUAN          | Carnet No 6000 Futaleufu     | 1-12-43  |
| <u>LILLO FUENTES,</u><br>CARLOS            | Carnet No 11735 Pitrufulquen | 21- 9-31 |
| <u>CONTRERAS QUINTANA,</u><br>JUAN VICENTE | Carnet No 3297 Achao         | 7-12-44  |
| <u>CARRASCO BAEZA,</u><br>NOLFA            | Carnet No 6017 Palena        | 13-12-43 |
| <u>FOITZICK MONCADA,</u><br>ALFREDO        | Carnet No 15540 La Union     | 28- 8-36 |
| <u>SOTO CARDENAS,</u><br>JULIAN            | Carnet No 11207 California   | 19-11-55 |

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1 The information has been extracted from a certificate issued by Don Aquiles Bravo Olave, Head of the Chilean Office of Identification, dated 7 October 1965 (Doc. No. 104).

Part Two

|                                       |                             |          |
|---------------------------------------|-----------------------------|----------|
| <u>VIDELA PENAIPII,</u><br>EULOGIO    | Carnet No 6178 Palena       | 17-12-43 |
| <u>JARAMILLO CARRASCO,</u><br>ALFREDO | Carnet No 5052 Achao        | 3-12-46  |
| <u>JARAMILLO CARRASCO,</u><br>ALBERTO | Carnet No 5083 Achao        | 9-12-46  |
| <u>SAEZ VELASQUEZ,</u><br>DIONILDO    | Carnet No 31694 Castro      | 30-12-48 |
| <u>HERRERA PEDRERO,</u><br>SANTIAGO   | Carnet No 12404 La Union    | 19- 6-34 |
| <u>PENA ARANCIBIA,</u><br>PABLO       | Carnet No 33142 Valdivia    | 14- 5-52 |
| <u>SEGURA VALERIA,</u><br>JOSE MATIAS | Carnet No 66000 Osorno      | 14- 8-50 |
| <u>SAEZ ESTENCAMS,</u><br>DELMIRO     | Carnet No 11307 Alto Palena | 22-11-55 |
| <u>HERRERA JARA,</u><br>JOSE DAVID    | Carnet No 39613 La Union    | 31-10-57 |
| <u>MERA,</u> ADIODATO                 | Carnet No 6071 Palena       | 13-12-43 |
| <u>RIVERA IRIBARRA,</u><br>PEDRO      | Carnet No 6081 Palena       | 15-12-43 |
| <u>ANABALON CARRILLO,</u><br>CLAUDIO  | Carnet No 10906 Palena      | 15-11-55 |

100. This list shows that out of 23 identity cards issued for the inhabitants of California eighteen were issued from 1931 to 1952 by various registration offices in Chile (such as Achao, Futaleufu, Pitrufulquen, La Union, Castro, Valdivia, Osorno and Palena), where they were requested by the individuals concerned or which were at the time, administratively responsible for the area of California; four were issued in 1955 in Palena, California or Alto Palena; and one was issued in 1957 at La Union, Province of Osorno, Chile.

(4) Registration of births, marriages  
and deaths.

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101. The Public Registration Office in Palena was not opened until 1952. Before that the nearest office was at Futaleufu, more than forty miles<sup>1</sup> away from the California Valley. Because of this distance there was a tendency on the part of some settlers (but not all) to enter their registrations at Argentinian offices. However, after the Palena office was opened, a number of persons who had previously registered in Argentina re-registered at that office.

(i) Births

102. Of a total of 195 persons living in the California Valley to-day, 98 birth certificates have been found at Chilean Public Registration offices. 28 persons are stated to be registered at Argentine offices. The remaining 69 persons whose registration papers have not yet been found state that they are Chilean.

(ii) Marriages

103. Chilean registrations have been found of 12 marriages amongst the families living in the California Valley.

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1 That is, more than one day's journey in each direction by horse.

(iii) Deaths

104. Deaths of people who lived in California have for many years been registered at the Chilean registration offices of Futaleufu and, later on, Palena.<sup>1</sup>

(5) Animal brand register

105. A register of animal brand marks is kept in the Communal Treasury at Achao (Chile). One of the earliest certificates records that Agustin Videla Peñaipil, stated to be resident in Palena, but in fact living in California, registered an animal brand mark which is entered under No. 14 in the register.<sup>2</sup> Other brands for cattle belonging to residents of California appear also to have been registered:

- (i) Brand "E", registered at Achao (Chile) on 3 April 1940 (Municipal Order No. 13) by Eulogio Videla Peñaipil.<sup>3</sup>
- (ii) Brand "B.C.", registered at Achao on 7 December 1944 (Municipal Order No. 19) by Juan Vicente Contreras.<sup>3</sup>
- (iii) Brand "M", registered at Achao on 25 November 1949 (Municipal Order No. 14) by Carlos Mera Velasquez (see paragraph 77 (iii) above).<sup>3</sup>

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1 See, for instance, Docs. Nos. 12, 18 and 51.

2 See Certificate No. 27 issued by the Treasurer of Achao on 3 April 1940, Doc. No. 105.

3 See Certificate No. 7 issued by the Treasurer of Achao on 20 March 1965, Doc. No. 106.

(6) Military service

Part Two

106. The settlers of California have habitually registered for Chilean military service at the Chilean Army Registration Office and, when called for service, have served. The following persons now living in the Valley have been registered: Claudio Anabalon Carrillo; Ramon Anabalon Carrillo; Erardo Arratia Sanchez; Sergio Balboa Barriga; Francisco Bravo Castillo; Aladino Cancino Jaramillo; Roberto Cid Matus; Eduardo Foitzick Ojeda; Alfredo Segundo Foitzick Ojeda; Alberto Jaramillo Carrasco; Alfredo Jaramillo Carrasco; Domingo Lafuente Jaramillo; Manuel Lillo Alarcon; Adeodato Mera Gomez; Felix Peña Cuevas; Dionisio Saez Velazquez; Dionildo Saez Velasquez; Julian E. Soto Cardenas; and Diego Videla Jaramillo.<sup>1</sup>

(7) Elections

107. In so far as the inhabitants of California are qualified by age and literacy to participate in elections, they have done so actively. 20 residents of California are registered in the electoral register of the Commune of Palena.<sup>2</sup> In

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1 See Doc. No. 107.

2 See Certificates given by the President of the Registration Board and Civil Registrar of Palena, dated 22 March 1965, Doc. No. 108, and 25 September 1965, Doc. No. 109.

general, though the inhabitants are much interested in Chilean politics, they show no comparable concern with Argentine politics.

(8) Legal transactions

108. The economy of California being simple and with clear characteristics of a rural exchange economy, many of the transactions consist of barter which are seldom registered. Nonetheless the residents of the area normally carry out their formal legal transactions before the Chilean authorities.

109. (i) For example, in 1951 Dona Filomena Carrillo Saez, resident in Corcovado, Argentina, appeared before the District Judge of Palena and stated that she was transferring to her sister Bibiana (sic) Carrillo Saez her share of the land in the estate of Pablo Carrillo, their father (para. 70) "Los Cerrillos", California, occupied by her brother-in-law Onofre Anabalon Vega (para. 77 (ii)). As consideration Miss Carrillo received from her sister Viviana the sum of nine hundred Argentine pesos.<sup>1</sup>

110. (ii) Another illustration is provided by a transfer of "mejoras" and rights of possession of

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1 See original document signed by Filomena Carrillo before the District Judge of Palena, Reinaldo Casanova, on 27 May 1951. (Doc. No. 110).

land situated in California, made between Onofre Anavalon (sic) (para. 77 (ii)) and Carlos Domingo Lafuente Inostroza on 25 January 1954 before the Civil Registrar of Palena acting as Notary Public.<sup>1</sup>

111. (iii) Reference may also be made to a transfer between Juan Bravo Maraboli and Felix Galilea Martinez by which señor Galilea acquired from señor Bravo the rights of the latter on a plot situated in California. The document was signed in Puerto Montt (Chile) before two witnesses.<sup>2</sup>

(9) Religious activity

112. It is not necessary in this Memorial to trace back to the days of Spanish rule the activity of the Catholic Church in the Southern regions of Chile. It suffices to say that the area of California has been specifically subject for over a century to the jurisdiction of the Chilean Catholic authorities. On 6 June 1840 the diocese of San Carlos de Ancud (Chiloe, Chile) was created by the Papal Bull "Ubi primum" of His Holiness Pope Gregory XVI. The jurisdiction of the diocese was defined as the territory included between the Rio Cautin, Cape Horn, the Cordilleras of the Andes and the Pacific Ocean.

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1 See Doc. No. 24.

2 See Doc. No. 54.

Subsequently, the Bull "In amplitudine Crescit" created the Apostolic Vicarage of Aysen (Chile), placing under it the present province of Aysen and Continental Chiloe (including the area of California).

113. From about 1920 onwards, visits by Catholic priests, under the jurisdiction of this Vicarage, began to the zones of Alto Palena, Futaleufu, California and River Encuentro. This is stated by the present Vicar-General of the Ancud Bishopric, Monsignor Ramon Mayorga Paredes.<sup>1</sup>

114. The dependence of the area upon the Chilean Church authorities is confirmed by Monsignor Angel Moreno Pariente, Secretary-Chancellor and Principal Notary of the Archbishopric of Puerto Montt (Chile) who states that "the above referred places" (i.e. Alto Palena, Valle California and Rio Encuentro) "belong at present to the said Vicarage" (i.e. Apostolic Vicarage of Aysen).<sup>2</sup>

115. At present, the Catholic Church nearest to California is in Palena. The church does not have a full-time priest, but his duties are performed by "misiones", that is, two or more priests

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1 See "Datos acerca del Obispado de Ancud-Chile" (Information on the Ancud Bishopry (Chile)), dated 30 September 1965. (Doc. No. 111).

2 See Doc. No. 112.



who go on circuit to minister to the religions needs of the settlers. These missions carry out baptisms and celebrate marriages, registering them in the corresponding parish books.

116. The visits made by several "Misiones" from the Apostolic Vicarage of Aysen (Chile) to Futaleufu, Palena and adjacent zones, since 1937 are registered in the archives of the Vicarage. With the exception of 1959 these places have been visited by the Missions once a year. In 1962 Monsignor Vielmo, Bishop in charge of the Vicarage visited Palena, Futaleufu and the California Valley, and spoke to the settlers gathered in the school.<sup>1</sup>

117. The small Protestant church in the Valley is associated with the "Corporacion Evangelica de Vitacura", of which the headquarters are in Santiago, the capital of Chile.

(10) Trade

118. Trade is mainly with other parts of Chile. Agricultural produce is sold mainly in Palena. Food supplies, clothing, etc. are for the most part purchased in Palena or at the sub-agency of the Chilean

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1 See note No. 228/65, dated at Puerto Aysen (Chile) on 2 October 1965, issued by Monsignor Domingo Luna Gomez, Chancellor and Secretary of the Apostolic Vicarage of Aysen (Chile). (Doc. No. 113).

Empresa de Comercio Agrícola (ECA) at the south end of the California Valley.

C. LOCAL ACTIVITIES OF THE CHILEAN GOVERNMENT

(1) Administrative, Police and Judicial Activity.

119. Clear evidence has already been provided in the preceding Section of various acts of Chilean public administration applied to California and its inhabitants - the allocation of public land, the collection of taxes, the issue of identity cards, the maintenance of registers of births, deaths, marriages and animal brands, the extension of elections and the validation of legal transactions. In addition to these there is evidence of other Chilean administration, police and judicial activity which it is convenient to set out in the present Section.

120. By way of introduction, it may be observed that Chilean administrative activity in California has been closely, but not exclusively, linked to the neighbouring township of Palena. There were residents in and around the township long before 1927, when the Head of the Province of Chiloe first laid the town out, or 1937, when the Decree giving Palena legal existence was passed. The cemetery half way between Palena and the Encuentro has been in use for over forty years.

121. Of course, an important factor affecting the intensity of Chilean governmental activity in the area is its general inaccessibility due to inadequate communication routes. These difficulties are described in the following extract from a report of a tour of inspection carried out in 1939 by the Intendant of Chiloe. He said:

In order to reach the towns of Futaleufu and Palena, Community of Yelcho, and as no road now exists between the port of Chaiten and the places abovenamed, the journey had to be made by taking a small truck from the Office of Roads of that province. With that vehicle we penetrated into Argentine territory in order to arrive at Esquel. From this Argentine City, where we spent the night, we made the journey in a motor car, to Futaleufu and from here on horseback to Palena.

I can disclose to Your Lordship that this is the second time that a Governor has made a journey to that remote and valuable region of our National Territory. Formerly the then Governor of Aysen, Colonel Marchant had arrived as far as that.

The journey, a long one and often dangerous, was of great benefit to the undersigned, since it offered him the opportunity of becoming acquainted with the problems and the life led there by many hundreds of compatriots who work strenuously, fighting against all the elements and inclemencies proper to nature in that region.<sup>1</sup>

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1 Extract from the report submitted by señor Guillermo Nielsen Tomsen, Intendant of Chiloe, on his official activities during 1939. (Copy delivered on 29 September 1965, by señor Guillermo Valenzuela Mercado, Secretary and lawyer of the Chiloe Intendencia). (Doc. No. 114).

122. Nonetheless, in the previous year, 1938, the Subdelegate of Yelcho, señor Carlos del Canto Medan, spent the months of February and March in the Palena district and visited California. After mentioning that he had been travelling around for thirty six days between Futaleufu and Palena, had made a summary investigation of a fire at Palena and had examined the position of the Carabineros there, he spoke of a stay of

"Sixty-two days in the Town of Palena on departmental matters delivering lands to Chilean settlers who had arrived from Argentina, reviewing roads, an inspection in the part called California, near Lake General Paz, to see the unoccupied lands and to be able to deliver them in due course."

He added that in the Commune of Yelcho "roads are very bad and the distances from one place to another are extensive".<sup>1</sup> This information is contained in his claim for special travel allowances for 108 days absent from his home.

123. One of the most active and effective arms of Chilean administration in the area has for many years been the Carabineros - the guardians of public order. At first they used to patrol the area

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1 Oficio No. 14, dated at Achao (Chile) on 29 August 1938, sent by señor Carlos del Canto Medan, Sub-delegate of Yelcho to the Governor of Quinchao. (Doc. No. 115).

from Aysen; later from Palena; and in more recent years from posts in the California Valley itself.

124. Whenever any event calls, in the opinion of the Carabineros, for a report to an official organ, they prepare what is known in Chilean practice as a "parte". A number of "partes" relating to events in California are available. They refer, however, only to events in the past ten years because a standing instruction to all the Carabineros in Chile calls for the destruction of files more than ten years old. But even prior to 1955 normal Chilean police activity took place in California on a continuous basis, and the Government of Chile is actively seeking examples of earlier "partes" which may still lie in the files of other governmental authorities.

125. The following are examples of the material to be found in such "partes":

(i) On 19 July 1955 Serjeant Agustin Cortes Valdes informed the District Court of Palena that on that day senior Alberto Jaramillo Carrasco had appeared at Carabineros post (tenencia) to report that he had been deliberately wounded by a rifle fired by his niece Elsa Jaramillo Videla. Corporal Raul Garrido Carrasco, who attended Jaramillo, stated that there would be grave consequences for the wounded hand of Jaramillo. This "parte" thus evidences the jurisdiction

of Chilean Carabineros in California, since Alberto Jaramillo Carrasco's home where the incident took place is in the California Valley (paragraph 78 (ii)). It also indicates that sometimes the Carabineros gave first aid to people in the area.<sup>1</sup>

(ii) On 8 September 1955 señor Bautista Saez Stencams (sic) reported to the Carabineros the theft of three calves belonging to him from "the fiscal land he occupies". He communicated to the police that he had "well founded suspicions" about persons whose names he gave. Both señor Saez and the persons he mentioned as likely thieves of his cattle had their homes in California.<sup>2</sup> Lt. Romero, Chief of the Police Station in Palena, reported on this accusation to the District Judge of Palena.

126. Additional evidence of the exercise of Chilean criminal competence in relation to events, or people residing, in the California Valley, is to be found in the following three cases which have been traced in the files of the District Court of Palena:

127. (i) On 9 October 1948 the Carabineros reported to the District Judge of Palena on the existence of a gun, caliber 44 mm, serial No. 99494,

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1 See "parte" dated 19 July 1955 (Doc. No. 116).

2 See "parte" dated 8 September 1955 (Doc. No. 117).

lost by its owner and which had come into the hands of Carabineros. On 25 November 1948 señor Evaristo Jaramillo Mera appeared before the judge and claimed that the gun belonged to him. Señor Jaramillo who lived then in California (para. 77 (xi)) recovered the possession of his lost weapon.<sup>1</sup>

128. (ii) On 9 June 1949 señor Nicanor Bravo C. appeared before the Palena District Court. He identified himself as an "Argentinian, twenty years old, bachelor and with domicile in the California Valley with his father". He had been denounced by Vicente Contreras Quintana as having insulted Contreras' family. Señor Bravo stated to the judge that the accusation made by Contreras was false and that, on the contrary, he had been insulted by a member of the Contreras household. He signed his statement for the record.<sup>2</sup> Señor Contreras' holding - where the events took place - is south of the major

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1 See act of retention of weapon, dated 25 November 1948, copy delivered by señor Sigifredo Castillo Silva on 15 September 1965 (Doc. No. 118).

2 See copy dated 15 September 1965 (Doc. No. 119).

channel and east of the minor channel. (para. 77 (ix)).

129. (iii) On 3 December 1951 señor Juan Bravo Maraboli appeared before the District Judge of Palena. He stated that he was domiciled in the California Valley Sector. He complained that he had been wounded by Asad Said Torres. The episode had taken place on 23 November 1951, in the home of Dona Nolfra Carrasco, the widow of Jaramillo "situated in California", where señor Bravo had been the target of señor Said's gun.

130. Señor Bravo was visited in his home by the Chilean medical auxiliary Oscar Insulza. After a few days, feeling himself better, señor Bravo asked that Said be not criminally prosecuted, but suggested instead that Said should help him to pay his medical expenses.

131. On the same day, señor Said appeared before the District Judge of Palena. He identified himself as "Argentinian, bachelor, with domicile in Puerto Ramirez (Chile), identity card No. 7310211 from Trevelin, and born in Corcovado" (Argentina). He gave his own version of the facts and admitted that he had wounded señor Bravo with his gun shots, adding, however, that he only had intended to intimidate señor Bravo, who had previously insulted him.



merits full quotation:

"On the following day, at more or less 4 in the morning, I mounted on horseback and went away in the direction of the mountain range where I was until the first of December of the present year, at which date I presented myself voluntarily at the Reserve Corps of Carabineros of Palena in order to make the essential declaration on the matter."

133. It is hardly necessary to emphasize the relevance of this statement or the document containing it. Señor Said, an Argentinian citizen, after meditating on the likely consequences of his action, decided, of his free will, to appear before the Chilean Carabineros and not before Argentinian authorities.<sup>1</sup>

134. Another instance of Chilean judicial activity in relation to events in the California area may be found in a decision of a higher civil court - that of Quinchao, the higher Court of the Department.

The case concerned a seizure of fifty-one heads of cattle belonging to Juan Antonio Balboa (para. 63), which was ordered by the Judge of Quinchao in enforcement proceedings initiated

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1 See copy of proceedings, taken from the "Record of Adjudged Cases" corresponding to 1951, delivered by the present Judge of Palena on 15 September 1965. (Doc. No. 120).

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before that Court by señor Diego Torres.

According to available information, señor Torres having obtained a favourable decision of the Judge, believed that without further authorization, he could drive away cattle which, after its seizure by order of the Judge, had been placed under the responsibility of señor Abelardo Retamal as depositary. The Judge, answering a question put to him by the Governor of Quinchao, replied that señor Retamal, being the judicial depositary of the seized cattle, was the only one who could administrate the herd and sell it.<sup>1</sup>

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1 These facts are narrated in letter No. 66 sent by Judge Luis Vargas and the Secretary of the Court to the Governor of Quinchao, dated at Achao (Chile) on 23 March 1939. (Doc. No. 121). Efforts have as yet proved fruitless to locate the actual proceedings.

## (2) Census

135. The Government of Chile has since 1930 treated California as a part of Chile for census purposes.

The first census carried out in the region was the one comprised in the 10th General Census of Population taken on 27 November 1930. It showed that there were two dwellings in the area called "California", with 7 inhabitants; and three dwellings in the area called "Rio Encuentro" with 20 inhabitants.

The next census (the 11th General Census) took place on 28 November 1940. Under the heading "California" there appear 10 dwellings with a population of 67.

## (3) Education

136. The Chilean authorities have also provided educational facilities which have been used by the children of the inhabitants of California. A school was available, first, in Palena and, later, in the California Valley itself.

137. The school in Palena had begun to function as early as 1929, though the only documentary evidence which it has been possible to trace belongs to a later period, namely, the early 1940s.

138. The register of the girls' side of the school, which covers the years 1940-1943 shows that in those years four girls from California came to the classes

in the school: Elvira Rosales (registered from 1940 to 1942), Lucía Rosales (registered for 1940), Generarda Rosales (registered from 1940 to 1942), and Irma Rosales (registered from 1940 to 1942).<sup>1</sup> These girls are daughters of settler Juan F. Rosales who lived with Guillermina Jaramillo Carrasco.

139. The boys' registration book covers the years from 1943 to 1946.<sup>2</sup> During that period seven children from California appear to have attended the school: Aladino Carrillo (registered in 1943); Dionildo Sáez (registered from 1943 to 1946); Alfredo Jaramillo Carrasco (registered in 1943); Alberto Jaramillo Carrasco (registered in 1943); Sigifredo Rosales Riquelme (registered from 1945 to 1946); Oscar López (registered in 1946); Orlando López (registered in 1943).

Dionildo Sáez is a son of Juan Fortunato Sáez (para. 69).

Alfredo and Alberto Jaramillo Carrasco are sons of Nolfia Carrasco, widow of Jaramillo (para. 77, xi).

Sigifredo Rosales is a son of Juan F. Rosales

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1. "República de Chile - Ministerio de Educación Pública - Escuelas Primarias - Registro Escolar - Escuela de Ninas No. 63, del Departamento de Quinchao, Provincia de Chiloé - ubicado en Palena, comuna de Yelcho." Extract leaf of the book (Doc. No. 122). The book is available for examination to the Court and to the Agents of the Argentine Republic.
  2. Book similar to Doc, No. 122, used by Escuela de Hombres No. 64 de Palena. Extract leaf of the book. (Doc. No. 123).

and stepson of Guillermina Jaramillo Carrasco; the latter is at present married to Juan Vicente Contreras Quintana (para. 77, ix).

Oscar and Orlando López are sons of Mariá López, sister of Simón López (para. 77, i).

140. In 1956 the settlers in the Valley set up a small school of their own which they then asked the Government to take over. This was done by Decree 1588 of 2 April 1956. The school now has two teachers and 57 children, most of them Chilean. The cost of the school is borne by the Chilean Government and the curriculum is the same as that in use in other Chilean schools. The school house is located to the east of the Arroyo Lopez, near the land of the settler Carlos Lillo.

#### (4) Public health

141. The first steps towards the provision of health facilities for the residents in the California Valley were taken after the foundation of Palena. Services were improved after 1952, when the airfield at Palena was built. The doctors in Palena, where there is now a sizeable modern hospital, regularly visit the Valley; and more recently a house has been built there for a resident doctor.

THE ABSENCE OF ANY COMPARABLE  
ARGENTINE LOCAL ACTIVITY IN CALIFORNIA

142. Correlative to the intensity of the Chilean connection with the California Valley is the slender display there of Argentine interest. So far as the Government of Chile is aware, there has been no display by Argentina at an official level of any governmental activity in any degree remotely comparable with that of the Chilean authorities. From 1914 to 1952 there was (with the exception of the debates in the Mixed Boundary Commission - as to which, see below, Part III), complete silence by Argentina on the subject of the Valley. Only in July 1952, as recorded in the Chilean note of protest of 29 August 1952<sup>1</sup> was this inactivity first interrupted - by an incursion of Argentine gendarmes into the California Valley. In this note the Chilean Government asserted that on 25 July the temporary head of the Argentine gendarmerie at Carrenleufu appeared in the California Valley "and, after examining the houses of the Chilean settlers, he took their personal documents from them (receipts for land tax payments, minutes of "radicacion" issued by the relevant Chilean authorities etc.) ..." He claimed that the California Valley belonged to Argentina and sought to require the inhabitants to meet Argentine official administrative arrangements. The Argentine Government does not appear to have replied to

1. Annex No. 45A.

this note or to have denied the facts there stated.

These facts, while constituting clear evidence of regular Chilean administration in the area before that time, are equally a strong reflection of corresponding Argentine inactivity in the area.

143. Before that date the California Valley was largely a matter of unconcern to the Argentine authorities. Even then the Argentine authorities were so little troubled by thoughts about the area that no record can be found of any response by them to the Chilean note. As perusal of a calendar of diplomatic correspondence between Chile and Argentina relating to the California Valley will show, there was no word of protest by Argentina against Chilean activity in the California Valley until the Argentine memorandum of 22 June 1956.

144. And even after that date it is significant that an Argentine public notary in the Argentine town of Sarmiento was prepared, on 4 April 1957, to notarise an authority conferred by dona Isabel Carrillo upon her brother don Florindo Carrillo in which the brother was described as being "vecino de Palena, Chile", when in fact he was a resident of the California Valley, east of the minor channel,<sup>1</sup> and in which, moreover, dona Isabel

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1. See power of attorney given by Isabel Carrillo before Notary VLK, on 4 April 1957 (Doc. No. 124).

Carrillo recognised that, in matters that might arise in connection with her rights of inheritance to her father's property in California east of the minor channel, the Chilean National Direction for Lands would possess competence. Similar significance may be attached to a power of attorney granted on 12 June 1957 by Margarita Carrillo, before an Argentine Justice of the Peace, to her brother, the same Florindo Carrillo<sup>1</sup>.

E. CHILEAN ACTIVITY AT THE INTER-GOVERNMENTAL LEVEL

145. Finally, some reference should be made to Chilean action at an intergovernmental level in its relations with the Argentine Government.

146. No attempt will be made in this section to review the large diplomatic correspondence passing between Chile and Argentina on the subject of the boundary and sovereignty over California in the period after 1952. In the view of the Chilean Government what happened after that year can only serve to confirm courses of activity and rights established before then.

147. In 1913-1914, however, an important and unique exchange of correspondence took place between the two Governments and the outcome of that correspondence must be regarded as having influenced Chilean activity

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1. See power of attorney dated 12 June 1957 granted before Señor Edgardo Hahn Argentine Justice of the Peace of Rio Pico, Chubut, acting as Notary Public (Doc. No.125).



in the area over the ensuing forty years.

Part Two

148. The significance of this exchange will be the better appreciated if it is recalled that the key passage in the 1902 Award is that "the boundary shall follow the River Encuentro to the peak called the Virgen" and in the Report that the boundary "shall follow the Encuentro along the course of its western branch to its source on the western slopes of Cerro Virgen". The essential issue between the Parties is thus whether, as Argentina contends, these words require that the course of the boundary shall follow the Encuentro along the minor channel and be connected to the Cerro Virgen, or, as Chile contends, these words require that the course of the boundary shall follow the Encuentro along the major channel and thus place the whole area west of the line of the Chilean submission within Chilean territory.

149. As the Government of Chile views the historical development of the relations between the Parties on this aspect of the matter since 1902, this issue arose, and was resolved between them in 1913-1914, in a manner favourable to the Chilean position.

150. On 9 December 1913,<sup>1</sup> the Argentinian Legation in Santiago delivered a Memorandum to the Chilean Government referring to the wrong location of Post 16. The Memorandum said:

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1. Annex No. 32

"This boundary post is not at the place indicated in the Arbitral Award, that is to say, opposite the mouth of the River Encuentro, but more to the east of this point, opposite the mouth of another different river which has its source in the vicinity of the Peak Herrero, wherefore it deflects the frontier line out of its true direction both to the North and to the South of the Rivers Carrenleufu or Corcovado and it becomes impossible for the boundary line to pass through the Virgin Peak (Cerro Virgen) which has been expressly indicated as a boundary point in the Award, or for it to continue thence to the South through the other points indicated in the Award."

151. It is important to read this Memorandum in the light of two documents which, at the time when the Memorandum was prepared, were in the possession of the Argentine Office of International Boundaries. The first, dated 9 November 1903,<sup>1</sup> was written by the Argentine Engineer Sr. Emilio Frey, who accompanied Captain Dickson during the demarcation of the boundary. This letter, which appears to have been written to the Argentine International Boundary Office by Sr. Frey, indicates that even in 1903 he had become aware that the Engaño (which in all quarters was then thought to flow into the Encuentro) actually flowed into the Salto. The source of Sr. Frey's knowledge was a journey made by Mr. Sund, at Sr. Frey's request, in which he followed the Engaño from its sources to its outlet on the Palena, which turned out to be the Salto. Moreover, Sr. Frey observed that

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1. Annex No. 31

"due to the position of the present post, all the river Engaño is on Chilean territory which, according to the Arbitral Award, should be Argentinian. This Award, in that part which refers to the post in the river Encuentro, will never agree with the topography of the land, unless the river Salto is recognised to be the river Encuentro".

152. The second document is the report dated 17 June 1907, prepared for the Argentinian Government by the engineer of the Boundaries Office, Sr. Luis A. Alvarez. He had been sent on a special survey of the area around Post 16. In the course of his report he referred to a sketch enclosed with it,<sup>1</sup> and says: "The red line on the sketch indicates that Award, whilst it can be seen that the stream where the post was erected has its sources close to the Herrero hill."<sup>2</sup>

153. These documents call for the following comments. They demonstrate clearly that the Argentinian Government was aware in 1913 that the river joining the Palena at Post 16 did not have its source on the Cerro Virgen or on any mountain forming part of that same range. Instead, the Argentine Government was conscious that the river flowed from the east and, in ascribing it a source near the Cerro Herrero, appreciated that it rose on the same range as contains the Pico de la Virgen. That Government understood, moreover, that if the river

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1. Map No. CH.18

2. Annex No. 31

joining the Palena at Post 16 were the boundary, the whole of the basin of the river Engaño would be on Chilean territory. And it knew, too, that the Engaño flowed into the Palena through the Salto. At the same time, the Argentine Memorandum insisted that the sole error was in identifying the river joining the Palena at Post 16 as the Encuentro; and thus, instead of concentrating on the rectification of the real error, adopted a position which was then juridically untenable, namely, that Post 16 had been wrongly placed.

154. The Chilean Government replied to the Argentine Memorandum in a Memorandum dated 26 December 1913.<sup>1</sup> This Memorandum stood firmly on the position that no error had been made in 1903 in the fixing of Post 16. It explained the circumstances surrounding the location of the Post and concluded that it was "properly placed" by the Commission acting in accordance with the Boundary Demarcation Treaty of 28 May 1902.<sup>2</sup> The Memorandum did not discuss the geographical details set out in the Argentinian Memorandum about the sources of the river which joined the Palena at Post 16, or the consequences of the course which the Argentine Government attributed to it. Nevertheless, in insisting, in the face of the geographical information given by Argentina, that Post 16

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1. Annex No. 33

2. Annex No. 16

was properly located, the Chilean Government was by implication saying that it accepted and treated as the boundary a river which had its sources in the neighbourhood of the Cerro Herrero, and that it regarded the area bounded by the Encuentro (major channel) and the southern projection of the water-divide of the cordon of which the Cerro Herrero formed part as being wholly Chilean territory.

155. On 26 January 1914<sup>1</sup> the Argentine Minister in Santiago delivered a Note to the Chilean Minister of Foreign Affairs referring to the details of interviews which had taken place between them and asking the Minister of Foreign Affairs to "say when replying that all I have said is what we agreed in the interview". The Note stated that two experts, one named by each government, would go to the area and study the points in issue. As regards Post 16, the Note continued, "... if agreement cannot be reached about the true location of this boundary post ... then the two experts to be appointed will inform and report to their respective offices".

156. The Chilean Government replied by a Note dated 17 June 1914.<sup>2</sup> This said that the Government would not object to again sending an expert to Post 16 "so that he, in company with another sent by your Excellency,

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1. Annex No. 34

2. Annex No. 35

might verify its correct position". But the Government preferred that the experts should not submit a report in common but should each inform their governments separately of the results of their work. The Note continued: "If it were proved that there was a real error in the placing of the said Boundary Post, 16, you can be sure that nothing would be further from my government's mind than to take advantage of this situation for its own benefit".

157. At this point this exchange of correspondence ends. The two Governments did not send experts to Point 16 and exchanged no further messages about this part of the boundary until 1952.

158. What conclusion, then, may be drawn from the episode? In the opinion of the Government of Chile, the effect of this exchange of notes, coupled with the subsequent silence on the part of Argentina until 1952, is to make it plain that Argentina, having at first contended that the river joining the Palena at Post 16 could not be the boundary because it did not have its source on the Cerro Virgen, concluded by accepting tacitly that that river, though having its source in the neighbourhood of the Cerro Herrero, was the boundary. It was incumbent upon Argentina, if it continued to maintain the assertion made in its first Memorandum, to pursue the matter further. By not doing so, the Argentine

Government led the Government of Chile to understand that it accepted Post 16 as being correctly located; that the river joining the Palena at Post 16 was the boundary and had its sources near the Cerro Herrero; and that the adjacent area to the west of the line of the present Chilean submission was to be regarded as Chilean territory. Accordingly, the Chilean Government and the Chilean settlers proceeded to act on the basis that the whole of California was Chilean territory.

PART THREE

THE QUESTION WHETHER THERE HAS BEEN  
ANY SETTLEMENT OF THE BOUNDARY  
BETWEEN POSTS 16 AND 17



SUMMARY STATEMENT OF THE CHILEAN CONTENTIONS

1. In the present Part, having regard to the terms of Article 1 of the Compromiso, the Government of Chile will consider the question of "the extent, if any, that the course of the boundary between the territories of the Parties in the Sector between boundary posts 16 and 17 has remained unsettled since the 1902 Award". The question whether there has been any settlement of the boundary in that Sector arises from the fact that, in its Note to the Chilean Government of 12th September 1964 and in its Memorandum to Her Majesty's Government of 25th November 1964, the Argentine Government has claimed that Minute No. 55 of the Mixed Boundary Commission, dated 1st November 1955, effected a "definite settlement between the Parties" of two segments of the boundary and that, by virtue of Article 2 of the General Treaty of Arbitration of 1902, this "settlement" cannot be reopened.

2. Before examining this claim, the Chilean Government desires to point out that the terms of Article 2 of the General Treaty of Arbitration of 1902 are by no means so absolute as the Argentine Government's Note to the Chilean Government of 12th September 1964 and its Memorandum to Her Majesty's Government of 25th November 1964 might seem to imply. The full text of

Article 2 reads as follows:

"Questions which have already been the subject of definitive arrangements between the High Contracting Parties cannot, in virtue of this Treaty be reopened. In such cases, arbitration will be limited exclusively to the questions which may arise respecting the validity, the interpretation, and the fulfilment of such arrangements"

(Underlining added).

The Chilean Government believes the Argentine claim that Minute 55 brought about a definite settlement between the Parties of two segments of the boundary to be completely unfounded. But if, contrary to the views of the Chilean Government, Minute 55 were to be regarded by the Court as prima facie effective to bring about a definite settlement between the Parties with respect to the two segments in question, that "settlement" would still, the Chilean Government contends, be wholly invalid because of the fundamental errors of fact pointed out in paragraph 82 below, which nullify the resolutions of the Mixed Commission incorporated in Minute 55.

3. In general, consideration of the Argentine claim involves an examination of: (a) the functions and powers of the Commission under the provisions of the Protocol of 16th April 1941 which set it up, (b) the provisions of the Plan of Work and General Directives and of the Regulations under which it operated, (c) the relevant proceedings of the

Commission and the terms and legal effect of Minute 55, and (d) the attitude taken up by each Government with respect to Minute 55.

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4. In the light of this examination the Government of Chile will submit:

(i) The functions and powers of the Mixed Boundary Commission, as laid down in the 1941 Protocol and described in the related instruments, are limited to those provided for in the Protocol.

(ii) These functions and powers are essentially those set out in Articles 1 and 6 of the Protocol, namely:

- a) to replace boundary posts which have disappeared or are in a bad state;
- b) to set up new intermediate boundary posts wherever considered necessary by the Commission in order to indicate the boundary line with more clarity and precision;
- c) to determine the exact geographical coordinates of all the existing boundary posts and of those which the Commission should set up; and
- d) to draw up and transmit to the two Governments Minutes containing the location and other descriptive details of any post set up by the Commission and producing full and immediate effect with respect to each country.

(iii) These functions and powers relate exclusively to the boundary line between Chile and Argentina as it has already been laid down in the Treaties and Arbitral Awards binding upon the two countries; and in exercising them the Commission is bound strictly to conform to the terms of such Treaties and Awards.

art Three (iv) The power of the Commission to draw up and approve Minutes producing full and definitive effect for the Parties is strictly confined to Minutes drawn up in special form and in connection with Boundary Posts that have been established in conformity with the applicable Treaties and Awards.

(v) Furthermore, in demarcating the boundary between two existing Boundary Posts, the Commission has no power to settle definitively any line or point as constituting part of the boundary in that Sector until the whole course of the boundary between those Posts has been identified in conformity with the applicable Treaties and Arbitral Awards and it has thereby been established that such line or point indubitably forms part of the boundary laid down for that whole Sector.

(vi) The boundary line proposed by the Mixed Boundary Commission in Minute 55 between the Cerro Virgen and Post 16 does not conform to the 1902 Award and Report. The River Encuentro does not run towards, nor have its source on the slopes of, the Cerro Virgen; nor does any tributary of that River. No line passing through the Cerro Virgen can therefore conform to those documents. The Cerro Virgen is an element referred to only incidentally and erroneously as designating the point of junction between the two principal elements in the definition of the line connecting Posts 16 and 17,

namely, the River Encuentro to its source and from the peak above the source the local water-divide to Post 17.

(vii) The boundary line between Post 17 and the Cerro Virgen purportedly "approved" by the Mixed Boundary Commission in Minute 55 equally does not conform to the 1902 Award and Report. The Cerro Virgen does not constitute a point on the boundary line laid down in those documents, since this line consists of two parts, namely, the River Encuentro to its source and from the Peak above the source the local water-parting leading to Post 17. The River Encuentro has its source on the Pico de la Virgen and not on the Cerro Virgen. In consequence, the boundary between Posts 16 and 17 is not traceable in conformity with the 1902 Award and Report on the basis that part of the boundary line runs from Post 17 to the Cerro Virgen.

(viii) In addition, the resolutions adopted by the Mixed Commission were nullified by a fundamental error regarding the course and source of the River Encuentro, in consequence of which they could have no binding force or effect for Chile and Argentina unless afterwards agreed to by both countries.

(ix) Accordingly, even if Minute 55 could be regarded as fulfilling the formal conditions prescribed for the drawing up of a Special Minute producing full and definitive effect under Article 6 of the 1941 Protocol,

it would still be without any legal force or effect for the Parties; and would not constitute a settlement of any part of the boundary in the Sector between Posts 16 and 17.

(x) Minute 55, did not, in fact, fulfil the conditions prescribed for a Special Minute producing full and definitive effect, and was not such a Minute. Nor was any new Boundary Post set up by the Commission in the Sector between Posts 16 and 17 nor any Special Minute drawn up with respect to any so-called Natural Boundary Post in that Sector.

(xi) The Mixed Boundary Commission itself recognised that its joint proposal regarding the boundary line between the Cerro Virgen and Post 16 did not conform in all respects with the terms of the 1902 Award and for that reason submitted it to the Chancelleries of the two Governments for decision.

(xii) The Chilean Government, while expressing the view that the joint proposal was "recommendable", notified the Government of Argentina that it considered the proposal to involve a new line which rectified or modified a situation created by the decision of the 1902 Tribunal; that accordingly the joint proposal was not a question which could be solved by the procedures laid down by the Mixed Boundary Commission under the 1941 Protocol; and that the question must be settled between the two

Governments by signing a treaty which would require to be submitted to the Chilean National Congress prior to ratification.

(xiii) The Chilean Government subsequently rejected (a) the boundary line proposed in Minute No. 55 for the area between the Cerro Virgen and Post 16, (b) the boundary line purportedly approved by the Commission between Post 17 and the Cerro Virgen, and (c) the purported "approval" by the Commission, whether in that Minute or in any other Minute, of the Cerro Virgen as a Natural Boundary Post.

(xiv) The Argentine Government's acceptance of the Commission's "conclusions" in Minute No. 55 was therefore without any effect; and the position regarding the course of the Boundary between Posts 16 and 17 was restored to what it had been prior to the fifteenth plenary meeting at which Minute No. 55 was drawn up.

(xv) No agreement was subsequently reached between the Parties with respect to the course of the boundary in any part of the Sector between Posts 16 and 17.

(xvi) Accordingly, there has been no "settlement" of any part of the boundary between Posts 16 and 17 through the proceedings of the Mixed Boundary Commission, and it falls to the Court of Arbitration to report its conclusions on what, on the proper interpretations and fulfilment of the 1902 Award, is the course of the boundary throughout the whole of the Sector.

CHAPTER IITHE PROTOCOL OF 16th APRIL 1941 RELATING TO THE  
REPLACEMENT AND SETTING UP OF BOUNDARY POSTS ON  
THE CHILEAN-ARGENTINE FRONTIERA. The Genesis of the 1941 Protocol

5. The determination and basic demarcation of the Chilean-Argentine boundary over most of its length was completed through a series of agreements beginning with the Boundary Treaty of 23rd July 1881, and the Arbitral Awards of 1899 and 1902. However, in a number of areas the demarcations were not sufficient to remove all possibilities of uncertainty and dispute as to the course of the boundary. In some areas the difficulty of the terrain or the limited resources of the demarcators caused the boundary posts to be placed at considerable distances apart, while in others the forces of nature intervened to destroy or cover up the posts. As settlers began increasingly to move into the frontier areas, the uncertain character of the boundary in these areas led to frontier incidents, more especially in the frontier zone to the east of Talca, a Chilean town lying to the south of Santiago. In 1940 these incidents inspired Major Mardoqueo Muñoz Moraga, Deputy Director of the Military Geographical Institute of Chile, to write an article in a technical publication, drawing attention to the defective marking of the boundary and suggesting the appointment of a



Mixed Commission of the two countries to carry out a densification of the boundary posts. The idea was taken up officially by Colonel Baldomero de Biedma, Director-General of the Argentine Military Geographical Institute, Engineer Félix Aguilar, Director of the Observatory of the National University of La Plata and by Engineer Norberto Cobos, then acting as Director of Sovereignty and Boundaries of the Argentine Chancellery. As a result, a meeting of officials of the two countries was convened in Buenos Aires on 20th March 1941 for the purpose of considering the establishment of a "Mixed Commission for the Demarcation of Boundaries between the two Countries".

6. The genesis of the Mixed Boundary Commission, it is therefore clear, had no particular connection with the sector of the boundary between posts 16 and 17, and did not have as its object the renegotiation of matters dealt with in the above-named treaties and awards. The proposal for the creation of the Commission arose out of incidents that occurred elsewhere on the boundary and related only to improving the means of identifying the line of the boundary on the ground; and the proposal emanated from the technical personnel of the geographical services of the two countries. Furthermore, it was not a proposal for the virgin demarcation of undemarcated

sectors of the boundary. It was a proposal for the conservation, densification and better description of a boundary the first demarcation of which had already been completed by 1906<sup>1</sup>.

7. At the meeting of 20th March 1941 Argentina was represented by the three persons mentioned in paragraph 5 above, namely, Colonel de Biedma and Engineers Aguilar and Cobos.<sup>2</sup> Chile was represented by Major Muñoz, author of the above-mentioned article, and by Major Rodolfo Concha, and the opening paragraph of the official decree which appointed them read (Annex No. 36):

"The following Officials are appointed to represent the Chilean Government on the Chilean-Argentine Mixed Commission which will proceed to agree upon the method of carrying out the preparation of the Map of the common frontier, to verify on the ground the location of the demarcator boundary posts set up in conformity with the Treaties in force and to effect the replacement or removal of those posts where this shall be necessary."

This decree expresses in the clearest possible terms the limited conception which the Chilean Government had of the functions that were to be entrusted to the Mixed

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1 The Mixed Commissions set up under the Boundary Treaty of 1881 and the Protocol of 1893 completed their work in 1906, while the demarcation of the sector with which the present case is concerned was carried out in 1903.

2 Hereafter for convenience of identification the letter (A) will be placed after the name of any Argentine delegate and the letter (C) after the name of any Chilean delegate.

8. According to the Minute of the meeting, (Annex No. 37), Engineer Cobos (A), stating that it would be "appropriate for the Chancelleries of both countries to sign a Protocol for the purpose of agreeing the necessary means for the carrying out of the demarcation on the ground", himself read out a preliminary draft of such a Protocol at the meeting. The text of this draft, which will be found incorporated in the Minute, confirms in terms no less clear that Argentina had the same limited conception as Chile of the functions of the proposed Commission. Thus the Preamble stated the object of the Protocol to be that of

"agreeing the measures for replacing the boundary posts which have disappeared, setting up new boundary posts in those sections of the Argentine-Chilean Frontier where they are necessary and determining the exact geographical co-ordinates of all such boundary posts".

And Article 1 provided:

"The work will be entrusted to a Mixed Commission formed by technicians nominated by the Argentine Republic of Chile, which will proceed to replace the boundary posts which have disappeared or which are in a bad state, to set up new intermediate boundary posts wherever it shall consider it necessary to do so in order to indicate the boundary line with greater clarity and precision, and to determine the exact geographical coordinates of all the existing boundary posts and of those which it will set up."

(underlinings added)

These passages which reappeared unchanged in the final text of the Protocol, make it plain that the Commission was envisaged by Argentina as one that would be composed exclusively of technicians and that would be concerned only with the preservation, densification and precise description of an already determined boundary.

That this was the common view of the delegates of both countries at this meeting is further shown by the discussion which followed between Major Muñoz (C) and Engineer Aguilar (A). Major Muñoz (C), while raising no objection to the statement of the objects of the Protocol and of the functions and composition of the Commission, said:

"In addition to the replacement of the boundary posts and the setting up of a larger number in that part of the frontier where there is a shortage of boundary posts, it was the desire of his Government that there should be prepared, jointly, a map of the frontier zone, a map which was becoming necessary due to the increase in population in those regions, and more especially in order to have the frontier line clearly marked in those sectors where the configuration of the ground which has already been exploited and is easily exploitable in the future and is not very clearly demarcated by geographical features, lends itself to continual disputes over sovereignty. Furthermore, it is desirable, for the better discharge of the duties of the Mixed Commission, that it should have before it complete elements of judgment to enable it to study the best demarcation which must be done in accordance with the Boundary Treaty in force. Such are the principle reasons why the Chilean Commission is of the opinion that there must be included in the Draft Protocol provision for the preparation of an official

frontier map." (underlinings added).

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Engineer Aguilar (A) agreed that the preparation of a frontier map was a matter of great importance, but pointed out that a topographical survey of the extensive and sparsely populated territory would be a lengthy and costly process. He considered it "very urgent to define the frontier line better than it is, by means of the increase in the density of the boundary posts and the replacement of such as might have disappeared or as might be in a bad state of preservation". He also considered equally important and urgent "the exact determination of the location of the existing boundary posts and of those which will be set up", adding that only thus would it be "possible to remedy the serious cartographical difficulties with which one has had to contend up to now, owing to the deficient determinations of the positions of the boundary posts." Major Muñoz (C) concluded the discussion of this point by suggesting that in any event the Commission "should be empowered to make a detailed official map representing a sufficient strip of ground on both sides of the border in cases where it shall so think fit, which additional cost would be justified by the advantages inherent in a clear and perfect idea of the course of the boundary line in those Zones which are populated or which offer attractions to settlers".

9. A second meeting was held on 24th March, at which new drafts based on the previous draft of Engineer Cobos (A) were presented by Engineer Aguilar (A) and Major Muñoz (C), and these drafts were discussed at a further meeting held on 8th April 1941 for the purpose of settling the final text. Both drafts contained a new Article 8, identically worded and therefore presumably concerted between the two delegations beforehand. This important Article, which makes provision for cases where disagreement arises as to the location of the boundary line, appears unchanged in the final text of the Protocol. The Argentine draft was in other respects unaltered from that previously presented by Engineer Cobos (A). In the first of the two final paragraphs of the Protocol the Chilean draft used the phrase "will come into force immediately the documents of ratification are exchanged" instead of "will come into force immediately it is approved by the Executive Powers", and a corresponding change was made in the wording of Article 3. These amendments were adopted and incorporated in the final text. The only other amendment proposed in the Chilean draft was in Article 5, where the words "purely by way of information" were omitted from the Argentine text, which read "The Mixed Commission will agree the plan of its work and, purely by way of information, will bring it to the

knowledge of their respective Governments." The amendment had been made by the Chilean representatives in the belief that exception was taken to the words by the Argentine Chancellery, but to their surprise Engineer Aguilar (A) opposed the omission of the words:

"The fact that the Mixed Commission agrees its plan of work and submits it for approval to the respective Governments, would mean that it leaves it free to them either to accept it or to reject it, thus creating situations which are incompatible with the very nature of the Mixed Commission, in view of its character as a Technical Commission. It is to be supposed that when a Government appoints a commission of technicians for the carrying out of a specific work, it delegates to them, fully, the power to agree their plan of work, seeing that otherwise it would find itself under the necessity of appointing another technical super commission to advise it, thus repeating that same situation. If the wording of Article 5 is accepted as it was proposed by the Chilean Delegates, those who sign that document would not divest themselves of the power to approve or reject the plan of work drawn up by the Mixed Commission."

(underlinings added).

Thus, as the underlined words show, Engineer Aguilar (A) based his opposition to the Chilean amendment on the very ground of the Mixed Commission's being a purely "technical Commission" - a "commission of technicians for the carrying out of a specific work". The Chilean delegate, naturally, withdrew his amendment and the Argentine version of Article 5 was retained unchanged in the final text of the Protocol.

#### B The 1941 Protocol

10. Shortly afterwards, on 16th April 1941, the

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Protocol was signed in Buenos Aires by the Chilean Ambassador and by the Secretary of State in Argentina's Department of Justice and Public Instruction, then temporarily acting as Minister for Foreign Affairs and Public Worship. The full text of the Protocol is reproduced as Annex No. 38. It will be seen that the Preamble and Article 1 state the object of the Protocol and the composition and functions of the Mixed Commission precisely in the terms proposed by the Argentine delegation on 20th March which have already been set out and commented upon in paragraph 4 above. Article 2 requires the two Governments to furnish their respective Commissions with the personnel, material and means necessary for the work. Article 3 requires the Mixed Commission to meet within one month of the exchange of ratifications for the purpose of settling by mutual agreement the plan of work and of making an immediate start. It also specifies, as had been proposed by the Chilean delegation, that where the Commission deems it expedient, it shall "consider as a first operation the preparation in detail of an official map representing a sufficient strip of land on both sides of the boundary". Article 4 requires the Mixed Commission to apply to their Governments for the "appointment of technical operators and of the necessary auxiliary personnel for the conduct of the



field and desk work". Article 5 is in the terms proposed Part Three by the Argentine delegation, and requires the Mixed Commission to agree the plan of work and "purely by way of information" to bring it to the knowledge of their respective Governments. As pointed out in paragraph 5 above, the Argentine delegation had insisted upon this formula because of the purely technical character of the Commission and of its work. It is also evident that neither the Chilean nor the Argentine Government could possibly have accepted such a formula if the Commission had not been a purely technical body but had been one empowered to negotiate and conclude new agreements on behalf of the two countries. Article 7 precludes the Commission from suspending its work before completing it, allowing temporary suspension only in cases of force majeure. Article 9 provides for customs exemption and freedom of importation and transit for the material of the Commission, and requires the two Governments to grant facilities for the transport of personnel and equipment. It also requires them to "allow military or civil aircraft which have a mission to carry out in connection with such work, to fly over the frontier zone" and to grant them the necessary facilities for the purpose.

11. Leaving aside Articles 6 and 8 for the moment, the Preamble and provisions of the Protocol

permit no doubt whatever as to the purely technical character of the Mixed Commission and the limited functions and powers entrusted to it by the two Governments. Article 1 is categorical that the Commission shall be formed of technicians, and this point is reiterated in Article 4, while Articles 2, 3, 5, 7 and 9 also reflect the technical and executive nature of the Commission. The functions and powers, as indicated in the Preamble and stated in Article 1, are only three:

- (a) to replace boundary posts which have disappeared or are in a bad state;
- (b) to set up new intermediate boundary posts wherever considered necessary by the Commission in order to indicate the boundary line with more clarity and precision; and
- (c) to determine the exact geographical coordinates of all the existing boundary posts and of those which the Commission should set up.

In addition, the travaux préparatoires of the Protocol, as pointed out in paragraphs 3-5 above, entirely confirm both the purely technical character of the Mixed Commission and the limitation of its functions and powers to the three tasks just mentioned. Nor was there anything unusual about these provisions of the Protocol. Even in the case of a Commission engaged

in the virgin demarcation of a boundary it is well established that it is an essentially technical body and that its functions and powers are limited to verifying on the ground the course of a boundary previously determined under a treaty or arbitral award, setting up boundary marks at appropriate points and defining the course of the boundary in precise geographical terms. A fortiori does that apply to a Commission appointed only to conserve, densify and define geographically an already demarcated boundary. Furthermore, the restricted nature of the functions and powers of the Mixed Commission envisaged in the 1941 Protocol is underlined by the wording of the provision in (b) above relating to the setting up of new boundary posts. This provisions speaks only of new "intermediate" boundary posts considered necessary by the Commission "in order to indicate the boundary line with more clarity and precision". In other words, the function of the Commission envisaged under (b) is the purely mechanical one of densifying the boundary marks in order to indicate the course of the boundary on the ground with greater clarity and precision. It does not extend to pronouncing on the correct legal interpretation to be given to an Arbitral Award whose meaning is brought into question owing to errors of cartography or to the fact that the actual geographical facts do not correspond in all respects with those

mentioned in the Award.

12. Articles 6 and 8 are of particular interest in the present case, and have therefore been reserved for separate examination.

13. Article 6, the first paragraph of which reflects provisions found in the Boundary Treaty of 1881, reads as follows:

"Minutes will be drawn up in duplicate, both copies of the like tenor, containing the location and other descriptive details of each of the boundary posts set up, which Minutes will be signed by the Commissioners in charge of the demarcation and will be transmitted to the contracting Governments. The said Minutes will produce full effect and will be regarded as firm and valid, each of the countries exercising as from that moment full dominion in perpetuity over such territories as shall respectively pertain to them, without the necessity of any further formality.

The respective Governments undertake to vacate within a period not exceeding six months those territories which, in accordance with the provisions of the preceding paragraph, shall pass out of the jurisdiction of one country into the jurisdiction of the other country, which fact they will communicate for the purposes of the corresponding occupation."

The Minutes provided for in this Article, as the Article itself makes clear, are of a special kind. They have the character of formal "Acts" of the Commission, recording with binding effect the Commission's definition of the "location and other descriptive details of each of the boundary posts set up". It is only these special minutes which under the terms of the Article are to "produce full effect" and to be "regarded

as firm and valid .... without the necessity of any further formality", namely, Minutes defining the location and giving other descriptive details of boundary posts.

No other minutes of the Commission's proceedings are accorded this effect by Article 6 of the Protocol. The Article has, moreover, necessarily to be read in conjunction with Article 1, which limits the powers of the Commission to replacing existing boundary posts and setting up "new intermediate boundary posts wherever it shall consider it necessary to do so in order to indicate the boundary line with more clarity and precision". A "Minute", in order to fall within Article 6, must therefore be one that relates to a boundary post the setting up of which is authorised by Article 1. The second paragraph of Article 6, which is consequential in character, provides for the vacation of any territory over which either Government has been exercising jurisdiction but which the setting up of a boundary post establishes as being in the jurisdiction of the other Government. This provision also has to be read in conjunction with Article 1, so that it comes into play only when a Minute has been drawn up that is of the kind provided for in the first paragraph of Article 6 and relates to a boundary post the setting up of which is authorised by Article 1.

14. Article 8, which reflects provisions found in

earlier instruments while adapting them to the particular circumstances of the Protocol, reads:

"When in carrying out the setting up of a boundary post a disagreement arises as to the location of the boundary line, the Commissioners acting will jointly prepare a large scale plan of the disputed zone and will accompany it by a report by each of the parties. With these elements, the Chancelleries of both countries will decide as may be appropriate. If the latter are unable to reach agreement, the Governments will submit the dispute to the arbitration of an expert of a third State, which will be appointed by mutual agreement within a period of one month from the time the disagreement is known."

This Article is the natural consequence of the technical and limited character of the functions and powers entrusted to the Commission under Article 1. Whenever the Commissioners in setting up a boundary post are not agreed as to the location of the boundary line, they are to make a report and the Chancelleries of the two countries are to "decide as may be appropriate"; and if they cannot agree the matter is to go to arbitration. In these cases, therefore, the matter is at once to be transferred from the technical to the political level. Moreover, as Article 8 speaks only of disagreement "in carrying out the setting up of a boundary post", it is evident that this Article also must be read in conjunction with Article 1, which limits the power of the Commission to set up new intermediate boundary posts to cases

where this is necessary "to indicate the boundary line with more clarity and precision". There is nothing therefore in Article 8 which authorises the Mixed Commission to agree upon the location of the boundary in a case where it has reached the conclusion that the boundary line which it proposes to densify with new intermediate posts does "not accord with the reality of the ground." The resolution of the problem arising from such a conclusion is not a matter entrusted to the decision of the Commission either under Article 1 or Article 8.

15. The Protocol terminates with a declaration which further underlines its limited, technical object. The signatories "declare that in accordance with the laws of their respective States, the present Agreement does not require legislative approval and therefore it will come into force immediately the documents of ratification are exchanged". If in the minds of its authors the Protocol had been intended to give the Mixed Commission the power to refashion the course of the boundary and in the process alter an existing determination of the boundary by an arbitral tribunal, provision would certainly have been made

Part Three. . . . for legislative approval of the agreement, as in  
Chile's other boundary agreements with Argentina<sup>1</sup>.

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<sup>1</sup> The Chilean Government did in the event submit the Protocol to Congress. This was done for internal political reasons and did not imply that any different view was taken as to the purely technical character of the Protocol. In Argentina it was ratified by Executive Decree.



## CHAPTER III

Part Three

### THE ESTABLISHMENT OF THE MIXED COMMISSION AND THE SUBORDINATION OF THE DELEGATES TO THEIR GOVERNMENTS

16. The Mixed Commission was formally constituted on 2nd October 1941 by a Minute signed by the Chilean Ambassador and the Argentine Minister for Foreign Affairs and Public Worship and by the members of the Chilean and Argentine Commissions who were to form it (Annex No. 39). These were the five geographical experts who had taken part in the preliminary meetings for drawing up the Protocol: Major Muñoz and Major Concha on the Chilean side and Engineer Aguilar, Colonel Biedma and Engineer Cobos on the Argentine side. The Minute referred to the Protocol and then expressly recalled its object as formulated in the Preamble "with the object of agreeing the measures for replacing the boundary posts which have disappeared, setting up new boundary posts in those sections of the frontier where they are necessary and determining the exact geographical co-ordinates of all such boundary posts".

17. Chilean Commission's responsibility to the Chilean Ministry for Foreign Affairs. At first the Chilean Commissioners acted simply on the basis of the Minute of Constitution and of the original Decree of 15th February 1941 appointing them to represent the Chilean Government on the Mixed Commission to "agree upon the

method of carrying out the preparation of the map of the common frontier, to verify on the ground the location of the demarcator boundary posts set up in conformity with the treaties in force and to effect the replacement or removal of those posts where this shall be necessary". On 21st December 1943, however, Decree No. 2071 dealing with the organisation of the Chilean Boundary Commission was issued (Annex No. 41). Inter alia, it laid down that the Commission was to be composed of the Director of the Military Geographical Institute, who should preside, and by two technical delegates of senior rank, nominated annually on the proposal of the Director of the Military Geographical Institute. This provision it explained on the ground that "in a technical matter of boundaries" it pertained to the Military Geographical Institute "as the highest geographical authority in the country" to make suggestions. Section 5 then provided that the Director of the Institute "will each time it is necessary, ask for the instructions which the Ministry for Foreign Affairs has to impart for the fulfilment of the clauses laid down in the Protocol which defines the functioning of the Chilean-Argentine Mixed Boundary Commission". And Section 6 assigned to the Ministry for Foreign Affairs the duty of including in its budget the necessary financial provision for the normal functioning of the Commission. Thus, the Decree specifically subordinated the Chilean Commissioners to the instructions

of the Ministry, whenever necessary, for carrying out the clauses of the Protocol.

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18. Argentine Commission's responsibility to the Argentine Ministry for Foreign Affairs and Public Worship. The Argentine Commission acted under laws and regulations which were revised and restated in Decree No. 7713-M-361 of 24th March 1947 and in Regulations made on 31st March 1947 for implementing that Decree. The texts of the Decree and of the Regulations will be found in Annexes Nos. 43 and 44. The Preamble to the Decree first recalls the existing legal position regarding the respective functions of the Ministry of Foreign Affairs and Public Worship and the Ministry of War in connection with boundary matters:

"That Law No. 3727 establishes as pertaining to the exclusive competence of the Ministry of Foreign Affairs and Public Worship the determination and demarcation of international boundaries, the settlement of any disputes to which they may give rise and the establishment of conventions relating to the fixing of the said boundaries;

That Law No. 12,696 entrusts to the Ministry of War, through the Military Geographical Institute, the carrying out of the fundamental geodetical work and the topographical survey of the whole of the territory of the Nation;

That the exclusive jurisdiction of the Ministry of Foreign Affairs and Public Worship in the orientation and determination of the problems of boundaries was likewise duly defined in the debate on Law No. 12,696;

That the Ministry of Foreign Affairs and Public Worship can, without renouncing the specific function which legally pertains to it, seek the advice and utilise the technical co-operation of the specialist organisations of the Nation."

Article 1 then provides that the Ministry of Foreign Affairs and Public Worship is to appoint the Argentine delegates to Boundary Demarcation Commissions and that these Commissions are to "function under the direct dependency" of the Ministry of Foreign Affairs and Public Worship<sup>1</sup>. Article 2, on the other hand, lays down that the Director-General of the Military Geographical Institute is to act as chairman and administrator of all Boundary Demarcation Commissions and is to be "an intermediate authority between the Commissions and the Ministry of Foreign Affairs and Public Worship". Articles 3, 4 and 5 contain provisions which indicate that the work of the Argentine Boundary Demarcation Commissions was envisaged by the authors of the Decree as being of an essentially technical character, while Article 5 reiterates the subordination of the Directorate of the Military Geographical Institute to the Ministry of Foreign Affairs and Public Worship with respect to geodetical-topographical work in frontier zones.

19. The Regulations of 31st March 1947, (Annex No. 44) which set out in greater detail instructions for giving effect to the Decree, confirm both the subordination of the Boundary Demarcation

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1. Under Article 6 the Ministry of Foreign Affairs and Public Worship is also made responsible for the budget of Boundary Demarcation Commissions.

Commissions to the Ministry of Foreign Affairs and Public  
Worship and the technical character of the work entrusted  
to them. On the latter point, attention is drawn to  
Article 3 of the Regulations which is particularly clear  
and specific:

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"It will be a fundamental mission of the Boundary Demarcation Commissions to materialise on the ground the frontier line, as provided in the respective protocols, they being exclusively entrusted with the erection of boundary posts and the trigonometrical operations for linking those boundary posts to the trigonometrical points determined by the Military Geographical Institute which shall have been accepted by both countries or to such points as may in future be established by mutual agreement between the two nations concerned."

The task of the Boundary Demarcation Commissions, the Regulation states, is to "materialise on the ground the frontier line, as provided in the respective protocols" and the Commissions are "exclusively entrusted with the erection of boundary posts and with trigonometrical operations respecting those posts."

CHAPTER IVTHE PLAN OF WORK AND GENERAL DIRECTIVES AND THE REGULATIONS OF THE MIXED BOUNDARY COMMISSIONA. The Plan of Work and General Directives

20. On 15th January 1942 the Mixed Commission after discussing it at several previous meetings, formally approved a "Plan of Work and General Directives" (hereafter referred to as the "P.W.G.D."), at the same time stating that it was to be brought to the knowledge of the two Governments in accordance with Article 5 of the Protocol. The P.W.G.D. was revised from time to time at meetings of the Commission and the text set out in Annex No. 40 incorporates the various amendments and additions made to the original text. The P.W.G.D. begins with a Preamble recalling the statement of its tasks under the 1941 Protocol "to replace the boundary posts which have disappeared or are in a bad state etc." (Article 1) and "the preparation in detail of an official map representing a sufficient strip of land on both sides of the boundary" (Article 3). The Preamble also states that the document has been agreed by the "technical Delegates nominated by the respective Governments", while Article 1 reiterates that "the Mixed Boundary Commission will be formed by such Technical Delegates as shall be nominated by each Government". The essentially technical and expert character of the Commission also appears in a clear form in Article 8,

which provides: "The opinions of the Delegates as expressed at the meetings will be of a personal nature and shall not represent the opinion of the Delegation of the country to which they belong."

21. The attention of the Tribunal is drawn to Articles 8 and 10, which make the clearest possible distinction between ordinary Minutes of meetings and "Special Minutes" to "record the location and other descriptive data of each of the existing boundary posts and of such as may be set up, as well as of any which have disappeared or which, through having been destroyed, are replaced by others". These "Special Minutes", states Article 10, are to be signed by the "Demarcator Delegates" and are to be numbered consecutively within each category. The Demarcator Delegates here mentioned are those provided for in Article 17, which states that "in order to carry out its work on the ground the Mixed Commission will organise Sub-Commissions, that is Demarcator and Geodetical".

22. Article 15 directs that each Delegation is to "inform their Governments, for the purpose of Article 6 of the Protocol, of any changes of jurisdiction of territories which might have occurred as a result of the demarcation, such report being accompanied by an attested copy of the corresponding Minutes and of the map prepared, with the frontier line drawn and approved by the Mixed

Commission". And it fixes a time limit within which this documentation must be forwarded to Governments. The Minutes referred to in this Article are, of course, the "Minutes" provided for in Article 6 of the Protocol and designated "Special Minutes" in Article 10 of the P.W.G.D. It will also be observed that the present Article, like Article 6 of the Protocol, envisages changes of jurisdiction as possibly occurring only as a result of "demarcation"; in other words, where the erection of a boundary post in accordance with the provisions of a treaty or arbitral award determining the boundary reveals that one or other Government has been exercising jurisdiction beyond the proper limits of its territory.

23. Article 16 states that in order to insure uniformity and consistency the Commission is to prepare supplementary "Regulations" to which "it will have to conform in all its activities". This Article, in fact, provides the formal basis for the detailed "Regulations" to which further reference will be made later (paragraph 30).

24. Article 19 specifies that for the purposes of "delimitation" the frontier line is to be divided into 16 sections, while Article 20 lists the documents which the Commission is to "utilise", namely:

- a) Boundary Treaty of 23rd July 1881;



- b) Protocol supplemental to and clarifying the 1881 Boundary Treaty, of 1st May 1893;
- c) Minute relating to the boundary of the territory of Atacama of H.E. the Envoy Extraordinary and Minister Plenipotentiary of the United States of America, Mr. William I. Buchanan, of 24th March 1899;
- d) Report and plans of the Arbitration Tribunal of 19th November 1902;
- e) Award of H.B.M. Edward VII of 20th November 1902;
- f) Plans of the demarcation and list of the boundary posts erected by the Holdich Commission in 1903;
- g) Agreement on the boundary to the North of Parallel 23° of latitude South, dated 2nd May 1904;
- h) Minutes of the erection of boundary posts signed by the Delegates of both countries; and
- i) Such survey maps as may be made by the Mixed Commission.

Item i) - survey maps - was added to Article 20 in 1950, and after Chile's rejection of the line proposed by the Commission for the Sector between Posts 16 and 17 gave rise to discussion in the Commission.

Article 21 then adds: "The interpretation on the ground of the official documents relating to the frontier line is assigned solely to the Delegates who form the Commission. Clearly, the Delegates could not by this provision arrogate to themselves any larger function of interpretation than had been entrusted to them by the Protocol, and this function is the interpretation of the geographical facts to which the boundaries determined and delimited in the applicable treaties and arbitral awards

relate for the purpose of "materialising" those boundaries "on the ground". Nor is there, in fact, any room for reading Article 21 as an assertion by the Delegates of autonomy in the interpretation of the treaties and awards as legal instruments; for the second part of the Article explains that the object of the provision is simply to exclude suggestions from "outsiders" which might produce disagreements between the Delegates and disturb the cordial relations of their Governments.

25. Article 22 provides for the preparation of a map as contemplated in Article 3 of the Protocol, and Article 23 for an "annual informative report" of its proceedings, which is to be forwarded by the delegations to their Governments as a private document. The latter Article also provides that when all the work relating to a frontier section has been completed the Commission is to draw up a "definitive legal-technical report by Sections", which is to be a public document.

26. Part II of the P.W.G.D. is headed "Demarcation", and Articles 24, 25 and 28 contain provisions which indicate the Commission's own understanding of the nature of its task:

"24) The reviewing of the existing boundary posts, the replacement of those which have disappeared and the interposition of new posts where this is necessary in order to mark the frontier with greater clarity and precision will be under the charge of a "Demarcator Sub-Commission".

By "demarcation" is understood solely the materialisation or erection of a land-mark in respect of one or more points of the boundary on the ground; and by "trazado" (tracing), the drawing of the boundary line on the topographical sheets.  
(underlinings added)

25) The Office of Head of the Demarcator Sub-Commission will be held by Delegates of both nations. The said Sub-Commission will be made up of technical and auxiliary personnel from each country, or by such as may be laid down in the Annual Plan of Work."

"28) The Demarcator Sub-Commission will start by inspecting the boundary posts, replacing those which have disappeared and repairing those which have been damaged. At those places where it is desirable to interpose new boundary posts, it will carry out the determination of the boundary conforming strictly to what is laid down in the official documents referred to in Article 20.

In order "to demarcate" and to draw the "traza" (line on the map), it must first have at its disposal maps of the relevant zone, prepared by the Mixed Commission."  
(underlinings added)

These articles leave no doubt that those who drew up the P.W.G.D. well understood the functions entrusted to them to be limited to the technical ones (a) of conserving the boundary where it had already been demarcated and (b) of further materialising an already existing boundary line on the ground by the erection of intermediate boundary posts - and this only in strict conformity with the terms of the applicable treaties and arbitral awards.

27. The same understanding appears in Article 29, which deals with cases of disagreement:

"If on the basis of the inspection of the ground and the available records the Delegates shall fail to reach agreement on the course to be followed by the boundary line between two boundary posts, one will proceed in accordance with the following rules:

a) The Demarcator Sub-Commission will coopt one or more members of the Commission. This Sub-Commission, so enlarged, will arrange for fresh studies on the ground and for the preparation of the map prescribed by the Protocol in Article 8 thereof on such scale as it shall deem expedient.

b) If with these records the Demarcator Sub-Commission so enlarged as aforesaid shall fail to reach the necessary agreement, it will pass them to the full Commission which will have to exhaust all the means within its scope to achieve agreement; and

c) If the Commission shall fail to reach a general agreement on the tracing (traza) of the frontier line at that place, a Minute will be drawn up in duplicate explaining the dispute which has arisen.

A copy of the Minute and of all the records considered and of the action taken will be forwarded by the Delegation to their respective Governments."

It is always the inspection of the ground - the studies of the ground - which is to be the basis of the Commission's conclusions. Furthermore, this Article envisages that there will be a failure to reach agreement on the course of the boundary between two boundary posts whenever there is disagreement as to the location of any part of the boundary between those posts. Article 30 adds that in the event of a dispute "the work of demarcation will not be suspended but will be continued wherever there may be agreement either in the same Section or in another adjacent Section".

Article 37 provides that "well defined inaccessible peaks through which the boundary line passes" are to be considered as "natural boundary posts"

and that their geographical co-ordinates and height must therefore be determined. At the same time it states that in order to declare natural boundary posts it is necessary previously to have the relative map prepared by the Mixed Commission on which the natural boundary post can be identified in an unmistakable manner.

28. Article 38 refers again to the special Minutes required for the erection of boundary posts under Article 6 of the Protocol:

"In respect of each boundary post a Minute will be drawn up in duplicate in accordance with the models given in the Regulations. The Minute will consist of two parts: the first will record the date of the erection or review, as the case may be, its numbering and its name, if any, and such other details as shall identify it; it will be signed by the Demarcator Delegates and will suffice for the purposes of Article 6 of the Protocol. The second part will contain the geographical co-ordinates and height, as approved by the Commission, this again being signed and dated by a Delegate from each country. Each copy of the Minute will be accompanied by the monograph of the boundary post. This whole file will form a single instrument."

These provisions again make it quite clear that Minutes regarding the erection or "review" of boundary posts are quite distinct from the ordinary minutes of meetings and are to be of a fixed formal character. Article 39 adds that a "monograph" is to be drawn up of each boundary post on the model laid down in the Regulations.

29. The remaining 28 Articles of the P.W.G.D. deal with technical details of trigonometric procedure, geographical co-ordinates, measurements and equipment.

B. The Supplementary Regulations

30. The supplementary regulations envisaged in Article 16 of the P.W.G.D. were approved by the Mixed Boundary Commission on 27th November 1949. The text of these Regulations, which is of considerable length, is reproduced in Annex No. 45. Part I amplifies to some extent the provisions contained in the P.W.G.D., while four further Parts give detailed directives regarding geodetical work, astronomical observations, "bases", triangulation, levelling, gravity and magnetism, topographical work, aero-photogrammetric survey, cartography, conventional signs and calculations. The Regulations, in short, constitute what really amounts to a technical handbook for the Delegates and staff of the Mixed Boundary Commission, and many of them are couched in highly technical terms. Detailed comment upon them would therefore be out of place in the present proceedings and, apart from Regulations Nos. 2 and 3, the Chilean Government confines itself to observing that these Regulations testify in the most eloquent manner possible to the essentially technical character of the Commission's functions.

31. Regulations Nos. 2 and 3 again make a clear distinction between ordinary minutes of meetings and the Special Minutes envisaged by Article 6 of the Protocol and Articles 10 and 38 of the P.W.G.D. Regulation No. 2 contains brief instructions regarding ordinary minutes of

meetings, while Regulation No. 3 amplifies Articles 10 and 38 of the P.W.G.D. by giving precise directions concerning the forms which Special Minutes are to take. Under Regulation No. 3, Special Minutes are to be drawn up in accordance with the models set out in the Regulation, and are to be "typewritten on the ground as soon as the reviewing, annulment or erection of boundary posts is carried out". As in the case of ordinary minutes there are to be two originals of the same tenor signed and initialled on each page by the Delegates, and each Delegation is to be handed one of these originals, which is to constitute the definitive official document. The Special Minute is also to bear on the right-hand side the signature of the Delegate of each country in whose possession the document is retained. Other documentation relating to the Minute, whether of a legal or technical character, is correspondingly to be exchanged against a receipt.

32. Four different models of Special Minutes are set out in the Regulation: a Minute of Review, a Minute of Annulment, a Minute of Erection and a Minute of a Natural Boundary Post. The term "review" as used in the P.W.G.D. and Regulations signifies not reviewing in the sense of "amending" but "inspecting" for the purpose of verifying, as clearly appears from the language of the model Minute. As neither this form of Minute nor that of

Part Three Minutes of Annulment come into question in the present case, it suffices here to set out the models of Minutes of Erection and Natural Boundary Posts:

Minute of Erection

BOUNDARY POST:.....(Name of the Boundary Post)....

SECTION:.....(VI - 18).....

The undersigned members of the Mixed Boundary Commission, having met on ..... (Date: day month year, in words)..... at the site agreed for the setting up of this boundary post, proceeded to erect the same.

The boundary post is in Section VI and bears the number 18; it is of (iron or reinforced concrete), of the model which is indicated in the annexed monograph. It is situate at ..... (Brief geographical description).....

It is intervisible with the boundary posts.....

(Signatures and names of the Demarcator Delegates)

Geographical Coordinates

Latitude: in figures

Longitude: in figures

Height: in figures

(Signatures and names of the Delegates)



Minute of a Natural Boundary Post

Part Three

BOUNDARY POST:.....(Name of Boundary Post) Steffen Hill.

SECTION:.....(VI).....

The undersigned members of the Mixed Boundary Commission, having met ..... at the (Encampment, foot of the hill, or foot of such and such a boundary mark), declare that the (Steffen Hill, Botella Peak, Mount Blanco, etc.), is a natural boundary post inasmuch as the international boundary passes through the said place (describe as clearly as possible the geographical feature and where the frontier runs, indicating the official document defining the frontier).

This boundary mark is in Section VI and is visible from the boundary posts .....

(Signatures and names of the Demarcator Delegates).

Geographical Coordinates

Latitude: in figures

Longitude: in figures

Height: in figures

(Signatures and names of the Delegates).

The Plan of Work and Regulations were in force in 1955, so that any Minute of Erection or of a Natural Boundary Post then drawn up, if it was to have legal value, was required to be drawn up in the form of one or other of the two "Models" set out above. It may be added that a similar form of Minute had been used from the first by the Mixed Boundary Commission as can be seen

Part Three from Minute of Review No. 3 of 5th March 1947, recording the "reviewing" of the placing and state of preservation of Boundary Post No. 16 (Annex - No. 42).

THE COMPETENCE OF THE MIXED BOUNDARY COMMISSION  
IN REGARD TO THE SECTOR OF THE BOUNDARY BETWEEN  
BOUNDARY POSTS NOS. 16 AND 17

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33. In the sector between Boundary Posts Nos. 16 and 17 the course of the boundary had in principle been determined by the Arbitral Award of 1902 in application of the Boundary Treaty of 1881 and the Protocol of 1893, and had been demarcated on the ground to the extent of the erection of the two Boundary Posts in question. Consequently, and having regard to the analysis of the 1941 Protocol and of the Plan of Work and Regulations made in the three preceding Chapters, it follows that the competence of the Mixed Boundary Commission in this sector was limited to

- a) ascertaining the location and condition of Boundary Posts Nos. 16 and 17 and replacing them if they had disappeared or were in a bad state;
- b) Identifying on the ground the line of the boundary in conformity with the applicable Treaties and Awards;
- c) setting up intermediate boundary posts wherever considered necessary by the Commission in order to indicate the boundary line with more clarity and precision;
- d) determining the exact geographical co-ordinates of all the existing boundary posts and of any new

Posts which the Commission might set up;

e) drawing up and transmitting to the two Governments Special Minutes containing the location and other descriptive details of any Posts set up by the Commission which would produce full and immediate effect with respect to each country;

In addition, the 1941 Protocol empowered the Commission:

f) in case of disagreement as to the location of the boundary, to prepare a large-scale plan of the disputed zone and to transmit the plan together with a report to each Government;

g) if deemed expedient by the Commission, to prepare in detail an official map representing a sufficient strip of land on both sides of the boundary.

The Protocol of 1941 made no provision for "Natural Boundary Posts" or for Special Minutes respecting mountain peaks or other natural features which would "produce full effect". The Commission, however, in its P.W.G.D. and Regulations had introduced the concept of Natural Boundary Posts in the case of "inaccessible" mountain peaks apparently by way of a substitute for a boundary post where the erection of a new intermediate boundary post would, because of the physical difficulties, be impracticable. Even so it sought to surround

"Natural Boundary Posts" with the same guarantees as the Boundary Posts, which Article 1 of the Protocol had authorised it to set up, by requiring the establishment of a Natural Boundary Post to be effected by the drawing up of a Special Minute similar to those required by Article 6 of the Protocol

34. The Chilean Government, of course, recognises that the competence of the Mixed Commission by implication included the power to make the necessary studies and carry out the necessary technical operations to carry out the tasks entrusted to it by the 1941 Protocol - the conservation, densification and exact geographical definition of boundary posts on the boundary line already determined by the 1902 Award. At the same time the Commission was, no doubt, competent - and indeed bound - to read the terms of the Award in conjunction with the geographical facts for the purpose of ascertaining and materialising on the ground the course followed by the boundary as laid down in the Award. There, however, in the submission of the Chilean Government, the competence of the Mixed Commission stopped. If in any case it should become apparent to the Commission that there was a radical divergence between the geographical facts actually found on the ground and the terms in which the Award defined the course of the boundary, the question would cease to be

Part Three    the purely technical one of the application of the Award to the geographical facts, would raise issues as to the correct legal interpretation of the Award and of the treaties which the Award applied, and would necessarily pass outside the competence conferred on the Commission by the Protocol.

NON-DEFINITIVE CHARACTER OF PARTIAL TRACING OF THE  
BOUNDARY BETWEEN POSTS 16 AND 17

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A. The Argentine thesis

35. The Argentine Government in its diplomatic Notes has taken the position that the purported "approval" by the Mixed Boundary Commission in Minute 55 of the location of the boundary between Post 17 and the Cerro Virgen and between Post 16 and the confluence of the "major" and "minor" channels fixed the course of the boundary in those two segments definitively and with binding effect for the two Governments. In its Notes the Argentine Government has for the most part attributed the supposed definitive and binding character of the Commission's "approval" of the two segments in Minute 55 simply to Article 6 of the 1941 Protocol. It has thus seemed to claim that a minute drawn up at a plenary meeting of the Commission "approving" the location of the tracing of any part of the boundary on a map approved by the Commission is equivalent, for the purposes of Article 6, to a minute drawn up with respect to the erection of a boundary post.

In a Note of 30th October 1959<sup>1</sup>, however, the Argentine Government appeared rather to try and extract

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1 For this Note, (Annex No.89) see Part IV, paragraph 12.

the supposed definitive and binding character of the Commission's approval of the two segments from Article 3 of the Protocol, which merely provides that, in settling its plan of work, "the Commission will, in those cases where it deems it expedient, consider as a first operation the preparation in detail of an official map representing a sufficient strip of land on both sides of the boundary". In that Note the Argentine Government said that the Commission had carried out the first operation laid down in Article 3 of the Protocol by approving the frontier line traced from boundary Post 16 to the junction of the "major" and "minor" channels and from Post 17 to the Cerro Virgen, and that in so doing it had complied with Articles 20(1), 22 and 24(2) of the P.W.G.D. It then said that for the purpose of documenting all the work carried out in connection with this first operation, the Mixed Commission had prepared Minute 55 as the minute which is prescribed by Article 9 of the P.W.G.D. Since Article 9 deals generally with the minutes of meetings of the Commission and it is Article 10 which deals with "Special Minutes" recording the location of boundary posts, the Argentine Government impliedly recognised that Minute 55 did not have the character of a "Special Minute". Nevertheless, it went on to contend:



"Consequently, the first operation referred to in Article 3 of the Protocol having been carried out and approved by mutual agreement so far as regards the upper and lower sectors described in Minute 55, it is the duty of the Mixed Commission to continue with the second operation where there was agreement, as is provided by Article 30 of the P.W.G.D., that is to say, with the setting up of boundary posts in such places as it shall deem necessary, it being left to the Chancelleries to pronounce only on the small unapproved intermediate sector."

On this basis, it claimed that the lines approved by the Commission for the upper and lower segments were "valid and permanent", and that the only thing left for the Commission to do was to carry out the setting up of boundary posts wherever it considered them to be necessary.

36. The Argentine thesis regarding the definitive character of the resolutions in Minute 55 was considerably enlarged by the Chairman of the Argentine Delegation in the course of discussions which took place in the Mixed Boundary Commission, subsequently to Chile's rejection of the lines proposed and approved by the Commission for the Sector between Posts 16 and 17. Thus, at the seventeenth plenary meeting<sup>1</sup>, General Helbling (A), inter alia, said :

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1. Minute 58 (26th November to 13th December 1958). Extract in Annex No.79. Parts of the translations of this Minute and of Minute No.59 (Annex No.89A) were supplied by the advisers to the Argentine Government, and the Chilean Government (without prejudice to its general reservation on translation) notes that the word appearing in these translations as "landmark" should rather have been translated as "boundary post" which, inter alia, conforms with the Compromiso.

"The Argentine Government and its Frontiers Commission have done no more than to confirm the truth of what has been done, i.e. that the frontier line through the two sectors between land marks VII-3 (16) and VII-2 (17) had been finally approved, since agreement had been reached on the exact location of the frontier line as a preliminary step to demarcation. All this was in accordance with the provisions of the international documents determining the frontier, in this case the Arbitration Judgment and the Tribunal's Report and Maps on which the frontier line is shown, which together form a single legal entity .....

No, the work of the Mixed Commission concludes in some cases when 'there is agreement on the location of the dividing line' and when land marks that have disappeared or are in a bad state of repair have been replaced, and in other cases when the foregoing has been completed and new intermediate land marks erected 'where considered necessary' (Art. 1 of the Protocol). Thus Records of the Inspection or Erection of land marks are no more than the outcome of a prior study to which the relevant international documents have been applied".

At the eighteenth plenary meeting<sup>1</sup>, General Helbling (A) went much further:

"This Mixed Commission is an international body with autonomous powers, and is endowed with all the characteristics and functions inherent in such bodies .....

Both countries delegated sovereign powers to this Commission so that it could, independently and in its own right, take all decisions with regard to the work to be carried out (Article 1), the Plan of Work (Articles 3 and 5), and to ensure that all operations carried out by common agreement should have full de jure validity.(Article 6)"

He then said that Argentina and Chile had delegated to the Commission the power to negotiate on their behalf (jus tractatum); that its decisions expressed their will; and that it was empowered to make hard and fast

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<sup>1</sup> Minute 59 (5th-14th January 1960). Extract in Annex No.89A

administrative decisions, binding on the States which had created it. He further said that the rules laid down by the Commission, in application of Articles 3 and 5 of the Protocol, are internal laws for the Commission and at the same time international laws deriving their force from the Protocol; and that, as such, they are binding on the parties to the Protocol.

37. Starting from this basis, General Helbling (A) proceeded to argue as follows:

"Article 3 of the Protocol which established a basic and fundamental rule, laid down that one of the expressly delegated powers was that the Commission could divide its work into two stages: an initial operation of 'drawing up a detailed official map covering an adequate strip of land on both sides of the frontier', and a second operation directly following on this: the setting up of land marks where considered necessary. The Protocol laid down the procedure for this purpose, in both agreed and disputed case, in Articles 6 and 8.

The above-mentioned provision of Article 3, which is extremely clear and precise, was correctly interpreted by the Mixed Commission when it declared, in Article 22 of the P.W.G.D., that "in accordance with Art. 3 of the Protocol, prior to demarcation a normal survey map shall be made, on a 1:50,000 scale, of an approximately 5 km. wide strip of land on both sides of the frontier".

Similarly the second section of Art. 28 of the P.W.G.D. makes it obligatory for maps of the relevant zone, drawn up by the Mixed Commission, to be available before the frontier can be demarcated and drawn in.

Article 20 likewise states which documents the Commission is to use, and includes under point i) the maps drawn up by the Commission.

Article 15, too, lays down that the reports which each Delegation must furnish to its Government on the changes in jurisdiction over territory

arising out of demarcation should be accompanied by the map made (by the Commission), with the frontier line drawn in and approved by the Mixed Commission.

This is one of the main provisions of the P.W.G.D., since it sets out the manner in which the Commission's work is to conclude, and covers both those areas where land marks are located and those where they are not considered necessary.

It is very important to take account of this point, since the map showing the frontier line which has been drawn in and approved by the Mixed Commission constitutes the demarcating document for the dividing line from one land mark to the next. This arises out of Article 29 which prescribes the procedure to be observed when no agreement is reached on the course followed by this line between two land marks.

As pointed out already, the Mixed Commission took the real nature of this rule in Article 3 of the Protocol into account, and it then became a basic rule for the P.W.G.D., when it was transferred in exactly the same terms to become the basic ruling in Art. 22 and Articles 15, 20 inc. i), 24, 28 and 37 which confirm Art. 22.

While there is no doubt that the power delegated under Art. 3 of the Protocol was optional in those cases which the Mixed Commission thought fit, the Commission nonetheless considered it as necessary for its whole task of demarcation: Articles 15 and 22 of the P.W.G.D.

In this respect, there can be no objections to this decision because it was made in exercise of the Commission's own powers."

As to the present case, he claimed that the initial operation mentioned in Article 3 of the Protocol had been carried out, and went on:

"The second stage, in which the Commission has to consider and decide whether it was necessary to set up intermediate land marks or not, could not be completed because the Chilean Government objected to what had been done by the Mixed Commission during the initial operation referred to in the

preceding paragraph, and the present Chilean Delegation has not so far agreed to work being continued.

Thus, with the exception of one short sector, the frontier line through the section of the frontier we are concerned with has been finally drawn on the map and approved, by a firm and valid decision of the Commission in accordance with the provisions of the aforementioned Art. 28 of the P.W.G.D."

He added that the Minutes<sup>1</sup> had been drawn up for information only and that these Minutes did not require ratification by the Governments under the provisions either of the Protocol or of the P.W.G.D.

In regard to maps used in the Commission General Helbling (A) maintained:

"If we look at the procedure to be followed by the Commission (point 5) we see that maps are legally required by the law governing our activities. Thus Article 22 of the P.W.G.D. stipulates that the map should be made of the entire length of the frontier, prior to demarcation. Article 28 makes it obligatory for maps drawn up by the Mixed Commission to be available before there can be any demarcation or drawing in of the frontier line. The basic rule contained in Article 15 in turn lays down that when the demarcation of the whole frontier (part 2) or of a specific section of the frontier has been completed the corresponding reports should be accompanied by the map which has been drawn up, showing the frontier line drawn in and approved by the Mixed Commission.

The inference of these express legal provisions is that these maps not only have an official character and full legal validity but that over and above every other consideration they are the true public instruments of demarcation of the dividing line along the entire length of the frontier, and in particular of the sectors of the

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1 For a full account of Minute 55 (Annex No. 52) see paragraph 68 et seq. below.

line between land marks. In this respect they fulfil a more lasting and effective purpose than the landmarks themselves, because the latter are inherently perishable. These maps will enable us to know what is the true frontier line in areas where there are no land marks, or where those set up have disappeared."

In regard to the conclusion of the Commission's work he said that, as the Commission was required to set up new boundary posts only when it considered them to be necessary, the conclusion of its work would not in all cases be dependent on the carrying out of the procedure of setting up new Posts; and that where new Posts are unnecessary the work will terminate with the drawing up of the map showing the frontier line as drawn in and approved by the Mixed Commission in accordance with Article 15 of the P.W.G.D. And he further said that this applies whether the Commission is engaged on the complete demarcation of the frontier or of a specific section of the frontier.

B Inadmissibility of the Argentine Thesis

38. The statements of General Helbling (A) at the seventeenth and eighteenth meetings of the Mixed Boundary Commission appear, notwithstanding Article 8 of the P.W.G.D., to be a statement of the position of the Argentine Government on this matter, and they will be presumed to be such for the purposes of the present Memorial.

39. The concept of the functions and powers

of the Mixed Boundary Commission put forward by the Argentine Government and Argentine Boundary Commission, cannot be accepted without substantial qualifications. In the first place, the contention that the two countries have delegated to the Mixed Boundary Commission the power to negotiate on their behalf (*jus tractatum*) appears to the Chilean Government to be unfounded. If the Mixed Boundary Commission may properly be regarded as an international organ established by the two countries to act on their behalf, it is an organ invested with particular functions and governed by a particular statute - the 1941 Protocol. The Preamble and Article 1 of the Protocol, as pointed out in paragraph 8 above, state quite explicitly that the objects of the Protocol and the functions of the Commission were to agree the measures for replacing boundary posts which have disappeared or are in a bad state, setting up new intermediate boundary posts where necessary to indicate the boundary line with more clarity and precision and to determine the exact geographical co-ordinates of all the existing posts and of all those to be set up by the Commission. These functions do not envisage any power to "negotiate" and certainly do not embrace a general power to "negotiate" a "settlement" of the boundary. They envisage rather administrative action of a purely technical kind to preserve, densify and give

absolute precision to an already settled boundary. Undoubtedly in the performance of its tasks, the Commission is empowered to take certain technical and administrative decisions, which if within the limits of its powers, may be binding on itself and on the Governments which created it. But it is not a negotiating body which concludes agreements on behalf of the Governments; it is a body of technical experts empowered by the Governments to carry out certain acts in matters within the competence entrusted to them. This point of view was, indeed, strongly expressed by the Argentine Government itself in a Note of 8 August 1957 objecting to the addition of a lawyer to the Chilean delegation. In that Note<sup>(1)</sup> it said:

"If the experts come across a difficulty in the technical work entrusted to them which derives from the application in the field of the frontier agreements, it is not the Commission's job to interpret treaties and legal documents, but rather the facts ought to be taken to the respective Chancelleries so that they, advised by their legal advisors, may resolve them before having recourse to arbitration" (underlining added)

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(1) For a further reference to this Note (Annex No. 70) see paragraph 117 of the present Part.



40. The technical character of the Commission and its work, which is emphasised throughout the 1941 Protocol and the P.W.G.D., places other inherent limits on its function and powers. Thus, in that same Note of 8 August 1957 the Argentine Government said that it understood that the "interpretation of documents" referred to in the P.W.G.D. "must be a technical interpretation within the limits of the Commission's powers, and cannot give rise to legal arguments which are beyond its competence". Equally, it is clear that the Commission cannot set aside those limits upon its powers merely by failing to notice, or shutting its eyes to, the fact that an interpretation with which it is confronted is not purely technical but gives "rise to legal arguments".

41. Again, since the function of the Commission is to identify the actual facts on the ground and to give effect to those facts in preserving and densifying the boundary posts and in establishing their geographical co-ordinates, geography and trigonometry impose inevitable limits on the definitive character of its conclusions. Thus, if owing to an erroneous calculation, the Commission states that the geographical co-ordinates of an already erected boundary post are X-Y, whereas in fact they are X-Z, no degree of consensus or formality in the Commission's conclusions can make the

co-ordinates other than in fact they are. Similarly, the Commission cannot by its mere "say-so" alter geographical facts actually existing on the ground.

42. If under the Protocol the Commission may be competent in the due discharge of its functions to adopt rules of procedure and make certain administrative decisions binding on itself and on the two Governments, it is equally clear that this competence is subject to and controlled by the terms of the Protocol from which it is derived. The Commission cannot by the mere process of adopting a rule of procedure or taking an administrative decision arrogate to itself a competence withheld from it by the Protocol. Article 1 of the Protocol provides in the most express terms that the functions of the Commission are three: the restoration of existing boundary posts, the setting up of new posts where necessary and the establishing of the geographical co-ordinates of all boundary posts. If the parties to the Protocol had intended to make the tracing of the boundary upon maps a specific function of the Commission, they could and would have included it amongst the objects mentioned in the Preamble and amongst the specific functions listed in Article 1. They did not do so, and it would be contrary to the accepted principles of interpretation to read into the carefully stated list of specific functions conferred on the

Commission by Article 1 a function for which neither that nor any other Article of the Protocol provides. No doubt, Article 3 of the Protocol confers on the Commission a permissive power to prepare official maps where thought expedient as an aid to the performance of the specific tasks delegated to the Commission in Article 1. No doubt also, the Protocol may properly be interpreted as implying certain other powers, such as visits to the spot, aero-photogrammetric operations and the tracing of lines on maps. But these functions are not themselves the specific functions which the Commission was set up to discharge; they are merely ancillary aids to the discharge of those functions.

43. Similarly, if the Parties to the Protocol had intended to attach definitive effects to an "approval", or to a tracing on a map, of a boundary line by the Commission, they could and would have so stated in Article 6 of the Protocol. This Article provides in the most express terms that Minutes in special form are to be drawn up containing the location and other descriptive details of each of the boundary posts set up and that these Minutes are to "produce full effect" and to be "regarded as firm and valid, each of the countries exercising from that moment full dominion in perpetuity over such territories as shall respectively pertain to them, without the necessity of any further

formality". The Parties to the Protocol said nothing either in Article 6 or anywhere else in the Protocol of any other Minutes or decisions of the Commission having such definitive effects with respect to their territories or their sovereignty. The clear implication both in logic and in law is that they did not intend other Minutes or decisions of the Commission to have these automatic definitive effects in settling the boundary between their territories. In international law, where the conferment of a binding power of decision on an international organ is the exception rather than the rule, that implication is, in the view of the Chilean Government, inescapable.

In addition, the Parties to the Protocol had every reason to distinguish in this connection between the setting up of boundary posts and other acts of the Commission. The erection of a boundary post is not only the final stage (demarcation) of the establishment of a boundary; it is an act carried out on the ground in direct contact with the actual geographical facts. It thus affords a measure of security against error not possessed by a description or a tracing made in an office. Moreover, it is on the ground, not on the map, that the boundary has to be applied. The boundary between the territories of the Parties had already been defined in Treaties and Awards and, as

the Protocol and the discussions which preceded it make clear, it was on the ground that the Parties wished to have the boundary line "indicated with more clarity and precision".

This does not mean that the preparatory studies, map-making and tracing of boundaries undertaken by the Commission are without any value. They have the value which attaches to them as the conclusions of technical experts. Equally, that value depends on the accuracy of the work of the experts and is lost if it is shown to be erroneous. Nor does the Chilean Government deny that the "approving" or "tracing" of the boundary line by the Commission might come to have a definitive and binding character, if afterwards applied on the ground and accepted by the two Governments. But it would not be the decision of the Commission which made the line definitive; it would be the acceptance of that decision by the Governments. The 1941 Protocol, from which the Commission derives its competence, reserves definitive and binding effects exclusively for Minutes drawn up with regard to the setting up of boundary posts.

44. It follows that the value of any maps made by the Commission depends essentially on the degree of their technical excellence and of their geographical accuracy. Such binding character as they may have derives from their correctness and it is quite unthink-

able that the Parties to the Protocol should have intended that the adoption of an erroneous map by the Commission should be an act binding on the two Governments. The only reference to "maps" is in Article 3, which merely provides that in settling its plan of work "the Commission will, in those cases where it deems it expedient, consider as a first operation the preparation in detail of an official map representing a sufficient strip of land on both sides of the boundary". (underlining added). The provision is permissive in character and the preparation of the map merely an initial operation to facilitate the study of the demarcation of the boundary. Article 8 further requires that, in cases of disagreement as to the location of the boundary line, the Commissioners are jointly to prepare a large-scale plan of the disputed zone as one of the elements on the basis of which the Chancelleries are to arrive at their decision. Here again, it is quite unthinkable that the Governments should have intended that they should be bound to accept an erroneous "large-scale plan" prepared by the Commission as a basis for their decision regarding the disputed zone.

45. Nor can it make the slightest

difference that the Commission has included "such survey maps as may be made by the Mixed Commission" in Article 20 of the P.W.G.D. among the documents which it "will utilise" in its work, or that in Article 22 it has made the preparation of a "proper map" of a certain scale a regular procedure of the Commission preliminary to demarcation. The Commission could not, merely by adopting an internal rule of procedure, provide that maps, and still less erroneous maps, prepared by it are to be automatically binding on the Governments. Nor does Article 20 or Article 22 of the P.W.G.D. in fact contain anything to state that survey maps made by the Commission are, as such, to be definitive and binding.

46. Impossibility of a definitive decision relating to part only of the course of the boundary.

The Commission was confronted with a boundary which has already been demarcated; and its task under the Protocol was, where necessary, to subdemarcate the course of the boundary between the existing boundary posts - in the present case between Posts 16 and 17. In the view of the Chilean Government, both common sense and good faith in the execution of the 1941 Protocol would in any event debar the

Commission from approving definitively any one segment of the boundary line between two existing Posts until the whole course of the boundary between those posts had been identified in conformity with the applicable Treaty or Award and it had thereby been established that the course of the boundary laid down for the whole sector indubitably embraces the segment in question. Otherwise, as in the present instance, the Commission might, by a premature decision regarding one segment, render impossible the proper interpretation and application of the Treaty or Award governing the boundary in the Sector. In short, any resolution of the Commission purporting to "approve" one segment only of the line in a given Sector must in the nature of things be considered provisional, pending the "approval" of a boundary line for the whole Sector conforming to the applicable Treaty or Award. Accordingly, in the event of the Commission's having failed to arrive at a resolution approving for the whole Sector a line conforming to the applicable Treaty or Award and embracing the particular segment, the partial resolution relating to that segment necessarily falls to the ground.

If the Commission fails, and fails finally,



to establish a complete course for the boundary in the whole Sector conforming to the applicable Treaty or Award, then the whole matter of the course of the boundary in that Sector necessarily reverts to the two Governments. In that event, neither the Governments nor an Arbitrator appointed by them can be bound by the partial resolution of the Commission relating to one segment only of the line. Otherwise, it may be impossible for them to arrive at a complete course for the boundary throughout the whole Sector on the basis of a proper interpretation of the applicable Treaty or Award.

47. Quite apart from the considerations of common sense and of good faith in the application of the Protocol referred to in the previous paragraph, Articles 15 and 29(c) of the P.W.G.D. appear to recognise that resolutions of the Commission can become definitive only when its work for the whole Sector in question is complete. These Articles and Article 23 also indicate that the work in a Sector is not to be considered complete until each separate stage has been carried through to a finish. In the present instance, the Commission by a resolution of 28th November 1944 expressly decided that in the area which included the Sector between

Part Three Posts 16 and 17 the work should be carried out in five successive stages; and of these stages only three had been carried out when the Chilean Government rejected the resolutions and proposals of the Commission embodied in Minute 55.

THE PROCEEDINGS OF THE MIXED COMMISSION  
RELATING TO THE BOUNDARY BETWEEN BOUNDARY  
POSTS NOS. 16 AND 17

A. The Preparatory Work of the Commission (1943-52)

48. Article 19 of the P.W.G.D., as already mentioned, divides the boundary into Sections for the purpose of the Commission's scheme of work. In this scheme the Section which includes Boundary Posts Nos. 16 and 17 is numbered Section VII, and this Section covers the area between latitude  $42^{\circ}$  and latitude  $44^{\circ}$ , that is approximately from Lake Puelo in the North to Lake General Paz in the South.

49. 1943-4. Having completed Section VI, the Commission turned its attention to Section VII, and at a meeting held in Santiago on 19th September 1943 resolved to entrust to the Argentine Military Geographical Institute "the taking of photographs in the North, as far as the River Carrenleufú or Palena, having the character of a survey of the frontier zone"; and that a Chilean representative should participate.<sup>1</sup> A topographical survey of the area had been made in the previous season and the object of the resolution was to attempt an aero-photogrammetric survey from the South up to the River Palena. On 27th February 1944 the

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1 Minute No. 25

Commission, in order to take advantage of the presence of the Argentine survey plane in the vicinity, decided to carry out the photographic survey in the current season.<sup>1</sup> Later that year, on 28th November, the Commission agreed upon the following order for its work in the area<sup>2</sup>:

- 1) determination of the area of work;
- 2) preparation of the plani-altimetric map in the said zone;
- 3) tracing of the boundary on the said map by the Mixed Commission;
- 4) material demarcation of that line on the ground; and
- 5) determination of the geographical co-ordinates of the boundary posts.

And it is clear that the Commission contemplated that all five procedures would have to be carried out in the whole Section before its work there could be considered to have been completed. The Commission also decided that, in the event of a boundary post's being found to be badly situated, it was not authorised to remove the post, and that in such case it must bring the matter to the notice of the respective Governments - a clear recognition of its limited competence when confronted with a question which was not purely one of carrying out its tasks under the 1941 Protocol. The Commission

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1 Minute No. 26

2 Minute No. 27

further decided at that meeting that a sub-Commission should operate during 1945 in the area from North of Lake General Paz to the zone of Futaleufú for the purpose of triangulating.

50. 1945. At a meeting on 3rd March 1945 the Commission recorded<sup>1</sup>:

"The boundary post to the north of Lake General Vintter (Paz), at which a work was carried out similar to that carried out in the previous season by the delegates Concha and Renault, on the boundary posts to the south of the same lake, was reviewed. As these boundary posts belong to Section VII, they will have to bear the numbers VII-1 and VII-2 respectively."

A discussion also took place as to whether or not the making of a map should precede demarcation on the ground, and there was agreement between the two delegations that this was a necessary preliminary to the demarcation. It was accordingly decided to proceed with the triangulation, to have further flights in order to obtain aerial bearings and to prepare the map of Section VII. At a second meeting held on 6th September 1945 it was resolved to fix the frontier line on the plane table sketches (planchetas).<sup>2</sup> General de Biedma (A), who had strongly advocated the preparation of a map as a preliminary to demarcation, asked that a record be made in the minutes of the

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1 Minute No. 28.

2 Minute No. 29.

following expression of his opinion:

"The line to be drawn on the plane table sketches (planchetas) will only indicate approximately the course of the boundary, it being impossible to assign to it any legal value for it is not possible to give an exact representation of the boundary on a map, however perfect such map may be. He explained that the true frontier is the line which is demarcated and marked on the ground itself."

51. 1946. The next meeting was on 29th January 1946, when a letter from General Aldana (C) was read out in which, somewhat optimistically, he said<sup>1</sup>:

"The Chilean Boundary Commission is of the opinion that the topographical preparation of a map, carried out before demarcating the frontier, apart from the cases already mentioned, would be justified if it were a case of a new dividing line which it was sought to establish. Our frontier, on the other hand, is defined by boundary treaties and by the Award of the Arbitrator; in this region, there is an official plan of the demarcation - prepared by the Arbitrator's representatives - and such plan contains no substantial errors which are capable of affecting the demarcation to be carried out ...."

At a further meeting on 20th March<sup>2</sup> Lt. Colonel Munoz (C) pointed out the need to press on with the work in Section VII, since "there exist outstanding problems relating to territorial sovereignty owing to a lack of demarcation and since this is a zone which offers enormous attraction to settlers". General de Biedma (A), observing that it was impossible in the

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1 Minute No. 30, Annexure 1.

2 Minute No. 31.

existing circumstances to complete the work of preparing an aero-photogrammetric map, agreed that the Commission should carry on with the available means the work which had been suspended. Accordingly, Section VII was decided upon as the zone of work for the 1946-7 season.

52. The Commission met again from 16th to 21st December 1946<sup>1</sup>, when, inter alia, it discussed the form to be given to its Report. In this connection Engineer Cobos (A) said:

"The essential part of the Report must be the description of the frontier line, which must be minutely precise, principally as regards the spaces which lie between boundary post and boundary post, spaces which are not materially marked on the ground by any sign whatever, except where there are precise features, such as the course of a river .... the description contained in the work of Lieutenant-Colonel Muñoz appears to him to be excessively condensed."

Lt.Col. Muñoz (C) replied that:

"in his draft he has not been profuse in this aspect where there exists a topographical map, because he is of the opinion that a description of the international boundary, however complete, will give a more imperfect idea of the boundary than a direct study thereof on the topographical sheets, which form an annexure to the Report".

In the event Engineer Cobos and Lt.Col. Munoz were requested to continue their work on the Report, and it was decided that, so far as concerned the description of the frontier line, the Report would

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Minute No. 32.

constitute the official word of the Mixed Commission. In addition the following decisions were reached respecting the new work on the ground for the 1946-7 season:

"Triangulation

a) principal chain on the frontier or close thereto along Section VII, starting from Lake General Paz and going northwards

b) special triangulation of densification in the zone River El Salto - River Encuentro - Hill of the Virgin, on which to base a topographical survey

. . . . .  
Topography

c) special survey of the zone River El Salto - River Encuentro - Hill of the Virgin."

53. The method to be employed in order to carry out the work under paragraph (c) gave rise to an intense discussion, which is recorded in the minutes as follows. General de Biedma (A) and Lieutenant-Colonel Carbonell (A) maintained:

"The aforesaid zone, and in general the whole of Section VII, is a difficulty - being rugged and covered with forest - such that the work of the topographer would be impossible or at least very arduous. They are of the opinion that the only type of survey applicable there is aero-photogrammetric."

For his part, Lieutenant Colonel Muñoz (C) asserts

"that mapmaking with a plane table in the region which concerns the Mixed Commission, namely the region which lies to the north of Lake General Paz as far as the River Palena, is perfectly practicable. He is of that opinion because he is acquainted with a great part of the zone."



resolved:

"a) To instruct Lt.Col. Carbonell to prepare two plans for aero-photogrammetric survey; one of the basin of the lakes La Plata and Fontana, and another of the zone River El Salto - River Encuentro - Hill of the Virgin. These plans will have to be made on the basis of the data respecting this class of work in the possession of the Military Geographical Institutes of both countries, and such plans will have to include any estimate of the cost of the operations.

b) The Demarcator Delegates will have to study the problem of the Demarcation in the zone River El Salto - River Encuentro - Hill of the Virgin on the ground itself, as one of their first jobs in the field work season, and to report at the first field meeting as to which type of survey is possible and convenient in that zone."

54. In studying the items which would have to be included among the new work comprised in the Plan, mention was made of "the possibility of demarcation in Section VII," and this gave rise to further discussion. General de Biedma (A), whose views were shared by Lt.Col. Carbonnel (A), stated:

"Section VII is the most difficult, topographically speaking, of those which the Mixed Commission has had to deal. There are many cordons and an infinite number of water courses and water divides. When putting up a boundary post, would the Demarcator Delegates be absolutely certain that they had placed it on the true frontier line? A mistake of this nature would constitute a very grave error, a risk which the Commission must not run. Erection of a new boundary post necessitates a technical basis, which cannot be other than a topographical or aero-photogrammetric survey. Hence the necessity of having a survey prior to demarcation. Owing to the nature of the ground and on account of its greater speed, the survey indicated on this case is an aero-photogrammetric one."

Lt.Col. Muñoz (C), on the other hand, took a somewhat different line, which also commended itself to the remainder of the Delegates:

"The long experience which he has in the demarcation of the frontier enabled him to assert that the Demarcator Delegates can perform their function without major obstacles. They must start their work with the identification and verification of the existing boundary posts and continue it with the reconnaissance of the frontier line between the recognised boundary posts and erect new boundary posts wherever they consider it necessary and where no doubt exists as to the international boundary. These valuable elements of judgment available to them for the purpose of identifying the frontier, apart from the careful personal exploration of the ground which is the most reliable source, are: The Arbitral Award, The English Map of the Arbitral Award, The Chilean Map of Boundaries, the Minutes of Erection of Boundary Posts by the representatives of the Arbitrator, etc. If on the ground itself they should have doubts in regard to identifying the course of the international boundary to be marked, the Protocol and the Plan of Work and general regulations of the Mixed Commission indicate the modus operandi, that is to say, the Delegates must arrange for the preparation of a topographical map of the disputed region on such scale and covering such area as they shall deem expedient, and, having done this, they will assuredly arrive at the correct solution of the problem. If they should be unable to agree, other Delegates will be called in to assist, and if the disagreement shall still subsist then the Mixed Commission studies the problem, which, should it remain unsolved, it passes on to the Chancelleries in the clear and precise form which was laid down at the time of the drawing up of the Plan of Work and general regulations of the Mixed Commission, that is to say, the main Regulations of the Protocol, regarded by Chileans as a Law of the Republic.

These fundamental reasons, apart from his experience as a Demarcator, cause him to assert that the Demarcator Delegates are always in a position to define the international boundary. If they have encountered doubts at any place, then they continue

their task at another place where no doubt exist while the topographical survey is being made.

Part Three

The Mixed Boundary Commission notwithstanding its being the only authority on this matter by order of the Law, namely the Protocol, is not empowered to suspend the demarcation of the frontier which consists in inspecting the existing boundary posts, repairing and cementing them, erecting new boundary posts where necessary and fixing the geographical co-ordinates of all the posts. The carrying out of an astronomical observation or the measuring of a base of a chain of triangles for purposes of the preparation of the map are not demarcation nor can they be regarded as preliminary fundamental work for the demarcation without disregard of the spirit and letter of the Protocol which gave birth to the Commission.

This same Law establishes clearly and expressly when a topographical survey is necessary as a preliminary to demarcation and this it has already established. Up to date, from 1942, there had been no difficulties in the demarcation. Where the Demarcators have had doubts, they have not demarcated and a topographical survey has been made as has happened in two small sectors, namely, along the course of the Arroyo de la Galera and in the Ibanez-Pallavicini Peninsula in the season which has recently ended.

It has been here stated that a preliminary survey shall be proceeded with in Section VII by the aero-photogrammetric process in order afterwards to effect the demarcation. He recognised that to have beforehand a map on a scale of 1:50,000 or less would make the work easier and less personal effort would be expended in demarcating the international boundary, but such a procedure would involve an expenditure perhaps one hundred per cent greater than the costs which the two countries at present have to bear, without any technical advantage to justify it.

Finally, he asks himself the question: Has the Mixed Commission the essential equipment to be able to decide upon an aero-photogrammetric survey; does it possess an aeroplane, cameras, films and plotting apparatus? No. This work must be entrusted to other bodies who have nothing to do with the Mixed Commission, namely, the Military

Geographical Institutes of both countries. But, can these bodies at the present time fully satisfy the needs of the Commission? He thinks not, for they are not self-sufficient with regard to the items required by the aero-photogrammetric procedure.

In short, to suspend now the work of demarcation of the frontier in Section VII or in any other Section, in view of the a priori demand for a topographical or aero-photogrammetric survey, would be openly to violate the legal and regulatory provisions which govern the life and activities of the Commission; to do such work in the manner claimed, one would have first to amend the said provisions."

On the proposal of General Cañas (C), a compromise formula was eventually arrived at, namely:

- a) the Demarcator Delegates, as one of their first jobs on the ground, should inspect the frontier and decide in which zones it was possible to demarcate normally and in which zones it was necessary to have a previous survey;
- b) in order to make better use of their inspection, the Demarcator Delegates should review the existing boundary posts;
- c) the Mixed Commission should meet on the ground as soon as the said Delegates were in a position to report on their work.

55. 1947. i) On 28th February of this year<sup>1</sup> the Commission considered item (c) "Special Survey of the zone River El Salto - River Encuentro - Hill of the Virgin," and the following discussion was recorded in the minute of the meeting:

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1 Minute No. 33.

"Lieutenant-Colonel Cumplido (C), in accordance with the mission which was entrusted to him at Meeting No. 32, proceeded to reconnoitre the ground in order to report on which type of survey is possible and suitable in the said zone. Unfortunately it was not possible for him to be accompanied on this reconnaissance by Lieutenant Colonel Carbonell (A), as provided in the resolution in Minute No. 32, owing to the Delegate in question having only recently arrived on the ground from Buenos Aires. As a result of his inspection, it appears that it would only be possible to survey with plane table, in the normal manner, the lower basin of the River Encuentro, the basin of the Arroyo Mallines (a tributary of the Encuentro which runs from south to north) and the zone more to the south called California, as far as the junction of the River Engano with the River Tigre. The rest of the Sector, especially the River Encuentro in its middle and upper course, through being very enclosed, would only permit of a direct survey by plane table provided the technical requirements were suitably lessened. In any case, this simplified survey would permit of a trustworthy representation of the ground, especially as regards the hydrography and orography of the sector, sufficient for the purposes of demarcation. However, in his opinion, for the purposes stated (demarcation), it is not necessary to carry out in this sector any survey whatever, since according to the Arbitral Award the boundary follows the River Encuentro as far as the Peak called Virgin, and, consequently, it is solely a case of identifying by a reconnaissance what course this river follows in order to satisfy such purposes.

Lieutenant-Colonel Carbonell (A) is of the opinion that an aero-photogrammetric survey of the whole zone is essential since it is a case of a frontier sector over which hangs a question mark. The complete survey of the zone will provide elements of judgment which will enable a final decision to be made on the course of the boundary." (Underlining added).

Thus, as the underlined words show, the Chilean delegate, after reconnoitring and inspecting the ground in 1947, treated as undisputed points of geographical fact that:

(1) the mountain channel - the channel whose middle and upper course was very enclosed - was the River Encuentro; and

(2) the Arroyo Mallines was a tributary of the River Encuentro.

Nor is there any record that any other member of the Mixed Commission disagreed with Lt.-Colonel Cumplido's presentation of the River Encuentro and the Arroyo Mallines and of the relation between them.

ii) The Commission also heard a report from Lt. Col. Carbonnel (A) on a possible plan for the aerophotogrammetric survey of the same zone. He submitted two schemes, "the simpler of which would have ..... the advantage of lower cost". He explained these schemes in detail, illustrating them with diagrams, and General Cañas (C) asked to be given a copy of the fundamental part of the schemes in order that he might have them studied in the Chilean Military Geographical Institute. At a second meeting, on 9th March<sup>1</sup>, the Commission discussed the Argentine proposal for a reconnaissance of Section VII, and resolved to consider preliminary reconnaissance flights and to "review" existing boundary posts. A further meeting was held in the autumn, on 23rd-29th October<sup>2</sup>, at which a number of

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1 Minute No. 34.

2 Minute No. 35.

technical questions were discussed. At this meeting, Lt.Col. Muñoz (C) called particular attention to a new regulatory provision relating to natural boundary marks, namely that these should not bear any number in future, and should be designated solely by the regional name. The Plan of Work for the 1947-48 season as approved at the meeting advised "inspection in Section VI," which "will precede the work of demarcation in Section VII", and reconnaissance and erection of new boundary posts along the frontier from the River Palena or Carrenleufu northwards, "where the international boundary does not present any doubts".

56. 1948. The first meeting in 1948 was held on 17th April,<sup>1</sup> when technical problems of demarcation in Section VII were discussed. In this connection reference was made by the Argentine Delegation to the fact that, apart from some cordilleran passes, it would not be possible to demarcate large parts of the Section owing to the rugged nature of the ground and the existence of tall forests. A study was suggested of the stereophotoscopic demarcation of all the frontier zones where it had not been possible to demarcate by ground methods. Technical matters were further discussed at a second meeting held on 16th September<sup>2</sup>,

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1 Minute No. 36

2 Minute No. 37.

and in addition the need for providing duplicates of Monographs. Reference was made to certain differences of opinion which had arisen between Engineer Cobos (A) and Lt.Col. Muñoz (C) in regard to the tracing of the frontier line on the topographical sheets. The continuation of the demarcation was also directed. This question was discussed between the two Delegates concerned at a third meeting on 25th October<sup>1</sup> in connection particularly with the delineation of the frontier line on the topographical plane table sketches (planchetas) for the pampas lands. At this meeting the "immutability" and "intangibility" of the boundary posts set up by the British Demarcation Commission was expressly recognised.

57. A few days later, on 31st October 1948, a further meeting was held<sup>2</sup> at which the Commission decided to define the word "demarcation" as "the materialisation or marking on the ground of a series of points on the boundary" and the word "tracing" as the "drawing of the boundary line on the topographical sheets". The Commission also approved the Munoz-Cobos Report for the years 1941-7, and this Report contains, on pages 89 et seq., passages which relate directly to

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1 Minute No. 38.

2 Minute No. 39.



"Work of the Demarcating Sub-Commission"Demarcator Delegates

The following act as Demarcator Delegates, on behalf of Chile, Lieutenant-Colonel Enrique Cumplido Ducos and; for Argentina, Engineer Norberto B. Cobos.

Camp

The Central Camp of the Demarcating Sub-Commission was established in the last days of January 1947, in the locality of Travelin, 25 kms. to the west of Esquel (Chubut).

Revision of the Boundary Posts set up by the Arbitrator

In previous seasons there had been reviewed boundary posts (18) and (17), which were set up respectively on the south and north of Lake General Paz or Vintter in 1903 by Captain B. Dickson, such revision being performed by the Demarcators Lieutenant-Colonel Claudio Guzman and Engineer Norberto B. Cobos.

In this season Engineer Cobos, acting along with Lieutenant-Colonel Enrique Cumplido D, reviewed the boundary post (16) on the River Encuentro and the boundary posts (15) and (14) which were placed respectively to the south and north of the River Futaleufu.

Lieutenant-Colonel Cumplido and Lieutenant-Colonel Roberto Carbonell reviewed boundary posts (13) and (12), respectively to the south and north of the River Puelo.

Study of the Frontier of Section VII

From the natural boundary mark VI-43, Hill Botella Oeste, last boundary mark in Section VI, situate in the high mountain chain which separates the upper basin of the River Pico (on the east) from the basin of the same river, called Figueroa in Chile (on the west), the boundary runs in a general north-east direction through this chain until it descends by the chain

to boundary post VII-1 (18), situate on the south bank of Lake General Paz. The line crosses the Lake from south to north and continues along a local water-divide which separates the waters which flow into the River Engaño, leaving them on the east and arriving finally at the Hill of the Virgin.

From this hill, which ought to be regarded as a natural boundary mark, the boundary must continue, in accordance with what was indicated in the Award of H.M. Edward VII and in the Report of the Arbitral Tribunal, along the course of the River Encuentro from its source to its outlet into the River Palena. On the north bank of the latter river, opposite the place where the River Encuentro runs into it, is erected boundary post No. (16).

The topography of the Northern zone of the Hill of the Virgin does not correspond with the topography shown by the cartographical documents of the time when the Arbitral Award was made.

The map used by the English Demarcators, from which the dividing line was traced, contains serious defects, especially in that part which corresponds to the hydrographical basin of the River Encuentro in its upper and middle reaches. For that reason, the identification and material delineation on the ground of this sector of the frontier line has presented difficulties, which the Mixed Commission is at present trying to solve.

From boundary post (16) the boundary continues in a generally northerly direction .....

#### Definitive Demarcation

A definitive demarcation of the frontier, increasing the density of the boundary posts set up by the British Demarcators in 1903, has not yet been made, seeing that the annual Plan of Work on the ground for the 1946-1947 season, approved at Meeting No. 32, advises only the reconnaissance of the frontier and the revision of the existing boundary posts. (Plan of Work, Demarcation, Page 88)."

These passages from the Report call for two comments. The first is that, if the Report expresses the opinion that the Hill of the Virgin "ought to be regarded as a natural boundary mark", no Special Minute was drawn up then or at any other time to give effect to that opinion. The second is that, even while recording that opinion, the Delegates in question recognised that "the topography of the Northern zone of the Hill of the Virgin does not correspond with the topography shown by the cartographical documents of the time when the Arbitral Award was made" and that the "map used by the English Demarcators, from which the dividing line was traced", contained "serious defects". (Underlinings added).

58. 1949. The only meeting held in this year was on 19th March,<sup>1</sup> when Lt.Col. Urra (C) urged that the annual Plan of Work for the next season should advise the carrying out of an aero-photogrammetric survey covering the zone River Encuentro - Hill of the Virgin. Lt.Col. Daul (A) also advised the taking of air-photographs in the zone Lake General Paz - River Palena, in order to make a mosaic as a basis for further studies, but considered that this should be subject to the necessity of first completing the photogrammetric tasks relating to Sections V and VI.

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1 Minute No. 40.

59. 1950. The next meeting was on 7th February 1950<sup>1</sup>, when a sub-commission composed of Lt.Col. Urra (C) and Surveyor Dvoskin (A) in its report to the Commission made the following significant statement:

"it has verified the impossibility of determining, demarcating and drawing the line of the boundary in Peak Rojo, Peak Principio and the "River Encuentro" zone, due to the fact that if one keeps to the tracing drawn by the Award in the maps which form part of the Arbitral Award, these maps do not respond in certain cases to the geographical reality of the ground." (Underlinings added).

The Sub-Commission furthermore added that the British Tribunal had used the maps provided by the Parties and that these maps did not permit of "an exact and detailed interpretation of the geographical reality of the ground".

It then continued:

"Therefore, when they describe the tracing which they drew on the said map, they name as "points on the line" a series of Peaks some of which it has been proved on the new maps are not on the boundary line which they themselves traced. The fundamental concept established by the Award is that the boundary is formed by the Rivers, the high Peaks and the continental or local water-divides; consequently, it is evident that if one keeps faithfully to the line which appears on the maps used by the Arbitrator this would mean not keeping to the criterion which guided the Arbitrator when giving his Award." (Underlinings added)

Here again there is a clear recognition by two further Delegates that the maps which form part of the Arbitral Award do not correspond in certain cases to the geographical reality of the ground and that some of the

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1 Minute No. 41

Peaks named in the Award as situated on the boundary line are not in fact on that line. There is also a clear recognition that in these cases the demarcation and drawing of the line of the boundary cannot be effected by any merely technical process of materialising on the ground the line determined by the Award; and that if this were done, it would mean, owing to the actual geographical facts, not keeping to the criterion which guided the Arbitrator when giving his Award. In the light of the Sub-Commission's Report and of the suggestions which it made, the Commission decided to inform the respective Chancelleries of the situation.

60. The Commission met again on the 8th November 1950, and the Argentine Delegation reported that<sup>1</sup>:

"its Chancellery approved the thesis supported by the Mixed Commission to the effect that the zones where the plans utilised by the Arbitral Tribunal or the Holdich Commission do not coincide with the real position as proved by the present maps prepared by the Mixed Commission will be governed by the latter maps, the demarcation and the tracing of the boundary line being made on the basis of the present cartography, thus harmonising the criterion maintained by the Award with the geographical reality of the ground". (underlining added)

The Chilean Delegation in turn reported that

"according to the thesis of its Chancellery, the Demarcator Delegates, in the event of any discrepancy having arisen in the work and powers indicated in the first Article of the Protocol

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1 Minute No. 43.

which might affect the implementation thereof 'would have to be the subject of study by the Chancelleries and would have to be referred to them in conformity with the eighth Article of the same Protocol'." (underlinings added)

It may be added that the Minute of this meeting contained an Annexure entitled "Summary geographical co-ordinates and spot heights Section VII" which shows that the Hill of the Virgin had been approved only as a trigonometric point and not as a "natural boundary post".

61. 1951. The spring meeting of this year was held on 26th March 1951<sup>1</sup>, when Surveyor Dvoskin reported that in Section VII the Sub-Commission had worked from the Lake General Paz northwards, making use of the information from the flights undertaken in 1944; and that only three further reconnaissances remained to be made in order to complete the aerial survey of the Section. At the autumn meeting, which took place on 21st September<sup>2</sup>, the Argentine Delegation raised the question of the suitability of the phrase "changes of jurisdiction of territories" in Article 15 of the Plan of Work and Articles 5 and 6 of the Regulations, explaining its doubts as follows:

"The Mixed Commission is only authorised to increase the density of boundary posts on the frontier, but never to change the boundary;

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1 Minute No. 44.

2 Minute No. 45.

therefore, as there is no frontier modification, there is no 'change of sovereignty'. The only thing which has arisen and can still arise in cases where through lack of knowledge as to where the true frontier line runs, private individuals with properties in the frontier zone occupy territories in the neighbouring country and even the authorities themselves extend their jurisdiction to territories of the other country."  
(underlining added)

The Chilean Delegation expressed its agreement with these views. The Chilean Delegation also stated that it was not in a position to carry out the work of the aero-photogrammetric Sub-Commission in Section VII, and that Argentina would undertake the work subject to the availability of the necessary aircraft.

B. Beginning of Argentine interference with Chilean Settlers in the California Valley accentuates the need for a solution of the Boundary

62. 1952. The next meeting which is of interest for the present case was held on 9th October 1952<sup>1</sup>, when the delivery was recorded of a diagram of the preliminary map - scale 1 to 250,000 - of the reconnaissances made during the taking of aerial photographs in Section VII with approximate indication of the vertices and boundary posts. The Minute of the meeting also records:

"The Delegates state that, at a meeting with the Technical Operators of that Sub-Commission, they were surprised by a complaint from the Chilean Observer Senor Charlin who said that up

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1 Minute No. 49.

to date he had done nothing because he had not been given space in the photogrammetric aeroplane....

It was stated by the Argentine head of the Sub-Commission that offers had been made to include Observer Charlin in the work by inviting him to occupy any position in the aeroplane; and by other Delegates that Observer Charlin was not qualified to carry out any one of the functions attaching to a photogrammetric flight. The Commission decided to apply the last paragraph of Article 28 of the Regulations, under which where the capacity of an aeroplane does not admit more than a limited number of persons "the technicians of both countries will make a record of the numbers of the pictures with which the separate flights begin and end". The Chilean Delegates, General Urra and Lt.Col. Avendaño, also agreed to place on record the "correct discharge by the Head of the Sub-Commission, Argentine Technical Operator Ricardo Lombardi, of his duties and his concern that the work should be carried on in an atmosphere of harmony, as exists among members of the Mixed Commission". At this meeting, the Chilean Commission reported that its Chancellery had been informed that:

"in August last difficulties arose between Argentine Gendarmerie and settlers in the Chilean localities of Palena and California, owing to the fact that the work of demarcation of the frontier by the Mixed Boundary Commission has not been completed in the zone to the south of Boundary Post VII-3 (16) situate on the north bank of the River Palena (Carrenleufu) opposite its junction with the River Encuentro." (underlining added)



The Chilean Commission stated that it had informed its Chancellery of the present state of the work of demarcation. It suggested that instructions should be sent to the Argentine Gendarmerie authorities and to the local Chilean Civil and Carabineros authorities to avoid taking any steps until the frontier was definitely demarcated; and that priority should be given to the surveying of the zone in the next season's work on the ground. The Argentine Delegation agreed with these suggestions, saying that its Government had in fact given similar instructions in order to avoid further incident. The Tribunal will note that in the passage from its letter cited above the Chilean Commission referred specifically to the Chilean character of California, and that the Argentine Delegate did not question it.

63. 1953. At a meeting held on 24th March of this year<sup>1</sup> Surveyor Dvoskin (A) reported that the Sub-Commission concerned with Densification and Ground Support for the aero-photogrammetric survey had completed the tasks laid down in the Plan of Work; and that it had carried out the check and the nomenclature for the aero-photogrammetric plotting of Section VII.

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1 Minute No. 50.

64. 1954. The next meeting of interest was on 25th October 1954<sup>1</sup>, when it was recorded that the Argentine Commission had delivered photographic copies of the following sheets:

- VII - 1 Lake General Paz - Palena
- VII - 2 Cerro Virgen
- VII - 3 River Encuentro

It was also recorded that the Chilean Commission had now been provided by the Argentine Commission with the films used in the plotting of the Sector Lake General Paz - River Encuentro.

65. Meanwhile-on 21st September - Colonel Urrea, Head of the Chilean Commission, had sent a memorandum to the Chilean Ministry of Foreign Affairs which, inter alia, set out certain points of controversy on which decisions would be required. The part of the memorandum relevant to the Sector of the Boundary with which the present case is concerned read as follows:

"Analysis of the Points of Controversy on Sheets V-6 and V-14 in relation to other discrepancies

There is a matter of much greater significance which must be considered by the Chilean Commission before making a decision as to the principle which will have to be followed in the solution of the problems raised on Sheets V-6 and V-14 and that is the matter of the River Encuentro - Hill of the Virgin, which can threaten much more extensive and important areas of the national territory.

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1 Minute No. 53.

In fact, from the interpretation of the Arbitral Award as from boundary mark VII-3 (16) "River Encuentro" going southwards, a dispute has arisen which has not yet been resolved.

Part Three

The Award states textually: "opposite the junction of the River Encuentro (with the River Palena) it shall then follow the Encuentro along the course of its western branch to its source on the western slopes of Cerro Virgen."

The problem has two aspects, which are:

a) To decide which is the western branch of the River Encuentro, following the course of the waters from the boundary post VII-3 (16) towards the south.

b) To determine which is the Cerro de la Virgen which was so designated by the Arbitrator in his Award, on whose western slopes is the source of the said western branch.

In the triangulation carried out in this Section there appears a Trigonometrical Point named Cerro de la Virgen, which it was sought to declare a Natural Boundary Post at a Plenary Meeting, but which, at Chilean indication, was left only as a Trigonometrical Point. This Hill must not be accepted as the point referred to in the Award, seeing that (according to) information obtained from local Chileans who know the area, the Cerro de la Virgen would be another Hill situate considerably more to the East of the said Trigonometrical Point, Cerro de la Virgen.

The Photogrammetric Plotting of this zone was done at the Argentine Military Geographical Institute during the office work season of the year 1953, the Technical Operator Major Alfonso Alfaro acting as Chilean Observer. The Chilean Boundary Commission was not content with this but it asked for and paid \$1,784.00 (Argentine National Currency) in order that it might be sent a set of films and it might proceed to carry out the plotting in our own Military Geographical Institute in order to check on the work done in Buenos Aires.

These films were delivered to our Embassy in Argentina and some of them have already been received by the Diplomatic Bag; the rest have not

yet arrived and for this reason the despatch of the whole has been urged.

From what has been stated up to now, some aspects can already be appreciated which contradict our position on some of the problems created in the lines traced on Sheets V-6 and V-14 and which it is necessary duly to assess in order to determine when and where it is necessary to yield something, in order to formulate an immovable criterion which shall enable us to gain much, or at least not to lose, in those regions which have a positive interest.

In any case, the solution favourable to our interests of the River Encuentro - Cerro de la Virgen problem, which is still outstanding and which is of much greater importance than those presented on Sheets V-6 and V-14, requires of the Chilean Commission the adoption of a uniform and well-defined criterion, conforming strictly to the provisions of the Arbitral Award, without claudications or concessions, even though to that end it may be necessary to give way on the apparent rights of much less significance than this, as are those of Cerro Rojo, Ap-Iwan and Principio, which moreover are based on contradictory appreciations of those Chilean Delegates who had intervened at different times, which do not prove a definite line and which have motivated the discrepancies with the Argentine Commission.

Starting from the basis of the greater importance to us of a favourable solution in River Encuentro - Cerro de la Virgen regarding the differences on Sheets V-6 and V-14, we will underline the arguments maintained by Chile in the defence of our legitimate rights in the main problem, in order then to compare them with the others and to decide therefrom what will have to be our line of conduct, after a logical and consistent analysis enabling us to formulate a uniform and well-defined criterion, free from contradictions.

#### I. - River Encuentro - Cerro de la Virgen Problem

It threatens the populated zone of California and at one time it threatened the populated zone of Palena.

a) The Argentine Commission produced arguments based on the official documentation of the period, in order to maintain that the River Encuentro, the present boundary between the two Republics, was not the river which appeared on the map, but another river rather more to the West which would have left the whole of the region of Palena on the Argentine side. To support its thesis, it asserts that the boundary post VII-3 (16), which is situate at the junction of the Rivers Encuentro and Palena, was erroneously located by the British Commission charged with the task of giving material effect to the Arbitral Award.

Chile unyieldingly maintained the principle of the immovability of the Boundary Posts, and it won its argument, thereby establishing a precedent which must be maintained and which must be extended in its significance to cover the whole of the Arbitral Award, a matter on which the present Mixed Commission is perfectly in agreement.

b) From the defence of this principle of permanency and absolute respect for the terms of the Arbitral Award depends whether we are successful in the determination of the western branch of the River Encuentro from Boundary Post VII-3 (16) towards the south.

c) A consequence of the foregoing will be the real proper and convenient location of the Cerro de la Virgen, on whose western slopes is the source of the said western branch of the River Encuentro.

d) The fact of designating a Trigonometrical Point of the triangulation with the name of a Cerro de la Virgen because it was assumed at that time that this was the name of the geographical feature on which the point is located, is a logical thing, but in no case sufficient for the demarcation, seeing that, by provisions of the regulations, such demarcation cannot be done without first having a map prepared by the Mixed Commission. The Argentine claim, rejected by Chile, to declare such Trigonometrical Point a Natural Boundary Mark would have been detrimental to our interests, seeing that, with such a declaration, the said point would automatically have become situate on the frontier line threatening a large portion of our territory.

This Chilean attitude must therefore be maintained, in order to enable a solution to be sought which is beneficial to our interests." (underlinings added).

Here again the Chilean Commission seems to have had no doubt as to the existing Chilean character of the zones "threatened" by the demarcation. The Tribunal is also asked to note the clear and reiterated statement of Colonel Urra that the Cerro Virgen had not been accepted as a Natural Boundary Post, but only as a "trigonometrical point".

66. Towards the end of 1954 - on 9th December - the Argentine Government, through its Embassy in Santiago, made a proposal for a formal exchange of Notes by which the two Governments would undertake to maintain the status quo in certain zones depicted in an accompanying diagram as under Chilean and Argentine jurisdiction. This diagram, the cartography of which leaves much to be desired, purported to place California under Chilean jurisdiction but only by limiting the area called California on the diagram to one part of California to the extreme west. The rest of the area which California embraces was depicted as under Argentine jurisdiction. The Note was left without reply until further incidents occurred in August 1955, as a result of which a reply was sent to the Argentine proposal on 14th September 1955. The

contents of these Notes will be considered in Chapter VIII of this Part and they are mentioned here only as part of the sequence of events prior to the Mixed Boundary Commission's approval of Minute 55.

67. 1955. In this year the whole question of the boundary in Section VII came to a head. The first meeting took place on 7th April 1955, and at the end of it the Argentine Delegation handed to the Chilean Delegation copies of the Sheets VII-1 (Lake General Paz - Palena), VII-2 (Cerro Virgen) and VII-3 (River Encuentro) showing the tracing which it proposed and also the "foundations" of the last two sheets "for a better interpretation of the reasons which led it to propose the tracings"<sup>1</sup>. In June two members of the Chilean Commission retired and were replaced by Lt. Colonels Saavedra and Figueroa, and on 30th August General Urrea, Chairman of the Chilean Commission, instructed Lt. Colonel Saavedra to study the question of the Chilean counterproposal to the line proposed by the Argentinian Delegation. Meanwhile, during August the further incidents already mentioned in paragraph 66 had occurred, and on 14th September the Chilean Foreign Minister addressed a Note to the Argentine Government informing it that his Government would instruct the Chilean Boundary Commission to try and reach a

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1 Minute No. 54.

definitive solution of the problem at the next Plenary Meeting and expressing the hope that similar instructions would be given to the Argentine Commission. Between 20th September and 5th October aero-photogrammetric plotting of the disputed zone on the basis of "trimetrogon" photographs taken by an American squadron was amplified by work carried out at the Chilean Military Geographical Institute and by 13th October the Chilean counterproposals had been formulated and translated on to the map sheets. A conference was then held at the Ministry of Foreign Affairs attended by the Foreign Minister himself, together with a number of officials, including the Legal Adviser; and the members of the Chilean Commission. The directive given by the Foreign Minister to the Chilean Commission at the meeting was to support the Chilean thesis and, if it made no headway with these proposals, to fall back on the application of Article 8 of the Protocol.

C. The Argentine and Chilean Proposals at the Fifteenth Plenary Meeting

68. The Mixed Commission met again for its fifteenth plenary session in Buenos Aires on 20th October under the Chairmanship of General Helbling of Argentina. In addition to the members of the two Commissions there were present the Head of the Treaties and Boundaries Department of the Chilean Ministry of



Foreign Affairs, Señor Lorca, and the Director of Territorial Sovereignty of the Argentine Ministry of Foreign Affairs and Public Worship, Señor Carlos Vittone. At the opening session of the meeting, however, the Chairman pointed out that under the Protocol it was only the Delegates who were authorised to discuss and approve matters dealt with in the Mixed Commission. Thereafter Senor Lorca of the Chilean Foreign Ministry did not attend the sessions and in fact left Buenos Aires two days before the plenary meeting ended and before the "joint proposal" was tabled.

The Chairman, General Helbling, began by urging the Delegates to use every endeavour to get the line definitively approved in the River Encuentro zone, with the object of putting an end to the incidents which had occurred in that zone. The Chilean Delegation then handed over to the Argentine Delegation a memorandum containing its proposals regarding the boundary line (Annex No. 49) together with a diagram (Map CH.22), corresponding to an aerophotogrammetric map made by the Chilean Military Geographical Institute of the zone to the east which had not been included in the sheets presented by the Argentine Delegates. In the Sub-Commission, to which the problem of the Lake General Paz - River Encuentro sector was referred, the Chilean delegates submitted a supplementary memorandum concerning certain

technical points in its proposals (Annex No. 50). The Argentine Delegates presented their counter-arguments verbally and the merits of the respective lines were debated within the Sub-Commission without any agreement being reached. The question was then debated in the full Mixed Commission and the arguments on both sides were repeated. The counter-arguments of the Argentine Delegation were not reduced to writing during the sessions, but, at the request of General Urrea (C) and in order to complete the documentation, the Argentine Chairman drew up a statement of the Argentine arguments after the end of the Meeting, and sent it to the Chilean Commission on 17th November. (Annex No. 53).

69. The Argentine proposals. The boundary line advocated by the Argentine delegation was superimposed on the three map sheets which had been prepared in the Argentine Military Geographical Institute on the basis of the information obtained from the aero-photogrammetric surveys. These maps were seriously defective in a number of significant respects. The map sheet depicting the River Encuentro area was so drawn as to cover an area extending 20 kilometres to the West (Chilean) side of the line advocated by the Argentine Commission but only 5 kilometres to the East (Argentine) side of that line. As a result, the sheets depict the several features necessary to support the Argentine

proposals but exclude altogether from the map the features essential to the consideration of the Chilean claim. Thus, the sheet headed "Rio Encuentro (VII-3)" does not include the Cordon de las Virgenes. Worse, it does not show more than about half the length of the "major channel", that is of the true River Encuentro; the source of the river on the slopes of the Pico de la Virgen and all the upper half of the river are outside the map. Worse still, the Arroyo Lopez, the tributary half the size of the major channel, is marked with a double line in the same manner as the main river below the "watersmeet", while the "major channel" - the main river - is marked with the thinnest possible "hair" line. Then, the name Rio Encuentro is gratuitously attached to the little meandering rivulet hitherto known as the Arroyo Mallines and, the Arroyo Lopez, or sometimes called "Falso Engaño". And equally gratuitously the "major channel" was deprived of the name Rio Encuentro by which it had hitherto been known and instead it was labelled "Falso Engaño". In addition, the newly christened Rio Encuentro - comprising the Arroyo Mallines and Arroyo Lopez - is depicted as having its source in the valley, whereas in fact the Arroyo Mallines rises some 2 kilometres to the East on the slopes of the Cordon de los Morros. Finally, the same liberties were taken with the rivers of the Salto

as with those of the Encuentro basin. The River Engaño was depicted as a tributary of the River Salto/Tigre instead of as the main river, while the name Salto was attached to the tributary, El Azul.

The line proposed by the Argentine Commission for the whole Sector between Posts 16 and 17 was drawn from Post 16 along the River Encuentro to the "watersmeet", then upstream along the course of the Arroyo Lopez to its junction with the Arroyo Mallines, and then along the course of the Arroyo Mallines to a point in the valley where the course of that little rivulet turns up the slopes of the Cordon de Los Morros rising some 2 kilometres to the East of the point in the valley. Instead of following the Arroyo Mallines - the newly christened Encuentro - eastwards to its source in the Cordon de Los Morros, the Argentine line proceeded in a south-westerly direction out of the valley to join the River Engaño and follow the course of this river downstream to its junction with the River El Azul. Next it ran southwards up the River El Azul until its junction with the Arroyo Las Matreras, whence it followed the course of a branch of the latter to the western slopes of the Cerro Virgen. From the Cerro Virgen the line continued southwards along the watershed for some 7 kilometres and then turned eastwards across the pass at the top

of the Hondo Valley, passing thence in a south-easterly direction to Post 17.

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The line was also depicted on a chart (Map CH.21) covering its whole course between Posts 16 and 17 as shown on all the three map sheets. This chart exhibited most of the defects found on the map sheets. The chart covered the full extent of the area to the west to which Argentina desired to direct attention, but excluded the Cordon de las Virgenes, the source and a large part of the course of the true River Encuentro. As in the map sheets, the name Encuentro was transferred to the course of the Arroyo Lopez - Arroyo Mallines, which was made to appear the more important watercourse. And the name Falso Engaño was detached from the Arroyo Lopez - Arroyo Mallines, with regard to which it is meaningful<sup>1</sup>, and transferred to the "major channel" - the true Encuentro - with regard to which it is meaningless. True, the chart did show the beginning of Arroyo Mallines, two kilometres to the east of the valley; but this was disregarded in drawing the line, and for obvious reasons. If the true source of the Arroyo Mallines had been taken as the source of the newly christened Encuentro, all possibility of

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1 Coming from the south, it is easy to imagine that the Valley of the River Engaño continues northwards up the Mallines - Lopez Valley.

fashioning any kind of line passing through the Cerro Virgen would have disappeared.

70. Manifestly, the basic consideration inspiring the Argentine proposals was how to draw a boundary between Posts 16 and 17 which could be represented as following the course of so-called River Encuentro to its source, and yet arrive on the western slopes of the Cerro Virgen. Did the Argentine Delegation recall that, as early as 1903, the Argentine expert, Señor Frey, had said that, if Post 16 remained where it was, the whole of the River Engaño is on Chilean territory? Did it recall that in 1913 the Argentine Government itself had said that the river opposite the mouth of which Post 16 was placed had its source in the vicinity of the Cerro Herrero, that is in the Cordon de las Virgenes; and that on this basis it becomes impossible for the boundary line to pass through the Cerro Virgen? The Chilean Government does not know the answer to these questions. It only knows that, in order to produce the desired boundary line, the Argentine Delegation switched the name Encuentro from the major to the minor channel; stopped that channel short of its true source; then ran the boundary downstream along a considerable river - the Engaño - not mentioned in the Award or Report as forming part of the boundary, and then back up another river - the El

Azul - not mentioned in the Award or Report; and brought it eventually to the western slopes of the Cerro Virgen by way of a tributary of this river.

The considerations by which the Argentine Delegation sought to justify its proposals were set out in an explanatory memorandum (Annex No. 47). First, it recalled Señor Frey's disagreement with the placing of Post 16 and implied that the present problem only arose because Captain Dickson had declined to look for another river further to the west as the intended River Encuentro - in other words to look for the River Salto. Next it asserted that, if the 1902 Tribunal had possessed a complete cartography of the zone in question, it would certainly have traced the boundary along the Cordillera in which are situated the Cerro Cónico and the Cerro Surrucho, so as to cross the Cordon de las Tobas and then the Palena at the point opposite the mouth of the River Salto. This assertion seems to have been made in order to provide some sort of justification for the extraordinary boundary line which the Argentine delegation was proposing from the southern end of California along the Rivers Engaño, Azul and Matreras, which all form part of the River Salto system. For the Argentine Delegation expressly recognised that boundary post 16, erected under the Award at the mouth of the River Encuentro, was not open to question by the Mixed

Commission. In point of fact, as has been shown in Part I, Captain Dickson, who erected Post 16, was quite satisfied that the river opposite which he finally placed the Post was the River Encuentro intended by the Tribunal. Moreover, as has also been shown in Part I (Cap. V.C), the principles which guided the Tribunal in deciding upon the line of the Encuentro were other than those mentioned in the Argentine memorandum; and these principles remain entirely valid and relevant in the light of the new geographical facts which have emerged.

While maintaining - erroneously - that the boundary had been conceived of by the Arbitrator as cutting the Palena further to the west in order to reach the Salto and, via the Salto, the Cerro Virgen, the Argentine Delegation agreed that "the River Encuentro, mentioned in the Award, is the river which really has that name and in consequence is the boundary between the two countries although it may not have its source in the Cerro Virgen". Moreover, in stating why it did not reopen the question of the placing of Post 16, it stated among its reasons the following:

"Since it accepts the principle of uti possidetis applied by reason of the situation of the Palena settlement and the possession exercised by Chile in the adjacent zone."



"Because it is of the opinion that the said situation has arisen, without any doubt, from a decision based on the most absolute good faith of the Chilean Government." (underlinings added)

What the Argentine Delegation did not explain was why these reasons did not apply equally to the "Chilean settlement and the possession exercised by Chile" in good faith for many years past in California, the Chilean character of which the Argentine Government had itself recognised in 1952 (see paragraph 86 below)

Next, the Argentine Delegation stated that the rule adopted by the Mixed Commission in cases like the present was "to harmonise the criterion maintained by the Arbitrator with the reality of the ground". And it further stated that the "criterion maintained by the Arbitrator" in the present case was that of "crossing the River Palena and continuing along a hydrographical course as far as its source on the slopes of the Hill of the Virgin". But even if the "criterion maintained by the Arbitrator" could properly be formulated in this manner, **an** insurmountable obstacle would confront the Argentine thesis: no hydrographical course starting from Post 16 can be represented as having its source on the slopes of the Cerro Virgen. In consequence, the Argentine Delegation was driven to draw its line along not one but three or more separate "hydrographical courses". In fact, as has been shown in Part I, the

"criterion maintained by the Arbitrator" was quite different: a particular hydrographical line - the course of the River Encuentro to its source on the slope of an elevated watershed and its immediate junction with this watershed on the Peak above the source of the River Encuentro.

However, claiming that the line which it proposed harmonised the criterion maintained by the Arbitrator with the reality of the ground, the Argentine delegation purported to justify it on ten grounds:

1. - Because the River Encuentro remains as a boundary river, as specified in the Award.

2. - Because the geographical features on the ground which materially define this line, although they are not the same, are almost entirely of the same character as that revealed by the Award, that is to say, hydrographical.

3. - Because although the line is not in accordance with the whole of the text of the Award, it is in accord with the line which was drawn on the maps used by the Award.

4. - Because the boundary line proposed in the sectors where a survey map existed coincides in form and situation with the line drawn by the Award, with differences due to the cartography used by the Award.

5. - Because in addition, this is the line most similar to the line which up to the present has appeared (for 51 years) on the official cartography of both countries, it being respected by those countries, so far as it is possible to do so in a zone which, up to the present, has lacked any fully authoritative maps.

6. - Because the foregoing means that there will not be any changes of sovereignty and if there should be a change of jurisdiction, this would be one of the points that appear and will appear on "densifying" isolated sectors of the frontier, hitherto unknown.

7 - Because in this way the Award has, within the scope of possibilities, been respected, by harmonising the essence of the Award with the material definition thereby established.

8 - Because the River Engaño, which according to the Award must be wholly in the Argentine Republic, is within the Republic for its greater distance, save for a part which will serve as a boundary.

9 - Because the zone named Lagunitas will remain under the sovereignty and jurisdiction of Argentina, as it was at all times according to the provisions of the Award and the law of possession.

10. - Because there will be no changes of sovereignty since each country has been in full possession of the zones delimited since the Arbitrator demarcated the frontier in 1903."

71. The Chilean Commission presented its reply to the Argentine memorandum in writing (Annex No. 51). As to Post 16, it pointed out that the Argentine expert, Señor Frey, had ended by acknowledging that the River Encuentro was in fact the one which Captain Dickson had found. It further said that it was unnecessary to deal with the matter of Post 16, since this had been accepted by both countries.

The Chilean Commission, having agreed that in 1902 "there was no adequate cartography to interpret

faithfully the Arbitral Award", said that the discrepancies began with the course followed by the River Encuentro to the Cerro Virgen; and that these discrepancies led to the conclusion that this mountain is not the one which is indicated as the source of that River. It then recalled the Argentine Commission's admission that its proposed line was not in accord in every respect with the text of the Award and that Commission's attempt to argue that its line was nevertheless in accord with the maps utilised by the Arbitrator. The Chilean Commission pointed out that if the 1902 maps were accepted as being erroneous because not depicting the topographical reality of the ground, then it was quite unwarranted to have recourse to them as evidence to justify the proposed line, as Argentina sought to do in paragraphs 4 and 5 of its "grounds"

As to paragraph 7 of the Argentine "grounds", the Chilean Commission insisted that it was not enough to respect the Award within the scope of the possibilities, and that the Chilean view was that the Award and

the Report must be respected as a whole. It then made the following points:

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(1) The river designated the Encuentro by the Argentine Commission from "waters-meet" southwards (i.e. the Lopez - Mallines sector) was not accepted by the Chilean Commission as the River Encuentro inasmuch as it does not have its source on the western slopes of the Cerro Virgen.

(2) The Award did not mention the hydrographic line used by the Argentine Commission but mentioned in a precise manner the course of the river named Encuentro.

(3) The Argentine line followed the course of several rivers having different hydrographical basins (Engaño and Tigre) not mentioned in any part of the Award; and crossed the table land situated between the minor channel and Engaño in an unacceptable manner, seeing that it departed from the terms of the Award.

The Argentine "grounds of justification" are indeed open to other objections. For example, grounds 8, 9 and 10 are nothing but assertions which, in the view of the Chilean Government,

are completely unfounded. Argentina, for example, had certainly not been in full possession of the zones attributed to her by the Argentine Commission's proposed line. On the contrary, as the evidence presented in Part II shows, it is Chile that was in full and undisturbed possession of California, the Hondo Valley and the basin of the River Engaño until the Argentine Gendarmerie attempted to stake a claim for Argentina in 1952. Similarly, it is quite incorrect to say, as was said in paragraph 5 of the Argentine "grounds", that the line shown on the erroneous official maps of both countries was respected by them for 51 years "so far as it is possible to do so in a zone which, up to the present, has lacked any fully authoritative maps". The evidence presented in Part II shows quite the contrary. Chilean settlers and Chilean administrative authorities applied on the spot the line of the true River Encuentro - the major channel - accepting it as the boundary between the two countries.

by the Chilean Commission, as described in its Memorandum (Annex No. 49), ran from Post 16 along the lower section of the River Encuentro to the "watersmeet" and then continued along the "major channel" to its source on the western slopes of the Pico de la Virgen in the northern part of the Cordón de las Virgenes; ascending to this Peak, it ran southwards along the water-divide formed by the high summits of the Cordillera in that region for a considerable distance, then turned south-westwards through named high points so as finally to arrive at Post 17. The line was thus similar, though not identical, to the one which the Chilean Government in the present Memorial is asking the Court to hold is the correct boundary which results from the interpretation and fulfilment of the 1902 Award. It is not identical because, under a misconception, the Chilean cartographer traced the line in that area somewhat to the northwards of the line now known to be the true water-parting in the vicinity of the Engaño lakes.

Explaining its proposed line, the Chilean Commission said that its disagreement with the Argentine Commission started at the junction of the

River Encuentro with the Arroyo Lopez where the River Encuentro changes from a general north - south to an east - west direction. First, it emphasised that the source of the Arroyo Mallines, designated by the Argentine Commission as the Encuentro, plainly did not fulfil the conditions prescribed by the Award. Secondly, it contended that the "major channel" fulfilled the geological requirements for a "river" and that it also complied with the condition in the Award that its source should be in the line of the high summits of the Cordillera constituting the water-divide. Seeking to find an explanation of the words "western branch", it suggested that this referred to the western "stretch" of the river in the east - west sector of the river. In truth this argument was beside the point, since, as pointed out in Part I, the reference to a "western branch" was merely part of the geographical error under which the 1902 Tribunal laboured in regard to the course of the River Encuentro. It further said that the Virgin Peak could not be placed in a zone not possessing the characteristics indicated in the 1881 Treaty - the highest summits of the Cordillera - which characteristics were, on the other hand, found in the Cordon to which the Pico de la Virgen belonged. It claimed that the line which it proposed



was strictly in accord with the applicable Treaties and Protocols and with the Report and Award of the 1902 Tribunal; and that it did not rest on forcing the nomenclature but on the geological construction of the zone.

73. In its supplementary memorandum of explanations (Annex No. 50), the Chilean Commission mentioned that the map annexed to its proposal had been constructed from its own material in order to fix its counter-proposal of a tracing which passed outside the zone covered by the map-sheets prepared by the Mixed Boundary Commission.

In this memorandum the Chilean Commission made express reservations as to the nomenclature which appeared on the map sheets of the Mixed Boundary Commission. These reservations, it explained, related to the "places referred to as 'River Encuentro' and 'Falso Engaño'", and the grounds for them were set out in its counter-proposal.

In addition, it emphasised that, in its view, the only official documents applicable in the Sector under consideration were the Award and Report of the 1902 Tribunal, as also throughout the zone in which the Arbitrator intervened.

74. The Argentine Commission's comments on the Chilean proposals, as already mentioned, were recorded in

a memorandum drawn up after the conclusion of the fifteenth plenary meeting (Annex No. 53). Saying that the points of beginning and ending had already been approved by the Mixed Commission, it limited its study of the Chilean proposals to the area between Post 16 and the Cerro Virgen. Then it contended that, owing to the fact that the cartography used was not the cartography prepared and approved by the Mixed Commission, the proposed boundary line based on that cartography did not comply with the applicable rules and was in consequence invalidated. In support of this contention, it referred to Articles 3 and 8 of the Protocol and Sections 20 and 22 of the P.W.G.D. The position taken by the Argentine Commission was, in the view of the Chilean Government, entirely unwarranted. The function of the Mixed Commission was to demarcate the boundary laid down by the 1902 Award. The maps prepared for the Mixed Commission in the Argentine Military Geographical Institute, as already pointed out, covered an area so limited as to exclude the source of the "major channel" and the watershed on the slopes of which the source is situated. The Chilean Commission, when called upon to address its mind to identifying the course of the boundary between Posts 16 and 17 as laid down by the 1902 Award, had concluded that the boundary followed the line of the "major channel" to its source on the slopes of the

Pico de la Virgen and thence ran southwards along the watershed of the Cordon de las Virgenes. And that conclusion it had formulated in a proposal describing the line and illustrating by reference to a map. If that proposal represented the correct interpretation of the 1902 Award in the light of the actual geographical facts, it could not be invalidated by the mere fact that it was illustrated by a map which had not been prepared by the Mixed Commission. On the contrary, in that case it would be the duty of the Mixed Commission to adopt the proposal and to adjust its maps accordingly. The sole function and power of the Mixed Commission was to demarcate the boundary in accordance with the provisions of the applicable Treaties and Awards, in the light of the facts on the ground. It was authorised to prepare official maps as an aid to the demarcation of the boundary in accordance with the provisions of the applicable Treaties and Awards. It was not authorised to use such maps either as a substitute for the facts on the ground or as a pretext for setting aside the correct interpretation and fulfilment of the applicable Treaty or Award. The mere fact that survey maps made by the Mixed Commission are mentioned in Article 20 of its internal regulations among the documents for use by the Commission does not entitle the Commission to utilise a map which shuts out of its consideration areas through which, on the correct

interpretation of a Treaty or Award, the boundary passes.

75. However, the Argentine Commission also went on to make certain observations regarding the merits of the Chilean proposal. First, it criticised the Chilean Commission's interpretation of the term "western branch", stating that it did not correspond to the normal use of the word "branch" or to the normal geographical concept of a "western branch". That criticism, if it has a certain force, does not carry the matter any further because, as already pointed out, the reference to a "western branch" in the 1902 Award was simply a reflection of the erroneous structure of the Encuentro system introduced into the second Argentine map by the Argentine expert at that time. On this point it is unnecessary to add to what has already been said in Part I.

On the other hand, one argument used by the Argentine Commission in this connection does call for comment. Claiming that the "major channel" is not a "section" (tramo) of the River Encuentro, it said:

"It is not a section (tramo), because it is the River Falso Engaño which flows into the River Encuentro, as is proved by the cartography prepared and by the nomenclature used by the Sub-Committee of the Mixed Commission, the only (cartography) valid for such purpose."

(underlining added)

Here again, the Argentine Commission seems to have been contending that the maps and nomenclature used in the

Mixed Commission, whether or not they reproduced the actual geographical facts and actual nomenclature, were unimpeachable and decisive for the purposes of the demarcation. The Chilean Government, for the reasons which have been given in the preceding paragraph, takes the strongest exception to such a theory of the functions and powers of the Mixed Commission.

Furthermore, it recalls that in 1902 the maps submitted initially by both Parties to the Tribunal showed the course of the River Encuentro following approximately the course which the "major channel" in fact has; and that it was only at the last moment that another Argentine map appeared, erroneously showing the River Encuentro following a different course southwards towards the Cerro Virgen. If "History" is said to repeat itself, it is altogether unacceptable that the errors of history should do so. In the view of the Chilean Government, the Mixed Commission was wholly incompetent to switch the name of the Encuentro from the "major" to the "minor" channel and again turn the alleged course of the river southwards towards the Cerro Virgen. To do this is not to interpret the 1902 Award in the light of the actual geographical facts. It is to reconstruct the geographical facts and distort the interpretation of the Award.

76. The Argentine Commission also raised objection to the Chilean concept that the boundary line

should pass through high summits of the Cordillera of the Andes. It said that this concept had been advanced by Argentina in 1902 but had not been accepted by the Tribunal; and the high summits of the Andes lie much further to the west. The Chilean proposal, however, referred only to the highest summits of the Cordillera in that Patagonian region, meaning to indicate the predominance of the Cordon de las Virgenes as a range of the Cordillera over the minor range in which the Cerro Virgen is situated. Moreover, as pointed out in Part I, the principle of the elevated watershed with geographical continuity was undoubtedly one of the basic principles applied in the 1902 Award.

In addition, the Argentine Commission formulated the arguments by which it claimed to justify its own thesis as to the true course of the River Encuentro. It contended that the Arroyo Mallines, Arroyo Lopez and the "lower section" of the Encuentro together form a single water-course; that this is the water-course which is the principal collector of the water-basin formed by it, by the River Falso Engaño (Argentine version) and by other streams; and that this water-course - Mallines, Lopez, "lower section" - constitutes the true River Encuentro. It affirmed that the three elements were a case of a single river, because it was so proved by the Sub-Committee of the

Mixed Commission and so drawn and named on the maps of the Commission without any observation having been made. It further contended that the north-south valley is the principal valley because it is delimited by the two principal dorsals which comprise it, follows the same direction as those dorsals, and has its source at a point where the two dorsals can be said to join. Per contra, it contended that the River Falso Engaño (Argentine version) and other streams, which have their source on the slopes or sides of the principal dorsals, are only secondary water-courses. It asserted that the classification of rivers or streams with a given hydrographical basin does not depend on the volume of water with which they start but rather on their importance as a collector; and that the River Encuentro (i.e. the minor channel plus the "lower section") is the most important collector of the whole of the basin which embraces it, because into it flow all the rest of the rivers. It further asserted that a single water-course which flows in a single general direction cannot be regarded as several water-courses which go on joining up, one after another, simply because they have tributaries. Then, it observed that instances may arise where a river of greater or lesser length may have, in addition to its true name, other names, which may be designated as regional names, given in some cases by the riparian

settlers owing to some particular characteristic of the water-course itself or of its boundaries; but that this does not invalidate the proposition that the river and its true name are one unity.

77. The above argument was, of course, closely tailored to meet the particular obstacles to be overcome in trying to convert the "minor channel" into the River Encuentro. Quite apart from the gratuitous switch of the name Encuentro from the major to the minor channel, the Argentine arguments call for a number of comments. In the first place, it is wholly inadmissible to describe as the "principal collector" of the River Encuentro basin a channel having half the length and half the volume of the major channel rising on the Pico de la Virgen. Secondly, the "major channel" itself collects the waters of a number of tributaries coming off the adjoining mountains. Thirdly, the Arroyo Mallines - the so-called "principal collector" - is nothing but a marshy rivulet which finds its way into and is collected by the larger and longer mountain stream, Arroyo Lopez. Fourthly, as explained in Part I, it is the "major channel" and the "lower section" which physically have the same characteristics and form a unity - not the "minor channel". As to the "dorsals" and their alleged meeting at the source of the Arroyo Malines, this is a quite arbitrary and artificial



conception based on a petitio principii that the Los Mallines valley is the Encuentro valley. The main "dorsal" of the River Encuentro system is the Cordon de las Virgenes feeding the "major channel" - the main river; and in fact the Cordon de los Morros and the western "dorsal" of the Argentine concept send their waters mostly into the River Salto, rather than into the Arroyo Mallines.

At least, the Argentine Commission's argument concerning the "principal collector" as the true river explains why it found it necessary to take liberties also with the nomenclature of the River Salto system. The River Engaño, being of much larger volume than any of the tributaries of the River Salto, including the El Azul, is manifestly the main river - the upper reach of the Salto. Unhappily for the Argentine thesis, however, it bears much the same relation to the lower section of the River Salto as does the "major channel", the Pico de la Virgen channel, to the "lower section" of the River Encuentro. The River Engaño is a river of the mountains rising in the Engaño lakes and passing through narrow valleys until it is joined by the El Azul from the south in a way similar to that in which the Arroyo Lopez joins the major channel - the true River Encuentro. Accordingly, if the Argentine Commission's ingenious concept of "the principal collector" was not to be in

flagrant contradiction with what was to be found in the very next river basin, the River Salto must undergo a similar metamorphosis. And, with a wave of the cartographer's wand, the Azul became the Salto and the Engaño a mere tributary.

The Argentine Commission also made certain observations regarding the concepts of the River Encuentro held by Dr. Steffen and by Captain Dickson. These matters have been dealt with in Part I. Nor is it necessary to comment on a parallel to its proposed boundary which it claimed to find in the Arroyo de la Galera in another sector, since this has no relation whatever to the boundary line laid down by the 1902 Tribunal in the Sector between Posts 16 and 17.

Finally, the Argentine Commission made a bold effort to rehabilitate and rely on the "second Argentine map" used by the 1902 Tribunal to illustrate its award in the sector between the River Palena and Lake General Paz. It said that the line which it proposed followed the general directions of the line drawn by the Award when they are projected on to a mapped zone. And it added:

"Differences are only observed in the zones in which  
"the maps used by the British Demarcators, owing  
"to the survey not having been carried out, have  
"been filled in with figurative curves and with  
"rivers which do not exist on the ground.....  
" Hence the outlet of the River Encuentro and the  
"whole of its course do not accord with reality,  
"and the same applies in the case of the River  
"Salto or Tigre."

Since in this sector the course of the River Encuentro is the fundamental factor in the Award, these observations do nothing to restore the credit of the "second Argentine map" as an element possessing any value for appreciating the boundary line laid down by the Award. Nor do any of the observations of the Argentine Commission regarding the map explain how the imaginary course of the River Encuentro came to appear on that map when its approximately correct course and direction were shown on the maps first submitted to the Tribunal.

Part Three

78. Mindful of the need to put an end quickly to the uncertainty regarding the boundary and the Chilean proposals having virtually been set aside by the Argentine Commission as out of order, the Chilean Commission in the last days of the Meeting acquiesced in looking for a compromise solution and in working upon the three aero-photogrammetric map sheets for the purpose. At the penultimate session, held on 31st October, agreement was reached to record in Minute No. 55 the following statement:

"Fourth Item: Various Subjects of a Legal, Technical or Administrative Character

- A. - Study and approval of lines<sup>1</sup> traced on Sheets (VIII-1) "Lake General Paz - Palena", (VII-2) "Hill of the Virgin", (VII-3) "River Encuentro".

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1. In Spanish "trazas" (tracings).

Having studied the proposed lines drawn and the fundamental principles thereof, together with amplifications and objections thereto, presented by both Delegations, which are in their possession, the Mixed Commission came to the following conclusions:

- a) The line presented by the Argentine Delegation on the Sheet Lake General Paz-Palena (VII-1), is approved.
- b) There is also approved the section of the line on the Sheet Hill of the Virgin (VII-2) comprised between parallel  $43^{\circ}50'$  and the Hill of the Virgin whose geographical coordinates and height (cota) are those approved by the Mixed Commission,

by Minute Number Forty-three (43) Annexure Two (2), Page six (6).

The Chilean Commission places on record the fact that the said line is approved taking into account what is stated in the Informative Report by the ex-Delegates Don NORBERTO COBOS and Lieutenant-Colonel MARDOQUEO MUÑOZ MORAGA, which covers the periods 1941 to 1947 inclusive and which was approved in Minute Number Thirty-nine (39) of the Mixed Commission and which reads:

'STUDIES OF THE FRONTIER IN SECTION VII

From the Natural Boundary Mark VI-43, Peak Botella Oeste, the last boundary mark in Section VI, situate in the high mountain chain which separates the upper basin of the River Pico (on the East) from the basin of the same River called Figueroa in Chile (on the West), the boundary continues in a general north-westerly direction along this chain to where it descends by the chain to boundary post VII-1(18) situate on the south bank of Lake General Paz. The line crosses the Lake from south to north and follows a local water-divide which separates the waters which flow into the River Engaño, leaving them on the East and arriving finally at the Hill of the Virgin. From this hill, which must be regarded as a natural boundary mark, the boundary must continue .....

The Mixed Commission makes it clear that the Hill of the Virgin above-mentioned has nothing to do with the Virgin Peak referred to by the Chilean Commission in its fundamental principles and proposed line presented to the Argentine Commission.

- c) Also, after a full exchange of ideas, the Mixed Commission resolves to approve the line traced on Sheet VII-3 "River Encuentro", from the Boundary Post VII-4A to a point on the River Encuentro, whose graphical coordinates are:

X = 5170310                      Y = 1523970

- d) Furthermore, it is recorded that the proposed line presented by the Argentine Commission in the Sector comprised between boundary post VII-4A, spot-height 1802, on Sheet VII-3 "River Encuentro" with graphical coordinates:

X = 5177850                      Y = 1510280

and the point of the water-divide, graphical coordinates:

X = 5183900                      Y = 1511800

is tacitly approved; it will not be finally approved until one has the survey of Sheet VII-4 for the purposes of taking into account the continuity of form of the ground.

- e) As on the sheets mentioned in the heading there has been left a section of the line which has not been approved and which is comprised between the Hill of the Virgin and a point on the River Encuentro, whose coordinates are those given in paragraph c); the Mixed Commission, after the appropriate studies, resolves to record the following:

In view of the fact that it has not been possible to make the proposed lines and the grounds therefor, presented by the Argentine and Chilean Commissions, fit in, in every respect, with what is laid down in the Award of H.M. Edward VII and the Report of the Arbitration Tribunal, owing to the fact that the western arm of the River Encuentro does not have its source in the western slopes of the Hill of the Virgin, but at the point possessing the graphical coordinates:

X = 5163550                      Y = 1523670

the Mixed Commission, in a desire to find a harmonious solution, agrees to submit to the consideration and decision of both Chancelleries

in order that they, in accordance with Article 8 of the Protocol relating to the replacement and setting up of boundary posts on the Chilean-Argentine frontier may decide on the joint proposal which is handed in as Annexure No. 5 (five) and which consists of a diagram with the position of the frontier line and its descriptive text."

In conjunction with this statement has also to be read Annexure No. 5 to the Minute, which is entitled "Description of the Line submitted by the Chilean-Argentine Mixed Boundary Commission for Decision by the Two Chancelleries" and which reads:

"From the Hill of the Virgin, a point approved as belonging to the international boundary, this boundary turns northwards following the line of the local water-divide which, passing through the Peak of a height of 1825 m., the spot-heights 1270 m., 1271 m., 1276 m. and 1330 m. respectively and through the hillock of a height of 733 m., continues as far as the River Engano which it crosses to ascend to the pass on the northern slope whereof and at graphical coordinates  $X = 5163550$   $Y = 1523670$ , is the source of the River Encuentro, through the middle line whereof continues the frontier line as far as the point where it runs into the River Carrenleufú."

79. Parts of the lines approved under conclusions (a) and (c) cover segments of the boundary which are not before the Court, while the line tacitly approved under conclusion (d) is wholly outside the sector between Posts 16 and 17. So far as concerns the present proceedings, the Mixed Commission purported in Minute 55 to "approve" two segments of the boundary line between Posts 16 and 17:

Under (a) and (b), the Argentine line from

Boundary Post 17 to the Cerro Virgen; and,

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Under (c), the common Argentine and Chilean line from Boundary Post 16 upstream along the thalweg of the River Encuentro to the point where the waters of the River Encuentro and the Arroyo Lopez meet;

Under (e), on the other hand, the Mixed Commission found itself confronted with a segment in which it recognised that any line which it drew must, so far as the terms of the 1902 Award were concerned, be regarded as pure invention. The trouble in this segment was, of course, the fact that "the Western arm of the River Encuentro does not have its source in the Western slopes of the Cerro Virgen". In consequence of this fact the Commission felt bound to conclude that it was "not possible to make the proposed lines and the grounds therefor" fit in, in every respect, with what is laid down in the 1902 Award. Recognising that it could not comply in every respect with the Award and yet being anxious to find a harmonious solution the Commission agreed to submit to the decision of the Chancelleries the "joint proposal" formulated in Annexure 5. This "joint proposal", it is to be observed, was expressed to relate to the whole length of the boundary from the Cerro Virgen northwards to Boundary Post 16, though the diagram attached to Annexure 5 appears rather to relate the proposal to the segment between the Cerro Virgen and the confluence of the

D. Legal Significance of Minute 55

80. The "conclusions" of the Mixed Boundary Commission recorded in Minute 55 call for certain comments both with regard to their form and their substance. Minute No. 55 was manifestly an ordinary minute - however important - of a meeting of the Mixed Commission. It was not a "Special Minute" producing full effect under Article 6 of the Protocol, the drawing up of which was governed by special rules laid down in Article 10 of the Plan of Work and in Regulation No. 3 (see paragraphs 21 and 31-32 above). Under these rules, as under Article 6 of the Protocol, "Special Minutes" were to be drawn up only in connection with the Boundary Posts already erected; they were to be "typewritten on the ground"; they were to be drawn up in a precise form laid down in Regulation No. 3, and they were to be signed by the "Demarcator Delegates". Minute No. 55 did not fulfil those conditions. At most, therefore, it could be regarded as a preliminary resolution of the Commission which, if in accord with the applicable instruments, might furnish a basis for a Demarcation Sub-Commission afterwards to proceed to demarcate by erecting Boundary Posts along the line "traced" on the Argentine sheets and recording their erection in "Special Minutes". In fact, apart from Boundary Posts Nos. 16 and 17, no such



Boundary Posts either had been or were afterwards erected along the lines "approved" in Minute No. 55. Nor was the position any different with regard to the Mixed Commission's reference to the Cerro Virgen as a Natural Boundary Post. Even if it be assumed that the Commission was authorised to attribute to "approved" Natural Boundary Posts a status similar to erected Boundary Posts, Article 37 of the Plan of Work and Regulation No. 3 make it quite plain that the "approval" of a Natural Boundary Post must be effected by a "Special Minute" similar to that required for erected Boundary Posts, typewritten on the ground in a particular form and signed by the Demarcator Delegates (see paragraphs 27 and 32 above). Minute No. 55 was clearly not such a Special Minute. Nor was the earlier Minute No. 43, Annexure No. 2 of which gave the geographical coordinates and spot heights of the Cerro Virgen, such a Special Minute; for the text of that Annexure shows that it was the data of a trigonometric point, not of a Natural Boundary Post, that had been approved (see paragraph 60 above). Still less can the reference to the Cerro Virgen as a Natural Boundary Post in the Cobos-Muñoz Report approved in Minute No. 37 be regarded as a Special Minute (see paragraph 57 above). Nor was any Special Minute relating to the Cerro Virgen ever drawn up subsequently to the meeting of October 1955<sup>1</sup>.

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1. Moreover, there is no Natural Boundary Post anywhere on the boundary which does not have its Special Minute drawn up in due form under the Protocol and P.W.G.D.

In short, in the view of the Chilean Government, it is clear beyond any possible doubt that there never was any "Minute" of the Mixed Commission of the kind capable of producing "full effect" under Article 6 of the Protocol with respect to any point of the lines drawn on the Argentine sheets - leaving aside Boundary Posts Nos. 16 and 17, as to which there is no dispute.

81. The Chilean Government has felt bound to underline the true status of Minute No. 55 and of Minutes 39 and 43 under Article 6 of the Protocol because subsequently in official statements and diplomatic Notes the Argentine Government has sought to attribute to those Minutes the force of Special Minutes producing "full effect" under the Protocol. It desires, however, to make it plain that, in its view, the position would be no different in the present proceedings even if those Minutes were to be regarded as possessing, from a formal point of view, the character of "Special Minutes". The Chilean Government contends that in the sector between Boundary Posts 16 and 17 the Mixed Commission, once it had reached the conclusion that it was not "possible to make the proposed lines and the grounds therefor, presented by the Argentine and Chilean Commissions, fit in every respect with what is laid down in the Award of H.M. Edward VII and the Report of the Arbitration Tribunal, owing to the fact that the Western arm of the

River Encuentro does not have its source in the Western slopes of the Hill of the Virgin", (underlining added) travelled outside its competence under the 1941 Protocol in purporting definitively to "approve" any stretch of the boundary line between Posts Nos. 16 and 17. The legal grounds on which this contention is based have been set out in Chapters I - V of this Part of the Memorial, and the factual grounds, which have already been set out at length in Parts I and II, will be summarised in the next paragraph. Here the Chilean Government confines itself to emphasising that, if its contention on this point is correct, no Minute of the Mixed Commission purporting to record "approval" of a particular stretch of the boundary line or of a Natural Boundary Post or to record the erection of a new Boundary Post, however scrupulously the Minute conformed to the conditions laid down in the Plan of Work and Regulations, could have had any legal effect at all unless and until accepted by the two Countries.

82. The boundary between Posts 16 and 17 laid down in the 1902 Award is a continuous boundary the definition of which has to be read as a whole and the several links of which are inter-dependent. The line adopted by the Mixed Commission as the basis for its joint proposal, contains three segments, the long middle segment of which cannot be reconciled with the terms or

Part Three the principles of the Award. The first segment, running from Boundary Post No. 16 to the "watersmeet", is accepted by both Parties as conforming to the terms of the Award and reflecting the true intention of the 1902 Tribunal. The first part of the middle segment, running from the "watersmeet" up part of the Arroyo Lopez and then up the Arroyo Mallines to what was alleged to be its source, is irreconcilable with the Award, as the Mixed Commission itself recognised, because the Arroyo Mallines does not have its source on the western slopes of the Cerro Virgen. Nor does this rivulet have its source on the western slopes of any mountain up which the boundary line might ascend directly to an elevated watershed in the manner clearly required by the terms of the Award. In consequence the second part of the middle segment, running from the alleged source of the Arroyo Mallines to the Cerro Virgen, bears no relation whatever to the line indicated by the Award. Leaving the alleged source of the Arroyo Mallines, it runs in the opposite direction from that contemplated by the Award, passes over a small rise into the valley of the River Engaño, a major water-course not mentioned in the Award, cuts this major river, ascends to a watershed up the slopes of a hill which is not the Cerro Virgen, and eventually reaches the latter from the North East instead of from the West. The third segment, running from the Cerro

Virgen to Boundary Post No. 17 on the north shore of Lake General Paz, is admittedly reconcilable with the actual words of a passage in the Award. But even in this segment the Argentine line can be represented as compatible with the terms of the Award only on the basis that the Peak designated in the map sheets as the Cerro Virgen was indeed intended by the 1902 Tribunal on its own merits to be a fixed, cardinal point determining the location of the boundary line. This is not what appears from the terms of the Award, which speaks of the Cerro Virgen only as a point of reference incidental to the ascent of the line directly to the high watershed immediately above the source of the River Encuentro. No doubt, it was for this reason that the Argentine Delegation in presenting its proposals traced the line in this segment from Boundary Post No. 17 on Lake General Paz northwards to the "Cerro Virgen"; for only by tracing the line from the south to north and isolating this segment from the impact of the terms of the Award respecting the rest of the boundary to the north is it possible to consider the Argentine line on this segment as corresponding to the line laid down in the 1902 Award and the Cerro Virgen as a Natural Boundary Post. But to trace the line in this way from south to north is to do it in a direction which is the exact

opposite of that followed in the 1881 Treaty and adopted by the 1902 Tribunal and to do it in a manner which radically departs from the Tribunal's concept of the boundary between Posts 16 and 17. This concept, as explained in Part I, was of a line following the River Encuentro to its source on the slope of a high watershed and then from the Peak above that source continuously along the local water-parting to Post 17.

83. The Chilean Government therefore considers that in purporting to "approve" a line from Post 17 to the Cerro Virgen and in proposing a line joining the watersmeet to the Cerro Virgen in Minute 55 the Mixed Commission assumed an authority to revise the Award and refashion the boundary between Posts 16 and 17 which had not been conferred upon it by the 1941 Protocol.

The Chilean Government also considers that the resolutions of the Mixed Commission in Minute 55 were vitiated by error. The map sheets prepared by the Argentine Military Geographical Institute and used in the Commission were completely inadequate and erroneous with regard to the vital questions of the true course of the River Encuentro and of the location of its source. The inadequacies and errors of the map sheets have been set out fully in

paragraph 69 above and it is unnecessary to repeat them.

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The Chilean Government contends that no act of the Mixed Commission springing from such fundamental errors could be binding on either of the countries concerned unless afterwards ratified by them.

84. In any event, by dealing with the boundary between Posts 16 and 17 in three separate segments and by relating its "joint proposal" only to the two northern segments, the Mixed Commission in Minute 55 presented the question of the course of the boundary in this Sector in a false and incomplete light. Minute 55 and Annexure 5 simply assume that no problem exists of reconciling the Lake General Paz - Cerro Virgen segment with the course of the boundary laid down in the 1902 Award. In that way the Mixed Commission glossed over completely the fact that, as the source of the Encuentro is not located on any slope of the Cerro Virgen, the line "approved" by the Commission for the southern segment does not "fit in with what is laid down in the Award of King Edward VII and the Report of the Arbitration Tribunal", any more than do the lines proposed for the middle segment. A partial resolution approving one segment only of the course of the boundary can never, for the reasons given in Chapter V of Part III, be other than provisional pending the identification by the Commission of a

boundary line for the whole Sector conforming to the 1902 Award. Equally, a partial resolution regarding one segment only which confessedly leaves it impossible to complete the boundary in the other segments in a manner conforming to the applicable Treaty or Award is defective on its face and cannot become definitive unless it is subsequently accepted and ratified by both countries. Furthermore, the work of the Commission in the Sector between Posts 16 and 17 was far from completed and, as also pointed out in Chapter V, this is an additional reason why the resolutions in Minute 55 cannot be considered to have been definitive and binding on the two countries



CONSIDERATION OF THE BOUNDARY BETWEEN POSTS  
16 AND 17 BY THE TWO GOVERNMENTS

35. Mention has already been made in paragraph 62 above of the occurrence of certain "difficulties" which arose in 1952 between "Argentine Gendarmerie and settlers in the Chilean localities of Palena and California". On 25th July of that year incidents occurred which brought the problem of the demarcation of the boundary between Posts Nos. 16 and 17 sharply to the attention of the two Governments before any line had been put forward by the Mixed Boundary Commission. The commander of the Argentine Gendarmerie at Carrenleufú suddenly appeared in the Rio Encuentro - California areas forming part of Palena District, inspected the houses of the Chilean settlers, took their personal documents (tax receipts and residence records issued by Chilean authorities) and notified them to present themselves the following day at the house of a settler, Bautista Saez. Eight settlers attended the meeting, the remainder refusing to go. At the meeting the commander of the Gendarmerie asserted that the boundary between Chile and Argentina was the River Encuentro along the whole of its length and then an imaginary line which went southwards from the source of that River and, crossing the River Tigre, went up to a Cerro at an angle and continued the frontier as far as

Post 17 on the north side of Lake General Paz. By way of justifying his action the Gendarme said that he was basing himself on the Provisional Map of the Argentine Military Geographical Institute which he claimed to have in his possession. The boundary which the Argentine Gendarme described, it may be observed, bears a striking resemblance to the compromise line which the Argentine Commission was afterwards to sponsor in the Mixed Boundary Commission. Furthermore, the Chilean Consul in Esquel was informed by the local Gendarmerie authorities that they were obeying the orders of their superiors and were under instructions to act in accordance with the indications on the map of the Argentine Military Geographical Institute. Wherever his instructions may have come from, the Argentine Gendarme notified the Chilean settlers that from that moment they belonged to the Argentine Republic, and that they must within thirty days comply with all Argentine laws and more especially with the laws governing residence certificates and registration with the frontier police, and with those prohibiting live-stock and goods from being taken over the border into Chile and persons from crossing the frontier without a permit. The Chilean Government at once protested, (Annex 45A), and in response to its protest the Argentine Government ordered a summary investigation for

the purpose of ascertaining what responsibility might arise from these acts and the immediate removal of the Gendarmes concerned from the areas. At the same time the Argentine Minister for Foreign Affairs and Public Worship informed the Chilean Ambassador that the existing situation would be maintained unchanged in those areas until the Mixed Boundary Commission had completed the demarcation of the boundary.

86. In the same connection the Argentine Chancellery on 21st August 1952 issued an official statement, which read:

"In view of newspaper reports, according to which the National Gendarmerie is alleged to have served notices of ejection on the populations of Rio Encuentro and California in the territory of Chubut, the Chancellery states: The Minister of the Interior has given instructions to the Commander of the detachment of Gendarmerie at Carrenleufu to maintain the existing status until the Argentine-Chilean Mixed Boundary Demarcation Commission carries out the appropriate demarcation."

As this statement appeared to the Chilean Government to be somewhat equivocal, the Chilean Ambassador in Buenos Aires addressed a Note to the Argentine Minister of Foreign Affairs and Public Worship dated 29th August, in the following terms (Annex No. 45A):

"Having regard to the fact that in the afore-said official statement of the Ministry of Foreign Affairs and Public Worship the settlements of Rio Encuentro and California are referred to as belonging to the territory of Chubut, it appears to me essential to

place on record the fact that, having pointed out to your Chancellery the error of such statement, I was informed that, in the opinion of the Argentine Technical Officials, the River Encuentro is on the boundary and California is actually Chilean and that the reference to the territory of "Chubut" in the said statement was a "slip".

The Argentine Government took no exception to this extremely clear and pointed declaration by the Chilean Government. Moreover, informing the Chilean Foreign Minister of what had transpired, the Chilean Ambassador reported on 5th September:

"1. - From interviews with Generals Levene and Helbling, the former Director of the Military Geographical Institute and the latter Chairman of the Argentine Boundary Demarcation Commissions, I come to the conclusion, after carefully reviewing the facts, that there does not exist any edition of the maps of the zone in which the locality California appears as Argentine territory.

2. - Attitude Gendarmerie Carrenleufú can only be explained by absurd interpretation arbitral award with respect source River Encuentro and of Tigre or Salto.

3. - Incident has been totally clarified with technical authorities - Generals Levene and Helbling - who told me total lack foundation claims Gendarmerie Carrenleufú."

Not unnaturally, the Chilean Government understood from these exchanges that the Argentine Government recognised the existing status of California to be Chilean.

87. On 9th December 1954 the Argentine Embassy addressed to the Chilean Government the Note proposing an Exchange of Notes regarding maintenance of the status quo to which reference has already been made in

paragraph 66 above (the text of this Note, its annexed draft and the accompanying diagram are Annex No. 46). After referring to the desirability of putting an end to incidents and avoiding a clash between the authorities of the two countries in sectors not yet definitively demarcated, the draft of the Notes to be exchanged proceeded:

"In this connection, the more frequent incidents occur in the River Encuentro-Palena zone and it is for that reason that the Government of the Argentine Republic, with the sound purpose of bringing tranquillity to the settlers in that zone, does hereby agree with the Government of the Republic of Chile on the necessity of maintaining a "status quo" until the Mixed Boundary Demarcation Commission has studied and given a ruling on the definitive boundary line of the said Sector.

To such end, on the diagram which accompanies this note and forms an integral part thereof are shown the zones which will remain under the exclusive jurisdiction of each country, without this establishing a precedent for the definitive demarcation."

And then followed the undertakings proposed for the maintenance of the status quo. As indicated in paragraph 66, the cartography of the diagram was defective. Apart from placing California to the north-west of the Rio Engaño, it depicted the little Arroyo Mallines as the River Encuentro. Thus, far from representing the existing zones of jurisdiction, it depicted as the jurisdictional boundary the line which it intended to advocate in the Mixed Boundary Commission.

88. Further incidents having taken place in the Encuentro and California area during August 1955, the Chilean Foreign Minister addressed a Note of 14th September 1955 to the Argentine Government, recalling the latter's proposal and giving a somewhat different focus to its own acceptance of the status quo (Annex No. 48). After two preliminary paragraphs the Chilean Note stated:

"My Government fully shares the high purposes expressed by Your Excellency and reiterates its desires to avoid any frontier incidents which may come to threaten the cordial relations which exist between our two countries.

In this respect, I wish to refer to a recent incident which occurred exactly in the Chilean localities of Río Encuentro and California Valley (District of Palena) where Argentine Gendarmerie, at the end of last month, made an incursion into the said Chilean Sector, notifying the settlers in that territory that it belongs to the Argentine Republic and at the same time carrying out a census of the population and cattle.

4. The incident in question, in respect of which my Government has presented a protest to the Ministry of Foreign Affairs and Public Worship in Buenos Aires, is a repetition of what occurred on 25th July 1952, in the same region, and which motivated another claim by Chile. On that occasion, the Argentine Government, through the Minister for Foreign Affairs, His Excellency Señor Jeroñimo Remorino, informed the Chilean Ambassador, after giving the necessary explanations, that a summary investigation would be initiated in order to establish responsibility for those acts and the gendarmes who had taken part in the incident would be withdrawn from the zone. And in conformity with such attitude, the Minister for Foreign Affairs

and Public Worship issued an official statement in which it was affirmed that 'instructions had been given to the Commander of the Detachment of Gendarmerie at Carrenleufú to maintain the existing "status" until the Argentine-Chilean Boundary Demarcation Commission had effected the corresponding demarcation'.

5. Reverting to the proposal contained in Your Excellency's Note No. 179, my Government considers that the maintenance of the "status quo" recognised by the Argentine Government in the official statement above-mentioned, while the Chilean-Argentine Mixed Boundary Commission is establishing the geographical coordinates and boundary posts which are required to indicate more objectively the demarcation which Chile and Argentine have recognised as a frontier, ought to be sufficient to prevent this class of incident, and it does not judge essential to extend the said "status quo" to all the Sectors, even those not reviewed, of the frontier line, seeing that this line has been clearly indicated in the Arbitral Award of 1902, there not existing any sector which is not demarcated and which could be considered to be outside the said Arbitral Award.

6. However, in the desire to avoid any friction and incident between the two countries which may affect the cordial relations existing between them, my Government will instruct its Boundary Commission to try and reach a definitive solution of this problem at the next Plenary meeting of the Chilean-Argentine Mixed Boundary Commission which is to be held in Buenos Aires in the second half of the month of October in the present year. The Chilean Government hopes that Your Excellency's Government, animated by identical purposes, will give its Commission instructions to the same effect, with the object of putting an end to the lamentable incidents above referred to which my Government deeply deplores."

(underlining added).

Thus, as the underlined words show, the Chilean Foreign

Minister insisted that the frontier in the Sector had already been clearly indicated by the 1902 Award and demarcated so that the establishment by the Mixed Boundary Commission of the Geographical coordinates and Boundary Posts "required to indicate more objectively the demarcation" ought to be sufficient to prevent incidents. And then he said that he would instruct the Chilean Commission to try and reach a definitive solution at the next meeting of the Mixed Boundary Commission and asked for similar instructions to be given to the Argentine Commission. As this problem had already been hanging fire in the Mixed Boundary Commission for a considerable number of years, and incidents were now occurring in the areas concerned, it was entirely understandable that the Foreign Minister should suggest that the Commission should be reminded of the need to bring the matter to an early conclusion.

89. Meanwhile, as stated in paragraph 67, the Chilean Commission had submitted to the Foreign Minister its proposals regarding the boundary between Posts Nos. 16 and 17. The memorandum drew attention to the relevant passages from the 1881 Treaty, the 1893 Protocol, the Report of the 1902 Tribunal and the Arbitral Award itself. It then proposed a boundary which, starting from Post No. 16, would follow the



River Encuentro to its source on the western slope of the high peaks called the Cordon de las Virgenes, ascend up those slopes to a high summit of 2,100 metres and then proceed southwards along the water-divide touching the highest summits of the Cordillera and thus arrive at Post No. 17 on Lake General Paz. Finally, it provided a reasoned statement of the grounds on which it justified this boundary line as being the line which best accorded with the Treaties, the Report of the 1902 Tribunal and the 1902 Award. The Chairman of the Chilean Commission, General Urrea, was informed of the Note which had been sent to the Argentine Government suggesting that the two Commissions should be instructed to try and reach a solution of the problem at the next Meeting. As pointed out in the preceding paragraph, this suggestion was only natural, having regard to the incidents and to the long history of the matter before the Mixed Boundary Commission; and it meant no more than that the two Commissions should be told to get to grips with the problem and to try and reach a solution. It certainly did not mean - and there is no trace of any such suggestion in the Foreign Minister's Note of 14th September - that the Mixed Boundary Commission should be instructed to reach a solution without regard to the terms of the 1902 Award or to the provisions of the 1941 Protocol. On the contrary, General Urrea was instructed to support the

Chilean proposals and, if he made no headway with these proposals, to invoke Article 8 of the Protocol.

90. During the period from 20th October to 1st November 1955, when the Mixed Boundary Commission was meeting in Buenos Aires, the Chilean Commission, presumably because of the technical character of the Mixed Boundary Commission, made no communication whatever to the Chilean Foreign Ministry. However, the meeting having terminated with the results recorded in Minute 55, General Urrea returned to Santiago and on 16th November submitted an official report to the Foreign Minister, an extract of which is reproduced in Annex No. 54. After referring to the programme of work for the current season, he wrote:

"As regards the problem of the delimitation of the River Encuentro - California - Hill of the Virgin zone, which was carefully gone into at this Plenary Meeting, after an exhaustive study the conclusions were reached which are stated in Minute 55, page 9, Item Four. Various matters of a Legal, Technical or Administrative nature, Letters A) and e), and under which there is submitted for the decision of both Chancelleries a joint proposal which comprises the frontier line between the junction of the River Encuentro, on a west and east arm, and the Hill of the Virgin, in the form indicated on the enclosed diagram and the description which is attached to the present communication.

Although the Argentine Commission accepted the line in the form agreed, the Chilean Commission did not wish to decide definitively without the approval of its Chancellery, for which purpose it evoked Article 8 of the Protocol relating to the replacement and setting up of boundary posts on the Chilean-

Argentine frontier promulgated on 8th October 1941, it being felt that thus was being obtained the legal and moral backing suited to a decision of great importance.

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In accordance with what was stated to you verbally at the interview which you were good enough to grant to the Commission, the problem has its origin in the fact that the Award of the Arbitrator, H.M. Edward VII, and the Report of the Arbitration Tribunal do not accord with the reality of the ground, a thing which the Mixed Commission rendered evident when making the map on a scale of 1:50,000 of the zone in question.

The Arbitrator and the Arbitral Tribunal demarcated on incomplete maps, as a result of which they refer to a River Encuentro the source of whose western arm is on the western slopes of the Hill of the Virgin, which is not true.

Once your Chancellery has been good enough to accept the joint solution proposed - if it shall so think fit - it will have to send the necessary communications through our Embassy in Buenos Aires and at the same time authorise this Commission to publish the statement of both Commissions which is enclose herewith, in newspapers in Santiago and Buenos Aires, the purpose of which is to bring the necessary tranquillity to the settlers in that zone and to give official information to the public in the two countries.

Under this proposal, Chile would cease to exercise jurisdiction over the zone to the east of the River Encuentro, which is at present occupied by Chilean settlers, and which covers an approximate area of 2,083 Hectares, according to the attached plan (Annexure 3) and the Minister for Lands and Colonisation will have to inform those settlers of their position so that they do not continue to pay their taxes to Chile and to consider their possible placing in another zone, if it shall be so thought fit.

As to the zone to the West of the general line Hill of the Virgin - River Encuentro, this will pass in its entirety to Chile, along

with the valley basins of the rivers Tigre and Engaño, which are of great importance to the locality of Palena, and its surroundings and covers an area of approximately 5,500 Hectares.

Once the frontier tracing is accepted in the form proposed, once the boundary posts are set up and once the maps on a scale of 1:50,000 are delivered, the Chilean Commission, as is usual, will send them for information and the necessary purposes to the Ministry of Lands and Colonisation, the Ministry of Internal Affairs, the Ministry of National Defence and the Ministry of Foreign Affairs, and this would complete its specific mission, the negotiations for the occupation and vacation of lands being left to the bodies which come under the Ministry of Lands and Colonisation." (underlining added).

His report ended by repeating the description of the line proposed in Minute 55 and already notified to each Chancellery by its Delegation.

91. The report was remarkable in that it supplied no explanations whatever of the reasons that had led the Chilean Commission to abandon completely its own thesis which it had been directed to support. General Urrea appears - quite erroneously - to have treated the points approved and agreed in Minute 55 simply as technical points of demarcation. Inadequate though the report is, it contains certain points which are significant. First, General Urrea makes it plain that the Chilean Commission had not wished to "decide definitively without the approval of its Chancellery" and had invoked Article 8 of the Protocol for that reason. Since Article 8 is expressed to operate only in

cases of "disagreement" as to the location of the boundary, it appears that, notwithstanding the proposal in Minute 55's being a joint one, the Chilean Commission had doubts as to the propriety under the Protocol of approving a line which manifestly could not be reconciled with the terms of the applicable instrument determining the boundary. At any rate, it is quite clear from the report that General Urrea considered that the Chilean Government was free to accept or reject the "joint proposal" until its acceptance by the Chancellery had been formally communicated to the Argentine Government through the Chilean Embassy in Buenos Aires. Secondly, General Urrea recognised once again that the 1902 Award and the Report of the 1902 Tribunal "do not accord with the reality of the ground". Thirdly, General Urrea makes clear his opinion that (a) the result of the joint proposal would be that Chile would cease to exercise jurisdiction in the zone to the east of the "River Encuentro" (thereby meaning the Arroyo Mallines), i.e. in parts of California; (b) this zone was at present occupied by Chilean settlers; and (c) these settlers were then paying their taxes to Chile.

92. In response to a request from the Chilean Ministry of Foreign Affairs that the report should be amplified, the Chilean Commission made a second report, the first part of which read:

"As is stated in the part which speaks of the Chilean Boundary Commission, before the drawing of the frontier "line", it is necessary to prepare a proper map on a scale of 1:50,000 of a zone embracing 5 kilometres on both sides of the frontier line.

This was done in this zone, which corresponds to Section VII, the Sheets of the following Maps being drawn up:

- VII-1 "Lake Palena-General Paz"
- VII-2 "Hill of the Virgin"
- VII-3 "River Encuentro"

This map was made using the aero-photogrammetric system and technicians of both countries nominated expressly by the Mixed Commission took part therein.

The two Commissions (Chile and Argentina) separately studied the nomenclature, toponomy and detail of these Maps which faithfully depict the ground.

Each Delegation studied the proposed line basing itself on the description in the Award of H.M. Edward VII and the Report of the Arbitration Tribunal.

These draft lines were discussed at length at the 15th Plenary Meeting of the Mixed Commission held in November of the current year in Buenos Aires.

On that occasion the following conclusions were come to:

- The Boundary Posts 16 (junction of the Palena with the Encuentro) and 17 (northern bank of Lake Palena) are recognised as properly located and at the actual places described.

- The Cerro Virgen, which appears in the map used by the Arbitrator, is the same geographical feature as that which appears in the present Map of the Mixed Commission.

- The River Encuentro, which throughout its course defines the frontier line, does

not rise in the Cerro Virgen.

Part Three

- It was agreed to consider that the frontier line between boundary post 15 and boundary post 16, between the last boundary post and the junction of the River Encuentro with the River Falso Engaño (8 kilometres), and between the Cerro Virgen and boundary post 17, on the north bank of Lake Palena or General Paz (25 kilometres), interpreted faithfully and exactly what was described in the official documents (Award and Report) and, therefore, it was caused to be drawn and was regarded as approved.

- That the draft line proposed by Argentina (green line on the Map) did not fit in with the Award nor with the Report, despite the fact that generally speaking it follows the same form as depicted on the Map used by the Arbitrator. The said line passes along the upper reaches of the River Engaño and the lower reaches of the River Salto or Tigre, which is the one which rises in the Cerro Virgen. The Chilean Commission rejected this proposal, seeing that none of these rivers is mentioned in the description made by the Arbitrator and the Arbitration Tribunal.

- With these antecedent facts the Mixed Commission, in an attempt to find a harmonious solution which might solve the problem of the demarcation of the zone comprised between the junction of the River Encuentro with the Falso Engaño and the Cerro Virgen (19 kilometres, drawn with a blue line on the map), resolved to submit for the decision of the two Chancelleries a joint proposal which, interpreting as far as possible the Award and the Report, shall not modify the general idea of the demarcation. It did no more than conform to Article 8 of the Protocol relating to the replacement and setting up of Boundary Posts on the Chilean-Argentine frontier .....

This report confirms that at the meeting of the Mixed Boundary Commission the Commission had been led to abandon its own correct method of viewing the boundary as a whole and to begin by focussing on the two strips

adjacent respectively to Boundary Posts Nos. 16 and 17 without regard to the fact that this rendered it impossible afterwards to trace and demarcate a line for the whole sector which was reconcilable with the 1902 Award. The report also contains one indication which may partly explain how the Chilean Commission came to be persuaded to fall into this error; for it shows that the Chilean Commission, despite its earlier reservations, acquiesced in the Argentine Commission's erroneous presentation of the River Encuentro and its tributaries on the map which that Commission had prepared for the Mixed Boundary Commission. This map depicts - quite wrongly as has been shown in paragraph 69 the Arroyo Mallines as the major river and gratuitously attaches the name "Falso Engaño" to the main river, which has its source on the slopes of the high summits of the Cordon de las Virgenes. On the basis of this erroneous presentation of the vital Encuentro river system, the Chilean Commission seems to have been persuaded that it might then be possible to link up the supposed source of the River Encuentro with the Cerro Virgen without "modifying the general idea of the demarcation". Even so, it recognised that this would be interpreting the 1902 Award and Report only "as far as possible" and that accordingly the question was one which was required



under Article 8 of the Protocol to be submitted to the respective Chancelleries.

Part Three

93. The remaining part of this report read:

" - As hereinbefore mentioned, the blue line on the map marks the joint proposal which our Chancellery is studying.

- Its acceptance will mean that Chile annexes for its own the zone which comprises the River Engaño and the Salto or Tigre, the latter from its source on the Cerro Virgen, with a total of 5,500 Hectares.

- The valleys of both rivers are fertile and of a large area, apart from the importance which they have for the future of the locality of Palena, seeing that the rivers join precisely in that area.

- The zone of California, as has been mentioned, covers an area of 2,100 Hectares and is occupied by 6 Chilean settlers, is to the East of the River Encuentro and IS NOT CHILEAN, according to the description given to the frontier line by the Arbitrator and the Arbitration Tribunal, duly recognised by Chile at the due time.

- The said settlers were put there in error by the Ministry of Lands and Colonisation, before the present Boundary Commission had been organised and without the necessary inquiries being made at the Ministry of Foreign Affairs as to whether that zone was Chilean or Argentine.

- The Ministry of Lands must study the possible location in another zone of the national territory for those settlers - if the parties concerned so desire it, it being recorded that it has been agreed that, as there will be no change of sovereignty, but only of jurisdiction, Argentina will not dispossess the said settlers, but the latter will have to pay their taxes in the said Republic.

Final Conclusion. - To sum up, Chile does not lose or surrender nor trade any part

of its territory, inasmuch as the zone of California was not nor is it Chilean, since the Arbitrator and the Arbitration Tribunal fixed the boundary on the River Encuentro; on the other hand, under the joint proposal presented by the Mixed Commission to the two Chancelleries, Chile claims for itself a zone which always figured on all the drafts, maps and official documents as Argentine."

Here General Urrea, who in his memorandum of 21st September 1954 (paragraph 65 above) and his memorandum of August 1955 had had no doubts as to California's being within Chilean territory, abruptly denied its Chilean character and attributed the presence of Chilean settlers in the valley to the error of the Ministry of Lands and Colonisation. This change of front on the part of General Urrea had no other basis than the conclusions recorded in Minute 55. His reference to the "error" by the Ministry of Lands and Colonisation was, in fact, somewhat singular, seeing that only a few weeks previously he had himself presented a powerfully reasoned memorandum concerning the effect of the 1902 Award in which he put California unequivocally on the Chilean side of the boundary. Similarly, it was on the basis of the erroneous presentation of the River Encuentro that General Urrea in the final paragraph contended that these conclusions in Minute 55 did not involve any surrender of territory by Chile. Moreover, he sought to justify this contention by recourse to the totally erroneous map annexed to the 1902 Award, an argument

whose absolute inadmissability the Chilean Commission had itself pointed out in its memorandum.

Part Three

94. The Report of the Legal Department. The whole matter was placed before the Legal Department of the Foreign Ministry by an Order dated 16th November 1955 and drawn up in the following terms:

"Pass to the Legal Department the Official Communication No. 105 from the Chilean Boundary Commission and the Minute No. 55 of the 15th Plenary Meeting of the Mixed Chilean-Argentine Boundary Commission, with the request that it be good enough to report, with the greatest possible urgency, on the proposed boundary line in the Sector River Encuentro - California - Cerro Virgen submitted to the Ministries of Foreign Affairs of Chile and Argentina by the Mixed Boundary Commission."

In this Order, it was only the Commission's joint proposal for solving the problem of the boundary line between Post 16 and the Cerro Virgen which was referred to the Legal Department. In consequence the latter's attention was not directed to considering whether the difficulties arising in those segments might also have repercussions in the southernmost segment from Post 17 northwards. Some days later - on 28th November - the Legal Department submitted its Report No. 397/g.96:

"1. - That the line proposed by the Mixed Commission does not conform in all respects to the Arbitral Award which traced the frontiers nor to the Report of the Arbitration Tribunal, for the reasons indicated by Minute No. 55;

2. - That it is a question of a new line which rectifies or modifies a situation created by the decision of the Arbitrator, a situation which, according to recent studies of the

Commission, is erroneous;

3. - That, accordingly, the question under examination cannot be resolved by the means of procedures laid down for the functioning of the Mixed Commission which, according to Article 1 of the 1941 Protocol, is only competent to perform the following functions:  
a) to replace the boundary posts which have disappeared or are in a bad state; b) to set up intermediate boundary posts where it considers it necessary to do so in order to mark with more clarity and precision the frontier line; and c) to determine the exact geographical coordinates of all the existing boundary posts and of those which it will set up:

4. - That, furthermore, the question under examination is manifestly outside the provisions of Article 8 of the Protocol, invoked by the Commission, for that Article deals with the settlement of any conflicts or disagreements in which the Mixed Commission might become involved in connection with its labours. On the other hand, in the present case, the Chilean and Argentine Commissions are in agreement and there is no conflict between them which can be solved by the Chancelleries;

5. - That the question under examination involves a demarcation of frontiers by modification of a line traced by the Arbitrator, which line, according to the Mixed Commission, cannot be applied since there exists an error of fact;

6. - That accordingly the question of fixing the boundary of the zone referred to must be discussed between the Governments of Chile and Argentine in the form usual in these cases, that is to say, by signing a Treaty or Supplemental Agreement which must be submitted for approval of Congress and for the corresponding ratification."

(underlining added).

The terms of this important Report are so clear and categorical that the emphasis supplied by the underlining is scarcely required. In the opinion of the Legal

Department the proposed line was a rectification or modification of a line traced by the 1902 Tribunal; the question under examination fell outside the 1941 Protocol; and the fixing of the boundary must accordingly be dealt with between the two Governments by the signature of a Treaty or supplemental Agreement which must be submitted to the Chilean Congress for approval before ratification.

95. Meanwhile, on 25th November, the Argentine Embassy in Santiago had transmitted a memorandum to the Chilean Foreign Ministry proposing a "modus vivendi" pending "definitive demarcation" which the Boundary Commission had proposed should begin on 15th December (Annex No. 55). And immediately afterwards the Argentine Charge d'Affaires proposed to the Ministry a "modus vivendi" in the sense that in accordance with Sheets VII-1, VII-2 and VII-3, approved by the Mixed Boundary Commission, the Chilean Carabineros shall not pass to the East of the River Encuentro, because the Argentine Government had given instructions that the Gendarmerie should operate only on the East of the said river. The river here named Encuentro was, of course, not the Encuentro, but the Arroyo Mallines.

96. Having regard to the Legal Department's Report and in the light of the Chilean Commission's observations, the Foreign Ministry instructed its Embassy in Buenos Aires on 9th December as follows:

1. - That the joint proposal had been submitted to His Excellency the President of the Republic, who, after being informed of its fullest details, gave his approval thereto.

2. - That the proposal is recommendable, because it guards the national interests.

3. - As the line proposed does not conform either to the Award or to the Report of the Arbitration Tribunal, for the reasons indicated in Minute 55, as the River Encuentro does not have its source in the western slopes of the Hill of the Virgin, and as it involves a demarcation, the matter must be resolved by means of a Treaty or Agreement which must be submitted for approval of the National Congress and for the corresponding ratification.

4. - That respect must be obtained for the rights of the Chilean settlers, whose lands would pass under Argentine Sovereignty.

5. - That the "Modus Vivendi" proposed by Argentina, while the conversations are in progress and with a view to avoiding incidents, had been accepted.

A few days earlier, on 5th December, the Ministry had issued a public statement on similar lines in connection with rumours appearing in the press:

" . . . . . "

1. - It is not true that California has passed or will pass totally to Argentina.

2. - The Mixed Commission on Boundaries between Chile and Argentina, which met in Buenos Aires during the second half of October last, handed to the Chilean and Argentine Governments for consideration a proposal for a frontier tracing in the said region, which up to date had not been demarcated.

3. - The proposal in question, which has been duly studied by this Secretariat of State, amply safeguards the national interests, and is at present a matter of negotiation with the Argentine Chancellery.

4. - Any solution of this delicate problem will be the subject of a Convention between Chile and Argentina which will necessarily necessitate the approval of Congress."

97. On 14th December 1955 the Chilean Embassy in Buenos Aires transmitted to the Chilean Foreign Ministry a copy of a Note in which the Argentine Government formally notified the Chilean Government of its acceptance of the "adjustment sponsored by the Commission", adding that a favourable decision on the part of the Chilean Chancellery would now enable the dispute to be solved and the demarcation of the sector to be carried out in the forthcoming season (Annex No. 56).

98. On 19th December the Chilean Ambassador in Buenos Aires replied to the Argentine Note of 14th December (Annex No. 57). After referring in general terms to the Mixed Boundary Commission's joint proposal and the Argentine approval of the line, the Chilean Ambassador stated:

"Notwithstanding the fact that the Chilean Ministry of Foreign Affairs considers that the said proposal is recommendable, it thinks that the line suggested does not fully conform to the Arbitral Award which traced the frontier, nor to the Report of the Arbitration Tribunal, for the reasons which are set forth in Minute 55 of the 15th Plenary Meeting and which says that this procedure is adopted 'considering that it has not been possible to make the proposed boundary lines and the fundamentals thereof presented by the Argentine and Chilean Commissions conform in all respects to what was laid down in the Award of H.M. Edward VII and the Report of the Arbitration Tribunal, due to the fact that the western branch of the

River Encuentro does not have its source on the western slopes of the Hill of the Virgin, but at the point of geographical coordinates X = 5163550 Y = 1523670. Consequently, it is a question of a new line which rectifies or modifies a situation created by the decision of the Arbitrator, a situation which, according to the studies of the Mixed Commission, is erroneous.

Therefore, it is evident that the question cannot be solved by the means or procedures laid down for the functioning of the said body which, according to Article 1 of the 1941 Protocol, is only competent to perform the following functions: a) To replace boundary posts which have disappeared or are in a bad state; b) to set up intermediate boundary posts where it shall consider it necessary to do so in order to mark the frontier line with more clarity and precision; and c) to determine the exact geographical coordinates of all the existing boundary posts and of those which it will set up.

Now, as the line proposed by the Mixed Boundary Commission involves a demarcation of frontiers by a modification of the line stipulated by the Arbitrator, which line, according to the said Mixed Commission cannot be applied owing to the existence of an error of fact, the question of fixing the boundary in the River Encuentro - California - Hill of the Virgin zone must, in the opinion of the Chilean Chancellery, be dealt with between the two Governments in the manner usual in these cases, that is to say, by signing a Treaty or Convention which has to be submitted for approval of the National Congress and for the corresponding ratification.

Until the two countries ratify the Convention or Treaty in question and with the object of putting an end to the incidents which are wont to occur in the said zone, the Chilean Government is prepared to arrange with the Argentine Government for "a status quo" on the same bases as those suggested by the Mixed Boundary Commission, at its 15th Plenary Meeting, to both Secretariats of State ....."  
(underlining added).



He then went on to mention a discrepancy in the Argentine Note of the description of the proposed line and to agree that "while the conversations are in progress and with the object of avoiding possible frontier incidents" the Chilean Police Authorities would be instructed not to pass to the East of the River Encuentro.

99. Thus, in this first Note communicating to the Argentine Government its reaction to the joint proposal in Minute 55 the Chilean Government repeated the legal considerations set out in its Legal Department's Report; and it took a clear position that the joint proposal raised a question which was outside the 1941 Protocol and could only be dealt with by the negotiation and signature of a treaty which would be subject to parliamentary "approval" before it could be ratified by Chile.

100. Meanwhile, information regarding the joint proposal having leaked to the press, the Chilean Parliament reacted strongly and, in consequence, the Foreign Ministry instructed the Chilean Ambassador not to take any further step in the matter. At the end of December 1955 and on 2nd January 1956 meetings to discuss the question took place between the Foreign Minister and the Foreign Affairs Committees of the Senate and of the Chamber of Deputies, with General Urra

in attendance<sup>1</sup>. Afterwards the Chilean Ambassador was informed of the opinions of Chilean Members of Parliament and of the possibility that it might be necessary to review the conclusion of the Mixed Boundary Commission regarding the location of the Cerro Virgen. Subsequently, he was instructed to ask the Argentine Government for a postponement of the application of the 'modus vivendi' and in due course he broached this matter with the Argentine Chancellor in a Note of 16th February 1956 (Annex No. 58). After referring to Minute No. 55 and its submission to the two Chancelleries for decision, he pointed out that, notwithstanding its secret character, news of the Minute seemed to have reached the ears of the Argentine Gendarmerie in the area. He said:

" . . . . .  
It was possible to obtain authentic proof that some Members of the National Gendarmerie stationed at Esquel and among them Sergeant Carlos Campos, affirmed, duly provided with plans of the region, that the Sector of California was Argentine. This version was got hold of by the Chilean radio broadcasting stations and evening newspapers, which - with singular surprise - published on the 4th December of last year the erroneous news that 'Chile had handed over to Argentina the zone of California', pointing out, at the same time, that the document produced by Sergeant Campos bore the signature of one of the Chilean Members of the Chilean Boundary Commission.

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1 This meeting was of an exploratory character and no written record was made of the discussion.

As is logical to suppose, such inaccurate reports produced the consequent reaction on public opinion.

It was difficult furthermore, for our Secretariat of State, to understand how a simple proposal of the Mixed Commission, of a secret nature and which was still under study by the Mixed Commission, had become public, it being furthermore granted the state of a completed matter, when it must have been known that to attain such status it was necessary - as I stated in this Embassy's Note No. 181 of 19th December 1955 - for the Chilean and Argentine Governments to sign a special Convention with respect thereto.

The origin of these events might perhaps be found in the statement contained in the Memorandum handed, under date of 2nd December last, by the Ministry of Foreign Affairs and Public Worship to this Mission, to the effect that the proposed tracing put forward by the Mixed Boundary Commission had to be forwarded to the respective Chancelleries 'in order that it may be transmitted to the frontier Authorities with instructions that the Argentine Authorities shall not pass to the West of the River Encuentro and the Chilean Authorities to the East, until it is definitively decided on the frontier line'.

It is necessary to state that the Mixed Commission never reached an agreement to that effect, as is shown by the mere reading of the Minute drawn up, and that the joint proposal was a matter the determination whereof rested exclusively with the Chancelleries of Chile and Argentina. It is natural moreover that this should be so, seeing that the Mixed Commission has no authority to vary the frontier established by the Treaty of 1881, as is clearly stipulated by the spirit and letter of the 'Convention relating to the replacement and setting up of boundary posts on the frontier line with Argentina' of 16th April 1941.

What is above stated, as well as the various reports which are in the possession of our Secretariat of State, denotes that there has been

hastiness on the part of the Argentine authorities in according to a mere proposal, the character of an agreement, without there having been previously any acceptance whatsoever on the part of Chile, instructions being given to the Gendarmerie of the zone regarding a matter which was not decided, which was only at the consultation stage and which it was obvious ought to be kept secret, the more so as our Government had not expressed any view on the said proposal.

Furthermore, the newspaper 'Esquel' of that Argentine locality, during the period from 11th to 22nd December 1955, published in a series of articles, almost 'in extenso', not only the resolutions adopted at the 15th Plenary Meeting but also maps and all the records relating to the problem in question, asserting that an agreement had been reached between the two countries on the frontier line in the zone of California.

All these events have unleashed in both branches of the Legislative Power, in the national press and on the national radio a tenacious campaign which censures what has occurred and fiercely challenges the proposal of the Mixed Boundary Commission, thus creating an unpropitious climate for a harmonious solution of the problem.

The Chilean Government, in various ways, has let there be known publicly the true scope of the said proposal which must not in any way be considered as an agreement between the two states. Guided also by the best intentions, it desires to reach following the appropriate legal procedure, a fair, equitable and just settlement of this question in conformity with the cordial relations existing between the two peoples.

It trusts, furthermore, that the Argentine Government, realising the numerous obstacles which have been raised in connection with the said proposal, will be ready to cooperate in order that this matter may continue to be dealt with in accordance with the circumstances which arose subsequently and with the antecedents which are explained.

For such purposes, he is of opinion that it would be desirable to suspend the proposed modus vivendi, which does not mean compromising in any way the dividing line in that region, a fact which would facilitate the detailed and basic solution of this question.

In this way, things would be restored to the state previously existing, which, in its opinion, would enable the problem to be tackled and a solution thereof to be sought in a more favourable atmosphere." (underlining added).

101. Then - on 24th February - after the text had been communicated to the Argentine Ambassador, the President of Chile ordered the following statement to be handed to the press:

"The President of the Republic, after having heard the opinions expressed in the Council of Ministers and having examined all the evidence supplied by the Minister for Foreign Affairs with reference to the boundary problem in the Palena-California region, which has been dragging on for several years, has issued the following instructions:

1. Reject the proposed tracing suggested by the Chilean-Argentine Mixed Boundary Commission at its Plenary Meeting held in October last in Buenos Aires and which was under study at the respective Chancelleries;
2. As a consequence of the foregoing, restore the position to the state existing prior to the said meeting of the Mixed Boundary Commission;
3. Instruct the Chilean Ambassador in Buenos Aires to inform the Argentine Government of these decisions, expressing to it the sincere desire of our Government that, in direct conversations and within the framework of the existing treaties, a just solution of this question may be come to in accordance with the traditional friendship which unites the two countries and which it is the fervent desire of the First Mandatory to bring still closer."

The President's statement, as its terms make clear, constituted a definitive rejection by Chile of the boundary line suggested by the Mixed Boundary Commission in Minute 55. Equally, by insisting that the position must be restored to what it was prior to the fifteenth plenary meeting of the Commission the President rejected the whole outcome of the proceedings at that meeting, including the purported "approval" of the line in the area Lake General Paz - Cerro Virgen.

102. On 27th February, in execution of the President's directive, the Chilean Ambassador in Buenos Aires formally notified the Argentine Government of the Chilean Government's decision to reject the line suggested by the Mixed Boundary Commission and to restore the position to the state in which it was prior to the fifteenth plenary meeting.

103. Meanwhile, on 26th February, the Argentine Minister for Foreign Affairs and Public Worship had in turn issued an official statement of the Argentine position (Annex No. 59). After referring to the Chilean President's statement and to reports in Santiago that further incidents had occurred in the region, the Foreign Minister said:

"With respect to the actions of the Argentine-Chilean Mixed Boundary Commission, the Ministry of Foreign Affairs and Public Worship states that in the decisions reached unanimously at the meetings held in October last, approval was given to the definitive

frontier line from Boundary Post 16, at the outlet of the River Encuentro into the River Palena or Carrenleufú, to the outlet of the River Falso Engaño into the said River Encuentro.

Definitive approval was also given to the frontier line which runs from the Hill of the Virgin, a natural boundary post established as such in the year 1947 by the Mixed Commission as recorded in the relative Minute, to Boundary Post 17 on the north bank of Lake Vintter or General Paz. The two sectors of line above-mentioned appear in the Minute No. 55 and in plans prepared by the Mixed Commission and approved unanimously. The said Minute, according to Article 6 of the Protocol relating to the Replacement and Setting up of Boundary Posts on the Argentine-Chilean frontier of 16th April 1941, will produce full effect and will be regarded as firm and valid, each of the countries exercising, as from that moment, full dominion in perpetuity over the territories which respectively belong to them, without the necessity of any further formality. Furthermore, in the said Minute 55 and its Annexure 5, appears an intermediate sector, of approximately 20 Km., which runs from the outlet of the River Falso Engaño into the River Encuentro to the above-mentioned Hill of the Virgin, which said intermediate sector was submitted by the Boundary Commission to the Chancelleries of the two countries for decision and which has just been rejected by the Chilean authorities. Consequently, the said intermediate sector is the only one in which the position would be restored to the state existing before the said meeting of the Mixed Boundary Commission and with respect to which the Argentine Chancellery holds the conviction that it will be possible to reach by direct negotiations a just solution in tune with the friendship which binds the two countries closely together."

104. Some days later this statement was repeated by the Argentine Government in a Note of 6th March 1956, in which it transmitted its reply to the Chilean Notes of 16th and 27th February (Annex No. 61). In this Note the Argentine Government contested the

validity of the Chilean Government's complaints in its Note of 16th February regarding the leakage of the proposals of the Mixed Boundary Commission to the Press and the too hasty treatment of those proposals by the Argentine authorities as definitive resolutions. At the same time, it said that only an "intermediate sector" of approximately 20 kilometres "from the outlet of the River Falso Engaño into the River Encuentro" to the Cerro Virgen had been submitted to the Chancelleries for decision; and that it assumed that the Chilean Government was referring only to this intermediate sector when it claimed that the position would be restored to the state which existed prior to the fifteenth plenary meeting. The Note concluded by stating that instructions had been given to the Argentine Gendarmerie to avoid incidents and that the Argentine Boundary Commission was ready to initiate conversations with any Chilean delegates that might be appointed in order to try and arrive at a definitive solution.

105. In a further Note of 18th April 1956 the Chilean Government made it clear to the Argentine Government that it did not accept the latter's interpretation of the situation (Annex No. 62). While expressing its readiness to initiate direct conversations with a view to reaching a settlement, the Chilean Government



(1) declined to recognise the "approval" in Minute 55 of the segments between Boundary Post 16 and a point on the River Encuentro and between Boundary Post 17 and the Cerro Virgen as possessing any binding force under Article 6 of the 1941 Protocol, since none of the specific requirements of the Protocol had been complied with;

(2) denied that the Cerro Virgen had ever been "approved" as a Natural Boundary Post;

(3) insisted that the line proposed by the Mixed Boundary Commission departs from the 1941 Protocol, from the 1902 Award and from the Report of the 1902 Tribunal;

(4) insisted that its rejection of the proposed line meant the restoration of the position as it existed prior to the fifteenth plenary meeting;

(5) pointed out that it was, in consequence, only natural and logical that the patrolling by Chilean Carabineros should be resumed in the same manner as before.

106. Further diplomatic Notes were afterwards exchanged between the two Governments and these Notes, together with other developments, are dealt with in Chapter IX. But the diplomatic correspondence exchanged

and the official statements issued in the period from November 1955 to April 1956 crystallised the positions of the two Governments on the question of the boundary between Posts 16 and 17. Indeed, during the remainder of 1956 a parliamentary inquiry was in progress in Chile and the Argentine Government did not reply to the Chilean Note of 18th April 1956 until nine months later. Accordingly, the initial phase of the present dispute regarding the course of the boundary between Posts 16 and 17 may be regarded as having been completed with the delivery of the Chilean Note of that date. It therefore seems convenient to terminate Chapter VIII at this point and to conclude it with a brief resumé of the positions taken up by the two Governments in the Notes and statements which have been examined in the foregoing paragraphs.

107. The position taken by Chile was that the Mixed Boundary Commission had no authority to vary the frontier established by the Treaty of 1881 (Note of 16th February 1956); that the boundary line proposed in Minute 55 was a new line which rectified or modified a situation created by the 1902 Award (Note of 19th December 1955); that, in consequence, approval of the proposed line could be effected only by means of a treaty drawn up between the two Governments and duly ratified after submission to the Chilean National Congress (Ibid.); that, as Minute 55 did not comply

with any of the specific requirements of Article 6 of the Part Three Protocol, the Commission's purported "approval" of (a) the line between Post 16 and the "watersmeet" on the River Encuentro and (b) the line between Post 17 and the Cerro Virgen could not possibly have any binding force (Note of 18th April 1956); that for the same reason the Commission's purported "approval" of the Cerro Virgen as a Natural Boundary Post was without any binding force (ibid); that the boundary line proposed by the Mixed Boundary Commission was rejected by Chile (President's statement of 24th February 1956 and diplomatic Note of 27th February 1956); and that, in consequence, the position regarding the course of the boundary between Posts 16 and 17 was restored to what it had been prior to the fifteenth plenary meeting.

108. The position taken by Argentina, on the other hand, was that under Article 6 of the Protocol Minute No. 55 constituted a definitive approval, producing full effect for the two Governments, of the line from Post 16 along the thalweg of the River Encuentro to the point of the "watersmeet", and also of the line from Post 17 on Lake General Paz to the Cerro Virgen; that it was only the intermediate sector from the point of the "watersmeet" to the Cerro Virgen (i.e. the two middle segments examined by the Mixed Boundary Commission) which had been submitted to the decision of the

Chancelleries and had been rejected by Chile; and that in consequence it was only the question of the line in this intermediate sector which would be restored to the position existing prior to Minute No. 55 (Foreign Minister's statement of 26th February 1956 and diplomatic Note of 6th March 1956).

109. The Argentine Government, it will be observed, did not in any way contest the efficacy of the Chilean Government's rejection of the proposal of the Mixed Boundary Commission in so far as that rejection related to the intermediate sector from the point of the "watersmeet" to the Cerro Virgen. It contested that rejection only with respect to the segment from Post 16 to the point of the "watersmeet" and to the segment from Post 17 to the Cerro Virgen. In the view of the Chilean Government, for the reasons which have been given in foregoing Chapters of this Part, the position taken up by Argentina with regard to the definitive legal effects of Minute No. 55 on the boundary line in these two segments was completely without any foundation in Article 6 or in any other provision of the 1941 Protocol.

DEVELOPMENTS SUBSEQUENT TO CHILE'S REJECTION  
OF THE BOUNDARY LINE PROPOSED BY THE MIXED  
BOUNDARY COMMISSION

A. The Report of the Parliamentary Committee.

110. The Chilean Senate by a resolution of 17th January 1956 set up a special committee, in which members of the Chamber of Deputies also participated, to study and report to both Houses of the National Congress on the boundary dispute in the California - River Encuentro region. During 1956 this Special Mixed Committee of Senators and Deputies held 35 meetings, interviewed a considerable number of persons, including Admiral Olsen, the former Foreign Minister, and General Urrea, the Head of the Chilean Boundary Commission, inspected the disputed area and took statements under oath from settlers in the California Valley. The report of the Committee was completed on 25th October and by a resolution of Congress on 13th November was then published.

111. The report, which was originally intended to be of a confidential character, set out in summary form the relevant geographical and historical facts and the information obtained by the Committee. It made, inter alia, the following points:

- (1) The River Encuentro rises on the Western

slopes of a steep peak situated in the "Cordilleras de las Virgenes" on the Eastern side of the California Valley and rising to a height of 2,100 metres.

(2) In the Arroyo Lopez the River Encuentro receives a tributary which is of "minimum importance"; and the Arroyo Lopez itself is fed by a small brooklet (esterillo) named Mallines which begins in a marsh.

(3) The Cerro Virgen has a height of 1901 metres, being covered with snow only in winter; and it is the river Salto or Tigre which rises on its Western slopes. The peak in the Cordon de las Virgenes, on the Western slopes of which the River Encuentro rises, has a height of 2100 metres, being perpetually capped with snow; and it is this peak which corresponds to the peak designated the Virgin Peak in the Arbitral Award.

(4) The topographical sheets VII - 1, VII - 2 and VII - 3 put before the Mixed Boundary Commission do not include the high summits which form the Cordon de las Virgenes and define a clear water-divide in the California Valley; in consequence, the Chilean thesis regarding the course of the boundary under the 1902 Award was, in effect, shut out from consideration at the fifteenth plenary meeting.

(5) The line proposed by the Chilean Commission at the fifteenth plenary meeting corresponds, subject to one amendment, to the "correct arbitral line". The Chilean Commission, owing to its not having inspected this part of the ground and to an error in the aerial map plotted by the United

States military team, had not appreciated that the four lakes, known as Lagunas del Engano, drain into the Pacific Ocean via the Rivers Engano and Salto; and in consequence at the southern end of the Cordon de las Virgenes it ought to have placed the local water-divide to the south, instead of the north, of those lakes.

(6) Under Article 6 of the 1941 Protocol the only instruments of legal value producing full effects are the Minutes of boundary posts drawn up by the demarcation Commissioners; other Minutes have merely an administrative value for recording the proceedings and conclusions of the Commission. Accordingly, the demarcation of the frontier is produced exclusively by the erection of artificial boundary posts or the recognition of natural boundary posts by acts recorded in Minutes complying with Article 6 of the Protocol.

(7) No such Minute exists with regard to the Cerro Virgen.

(8) The settlers in the California Valley are Chilean and, to prove that fact, produced to the Committee administrative documents, such as marriage and birth certificates, receipts for payments of taxes and applications to the Chilean Ministry of Lands and Colonisation.

(9) In 1952 the Argentine authorities had recognised the existing status of California to be Chilean.

112. With regard to the "joint proposal", the report stated, inter alia, the following findings:

(1) General Urrea, being unable to get the Chilean thesis accepted and thinking that he was carrying out the instructions of the Chancellery to reach a definitive solution, felt that he had to opt for the "joint proposal", which he considered to fall within the competence of the Commission under Article 8.

(2) The making of the "joint proposal" was not covered by Article 8, as the Legal Adviser of the Chancellery pointed out, and was, in fact, wholly outside the competence of the Mixed Boundary Commission.

(3) The Government had had in mind to accept without any further formality the boundary line indicated in the "joint proposal".

(4) This step did not materialise owing to the report of the Legal Adviser to the Chancellery.

(5) In response to the requests of a Committee of both Houses of Congress and under the pressure of public opinion the Government rejected the "joint proposal" and communicated that rejection to the Argentine Government.

113. The report further contained criticisms of the organisation of the Chilean Boundary Commission and of the Ministries of Foreign Affairs and Defence for dealing with boundary questions. In addition, it passed strictures on the handling of the present question by the Chairman of the Chilean Boundary Commission, the Minister for Foreign Affairs and the President of the Republic, together with certain other



persons.

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B. Reorganisation of the Chilean Boundary Commission.

114. After the rejection of the "joint proposal" the organisation of the Chilean Boundary Commission was reconsidered and by a decree of 17th June 1956 it was reconstructed so as to increase its members from three to five and to provide that one of these five should be a legal adviser in the employ of the Ministry of Foreign Affairs. These changes were communicated to the Argentine Chancellery on 16th October 1956, (Annex No. 63), with the suggestion that it might be necessary to modify Article 1 of the Plan of Work, which referred only to three delegates. Replying on 29th December 1956, (Annex No. 64), the Argentine Chancellery challenged the appointment of a legal adviser to the Mixed Boundary Commission as being inconsistent with Article 1 of the 1941 Protocol, which contemplated that the Commission should be composed of "experts" and made no provision for "advisers". The Chilean Government, in a Note of 23rd January 1957, (Annex No. 65), contested the right of either Government to object to the other's nomination of an "expert" under Article 1 of the Protocol:

"The technical quality is attributed by each Government to the members of the respective national Boundary Commission, without the other Government being able to object. The name given to these delegates cannot alter their true nature, which is to be experts, i.e. competent in the questions they are called on to deal with."

However, it added that if it was the word "adviser" which was troubling the Argentine Government, the Chilean Chancellery was perfectly prepared to rename the two new members "experts" instead of "advisers".

115. The Argentine Government reverted to the question in Notes of 30th April and 8th August 1957, which merit the close attention of the Tribunal, since they appear completely to confirm the Chilean Government's contentions regarding the essentially technical and limited character of the functions entrusted to the Mixed Boundary Commission. In the earlier Note of 30th April (Annex No. 67), after conceding that an increase in the number of delegates could be effected by an amendment to the Plan of Work endorsed by the respective Ministers, the Argentine Minister of Foreign Affairs and Public Worship insisted that any change in the type of the delegates would entail a modification of the 1941 Protocol and was not admissible. In regard to the Protocol itself he observed:

"This instrument was concerted when, once the prolonged frontier question between Chile and Argentina was closed, all the legal, political and military differences which separate the two nations had been got over and there remained to be settled only isolated technical details of the definitive demarcation, following the Award which His Britannic Majesty dictated in 1902. It was not a question of reopening of any of the former disputes, but exclusively of determining, by scientific methods of unquestionable accuracy, the actual application of that intangible Award." (Underlining added).

"The meaning of the word "technician" (técnico) is very broad, since it comprises generically experts in the most diverse disciplines; but there is no need to be over-subtle in order to admit that when two governments agree to confer to "technicians" a given task they are referring exclusively to specialists in the subject concerned. Who are then the technicians of article 1 of the Protocol of 1941? As your Excellency says very rightly in the note I am answering, they ought to be "competent in the matters they are called on to deal with". And what are these matters? The Protocol gives a clear answer: replacing boundary posts, placing new ones, determining geographical co-ordinates. They must study the boundary tracing, mark it out, identify and make actual on the ground the line described in the Award. It is quite obvious therefore that the only people capable of doing this are technicians in the geographical disciplines or some related special subject. These questions cannot be decided, according to the express and limited terms of the Protocol, by lawyers, naturalists, strategists, etc., to quote by way of example some of the technical categories foreign to the functions of the Boundary Commission.....

By the decree of 17 June 1956, the Chilean government resolved not only to increase the number of the members of the Chilean Boundary Commission - in the way analysed above - but also to incorporate a Legal Adviser into it, an official of the Ministry of Foreign Affairs, and an Adviser of the General Staff of the Armed Forces. These men would act not as simple advisers to the delegates - which could not be objected to - but as members of the Mixed Commission, i.e. with a right to intervene in its decisions; decisions which, as has been established, are related to the replacing and placing of boundary posts and the determining of geographical co-ordinates. It being evident, for obvious reasons, that these are not matters included in their technical competence, their presence in the Commission would weaken its character and it would happen that points of view would be introduced into its discussions which are completely foreign to its unmistakable mission. This Chancellery agrees with your Excellency that "the technical type is attributed by each government to the members of the respective National Boundary Commission, without

the other government being able to object"; but this right refers to the appreciation of the professional titles of each member in his speciality, not to the character of this speciality itself, which has been determined by both Parties and which ought to be shown in a Mixed Commission subject to objectives and precepts adopted by common agreement." (underlining added)

116. On 16th July 1957 the Chilean Foreign Minister reasserted the right of each Government to appoint such experts as it thinks fit, at the same time stating that, in order to meet the objections of the Argentine Government as far as possible, it had eliminated the condition that the legal adviser should be an official of the Ministry of Foreign Affairs, (Annex No. 69). He then stated:

"My government believes the services of a legal Adviser with diplomatic experience indispensable in the Chilean Boundary Commission and in the two Mixed Commissions with Argentina and Bolivia because both have to work on the basis of the interpretation of the international Agreements, the details of which might escape those who are not versed in these matters.

Your Excellency must agree that the replacement of missing boundary posts and the placing of intermediate boundary posts must be done in accordance with what is disposed in the Treaties, and these Treaties can be read and interpreted much better by a jurist than a geodesist.

Moreover these two activities complement each other rather than hinder each other, and the presence of a legal Adviser in the Mixed Commission will facilitate the work to be done and will avoid false interpretations of the Treaties, as happened at the last Plenary Meeting in Buenos Aires of the Chilean Argentine Mixed Boundary Commission, which obliged my government to reject the proposed tracing approved by the Mixed Commission.

Experience shows us then that the presence of a legal Adviser is not only useful but also necessary.

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Furthermore article 20 of the Plan of Work says that "The Commission will use the following official documents" and in the next line enumerates all the existing international Agreements about frontiers in force between Argentina and Chile. One must suppose therefore that those Agreements must be interpreted and this is said by the following article when it states: "The interpretation in the field of the official documents about the frontier line is assigned solely to the Delegates who make up the Commission." Therefore if the Mixed Commission must use Treaties and if these are to be interpreted by the delegates, it is logical to suppose that they must be interpreted both legally and technically in order to determine the boundary line to which the Treaties refer and on which the boundary posts must be placed. It would not be possible to suppose moreover that the interpretation of these Treaties ought to be made only in the field and not within the Mixed Commission, or that this interpretation can be only geographical and technical. (underlining added)

Later, having recalled a number of specific occasions on which the delegates of one or other country had exceeded three in number, he dealt with the Argentine Government's contentions regarding the "type" of experts as follows:

"If the purpose of the Mixed Commission was solely that of determining the geographical co-ordinates of existing boundary posts, I understand how a jurist would be superfluous; but not when it is a matter of replacing missing boundary posts or of placing intermediate boundary posts in accordance with the provisions of a Treaty or an Arbitral Award.

My government would think it unnecessary to oblige a jurist to intervene personally in all the tasks undertaken by the Sub-commissions charged with erecting boundary posts in the field or of determining their geographical co-ordinates; but on the other hand it believes a jurist is correctly employed within the Mixed Commission and in his role of interpreting the Treaties in order to determine if the boundary line is in accordance with them or

if it has duly respected the will of the Arbitrator, as in our case with the Arbitral Award of His Majesty the King of England.

What I have been saying is so obvious (that the Mixed Commission ought to interpret Treaties and therefore has a place for a Legal Adviser), that your Excellency's government in its note of 24th January 1957 recognises the right of the Chilean Government to reject a tracing proposed by the Mixed Commission 'as it did not comply' you say verbatim, 'with the Protocol of 1941 and because it departs from what was established in the Award of His Britannic Majesty and the Report of the Arbitral Tribunal'." (Underlining added)

The Chilean Government, it may be pointed out, did not take the position that the Mixed Boundary Commission is competent to pronounce on the correct legal interpretation of the treaties and arbitral awards which it is called upon to apply. It took the position that the inclusion of a legal adviser in the Chilean Commission was desirable only for the purpose of determining whether the boundary line being demarcated by the Commission is in accordance with the applicable treaty or award.

117. The Argentine Government, in its Note of 8th August 1957 (Annex No. 70), reaffirmed the opinion which it had expressed in its earlier Note of 30th April, adding:

"In fact it continues to believe that the task of 'replacing missing boundary posts, placing boundary posts in those sections of the Argentine-Chilean frontier where they may be necessary and determining the exact geographical co-ordinates of all of them' does not involve

juridical disciplines in which legal assessors are trained in and demands, in order to comply with the provisos of the Agreement, technical skill in a field to which lawyers are aliens.

Your Excellency expresses that your government believed the services of an assessor of this type in the Mixed Commission to be indispensable because the Commission must work on 'the basis of the interpretation of international agreements, the details of which might escape those who are not versed in these matters'.

Allow me Mr. Ambassador, to quote again the text of the Protocol of 1941, from which I copied a part in a previous section. It says that "when in carrying out the setting up of a boundary post a disagreement arises over the location of the dividing line, the acting members of the Commission will work out together the mapping out on a large scale of the area in question and will accompany it by a report by each of the parties. With these elements the Chancelleries of both countries will decide as may be appropriate", referring then to arbitration in case of disagreement. I.e. if the experts come across a difficulty in the technical work entrusted to them which derives from the application in the field of the frontier agreements, it is not the Commission's job to interpret treaties and legal documents, but rather the facts ought to be taken to the respective Chancelleries so that they, advised by their legal advisers, may resolve them before having recourse to arbitration.

These articles, which are extremely clear, are the ones which have determined up to now the composition of the Mixed Commission, with great success in the mission entrusted to it.

Because of this the Argentine government understands that the 'interpretation of documents' referred to in the Plan of Work and which your Excellency refers to must be a technical interpretation within the limits of the Commission's powers, and cannot give rise to legal arguments, which are beyond its competence". (underlining added)

118. In this correspondence in 1956-7 concerning the composition of the Chilean Boundary Commission,

therefore, the Argentine Government appears to have been strongly of the opinion - no less so than the Chilean Government - that the functions of the Mixed Boundary Commission are essentially technical and limited. Certainly, it took a clear and firm position that, if the experts come across a difficulty in their technical work deriving from the application in the field of frontier agreements, it is not the "Commission's job to interpret treaties and legal documents" but to refer the difficulty to the two Chancelleries to be resolved either by agreement or by arbitration. And it also took a clear and firm position that any "interpretation of documents" by the Commission can only be a technical interpretation within the limits of the Commission's powers, and cannot involve legal questions which are outside those powers. This is precisely the position of the Chilean Government in the present case. The Chilean Government would only add that, in its view, it is self-evident that what the Commission is incompetent to do when it notices a difficulty in the application of a frontier agreement it is equally incompetent to do when, through inadvertence, error or any other cause, it fails to notice or puts aside a difficulty which actually exists in the legal application of such frontier agreement.



C. Resumption of the negotiations concerning the boundary. Part Three

119. On 24th January 1957 the Argentine Government resumed the diplomatic correspondence, which had ceased with the Chilean Note of 18th April 1956, stating that with the termination of the investigation ordered by the Chilean Congress it felt free to put its views on the difference which had arisen (Annex No. 66). These views were as follows:

(a) The agreement of the Mixed Boundary Commission regarding the boundary line "has unquestionable legal effectiveness since it shows the common opinion of the delegates of both countries about what is the true boundary".

(b) Minutes of meetings which record previous agreement are the immediate and essential antecedent to the physical demarcation which is described in the Minutes provided for in Article 6; for out of such previous agreements are born the legal consequences which the records provided for in Article 6 finally confirm. The mere fact that Article 6 refers to such Minutes without mentioning those of the Plenary Meetings does not permit the inference that it denies validity and effectiveness to what was done before.

(c) The Boundary Commissions are the bodies lawfully authorised to determine the line of the boundary and the subsequent demarcation, where appropriate, can be carried out only in accordance with the boundary line previously approved. This requirement had been strictly complied with in the two sectors which extend from the confluence of the

River Encuentro with the River Carrenleufú to the outlet of the River Falso Engaño into the River Encuentro<sup>1</sup>, and between the north bank of the Lake General Paz and the Cerro Virgen.

Consequently, there was no legal ground which would permit Chile to deprive the Minutes relating to those sectors of any authority.

(d) The map on which the line is fixed has the advantage of marking the whole of the frontier, and not just one of its points, like the boundary post. The boundary post may disappear; but not the map. Article 6 supposes implicitly that the line exists. Only the line can delimit a territory, because it is a line and not a boundary post, which solely defines, or makes actual, a point in the line.

(e) The Chilean Government was fully entitled to reject that which, not being done in compliance with the 1941 Protocol and not being in accord with the provisions of His Britannic Majesty's Award and the Report of the Arbitration Tribunal, is nothing more than a proposal formulated by the Mixed Commission and as such capable of either acceptance or rejection.

(f) Rejection is not, however, possible of that which is not a proposal, but a firm agreement made with authorised agents. Otherwise, the result would be that until the Minutes prescribed by Article 6 are drawn up, the work of the Mixed Commission, even though it be carried out in

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1. According to the Argentine theory of the River Encuentro.

scrupulous compliance with the Protocol and even though it accord exactly with the Award and Report, is as null and void as if nothing had been done in the matter.

(g) As regards the declaration of the Cerro Virgen as a natural boundary post, it was enough to refer to Minute No. 39 of 31st October 1948, the statement in which had already been declared in Minute No. 32 to be the official word of the Commission about the description of the boundary line. The Hill of the Virgin therein mentioned is the one which corresponds to the hill marked on the arbitration map.

(h) Although the Cerro Virgen may not appear as a natural boundary post in minor plans of co-ordinates to be recorded, the fact remained that it was an unmistakable point in the frontier, and this took away all meaning from the other fact that the record required by the Regulations had not been signed - a formality only carried out at the moment of demarcation.

(i) Argentina was prepared to try and arrive at a solution with respect to the intermediate segment of the line contained in the joint proposal and, failing any solution, to appoint Her Britannic Majesty arbitrator of the dispute.

120. The Chilean Foreign Minister replied in a Note of 27th June 1957 that the Argentine Government appeared to be under some misapprehension as to the true place of the 1941 Protocol among the Agreements governing the Chilean-Argentine boundary problems

"In this matter my government has been perceiving, not without a certain alarm, that for some time now there has been a gradual deformation of the said Protocol and of the functions of the Mixed Commission, in the sense of giving the agreements of that Commission the value of *res judicata*, even before all the requisites mentioned by the Protocol have been complied with, attributing to the Mixed Commission powers which it does not possess and which were never in the mind of our governments to accord it, since to attribute such powers to it would have meant placing the Commission above the Arbitral Award, when in fact its purpose is the application in the field of that Award".

Then, having referred to the origins of the 1941 Protocol and to the terms of its Preamble and of Article 1, he observed:

"The Mixed Commission created by the Protocol of 16 April 1941 was not then a delimitation Commission for a non delimited boundary or a body with arbitral powers. The boundary line was already fixed. It had been agreed on by the two countries in the Boundary Treaty of 23 July 1881; and in the parts which were the object of subsequent controversies, it was determined by the Arbitral Award of His Britannic Majesty of 20 November 1902. A Commission designated by the Arbitrator had materialised the arbitral award, placing boundary posts in the most salient points of the boundary and making Records of each one of these posts.

With the passage of time some of the boundary posts were destroyed. Besides it seemed suitable to place intermediate boundary posts in certain sectors, naturally in the boundary line already established. Hence the necessity of the creation of the Mixed Commission. This Commission cannot therefore depart from the terms of the Treaty of 1881 and the Arbitral Award of 1902 without making absolutely null and void its decisions. Therefore either of our two governments - during the demarcatory process of the Commission - can call its activity null and void if it departs

from what was established in the international deeds which determined the boundary line or if the requisites determined by the Protocol of 1941 are not complied with." Part Three

As to the Minutes provided for in Article 6 of the Protocol the Chilean Chancellor emphasised that they were required "in order to surround with every type of guarantee the operation of replacing and placing boundary posts"; that without the formality of drawing up the Minutes the procedure lacked all legal value; that the Minute required by Article 6 constitutes the document which identifies the boundary post; and that it does not matter if a boundary post is destroyed because it will always remain recorded in the Minute so that it can be replaced exactly. He further emphasised that the Protocol does not speak of any other type of Minute; that the other Minutes of meetings of the Mixed Commission derive simply from its own regulations and have no definitive validity for the Governments without the drawing up of a Minute in the form required by Article 6 of the Protocol; and that to give any higher value to these Minutes would be to admit that the Mixed Commission could lay down rules for itself which prevailed over both the 1941 Protocol and the instruments which fix the boundaries of the two Republics.

The Chilean Chancellor freely conceded that members of the Mixed Commission have authority to act

in the name of their Governments, but only for the specific purpose conferred on them by the 1941 Protocol and within the limits of its provisions. He agreed that a boundary is not a boundary post, but a continuous line in which the boundary posts are only prominent marks on the line; and that this line must be pointed out and described. He insisted, however, that this was the task of the Arbitrator; that the indication of the line on a map by the Mixed Commission could only be considered as part of the preparatory work to facilitate the placing of the boundary posts and in no case as a substitute for the line fixed by the Arbitrator; and that unless the Mixed Commission's indication of the line is a faithful copy of the boundary fixed by the Arbitrator it is beyond the powers of the Commission and null and void.

As to the status of the Cerro Virgen as a natural boundary post, the Chilean Chancellor underlined that no Minute of the kind mentioned in Article 6 had been drawn up with reference to the Cerro Virgen; that in any case only a deficient study of the area or a confusion could have led the Commission into the error of accepting this mountain as a natural boundary post; and that when Argentina stated that Minute 39 specified that the topography of the area north of the Cerro Virgen does not correspond with the terms of the

Arbitral Award and that the dividing line suffers from serious defects, specially in regard to the hydrographical basin of the River Encuentro, it is immediately obvious that the area referred to by the Mixed Commission is not the one indicated by the Arbitrator". In this connection he observed:

"Since the Arbitrator chose such simple natural objects like a river (the Encuentro) and a local watershed (between the Pico Virgen and boundary post 17), there can be no mistake in the Award and it is doubtless only a mistaken application of the terms of the Award to the area which has produced a misunderstanding which our Governments are at present trying to clear up.

It is for these reasons that my Government has considered that the tracing drawn at the last meeting of the Mixed Commission at Buenos Aires, between boundary posts 16 and 17, is not in accordance for almost all its length with the wishes of the Arbitrator and it has consequently rejected what the Commission had done".

He agreed that the problem should be analysed at another meeting of the Commission; and, while recalling Chile's traditional adherence to the principle of arbitration, concluded by suggesting that they should first exhaust all the means indicated in the Protocol and ask the Commission to investigate again the possibilities of finding a solution.

D. Re-examination in the Mixed Boundary Commission

121. On 26th August 1957 the Argentine Government, while reserving its position concerning the two segments where it regarded the line as having already been

settled, agreed to the Chilean suggestion that the problem should be examined again by the Mixed Boundary Commission. When the Commission accordingly reconvened in Santiago on 20th November 1957 for its sixteenth plenary session, General Rodriguez, now head of the Chilean Commission, opened the discussion of the boundary between Posts 16 and 17 by restating the position taken up by the Chilean Government<sup>1</sup>. After recapitulating certain of the points contained in the Chilean Note of 27th June 1957 General Rodriguez said:

"Another factor which, in the view of the Chilean Government, has led the Mixed Commission into error is the reversal of values which has been effected, within the Mixed Commission, of the various component parts of the Arbitral Award. The Award itself has been forgotten, and importance given to secondary elements of the arbitral decision.

In the Award of His Britannic Majesty, there are three documents the order of priority and importance whereof is as follows: 1) The Award of 20th November 1902; 2) The Report; and 3) The plans of the demarcation and the list of the boundary posts erected by the Holdich Commission in 1903.

The Award is the most genuine expression of the wish of the Arbitrator and, consequently, it must occupy first place. Nothing can be put in front of the Award because it is the judgment pronounced at the request of the Parties in dispute.

The report of the Arbitration Tribunal is complementary to the Award, but it cannot replace it; still less can the charts or maps which only

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1 Minute 57 (Annex No. 71 (Extract))



gave at that time an approximate idea of the geographical reality of the zone in question.

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The Demarcator Commission, which was presided over by Colonel Holdich, gave material effect to the decision of the Arbitrator on the ground, and for that reason the boundary posts which it set up and the Minutes which it drew up of the erection thereof, constitute elements of first importance for determining, in a material manner, what the wish of the Arbitrator was. The Award and the Boundary Post are twin brothers, because the one expresses in spirit and the other marks materially the decision of the Arbitral Authority.

The Mixed Commission must, then, abide by the arbitral Award when trying to determine the frontier and to select the places where it must set up the boundary posts, without seeking to make the cartography or the nomenclature prevail over the Award. A frontier is marked by boundary posts, that is, by artificial elements and not by lines drawn on a map".

He also criticised the "excessive importance which has been given to the preparation of maps and to the tracing of the frontier on maps as compared with the inspection of the ground itself - which has been neglected" and suggested that a visit by the full Mixed Commission or by a substantial number of its members to the Alto-Palena - River Encuentro - California area would make for a better understanding of the problem. He said that although some delegates had been nominated to examine the boundary after 1947 the work had never been begun for one reason or another; and that for years the idea of making a topographical survey map prior to demarcation had taken precedence over on-the-spot examination or inspection, which the Commission should either have carried out by

itself or delegated to a Demarcation Sub-Commission. He further said that the Mixed Commission had taken no decision as to the precise zone to be covered by aerial photogrammetry and had referred only to "the El Salto or Tigre - River Encuentro - Cerro Virgen" zone, it being tacitly understood that this meant the area between the Palena or Carrenleufú River and Lake General Paz; that, after an aerial photogrammetric survey, the sheets Lake General Paz (VII-1), Cerro Virgen (VII-2) and River Encuentro (VII-3) had been made; but that they did not extend far enough to the East and the strip of land through which Chile believes the boundary to run was not covered. In addition, he maintained that the preparation of these sheets had not been carried out in accordance with the provisions of Article 18 of the Regulations, concerning the "Exchange, revision and approval of the topographical sheets".

122. General Rodriguez then proposed:

(1) The Commission or a Demarcation Sub-Commission should reconnoitre the boundary between Posts 16 and 17 on the spot and, as provided by Article 28 of the Plan of Work, should set up intermediate boundary posts, where thought necessary, in strict accordance with the official documents mentioned in Article 20 of the Plan of Work.

(2) If the Mixed Commission did not reach agreement on the direction of the frontier between

Posts 16 and 17, it should proceed in the manner laid down in Article 29 of the Plan of Work.

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(3) The Mixed Commission should arrange for a topographical survey map to be made covering the area between, on the north, the River Palena, on the south, Lake General Paz, on the west, the El Salto River and, on the east, the latitude of the eastern limit of Lake General Paz (i.e. covering the Cordon de las Virgenes).

He stressed that it was not a question of drawing a new boundary line but of studying the existing one. And he expressed the view of his delegation that few parts of the Award are so clear as the one which refers to the sector between Posts 16 and 17.

"In point of fact, the Arbitrator himself undertook to identify the River Encuentro, and he did so in the most positive manner, by setting up a boundary post at its junction with the River Palena or Carrenleufú, and he stated that the frontier would follow the course of that river as far as its source on the western slopes of the Virgin Peak (Pico Virgen). It is sufficient, then, to follow the course of this river to its source in order to determine the location of the hill from which it originates, that is, the Virgin Peak (Pico Virgen) designated in the Arbitral Award. When the ground is inspected, the operation becomes relatively easy and unequivocal, but when one attempts to carry out the operation on the maps of the period, which contain errors and empty spaces owing to the then ignorance of those regions, the demarcator divorces himself from the geographical reality and runs into manifest errors.

Furthermore, the Virgin Peak (Pico Virgen) is not a determining element of the demarcation, but a point of reference which the Arbitrator used in order to indicate the point to which the first frontier sector went which followed the course of the River Encuentro, and the point from which

the second sector started which follows the local water-divide as far as the banks of Lake General Paz, where the second boundary post (17) was set up by him.

In the first sector, the Arbitrator employed a hydrographical element, namely, a river, to demarcate the frontier; in the second sector, he utilised an orographical element, namely, the local water-divide. The Virgin Peak (Pico Virgen) is the point of intersection of two lines of demarcation. It possesses, then, a secondary value, and if the Arbitrator had not mentioned it, the boundary line would not on that account have ceased to be recognisable, for it was clearly defined by a river (hydrographical element) and by a local water-divide (orographical element)".  
(Underlining added)

123. The Chairman of the Argentine Commission in turn recalled the position taken by the Argentine Government in its Note of 24th January 1957, and then addressed himself to certain of the points made by the Chilean Chairman. First, he denied that the Mixed Commission had given any order of preference to the various documents of the Arbitration, saying that it had adhered to Article 5 of the Award, which states: "A more detailed definition of the boundary line will be found in the Report submitted to us by our Tribunal and in the maps drawn up by the experts of the Argentine Republic and Chile, on which the boundary we have decided has been drawn by members of our Tribunal and approved by Us". And he put particular emphasis on the words "and approved by Us". Secondly, he disagreed entirely concerning the questions of cartography and

"Without nomenclature there are no Boundary Treaties, for a boundary such as ours can hardly be established without mentioning the names of the points through which it passes.

With reference to the cartography, I abide by the views expressed by the Delegates of both countries, which appear in the shorthand typescripts, in which they recognise the great importance of the cartography - "a boundary post disappears, a map does not."

Thirdly, he insisted that the Argentine Commission had not invented its own names for the geographical features but had used those contained in the international instruments, i.e. the "Cerro Virgen", "River Encuentro" and River "Falso Engaño". As to the Cerro Virgen, he maintained that it had been recognised as such for ten years; that the co-ordinates by which it was recorded as a natural boundary post had been approved; that it had been "tacitly recognised" as a boundary post; that its definitive co-ordinates had been approved and recorded in the Muñoz-Cobos report of 1947, which had been adopted as an official document, and which stated that the Cerro Virgen should be declared a Natural Boundary Post; and that its declaration as a Natural Boundary Post was to have been done once the boundary line was approved. As to the Rivers "Encuentro" and "Falso Engaño", he said that these names had been retained by the Sub-Commission entrusted with the task and approved by the

Mixed Commission.

The Argentine Chairman disagreed in regard to the inspection of the boundary between Posts 16 and 17. He claimed that the zone in question had been covered on a number of occasions by the delegates of both countries; and that, after the Argentine Commission had submitted the proposed boundary line, the Delegates of both countries had gone over the actual territory and had made a joint inspection with the map to hand before proceeding to study and approve the line. In this connection, he invoked the 1954-5 Information Report approved by the Mixed Commission.

He also disagreed on the question of the aerial photogrammetric maps (VII-1, VII-2 and VII-3), with regard to which he claimed that both Commissions had adopted "control, inspection and other special measures", although these were not required by the Regulations. In this connection he contended:

(a) In 1945, when triangulation was envisaged, the Cerro Virgen among other points was determined and, when Sector VII had been completed and the co-ordinates of all trigonometric points, boundary posts, etc., had been compared and approved, aerial photogrammetric flights were made over the Cerro Virgen - River Encuentro zone. This was in accordance with the Plan of Work, General Directives and the Regulations, was carried out by Argentine and Chilean experts

and embraced the strip of land through which both Commissions considered the boundary line to run.

(b) Part of the sheets covering the Cerro Virgen, Posts 17 and 16 and the Rivers "Encuentro" and "Falso Engaño" were prepared and this was thought to be the whole of the area through which the boundary ran.

(c) The resulting map was taken to and compared with the territory by a Sub-Commission composed of one Argentine and one Chilean expert. Delegates of both countries went to the area, checked the accuracy of the map, unified the nomenclature of the geographical features and added to their field knowledge in order to complete the maps of the adjacent zones.

(d) A Chilean observer specialising in aerial photogrammetry was present during aerial triangulation and during the processing of the map. He recorded both his presence and his observation of the good quality of the work and was given all the necessary data to enable the Chilean Commission to make its own map if it so wished. This work was completed in 1953.

(e) In 1954 the Chilean Commission was given the negatives required for processing the map which it intended to make of the Lake General Paz - River Encuentro zone. At no time did it suggest that the Cerro Virgen was not the same mountain as the one indicated by the Arbitrator as a boundary point; nor was any question raised regarding the Rivers "Encuentro" and "Falso Engaño".

He added that at the plenary meeting at the end of 1954

the Chilean Commission was given photolithographic copies of the three sheets (VII-1; VII-2; and VII-3) for final verification; and that at the beginning of 1955 the draft boundary line on the sheets was submitted to the Chilean Commission, and the zone inspected with the topographical maps in hand as he had mentioned earlier in his statement.

The Argentine Chairman then stated that he had no objection to reconnoitring and demarcating the line in the zones "approved" by the Commission in Minute 55; but that in the intermediate section, Cerro Virgen - confluence of the Rivers "Encuentro" and "Falso Engaño" he only considered himself authorized to agree to a draft amendment which would require to be submitted to the Foreign Ministers for approval. As to the Chilean proposal for a topographical survey map, he declined to agree to making a map "embracing a zone in which the frontier line has been finally approved". In other words, he declined to move from the position taken up by his Government that in the zones "approved" by the Mixed Commission in Minute 55 the boundary was already settled.

In concluding his statement the Argentine Chairman added the following observations:

"Likewise it is proved by the cartography of the Mixed Commission, corroborated on the ground,



that the River Encuentro does not rise in the Hill of the Virgin. Consequently, it is not sufficient to follow the said River to its source in order to determine the location of the said Hill, for the said River rises in the foothills (faldeo) of a small pass.

Furthermore, it is of interest to note that if the Arbitrator, in exercise of his powers, had thought it right to draw the boundary through the Cerro Central he would have done so, mentioning it clearly, in which case the Arbitration Tribunal would not have said that the boundary follows the western arm, but the eastern one (Falso Engano), the only way of reaching the above-mentioned Peak (Cerro Central).

Likewise, on the plans the boundary would not have been drawn along the river which flows westwards, and mention would have been made not of the Hill of the Virgin but of the Cerro Central, which were the only features known to the Arbitrator and the Arbitration Tribunal.

It calls attention to the fact that it is alleged that the "Virgin Peak" or the Hill of the Virgin is not a determining element but a point of reference, and that it possesses a secondary value. Such view is not accepted, for so to classify a point on the boundary which is clearly established by the Award and not to comply with the obligation that the boundary passes through that point, is to go against the Award, which would be to set oneself above the Arbitral Award, under circumstances where its precise mission is the application on the ground of the said "Award", as stated by the Chilean Government."

124. The Chilean Chairman then said that nothing new had come out of the Argentine statement; that the Mixed Commission appeared to have reached an impasse; and that, if it proved impossible to find a just solution, their only recourse would be to report to the two Governments. However, in order that all possibilities

of arriving at an understanding might be explored, he suggested that the question should be left over until the next plenary meeting; that in the meanwhile the Mixed Commission should prepare a large-scale map of all the area; and that a Sub-Commission should at the same time reconnoitre the frontier zone. He added that, if no agreement was reached at the seventeenth plenary meeting, both delegations would bring the matter to the knowledge of their Governments for their decision; and that the map so prepared and a report setting out the details of the controversy would be useful elements for the Governments to assist them in reaching a decision. The Argentine Chairman replied that he was unable to give an immediate answer to the Chilean proposal for a survey of the adjacent zones, but that he would bring it to the attention of his Government.

125. Some weeks later - on 2nd January 1958 - the Argentine Government, through its Embassy in Santiago, proposed to the Chairman of the Chilean Commission that a meeting of the Mixed Boundary Commission should be held on 10th February at Palena (Annex No. 72). The object of the meeting was expressed to be to inspect the zone between the confluence of the so-called "Falso Engaño" and the so-called Encuentro and the Cerro Virgen - in other words, the intermediate segments of the "joint proposal"; and to study the possibility of making a

survey map of this sector. The Note added that "as for the remaining two approved sectors, these could eventually be inspected by the Members of the Mixed Commission".

126. The Chilean Minister for Foreign Affairs, having been informed of the Argentine proposal, replied in a Note of 27th January 1958 (Annex No. 74). He pointed out that this proposal was similar to one made by an Argentine Delegate during the sixteenth plenary meeting that the Argentine proposal had been rejected by the Chilean Commission because it disregarded altogether the Chilean proposal for a map to be made covering a somewhat wider zone extending to the Cordon de las Virgenes; that the Chilean Commission had declined to accept the view that there were any definitive agreements for the zones comprised between Posts 16 and 17. The Chilean Foreign Minister then endorsed the Chilean Commission's rejection of the Argentine proposal to meet at Palena for the objects mentioned in the Argentine Note. He further said that the Chilean Government had "clearly established that the whole of the boundary line between Boundary Posts 16 and 17 has yet to be demarcated, by virtue of the fact that the scope and value which Your Excellency's Government seeks to give to the Minutes of Meetings of the Mixed Commission is devoid of any legal foundation". He concluded by repeating the Chilean proposal for an inspection and survey of a somewhat wider

zone. And he added that if the Argentine Government should not agree, the Chilean Government would instruct its own Boundary Commission to make such a survey.

E. Chilean Commission's Inspection of the Disputed Zone.

127. The Chilean Foreign Minister, having received no reply and being anxious to have more information regarding the geographical facts of the disputed area, instructed the Chilean Commission to carry out a topographical survey of the whole area; and this it proceeded to do between 10th and 12th February. Some two months later - on 17th April 1958 - the Argentine Government, through its Embassy in Santiago, addressed a Note (Annex No. 75) to the Chilean Government stating that, in order to achieve co-ordination of the work of the experts of the two countries, it was necessary for work of this kind to be done jointly. It further said that it "would appreciate it if any work of this character in the zone under dispute were carried out in the presence of Argentine delegates". The Chilean Government in its reply of 26th April 1958 (Annex No. 77) recalled its previous Note of 27th January, in which it had informed the Argentine Government, that, failing agreement on the part of Argentina, the Chilean Commission would carry out a topographical survey of the whole area; and said that, in the absence of any reply, it had proceeded accordingly.

At the same time it stated that it shared the view of the Argentine Government that the topographical survey (i.e. the survey of the whole area) should be carried out jointly.

128. The Argentine Government reverted to this question in a Note of 9th May 1958 (Annex No. 78). In its earlier Note of 17th April it had not challenged the right of the Chilean Commission to make its own inspection of the disputed zone. Now it said that the fact that it had not replied immediately to the Chilean Note of 27th January 1958 did not signify its acceptance of the procedure; and it stated that any work of this kind in the disputed zone required the presence of Argentine Delegates.

129. At the seventeenth meeting<sup>1</sup> of the Mixed Boundary Commission, held in Buenos Aires between 26th November and 13th December 1958, the Chilean Commission repeated its proposal for an inspection of the zone in dispute and for the preparation of a "large-scale map showing greater detail than the present one so as to elucidate this matter, since our divergent viewpoints are founded on statements about the true geographical facts". The Argentine Commission, however, stated that the whole question of the boundary between Posts 16 and 17 was in the hands of the Foreign Ministry and that it was not in

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Minute 58 (Annex No. 79 (Extract))

a position to enter into any fresh discussion of it. At this meeting both delegations made statements in which they reiterated the views previously expressed by their Governments and which, therefore, it is unnecessary to repeat here. The Argentine Commission, while making certain observations in reply to those of the Chilean Commission, stated that it was now forbidden to enter into any discussion of the subject of the boundary in the Sector between Posts 16 and 17.

130. The seventeenth plenary meeting of the Mixed Boundary Commission marked the end of the attempts of the two countries to find a solution of the problem of the boundary between Posts 16 and 17 by examination and discussion. In the view of the Chilean Government, no settlement took place of any part of the boundary in that Sector. Minute 55, for the reasons which have been set out in this Part of the Memorial, did not and could not in itself constitute a decision or agreement binding upon the two Governments and producing full and definitive effect with respect to the course of any part of the boundary. Nor did any other Minute or proceeding of the Mixed Boundary Commission constitute a decision or agreement binding on the two Governments with respect to any point on the course of the boundary between Posts 16 and 17 and, in particular, with respect to the Cerro Virgen. The Chilean Government

expressly rejected the line proposed by the Mixed Boundary Commission in Minute 55 and its reference to the Cerro Virgen as a natural boundary post situated on the course of the boundary between Posts 16 and 17; and all subsequent negotiations between the two Governments regarding the boundary in that Sector were wholly abortive. In consequence, in the submission of the Chilean Government, the task of the Tribunal under Article 1 of the Compromiso is to report its conclusions on what, on the proper interpretation and fulfilment of the 1902 Award, is the course of the boundary between the territories of the Parties throughout the whole Sector between Posts 16 and 17.

PART FOUR

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FURTHER EVENTS AND DIPLOMATIC EXCHANGES  
PRIOR TO THE SUBMISSION OF THE DISPUTE  
TO THE PRESENT ARBITRATION



CHAPTER I

TENSION IN THE AREA AND THE ABORTIVE PROTOCOL OF 1960

A. Recurrence of Incidents

1. Frontier incidents. In January 1958 incidents began to recur in the disputed zone. Chilean Carabineros found seven Argentine Gendarmes, commanded by an Auxiliary, escorting a certain Señor Miguel Casarozza (A) while he pastured his sheep and cattle in the Chilean area called "Los Laguitos". The Argentines were asked to withdraw, but refused to do so, alleging that they were on Argentine territory. The Chilean Ambassador in Buenos Aires was then instructed to request the withdrawal of the Gendarmerie from Los Laguitos. The Argentine Government agreed, provided that the free grazing of cattle was permitted; the Chilean Government agreed to this compromise and the Gendarmerie were withdrawn.

2. Granting of Chilean Titles of Ownership. In the same month - in a Note of 8th January (Annex No. 73) - the Argentine Government called attention to the granting of Chilean titles of ownership to settlers in areas which it said were Argentine, though disputed by Chile. At the same time it referred to the presence of Chilean Carabineros in what it termed the Argentine zone of Lagos del Engaño, saying that they were preventing the

entry of cattle from Argentina to grazing grounds claimed to belong to Argentine citizens. It expressed the hope that both countries would contain "the present situation within the zone in question, so as to avoid any incidents which may obstruct the normal course of the proceedings of the Mixed Boundary Commissions."

In its reply of 23rd April 1958 (Annex No. 76) the Chilean Government said:

"I must first point out, in order to avoid misunderstandings, that the said zones are and have been traditionally under the sovereignty of Chile and that it is only recently that an attempt has been made to dispute the validity of its claim thereto.

Having consulted our competent Authorities in regard to the lands occupied by the Chilean citizens to which Your Excellency refers, it was possible to establish that they are totally within our territory and that they are to the west of the frontier demarcation line laid down in the Arbitral Award of His Majesty King Edward VII.

For these reasons, the Lands Office proceeded to grant to former occupants the usual Titles in accordance with the legal provisions in force, thus adopting normal measures of an administrative character.

What is above stated accordingly justifies the presence of Chilean Carabineros in a zone which is under the jurisdiction of our country and in which they are discharging their frontier guard duties." (underlining added)

### 3. Chilean inspection of the disputed zone.

The seventeenth plenary meeting of the Mixed Boundary Commission of November-December 1958, as observed in paragraph 130 of Part Three, marked the end of efforts to settle the substance of the dispute by negotiation between the

two Governments. Moreover, the Argentine Commission, on the instructions of its Government, was declining to participate in any joint inspection of the disputed zone outside the area covered by the "joint proposal" in Minute 55. The Chilean Government, however, feeling that the survey work of the Commission in the areas through which Chile considered that the line of the 1902 Award ought to run had been wholly inadequate, decided that further surveys of these areas were essential in order to enable the problem to be appreciated with a full knowledge of the relevant facts. Accordingly, in January 1959, after full notice to the Argentine Government and after suggesting that the Argentine Commission should participate, the Chilean Commission carried out a further inspection of the disputed zone. On 11th March, apparently oblivious of the Chilean communication, the Argentine Government made a strongly-worded protest against this inspection (Annex No. 80). It asserted that the Chilean Commission had acted without advising the Argentine Ministry for Foreign Affairs and Public Worship and without informing the Argentine Commission. It contended - quite erroneously - that such a unilateral inspection by a national Commission was expressly forbidden by Articles 11 to 14 and 17 of the P.W.G.D.; and that the Chilean Commission had disregarded what had been resolved at the seventeenth plenary meeting,

at which no "work plan" for the 1958-9 season had been agreed upon.

4. The Chilean Government, in a reply of 11 May 1959 (Annex No. 82) sent through its Embassy in Buenos Aires, stated that it was unable to accept the protest which it considered to be without foundation. It said that the persons who carried out the survey belonged to the Chilean Commission; and that no provision of the 1941 Protocol or of the P.W.G.D. precluded the Chilean Commission from carrying out its specialised work in the frontier zone where Chile exercised jurisdiction on the instructions of the Chilean Government and for the purpose of clearing up obscure or controversial points. Furthermore, it pointed out:

(1) The Chilean Foreign Minister had informed the Argentine Ambassador in Santiago that the Chilean Commission would go to the area between Posts 16 and 17 and had said that, if the Argentine Commission wished to carry out the work jointly, the Chilean Commission would be very pleased.

(2) The passports of the members of the Chilean Commission had been sent to the Argentine Embassy, the object of the journey had been explained, and a three months' visa for travel in Argentine territory had then been obtained.

(3) If nothing had been said directly to the Argentine Commission, it was because the work was to be carried out in Chilean territory and because the Argentine Commission had always refused any invitation to survey the ground and prepare a large-scale map or accepted it only for a small area of the zone in question. The last such refusal had been at the seventeenth plenary meeting in November-December 1958, the reason stated by the Argentine Chairman being that the problem was in the hands of the Argentine Chancellery.

(4) When the Chilean party had passed into Argentine territory, it had left full details at the gendarmerie post. Moreover, during the whole of its passage through Argentine territory the Chilean Commission had been accompanied by Argentine gendarmes, who had said that they were acting on instructions from Buenos Aires.

(5) The fact that no annual plan of work had been approved for 1958-9 did not preclude the Chilean Commission from carrying out the order of its Government to collect all possible information tending to clear up the problem with which the two Chancelleries would have to deal.

5. Intensification of Argentine Patrols. The Chilean Carabineros had for some time past been under instructions that, while maintaining a firm attitude with respect to the Chilean claims, they should avoid incidents. In October 1958, however, they reported that Argentine Gendarmerie had recommenced intensive patrolling of the disputed zone. Later they reported that 60 Gendarmes under the command of officers had established a line between the Cerro Virgen and the Cerro Condor and that the Gendarmes were seeking to prevent Carabineros and Chilean settlers from crossing to the territory south of that line. In consequence, the new Chilean Foreign Minister, on receiving the Argentine Ambassador for the first time, expressed the Chilean Government's disquiet at the attitude which was being adopted by the Gendarmerie.

6. The Joint Declaration of 2nd February 1959. Not long afterwards the President of Argentina visited Chile and at a conference which took place on 2nd February

1959 between the Chilean and Argentine Presidents at Los Cerrillos the two Presidents issued a joint Declaration which, inter alia, contained the following:

"The Presidents of the Republics of Chile and Argentina, Their Excellencies Jorge Alessandri and Arturo Frondizi, at their meeting to-day in Santiago, have exchanged with cordial spontaneity their points of view on various matters of interest to America and to their two countries. ....

With respect to the matters of direct interest to the two nations, the Presidents have formulated the following Declaration:

1. Consistent with their permanent tradition of friendship and with the demands arising from their geographical and economic ties, which only underlines the honourable responsibility which falls to both nations in the cause of American unity, they express their categorical determination to enter forthwith into negotiations directed to finding such adequate arbitral formulae as may enable the existing differences to be resolved, such as those which preclude any possibility of this type of dispute being capable in the future of obstructing their friendly co-existence and the prosecution of the tasks which both countries propose to share with a view to the political and economic integration of America.

2. In order to create the atmosphere favourable to the negotiations referred to in the preceding paragraph, they agree on the need forthwith to smooth the course of the negotiations by eliminating anything which may give rise to clashes between their peoples."

7. The Chilean Carabineros had long since received instructions from the Chilean Government that, while maintaining Chile's legal position, they should avoid clashes with the Argentine Gendarmerie; and after the Joint Declaration these instructions were repeated. In March of the same year the new Chilean Ambassador in

Argentina, in delivering to the Argentine Chancellery a Memorandum containing bases of negotiation for the solution of boundary problems, proposed that the Gendarmes and Carabineros should be withdrawn and patrolling confined to the police. This led to a withdrawal of the camp of Argentine Gendarmes from "Las Horquetas", but the detachment in the Hondo Valley was maintained and a permanent building erected to house it. In consequence, the Chilean Government was constrained on 13th May 1959 to protest against the establishment of this detachment of Argentine Gendarmes on Chilean territory (Annex No. 83).

8. Hoisting of the Chilean Flag at the California School. The Chilean settlers in California, as mentioned in Part II, had taken the initiative in 1956 to get a school started near to the confluence of the Arroyo Lopez and River Encuentro. The schoolmaster was a Chilean belonging to the Chilean education service and paid by the Chilean Ministry of Education. As all Chilean schools under the Ministry of Education fly the Chilean flag, the schoolmaster had as a matter of course hoisted the Chilean flag at the school. On 25th September 1959, however, the Argentine Ambassador in Santiago entered a formal protest against the showing of the Chilean flag at the school, (Annex No. 85) claiming that it was incompatible with the Joint Declaration of

the two Presidents. The Chilean Government in turn protested the following day - 26th September - at the action of an officer of the Argentine Gendarmerie who, with a detachment of eight men, had tried to deliver a protest to the Headmaster of the School at the building (Annex No. 86). At the same time, it reiterated its protest against the erection of the permanent building for the Argentine Gendarmes in the Hondo Valley. In a further Note of 14th October 1959 (Annex No. 87) the Chilean Foreign Minister rejected the Argentine protest of 25th September with regard to the School, pointing out that the Chilean flag had always been flown at the School since its foundation. Referring again to the regrettable intervention of the Argentine Gendarmes in the Zone, he emphasised the urgency of obtaining a prompt response to the Chilean proposals for the solution of the problem of the boundary.

B. The Abortive 1960 Protocol of Arbitration

9. Meanwhile, as already mentioned in paragraph 7 above, the Chilean Government in a Note of 31st March 1959 had transmitted to the Argentine Ministry of Foreign Affairs and Public Worship proposals for finding a solution to the outstanding boundary problems. These proposals were set out in two documents (Annex No. 81). In the first document, called a "Memorandum", the Chilean Government referred to the position adopted by Argentina



that, before their armed forces could be withdrawn from the disputed zone, it would be necessary to agree the bases for initiating the negotiation of the Arbitration respecting not only the Palena-California zone but also the Beagle Channel. It expressed the fear that insistence on this point might delay the adoption of the measure; nevertheless, it put forward in the accompanying document a draft of "bases for initiating the negotiation of the Arbitrations". At the same time, it proposed that on the acceptance of these "bases" by both Parties, the Gendarmerie and Carabineros should be withdrawn.

The "bases" document, inter alia, proposed that Article 8 of the 1941 Protocol should be modified so as to provide for a permanent and automatic procedure of arbitration for all disputes arising within the Mixed Boundary Commission in the course of fulfilling the tasks entrusted to it by the Protocol. This arbitration procedure was to come into operation the moment such a dispute could not be solved by the intervention of the Governments; and the Chilean Government pointed out that, in consequence, under this proposal a separate submission of the dispute regarding the Alto Palena - California zone by arbitration would immediately follow.

10. In a later Note of 5th September 1959 (Annex No. 84) the Chilean Foreign Minister, after confirming that the "bases" document contained his

Government's general ideas for the solution of problems arising from the application of the 1941 Protocol, stated its concrete proposals. These were that the two Governments should agree that

(a) the Royal Geographical Society of London should be appointed as permanent Arbitrator;

(b) any difference which the Parties have been unable to settle during a period of one month after it has been established should be investigated by the Arbitrator; and

(c) the so-called Palena-California dispute should be submitted to arbitration under that procedure.

And in a further Note of the same date (Annex No. 84A) the Chilean Government proposed the adoption of the following modus vivendi:

(a) withdrawal of the detachments of Carabineros and Gendarmes from the frontier region in respect of which the disagreement between Boundary Posts 16 and 17 had arisen;

(b) simultaneous patrolling of the region; and

(c) a declaration that these arrangements were to be without prejudice to the rights of the Parties in the Arbitration.

11. The Argentine Government replied on 30th October 1959 (Annex No. 88) that it accepted the proposal to initiate forthwith negotiations for an Arbitration on the boundary disputes existing between the two countries, and to that end presented its counter-proposals to those

of the Chilean Government. As to the "River Encuentro region", it proposed the maintenance of the existing situation until the signing of the Arbitration Agreement. Then the Gendarmerie and Carabineros would be withdrawn simultaneously from the zone and no kind of civil or military activity would be permitted therein until the division of jurisdiction became effective; and meanwhile the two Governments would agree to avoid any act likely to lead to clashes or incidents.

12. In a separate Note of the same date (Annex No. 89), the Argentine Minister for Foreign Affairs and Public Worship set out the Argentine counter-proposals regarding arbitration. He said that Argentina was agreeable to the use of arbitration in order to solve the "boundary dispute in the zone of the River Encuentro", but had a different point of view as to the scope of the arbitration. Having recalled that the 1941 Protocol had as its object the material and definitive demarcation of the frontier, he said that Article 3 of the Protocol provides, as one of the powers expressly delegated, that the Mixed Boundary Commission may divide its tasks into two stages: first, the "preparation in detail of an official map corresponding to a sufficient strip of land on both sides of the boundary"; and, secondly, the setting up of the boundary posts. He then continued:

"In point of fact, in the sector comprised between boundary posts 16 and 17, it carried out the first

operation laid down in Article 3 of the Protocol by approving the tracing from boundary post 16 to the junction of the River Encuentro with the River Falso Engaño and from boundary post 17 to the Hill of the Virgin, in compliance at the same time with the provisions of Articles 20, Sub-section 1), 22 and 24, second part, of the Plan of Work.

For the purpose of documenting all the work carried out in connection with this first operation, the Mixed Commission prepared the Minute which is prescribed by Article 9 of the Plan (Minute No. 55 of the Mixed Commission).

As there was full agreement of the Parties in all action taken, it did not become necessary to follow the procedure laid down in Article 29 of the Plan for whenever agreement should not be reached between the Delegates. Therefore, with respect to the single sector of tracing which remained unapproved because it was not possible to make it conform entirely to what is fixed by the Award of H.B.M. Edward VII and the Report of the Arbitral Tribunal, due to the fact that the western branch of the River Encuentro does not have its source in the western slopes of the Hill of the Virgin, the Mixed Commission resolved by mutual agreement, to submit to the Chancelleries for consideration a joint proposal which was drawn up as Annexure No. 5 to Minute No. 55 of the said Commission.

As is observed, the Mixed Commission only submitted for the consideration of the two Chancelleries the joint proposal connected with a small sector of tracing between the boundary posts 16 and 17 which, for the reason above stated, had not been approved.

Consequently, the first operation referred to in Article 3 of the Protocol having been carried out and approved by mutual agreement, so far as regards the upper and lower sectors described in Minute No. 55, it is the duty of the Mixed Commission to continue with the second operation where there was agreement, as is provided by Article 30 of the Plan of Work, that is to say, with the setting up of boundary posts in such places as it shall deem necessary, it being left to the Chancelleries to pronounce only on the small unapproved intermediate sector. Consequently, the Argentine Government

considers that the tracing approved by the Argentine-Chilean Mixed Boundary Commission from Boundary Post 16 to the junction of the River Encuentro with the River Falso Engaño, and from Boundary Post 17 to the Hill of the Virgin are valid and permanent, it remaining for the said Commission to carry out the setting up of boundary posts wherever it shall consider it necessary (Article 30 of the Plan of Work). For these reasons, the Argentine Government proposes to the Chilean Government to submit to Arbitration only the Sector of the boundary comprised between the junction of the River Encuentro with the River Falso Engaño and the Hill of the Virgin."

In this passage, it will be observed, the Argentine Government did not claim that Minute 55 was a Special Minute "producing full effect" under Article 6 of the Protocol. On the contrary, it sought to give the resolutions in that Minute regarding the lines between Post 16 and the watersmeet and between Post 17 and the Cerro Virgen definitive effects under Article 3 of the Protocol. This contention, which certainly inflates the powers delegated to the Commission under Article 3 beyond anything which it contains, has already been shown in Part III to be wholly unfounded (Chapter VI).

The Argentine Government further proposed that the Arbitrator should be Her Britannic Majesty's Government and that it should be expressly laid down as to what documents the Arbitrator should take into consideration in drawing up the Award.

Finally, the Argentine Government concurred in Chile's proposal for supplementing the 1941 Protocol with an automatic arbitration procedure for cases in which the

Chancelleries are unable to reach agreement. It preferred, however, that the permanent Arbitrator appointed for the purpose should be the Swiss Confederation.

13. On 19th March 1960 (Annex No. 90) the Chilean Foreign Minister and the Argentine Ambassador in Santiago signed a Memorandum setting out the bases for the proposed agreements for arbitration and providing for a modus vivendi on the lines suggested by Chile in her Note of 5th September 1959. On 22nd March the Presidents of Chile and Argentina issued a Joint Declaration in Santiago announcing the signature of the Memorandum and referring to the procedures for arbitration for which it provided. (Annex No. 91)

14. Incident in the Hondo Valley. Two days later - 24th March 1960 - there was another incident in the Hondo Valley. As a patrol of Carabineros on their way to "Las Horquetas" passed near the Argentine Gendarmes, seven of the latter fired bursts of machine-gun fire into the air with the object of stopping the Carabineros from continuing into what the Gendarmes claimed to be Argentine territory. Inevitably, the Chilean Acting Foreign Minister in a Note of 26th March (Annex No. 92) protested, pointing out the inconsistency of the incident with the Presidential Declaration and Presidential Instructions of 1959.

Replying on 31st March (Annex No. 93), the Argentine Ambassador claimed that the cause of the incident had been the fact that a patrol of Carabineros had made repeated incursions "into territory to the south and east of the Hill of the Virgin", had disregarded the order of the Gendarmes to stop and had only desisted when three pistol shots were fired into the air. He also maintained that this attitude on the part of the Carabineros and the fact that the Chilean flag was still kept flying over the school in the disputed territory were not consistent with the terms of the undertakings given by the Chilean Government.

In a Note of 11th April (Annex No. 94) the Chilean Acting Foreign Minister pointed out that the Ambassador's reply impliedly acknowledged that fresh instructions had been issued to the Gendarmerie to prohibit the passage of the Carabineros to the south and east of the Hondo Valley camp, the setting up of which had been the subject of repeated protests by Chile. He said that the patrolling of the Carabineros accorded with the position taken by Chile with respect to the dispute and reiterated his complaint that the firing by the Gendarmes conflicted with the Presidential instructions. As to the Chilean flag on the school in the California Valley, he repeated his statement in previous Notes that it had been flown on the school ever

since the school's establishment in 1956.

15. The 1960 Protocol of Arbitration. On 12th June 1960 the Chilean Ambassador in Buenos Aires and the Argentine Minister for Foreign Affairs and Public Worship signed the Protocol the full text of which is reproduced in Annex No. 95. By Article 1 the two Governments agreed to ask Her Britannic Majesty

(a) to "indicate where the frontier line runs in the Sector comprised between Boundary Posts 16 and 17, the determination whereof has been the cause of controversy between the Parties";

(b) "at the same time to pronounce, among other matters and in the proper order, on the validity and scope of the resolutions of the Chilean-Argentine Mixed Boundary Commission relating to the sector described in the preceding paragraph, and, in particular, the resolutions relating to their Meeting in October 1955 which were rejected by the Chilean Government".

Article 3 further provided that the Arbitrator should have the "fullest competence to decide all such questions as may have arisen in the course of the arbitration and as may relate to the interpretation of the Arbitral Award of His Britannic Majesty dated 20th November 1902 in regard to ..... the Sector comprised between Boundary Posts 16 and 17."

Article 6 provided for the appointment of a "Demarcating Commissioner" to proceed to establish materially on the ground the frontier line as determined



in the Award, by setting up such boundary posts as shall be necessary in order that there may be no doubt as to the course of the line and by establishing the geographical co-ordinates of all the boundary posts set up. It also required the Commissioner to

"prepare Minutes in duplicate, each copy being of the same tenor, of the erection of each of the said boundary posts, recording therein the location thereof and other descriptive data of each post, leaving an attested copy in the possession of each party".

The Court will observe that in the 1960 Protocol of Arbitration, as in the 1941 Protocol, the two Governments made provision for the drawing up of special Minutes only with respect to the erection of boundary posts set up on the ground to indicate the course of the boundary. No such provision was made with respect to any tracing of the boundary on a map. Only by the setting up of boundary posts on the ground was it contemplated that the establishment of the course of the boundary could be effected definitively.

In addition, Article 7 contained an agreement for a "modus vivendi" during the arbitration which was to include the withdrawal from the disputed area of the detachments of Carabineros and Gendarmes.

16. The Supplement to the 1941 Protocol. At the same time the two Foreign Ministers signed an Instrument assigned to supplement the 1941 Protocol by providing a permanent and automatic procedure of arbitration

(Annex No. 96). This Instrument also provided for a "Demarcating Commissioner" and required the drawing up of special Minutes only with respect to the erection of boundary posts. On 8th September 1961 certain modifications were introduced into the Instrument (Annex No. 102).

17. Both the 1960 Protocol for arbitration of the dispute regarding the Sector between Posts 16 and 17 and the Supplemental Instrument amending the 1941 Protocol were made subject to ratification after submission to the Parliaments of the two countries. The Executive in both Chile and Argentina duly submitted the two agreements to their respective Parliaments but in neither country did they receive the approval of the legislature. Accordingly, they remained unratified and never came into force.

C. Increase in Incidents in the Disputed Area

18. In a Note of 9th November 1960 (Annex No. 97) the Argentine Minister for Foreign Affairs and Public Worship requested the immediate withdrawal of the Chilean Carabineros, and complained of a Chilean Decree of 8th April of that year which laid down the boundaries of the Province of Chiloe. The Decree, inter alia, referred to the Chilean boundary with Argentina in terms of the River Encuentro to its source in the Pico Virgen and from the Pico Virgen to the line of summits which bounds on the

North the hydrographic basin of Lake Palena. The Argentine Chancellor stated that the Decree created a "political district over a region which forms part of Argentine territory"; that the Decree affected the "status quo" presupposed in the Memorandum of bases of agreement; that the "modus vivendi" brought into existence by the Joint Presidential Declaration of 1959 was incorporated in the Joint Presidential Instructions which followed it; and that the Chilean Decree was in conflict with the spirit and letter of the presidential documents. He also recalled the two Protocols signed in the previous June. He concluded the Note by referring to the setting up of an encampment of Carabineros "1,000 metres south of the land of Luis Videla, on the east bank of the River Encuentro<sup>1</sup> and therefore in Argentine territory".

19. In its reply of 1st March 1961 (Annex No. 98) the Chilean Government pointed out:

(a) The Chilean Decree was a regulation made under Law No. 13375 of 9th September 1959, which had itself been fully ventilated in the Chilean National Congress in 1957.

(b) The boundary laid down in the Decree conformed to the frontier line described by the 1902 Award which Chile had always maintained to be the frontier. Accordingly, the Decree did not involve any change in Chile's thesis as to the area under her sovereignty.

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1. The Argentine name for what is in fact the Arroyo Lopez.

Chile, for her part, was not unaware that Argentina held a different view.

(c) The position maintained by Chile, which was based on the description of the frontier in the 1902 Award plus the actual occupation of the zone by Chileans, justified the Chilean Government in exercising all such acts of administration as should be necessary until a decision was given in the proposed arbitration.

(d) There was nothing in the Memorandum of Bases of Agreement as to the recognition of a "status quo" in the case of the Sector between Posts 16 and 17, in contrast with the case of the Beagle Channel. The Memorandum contained only a promise to negotiate a "modus vivendi", and this had been fulfilled in Article 7 of the Protocol of 1960. As this had not been brought into force, there was not a "status quo" valid in law.

(e) As to the camp of Carabineros, this was simply a reinstallation of that police detachment exactly in the same place as it had been for several years past for the protection of law and order and the safety of the numerous Chilean citizens living in that area. As in all previous seasons it had been withdrawn at the beginning of Winter for reasons of climate.

(f) The detachments of Argentine Gendarmerie, on the other hand, which had been reinforced and installed both at Las Horquetas and the Hondo Valley, had no justification; for there were no Argentine settlers or Argentine public order to protect in the area.

The Chilean Foreign Minister concluded by reiterating his request for the withdrawal of the Gendarmerie who, he said, had repeatedly interfered with the peaceful life and trade of the inhabitants, thus causing clashes and incidents contravening the spirit and letter of the undertakings.

20. In a Note of 7th July 1961 (Annex No. 100) the Argentine Chancellor maintained his protest and reaffirmed his contentions both as to the facts and as to the grounds. With regard to the Argentine posts, he stated that "their presence there will enable the Argentine settlers to enjoy the use of the lands the ownership whereof has been ceded to them by the competent National authorities in order that they may take their cattle there in favourable seasons".

21. Argentine Notification to Chilean Settlers.

Meanwhile, on 10th January 1961, the officer in command of Argentine Gendarmerie at the Gendarmerie Post on Argentine territory east of the Rio Encuentro - Palena confluence had summoned five Chilean settlers<sup>1</sup> in the California Valley to appear at that Post. He informed them that if they wished to continue to occupy the summer pastures in the Las Horquetas area they must submit an application because it was "Argentine

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1. Señores Vicente Contreras, Juan Hernandez, Onofre Anabalon, Juan Bautista Saez y Dionisio and Agustin Videla Peñaipil.

territory"; and that otherwise they would have to remove their animals. All, except one, refused, saying that it was Chilean territory and that, in view of the impossibility of adopting any other attitude, they preferred to remove their animals. The Chilean Government, when it heard of the matter, protested in a Note of 20th March (Annex No. 99). It complained that the action of the Gendarmerie violated the spirit and letter of all the past documents - the 1960 Protocol, Memorandum of Bases of Agreement, etc.

22. On 8th August 1961 (Annex No. 101) the Argentine Government in turn complained of (a) the passage of a Captain of the Carabineros, accompanied by two Chilean civilians, through the disputed zone and (b) the setting up of a Carabineros camp. In a further Note of 30th November (Annex No. 103) it complained that installations were still being constructed for a "post of Carabineros", including installations having the appearance of stables; and it complained that the Chilean flag was being flown at the camp.

23. Destruction of the metal plate of Post 16. In January 1962 it was reported by the Argentine Gendarmerie that the metal plate marking Boundary Post 16 had been deliberately destroyed by some person apparently on purpose; and the Argentine Ambassador so informed the Chilean Chancellor in a Note of 20th

24. Argentine Gendarmes fire guns near the Chairman of the Chilean Boundary Commission. On 5th March 1962 (Annex No. 104) the Chilean Government protested regarding an incident involving General Rodriguez, Chairman of the Chilean Boundary Commission. After having presided over a meeting of the Mixed Boundary Commission in the field in another Sector, the General was proceeding in company with others into the Chilean area of the Lake General Paz - Palena Sector when he was notified by the Gendarmerie at the Hondo Valley camp that they would not allow the Chilean party to pass southwards. The General replied that a senior Argentine officer of Gendarmes at Esquel knew all the details of his journey and that the Chilean party would continue on their way. Seven Gendarmes thereupon attempted to bar the passage of the Chilean party, firing machine-gun bursts in their direction. The Chilean party persisted and the Gendarmes then mounted their horses and followed them, repeating their threats. In its Note the Chilean Government emphasised the gravity of the incident and the disregard shown by the Gendarmerie for the prerogatives conferred on the Chairman of the Chilean Commission by Article 9 of the 1941 Protocol. It reiterated its view that the Hondo Valley is Chilean territory and that the presence of the

Argentine Gendarmerie in that Valley, where they had come for the first time in 1959, was wholly unjustified.

The Argentine Government in a Note of 24th April (Annex No. 106) denied that there had been any attack upon the Chilean delegates, the shots having been fired into the air. It also alleged that General Rodriguez and his companions were "acting personally and on their own initiative"; and that they were considerably to the south of where reconnaissance had to be done under the plan of work for that season. It further asserted that the Hondo Valley is Argentine under the 1902 Award and the decisions of the Mixed Commission.

25. Argentine Gendarmes erect a Wire Fence.

On 26th September 1963 (Annex No. 107) the Chilean Foreign Minister addressed a Note to the Argentine Ambassador informing him as follows:

"According to information afforded by the Head Office of Carabineros of Chile the Government is aware that the Argentinian Gendarmerie in the post in Valle Hondo, in the Palena-California area, between boundary posts 16 and 17 of our frontier, is building a wire barrier stretching from the Cordillera located on the north east bank of the river Engaño, almost opposite the confluence with the Arroyo Valle Hondo, then crossing the river Engaño and continuing to the south west over about 1,500 metres. This barrier cuts off areas occupied by old Chilean settlers who pasture their cattle there.

This barrier, on which seven members of the Gendarmerie have been working, obstructs the tracks which give access to the area known by the



name "Lagunas del Engaño", passing along las Horquetas and also to the Lake Palena along Valle Hondo. In this way the Chilean settlers' communications from Valle Hondo to the south will be practically cut off."

The Foreign Minister underlined the seriousness of these acts in a zone which was subject to a special régime of status quo under the Joint Presidential Declaration of 1959 and the Presidential Instructions of the same year. He also recalled the numerous protests which had been made by the Chilean Government against the presence of the Argentine Gendarmerie in the Hondo Valley, where they had installed themselves for the first time in 1959.

26. The Argentine Ambassador sent an interim reply on 9th October (Annex No. 108) explaining that the geographical situation of the zone caused a certain delay in the study of the facts and that his final reply would be sent as soon as possible. He stressed at the same time the desire of his Government to avoid incidents. The Argentine Government's reply was ultimately sent by the Argentine Chancellor in a Note of 30th October 1963 (Annex No. 109) in which he stated that the length of the fence was a little more than 1,000 metres; that its erection had been started in the previous May; and that it was situated to the south and east of the Cerro Virgen. He claimed that the fence was precisely on the line which separated that zone from the disputed zone comprised between the Cerro Virgen and

the confluence of the Rivers Encuentro and Falso Engaño<sup>1</sup>. He further claimed that the wire fence was in an unquestionably Argentine zone due to the fact that it was comprised within the demarcation made in 1955 by the Mixed Commission. And in this connection he said that it was pertinent to recall Article 6 of the 1941 Protocol, whose provisions regarding Special Minutes he set out in full in the Note. He then asserted that Minute 55 had accordingly given to Argentina a definitive title over the sector on whose northern edge the wire fence had been erected. In this Note, therefore, the Argentine Chancellor expressly based the Argentine claim to have acquired a definitive title under Minute 55 on Article 6 of the Protocol.

The Argentine Chancellor also contended that the fact that the fence crossed lands occasionally used by persons of Chilean nationality did not "allow the hospitality of Argentina to be mistaken for the alleged sovereignty of Chile".

Maintaining that the zone was not in dispute, he claimed that the wire fence had not changed any status quo even if one might exist in the disputed zone between the Cerro Virgen and the confluence of the Rivers Encuentro and Falso Engaño<sup>2</sup>. Similarly, he referred to the cutting of

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1. The two rivers being, of course, named according to the Argentine nomenclature.

2. Argentine version.

the fence in twelve places and to the incursion of persons driving cattle under the protection of the Chilean Carabineros as violations of Argentine territorial rights; and he maintained that the fence was simply a complement to the Gendarmerie patrolling which had been carried out in the zone for some time past. He further mentioned that in what he called the disputed zone between the Cerro Virgen and the confluence of the two Rivers Chile had set up a Carabineros camp and a school which had evoked protests from Argentina.

However, the Argentine Chancellor concluded by saying that, in a spirit of friendship, the Argentine President had ordered the immediate removal of the fence without in any way renouncing Argentina's rights. He added that the problem could easily be solved by arbitration and that his Government was ready to leave the initiative in preparing such an arbitration to an Argentine Committee of Legislators working with Chilean colleagues.

27. On 14th November 1963 (Annex No. 110) the Chilean Government addressed a long Note to the Argentine Government in which it expressed its satisfaction at the decision of the Argentine President to order the removal of the wire fence. At the same time it refuted in detail the legal considerations advanced in the Argentine Note of 30th October:

"Our Government is in absolute disagreement with those appreciations and considers that the fence was erected on territory which is unquestionably Chilean, seeing that it forms part of the Sector comprised between boundary posts 16 and 17 to the West of the boundary fixed by His Britannic Majesty in the Arbitral Award of 20th November 1902.

My country's Government realises that the differences which exist with your Government regarding the location of certain geographical features referred to in the Award, such as the Virgin Peak and the course of the River Encuentro, make it desirable that Her Britannic Majesty, who gave the Award, should determine, in conformity therewith, precisely where the frontier line runs in the Sector comprised between the boundary posts 16 and 17.

With regard to the statement by Your Excellency's Government that the zone situate to the South and East of what is improperly called Hill of the Virgin is not even disputed territory and which is based on the resolutions of the Mixed Boundary Commission of 1955 relating to that Sector, I have to state that my Government rejects that interpretation.

Moreover, such interpretation cannot be reconciled with the repeated solemn acts of recent date, which bear the signature of Plenipotentiaries of both countries, which have considered that the British Arbitrator must determine precisely the line of the frontier in the whole of the Sector comprised between boundary posts 16 and 17, notwithstanding that the Chilean Government holds the firm conviction that the said Sector belongs to the territory of our country.

Furthermore, my Government repeats that it disagrees with the value and scope which Your Excellency's Government attributes to the agreements of the Mixed Boundary Commission relative to the above-mentioned zone and, in particular, those referring to the Meeting of October 1955 which were rejected by the Chilean Government.

We consider it desirable to set out, once again, the reasons why those resolutions are in our opinion devoid of all value.

According to Article 1 of the Protocol of 16th April 1941, the function of the Mixed Commission, formed of technicians appointed by the Republics of Chile and Argentina, is "to replace the boundary posts which have disappeared or which are in a bad condition, to set up new intermediate boundary posts wherever it shall consider it necessary to do so in order to indicate the boundary line with more clarity and precision, and to determine the exact geographical coordinates of all the existing boundary posts and of those which it will set up".

This provision defines with meridian clarity the nature, object and powers of the Commission. Its fundamental and sole mission is to replace and to set up new intermediate boundary posts - it is necessary to repeat - in order to mark with clarity and precision, as stated in Article 1 of the Protocol, the frontier line. It is a matter, then, of a material work of a technical character and in carrying out its mission of erecting boundary posts the Commission has necessarily to abide by "the frontier line", which line was fixed by the Boundary Treaty signed by both countries on 23rd July 1881, the interpretation whereof, in the specific case of the Sector referred to, was the subject of the Arbitral Award of His Britannic Majesty given in 1902.

It appears unnecessary to say that the Mixed Boundary Commission, created by the 1941 Protocol, has no powers to determine at its discretion the frontier line, because this would be equivalent to having given it the power to fix the boundaries of our countries which were established by a duly ratified International Treaty and, in the case in question, clarified by an Arbitral Award. An administrative body of a technical character, whose function is only to mark materially on the ground the boundary line which both countries agreed, cannot, it is obvious, arrogate to itself the power to dispose of the territorial sovereignty of the one or the other.

The nature of the function possessed by the Mixed Boundary Commission and the scope of its powers being thus defined, it is evident that its agreements relating to the Sector comprised between the boundary posts 16 and 17 have no legal force, because they disregarded the legal instrument, in this case the Award of 1902, which laid down the

frontier line and which it pertained to the Commission to apply on the ground.

The mistake of the Mixed Boundary Commission and the nullity of the resolutions which it adopted in 1955 arose basically from the fact that it had departed from His Britannic Majesty's Award which fixed the boundary in that region along a line which runs from North to South, from a fixed point on the River Palena, where the Arbitrator's Commissioner set up the boundary post 16, and thence, following the course of the River Encuentro, which rises in the western slopes of the Virgin Peak, and the local water-divide towards the South, it goes as far as boundary post 17, which was set up also by the Arbitrator's Commissioner, on the North bank of Lake General Paz."

The Chilean Government went on to refute the Argentine contention based on Article 6 of the 1941 Protocol, pointing out that the Minutes provided for in that Article relate exclusively to the erection of boundary posts and cannot be confused with the ordinary minutes of meetings of the Mixed Commission.

The Chilean Government also drew attention to the General Treaty of Arbitration of 1902, mentioning that Article 2 provides that "any disputes which shall have been the subject of definitive settlements between the Parties cannot be revised by virtue of this Treaty" and that the Treaty adds that in such cases "the arbitration will be limited exclusively to such disputes as shall arise in regard to the validity, interpretation and implementation of the said settlements". Finally, while not disagreeing with the suggestion for the appointment of a Committee of Legislators, the Chilean Government

pointed out that under its Constitution the Chilean Committee could only be consultative, since the matter was one assigned to the Executive. It said that it had already initiated the necessary consultations and intended to proceed to secure a solution by arbitration as soon as possible.

28. Declaration of Alta Gracia. At a meeting held at Alta Gracia in Argentina on 6th March 1964 the Foreign Ministers of Chile and Argentina agreed upon a joint Declaration in which they reiterated their decision to seek the solution of the Palena and Beagle Channel disputes by arbitral or judicial means (Annex No. 111). The Declaration further announced their agreement to promote the setting up of the Parliamentary Committees provided for in the Diplomatic Notes of 30th October and 14th November 1963, and also to adopt measures to speed up the tasks assigned to the Mixed Boundary Commission by the 1941 Protocol.

29. The Parliamentary Advisory Commissions of both countries were duly set up and met in Buenos Aires between 26th and 29th May 1964. At the end of their meeting they in turn issued a Declaration (Annex No. 112) emphasising the immediate necessity of finding solutions for the outstanding territorial disputes mentioned in the Declaration of Alta Gracia. They also suggested the desirability of agreeing upon measures to speed up the

work of the Mixed Boundary Commission and of laying down rules to perfect the modus vivendi for the zones in dispute.

30. Further incidents. Despite these encouraging developments, further incidents occurred in California in July. At Las Horquetas, on the track which leads to Las Lagunas del Engaño, the Gendarmerie erected a palisade of tree trunks to prevent the passage of Chilean settlers and their cattle. The Chilean Government protested verbally and were assured by the Argentine Chancellor that every obstacle would be removed. However, another firing incident in the same Sector obliged the Chilean Government to send a formal Note of protest on 21st July. In this Note (Annex No. 113) it complained that on the 19th July a Sergeant and three men of the Carabineros on patrol in the Las Horquetas area had been stopped by three bursts of machine-gun fire; that the palisade of tree trunks was still in place; that the Argentine detachment at Las Horquetas had been reinforced by fifteen Gendarmes; and that the Chilean patrol had again been fired on as they were returning past the Gendarmerie post in the Hondo Valley. The Chilean Government characterised the acts of the Gendarmerie as a flagrant violation of the status quo ruling in the area, pointing out also that they contradicted the assurances given by the Argentine Chancellor.



31. The Argentine Government, in its reply of 27th July (Annex No. 114), claimed that, according to the inquiries which it had made, the facts were quite different and that no firing had taken place. It referred to the presence of two newspaper men with the Carabineros and to the flight of a Chilean Air Force jet aircraft over the Gendarmerie post in the Hondo Valley, and also to a later flight by a reconnaissance 'plane. It queried the nature of the assurances given by the Argentine Chancellor, implying that it had not gone beyond the suspension of the work on the palisade. In addition, it maintained that the palisade in question was nothing more than a store of materials to facilitate temporarily the use of a waterfall to obtain electric power.

At the same time the Argentine Government reasserted its claim that the areas concerned were Argentine territory as being "included within the demarcation made in 1955 by the Mixed Boundary Commission in conformity with the powers which were granted to it by Article 6 of the Protocol of 16th April 1941". Thus, it again based its supposed title to the sovereignty of the area on the combined effect of Minute 55 and Article 6 of the Protocol.

It further took exception to the name "Valley of California" on the ground of its possible association with the Chilean Decree of 8th April 1960, specifying the

our limits of the Province of Chiloe (paragraphs 18-19 above).

32. The Chilean Foreign Minister, Señor Julio Philippi, in a Note of 3rd August 1964 (Annex No. 115), expressed his disappointment at the terms of the Argentine reply, describing it as a backward step reverting to situations which had already been overcome. Recalling that he himself had made special efforts to get the negotiations for arbitration going so as to produce a positive result, he pointed out that this necessarily presupposed strict maintenance of the status quo in the areas. Instead, however, the Chilean authorities had noted, he said, unusual patrolling activity by the Gendarmerie in the Hondo Valley and at Las Horquetas, a palisade of tree trunks obstructing passage at the latter place and the obstruction of the normal work of the Carabineros by threats to shoot. He further observed that the statements afterwards published in Argentina had not coincided with the terms of the solution arrived at between the Chilean Ambassador and the Argentine Chancellor, which the Argentine Chancellor had afterwards confirmed to Señor Philippi himself.

Remarking that the Argentine Note of 27th July, instead of confining itself to the question of acts affecting the status quo, had reopened the discussion of the basic aspects of the dispute, the Chilean Chancellor

categorically rejected the Argentine claims to the territories in dispute. At the same time he rejected the "toponomy used in the Note of 27th July" which he referred to as containing "basic discrepancies as, for example, in giving the name 'Falso Engaño' to the 'Rio Encuentro'". Having reaffirmed the Chilean contentions in the Chilean Note of 14th November 1963, he stressed once more the limited character of the functions of the Mixed Boundary Commission and recalled that the Chilean Government had rejected everything that had been done by the Mixed Commission between Boundary Posts 16 and 17. He then added:

"Furthermore throughout the negotiations carried on between both Governments, these have recognised, solemnly and in official documents such as the Protocol on Palena of the 12th of June, 1960, that all the frontier line between boundary posts 16 and 17 are the subject of dispute. This relieves me (of the need) to add other arguments to refute Your Excellency's assertion to the effect that in some part of that zone the Mixed Boundary Commission had already completed its work, as also the assertion that the incidents material to this Note had occurred on "Argentine territory"".

He concluded the Note by reverting to the question of the "status quo" in the disputed area, maintaining that it was guaranteed not only by international law but by "specific instruments, such as the "Joint Declaration" of 2nd February 1959 and the "Simultaneous Presidential Instructions" of 5th October of that year."

33. On the same date - 3rd August (Annex No. 116) - the Chilean Foreign Minister transmitted an invitation

to the Argentine Foreign Minister to meet him at the scene of the incidents in order that, with full knowledge of the facts, they might adopt the measures necessary to prevent fresh incidents. This meeting, he said, would also give them the opportunity to exchange views on the most effectual procedure for preparing the legal instruments necessary to enable a solution of the territorial problems to be obtained. This invitation the Argentine Chancellor accepted in principle in a Note of 13th August, suggesting that the conversations could take place alternately in a Chilean and then an Argentine locality.

34. In a Note of 14th August 1964 (Annex No. 117) the Argentine Chancellor, after agreeing that the differences between the two countries must be solved in a friendly and definitive manner, returned to the question of the "status quo". Referring to the Chilean Government's Note of 1st March 1961, in which Chile had denied the existence of a status quo situation valid as a legal situation, and to the non-ratification of the 1960 Protocols, he contested the existence of any obligation binding upon Argentina with respect to a status quo.

He further contended that, the 1960 Protocols not having been ratified, the situation was, from the strictly legal point of view, in the same state as before

the signing of those documents. On that basis he claimed that for Argentina "the only frontier sector not yet demarcated between Boundary Posts 16 and 17 is that which extends from the confluence of the Rio Encuentro<sup>1</sup> and the Rio Falso Engaño<sup>1</sup> as far as the Cerro de la Virgen". Then, he recalled a statement in a Chilean Note of 1943 that the Mixed Commission entrusted with the implementation of the 1941 Protocol "is the only one called upon to determine the Chilean-Argentine frontier and, as has been stipulated, its decisions shall be regarded as final and irrevocable". And he professed to see in this statement unquestionable confirmation of the "validity of the action taken by the Mixed Boundary Commission of 1955 regarding the part of the frontier between Boundary Posts 16 and 17".

He concluded by refusing to agree to the Chilean Carabineros' having any right of patrol and by asserting that the Argentine Gendarmerie were strictly complying with their instructions to avoid incidents.

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1. Argentine version.

CHILE DECIDES TO INVOKE THE GENERAL TREATY OF ARBITRATION

35. Confronted with the Argentine Notes of 13th and 14th August, the Chilean Foreign Minister concluded that they only confirmed the deep divergence between the points of view of the two countries and the uselessness of embarking on sterile conversations with the Argentine Chancellor. Accordingly, on 24th August he addressed to the Argentine Ambassador the Note the full text of which is set out in Annex No. 118. He first deplored that the incidents of the previous month should have arisen at a time when promising bilateral negotiations, which had originated from agreements between the two Governments and from recommendations of the respective Parliamentary Advisory Committees, were in progress. Next, he said that the arguments put forward by the Argentine Government to justify the recent events had led the Chilean Government to the dispiriting conclusion that Argentina now sought to reduce the extent of the dispute to a part only of the disputed line, to ignore the existence of a status quo in the region and to deny Chile's rights to patrolling and free movement therein. He then went on:

"The scope of this dispute, which embraces the whole of the frontier line extending between boundary posts 16 and 17, that is, between the confluence of the Rivers Encuentro and Palena and the north bank of Lake Palena, is clearly defined in the Protocol which was signed by Plenipotentiaries

of the two countries on 12th June 1960, with respect to which the Argentine Government now says that 'it is unquestionable that no rights can be acquired under an international instrument which has not been ratified'.

Whatever might have been the fate of the aforementioned Protocol, it cannot be denied that, with the signature of authorised representatives, it bears witness to the fact that there is a dispute in the aforementioned region and that this dispute extends to the whole of the frontier line comprised between boundary posts 16 and 17. This formal recognition, recorded in the above-mentioned Protocol, and also in other instruments, has nothing to do with its being in force."

As to the status quo, he recalled the terms of the Argentine Note of 30th November 1961, the orders given by the Argentine President in October 1963 to re-establish the de facto situation which had been altered a short time previously in the same region, and the Argentine Chancellor's own assurances. He said that the subsequent development of events had made it evident that no useful purpose would now be served by the proposed meeting between himself and the Argentine Chancellor; and that he was accordingly obliged to place on record his Government's reiteration of its protests and of its rejection of the Argentine assertions regarding the acts of the Mixed Boundary Commission and formally to reserve all its rights.

Having referred to the "patriotic foresight of statesmen of our two Republics "in creating the appropriate instrument by concluding the General Treaty of Arbitration of 28th May 1902, Señor Philippi continued

Part Four as follows:

"The Chilean Government considers that in the present circumstances, it is appropriate to apply the aforesaid Treaty to the dispute over the Palena and Encuentro Rivers and Lake Palena, with a view to checking the periodical occurrence of unfriendly acts such as those which have just taken place and to permit a final solution of the dispute. Since the impossibility of achieving such aims by means of the negotiations conducted hitherto has been clearly demonstrated, the Chilean Government has decided to have recourse to Her Britannic Majesty's Government, i.e., the Arbiter appointed by both parties, so that, exercising the extensive powers with which it is invested, it would proceed to acquaint itself with and settle the differences in form and substance which constitute the aforementioned dispute and adopt immediately the measures it deemed appropriate. In this way the same High Court, which at the beginning of the century resolved the dispute which Chile and the Argentine Republic submitted to it, will inform each Party of its rights, then, correctly interpreting the Award which it made on the 20th of November, 1902, will indicate in accordance with the same, how the frontier line in the sector lying between boundary posts 16 and 17 should run."

And he then invited the Argentine Government to take similar and simultaneous action.

36. In a Note of 12th September 1964 (Annex No. 119) the Argentine Deputy Minister for Foreign Affairs stated that the fact that each side maintained its own thesis in regard to the dispute should not be a cause of resentment. He referred to the Chilean decision to have recourse to the arbitration of Her Britannic Majesty's Government and stated that the Argentine Government could have adopted in advance the same attitude but believed in direct negotiation. Observing that arbitration was



enjoined upon the two countries by the Treaty of 1902, he said that the Argentine Government was prepared to assign the initiative to a Parliamentary Committee who would be able to work with their Chilean colleagues.

Part Four

Then he added:

"With respect to the zone under reference, Chile wishes to leave to the Arbitrator the determination of the disputed frontier line. Argentina will have no objection, in that case, to its being done within the attributes governed by the General Treaty of Arbitration of 1902. In that sense I must recall that my Government considers that there was a settlement between the Parties, in accordance with Minute Number 55 of 1st November 1955, of the Argentine-Chilean Mixed Commission, with regard to the frontier line comprised, in one sector, between boundary post 16 and the confluence of the Rivers Falso Engaño and Encuentro, and, in another sector between the Hill of the Virgin and boundary post 17 on the north bank of Lake General Paz. Consequently, with regard to those sectors it will be necessary to abide by the provisions of Article 2 of the 1902 Treaty where it says: 'Disputes which shall have been the subject of definitive arrangements between the Parties may not be renewed by virtue of this Treaty'."

37. On 15th September 1964 (Annex No. 120) the Chilean Ambassador in London informed the Secretary of State for Foreign Affairs that the Chilean Government had decided to have recourse to the Arbitration of Her Majesty's Government "in respect of a dispute which has arisen between Chile and the Argentine Republic concerning part of the Award of 1902". He explained that the two Governments disagreed "on the meaning and effect of the Award of 1902 with respect to that section of the frontier extending from Boundary Post No. 16 to

Boundary Post No. 17"; and that the two Governments had been unable to arrive at a solution through negotiations. He then placed before the Secretary of State for Foreign Affairs the formal request of Chile to Her Majesty's Government to assume immediately the functions of Arbitrator with respect to the case. He also asked Her Majesty's Government in the meantime to take "such interim measures as my Government may request, in order to safeguard Chile's rights in the disputed area and which may be dictated by the prevailing circumstances".

38. On 22nd September 1964 (Annex No. 121) the Chilean Foreign Minister sent a further Note to the Argentine Government in reply to the latter's Note of 12th September. He expressed satisfaction at the Argentine Government's reply to Chile's notification of her decision to submit to arbitration the "territorial dispute existing in the region of the Rivers Palena and Encuentro - Lake Palena". He agreed that the written defence by each Party of its own thesis could not be a cause of resentment to the other, but pointed out that it was not this which had prevented the continuance of the negotiations. He went on formally to record his Government's disagreement with the Argentine proposition that there had been a "settlement" between the Parties by reason of Minute 55, saying that this proposition had been considered and refuted in the previous diplomatic

correspondence. Concluding with a final reaffirmation of Part Four  
the Chilean position, he said:

"Nevertheless, the Chilean Government cannot avoid rejecting, once again, the geographical nomenclature again used in the Note of 13th September and reiterating that the whole of the line comprised between the boundary posts 16 and 17 is in dispute, and that there do not exist any arrangements, agreements or understandings of any kind whatsoever which permit the contention that a part of the line can be excluded from the controversy. The proceedings of the Mixed Boundary Commission referred to in Your Excellency's Note are devoid of all force and effect for the solution of the problem and, consequently, the Chilean Government rejected them at the time."

39. On 30th October 1964 the Argentine Government acknowledged the Chilean Note of 22nd September, and in doing so informed the Chilean Government of its decision similarly to submit the case of the Beagle Channel to the International Court of Justice.

40. At the beginning of November 1964, in connection with the new President of Chile's assumption of his office, the Chilean and Argentine Foreign Ministers held conversations on matters of mutual interest, and on 6th November they issued a Joint Declaration which, inter alia, contained the following statement:

"4. - That with regard to the dispute in the region of River Palena - River Encuentro, which has been the subject-matter of recent communications between the two Governments, both Ministers share the desire that that dispute shall be settled by Her Britannic Majesty's Government, in accordance with the provisions of the General Treaty of Arbitration of 1902, without prejudice to the positions assumed by the two Parties in this matter."

The Declaration further recorded their agreement to take measures to facilitate the work of the Mixed Boundary Commission and to instruct their respective authorities to lay down rules to maintain friendly relations in the disputed zones.

41. The ensuing correspondence relating to the determination of the Comproiso of Her Majesty's Government is within the knowledge of Her Majesty's Government and of the Court of Arbitration, and it is not, therefore, necessary to set it out here. It suffices to recall that in its Memorandum to the Foreign Office of 25th November 1964 (Annex No. 124) the Argentine Government made a formal claim that, as a result of Minute 55, there had been a settlement between the Parties of the boundary in the segment between Post 16 and the confluence of the Rivers Falso Engaño and Encuentro (Argentine version) and in the segment between the Cerro Virgen and Post 17; and that in consequence the boundary in those segments must be considered to fall under Article 2 of the General Treaty of Arbitration of 1902 which provides that "Questions which have already been the subject of definite arrangements between the High Contracting Parties cannot in virtue of this treaty, be reopened"<sup>1</sup>.

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1. As pointed out in paragraph 2 of Part III, Article 2 of the General Treaty of 1902 goes on to qualify this provision with the words "In such cases arbitration will be limited exclusively to the questions which may arise respecting the validity, the interpretation and the fulfilment of the arrangements".

42. Prior to the determination of the Compromiso, the Chilean Government in a Note of 23rd March 1965 and the Argentine Government in a Note of 24th March 1965 separately gave undertakings to Her Majesty's Government "to use their best endeavours to prevent the occurrence of any incidents in the vicinity of the boundary which is the subject of the present controversy and any other action which might in any way hinder Her Majesty's Government in fulfilling their functions as Arbiter in that controversy."

43. The Compromiso was finally determined by Her Majesty's Government on 1st April 1965 in the terms which are reproduced in Annex No. 125 of this Memorial and which, inter alia, incorporate a reference to the above-mentioned undertakings of the Parties.

PART FIVE

THE CONTENTIONS  
AND SUBMISSIONS OF  
THE GOVERNMENT OF  
CHILE

THE CONTENTIONS AND SUBMISSIONS OF THE  
GOVERNMENT OF CHILE

In the view of the Government of Chile, the considerations and the evidence set out in the present Memorial establish the correctness of the following contentions:

Chapter I

The Proper Interpretation of the 1902 Award

(1) The governing principle controlling the 1902 Tribunal in formulating its Award was that of effecting a compromise between the orographical and hydrographical factors specified in the 1881 Treaty. This led the Tribunal to search for a boundary which would "combine as far as possible the conditions of an elevated watershed with geographical continuity".

(2) The boundary line between Posts 16 and 17 laid down by the 1902 Tribunal consists of two principal elements:

(a) a line cutting the River Palena at Post 16 and following the course of the River Encuentro to its source on the slopes of a mountain forming part of an elevated local water-parting;

(b) a line ascending from the source of the River Encuentro directly to the Peak of the mountain above the source and thence running continuously along the line of the local water-parting to Post 17.

(3) When cutting the River Palena at Post 16 the Tribunal intended to award all the river basins upstream of Post 16 to Argentina and all those downstream to Chile, with the exception of the River Encuentro which was itself made the boundary.

(4) The reference in the Report of the 1902 Tribunal to the western branch of the River Encuentro is attributable to the totally erroneous structure and course given to the River Encuentro in the "Second Argentine Map" which was used by the Tribunal to illustrate its Award. It is therefore without any relevance or value for the purpose of determining the proper interpretation of the 1902 Award in the light of the actual geographical facts.

(5) Accordingly, the essential criterion for determining the first part of the boundary laid down by the 1902 Tribunal southwards from Post 16 is the identification of the actual course and source of the River Encuentro.

(6) Similarly, the essential criterion for determining the second part of the boundary laid down by the 1902 Tribunal is the identification of the mountain Peak on whose slopes the source of the River Encuentro is actually situated.

(7) The reference in the Award and Report of the 1902 Tribunal to the Cerro Virgen as a point on the



boundary was consequential upon and incidental to the reference to the ascent of the boundary line from the source of the River Encuentro directly to the Peak situated above the source and forming part of the local water-parting. The relevance and value of the reference to the Cerro Virgen in the descriptions of the boundary by the 1902 Tribunal was therefore directly and inextricably linked to the supposed connection between that mountain and the source of the River Encuentro.

(8) The name "Cerro Virgen" appeared for the first time on the "Second Argentine map" in conjunction with the totally erroneous structure and course attributed on that map to the River Encuentro. In fact, neither the River Encuentro nor any of its tributaries has its source on the slopes of the Cerro Virgen. Even if, therefore, the location of the Cerro Virgen on the "Second Argentine map" is approximately correct, it is evident that the name of the Cerro Virgen was mentioned in the Award and Report simply because of the Tribunal's misconception of the structure and course of the River Encuentro. Accordingly, the reference to the "Cerro Virgen", like the reference to the "western branch", is without relevance or value for the purpose of determining the proper interpretation of the Award in the light of the

actual geographical facts.

(9) In fact:

The course of the River Encuentro is formed by what in this Memorial have been termed the "lower section", extending from Post 16 to the junction of the "minor" with the "major" channel and thence from the junction deep into the mountains of the Cordon de las Virgenes.

(The "minor channel", composed of part of the Arroyo Lopez and then of the rivulet the Arroyo Mallines, is not the River Encuentro but a tributary which joins the River Encuentro at the "watersmeet".)

(10) In fact:

(a) The source of the River Encuentro is high up on the slopes of the "Pico de la Virgen", a peak forming part of the important local water-parting which divides the basin of the River Palena upstream of Post 16 from the basin of the River Salto, a river which enters the Palena downstream of post 16.

(b) The "minor channel" running along part of the Arroyo Lopez and then along the Arroyo Mallines has its source on the lower slopes of a minor range, the Cordon de Los Morros, which does not constitute an important local water-parting and which is separated from the range in which the Cerro Virgen is situated by a major River, the River Engaño.

(c) No tributary of the river which flows

into the River Palena at Post 16 has its source on any slope of the Cerro Virgen or on any slope of any mountain of the range in which the Cerro Virgen is situated.

(11) According to the actual geographical facts, therefore, a boundary line following the course of the River Encuentro to its source on the western slopes of the Pico de la Virgen, ascending directly to that Peak and then following the elevated local water-parting southwards to Post 17 is the only one which

(a) is consistent with the principle referred to in paragraph (1) of these Contentions as governing the 1902 Tribunal in formulating its Award; and

(b) contains both the basic elements of the boundary mentioned in paragraph (2) of these Contentions as having determined the course of the boundary laid down by the 1902 Tribunal for the Sector between Posts 16 and 17.

(12) Furthermore, a boundary line drawn in the manner indicated in the preceding paragraph has the effect of leaving the entire basin of the River Palena upstream of Post 16 to Argentina and the entire basin of the River Salto to Chile. This boundary, therefore, also conforms to the principle mentioned in paragraph (3) as having guided the Tribunal when drawing the boundary across the River Palena at Post 16.

(13) A proper interpretation of the 1902 Award in the light of the actual geographical facts accordingly

Part Five

requires that the course of the boundary in the Sector between Posts 16 and 17 should follow the River Encuentro to its source on the slopes of the Pico de la Virgen, ascend directly to that Peak and thence follow the elevated local water-parting to Post 17.

Fulfilment of the 1902 Award

(14) The error in the course attributed to the River Encuentro on the map annexed to the 1902 Award was detected by the Argentine expert, Señor Frey, as early as 1903; and Señor Frey then recognised, inter alia, that if Post 16 were retained opposite the mouth of the River Encuentro "the whole of the River Engaño is in Chilean territory".

(15) Again in 1907 an engineer of the Argentine Boundaries Office, Señor Luis A. Alvarez, reported to the Argentine Government that the stream where Post 16 had been erected "has its source close to the Cerro Herrero"; and the Cerro Herrero is a mountain in the Cordon de las Virgenes near the Pico de la Virgen, which then lacked a name.

(16) Likewise in December 1913 the Argentine Government, in advancing a claim that Post 16 had been placed opposite the mouth of the wrong river, at the same time recognised that the river off which it had been placed "has its source in the vicinity of the Cerro Herrero". Similarly, in claiming that this deflected the frontier line out of its true direction, the Argentine Government also recognised that with Post 16 placed off that river - the River Encuentro - it becomes "impossible for the boundary line to pass

through the Cerro Virgen which has been expressly indicated as a boundary point in the Award".

(17) The Chilean Government replied that no mistake had been made in 1903 and that Post 16 had been "properly placed" by the Demarcation Commission. In so replying it impliedly asserted that the boundary did run along the River Encuentro to the mountains of the Cerro Herrero range.

(18) In January 1914 the Argentine Government suggested that an expert should be sent by each Government to the area to study the points in issue, adding that if agreement could not be reached about the true location of Post 16 then they should report to their respective offices. In June the Chilean Government replied that it had no objection to sending an expert to verify the correct position and that if a real error were proved it would have no wish to take advantage of the error. At the same time it stated that this courtesy was not to be understood as indicating its agreement to reopen discussion on the application of the Award made by the Demarcation Commissioner. The Argentine Government did not pursue the matter any further or revert to the question of the boundary in the Sector between Posts 16 and 17 in any manner until 1952.

(19) Cartography continued for some time to represent the boundary as shown on the erroneous map

annexed to the 1902 Award. But on the ground the boundary applied was the true course of the River Encuentro - the course of the river which has its source on the slopes of the Pico de la Virgen.

(20) Chilean settlers began from about 1910 to establish themselves in California. They built homes and developed farms on both sides of the Arroyo Lopez and Arroyo Mallines and they pastured their cattle in summer on the grazing lands of the Valle Hondo, Las Horquetas and Engaño Lakes areas. They did not, on the other hand, go to the east or to the north of the course of the river - the River Encuentro - which rises on the slopes of the Pico de la Virgen. The settlers naturally continued their associations with Chile.

(21) Chilean administrative authorities in Aysén, Palena, Achao and Chaiten regularly and effectively exercised various forms of jurisdiction with respect to the settlers in California, with respect to the lands which they occupied or grazed and with respect to their property, namely:

(a) grants of land titles, occupation permits and authorisations for use of summer grazing lands;

(b) exaction of land tax and the maintenance of land tax registers with respect to properties in California;

(c) registration of the settlers in the police registers and issue of identity cards;

(d) registration of births, marriages and deaths of settlers;

(e) registration of animal brand marks;

(f) registration of settlers for Chilean military service;

(g) registration of the settlers on the electoral roll and their admission to the vote in Chilean elections;

(h) inclusion of the settlers in the Chilean census;

(i) exercise of police, criminal and civil jurisdiction with respect to the settlers by Chilean authorities and courts and the general application to them of Chilean law and legislation.

(j) provision of education for the children of the settlers, first at Palena and then in California.

In addition, the religious services of the settlers were administered by the Chilean church authorities.

(22) The occupation of California by the Chilean settlers and the assumption of jurisdiction by the Chilean authorities was done openly and in good faith. No objection was taken by the Argentine Government and no attempt at any competing exercise of State activity in the area was made by Argentine authorities until 1952.

(23) Thus, with respect to the period between 1903 and 1952 the facts show that



(a) after 1914 both Parties in fulfilling the Award acted on the basis that the boundary from Post 16 southwards was the course of the river - the true River Encuentro - which has its source on the slopes of the Cordon de las Virgenes, and that California was Chilean;

(b) Chile displayed a continuous and effective State activity with respect to California and to the people inhabiting or grazing those areas;

(c) no such State activity was displayed by Argentina during this period.

(24) Consequently, the fulfilment of the Award by the Parties and the possession exercised by Chile in the period prior to the arising of the present dispute accords with and confirms the interpretation of the 1902 Award set out in paragraph (13) of these Contentions.

Chapter IIIAbsence of any Contrary Settlement of the Boundary  
by the Mixed Boundary Commission

(25) In July 1952, after the Mixed Boundary Commission had been studying the demarcation of the boundary in the Sector between Posts 16 and 17 in a somewhat desultory fashion for a number of years, the head of the Argentine Gendarmerie in Carrenleufú suddenly appeared in the River Encuentro and California areas. He examined the houses of the Chilean settlers, took from them their personal documents, issued by the Chilean authorities, and summoned them for the following day. Eight settlers went to the meeting, the rest refusing to go.

(26) At the meeting the Argentine gendarme declared that the boundary between Chile and Argentina was the River Encuentro along the whole of its length and an imaginary line which went southwards from its source, crossed the River Tigre, went up a Cerro at an angle and continued the frontier to Post 17 on the north side of Lake General Paz. He further declared that he was basing himself on a provisional map of the Argentine Military Institute in his possession. He then notified the settlers that from that moment they belonged to the Argentine Republic; and that they would have to comply with Argentine laws regarding residence certificates and registration and with Argentine bans on removing

their cattle to Chile or themselves crossing the border without a permit,

(27) On learning of the incident the Chilean Consul in Esquel at once had an interview with the Gendarmerie authorities and was informed that they were complying with superior orders to act in accordance with the Map of the Argentine Military Geographical Institute.

(28) The Chilean Government protested and was assured by the Argentine Government that the existing status was being maintained in the area until the Mixed Boundary Commission proceeded to the appropriate demarcation. The Argentine Government did not contest the account of the incident given by the Chilean Government, stating that an inquiry would be made as to who was responsible and the gendarmes in question removed.

(29) (a) In connection with an Argentine announcement regarding the same incident the Chilean Ambassador was informed by the Argentine Chancellery that "in the opinion of the Argentine Technical Officials the River Encuentro is on the boundary and California is actually Chilean".

(b) He was also informed by the Argentine Technical Officials themselves that in no edition of any Argentine map did the locality California appear as Argentine territory; that the claims of the

Gendarmerie at Carrenleufu were totally lacking in foundation; and that they were only to be explained by an absurd interpretation of the Arbitral Award with respect to the source of the River Encuentro and of the Tigre or Salto.

(30) The claims of the Argentine Gendarme were totally lacking in foundation, and the boundary which he described did not correspond to the boundary laid down in the Arbitral Award, nor his description of the River Encuentro to that of the Argentine Government in 1913. On the other hand, the boundary and the course of the River Encuentro described bears a noticeable resemblance to the boundary and to the River Encuentro afterwards sponsored by the Argentine Delegation in the Mixed Boundary Commission as a compromise proposal; and the Gendarmerie stated that they were acting upon superior orders.

(31) By 1954 the Chilean Commission was aware that the course of the River Encuentro and the location of the mountain "Hill of the Virgin" were going to be matters of acute controversy in the Mixed Commission and that the propositions being advanced by the Argentine Commission would "threaten the populated zone of California". And on 21st September of that year it submitted a memorandum to the Chilean Foreign Ministry explaining the position that was developing.

(32) On 25th October 1954 the Argentine Commission handed over to the Chilean Commission copies of the three aero-photogrammetric map sheets of the Sector which had been prepared in the Argentine Military Geographical Institute for the Mixed Boundary Commission. These map sheets were so composed as virtually to exclude the Cordon de las Virgenes, the source and half of the course of the "major channel", i.e. of the true River Encuentro. They mis-stated the relative size and importance of the "major channel", (true River Encuentro) and the "minor channel" (Arroyo Mallines - Arroyo Lopez). They also switched the name Encuentro from the "major" to the "minor" channel and attached to the "major" channel the name "Falso Engaño" more frequently and appropriately used with reference to the "minor" channel. In short, these map sheets incorporated a radical reconstruction of the river system of the River Encuentro.

(33) In December 1954 the Argentine Government, in proposing the maintenance of the status quo pending demarcation, transmitted to the Chilean Government a diagram purporting to depict the existing zones of Argentine and Chilean jurisdiction. This diagram assigned the name "Encuentro" to the Arroyo Mallines - Arroyo Lopez channel and, in flagrant contradiction with the actual facts, depicted the whole of the area to the

east of the Mallines - Lopez channel as under existing Argentine jurisdiction. It further depicted the existing jurisdictional boundary as running westwards from the Arroyo Mallines along the River Engaño to the River Salto/Tigre and thence southwards via the Arroyo Matreras to the western slopes of the Cerro Virgen. At the same time, it assigned the name "California" to the mountain slopes north-west of the River Engaño instead of to the populated zone known by that name. In fact, so far from depicting the status quo, the diagram depicted the extreme claim which the Argentine Commission was soon afterwards to put forward in the Mixed Boundary Commission.

(34) The Chilean Government did not reply to the Argentine proposal until - in August 1955 - the Argentine Gendarmerie had provoked further incidents in California by telling the Chilean settlers that they were in Argentine territory and carrying out a census of the population and cattle in the area. It then protested, on 30th August 1955, that the acts of the Argentine Gendarmerie were a manifest transgression of the "status quo". And in a later Note of 14th September it insisted that the frontier in the Sector had already been clearly indicated and demarcated under the terms of the 1902 Award; and that all that was required to prevent incidents was the establishment of

the geographical co-ordinates and boundary posts by the Mixed Commission.

(35) Meanwhile, the Argentine Commission had in the previous April handed over to the Chilean Commission copies of the three aero-photogrammetric map sheets showing its proposals regarding the boundary line, together with a supplementary chart showing the general tracing of the line in the whole Sector. The map-sheets and chart repeated the erroneous presentation of the geographical facts referred to in paragraph (32) of these Contentions; and the boundary line which they depicted followed the same extreme line as that presented in the diagram of the "status quo" described in paragraph (33) of these Contentions.

(36) The Chilean Commission had prepared in the course of 1955 a new map of the area covering the Cordon de las Virgenes and the whole course of the River Encuentro on the basis of photographs taken by a United States squadron. This map showed the River Encuentro as following the course of the "major channel" and as having its source on the slopes of the Pico de la Virgen.

(37) The boundary line proposed by the Argentine Commission at the fifteenth plenary meeting was presented on the defective aero-photogrammetric map sheets mentioned in paragraph (32) of these Contentions.

Starting from Post 16, it ran along the River Encuentro to the "watersmeet", then along the Arroyo Lopez to its junction with the Arroyo Mallines and then along the latter not to its source but to a convenient point in the valley; from there it contrived to find its way to the western slopes of the Cerro Virgen via a reach of the River Engaño, a reach of the River Azul and then up the Arroyo Matreras. The line departed radically from the boundary laid down in the 1902 Award and was in flagrant contradiction with the views of the Argentine experts and of the Argentine Government mentioned in paragraphs (14) - (16) of these Contentions.

(38) The boundary line proposed by the Chilean Commission at that meeting was similar, though not identical, to the line put forward by the Chilean Government in the present Memorial. It ran along the River Encuentro to its source on the western slopes of the Pico de la Virgen, ascended directly to this Peak, and thence continued along the local water-divide of the Cordón de las Virgenes, passing through named high points until it reached Post 17. In presenting its proposal, the Chilean Government made express reservations regarding the names given to the Rivers "Encuentro" and "Falso Engaño" on the map sheets of the Commission.

(39) The question of the course of the boundary



between Posts 16 and 17 remained in a state of deadlock until near the close of the fifteenth plenary meeting. The Commission then, by way of compromise, adopted a number of resolutions which it recorded in Minute 55. Under these resolutions it purported to "approve" a line drawn from Post 17 to the Cerro Virgen and a line drawn from Post 16 along the River Encuentro to the confluence of the "major" and "minor" channels. It further submitted for the decision of the two Chancelleries a line drawn northwards from the Cerro Virgen to the River Engaño, across that river allegedly to the source of the River Encuentro, then to the junction of the "major" and "minor" channels and thence along the River Encuentro to its confluence with the River Palena.

(40) The boundary line which results from the resolutions of the Commission recorded in Minute 55 departs radically from the boundary line laid down in the 1902 Award in that:

(a) it does not combine as far as possible the conditions of an elevated watershed with geographical continuity (paragraph (1) of these Contentions);

(b) it does not follow the course of the River Encuentro to its source on the slopes of a mountain forming part of an elevated local water-parting (paragraph (2) of these Contentions);

(c) it does not ascend directly from the

source of the River Encuentro to the Peak of the mountain above the source and thence run continuously along the line of the local water-parting to Post 17 (paragraph (2) of these Contentions);

(d) it cuts the River Engaño in two and, in consequence, violates the principle of awarding to Chile the whole basin of rivers which run into the River Palena downstream of Post 16 (paragraph (3) of the Contentions).

(41) The resolutions in Minute 55 by which the Commission purported to "approve" a line drawn from Post 17 to the Cerro Virgen and a line drawn from Post 16 along the River Encuentro to the confluence of the "major" and "minor" channels cannot be considered as definitive or binding upon the Chilean Government for all and each of the following reasons:

(a) Any boundary line drawn between Posts 16 and 17 on the basis that part of it passes through the Cerro Virgen departs radically from the boundary line laid down in the 1902 Award and it is beyond the competence of the Mixed Boundary Commission under the 1941 Protocol to approve definitively such a line so as to bind the two Governments.

(b) The competence of the Commission to approve Minutes which "will produce full effect and will be regarded as firm and valid" is confined to Minutes drawn up in special form in connection with the erection of boundary posts; and Minute 55 was not such a Minute.

(c) The Commission has no power to "approve" definitively any line or point as constituting part of the boundary in a Sector between two existing boundary posts until the whole course of the boundary between those Posts has been identified and it has thereby been established that such line or point indubitably forms part of the boundary laid down for the whole Sector.

(d) A resolution of the Commission regarding the location of the boundary can become definitive and binding on the Governments only when its work for the whole Sector is complete.

(e) The resolutions of the Commission adopted in Minute 55 are nullified by a fundamental error as to the course and source of the River Encuentro and cannot have any binding force or effect for Chile or Argentina unless afterwards agreed to by both countries.

(42) The resolutions of the Mixed Boundary Commission adopted in Minute 55 could not, therefore, constitute a binding settlement of any part of the boundary between Chile and Argentina unless accepted by both countries.

(43) Since the Chilean Government rejected completely all the resolutions of the Mixed Boundary Commission recorded in Minute 55 which related to the boundary between Posts 16 and 17, no "definite settlement" of any part of the boundary between the Parties has taken place as a result of the work of the Mixed Boundary Commission.

(44) Accordingly, the only settlement of the boundary which has taken place in the Sector between

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Posts 16 and 17 is that which occurred as a result of the fulfilment of the 1902 Award by the Parties between 1902 and 1952 and which established the course of the River Encuentro to its source on the slopes of the Pico de la Virgen and the watershed of the Cordon de las Virgenes as the boundary between the two countries in this Sector (paragraphs (14) to (24) of these Contentions).

The Position of the Court of Arbitration under  
Article 1 of the Compromiso

(45) It follows from Chapter III of these Contentions that the Court of Arbitration is not precluded by Article 2 of the General Treaty of Arbitration of 1902 from reporting its Conclusions on any part of the boundary in the Sector between Posts 16 and 17.

(46) In addition, the fundamental error on the basis of which the resolutions in Minute 55 were drawn up (paragraph (41)(e) of these Contentions) would in any event empower the Court of Arbitration to determine the invalidity of any alleged definite settlement that might otherwise have resulted from those resolutions and then to report its conclusions on the course of the boundary throughout the whole Sector between Posts 16 and 17.

Submissions of the Government of Chile

On the basis of the foregoing contentions, the Government of Chile submits that, applying the principles of international law, the Court of Arbitration should reach the following conclusions:

(A) On a proper interpretation of the 1902 Award, in accordance with its terms and in the light of the actual geographical facts, the course of the boundary between the territories of the Parties in the Sector between Boundary Posts 16 and 17 is a line which, beginning at Post 16, runs along the River Encuentro to its source on the western slopes of the Pico de la Virgen, ascends directly to that Peak and thence runs continuously along the elevated local water-parting to Post 17.

(B) The fulfilment of the 1902 Award by the Parties during the period between 1902 and 1952 when the present dispute arose confirms that the interpretation set out in paragraph (A) of these Submissions is the proper interpretation of the 1902 Award in the light of the actual geographical facts.

(C) The diplomatic correspondence exchanged between the Parties in 1913-1914 and the open,

effective and continuous display of State activity by Chile in California, without any objection from Argentina, in the period before the present dispute arose in 1952 establish the existence of an understanding and implied agreement between the Parties that, in the light of the actual geographical facts, the 1902 Award is properly to be interpreted as prescribing as the boundary between the territories of Chile and Argentina the line set out in paragraph (A) of these Submissions.

(D) Having regard to the understanding and implied agreement referred to in the preceding paragraph, even if the Court of Arbitration were to have any doubt as to the correctness of the interpretation set out in paragraph (A) of these Submissions, that interpretation must be considered to be the proper interpretation of the 1902 Award as between Chile and Argentina.

(E) Equally, having regard to the Submissions in preceding paragraphs (C) and (D), the Argentine Government was precluded in 1952 and is precluded in the present proceedings from contesting that the interpretation of the 1902 Award set out in paragraph (A) is the proper interpretation of that Award.

(F) It follows from the preceding Submissions that on the critical date, namely 25th

July 1952, when the Argentine Gendarmerie first intervened in the River Encuentro and California areas and Argentina began, in face of the protests of the Chilean Government, to attempt to display State activity to the west of the boundary line defined in paragraph (A), Chile already possessed a valid title to the areas in question. It also follows that any activity of the Argentine Government with respect to those areas was illegal and invalid.

(G) In addition, the Argentine Government is precluded from contesting that the status of California in 1952 was Chilean by reason of its express recognition of that fact in August of that year in response to a protest made by the Chilean Government regarding the intervention of the Argentine Gendarmerie referred to in the preceding paragraph.

(H) The purported "approval" by the Mixed Boundary Commission in Minute 55 of a line drawn northwards from Post 17 to the Cerro Virgen and of a line drawn southwards from Post 16 to the junction of the Arroyo Lopez with the River Encuentro as segments of the boundary in the Sector between Posts 16 and 17 did not constitute a settlement of the boundary in that segment



binding upon Chile under the Protocol of 1941 relating to the Replacement and Setting up of Boundary Posts on the Chilean-Argentine Frontier.

(I) The resolutions and proposals of the Mixed Boundary Commission recorded in Minute 55 having all been rejected by Chile, no definite settlement of any part of the boundary in the Sector between Posts 16 and 17 has taken place between the Parties since 1952 within the meaning of Article 2 of the General Treaty of Arbitration of 1902.

(J) If, contrary to the Submission in paragraph (H), the purported "approval" by the Mixed Boundary Commission of the lines referred to in that paragraph is to be considered as in other respects fulfilling the conditions of a definite settlement between the Parties of two segments of the boundary, that settlement was nevertheless invalid in respect of the line drawn northwards from Post 17 to the Cerro Virgen by reason of its being based on a fundamental error of fact regarding the location of the course and source of the River Encuentro. Consequently, even on such a hypothesis, there is no definite settlement between the Parties of that segment of the boundary in the Sector between Posts 16 and 17, as alleged in the

Memorandum from the Argentine Embassy in London to the Foreign Office, dated 25th November 1964.

(K) Therefore, acting in accordance with the provisions of Article 1 of the Compromiso, the Court of Arbitration should report to Her Majesty's Government that, on the proper interpretation and fulfilment of the 1902 Award, the course of the boundary between the Parties in the Sector between Boundary Posts 16 and 17 is:

Starting from Post 16, the boundary follows the River Encuentro upstream from its junction with the Palena to the point, at approximately  $43^{\circ} 30' 30''$  South, where it changes its general north to south direction to one from west to east, and then continues to follow the river in an easterly direction to its source on the western slopes of the Pico de la Virgen, a mountain of some 2,100 m. height situate towards the northern end of the cordon of high mountains comprising Co. Central and Co. Condor, named Cordon de las Virgenes. From this Peak the line follows the local water-parting southwards to Post 17: that is to say, the line is projected southwards along the water divide touching the highest summits of the Cordon, of which the heights are 1,970 m., 2,100 m., 1,940 m., and 1,930 m. From the last of these heights the line continues along the said Cordon de las Virgenes following the high summits, then circling the Lagunas del Engaño (i.e. Lakes Engaño, Redonda, Berta and Blanca), crossing

between them and Lake Huacho, then taking an orientation to the west through heights of 1,776, 1,800, 1,760 and 1,770 metres; and finally turning south to Post 17 (the line herein described being delineated on Map No. CH.26 annexed to the present Memorial).

Part Five

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