ARGENTINE-CHILE FRONTIER CASE COURT OF ARBITRATION

VOLUME 1

COUNTER MEMORIAL
OF THE GOVERNMENT OF CHILE

1966

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ABBREVIATIONS

Ch. Mem.	=	Chilean Memorial, 1965
Arg. Mem.	=	Argentine Memorial, 1965
Doc. No. -	=	Document Number in Volume 3 of the Chilean Memorial, 1965, "Additional Documents Referred to in the Memorial of the Government of Chile".
C-M -	=	Document Number - in Volume 3 of the Chilean Counter-Memorial, 1966, "Further Additional Documents filed with the Counter-Memorial of the Government of Chile". (This Volume is in two parts.)
CH.-	=	Map number - included in the box of maps filed with the Chilean Memorial, 1965.
CH(C-M)-	=	Map number - included in the folder of Maps filed with the Chilean Counter-Memorial, 1966.
A -	=	Map number - annexed to the Argentine Memorial.
A.M. -	=	Map number - annexed to the Argentine Memorandum on Land Use, Settlement and Circulation of Local Trade.

INTRODUCTION

1. This is the Counter-Memorial of the Government of Chile filed pursuant to Order No. 7 made by the Court of Arbitration on 6th January, 1966, as amended by Order No. 9 made by the Court on 11th May, 1966.

2. The Counter-Memorial contains, in addition to the present Introduction, the Chilean Government's observations, contentions and submissions regarding the case presented to the Court in the Argentine Memorial and Memorandum on Land Use, Settlement and Circulation of Local Trade and, in addition, further information, evidence and submissions supplementing the case presented to the Court by Chile in her Memorial. The Chilean Government has, for the convenience of the Court, divided the Counter-Memorial into Parts and Chapters which correspond, broadly speaking, to those in the Chilean Memorial. In commenting upon the case presented to the Court by Argentina, the Chilean Government has not followed the order adopted in the Argentine Memorial, but has dealt with the various elements of the Argentine case under each Part and Chapter of the Chilean case to which which it seemed primarily relevant.

3. At the end of the present Volume of the Counter-Memorial, there appears an Appendix to which the Chilean Government wishes to draw the Court's attention. This Appendix contains notes on certain points in some of

the maps, plans and sheets annexed to the Argentine Memorial.

4. In their letter dated 25th April, 1966, to Brigadier Papworth (begins acting as Registrar), the Agents of the Government of Chile stated that they intended to deal in the Counter-Memorial with the request made by the Argentine Agent in his letter of the 1st April, 1966, that any map prepared under the authority of the Court and to be used by the Court for any purpose should represent the whole course of the River Encuentro according to the Argentine version of that river, including the small stream which is referred to in Major Rushworth's Minute as Stream Z. This request, although couched in general terms, was made with particular reference to the possible use by the Court of the Outline Map at the Oral Hearings. Meanwhile, however, in Section (iii) of his letter of the 2nd June, 1966, the President has informed the parties that, because of its limitations except as a medium for the collection of place names and road classifications, the Outline Map is not intended to play any part in the Oral Hearings. And he has further stated:

> "At these Hearings, it will be for the Parties to rely on maps of their own choosing, either already annexed to the Memorials or possibly to be annexed to the Counter-Memorials."

Having regard to the terms of the President's letter, the Chilean Government does not now find it necessary

to develop in this Counter-Memorial the considerations which it desired to present to the Court with respect to the above mentioned request of the Argentine Agent.

5. At the same time, the Chilean Government feels that the request of the Argentine Government respecting the representation of Stream Z on any map to be used by the Court calls for certain comments. The Argentine Government did not in any of its letters challenge the correctness of the observations made by Major Rushworth in the field, and reported in his Minute of the 4th February 1966. In effect, it asked the Court in the letter of the 1st April, 1966 to mark on the map at any cost the course of Stream Z, neglecting any disproportion between Stream Z and other streams which this might occasion. It said (pages 2 to 3 of the letter):

> "For the purpose of the present proceedings, no comparison ought to be drawn between the depiction, upon the Outline Map, of the upper course of the River Encuentro and the depiction of other water-courses in the area of a comparable volume, but upon which neither Party places any importance or relevance."

Yet, the Argentine Government could not fail to have been aware from its reading of the Chilean Memorial (pages 300-301, 321, 457 and 471) and from the statement of Counsel for Chile at the Oral Hearing on 31st December, 1965 (page 65 of the Transcript) that the Chilean Government attaches definite importance and relevance to the insignificant volume of Stream Z in comparison

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with other streams in the area. Chile, as the Court knows, has underlined in her pleadings the much greater volume of the stream which rises in the Cordon de los Morros which absorbs Stream Z at their confluence in the valley and which appears to be the true course of the Arroyo Mallines.

6. The sensitiveness of the Government of Chile in face of a proposal calling for a distorted representation on a map in the present proceedings of a watercourse which is alleged by Argentina to form part of the River Encuentro can scarcely have been a matter of surprise. In 1902 a map prepared by Argentina (the "Second Argentine Map"), depicting erroneously the River Engaño and part of the basin of the River Azul as attached to the River Encuentro, was introduced into the proceedings at a late stage. The consequence was that the intention of the Tribunal to divide the river basin of the Palena and its tributaries between the two countries at the point of the Encuentro-Palena confluence was translated into an erroneous description of the boundary which afterwards furnished Argentina with a pretext for contesting that division.

In 1913/14 Argentina had recourse to that pretext and sought to re-open that question but desisted, apparently recognising the true nature of the division resulting from the Award. Then Chile established and

for some years enjoyed quiet possession of the areas allotted to her by the Award. Some years after the creation of the Mixed Boundary Commission, however, Argentina resurrected the erroneous description of the boundary line and through her delegates in the Commission claimed those areas. And in 1954 there was again introduced into the proceedings a Map prepared in Argentina and depicting erroneously the river system of the Encuentro. This Map misrepresented the relative magnitudes of the major and minor channels as well as the structure of the minor channel and its relation to the lower section of the River Encuentro. (See Part Three, Chapter VII, Paragraphs 80 to 82 of this Counter-Memorial). In consequence, the Mixed Boundary Commission was led in Minute No. 55 to mis-state the course of the River Encuentro and to mis-apply the 1902 Award.

Chile having rejected the conclusions and proposals of the Commission, there followed a decade of diplomatic controversy and of encroachments by Argentina on the areas allotted to Chile under Article III of the Award. Then, the dispute having been submitted to arbitration, Chile found herself confronted by a suggestion from Argentina that the Court of Arbitration should itself participate in a distortion of the cartographical representation of a segment of the minor channel in order

that Argentina might more plausibly illustrate to the Court her thesis that a watercourse which is not the River Encuentro ought to be considered the River Encuentro mentioned in the Award.

7. If the Chilean Government reacted with some firmness to the Argentine Government's suggestion it was past experience and no lack of confidence in the Court which provoked the Chilean reaction. On the contrary, the Government of Chile expresses its confidence that on this occasion the determination of the respective rights of Chile and Argentina regarding the boundary in the sector will be based on the evidence and on the actual facts as verified on the ground by the Court of Arbitration, and will not be affected by any cartographical errors or distortions.

PART ONE

THE LINE OF THE BOUNDARY

PART I

THE LINE OF THE BOUNDARY

CHAPTER I. REFUTATION OF THE ARGENTINIAN CONTENTION

1. The positive submissions of the Government of Chile as regards the line of the boundary upon a proper interpretation of the 1902 Award are set out in the Chilean Memorial, pp. 95-120. The approach of the Government of Argentine in the Argentine Memorial is, understandably, quite different. The Government of Chile believes that it may best assist the Court in this part of the Counter-Memorial by directing its observations first at the Argentine contentions rather than by reasserting the validity of the original Chilean submissions.

2. The Argentine Memorial has placed before the Court a number of different submissions regarding the correct line of the boundary. These vary from one another according to the particular alternative position which the Court may adopt in relation to the diverse Argentinian contentions as to the extent to which the line of the boundary had or had not been settled at the date of the Compromiso. The Government of Chile will not, at this stage in the present Counter-Memorial attempt to follow the Government of Argentina

into these complex alternatives, but will defer to Part Three below a consideration of these Argentine arguments. In this chapter the Chilean Government will do no more than examine the essential elements in the Argentine interpretation of the relevant parts of the 1902 Award. It will be the submission of the Government of Chile in the present Chapter that the Argentine contentions are unsound and ought not to be accepted. In so far as they rest on assertions of fact, it will be shown that in certain critical respects, turning upon expert observations and analysis, these assertions are wrong; and in so far as they turn upon an interpretation of the very terms of the 1902 Award, they will be shown to be inconsistent with the language of the Award and the principles on which it was based.

A. The Argentinian contention

3. When all the various alternative Argentine submissions are stripped of their complexities, the Argentine contention as to the boundary line boils down to the following propositions:

(i) The Cerro Virgen was mentioned in the Report and the Award and is identifiable. Therefore it must form a point of the boundary.

(ii) It is possible also to identify a local

water-parting from the Cerro Virgen to Post 17. Therefore this must form the part of the boundary from the Cerro Virgen southwards.

(iii) The Cerro Virgen has western slopes, on which a stream (a tributary of the Arroyo Matreras) has its source. The Arroyo Matreras runs into a river (the Río Azul) which can be followed downstream in an approximately northerly direction, to a point where it meets another river (the Engaño) flowing from the north east.

(iv) The course of the Engaño can be traced in a north-easterly direction towards what the Argentine argument contends is the source of the Encuentro.

(v) It does not matter that the Report and the Award make no reference to the Arroyo Matreras, the Río Azul or the Río Engaño.

(vi) At the point where the Engaño bends round the north-eastern bluff of the Cerro Virgen, it passes within 1300 metres of the sources of the so-called "Encuentro". Therefore, a line may be drawn between the Engaño and the Encuentro at this point. It does not matter that this line is not a hydrographic line nor the line of a water-parting and was not contemplated or provided for in the 1902 Report and Award.

(vii) This so-called River Encuentro is the western branch of a river which flows into the Palena at

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Post 16, and may therefore be followed from its source to its terminus and thus provide the final link in the line from Post 16 to Post 17.

4. Of course, when in its conclusions and submissions the Argentine Memorial proposes a specific line, it welds these individual elements together into a line described in continuous terms from Post 16 to Post 17. But the fact that the Argentine Government does this should not be allowed to obscure the dominant characteristic of the line so composed - namely, that it cannot be justified as a continuous whole from north to south by reference to the terms of the 1902 Award and Report; and that, at best, it is possible to do no more than show a literal relation between only some disconnected elements in the line and the terms of the 1902 Award and Report, and even that can be done only on the basis that the matter is approached in the order set out above. This order is not an arbitrary one put forward by the Government of Chile for purposes of argument. It echoes closely the order in which the Argentine Government itself identifies the features referred to in the 1902 Award and Report (See p. 73 of the Argentine Memorial) - an order which, it may be assumed, was not haphazardly adopted by the Argentine Government.

B. Two basic criticisms of the Argentine line

(1) Emphasis on the Cerro Virgen is wrong

5. The Government of Chile contends that this mode of approach of the Argentine Government is wrong. In the first place - as will be more fully argued in Part Five below - it is wrong as a matter of law. Clearly, when one is faced by a problem of error in a description of a boundary line, it is impossible to attribute equal status to every element in the description. It is necessary to identify the erroneous elements, assess the role which they were intended to play and dispose of them accordingly. In determining which are the elements affected by error it is not sufficient to say that named features which can be identified must, ipso facto, be retained as part of the line. This would be to disregard the fact (true in the present case) that it is the attempt to join two named and identifiable but unconnected geographical features which constitutes the error. Accordingly, the task of interpretation (as opposed to reconstruction) unavoidably involves weighing which of the named features is an essential element in the description.

6. In the present case, for the reasons set out in the Chilean Memorial, the governing features of the

line between Posts 16 and 17 are that it involves dividing the upper and lower basins of the Palena at a fixed point by a river line which leads directly to a high mountain and thence by the local waterparting to the next fixed point. Moreover, as both Parties are agreed, that river line must embrace the whole course of the River Encuentro from its mouth to its source. The reference in the description of the boundary to a named point such as the Cerro Virgen must be read against this general conception; and if a line drawn according to the general principle and following the course of the named river does not run through the Cerro Virgen, the reference to that mountain must be treated as subordinate and must, accordingly, be disregarded.

(2) <u>The Argentine line does not proceed from North to South</u>

7. A second general comment upon the Argentine line is that the Argentine Government has been obliged, in order to justify its position, to adopt an approach to the definition of the boundary in this sector which is striking by reason of its manifest lack of logical order and absence of inherent cohesion. The Argentinian description of the boundary in the sector between Posts 16 and 17 is in marked contrast with the description of the boundary employed in the 1902 Award

not only in relation to every other sector of the boundary but even in relation to the sector presently in dispute. The Report and the Award approach the definition of the boundary line in terms of describing a continuous unbroken line moving from north to south, one named section leading to the next named section and so on; without interruption. Yet in the section between Posts 16 and 17 the Argentine case rests on tracing not a continuous line, but one that begins, so to speak, in the middle of the sector, at the Cerro Virgen, goes south to Post 17, and is left there; while the northern part of the line is traced partly by tracking the line northwards from the Cerro Virgen along a stream which has its source on the western slopes of the mountain; partly by projecting the line of the Encuentro southwards up a minor confluent to a point where in its turn it is joined by an even smaller stream, tracing this stream back to its source, moving from the source over the hill behind it to a river, the Engaño, never mentioned in the 1902 Award, and then following that river downstream to its junction with a river of which the stream flowing from the Cerro Virgen is a tributary. The whole process is patently artificial and out of keeping with the tenor of the 1902 Award.

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C. Particular criticisms of the Argentine line

8. In the submission of the Government of Chile, these general reasons would alone suffice to justify rejection of the Argentinian contention. But there are, in fact, a number of particular reasons which individually serve to deprive the Argentine propositions of any force. These reasons may be considered under three heads:

(1) Misidentification of the upper course of the Encuentro;

(2) Inability to justify the Argentine line in terms of the Award; and

(3) Additional geographical difficulties.

(1) Misidentification of the upper course of the Encuentro

9. While, as will presently be seen, the Argentine Government is in certain important respects prepared to depart from the literal interpretation of the relevant words of the Award, it does not go so far as to deny the importance of the reference in the Award to the course of the River Encuentro. Indeed, at p.66 of the Argentine Memorial the observation is made that "...above all because of the outstanding role assigned to it in the delimitation of the international frontier, the River Encuentro is of great interest and calls for a detailed study of all its characteristics." As is

the case with the contentions of the Chilean Government, the contentions of the Argentine Government depend upon establishing the validity of its view of the true course of the River Encuentro.

10. Both Parties are agreed that the river which flows into the Palena opposite Post 16 is the river discovered by Dr. Steffen in 1894 and that it is called the Encuentro. They are agreed also that the lower stretch of this river, below the junction of the major and the minor channels (to use the terminology of the Chilean Memorial) is, and has at all material times since 1902 been, part of the boundary running between Posts 16 and 17. They are divided upon the identification of the upper course of this river.

11. The Argentine Memorial contends that the upper course of the Encuentro consists of what in the Chilean Memorial is called "the minor channel" and is named in a number of maps in part as a section of the Arroyo Lopez and in part, higher up, as a section of the Arroyo Mallines.

<u>The relevant factors</u>

12. The Parties do not appear to be seriously at issue as to the factors to be taken into consideration in determining which of the two channels is to be treated as being the proper parent of the lower sector of the Encuentro. They differ primarily in

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their statement of the factors and in their evidence of the material facts.

13. The factors upon which the Argentine Government relies as establishing that the minor channel is the Encuentro appear to be the following:

(i) The valley of the minor channel is "broad and open" and "the river bed is well defined" (Arg.Mem.,p.66)

(ii) "As can be seen from the Geomorphological Map of Palena (Map No. A28) the River Encuentro forms a clear-cut morphological feature from its headwaters to the north of the Portezuelo de las Raices to its final reach which starts some 3 km. from its mouth where it has cut into bedrock in a narrow gorge with rapids." (Arg.Mem., pp. 66-67)

(iii) The major channel is not the Encuentro, for it is principally fed by melting ice and snow, its volume varies from season to season and no valid deductions may be made from its volume at any given time in the year. (Arg.Mem., p.69)

14. The Argentine Memorial also contains a number of statements about the origin and structure of the minor channel which though not in terms deployed as arguments in favour of its being the Encuentro nevertheless appear to have been treated as having some relevance.

15. The factors to which the Chilean Government referred in its own Memorial were four in number: (i) the length and size of the channel; (ii) the volume of water therein; (iii) the comparison of alluvial deposits; and (iv) the physical characteristics of the valley in which the channel flowed. In addition, of course, the Government of Chile drew attention to the importance of the conduct of the local authorities and residents in treating the one channel or the other as constituting the international boundary.

16. Since the filing of the Memorials, the Government of Chile has obtained the expert advice of Dr. R.P.Beckinsale, a Senior Lecturer in Geography in the University of Oxford. Dr. Beckinsale is a specialist in the study of rivers and river systems. He has visited the California Valley and has carried out scientific observations and measurenents on both the major and minor channels. De. Beckinsale's account of his investigations and condlusions is set out in full in the form of a report annexed to this Counter-Memorial (Annex No.40). From this, it will be seen that Dr. Beckinsale's investigations have confirmed the views advanced in the Chilean Memorial.

17. In the pages at which he deals with the relative significance of the major channel (the Encuentro) and the minor channel (the Arroyo Mallines

Lopez) Dr. Beckinsale makes the following points:

- The Encuentro rises high up in the snow fields at an altitude of 2100 m, in contrast with the minor channel, which originates in certain "seepages" on the summit of the upper terrace on the western slopes of the Cordon de los Morros at an altitude of about 730 to 750 m.

- scientifically the Encuentro is by far the oldest major river course in this drainage basin, and is certainly older than the minor channel.

- the Encuentro carries about twice as much water as does the minor channel.

- the gradient at which the Encuentro descends is less than that of the minor channel. The minor channel thus falls into the Encuentro and on this basis can properly be regarded as a tributary of it.

- analysis establishes that the bed-load (i.e. the bed of the river resting on the solid bed rock) is predominantly and in parts almost entirely derived from the drainage of the Encuentro.

- the major channel is the only river in this drainage basin that rises at a main watershed.

- the basin of the major channel is the longest and the largest in the drainage system of California Norte.

18. In addition, Dr. Beckinsale's investigations indicate that that explanation given in the Argentine

Memorial as to the "source" of the minor channel is wrong. The Argentine Memorial (in this respect following the map of the Mixed Boundary Commission states that the minor channel originates in certain springs which give rise to a small stream on the northern slopes of the Portezuelo de las Raices. Dr. Beckinsale explains that the source of the minor channel is in fact not a spring but numerous seepages occasioned by surface water which soaks through the coarse debris that has tumbled down the mountain side and rests at the bottom of the western slopes of the Cordon de los Morros above the Portezuelo de las Raices. The water seeps downhill underground until it is held up by more impermeable clayey deposits and accumulates as a long band of seepages. Dr. Beckinsale's evidence upon this point - and his statement that there are several such seepages in the Portezuelo de las Raices and on the valley side to the west of the line of the Arroyo Lopez/Arroyo Mallines - accords fully with the details given in the report of 4 February 1966 given by Major Rushworth to the Head of the Field Mission and in which he questioned the correctness of inserting on the outline map (the stream indicated by the Argentine Government as the source of the minor channel.

19. It ought also to be observed that the implication throughout the Argentine Memorial that the

lower section of the Encuentro, below the junction of the major and minor channels, is a direct continuation of the minor channel cannot be justified by reference to a large-scale map. Two maps of the confluence of the major and minor channels exist. See Map CH(C-M)6 and map referred to in Dr. Beckinsale's Report (CH(C-M)7). These show clearly that the angle at which the minor channel joins the lower section of the Encuentro is greater than the angle between the major channel and the lower section. In other words, the geographical continuity between the major channel and the lower section, and the tributary relationship between the minor channel and the lower section, to which Dr. Beckinsale refers, can be visually confirmed.

20. In short, the scientific evidence now available to support the contentions in the Chilean Memorial shows

(a) negatively, that the minor channel is indeed the lesser channel and is no more than a tributary of the major channel, and

(b) positively, that the major channel is not merely more significant as a river than the minor channel, but that it can properly be regarded as continuous with the lower stretch of the Encuentro and as showing its characteristics and name.

(2) Inability to justify the Argentine line in terms of the Award

21. It is, secondly, impossible to justify the proposed Argentine line by reference to the terms or the principles of the 1902 Award.

(a) Unjustifiable introduction of (i) alternate land and river elements and (ii) four additional river elements

22. The proposal that the line in its progress southwards should, after reaching the source of an insignificant feeder-stream of the minor channel then cross land (i.e. over the Portezuelo de las Raices) to the Engaño River, follow the Engaño River to the point at which it is joined by the River Azul, follow the course of the Azul upstream to the point at which it is joined by the Arroyo Matreras and then follow first the Matreras and then one of its tributaries to a source on the western slope of the Cerro Virgen involves significant departures from the literal text of the Award.

23. The Report speaks of the boundary following the course of the River Encuentro along its western branch, to its source on the western slopes of the Cerro Virgen. Literally interpreted this means that there must be a direct river connection between Post 16 and the Cerro Virgen and that that river must

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be the River Encuentro and none other.

24. Yet, the Argentine proposal involves (i) interrupting the continuity of the river line with a line across land and (ii) pursuing the course not of one river only, the Encuentro, but of four additional watercourses, the Engaño, the Azul, the Matreras and a tributary stream of the Matreras. The literal inconsistency of this proposal with the terms of the Report and the Award is so obvious as to require no further elaboration.

25. Nonetheless, it is perhaps worth putting what is basically the same point in a slightly different way. The Report and the Award clearly contemplate that the River Encuentro will lead directly to and end on a high watershed - the same watershed, moreover, as leads to the next fixed point. This surely must exclude the adoption of any interpretation which involves placing the source of the Encuentro on anything other than a high watershed or one not directly connected to the next fixed point. Yet the interpretation proposed by the Argentine Memorial is defective in both respects. The source of the river which the Argentine calls the Encuentro is on the Portezuelo de las Raices - which can scarcely be called a watershed, and is certainly not a high one. Nor is it in any case directly connected to Post 17.

Again, the requirement of continuity between the named hydrographic line (the Encuentro), the watershed and Post 17 is completely disregarded in the arbitrary alternation of river and land sectors adopted in the Argentine Memorial.

26. Again, it may be observed that even in the use which the Argentine Government makes of the various hydrographic lines which it invokes - the minor channel the Salto/Tigre and the Azul and its tributaries, there is no consistency. The Report and the Award spoke of following the Encuentro to its source. This means following the hydrographic line upstream. The Argentine line does this only in part. It goes up the minor channel, but down the Salto/Tigre until it starts going up again, this time along the Azul and its tributaries.

(b) Abandonment of literal reliance upon "the western branch"

27. Furthermore, the Argentine proposal abandons any meaningful reliance upon the reference in the Award to "the western branch" of the Encuentro. At pp.93 and 211 the Argentine Memorial refers to the western branch of the River Encuentro in terms which suggest that the minor channel represents "the western branch" referred to in the Report. Yet at pp. 243-245 the Argentine Memorial identifies the stream which

rises on the western slopes of the Cerro Virgen as being the "western branch" of the Encuentro. This is, in effect, an attempt to use the reference to "the western branch" twice over - once to identify the minor channel as the Encuentro and once to maintain the possibility of the literal application of the reference to the river which has its source on the western slope of the Cerro Virgen. This liberality in the application of the concept of "the western branch" does nothing but destroy any meaningful relevance which it may have had.

28. In fact, the Government of Chile does not disagree with the Argentine rejection of the reference to "the western branch" - though the reasons for which each Party reaches this conclusion are quite dissimilar. As suggested in the Chilean Memorial, the reference in the 1902 Report to "the western branch" of the River Encuentro is a reflection of the error into which the Court fell when seeking to describe, in terms of the maps before it, the line upon which it had decided. There is, therefore, no need to regard it as an essential element in the description. The Chilean Government merely takes the present occasion of pointing out that if the Government of Argentina insists on the literal importance of the reference to the Cerro Virgen, it ought no less to insist on the

literal importance of the reference to the "western branch". But by disposing of this latter reference in the way it does, the Government of Argentina contributes yet further to the destruction of the integrity of its literal approach to the interpretation of the Award, and, in so doing, eliminates the slender remaining justification for insistence on the Cerro Virgen.

29. There is, indeed, a further difficulty about adherence to the concept of "the western branch" at least as applied by the Argentine Memorial for the purpose of justifying the selection of the Rió Azul and the Arroyo Matreras as an element in the line of the boundary. The exact phrase as used in the 1902 Report, it will be recalled, is, "the Encuentro along the course of its western branch to its source on the western slopes of the Cerro Virgen". In fact, however, the Rió Azul (which is the river along whose line, as the "western branch" of what might have been thought to be the Encuentro, the boundary is alleged to run) does not have its source on the western slopes of the Cerro Virgen, but in a valley further to the south and west. The watercourse upon which the Argentine Memorial relies to link the Rió Azul to the western slopes is a tributary of a tributary of the Azul.

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(c) Arbitrary division of subordinate waterbasins

30. The Argentine line may further be criticised on the ground that it divides in an entirely arbitrary manner the basins of both the Encuentro and the Engano Rivers. The Chilean Memorial suggested that the 1902 Award followed the principle that the line of the boundary did not cut river basins save in those cases where it was actually necessary to divide the upper from the lower basin of a river flowing transversely across the main north-south line of the cordillera; and that pains were taken not to cut subordinate river basins. Yet the Argentine proposal involves a clear and uncalled for departure from this principle.

(3) Additional geographical difficulties

31. There are in addition four other factors which militate against the acceptance of the Argentine contention. These may be described as "geographical", in the sense that their force derives not from the words of the Report and the Award but from the very facts of the situation.

(a) Division of individual landholdings

32. First, the proposed Argentine line involves the division of no less than four out of the twenty-one plots in the disputed area: Plot 6, occupied by Simon Lopez; Plot 7, occupied by Nolfa Carrasco; Plot 8, occupied by Dionisio Videla; and Plot 18

belonging to Felix Galilea.[1] The first two plots lie on both sides of the minor channel and the last lies on both sides of the section of the Engaño used in the Argentine proposal as part of the line. As to the third, notwithstanding the argument advanced in the Argentine Memorandum on Land Use, to the effect that the rights of Videla depend upon an Argentine grant which stipulates that the international frontier is the western boundary of the plot, the fact remains that Dionisio Videla as successor to his father Tomas Videla, is in occupation of a plot, under the authority of the Chilean Government and accepted by his neighbours, whose bounds exceed those indicated by the Argentine Government and which would therefore be bisected if the Argentine proposal were implemented.

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1. These Plot numbers refer to the numbers in circles which have been added to each of the 21 plots in the disputed area which fall on the Argentinian side of the line drawn according to the Argentinian contention. These serial numbers run in an approximately north to south direction along the minor channel, up the Engaño valley and, as regards the last three, along the Tigre; and are intended solely for ease of reference. They have been superimposed on each of the Plots as they appear on a revised and expanded version of Doc.20 filed with the Chilean Memorial and now filed with the present Counter-Memorial as Map CH (C-M) 1.

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33. Moreover, the adoption of the Argentine line will mean that at least two Chilean settlers who each have two plots in the area will find that one plot is in Chilean territory and another is in Argentinian territory. Thus Alfredo Foitzick, who occupies Plot 14 (104-53), on the Argentine side of the proposed line, also owns a plot (103-28) on the west bank of the lower section of the Encuentro, in undoubtedly Chilean territory. Similarly, German Monsalve who occupies Plot 21, which would fall on the Argentine side of the proposed Argentine line, holds a plot on the Chilean side of that line on both sides of the higher reaches of the Azul (104-50).

(b) The minor channel has not been treated as the international boundary.

34. Secondly, although fuller consideration will be given in Part II below, which is concerned with the fulfilment of the Award, to the manner in which the Parties and the residents of the disputed area have interpreted the Award, it is pertinent to point out here that the evidence in this connection shows clearly that

(i) the Chilean Government has not treated the minor channel as the boundary, but has so treated the major channel;

(ii) the local residents have done the same thing. In particular they have developed those twenty one

landholdings, out of the twenty six landholdings in the California Valley, which lie on the Argentine side of the line of the Argentine contention; and yet have for all practical purposes regarded themselves as being in Chile;

(iii) the Argentine Government has also treated the major channel, and not the minor channel, as the boundary.

35. There is one episode which can suitably be mentioned here because it brings out with such striking clarity the way in which the major channel was treated even by the Argentinian authorities as constituting the international boundary. In 1926/1927 the Argentine authorities closed the frontier in this region and prohibited Chilean transit across it. If, as the Argentine Government now contends, the proper line of the boundary was the minor channel, then the residents east of the minor channel would have been in Argentine territory and should therefore have been free to pass and repass to and from the rest of Argentina. But in fact this was not the case. The Argentine authorities drew no distinction between those who lived east of the minor channel and those who lived west of it. All were treated as being in Chile.

36. Evidence of this situation is to be found in

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the following extracts from affidavits sworn by people who lived in the area. Simon Lopez Delgado states (C-M 223):

> "...I clearly remember that the prohibition from crossing into Argentine territory affected both the settlers in the valley of Rió Palena and the settlers in California, because my father and also Fortunato Saez and Pablo Carrillo Vega lived there and were prohibited from crossing into Argentine territory because, according to the police, that area was Chilean territory..."

Lucas Lopez (the father of the deponent), Fortunato Saez and Pablo Carrillo all lived east of the minor channel in what Argentina now claims as Argentine territory.

37. Two other residents of the area living there at the time have both stated that the Argentinian authorities at that time treated the major channel as the Encuentro:

Transito Diaz Carrasco has said:

> "On that occasion the police told us that the boundary between the two countries was the River Encuentro, which descends from the mountains east of the houses belonging to settler Vicente Contreras (Plot 1) and empties in the Palena" (i.e. the major channel) (C-M 225)

José Casanova Vilches has said:

> "In those days the police expressed that the boundary between Chile and Argentina was the River Encuentro, indicating as such the river of that name at the present day, that is to say, the river flowing from the high range of mountains west (sic) of the houses of the present settlers Robert Cid (Plot 1) and Vicente Contreras (Plot 2), and which after joining the Rivulet Lopez empties into the River Palena.

"He also remembers that the police respected this boundary and did not patrol Chilean territory, and if at any time they crossed to the west of the River Encuentro they did so as visitors, and always admitted so. He does not remember having ever seen policemen or gendarmes in the area from River Tigre's bend to its confluence with the River Azul and the Rivulet Matreras". (C-M 226).

(c) Blocking of natural transit routes in the California Valley

38. Again, Dr. Beckinsale's affidavit provides in clear terms evidence that adoption of the Argentine line would involve cutting the natural transit routes which connect western California (the valley of the stretch of the Engaño employed as part of the Argentine line) to Palena, the nearest significant populated centre. Equally, the Argentine line would cut communications between Southern California and Palena. Dr. Beckinsale points out that the River Salto has cut a deep and impassable gorge into the exit from the valley through which it runs before being joined by the Rio Azul and that in consequence the inhabitants of western California use tracks leading north-eastwards to and over the Portezuelo de las Raices as their route to North California and Palena.

(d) Interference with the natural physical unity of California

39. Finally, it should be pointed out (on the basis of Dr. Beckinsale's report) that the adoption

of the line of the Argentine proposal would involve interfering with the natural physical unity of the California area. This unity stems from the fact that in the post-glacial period the whole of California formed a single vast lake which at one time reached a maximum height of 750 m. It was fed from the Lago General Paz, mainly through the Hondo Valley. This lake was the origin of thick glacio-lacustrine deposits over the whole of California. When the lake disappeared a new drainage system began to form upon these deposits and the terraces which can still be seen upon the valley sides are the remains of those deposits. The terraces do not have their origin in glacial action (as is contended in the Argentine Memorial at p. 68).

40. Apart from this inherent physical unity - which is reflected in similarity of relief, land-forms, soil and climate - California stands as an identifiable unit by contrast with the open areas of Argentine territory to the west of the Cordon de las Virgenes. There is a distinct element of artificiality in dividing this area in the manner proposed in the Argentine Memorial.

CHAPTER II. THE LINE ACCORDING TO THE CHILEAN SUBMISSION

41. In the previous Chapter, the Government of Chile has given reasons why, in its submission, the interpretation of the definition of the boundary advanced by the Government of Argentina is incorrect. The Government of Chile believes that it may now be helpful to assess the impact of the Argentine Memorial upon the precise submissions made by the Government of Chile in Chapters II and III of Part Two of the Chilean Memorial. In so doing, the Government of Chile will follow broadly the outline of its case as set out in the Memorial.

A. THE PRINCIPAL PART OF THE DEFINITION - "THE ENCUENTRO" (Ch.Mem. p.100)

(1) Identifying the Encuentro at its junction with the Palena (Ch.Mem. p.100)

42. It is now clear that both Parties are in agreement that the Encuentro is the river which joins the southern bank of the Palena opposite Post 16. (see Argentine Memorial, paragraph 56, at p.53)

43. The point is of overriding importance. It means, first, that the boundary must follow the true course of the river which flows into the Palena opposite Post 16. It means also that the boundary must not follow the waters of any other river. The

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only river to which the Report and the Award refer as being involved in the boundary between Posts 16 and 17 is the Encuentro. Accordingly, the inclusion in the boundary of the waters of any river can only be justified if they can be shown to be part of the Encuentro.

44. It follows from this that the waters of other rivers cannot form part of the relevant sector of the boundary. In particular, it is not permissible to introduce the waters of the River Salto/Engaño in the section from the bend of that river round the north eastern bluff of the Cerro Virgen to the point at which it is joined from the south by the Río Azul. Nor is it permissible to introduce a reference to any other watercourse by reason of the fact that it can be traced to the Western slopes of the Cerro Virgen. Neither the Salto/Engaño nor the Azul and its tributaries have any connection with the river which joins the Palena opposite Post 16 - and for that reason these other rivers and streams must be excluded as forming any part of the relevant sector.[1]

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1. In any event, as already indicated, the Río Azul does not have its source on the western slopes of the Cerro Virgen. The river which satisfied this description is a tributary of the Arroyo Matreras itself, a tributary of the Azul.

(2) The lower section of the Encuentro (Ch.Mem. p.101) Part One

45. There is now clear agreement between the Parties that the lower section of the Encuentro as described in paragraph 14 on page 101 of the Chilean Memorial is part of the Encuentro. This is not so, it may be added, because any decision of the Mixed Boundary Commission made it so, but because geographically it must be so.

(3) The difference between the Parties (Ch.Mem.p.101)

46. The Argentine Memorial confirms[1] the statement made in paragraph 16 of the Chilean Memorial - that the differences between the Parties as to the identification of the Encuentro begin at the confluence of what, in the Chilean Memorial, are called "the major channel" and "the minor channel". The Chilean Memorial contends that the River Encuentro flows from the east, and that the channel from the south is properly called the Arroyo Lopez. The Argentine Memorial contends that the southern channel is the River Encuentro and that the proper name for the eastern or major channel is the Falso Engaño.

(4) The grounds of the Chilean contention (Ch.Mem.p.103)

47. The Chilean Memorial set out three positive

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1 See Arg.Mem., p.66, paragraph 69 and following, where a description is given of the so-called "River System of the River Encuentro".

grounds on which the Chilean Government contended that the major channel represented the Encuentro.

(a) <u>The intentions of Sir Thomas Holdich</u>(Ch.Mem.p.103)

48. The Chilean Memorial contended (see pp.103-108, §§ 19-27) that Sir Thomas Holdich was seeking in the sector between Posts 16 and 17 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.

49. The Argentine Memorial, by contrast, emphasises the importance of the literal application of the words of the Award[1] and shows a general unconcern with the preparatory work of the Report and the Award.[2] Nevertheless, the Argentine Memorial does not go so far as to deny the relevance of the intentions of the draftsmen of the Report and the Award. Indeed, on a number of occasions the Argentine Memorial itself acknowledged that it is, in effect, impossible to disregard the intention underlying the words used in describing the boundary.

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1 See Arg. Mem., p.204 paragraph 225 - p.211, paragraph 232.

2 Apart from one reference(at p.25) to the report of Sir Thomas Holdich, which is called in the Ch.Mem. "Holdich's "Conditions other than geographical" (Annex No.21 to Ch. Mem.), the Arg.Mem. makes no reference to the preparatory work undertaken in connection with the Report and Award, which is essential to an understanding of the intention underlying them.

Thus, at p.25 paragraph 27, the Argentine Memorial actually refers to the passage in Sir Thomas Holdich's Report in which he states that the boundary of compromise "should combine as far as possible the conditions of an elevated watershed with geographical continuity". Further, at p.54, the Argentine Memorial, in contending that the Court must base its enquiry fairly and squarely upon the 1902 Award, said:

> "... it will be able to find within that Award and the documents which form part of it, taken together with the surrounding circumstances at the time and the subsequent behavious of the Parties, a complete solution for the question which is put to this Court." (Underlining added.)

This statement, and especially the underlined phrase, must mean, if it means anything, that the Court should consider what was the intention of the 1902 Tribunal. Again, at p. 246, the Argentine Memorial, while seeking to limit to three (the Report, the Award and the Map) the number of documents to be examined, was forced, almost by the logic of the situation, to use words (those underlined in the quotation which follows) that reflect the inevitability of recourse to the intention underlying the decision:

> "It is clear from those documents that in this part of the boundary the Arbitrator was seeking to create a boundary line which followed a water-course continuously from Boundary Post 16 to Cerro de la Virgen.

50. Moreover, in connection with the substance

of Sir Thomas' intentions, it is these same passages in the Argentine Memorial (particularly those at pp. 25 and 246) which confirm what the Chilean Government has throughout its Memorial contended - that his intention was to follow from the confluence of the Rivers Encuentro and Palena a continuous waterline to a point at which a local waterparting to the next fixed point (Post 17) could be identified. The rest of the Argentine Memorial in effect denies this; and in thus contradicting itself merely weakens its structure yet further.

51. Nor does there appear to be anything in the Argentine Memorial to suggest that the statements at pp. 104-106 paragraphs 22-24, of the Chilean Memorial do not correctly set out the considerations from which deductions may be made about the intentions of Sir Thomas. The only new fact of interest in this connection revealed in the Argentine Memorial is the existence of the Lange Map (Map A10); and this does nothing except establish with certainty, as emanating from an Argentinian source, the origin of the error which has given rise to the present arbitration.

(b) The physical characteristics of the Encuentro (Ch.Mem., p.108).

52. The Chilean Memorial contended, in the second place, 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 together be regarded as constituting the Encuentro, as against a combination of the lower section and the minor channel (Ch.Mem., p. 108, paragraph 28).

53. In this connection the Chilean Memorial referred to four relevant factors: (i) the greater length and size of the major channel; (ii) the fact that at the point of junction the major channel discharges almost twice as much water as the minor channel; (iii) the similarity of alluvial deposit between the major channel and the lower section; and (iv) the similarity of the canyon characteristic of the major channel and the lower section. Such details as the Argentine Memorial contains of the major channel and the minor channel are to be found at pp. 69 and 66 respectively. As already indicated, in the submission of the Chilean Government nothing in the Argentine statements of fact about the two channels in any way diminishes the force of the four factors advanced by the Government of Chile as showing that the major channel is the Encuentro.

(i) Comparative length and size

54. The Argentine Memorial makes no reference to

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the length of the major channel. Indeed, as in the case of the description of the minor channel, the principal emphasis is not upon the river itself, but upon the river valley. The Argentine Memorial states that the major channel has "a 'V' shaped cross-profile markedly different from the 'U' shape" of the minor channel. Be this so, it is of little relevance to the relative magnitudes of the two channels. Indeed, if anything, the 'V' characteristic of the cross-profile of the major channel resembling as it does the cross-profile of the lower section of the Encuentro suggests a greater degree of continuity and closeness of identity between the major channel and the lower section than between the minor channel and the lower section. Indeed the continuity of the major channel and the lower section of the Encuentro is strikingly brought out in the relevant aerial photograph. Moreover, a V-shaped valley makes for a much better boundary than does a U-shaped one.

55. The Argentine Memorial (at p.66, paragraph 69) refers to the length of "the main south to north valley of the River Encuentro" as being 17.5 km. This figure, it should be noted, refers to the length of the valley, and not the length of the minor channel itself. The latter, as indicated in the Chilean Memorial, p.109, is 9 km. (from the source of the Arroyo Mallines to

its junction with the Encuentro), in contrast with the 20 km. of the major channel from its source to the confluence of the minor channel.

56. The Government of Chile notes that its assessment of the insignificance of part of the minor stream is largely in accord with the findings of the Field Mission in February 1966.

57. Mention should also be made of the reference in the Argentine Memorial to the morphological features of the minor channel (Arg.Mem., p.66, paragraph 69):

> "As can be seen from the Geomorphological Map of Palena (Map No. A28) the River Encuentro (minor channel) forms a clear-cut morphological feature from its headwaters to the north of the Portezuelo de las Raices to its final reach which starts some 3 km. from its mouth where it has cut into bedrock in a narrow gorge with rapids."

58. The only comment which the Chilean Government would offer upon the introduction of a reference to the morphology of the region is that it can scarcely have much bearing upon the identification as "the River Encuentro" of one channel or the other. But if it is relevant, then the point to note is the similarity of features between the final 3 km. of the lower section just above the junction of the river with the Palena and the upper part of the major channel. This also appears very clearly on the aerial photograph to which reference has already been made.

59. It is also pertinent in this connection to refer to the following statement made in the speech of counsel for the Government of Argentine (Mr. Bathurst) on 30 December 1965:

> "...the representation of the River Falso Engaño (the major channel) immediately above the confluence with the River Encuentro (minor channel) on the Mixed Commission's map (entitled Rio Encuentro and being Sheet No. VII-3, annexed as Map No. A.31) now requires modification, for above the confluence the River Falso Engaño is subject to short-term changes of course, width of bed and volume. A recent landslide has diverted the course of the river so that the Mixed Commission's map sheet no longer accurately represents its course. The River Falso Engaño at its confluence with the River Encuentro is more than 5 metres wide and, like the Encuentro, should be represented on the map by a double blue line..."

The Government of Chile cannot accept the suggestion that the landslide has had any effect upon the width or volume of the major channel. The acknowledgment by the Government of Argentina that the major channel should at its point of confluence with the minor channel have been marked by a double blue line on the Mixed Boundary Commission map is an admission that in a major, indeed a crucial, respect this map was inaccurate. Once the Government of Argentina recognises (as it has now done) that at the point of confluence the major channel is a river of no less significance than the minor channel, its task of establishing that the minor channel is the Encuentro,

i.e. the upper continuation of that river rather than a tributary of it, becomes even more difficult.

(ii) Comparative discharges of water

60. The only point which the Argentine Memorial makes in connection with the flow of the two channels is to contrast the regularity of the minor channel, which (so it alleges) originates in springs (see Arg. Mem., p. 68), with the seasonal variations in the major channel, which is fed by melting ice and snow. (See Arg. Mem., p. 69) But this contrast does not meet the Chilean point that the major channel discharges at the point of junction almost twice as much water as the minor channel. (See Ch. Mem., p. 110)[1] It is no refutation of this point to say, as does the Argentine Memorial at p. 69, of the major channel: "...its volume varies from season to season, and no valid deductions may be made from its volume at any given time of the year". Dr. Beckinsale, in his report, makes the following important comment on this passage in the Argentine Memorial:

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1 Further volumetric measurements of the major and minor channels were made in April 1966. The results are set out in Annex 41. The major channel is called the "River Encuentro" upstream of confluence, and the minor channel is called the "Arroyo Lopez". It can readily be seen that even at that late stage in the Chilean autumn the volume of the major channel is on an average twice that of the minor channel

"But, in fact, this type of river régime is known internationally as nivo-pluvial and is common in all mountains that rise above the snow-line. The hydrometric measurements made fall within the realm of probability of a nivo-pluvial régime but such measurements are incapable of measuring floods beyond bank-full stage and these must occur often on the lower Río Encuentro at the measuring station selected. I visited the junction during a dry autumn when snow-melt was negligible and simple measurements of depth and width gave a volumetric ratio of 65 : 35 in favour of the major channel."

By contrast, the Argentinian Memorial does not say that the Argentine authorites have carried out any measurements of the flow of the two streams.

(iii) Similarity of alluvial deposits

61. There is nothing in the Argentine Memorial - save the reference to the morphology of the area - which has any bearing on this point; and beyond referring back to the comment made in paragraph 17 above on the similarity of morphology of the lowest section of the Encuentro and upper parts of the major channel, nothing more need be said on this point.

(iv) Similarity of the canyon charateristic of the lower section of the Encuentro and the major channel

62. Again, there is nothing but confirmation in the Argentine Memorial for the statement in the Chilean Memorial of the similarity of character between the lower section of the Encuentro and the

major channel. So no more need be said about that here - except to observe once more how clearly this feature is brought out in the aerial photographs.

(c) Treatment of the major channel as the boundary

(CH. Mem., p. 111)

63. This aspect of the case is so closely bound up with the question of the "fulfilment" of the Award that it will be best to reserve consideration of it to the next Part. Suffice it to say at this point that the Argentine Government did not seek in its Memorial to justify the boundary for which it contends by specific consideration of the treatment accorded by either the local inhabitants or the Parties to the minor or the major channel as representing the international boundary. Moreover, as has been seen, acceptance of the Argentine "Encuentro" involves drawing a line which places twenty-one Chilean landholdings (out of a total of twenty-six in the California Valley) in Argentine territory, and, moreover, in so doing makes the boundary divide the area of four of them, The few isolated examples of Chilean settlers registering in Argentina births of children born in the disputed area and of Argentinian acts of administration in the disputed area are examined in more detail below.

The Government of Chile submits that nothing said in the Argentine Memorial or Memorandum on Land Use can stand against the trend of the evidence adduced in the Chilean Memorial, or supplemented in the present Counter-Memorial, and pointing so clearly towards the major channel being treated as the true Encuentro.

(5) The "western branch" - a reference without a meaning (CH. Mem., p. 113)

64. Reasons have been given in the Chilean Memorial, pp. 113-115, why the reference in the Report and Award to "the western branch" of the River Encuentro is of no significance. The Argentine Memorial contains nothing which contradicts these reasons. On the contrary, as shown above, there is material in the Argentine Memorial which indicates that the Argentine Government itself considers the reference to "the western branch" to be either quite unimportant or so flexible in meaning as to be worthless as a governing criterion.

(b) The Dependent Part of the Definition (CH. Mem., p. 116)

65. The Chilean Memorial contends (at pp. 116-120) that once the River Encuentro has been identified and traced to its source on the western

slope of the Pico de la Virgen, the tracing of the southwards continuation of the boundary is almost automatic.

66. It is perhaps pertinent to observe in this connection that the Argentine Memorial does not question the existence of a local watershed in the terms set out in the Chilean Memorial. Indeed, quite independently the Argentine Memorial, as a statement of geographical fact, traces the watershed along the range of which the Pico de la Virgen forms part and onwards to Post 17 in terms which warrant quotation at this point:

> "...This lithology and glacial erosion of the high mountains, have produced a striking morphology of steep-sided, sharp-pointed crests and a succession of knife-edged ridges; an aspect that is repeated countless times in the Patagonian Andes. Cerro Herrero, 1,867 m., is prominent in the north, Cerro Central, 2,070 m., in the middle and Cerro Condor, 2,010 m., in the South.
>
> The range forms a watershed between the River Falso Engaño (G4) to the west and minor tributaries of the River Carrenleufu to the east. South of Cerro Condor, the mountain range appears to have its continuation in a peak at 1930 m. (H10) and in Cerro Llano, 1776 m. (H11), but the continuity of the crests is interrupted by the wide deep valley of the River Engaño (H10), the floor of which is over 1,000 m. below the crest of Cerro Condor. The watershed thus changes direction and is displaced to the south-east, along the spur between Lake Guacho (J9) and the Lakes of the Engaño (H11). It descends to an elevation of less than 1150m.
>
> In order to reach Boundary Post 17 from

this elevation along a watershed, it is necessary to follow a circuitous route: at first east to west, over the crest of Cerro Llano, then describing a semi-circle to the west in order to reach a final north-south section descending to Boundary Post 17 on the north shore of Lake General Paz."

67. It is in this connection particularly helpful to examine map AM10 appended to the Argentine Memorandum on Land Use and entitled "Terrain Types". This shows with striking clarity how the boundary may be followed from the source of the major channel in an almost due north-to-south direction along the high ground identified by the hatched pattern, then round the east side of the Engaño Lakes and finally in a westerly direction until just north of Post 17.

PART TWO

THE FULFILMENT OF THE AWARD

CHAPTER I

Part Two

The fulfil-
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THE RELEVANCE OF DEVELOPMENTS SUBSEQUENT TO THE 1902 AWARD

1. The Chilean Memorial devotes some 75 pages to a consideration of the elements relevant to the "fulfilment" of the 1902 Award. It describes the Chilean settlement in California, provides evidence of the Chilean identification of the residents of California, sets out the local activities of the Chilean Government and indicates how, on an intergovernmental level as well, the position adopted in 1913-1914 by both Parties reflected an acceptance of the correctness of the Chilean position. The Chilean Memorial concludes its summary of its contentions regarding the fulfilment of the Award as follows:

> "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." (See Chil.Mem., p.464).

2. The Argentine Memorial, by contrast, contains very little which bears on the question of fulfilment. At pp. 200-201 it suggests two possible meanings of the words. One suggestion is that it refers "simply to the faithful carrying out of an Award by the parties to whom it is addressed"; the other is that it refers to "making complete or supplying what is lacking". The Argentine

Memorial does not specify which of these meanings it adopts.

3. Apart from this reference to "fulfilment" the Argentine Memorial deals with the matter at pp.194-195. It states, first, ".... any evidence that may be addressed by a Party concerning purported acts of administration on the ground must be, to say the least, of doubtful relevance. For there can be no question of any new acquisition of sovereignty by either Party, whether by occupation, prescription or otherwise". Secondly, the Argentine Memorial states:

> "Moreover, there is a further limitation upon the cogency of such evidence of acts on the ground. It is the fact that the activity of Chile in the territory east of the River Encuentro is subsequent to the establishment of the Argentine-Chile Mixed Boundaries Commission, and mostly indeed subsequent to 1955."

The Argentine Memorial then concludes that, therefore, Chilean activity has taken place after the critical date.

4. The Government of Chile does not accept these contentions of the Argentine Memorial. The Government of Chile submits that the reference to 'fulfilment' in the Compromiso must be taken to establish the relevance and importance of the conduct of the Parties subsequent to the Award as a factor affecting the proper interpretation of the Award.

5. The Government of Chile believes that the Government of the Argentine Republic comes much closer to an

acceptable assessment of the relevance of the activities of the Parties in the period after 1902 in the following passage from the speech of Mr. M.E. Bathurst, Q.C., leading counsel for the Argentine Republic, on the second day of the preliminary hearings held 29 to 31 December, 1965. Mr. Bathurst said:

"My Lord, I make no apology for reminding the Court, yet again that what is in issue in this case is not the drawing of a new boundary line, but the proper interpretation and fulfilment of the Award made in 1902. For this purpose, any evidence of land use before 1902 - supposing any use were then made of the land - could conceivably be helpful. Likewise, any evidence of governmental administration, rather than land use in the strict sense, in defined portions of territory in the period immediately following the promulgation of the Award could suggest what the Parties, or possibly a Party, then understood the Award to mean. The law is perfectly clear that in this kind of interpretation issue, a particular government cannot better its case by unilateral activity after a certain 'critical date', and this rule of law cannot be exorcised by accumulating, under the general chapter heading of 'fulfilment', that which the law says is irrelevant. Here the law, after all, does no more than put into formal terms what is also the rule of common sense. It would be contrary to all reason, if one Party to a boundary settlement could by a conscious policy of encroachment, bend the course of an Award boundary line. For when the issue is the course of a boundary line, there can be no question, as there might well be if the issue were, for instance, the meaning of the constitution of a State, of a dynamic of changing interpretation. In a boundary Award, the whole purpose, the whole ethos, and the manifest principal canon of interpretation are all governed by the dominating need for stability and permanence.

"Conversely, of course, it is no doubt true that in some respects observation of local activity may be of some assistance to the Court in placing some of the arguments of a Party in their proper perspective. Thus, evidence on the ground of a very recent

> Policy of expanding settlement into new areas, always tending in the same direction, may suggest to the mind of the Court conscious encroachment rather than routine administration of territory accepted as belonging to the administering authority. The outward appearance of such a recent policy might, for example, take the term of fencing apparently recently erected, possibly fencing of a kind unusual in the locality; or again, new farm houses, possibly of a style or structure unusual in the area." (Transcript of Hearings, Second Day (30 December), revised version, pp. 43-44.)

6. It is noteworthy that the Argentine Government here recognised that "governmental administration ... in the period immediately following the promulgation of the Award could suggest what the Parties, or possibly a Party, then understood the Award to mean". From this it is clear that for some period following the promulgation of the Award, the conduct of the parties can properly be regarded as a factor relevant to the interpretation of the Award. But what is that period? Mr. Bathurst's statement speaks of the period "immediately" following promulgation of the Award. How long is this period of immediacy? In the submission of the Government of Chile, it must mean the period prior to "the critical date". For when the relevant sentence of Mr. Bathurst's speech is read with the sentences which follow, it can be seen that a distinction is being drawn between events before and events after the critical date - the date at which (as he put it) "a particular government cannot better its case by unilateral activity". It would appear that Mr. Bathurst

was equating the period immediately after the Award with the period prior to the critical date. If he was not, it is difficult, if not impossible, to see what date he would select as the termination of the period "immediately" after the Award.

7. The Government of Chile doubts whether at this point it would be helpful to pursue further the question of "the critical date" in this case. But one thing is certain, that the conduct upon which the Government of Chile relies as evidence of the fulfilment of the Award is conduct which developed gradually and continually from 1902 onwards without in any way being spurred or prompted by a consciousness of a difference of opinion existing between the Parties. There is no question in this case of the Chilean Government having pursued "a conscious policy of encroachment". There is, in particular, absolutely no warrant for the statement, made in the Argentine Memorandum on Land Use (at p.52), "that after the Chilean rejection in 1956 of the decisions of the XVth Plenary Meeting in 1955 of the Argentina-Chile Mixed Boundaries Commission, the intervention of the Chilean authorities in respect of the disputed area was particularly increased."

8. In addition, it should be observed that Mr. Bathurst acknowledged that "observation of local activity may be of some assistance to the Court ...". He pointed

out that such evidence could be of assistance in distinguishing between "conscious encroachment" and "routine administration of territory accepted as belonging to the administering authority".

9. In view of these admissions, the Government of Chile doubts whether it is necessary to go further in justifying in law the relevance and admissibility of the evidence which it has produced, and will now supplement, on the question of 'fulfilment'. But to the extent that additional legal argument is thought desirable, it will be found in the statement of the contentions and submissions of the Government of Chile, in Part Five below.

CHAPTER II

THE CONNECTION BETWEEN ARGENTINA AND THE DISPUTED AREA VIEWED IN PERSPECTIVE

10. The Chilean Government is in some difficulty in the present Counter-Memorial in attempting to reply to an Argentinian argument about "fulfilment" which has not yet been fully deployed. Nonetheless, the material which is presented in the Argentine Memorandum on Land Use (hereinafter called "the Argentine Memorandum") suggests, mainly by implication, that the Argentine argument will principally be that the disputed area is and has been in a variety of material respects closer to Argentina than it has to Chile. The elements to which the Argentine Memorandum refers at various points, presumably for the

purpose of establishing this connection, appear to be four in number:

(A) the origin of the inhabitants of the disputed area;

(B) the nationality of the inhabitants;

(C) the physical connection, in terms primarily of comparative ease of communication, between the disputed area and neighbouring Argentine territory; and

(D) the extent of Argentine administrative activity in the disputed area.

The Government of Chile will devote this Chapter to considering the relevance and significance of each of these factors.

A. <u>The origin of the inhabitants of the disputed area.</u>

11. The Argentine Memorandum twice states that the settlers who came to the disputed area after 1920

> "were mostly Chilean men previously living in other places in Argentina who, when they married, whether before their arrival in the area or after, in many cases chose Argentine women as their wives." (See Arg. Mem., pp. 45 and 70.)

12. Now it is no part of the Chilean case to deny that a number of the settlers in the California Valley came there after sojourn in Argentina. Equally, it is part of the Chilean case that all the adult settlers in the California Valley after 1920 were Chilean nationals. The details of the origin of the settlers can be seen in

Part Two

Chapter IV below. But the Chilean Government attaches importance to the movement from Argentina being seen in its proper perspective and, in particular, in the light of two major factors:

(1) the physical difficulty of reaching the disputed area without first transiting Argentina; and

(2) the Argentine pressure upon Chileans in Argentina to repatriate themselves to Chile. This began in the 1920s and appears to have continued intermittently.

13. There is also a third factor which must be borne in mind, namely, that it had for long been Chilean policy to encourage the re-settlement in Chile of expatriate Chileans residing in Argentina.

(1) Physical difficulty of access to the California Valley

14. The dominant consideration affecting the question of physical access to the disputed area is that the line of the boundary dividing Argentina from Chile is such as to exclude, for all practical purposes, the possibility of direct north-south road communication on the western side of South America, south of Puerto Montt. Yet Puerto Montt is itself still a good thousand miles north of the southernmost point of the Chilean mainland. This means that non-aerial access from the rest of Chile to the interior of Chilean territory in the whole of this southern area must be either by water, to a coastal port

at the mouth of a river and then up the river valleys (by no means an easy feat in early days, as the accounts of the nineteenth century explorations show), or by land, across the mountains into the relatively traversable areas of Argentina, and then back on to Chilean territory.

15. So far as settlement in the California Valley is concerned, the consequence of this situation was that unless the settlers came by boat (which, so far as is known, was never the case in this area) they were bound to come via Argentinian territory. This explains why experts such as Butland (referred to in the Argentine Memorandum at p.4) say that "the movement of peoples into these regions was primarily from the east". They could approach the province of Aysen (the colonization of which Butland was discussing) in no other way. In fact, Butland makes the essentially "transit" character of Argentina in relation to the colonisation of Aysen quite clear in the map on p. 76. Although this map shows arrows coming from the east to indicate the direction from which Palena and Lago Verde were settled, it is actually demonstrating settlement by Chileans, as the heading on that map, "Migration Routes from Central Chile to Aysen", clearly shows. Far to the north of Neuquen and Chubut (in Argentina) from which the arrows indicate the flow of migration, there are other arrows pointing from the west, between Bio Bio and Llanquihue,

to show the true origin of the migration.

The same factor also explains why the Argentine Memorandum can quite truthfully identify the immediate provenance of a number of the settlers in the disputed areas as being Argentina. For in some cases, Chileans resided a while in Argentina before moving on. But it does not follow from this that the people who came were genuinely Argentinian in origin, though technically (by reason of accident of birth) they might occasionally be, by Argentinian law, of Argentinian nationality. Nor does it follow that such persons, who settled in Chile after a period of residence in Argentina, were Argentinian or Argentine-oriented. Many Chileans lived in Argentine Patagonia. At one time it was estimated that the population of Chubut was 80% Chilean. Temporary residence there, for longer or shorter periods and for diverse causes, was a common feature.

16. It is in this connection instructive to read of the circumstances in which one family, the Ramirez family, came to live for a while in the Argentine. As can be seen in greater detail in C.M.231, the Ramirez family set out from the Simpson Valley (Chile) in 1918 to return to Villarrica (Chile). They took 400 cows with them and had to pass through Argentina in transit. In Esquel (Argentina) the father suffered an accident and could proceed no further. The cows were sold; sheep were

bought; pasture was hired for a year; and finally the family moved into the area of Palena.

17. Another illustration may be found in the affidavit of Florentina Bahamondes Azocar (C-M. 228) who stated that in 1917 "with my husband we came from Argentina and brought with us our animals, as after residing for several years in that country we decided to settle in Chile."

(2) Argentine pressure for Chilean repatriation

18. The second factor which accounts for Chilean movement from Argentina is of a different character to the first. The years of more intensive Chilean settlement in the California Valley coincide with a period in which there was marked Argentine pressure upon Chileans to return to Chile. Understandably, nothing is said about this in the Argentine Memorial or Memorandum. But that the pressure was there and had a generally unsettling influence on all Chilean settlement in the border lands of Argentina there can be no doubt. Furthermore, the conditions under which Chileans lived in Argentine border areas were generally unfavourable and were of a kind to encourage resettlement in their own country.

19. In referring to the events of this period the Government of Chile is anxious to make it clear that it does so exclusively for the purpose of establishing the background to the movement of Chileans from Argentina to Chile. There is no desire on the part of the Government

of Chile to rake over these matters for their own sake; and it is not without reluctance that the Government of Chile prints some of the illustrative documents. It is the assumption of the Government of Chile that the measures there referred to were taken by the local authorities without the knowledge or approval of the Argentinian central government authorities. On occasion a measure of relief was obtained when representations were made by the Chilean representatives in Buenos Aires to the central government authorities there. Moreover, to some extent even Argentinians were victims of the oppressive conduct in question.

20. Perhaps the most public and cogent reflection of this pressure is to be found in the message sent by the President of Chile to the Congress on 7 January 1930 (Annex No. 3). This sets out the position so fully and clearly that fairly full quotation is warranted:

> "Amongst the great national problems which the Government must face urgently, there is the condition of Chilean citizens settled in the Argentinian Patagonia.
>
> Perhaps because of the adventurous spirit of our race and other reasons which need not be dealt with, during many years a considerable number of our fellow citizens have emigrated to the south of Argentina, in search of better prospects for their future. Recent statistics put the Chilean population of that territory at more than one hundred and fifty thousand people, representing almost eighty per cent of the total number of its inhabitants.
>
> Due to the facilities granted at the beginning

by the Government of that country, when those regions had not the importance for Argentina they acquired in the course of time, our emigrant compatriots settled on the lands nearest the Chilean border, particularly on the territories of Chubut and Rio Negro. Most of the occupiers are in possession of these lands for the last ten, fifteen and twenty years.

The general indifference regarding these territories; the lack of means of communication; the huge distance separating them from the federal Capital and other centres of population, has been undoubtedly, the determining cause of the difficulties which the Government of Argentina has encountered in the administration of these regions, so that the task of our consuls has been very heavy and thankless and because of the innumerable conflicts which often took place between the authorities and the Chilean settlers, the Government has always tried to act with great restraint, in order to avoid harming the good relations with our neighbours.

But it is becoming necessary to face the problem affecting our fellow countrymen, and the Government, in the same friendly manner adopted until today, must contribute with all the means at its disposal to save this situation.

In April of the year 1928, the authorities of Patagonia served notices to leave on more than fifty families in Rio Percy, Lago Futulafqen, Lago Situación, Rio Negro, Río Limay, etc.

It must be stated that these notices were served not to indigent persons but to good families owning valuable property, money, cattle, sheep, etc., and a great deal of working implements and means of transport.

In view of this situation the Ministry of Foreign Affairs, through our Embassy in Buenos Aires, succeeded in stopping the Government of Argentina from putting this measure into effect, at least during the year 1929; but recently our consul in Bariloche has reported that again the Chilean families have been served with notices to leave.

For the second time our Embassy has managed to

stop these evictions, while the Government of Chile finds the means of repatriation of the affected families.

The Ministry of Foreign Affairs aware of the gravity of the situation, had taken the initiative to provide the means of repatriation of the said settlers and, to this effect, ordered our consuls, at the beginning of 1928, to start inscribing the families wishing to return to Chile to colonize lands in the area of Aysen. ..."

21. The above extract serves to show that pressure had already developed by 1928. It is also reflected in a petition sent in December 1928 to the Intendants of Aysen by a number of residents of Palena and the California Valley (C-M. 15). The pressure clearly continued through 1930. The Report of the Ministry for Foreign Affairs for that year states that:

"several notes were sent to the Argentinian Government requesting the delay of the evictions of numerous Chilean settlers against whom eviction was decreed." (Annex No. 4)

22. The generally harsh standard of treatment of Chilean nationals by the Argentine authorities in the frontier regions adjacent to the sector now in dispute is clearly brought out in three further documents of 1930: a despatch dated 7 August 1930 from the Subdelegates of Yelcho (Chile) to the Chilean Consul in Esquel (Argentina) (Annex No. 4A); a report dated 17 September 1930 from the Intendant of Aysen to the Chilean Ministry of the Interior (Annex No. 4B); and a report dated 1 December 1930 from the Deputy Intendant of Aysen to the

Chilean Minister of Foreign Affairs (Annex No. 4C). It would appear that one of the causes[1] of this Argentinian pressure was heavy unemployment in that country - as reported at the time by the Chilean Consul in Esquel (Annex No. 6).

23. There is some evidence that matters may have improved for a while. A consular report of 3 June 1931 Esquel (Annex No. 5) speaks of various local disputes with the Argentine authorities having been satisfactorily settled, though the same report gives a long list of Chileans who had been repatriated under the facilities provided by the Chilean Law of 1930 (Annex No. 4). Likewise, a report of 18 March 1931 from the Chilean Consul at Esquel to the Minister for External Affairs (C-M. 53) mentions the satisfactory outcome of discussions between the Consul and the Governor of the relevant Argentinian province.

24. In the meantime, however, Chilean legislative and administrative procedures were being developed to cope with the flow of repatriates. In 1928 there is a letter from the Chilean Consul General in Buenos Aires to the

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1. Reference may also be made to C-M. 2 and 3, which date from 1919, as illustrating even earlier cases of harsh treatment in places not far removed from the disputed sector. See also the telegram dated 27 November 1931, C-M. 57.

Chilean Minister for Foreign Affairs acknowledging the receipt of money to be used in the opening of paths for the repatriation of groups of Chileans presently resident in the Valley of the 16th October. (See C-M.5). A Circular Letter of 17 February 1932 from the Intendant of the Province of Aysen to his Subdelegates deals with their responsibilities to provide provisional housing for repatriates and their power within restricted limits to grant rights to repatriates settling on State lands (C-M.68). But difficulties arose again. Even as late as 1939, the Intendant of Chiloe, in his Annual Report to the Chilean Home Secretary (Doc.114) stated:

> " ... on the Argentine side there are a large number of our compatriots who find themselves in a distressful situation due to their having been notified of their repatriation."

25. The significance of these events in the context of the present case is evident. There was a constant flow of movement across the frontier from Argentina to Chile after the 1902 Award and in particular from 1928 onwards. It was not a case of Chileans resident in Argentina moving from one part of the territory of that State to another. It was a case of Chileans being required or seeking to leave Argentine territory. In those circumstances it seems improbable in the extreme that the new settlers in the California Valley, endeavouring as they were to remove themselves from Argentinian to Chilean territory, should

have chosen to settle in the California Valley, on the eastern side of the major channel, if there could have been at that time any real local opinion that the area was part of Argentina. This proposition, which seems inherently reasonable as a matter of simple inference from the general circumstances prevailing at the time, is established beyond a shadow of a doubt in its particular application to the settlers in the disputed areas by the terms of their own statements of their reasons for removal. These are reserved for further consideration later.

(3) Chilean encouragement of the return of Chilean expatriates

26. Apart from this clear evidence of Argentine pressure upon the alien settlers in her frontier areas, it is right to bear in mind that it had long been official Chilean policy to encourage Chilean settlers in the Argentine border areas to return to Chile. Reference to some of the relevant Chilean legislation laying down the incentive, for example, of grants of free land may be found in the Chilean Memorial, p. 135, n.1. In addition, there was a certain amount of activity by Chilean settlers in Argentina directed towards maintaining their national identity with a view to their return home. Carlos Jara Carrasco, in a declaration made on 23 April 1966 (C-M.237) tells how in the period from 1924 to 1931 he participated in the activities of a

Chilean Society at Esquel (Arg.) - the Chilean Mutual Assistance Society Jose San Martin, established with authorisation from the Argentine authorities. He was active, with official Chilean support, in encouraging Chileans in Argentina to settle in Futaleufu and Palena- and in 1931 he himself went to live in Futaleufú.

(4) Other Matters affecting re-settlement by Chileans

27. Two other matters remain to be mentioned which have a bearing on the nature of Argentine pressure upon the Chilean settlers. The first is that there can be no question of Chilean movement westwards from the Chubut area of Argentina having been due to any shortage of land. Even in 1960 Chubut was noted by an Argentinian author as having one of the lowest population densities in the country, 0.6 inhabitants per square kilometre.[1]

28. Secondly, from 1924 onwards it was the deliberate policy of the Argentine Government to limit to the point of exclusion the acquisition of land by foreigners in border areas. The relevant decrees of 1924 form part of Annex 2. This same Annex, which consists of an extract from the Report of the General Direction for Lands for the 1922-1928 Administrative Period of the Argentine Ministry of Agriculture, may be read as indicative of

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1. See Aquiles D. Ygobone, Renacimiento de la Patagonia (Buenos Aires, 1964), p.426.

the general attitude of the Argentine authorities to foreign border settlers. At one point the Report describes the "new comers" as "transitory in most cases" and as belonging to "an inferior race". Again, in 1936 there is a report that the Argentine Republic had enacted that a belt of land 50 kilometres wide along the frontier with Chile should be occupied only by Argentine nationals. (C-M.112). Finally, in 1944, Argentina enacted legislation establishing "security zones" within a strip 100 kilometres wide contiguous to the land frontier with Chile. Within these zones it was declared to be a matter of public policy that property should belong only to native-born Argentinian subjects. (See Decrees of 13 June, 1944; 22 May, 1946; and 21 October, 1948 - Annex No.31). The effect of these decrees was to exclude the possibility of Chilean settlers ever acquiring a definitive title to land in the Argentine border areas.

(5) Actual reasons for which the settlors of the disputed areas left Argentina

29. Even if all the general considerations in the previous paragraphs of this Chapter could be entirely swept aside, there remains a body of evidence of such direct, clear and compelling force that it must entirely put an end to any suggestion that the settlers in the disputed area - though Chilean - had merely moved from

one part of Argentina to another. This evidence consists of their own statements of what they had in mind at the time of their removal. And though these statements will be referred to again when, in Chapter IV below, the ownership and occupation of each of the plots in the disputed area is examined in detail, there may be convenience even at this point in drawing attention to this significant group of documents. The striking feature of this material is that it will enable the Court to identify the motives which led the original occupants of virtually every plot in the disputed area to settle where they did. And the important thing is that in every case in which the reasons are given they are substantially to the effect (a) that in moving to the disputed area the settler was intending to leave Argentina and re-settle in Chile and (b) that he was doing so because of the uncertainties, difficulties and pressures in Argentina.

30. It will be convenient perhaps to examine the statements in the numerical order of the plots in which the various individuals settled.

Plot 1. The wife of Roberto Cid states (C-M.254) that when her husband came to live in California he was firmly convinced that he had left Argentina. Her statement continues:

"her husband left Argentina because being near

> Corcovado, he was evicted from the land he occupied which was transferred to an Argentine national who had more economic resources. He also realised that in Argentina he would never be able to become a landowner, and this is the reason why he returned to his native country."

Plot 2. The occupant, Vicente Contreras Quintana states (C-M.245) that when he came to settle in California he was absolutely certain that he was leaving Argentina. His statement continues:

> "This was one of the main reasons why I left Argentina and I came to settle in California, because in Argentina one encountered difficulties everywhere; without permission we could not sow the land, clear the ground, not even cut fire wood. There were obstacles for everything, we were constantly served with summons; life for Chileans was almost impossible, until they had enough and were forced to vacate their land, losing the 'improvements' they had effected and all the work they had done without any reward."

Plot 3. The widow of Dionisio Ovalle states (C-M.256) that when her husband came from Argentina to live in California, he was convinced he was in Chilean territory. He left Argentina because he was offered the chance of buying this land at a reasonable price.

Plot 4. This plot belongs to the heirs of Pablo Carrillo Lavoz, who settled in California in 1911, long before the wave of returns from Argentina.

Plot 5. This plot was settled by Carlos Lillo, who states (C-M.255) that he came straight from Chile "in the absolute certainty that he would work on Chilean land."

Part Two

Plot 6. Simon Lopez Delgado states (C-M.241) that his father came to California from Argentina in the belief that California was in Chile. His statement continues:

> "His father abandoned Argentina because being Chilean he could not hope to have security of tenure of land and make a position for himself. He often recounted that when he was in Argentina, Chilean nationals used to be served with notices to quit when they least expect them, because the land they occupied had been sold or rented to somebody else. This was a very sad experience, for all the efforts and sacrifices made to improve the land suddenly came to nothing ..."

Plot 7. Nolfa Carrasco, the widow of Evaristo Jaramillo Mera, states (C-M.251) that when she and her late husband left Argentina, they were quite sure they had come to settle in Chile. Her statement continue:

> "We left Argentina because a Chilean cannot ever own land there. Besides being Chilean we always wanted to settle permanently in our own country.
>
> After many privations, we had managed with my husband to build a little house, clear some patches of land for sowing and erect some fences on the land we occupied in Argentina; then we received an order to vacate it within three months. When the time was up we had to abandon all the fruit of our work for which he had no payment or reward ..."

Plot 8. The original settler was Tomas Videla. His son and successor, Eulogio Videla states (C-M.244) that when he came with his father to settle in California he was convinced that he had left Argentine territory. His statement continues:

> "My father left Argentina because there were many difficulties and problems there, and he

wanted to settle quietly in Chilean territory."

A similar statement has been made by Eulogio's brother Dionisio (see C-M.247). And see also under Plot 10 later.

Plot 9. Amelia Morales Catrilaf, the widow of Leandro Videla Penaipil, states (C-M.260) that when her late husband came to California he was certain that he had left Argentina. Her statement continues:

> "Her late husband left Argentina because he always wished to live in Chilean land. In Argentina they had managed to have a few head of cattle, but it was always very difficult to find land where to keep them permanently and to have a field presented many obstacles. When they heard that in California, Chile, there were lands available, they left the Argentine and came to settle in the land she owns at the present time."

Plot 10. Agustin Videla Penaipil, another son of Tomas Videla, referred to above, gives a statement of his father's reasons for leaving Argentina, similar to those given by his brother (see above, Plot 8). Presumably similar considerations governed Agustin's own conduct.

Plot 11. Julian Soto Cardenas states (C-M.242) that in coming to California he believed he was leaving Argentina; and that his reason for doing so was that he had always wanted to settle permanently in Chile.

Plot 12. José Anabalon Vega states that in coming to this plot he had always believed that he had left Argentina. He refers to the risk of eviction facing occupiers of land in Argentina and to the difficulties

arising from Argentinian controls (see C-M.249)

Plot 13. Adeodato Mera Gomez states that his father always thought he was settling in Chilean territory. (See C-M.258).

Plot 14. This plot is occupied by Alfredo Foitzick who also has a plot on the west bank of the lower section of the River Encuentro. He did not come from Argentina. He states that he has always regarded his plot in the California Valley as being in Chile. (See C-M.248).

Plot 15. Juan Hernandez Barriga states that he came to California thinking that he was leaving Argentina and that he was motivated by the lack of facilities for permanent settlement in Argentina (C-M.240).

Plots 16 & 17. Anastasio Rivera, the heir of Pedro Rivera states (C-M.262) that his brother had always thought that his plots were in Chilean territory.

Plot 18. This was formerly owned by Juan de Dios Bravo Maraboli. His widow states (C-M.246) that when he left Argentina he thought he was settling in Chile.

Plot 19. Sigifredo Rosales states (C-M.243) that his father, Juan Rosales, was convinced that he had left Argentina for Chile. He did so because he could not acquire title to land there and was too much controlled there.

Plot 20. Leonidas Monje Delgado states (C-M.263):

"His father left Argentina because a settler

> without capital could never have or hope to have land there, and he wished to live on his own land. It often happened that small farmers, after having managed to create a modest position for themselves in Argentina, were evicted by the police because the land had been sold to someone with capital. One could see that nothing was secure, and for this reason my father had always wished to find land in Chile, which he happily did."

Plot 21. The original owner of this plot, Venancio Rosales Garces, states (C-M.257) that he left Argentina because the authorities of that country prohibited him from carrying out his work on his land there. At first he moved to a plot north of the Palena river, but later he moved to this plot.

B. The nationality of the inhabitants of the area

31. Although the Argentine Memorandum refers to the Argentine nationality of the wives of some of the settlers and at pp. 52-57 mentions the names of thirty-two residents in the disputed zone who were in 1965 "Registered" Argentine nationals, it seems improbable that much will turn upon this aspect of the matter. Even on the basis that all who are claimed to be Argentinian are in fact so, they still represent only a small minority of the residents of the area. Moreover, eleven of them were at the material date children not more than fifteen years of age.

32. The important thing is that the principal residents of the area, those whose names constantly recur in the documents as being active settlers, applying for plots,

paying taxes, registering transactions, etc., are all undoubtedly Chilean - in the sense that they were born in Chile and were invested with Chilean nationality both by the *jus soli* and the *jus sanguinis*. In some cases, their children, born during the period of the parents' residence in Argentina, acquired Argentine nationality by the *jus soli*. Nonetheless, these children by reason of their parentage automatically acquired Chilean nationality upon their return to Chile.

C. Physical communication between the disputed area and Argentina

33. The Argentine Memorandum appears to attach importance to the ease of communication between the California Valley and the Argentine territory and to the fact that the Valley's trade was mainly with the neighbouring Argentine towns. (See, for example, p. 11 of the Memorandum.)

34. As to the physical facts, there can be no doubt. Reference has already been made to the difficulty of moving along a north-south line in southern Chile. Until the advent of easier and cheaper access by air, which has now had an important effect upon the direction of trade in the area,[1] trade was necessarily mainly along

1. It is now possible to transport agricultural commodities and even cattle by air at economic rates. For example, large quantities of wool are regularly transported by air from Palena to Puerto Montt.

an east-west line and involved constant crossing of the frontier - not only in the Palena area but also in many other places in southern Chile.

35. This is clearly shown by the fact that the inhabitants of the Palena region, including a number of residents of the disputed area, had frequently to obtain transit certificates from the local Chilean authorities which were then presented to the Argentinian authorities as a necessary condition for the grant by the latter of permission for the persons concerned to take their goods or cattle across Argentine territory to other parts of Chile. Examples of such certificates will be found for the following years:

Year	No.
1928	C-M.11.
1928	C-M.7, C-M.8, C-M.10, C-M.12.
1929	C-M.16, C-M.18, C-M.22, C-M.39.
1941	C-M.126.
1946	C-M.154.

36. There are, however, two important comments to be made on the general proposition relating to ease of communication between Argentina and the disputed area.

37. First, the dependence of a town, on the Chilean side of the frontier upon its links with a neighbouring Argentinian town does not convert that Chilean town into an Argentinian town. To such extent as the California

Valley was at a time tied to Argentina in terms of access and transit, so too was Palena. But Palena was not thereby rendered any the less Chilean. There are many other Chilean settlements in Patagonia in a similar position. It is questionable therefore whether this factor can really operate in any significant way to determine the national character of the California Valley.

38. Second, it should be borne in mind that against any significance which Argentina may seek to attach to the trade connection between the California Valley and Argentina must be set the fact that Argentina has in the past closed the frontier between Argentina and Chile in the Palena-California Valley region. This happened in 1926 and its consequences, prolonged for several years, were exceedingly painful no less to the inhabitants of the California Valley, which was treated in its entirety by Argentina as foreign territory, than it was to those of Palena itself.

39. The situation has been strikingly described, in a number of statements made by residents of the California Valley at that time. Thus Lindana Saez Figueroa, who has lived in the area since 1915, after telling of the closure says:

> "This situation was prolonged for a space of five years and once our provisions finished, that of all the settlers, the situation became painful. In consideration of the fact that there was no food in any of the houses and the confinement we

were in, the settlers met and decided to open a road toward the west as the only way to obtain food was by reaching the sea. It was possible to reach Yelcho Lake two years after the frontier was closed and from there, after making a small launch, it was possible to reach Chaiten. (See C-M.227).

40. Similarly, Florentina Bahamondes Azocar, who settled in the California Valley in 1917, when speaking of the closure of the frontier:

> "Those were very difficult years for us as it was impossible to get sugar, herbs, flour and other essentials. Our nourishment was exclusively based on potatoes, toasted oats and toasted flour. In order to smoke we used "maqui" leaves, wild strawberry leaves and other grass. In view of this difficult situation the settlers began to look for a road to the West, trying to reach the sea. It was possible to open a track after many sacrifices and it was then possible to reach Chaiten." (See C-M.228).

41. Likewise, Florindo Ramirez Soto, in the affidavit already cited, says:

> "The same Commissary Ruiz informed these persons that the frontier would be closed and that they would no longer be able to make purchases in any Argentinian locality. With this measure the population was left completely isolated as the only road or path led towards the frontier. In view that [i.e. because] the situation, when provisions were exhausted, was becoming desperate, some settlers held a meeting and decided to try to open a way to the Pacific ..." (See C-M.231).

42. Similar statements can be found in the affidavits of Sandalio Retamal Fernandez (C-M.229) and Ana Sanchez Vasquez (C-M.230). Another important statement of the effect of the closure of the frontier upon the inhabitants of Futaleufú and Palena can be found in the note of 18 December 1931 from the Chilean Consul in Esquel to

the Consul General of Chile in Buenos Aires (C-M.64).

43. Even in 1942 the pass from Palena to Argentina was closed by the Argentine authorities. This was reported by the Governor of Quinchao in a message to the Chilean Minister of the Interior of 21 October 1942 (C-M.128). The Argentine authorities had told the Yelcho Subdelegate that the pass was closed by order of the Ministry of War. In his note the Governor quoted the Subdelegate:

> "I must inform you that the situation of the population is very pressing, as nothing can be bought in Argentine and no articles can be brought from Chile because of the lack of means of communication."

44. It need hardly be added at this point (for reference will be made to it again later) that there can scarcely be more cogent evidence of acceptance of the Chilean character of the California Valley (particularly on what the Argentine Republic now claims to be the Argentine side of the boundary) than the fact that the settlers of that area desiring to take their cattle through Argentina should have had to obtain transit passes from the Argentine authorities and, for that purpose present certificates of title issued by the Chilean authorities.

D. Argentine administrative activity in the disputed area

45. The Argentine Memorandum also mentions a number of acts in the disputed area performed by or in relation to the Argentine Government which may perhaps be regarded as evidence of Argentine administrative activity in the area. The Argentine Memorandum does not in fact seek to develop upon these contentions any argument based upon a consistent

and open display of state activity by Argentina in the area. Nonetheless, the Government of Chile considers that it is as well to identify and list the instances of Argentine State activity appearing in the Memorandum if only so that their slight and intermittent quality may the more clearly be brought into contrast with the range of regular Chilean administrative conduct in the area.

46. In setting out the six categories of act or instances of action to which the Argentine Memorandum refers, the Government of Chile will comment briefly upon each. But the real strength of the Chilean reply to these allegations of the Argentine Government will not lie in these particular comments. The main burden of the Chilean case in reply will be found in Chapters III, IV and V below, where the Chilean Government sets out in detail, first, the identity of the Chilean settlers in the disputed area and the extent of their dealings with the Chilean Government and, second, the same materials, but looked at as a reflection of Chilean government activity. The Government of Chile submits that even if the Court were to accept as established every statement of fact connected with the Argentine contentions about to be examined, it should nevertheless conclude that the weight of the evidence is overwhelmingly in favour of the Chilean identity of the area.

(1) Grants of mining concessions

47. The Argentine Memorandum refers (at pp. 8-9) to the

grant by the Argentine Government in 1894 of fifty-one gold mining concessions in the Mining District of Corcovado, and states that three maps of 1906, 1908 and 1909 show the bounds of this Mining District.

48. Comment. It may be noted that none of these maps shows the Encuentro in its true position; and accordingly in themselves the maps do not constitute evidence of Argentine administration of the area. It need hardly be added that in any event the concessions were granted prior to the 1902 Award. As to the concessions themselves, which might perhaps have been of assistance, the Memorandum itself states (at p.9) that "up to the present time none of the individual mines has been identified."

(2) Survey by Argentine Ministry of Agriculture, 1920

49. The Argentine Memorandum claims (at p.12) that the survey shows that at that date Argentina

> "clearly understood that the territory of Argentina included all territory east of the boundary line as shown on those /the survey/ maps, part of which boundary was marked in as the River Encuentro, in the same location as that described in the Argentine Memorial in these proceedings."

50. Comment. Perhaps the most cogent comment which the Government of Chile can offer upon this map and the assertion based upon it is to invite the Court to examine two maps which appear as CH(C-M)3 and CH(C-M)4 in the folder of Maps accompanying this Counter Memorial. The first map is a consolidated sketch of Maps AM 3, 4, 5, 6, 7, 8 and 9 annexed to the Argentine Memorandum on Land-Use.

The second reproduces part of an Argentine map of 1960 prepared by the National Agrarian Council of the Argentine Department of Agriculture and Livestock. Both maps have been reproduced separately and combined: a transparent of the second map has been prepared as an overlay for purposes of comparison with the first one. [CH(C-M)5]

51. When each map is examined individually the following features of each may be noted. As regards the first map (used in 1920) the boundary purports to follow the line drawn on the Award map; the boundary lay to the west of Lots 18, 23 and 3; and the two plots of F. Saez and P. Carrillo are placed in the part of Square 23 which lies south of a river called the Engano. As regards the second map (prepared in 1960) the boundary has been adjusted to conform to the boundary line as drawn in the so-called Joint Proposal of the Chile Argentine Mixed Boundary Commission in 1955 and the boundary lies to the west of Lots 17, 24, 4 and 7.

52. When the later map is laid over the earlier map it can be seen that the lines and the numbers of the Lots coincide exactly, with one major set of exceptions. There are no Lots on the later map corresponding to Lots18 and 23 on the earlier map. They have simply disappeared; and only a small fraction of Lot 3 south of the Cerro Virgen remains. In other words the Argentine mapmakers of 1960, when adjusting the frontier to the line of the

lower section of the Encuentro and the minor channel simply cut off Lots 18, 23 and 3. Or to put it in another way, they recognised that a map representing the geographical reality could not include Lots 18, 23 and 3. It is clear, moreover, that the river marked in the earlier map as the Rio Encuentro is not (the suggestion in the Argentine Memorandum on Land Use to the contrary notwithstanding) "in the same location as that described in the Argentine Memorial in these proceedings." In short, the Argentine map of 1920 (A.M.9) is worthless.

53. The map apart, it is evident that the Survey, and the claim to jurisdiction implied in it, was an isolated event. It does not appear to have been repeated; nor is there any evidence that the payment of pasturage dues was ever again demanded by the Argentine authorities. Indeed, it is even possible that the pasturage dues, said to have been paid by Fortunato Saez and Pablo Carillo in 1918 were in respect of cattle grazed by them in "Lot 18" north of what appears in those maps as the "Rio Engaño" or of what may be supposed in fact to correspond with the true Rio Encuentro. (See Argentine Memorandum, para. 54, page 32).

(3) The registration of a number of births in Argentine civil registers

54. The few registrations involved are each referred to in the next chapter, in connection with the individuals to whom they relate. It will be seen that in most cases

the registrations were of births occurring in Argentina and are, therefore, of no relevance. In so far as they relate to births in the disputed area, they are occasional and reflect no consistent pattern of registration, amounting to any acknowledgment of Argentine authority by the parents concerned. Such as they are, their significance should be assessed in the light of a petition dated 15 October 1949 sent by the settlers of the district of Palena, through their Local Progress Committee, to the Chilean Minister of Justice (C-M.164). This petition, which was signed by 177 settlers, including Simón Lopez, Roberto Cid, Eulogio Videla, Agustin Videla, Evaristo Jaramillo, Juan de D. Bravo, Juan F. Rosales, Elvira Rosales, R., Faustino 2° Lavoz, Venancio Rosales, L. Rosales R., Rosario Riquelme, Adeodato Mera, Aristeo Mera, E. Jaramillo, Elcira Jaramillo, Carlos Lillo, Vicente Contreras, José Onofre Anabalon, Juan Bravo, Leonidas Moje, Rujo Flores, Rosario Carrillo, Bartolomé Balboa, Elcira Jaramillo, Gumercinda C. de Bravo and Guillermina Jaramillo (all of whom lived in the disputed area) asked the Minister to set up a local civil registration office in Palena. The petition explained that as a result of the difficulties of going to Futaleufú, then the nearest registration office, some thirty per cent of the local people were living in concubinage with a consequent high illegitimacy rate. Mention was made in the petition of

the fact that because of the difficulties in going to Futaleufú, a number of residents of the Palena district were registering their acts in Argentina.

(4) The grant of grazing rights in the area immediately north of Lake General Paz

55. (a) The Argentine Memorandum refers first (at p.40) to a grant of rights to the heirs of Cesar Casarosa.

56. Comment. The grant itself has not been produced, but only the application. Nor has the Argentine Memorandum mentioned the date of the Grant. But if the date 1957 which appears on the map attached to Annex K of the Memorandum reflects the date of the grant, then it will be seen to have been made after the critical date. In any event, the area to which it relates is partly in indisputably Argentinian territory, i.e. the part which lies on the Argentine side of the local watershed north of Lake General Paz. The area affected is, as can readily be seen, one which is well removed from the more populated parts of the disputed area and of the California Valley in particular. Regardless, therefore, of the significance, if any, which can be attached to this grant as justifying an Argentine claim to the portion of the disputed area affected by the grant, the episode is without importance in the wider context of determining the extent of Argentine administrative control over the area as a whole.

57. (b) The Argentine Memorandum also refers (at p.40) to "a further example of seasonal pasturing of cattle".

But nothing in the illustration as set out in the Argentine Memorandum suggests that the reference in the Mixed Commission Monograph (see Annex M of the Memorandum) to the "Veranada de Rosales" is to be taken as a demonstration of Argentine administrative activity at that spot. And if significance is to be attached to the mere use of names in this way, it should be recalled that the area to the south of the California and Hondo Valleys, which would be cut by the proposed Argentinian line, is known as the "Veranada de Balboa". As will be seen, there can be no doubt about the existence of Chilean allegiance of Balboa.

(5) The arrest and trial in 1946 of Juan Vicente Contreras

58. The Argentine Memorandum (at p.45) states that "from time to time the behaviour of the inhabitants of this newly settled area came under the eye of the Argentine authorities". The only illustration which the Memorandum provides is that of the arrest, trial and conviction of Juan Vicente Contreras in 1946 for the alleged theft of cattle from Juan Hernandez. Contreras, as will be seen, lived on Plot 2 (see Chapter III below) and Hernandez at that time lived on Plot 3 (see Chapter III below).

59. Comment. In the absence of evidence to support the Argentine statements about the trial and conviction of Contreras and the assistance rendered by the Chilean

Carabineros, the Chilean Government makes no admission either as to the facts or as to the propriety of what the Argentine authorities may have done. The Chilean Government would draw attention, however, to a statement made in 1966 by the Chilean Surveyor Carvajal (C-M.234). Carvajal says that when he was carrying out his survey in 1946/7 the wife of Contreras complained to him that her husband had been arrested by the Argentine police. Carvajal states that he wrote to the Chilean consul at Esquel and that Contreras returned to his land some weeks later.

(6) Grant of occupation permits in 1956

60. The Argentine Memorandum states (at p.49) that "in the early part of 1956, the General Directorate of Lands of the Argentine Ministry of Agriculture issued a number of permits of occupation to settlers in Lot 23 ...", which included part at any rate of the disputed area. Two specific examples of the permits then issued were given, namely, those issued to Eulogio Videla and Dionisio Videla.

61. Comment. First, it should be observed that the permits of occupation are said to have been granted to settlers in Lot 23. Yet this is one of the three Lots which disappeared from Argentine territory in the 1960 map to which reference has been made in paragraph 52 above. Whatever may have been the significance of the grants (assuming they were ever made) in 1956, it would appear that by 1960 so little significance was attached to them

that it was possible to drop the Lot in which they were granted from Argentine maps of the area.

62. Second, it may be noted that the Argentine Memorandum does not claim that the persons named in the grants had actually applied for them. In fact, both Eulogio Videla and Dionisio Videla deny that they have at any time applied to the Argentinian authorities for grants of land. Eulogio's statement that he has never signed any application to the Argentine authorities is in C-M.235; Dionisio's statement is in C-M.236. The latter says that on a number of occasions Argentine officials have asked him to request occupation permits and he has always refused. If any application should bear his signature, he states that it must have been obtained by fraud, for he has occasionally signed for the Argentine gendarmerie certificates for the sale of animals.

63. Two other residents of the area have also made statements denying any application to the Argentine authorities, Juan Hernandez Barriga (C-M.240) and Nolfa Carrasco Baeza (C-M.252).

Conclusion.

64. The Chilean Government concludes this section by reiterating its submission that nothing in the Argentine claims discussed above can really alter the essentially Chilean colour given to the disputed area

by the acts of the Chilean colonists and of the Chilean administration. It is to a more detailed analysis of this conduct that the Chilean Government now turns.

CHAPTER III

THE EARLY SETTLERS

65. The Chilean Memorial contains at pp. 130-140 a section on the first Chilean settlers in California, 1902-1917. In this connection the names of the following settlers were mentioned and evidence was tendered of their Chilean character:

Juan Antonio Balboa Arteaga	(Ch.Mem. p. 134)
Juan Fortunato Saez Figueroa	(Ch.Mem. p. 137)
Pablo Carrillo Lavoz	(Ch.Mem. p. 137)
Transito Diaz Carrasco	(Ch.Mem. p. 138)
Eleodoro Diaz Carrasco	(Ch.Mem. p. 138)
Lucas Lopez Saez	(Ch.Mem. p. 139)
Tomas Videla Catalan	(Ch.Mem. p. 139)

66. The Argentine Memorandum touches upon the extent of settlement in the California Valley at pp. 10-11 and deals with it more fully at pp. 31-35. At p. 35 the Memorandum contradicts the Chilean Memorial by saying that there were only two inhabitants in the California Valley south of the major channel, Pablo Carrillo and Fortunato Saez and by concluding that "there is no evidence of any settlement in the valley of the River Engaño at this time".

67. The only evidence which the Argentine Memorandum adduces in support of this position is a series of six Reports, dated 1920, prepared in 1919 for the Director General of Lands, Argentine Ministry of Agriculture. (See Memorandum, p. 12 and following). Of the 23 pages of description (constituting one third of the text of the Argentine Memorandum) only about three have any bearing on the area in dispute. The rest are concerned with "lots" or areas in the same general region but in no way in issue in the present arbitration.

68. The Government of Chile will not pause to elaborate any comment on the apparent paucity of relevant material which has led the Argentine Government so heavily to load the Memorandum with material having no evident bearing on the case. The Government of Chile sees no point in offering any comment upon those parts of the Reports which deal with Lots 94, 96, 14, 1, 10 and 17 (following the order of treatment in the Memorandum), for they are geographically remote from the disputed boundary line. And as regards Lots 3, 5, 6, 7 and 18 there is really nothing to be said.

69. Lot 23 (notwithstanding its disappearance from the 1960 map) remains, therefore, as the only relevant lot by reason of the inclusion in it of the names of two settlers whom the Government of Chile say then inhabited

Chilean territory. As to this, the Report states that there are only two settlers, Fortunato Saez and Pablo Carrillo. There are two ways of testing the validity of this statement. One is to compare it with the evidence of other persons about the extent of habitation in the area at that time; the other is to consider whether intrinsically the Report constitutes really credible evidence.

(1) Contrary Chilean evidence

70. First, reference may be made to the evidence of others as regards the extent of settlement in the California Valley prior to 1920. Some evidence has already been presented on this aspect of the matter in the Chilean Memorial.[1] It is now possible to supplement it with three further affidavits.

(i) Florentina Bahamondes Azocar (C-M.228) states that she, her husband and two of their children settled in the Valley of California in 1917. She locates their first house exactly on the ford of the Tigre, on the island (a spot which would appear to be at the point where the Tigre changes its direction from north west to south west). She confirms that Pablo Carrillo and Fortunato Saez lived in the valley at that time, but also mentions Luca Lopez (who is referred to in the Chilean

1. See Chilean Memorial, p. 134, paragraph 64. See also Doc. No.5, where the widow of Bravo states that Balboa "had come to live in Chile about 1913 and was engaged in beef raising; his cattle grazed in Chilean places called Las Horquetas, Las Pampitas and other places which later on I knew as 'Veranadas de Balboa'."

Memorial but is not mentioned in the Argentine Memorandum). That she is reasonably precise in her recollection may be seen from the fact that she states (as does the Argentine Memorandum) that Galo Diaz was a neighbour of of Fortunato Saez.

(ii) Sandalio Retamal Fernandez (C-M.229) states that she settled in 1912 with her parents in the Rincon del Aceite, which is just north of the Palena River and west of the boundary. She lists the neighbouring settlers and says: "Higher up, in the area known now by the name of California, lived Lucas Lopez, Pablo Carrillo, Fortunato Saez, Juan Antonio Balboa, and Bartolome Balboa."

(iii) Speaking of a slightly later date, 1925, Ana Sanchez Vasquez (C-M.230) states that she and her husband came to Palena in 1925, when they bought the mejoras of Fernando Figueroa "who was the occupier for several years past". She spoke of the last settler to the west being "Don German Vasquez who lived in the land occupied at the present time by dona Eufemia Delgado, the widow of Monje." (This was west of Palena, near the junction of the Rivers Salto and Palena.) She also said:

> "In the area known to-day by the name of California lived Fortunato Saez in the land occupied to-day by Vicente Contreras, Lucas Lopez where his son Simon Lopez and Pablo Carrillo, live at the present time. All these settlers were of Chilean nationality."

Part Two

71. From these various statements, taken together with the evidence attached to the Chilean Memorial, it seems clear that Fortunato Saez and Pablo Carrillo were not the only settlers in the disputed area prior to 1920.

(2) Intrinsic defects of the Argentine reports

72. Now, secondly, consideration may be given to the question of how likely the Report of 1920 is to have been correct. One obvious comment that must be reiterated at this point is that the map accompanying the Report is manifestly inaccurate. As the overlay of the 1960 map so clearly shows, the places at which the Survey located the settlers Saez and Carrillo were nowhere near the lower section of the Encuentro or the major or the minor channels. The settlers were in fact marked on the map at spots which to-day would fall in Plots 18 and 19, occupied by Felix Galitlea and Juan Rosales respectively, south of the River Salto/Engaño. The submission of the Government of Chile is that it is highly improbable that the Argentine Inspector could have carried out a thorough inspection of the area. Indeed, in the Report to which Map A.M.7. is attached the Argentine Inspector refers to the River Engaño as "emptying its waters" into the Engaño Lake, whereas, of course, the river in fact flows in the opposite direction. Furthermore, he would appear not to have gone south of the places where Fortunato Saez and Pablo Carrillo lived. It may be

observed from the opening lines of Annex C of the Argentine Memorandum that the Inspector claims to have inspected Lots 12, 13, 16, 23, 24 and 25 "from January 23rd to 25th, 1919". At p.3 of the same Annex C the Inspector states that there are no roads, only tracks and paths. Map AM 9 shows the area covered by these lots. How the Inspector could physically have even visited, let alone inspected, these six lots in three days remains a matter of wonder. Moreover, by 26 January 1919, the Inspector was back at Lot 94.

73. In short, the weight of evidence of the 1920 Reports in relation to the occupation of the disputed area is not such as to displace the statements of more extensive settlement relied upon by the Government of Chile.

B. The early settlers: Those agreed upon - their Chilean identification

74. Nonetheless, it remains necessary to describe further the earliest settlers, if only to establish the essentially Chilean character of their allegiance. It will be convenient to begin with the two settlers upon whose presence in the disputed area prior to 1920 both Parties are agreed, namely, Fortunato Saez and Pablo Carrillo.

75. Juan Fortunato Saez Figueros. The Argentine Memorandum gives certain limited information about him which may be intended to be read as suggesting that Saez had some Argentinian connection and continued to accept the authority of Argentina in the disputed zone. Thus

the Memorandum states (at p.10) that Fortunato Saez married Matilde Steinkamp, an Argentinian, in Chubut in 1914; that in 1918 he paid pasturage dues (though it is not said to whom or in respect of what land) (at p.33); and that in 1922, 1924 and 1926 he registered at Tecka, Esquel and Tecka respectively the births of his children Clorindo, Josefina and Alejandra. The Memorandum also states that Fortunato Saez "arrived in the zone from Tecka, Argentine" (p. 33).

76. The Chilean Memorial points out, at p. 137, paragraph 69, that Fortunato Saez was a Chilean born in Valdivia in 1885. There is ample evidence that Saez settled in the California Valley in the second decade of the present century. His son states that it was in 1910 (Doc. No.11). Others say that Saez was living in the Valley in 1912 and 1917 (see C-M.228 and C-M.229). It is true that he came to California from Argentina. His son, Juan Bautista Saez, in a recent statement (C-M.238) says that his father wanted to farm in Corcovado (Arg.) but that he was not allowed to do so because he was Chilean. Juan Bautista also declares that in 1914 his father rode to Puerto Aysen (Chile) to register the birth of Juan's brother Floriano, and again in 1916 to register the birth of another brother, Delmiro.

77. Fortunato Saez occupied the land now occupied by

Vicente Contreras (Plot 2)(Lot 104-6) (see C-M.230). His children were all born there (C-M.238).

In 1925 he requested a certificate from the Palena District Inspector for branded cattle (C-M.11).

In 1927 he registered a profit sharing agreement for the raising of cattle with the District Inspector in Palena (C-M.4).

In 1929 he donated money for the National School at Palena (C-M.20).

When his wife died in 1929, her death was reported to and certified by the District Judge in Palena, and she was buried in the Palena cemetery (C-M.25).

In 1929 also Saez obtained from the District Judge in Palena a transit pass to enable him to take 76 sheep skins to Torres Brothers in Esquel (Arg.) (C-M.22).

In 1930 he acknowledged before the Palena District Judge a debt of 1123 pesos, Argentine currency, due to Messrs. Lousen & Co. in Esquel (Argentine) (C-M.45).

In 1930 he appears on the Land Tax roll (C-M.47 and C-M.48).

In 1930 he is reported to have sold cattle to one Dionisio Fuente (C-M.54). The episode is significant because it is clear from the report that for customs purposes the sale was regarded as one made in Chile, not Argentina

In February 1932 he is recorded by the Palena

Carabineros Post as a settlor owning 2 carts and 2 yoke of oxen (C-M.70).

In March 1932 the Subdelegate of Yelcho ordered that as a settler of Palena Saez should be called to a meeting (C-M.72).

In April 1932 he is noted as having applied to the Chilean Authorities for some title to land (C-M.75).

IN April 1932 he was nominated a member of the examination commission of the Palena school (C-M.77).

In May 1932 his debts to Argentine traders are the subject of official Chilean correspondence which makes it clear that Saez is officially regarded as a Chilean living in Chile and as entitled to some official Chilean help. (C-M.79). His creditors almost caught up with him later (see below).

Land taxes on his land for the period 1929-1932 were paid to the Chilean authorities, though not until after his death (Doc. No.99).

In 1933 he registered at Futaleufú (Chile) the birth of his son Dionildo (Doc. No.57).

In 1934, when he sold his land to Manuel Morales, he signed and registered the document of sale in Palena (C-M.87), but there were some difficulties about this (C-M.91). Nevertheless, the plot in question was clearly regarded as being in Chile.

In 1934 the most striking proof of the Chilean

character of Saez and the Chilean location of his domicil is provided by the fact that one of his Argentinian creditors, Sr. Corball, a trader in Esquel, began proceedings against him in the Chilean courts, but Saez died before the judgment was enforced (C-M.98 and C-M.104).

Finally, when he died in 1935 he was buried in the cemetery of Alto Palena and his death was registered at Futaleufú (Chile) (Doc. No.11).

At some period he had purchased "mejoras" on both sides of the Rio Tigre from Francisco Calderon (C-M.238 and C-M.264); and when he sold his interests in Plot 2 to Morales he did in fact move to Plot 9. He left Plot 9 to his widow, Luciada Velasquez Jaramillo, but she soon abandoned it.

78. Pablo Carrillo. As in the case of Fortunato Saez, the Argentine Memorandum refers to the immediate provenance of Pablo Carrillo as being in Argentine territory (p.34) and mentions that the births of his three children were registered in Argentina in 1913, 1916 and 1919 respectively. It is also said (at p.33) that he had paid pasturage dues.

79. The material available to the Government of Chile and now presented to the Court gives a much clearer impression of the strong connection between Carrillo and Chile.

It is agreed that he settled in the California Valley in 1911 (Doc. No.14) after coming from Argentina. His reasons for leaving that country are given in C-M.253.

Certainly he is recorded as having been there in 1912 (C-M.229, C-M.185, C-M.193), in 1917 (C-M.228) and 1928 (C-M.232). He occupied what is now plot 4 (Land Tax roll 104-4), as well as part of plot 5 (see C-M.185, 186, 189 and 193).

In 1925 he requested from the District Inspector in Palena two transit certificates for cattle (C-M.11).

In 1929 he made a donation to the National School at Palena (C-M.20).

In 1929 he is noted as having had a house built in Palena (C-M.23). Since in the Land Tax roll there is no reference to his having owned a house in the village of Palena the note must have referred to his house in California. This was, it may be added, specifically spoken of as being in Chile.

When the wife of Fortunato Saez died in 1929, it was Carrillo who reported the death to the District Judge in Palena (C-M.25).

In the same year, 1929, Carrillo recorded before the District Judge in Palena the fact that he had sold a stallion to Bartolome Balboa (C-M.32).

In 1930 he sold cattle in Palena (C-M.54) and appeared on the Land Tax Roll (C-M.47 and C-M.48).

In 1932 Carrillo registered at Futaleufu (Chile) the births of two children born in 1929 and 1932 (Docs. Nos. 28 and 29).

In 1932 his wife died and her death was noted by the Chilean authorities (C-M.81).

In 1932 he registered the gift of a horse at Futaleufu (C-M.67).

In 1932 he complained to the Chilean authorities about the non-payment of a debt (C-M.74).

In 1934 he contributed 25 pesos, Argentine currency, for the road from Palena to Chayten (C-M.85).

In 1936 he filed with the Chilean authorities a declaration (C-M.113) for tax purposes in respect of Plot 4. He described the boundaries as follows: "North, fiscal ranges; South, fiscal ranges; East, Manuel Morales; West, Lucas Lopez". He appears, like a number of other settlers not to have been very precise in his conception of the cardinal points of the compass, for he seems to have rotated them ninety degrees in an anti-clockwise direction. This is shown by his placing Morales (who occupied Plot 2 to the north) on his east side and Lopez (who occupied Plot 6 to the south) on his west side. At that time there was no occupant of Plot 3 between Plot 4 and Plot 2.

In 1936, the Head of the Post of Carabineros certified that Carrillo had been a settler of good repute in the district for 20 years (C-M.108).

In 1937 he was summoned to meetings by the Chilean authorities (C-M.115, C-M.116) and again in 1938

(C-M.117, 118).

When he died in 1940 his death was registered at Futaleufú (Doc. No.12).

It is significant that even after his death, his connection with Chile was acknowledged by his heirs and successors. In 1951 one of his Argentine heirs, when alienating her share of the inheritance, did so by appearance before the District Judge in Palena (Doc. No.110). Again, in 1957, another daughter, residing in Argentina, gave to her brother, residing in Palena, a special power of attorney, so that he might represent her in the relevant proceedings in Chile (Doc.No.124).

In 1952 the successors to the estate, paid to the Chilean authorities taxes on the plot "Los Carrillos" for the years 1943-1951 (Doc. No.101).

Finally in 1953 his heirs complained to the Chilean authorities of encroachment upon his plot by Carlos Lillo (C-M.185, 186, 189, 193).

C. The other early settlers

80. There remains for consideration the other five settlers named in paragraph 65 above and who are either not acknowledged at all, or are attributed to a later period by the Argentine Memorandum. In addition, there is one further name to be mentioned, to which no reference was made in the Chilean Memorial.

Juan Antonia Balboa. Balboa's existence is

not acknowledged at all in the Argentine Memorandum. Yet, there is evidence that Balboa lived in the California Valley before 1912 (C-M.229). Certainly, in 1934 he was complaining that he had in 1931 been evicted from land "after more than 13 years of possession", i.e. since earlier than 1918 (C-M.83). He occupied what is now known as Lot 104-9 (Plot 13, Las Pampas, together with other land in and around the bend of the Tigre (Plot 18) (Doc. Nos. 4 and 5). His cattle grazed over the neighbouring area and up the Valle Hondo into the Veranada de Balboa. His presence in the area in 1928 is confirmed (C-M.232). In 1929 he made a donation for the Palena school (C-M.20). In 1930 he appeared on the Land Tax Roll (C-M.47 and 48). In 1931 he was a defendant in the Chilean courts, at the instance of an Argentinian trader, in an action upon a debt (C-M.51). In 1934 he contributed to the proposed road from Palena to Chayten (C-M.85). In 1934 and 1939 he was the defendant in civil proceedings brought in the Chilean courts, when judgment was given and enforced against him (C-M.89, C-M.105, C-M.106, Doc. No.121 and C-M.122).

Lucas Lopez Saez. One affidavit states that Lucas Lopez lived in the California Valley by 1912 (C-M.229), another, that he arrived in August, 1916 (C-M.132); and another confirms that he was there by 1917 (C-M.228). His presence there is confirmed in 1925 (C-M.230) and

1928 (C-M.232). He appears in the 1930 Land Tax Roll (C-M.47 and 48). He appears to have occupied the Plot known as "Las Raices", Land Tax No. 104-16, on the east side of the minor channel. In 1929 he was registered at Aysen for an identity card. He is then stated to have been resident at Palena. (C-M.24). In 1936 he filed a Descriptive Statement of the property for tax purposes (Doc. No. 90). He died in 1938, was buried in the cemetery of Alto Palena, and his death was registered at Futaleufú (Chile) (Doc. No.16). Nonetheless, in 1941 a notification of late payment of land tax was issued in his name by the Chilean authorities (C-M.125). In 1951 Land Tax was paid to the Chilean Treasury, in respect of "Las Raices", covering the period 1932-1946 inclusive (Doc. No.100).[1]

Tomas Videla Catalan. There is nothing to add to the evidence set out in the Chilean Memorial, p. 139, as establishing his presence in the California Valley before 1920. The Argentine Memorandum is wrong in including him in the Chapter entitled "Migration in the Area after 1920", at p.39. His sons Eulogio, Dionisio and Agustin have each made statements explaining the circumstances in

1. The Argentine Memorandum only denied the presence of Lucas Lopez indirectly, by excluding him from the early settlers and including him in the chapter on "Migration into the Area after 1920". The words actually used to describe his presence are: "Lucas Lopez ... was settled in the zone by 1936 ...." (p. 37, paragraph 62).

which their father left Argentina (C-M.244, 247 and 250). In 1947 he was regarded as sufficiently closely linked with Chile to be included in the list of persons whom Carlos Lillo Fuentes was to summon to a meeting with the Chilean Carabineros in 1947 (C-M.160). Part of his plot was recorded in the Carvajal survey of 1947 (Doc. Nos. 126 and 127, p. 371). In 1949 he requested "radicación" by the Chilean Government of the plot of land which he occupied (Doc. No.17) and in 1950 he filed with the Chilean authorities a formal description of the plot (Doc. No.92). The close connection between his son, Agustin, who lived with him, and the Chilean authorities, may be observed by examination of the entry relating to him in the analysis of settlers, paragraph 148 below.

Transito Diaz Carrasco. Although there is evidence that even by 1912 he was living near Palena, there seems to be no evidence to establish that he actually lived in the disputed area.

Eleodoro Diaz Carrasco. The position as regards Eleodoro is the same as that of his brother, Transito.

81. The name to be added to the list is that of Demetrio Cardenas. His presence is mentioned in an affidavit sworn by his widow Florentina Bahamondes Azocar in February 1966 (C-M.228). She stated that in 1917 she, her husband and two children settled in the California Valley. Their first house "was located exactly on the ford of the Tigre

on the islands". They left that in 1920 because they wanted to find a lower and better plot. Elizardo Casanova Delgado also speaks of them as "Chilean settlers of California" (Doc. No.6).

D. The position of Galo Diaz.

82. The case of Galo Diaz would not call for special mention were it not for the statement, at p. 32 of the Argentine Memorandum on Land Use, that Galo Diaz "knew that by moving to Lot 18 and then to Lot 23, he was moving into Argentine territory". The Memorandum also states that "Prior to 1918 Diaz had had dwellings on other lots of this Survey Sector I-III but had abandoned or sold them because he had believed himself to be in Chilean territory".

83. Like the Government of Argentina, the Government of Chile is unable to identify on what Lots of Sector I-III Diaz may have been settled before 1918. But, regardless of this, the important thing to observe is that when Diaz finally located himself in Lot 23, he chose a spot north of the river which appears in the 1920 maps as bisecting the Lot. On the assumption that the river depicted on the 1920 map as dividing Lot 23 is intended to represent the major channel and that the map seeks to relate the plots of the local residents to the supposed course of that river, then the striking feature about the move of Diaz is that he deliberately, in his personal

desire to live in Argentina, placed himself north and not south of that river. This fact surely tends to confirm that the river north of the plots occupied by Pablo Carrillo and Fortunato Saez and called "River Engaño" on the 1920 map was regarded by such local residents as Diaz, who attached importance to the matter, as being the boundary, north of which they must reside if they were to be in Argentina.

Conclusion

84. Whatever may be the position as regards the names of Videla and Transito and Eleodoro Diaz, the following facts are quite clear:

(i) That the Argentine Memorandum is incorrect in saying that the only early settlers in the California Valley were Juan Fortunato Saez and Pablo Carrillo Lavoz. It is necessary to add to them the names of Juan Antonio Balboa, Lucas Lopez Saez, Tomas Videla Catalan and Demetrio Cardenas.

(ii) That the lands occupied by each of these settlers were on the eastern side of the minor channel or of the proposed Argentine extension of the Encuentro.

(iii) That Pablo Carrillo was not "the southernmost settler in the Encuentro Valley" in 1920, as is stated in the Argentine Memorandum (pp. 32 and 33). The plots of Tomas Videla and Juan Antonia Balboa lay south of Carrillo's.

(iv) That each settler throughout the relevant period, and in many very important respects before 1952, maintained contact with Palena and acknowledged the administrative authority of Chilean officials.

(v) That these were not settlers of "different nationality", as is suggested by the Argentine Memorandum (p. 11). The settlers were all of Chilean nationality.

CHAPTER IV.

THE CHILEAN IDENTITY OF THOSE PARTS OF CALIFORNIA NOW CLAIMED BY THE ARGENTINE REPUBLIC

85. The Argentine Memorial had made it clear that, at its farthest extent, the Argentine claim, in so far as it affects the settlers of the California Valley, is limited to the area lying east or south-east of a line running from north to south formed by: the course of the minor channel; a land connection between the minor channel and the sharp bend of the River Tigre north-east of the Cerro Virgen; the course of the Tigre running south-west from that bend to the point where it is joined by the River Azul; then a line up the stream of the latter, to the point where it is joined by the Arroyo Matreras; then up that stream not to its source, but only to the point at which it is joined by a tributary from the north east, and then up that tributary stream to its source on the western slopes of the Cerro Virgen;

and, thereafter by the line of the local waterparting to Post 17.

86. This definition of the Argentine claim means that it is no longer necessary to devote special attention to those settlers whose plots lie west and north of that line - though some incidental reference to them will be unavoidable - since there is no dispute that this is Chilean territory.

87. There appear to the Chilean Government to be at least three steps which may be taken to establish the Chilean character of the remaining settlements, i.e. those on what would be the Argentinian side of the line were it drawn in the manner now contended for by Argentine.

(i) The first is to identify each of the plots and attempt some account of its occupation or ownership,

(ii) This leads to the second step - a consideration of the extent to which the various occupiers or owners of the material plots have associated themselves with Chilean, as opposed to Argentinian, administration.

(iii) The third step is to look at the same events from a different point of view and describe, by reference to different types of administrative conduct, the activities, of the Chilean Government in the area now in dispute.

88. It will be convenient to deal with the first two

steps together; and to take the third point separately.

A. Identification of the Plots: their occupiers and owners.

(1) Introduction. The purpose of this Section.

89. In this section the Chilean Government will examine each of the twenty one plots that are part of the Valley of California and its environs which would lie on the Argentine side of the boundary line if the latter were drawn in the manner for which the Argentine Government contends. The Government of Chile will set out, so far as it is able, on the material at present available to it, the history of each plot by reference to the persons who have occupied or owned it from time to time. It will, in addition, in relation to each plot, state the factors indicating that each such occupier or owner, and virtually every resident of the plots as well, has at all material times regarded the plots as being in Chilean territory, himself as Chilean, and the Chilean Government as the appropriate administrative authority of the area.

90. The Government of Chile will also take the opportunity of referring, in the context of the appropriate plots with which the particular individuals are associated, to the various statements made in the Argentine Memorandum about the Argentine origin or nationality of such individuals. It is the belief of the Government of Chile that when the information tendered by the Argentine Government (to the extent that such information is proved accurate) is seen

in its proper perspective relative to the other available information about settlement in the disputed area , it will be appreciated that such information cannot diminish in any measurable respect the essentially Chilean character of the whole of the disputed area.

91. The Government of Chile will suggest that when all the available information about the disputed area is looked at as a whole it is open to only one satisfactory interpretation: that the area bounded by the line of the Chilean submission constitutes, as reflected in the practice of the two Governments and the general conduct of the people, an integrated and indivisible territorial unit. The natural boundary of this unit on its eastern side is the line of the major channel and the watershed running southwards from the mountain at the source of that channel (as claimed in the Chilean Memorial). Intercourse and interconnection between the inhabitants and settlements in the immediate vicinity of the two sides of the line of the Argentinian proposal is the constant and dominating feature of the evidence. This shews clearly that in terms of living reality the line of the Argentinian contention is no boundary at all. On the other hand, in terms of settlement, identity of settlers and extent of governmental control there is a marked line of cleavage between the position on the Argentine and Chilean sides of the boundary drawn according to the

Part Two

Chilean contention. This shows equally clearly that the Chilean line fully reflects the locally accepted and acceptable division between the two countries.

92. As will be seen in the pages which follow, Chilean settlers have moved freely over the whole of the California Valley on the assumption that they were always in Chilean territory. Equally, their relations with the Argentine Government have reflected the assumption that the Valley was territory alien to Argentina - territory which was the refuge of Chileans obliged to seek repatriation to Chile by reason of Argentine measures of exclusion; territory which was, in terms of imports, exports and transit treated by Argentina as foreign territory; territory which for ten hard years was almost isolated from the amenities of civilisation by lying on the Chilean side of the closed Argentine frontier.

93. This is the case which the Chilean Government will now make good. In so doing, it has found it both necessary and convenient to repeat (though in a different form) a certain amount of the detail to be found in those parts of the Chilean Memorial which deal with settlement in the area (pp. 130-152). But the Chilean Government believes that this mode of approach will be of general advantage to the Court and to the Parties as enabling all to see, at a glance so to speak, the full range and effect of the available evidence.

(2) The Sketch Map

94. The Court has before it, as Doc. No.20, a sketch showing the present landholders and the number of their plots in the 1965 Chilean Land Tax Roll. This sketch is incomplete in that it does not follow the course of the River Tigre sufficiently far to the west to bring in the whole area, encompassed by the line of the Argentine claim as now formulated in the Argentine Memorial. Consequently, the Government of Chile has prepared a fresh version of this sketch map which extends westwards to include the holdings on either side of the River Tigre, the River Azul and the Arroyo Matreras and which is included in the folder of Maps as CH(C-M)1. The opportunity has also been taken to correct certain errors which appeared on Doc.No.20. For example, Lot No.104-4 is no longer shown as lying on the western as well as the eastern side of the minor channel;[1] while Lots No.104-16

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1. The Argentine Memorandum, pp.59-60, paragraphs 92 and 93, is correct in stating that the holding of Pablo Carrillo's successors is at present exclusively on the eastern side of the minor channel. The suggestion to the contrary by Counsel for Chile during the oral hearings in December, 1965, reflected an error on the sketch map (Doc. No.20).
   On the other hand, Counsel for Chile did not then point out, as he would now be justified in doing on the basis of the corrected map, that the proposed Argentine line would divide Lots Nos. 104-16, 104-5, 104-18 and 103-13 (Plots 6, 7, 8 and 18 respectively).

and 104-5 are now shown as lying on the western as well as the eastern side of that channel. Again, the western boundary of Lot 104-3 which is shown in Doc. No. 20 as touching only Lot. No.104-6 is now represented as touching Lots 104-17 and 103-7 as well.

95. In addition, because the numbers given to the plots in the Land Tax Roll do not follow any logical order and it is, therefore, not easy to find any given plot by reference to this number, an additional serial number has been added for each lot in the disputed area simply for purposes of identification in the present case. These numbers move approximately from north to south. The list of landholdings is as follows:

New serial identification number	Land Tax Roll number	Name of plot	Name of holder as printed on sketch map
1	104-3	Piedras Blancas	Roberto Cid
2	104-6	El Engaño	Vicente Contreras
3	104-17	El Maiten	Dionisio Ovalle
4	104-4	Los Cerrillos	Suc. Pablo Carrillo
5	103-7	San Antonio	Carlos Lillo
6	104-16	Las Raices	Simon Lopez
7	104-5	San Jose	Nolfa Carrasco, v. de Jaramillo
8	104-18	Quemado Grande	Tomas Videla
9	104-40	Porvenir	Leandro Videla
10	104-55	Lomas Bajas	Agustin Videla

New Serial identification number	Land Tax Roll Number	Name of plot	Name of holder as printed on sketch map
11	104-41	Los Lirios	Julian Soto and Bautista Saez
12	104-29	Las Pampitas	Onofre Anabalon
13	104-9	Las Pampas	Adebdato Mera
14	104-53	California	Alfredo Foitzick
15	104-7	Las Horquetas	Juan Hernandez
16	104-56	Rio Tigre	Pedro Rivera
17	104-19	Las Horquetas	Pedro Rivera
18	103-13	Estrella	Felix Galilea
19	103-23	California	Juan Rosales
20	104-13	El Rosal	Leonidas Monje
21	104-26	Colorado	Roberto Monsalve o German Monsalve

Conversion table from Land Tax Roll in numerical order to new serial number:

103-7 ...	5	104-7 ...	15	104-26 ...	21
103-13 ...	18	104-9 ...	13	104-29 ...	12
103-23 ...	19	104-13 ...	20	104-56 ...	16
104-3 ...	1	104-16 ...	6	104-40 ...	9
104-4 ...	4	104-17 ...	3	104-41 ...	11
104-5 ...	7	104-18 ...	8	104-53 ...	14
104-6 ...	2	104-19 ...	17	104-55 ...	10

96. The Government of Chile believes it to be essential to utilise some sketch map of this kind if it is to be at all possible to examine in detail the national character and allegiance of the various settlers as well as the ways in which the Government of Chile has exercised jurisdiction over them.

(3) Notes on the ownership and occupation of each plot.

97. The notes which follow do not give a comprehensive picture of the ownership or occupation of every lot since

its first settlement. They are, however, an attempt to record what is at present known in this connection by the Chilean Government.

PLOT NO.

1 (104-3) "PIEDRAS BLANCAS"

The Plot

98. On the Sketch Map (CH(C-M)1) this plot bears the name of Roberto Cid. In 1949 Cid began his occupation of the plot (Doc. No.47). The circumstances in which Cid returned from Argentina are set out in his wife's statement (C-M.254). In 1956 the plot was stated to be in the possession of Cid (Doc. No.44); and in 1957 Cid requested an occupation permit from the Chilean Government (Doc. No. 47).

Personal Notes

99. Roberto Cid Matus, Chilean, was born at Temuco, Chile, on 13 April 1891 (Doc. No.46); primary education in Temuco; lived for some years in Argentina; was enrolled for Chilean military service in 1945 (Doc. No. 107); returned to Chile in 1948 (?); arrived in California Valley and began occupation of Plot 1 in 1949 (Doc. No.47); received a Chilean identity card in 1955 (Doc. No.104); and requested a Chilean occupation permit for the lot in 1957 (Doc. No.47); Married to Maria del Carmen Ainol Barria (Chilean). Children: Eduviges del Carmen, Isolina del Carmen, Juana Pabla, Lucrecia Amalia,

and Miguel (Doc. No. 21, p. 77).

100. The Argentine Memorandum refers at p.38, paragraph 63, to the fact that Roberto Cid came to the disputed area in 1939, and states that he had three children, Leonilda, Aurelio and Matilde. Since neither the date of Cid's arrival in the California Valley nor the names of his children tally with the information available to the Government of Chile, no admission is made in this connection.

Other Residents of Plot 1.

101. Pablo Pena Arancibia, Chilean, born in 1910 at San Jose de la Mariquina (Province of Valdivia, Chile), obtained a Chilean identity card, 1952 (Doc. No.104). Arrived in California, 1960 (Doc. No.62). Married a Chilean. Five children, all born in Chile between 1939 and 1953 (Doc. No.21, p.82). On the Palena electoral register (Doc. No.109).

102. Matias Segura Valeria, Chilean, born at La Union (Chile) in 1934. Chilean identity card issued in 1950. On the Palena electoral register (Doc. No.108). Settled on this plot in 1961. Married to a Chilean. One child. (Doc. No. 21, p.84).

PLOT NO.

2 (104-6) "EL ENGAÑO" (sometimes also called "El Tusano")

The Plot

103. This was one of the earliest settled plots in the

Valley, having first been occupied by Fortunato Saez in or soon after 1910. Details of the life of Fortunato Saez and of his acceptance of Chilean authority in relation to this plot from 1910-1934 are given in paragraph 77 of Chapter III above.

105. In 1934 the plot was purchased by Manuel Morales and the document of sale was signed and registered in Palena (C-M.87; see also C-M.91 and C-M.94).

104. Manuel Morales was a Chilean, born at San Javier de Loncomilla in or about 1863. He died at Palena on 8 April 1939 and his death was registered at Futaleufú (C-M.123). On 9 December 1936 Morales filed at Palena a declaration for land tax purposes (C-M.114). He described the boundaries of his plot as follows: "North, State land; South, State Cordilleras; East, frontier line; West, Pablo Carrillo". In giving this description he has turned the cardinal points of the compass ninety degrees in an anti-clockwise direction, as is shown by the fact that he puts on the west Pablo Carrillo whose plot was undoubtedly to the south. His name appears on two Chilean tax receipts issued in 1952, some ten years after he left the property (Doc. Nos.102 and 103). Both receipts refer to the same property (C-M.148).

106. The Argentine Memorandum refers at p. 36, paragraph 61 to the settlement by Morales in the Encuentro Valley, states that he arrived from Argentina

with his wife and four sons, all of them Argentinian and mentions that the births of various children of three of the sons were registered in Argentina. These facts are not admitted. But even if true they are of questionable significance.

107. In 1942 Morales sold the plot to Juan Vicente Contreras Quintana (Doc. No.35, C-M.230). In 1943-1945 Contreras corresponded with the Chilean authorities about tax payments on this plot (C-M.148 and 149). In 1944 tax appears to have been paid in respect of this plot to the Achao Treasury, although the receipt refers to Fortunato Saez and is in respect of a period when the plot was occupied by him (See Doc. No.99. The identifying number is in the top right hand corner of the original. See also Ch.Mem., p.165). In 1952 he paid to the Chilean authorities accumulated taxes for the period 1932 to 1951 (Doc. Nos. 102 and 103). He still occupies the plot and pays taxes to the Chilean authorities.

Personal notes

108. Contreras is a Chilean, born at Temuco (Chile) in 1911. He lived in Argentina for a period of seven years (Doc. No.34), but came to the Valley in 1942. He has stated that when he came to California he did so in the belief that he was leaving Argentina (C-M.245). He lived for a while with Guillermina Jaramillo Carrasco, a daughter of Evaristo Jaramillo and Nolfa Carrasco (see

Plot 7 below). At that time (as now) this plot lay on both sides of the Arroyo Mallines - see the Carvajal map of 1947, Doc. No.126 - and thus straddled what the Argentine Memorial contends is the boundary. He also appears to have had some relationship with Leonilda Cid Diaz (mentioned in the Argentine Memorandum on Land Use as one of the children of Roberto Cid - see Plot 1 above), for in July 1944 Contreras was named, in a Chilean birth certificate issued at Futaleufu, as the father of Leonilda's son Marcelino born on 30 May 1944 (C.M.146). In 1943 or thereabouts he moved to his present plot (which is sometimes called "El Tusano").

109. Moreover, he continued to acknowledge his Chilean connection and the authority of the Chilean government in the following ways: he was placed on the Chilean electoral register (Doc. No.108); in 1944 he obtained a Chilean identity card (Doc. No.104); in 1944 he registered a brand mark in Palena (Doc.No.106); in 1945 he corresponded with the Chilean authorities about tax matters (C-M.148,149); in 1947 his wife protested to the Chilean surveyor Carvajal that her husband had been arrested by the Argentine gendarmes (C-M.234); in 1949 he began proceedings in the Chilean courts against a resident in the California Valley arising out of an alleged family insult (Doc.No.119).

It may be commented that if the California Valley were Argentinian, it would have been remarkable for Contreras to have begun proceedings in the Chilean courts.

In 1950 he filed a declaration with the District Inspector of Palena in respect of Plot 2 (C-M.168).

In 1952 he paid Land Tax in respect of the plot for the period 1932-1951 (Doc. Nos. 102 and 103).

In 1957 he obtained a certificate of good character from the Captain of Carabineros in Palena (Doc.No.34).

In 1957 he applied to the Chilean authorities for an occupation permit for and provisional title to the plot (Doc. No.35).

110. The marital status of Contreras is not clear. He has had two children by Leonilda Cid: Marcelino, born in 1944 (C-M.146) and Antolin, born in 1946. He has also had two children by Guillermina Jaramillo.

PLOT NO.

3 (104-17) "EL MAITEN"

The Plot

111. This plot appears on the Sketch Map (CH(C-M)1) under the name of Adelina Toledo (Dionisio Ovalle). This plot is first mentioned as having been occupied in 1944 by Dionisio Ovalle Silva (Doc.No.45). In that year Adelina Toledo Jofre came to live with

Ovalle, but Ovalle died without formally marrying her

1947 and 1949. The plot is mentioned as being in the occupation of Ovalle (Doc.Nos.37 and 71). He also appears in the Carvajal survey (Doc. No.126).

1947. Ovalle applied to the Chilean authorities for"radicación" in respect of the plot (Doc. Nos.79 and 80). In the same year, Ovalle died. Nonetheless in

1951 the Chilean authorities granted"radicacion" (Doc. No.81).

1952. Juan Hernandez Barriga complains to the Chilean authorities that his rights in the plot have not been recognised (Doc. No.83).

1956. Adelina Toledo requests "radicacion" from the Chilean authorities for the plot (Doc. No.44).

1957. Hernandez renounced his claim (Doc. No.83).

-- An undated description of the plot for the Chilean tax authorities signed by Toledo after Ovalle's death appears as Doc. No.91.

Personal Notes.

112. Dionisio Ovalle Silva. In 1950, Ovalle was described as being a Chilean, a bachelor, then 60 years of age, and with two children living (Doc. No.80). Adelina Toledo describes herself as having been married to him and states that when Ovalle came from Argentina to live in California, he was convinced that he was in Chilean territory (C-M.256). He was the brother of José

Miguel Ovalle Silva, who came from Valdivia, Chile.

113. Adelina Toledo Jofre.

Born at Futaleufú (Chile) in 1930 (Doc. No.43).

1944-1947 lived with Dionisio Ovalle.

1952. Reported to be living with Julian Soto (Doc. No.83).

1954. She registers before the Civil Officer in Palena a three year lease which she had granted to Heriberto Krause Schell (C-M.192).

1956. Applies to the Chilean authorities for "radicacion" (Doc. No.44).

She has two living children: Enrique and Ines Maria.

In a further affidavit she describes herself as having been married first to Dionisio Ovalle and then to Julian Soto (C-M.256).

114. Juan Hernandez Barriga. See below under Plot 15.

Other residents of Plot 3

115. (i) Adelina Toledo's daughter Ines Maria, born in the Valley.

(ii) The daughter's husband, José David Herrera Jara, born at Huacanalal, Chile, in 1941; holder of a Chilean identity card issued at La Union, Chile (1957), who came to the Valley in 1961 (Doc.No. 21 p.79).

(iii) The two children of Ines Maria and José David Herrera, namely, Santiago Segundo and Marcos.

(iv) The husband's father, Santiago Herrera Pedreros, born at Contulmo, Chile, in 1909, and his wife Edelmira del Carmen Jara Fierro, and their six children (Doc. No.21 p.79).

(v) Adelina Toledo's sister, Herminia Toledo Jofre (born in Argentina, see Argentine Memorandum, p. 57); her husband, Delmiro Saez Steinkamp, the son of Juan Fortunato Saez Figueroa, born in the California Valley in 1920, educated at the Palena State School and holder of a Chilean identity card issued in 1955, and their eight children (Doc. No.21. p.83).

(vi) Dionildo Saez Velasquez, a brother of Delmiro Saez and son of Fortunato Saez, birth registered at Futaleufú, Chile in 1933 (Doc.No.57), educated at the Palena State School, enrolled for military service in 1953 (Doc.No.107), and a registered elector in Chile; his wife, Rosa Soto Meza, the daughter of Julian Soto Cardenas (see below, Plot 11), was born in Argentina (see Argentine Memorandum, p.56) and their three children.

PLOT NO.

4 (104-4) "LOS CERRILLOS"

The plot

116. This plot appears on the Sketch Map (CH(C-M)1)

under the name of "Suc.Pablo Carrillo", This is another of the oldest established settlements in the Valley, belonging as it does to the heirs of Pablo Carrillo Lavoz. The details of Pablo Carrillo's Chilean connections and acceptance of Chilean authority are set out in paragraphs 78 and 79 of Chapter III above.

1930 The plot appears in the 1930 Land Tax Roll under the name of Pablo Carrillo (C-M 47 and 48)

1938 The plot again appears in the 1938 Land Tax Roll under the name of Pablo Carrillo (Doc.No.95).

1947 The estate of Pablo Carrillo requested "radicacion" from the Chilean authorities, the application being thumb-signed by Rosario, Pablo Carrillo's daughter (see below) (Doc. No.73).

1947. The plot was surveyed by Carvajal (Doc.No.74).

1950. "Radicación" applied for (C-M 175).

1951. "Radicación" was granted (Doc. No.75).

1952. Tax was paid to the Chilean authorities for the period 1943 to 1951. (Doc. No.101).

1953. The heirs of Pablo Carrillo lodged a complaint with the Chilean authorities to the effect that the 1947 survey had reduced the size of their plot in favour of an extended plot for their neighbour Carlos Lillo (C-M 185,186,189 and 193).

Personal notes.

117. The plot is now occupied by the following

persons:

118. (i) Pablo Carrillo's daughter, Rosario, born in Corcovado, Argentina in 1916 (Argentine Memorandum, pp. 39 and 53); her husband, Eulogio Videla Peñaipil, born in the Palena area in 1918, the son of Tomas Videla Catalan (see above, paragraph 80 of Chapter III), a registered elector in Chile (Doc. No.108), registered an animal brand mark in 1940 (Doc.No.106), obtained a Chilean identity card in 1943 (Doc. No.104) and had his birth registered in Palena in 1959 (Doc. No.59); and their nine children.

119. The Argentine Memorandum, at p.49, paragraph 83, states that on 6 May 1956 an Argentine occupation permit was granted to Eulogio Videla for an area of approximately 100 hectares. The bounds were stated to be "to the North Carlos Lillo Fuentes and Julian Soto; to the South Florindo Carrillo Saez; to the East Cordillera and to the West River Encuentro (international boundary)". The area thus described would appear partially to overlie Plot 4. The grant of this permit in 1956 (being after the critical date) could not, by the very tests which the Argentine Government advances, have much relevance to the determination of the allegiance of the inhabitants or the extent of governmental control in the period prior to that date. In any event, however, on 7 April 1966 Eulogio Videla

gave a certificate (C-M.235) in his own hand writing in which he said:

> "... on no occasion have I signed any document applying to the Ministry or land authorities of the Argentine Republic for the land I own in the Valle of California, because I recognise to be at the present time living in Chilean territory".

120. (ii) Two sons of Pablo Carrillo:

- Florindo Carrillo Saez, born in California in 1929. His birth was registered in Futaleufú in 1932 at the request of his father (Doc. No.29). Florindo holds a Chilean identity card issued in 1946. In 1962 he married, as his second wife, Edita Videla Jaramillo (Chilean, born in California, a daughter of Agustin Videla (see below, Plot 10). They have one child (Doc. No.21,p.77).

- Aladino Carrillo Saez, born in California in 1932. His birth was registered at Futaleufú. He went to the Palena State School.

PLOT NO.

5 (103-7) "SAN ANTONIO"

The Plot

121. This plot appears on the Sketch Map (CH(C-M)1) under the name of Carlos Lillo. There is no history of this plot as such earlier than 1947, when it was surveyed by Carvajal (Doc. No.126). But it would seem from the documents supporting the complaint of encroachment lodged by the heirs of Pablo Carrillo

(see above and C-M 185,186,189 and 193) that part at least of this plot had previously been claimed by Carrillo.

In 1947 Carlos Lillo Fuentes applied to the Chilean authorities for "radicacion" of this plot (Doc. No.37).

In 1962 the Ministry of Land and Colonization decreed that Carlos Lillo be granted a free title of ownership of this Plot (Doc. No.87).

The plot is still occupied by Carlos Lillo.

Personal notes

122. Carlos Lillo was born in Conquehua, Chile, in 1906, and his birth was registered in Victoria (Chile) in that year (Doc. No.36). In 1931 he obtained a Chilean identity card (Doc. No.104) in Pitrufquen. In 1933 he was still living in Victoria, for in that year he sought and obtained information from the Aysen Office of the Ministry of Lands about lands suitable for colonization (C-M 84).

In 1942, Lillo came to California directly from another part of Chile and settled to the east of Plot 4 (Doc. No.21, p.80). He states that he believed he was settling in Chile (C-M.255).

In the same year, described as "resident at Palena" Lillo was given a transit authorization by the Chilean carabineros in charge of the Palena post

(G-M.126).

In 1946 another transit authorization was given to Lillo by the Chilean authorities. It is of particular significance because the document bears an Argentine endorsement, dated "Corcovado, 10 July 1946", stating that the authorization had been entered in the corresponding book (C-M.154).

By 1947 Lillo appears to have achieved some representative position in the Palena district. In December 1947 he was asked by the Chilean carabineros "to summon the undermentioned settlers of that sector" to a meeting. The settlers were all inhabitants of California - Tomas Videla Catalan, José Onofre Anabalon and Agustin Videla Peñaipil (C-M.160). His wife died in that year and was buried in the Palena Cemetery (Doc. No.21,p.80).

In February 1950 he was requested by the President of the Committee for Local Progress of Palena to summon "the settlers of your [his] sector" to a meeting (C-M.165). In April 1950 he was summoned to a meeting to discuss the construction of an airfield at Palena (C-M.166). In June 1950 he was again requested "to inform the settlers of your [his] area" of a meeting of the Local Progress Committee (C-M.167).

In 1951, in a letter addressed to Lillo at "California", the Palena Committee for Local Progress

refer to Lillo's promise to provide some wood for the Committee (Doc. No.57).

In 1962, the Chilean Ministry of Lands and Colonization decreed that he should receive a free title of ownership to Plot 5 (Doc. No.87).

Lillo has four children, all born in Chile (Doc.No.21,p.80). The two boys have been enrolled for Chilean military service (Doc. No.107).

PLOT NO.

6 (104-16) "LAS RAICES"

The Plot

123. This plot appears on the Sketch Map (CH(C-M)1) under the name of Simon Lopez. It is one of the earliest settled plots in the Valley. It appears to have been occupied by Lucas Lopez Saez as early as 1916 (see C-M.132, and for personal details of Lucas Lopez see above, paragraph 80 of Chapter III)

In 1930 Lopez appears in the Land Tax Roll in respect of this plot (C-M.47 and 48).

In 1936 Lucas Lopez filed with the Chilean authorities a Descriptive Statement of the property (Doc. No.90).

In 1938 Lucas Lopez died and the property passed to his son, Simon, who occupies it now (C-M.230).

In 1943 land tax is paid in respect of the plot (C-M.130 and 131).

In 1943 Simon Lopez applied for "radicacion" in respect of the plot (C-M.129) and free title thereto (C-M.132).

In 1947 Simon Lopez again applies for "radicacion", apparently in respect of the same, or part of the same plot, but described slightly differently (C-M.157).

In 1947 the plot is mentioned in Doc. No.37 as being in the occupation of Simon Lopez.

In 1948 Simon Lopez paid tax in respect of an application for provisional title (C-M.161).

In 1949 Simon Lopez is mentioned in Doc. No.71 as being the eastern and southern neighbour of Onofre Anabalon.

In 1950 the plot was surveyed (C-M.159).

In 1950 Simon Lopez was "radicated" in respect of the plot for which he applied in 1947 (C-M.174 and C-M.158).

In 1951 Land Tax is paid on the plot to the Chilean authorities (Doc. No.100).

In 1957 Simon Lopez requested a free title of possession (C-M.200).

In 1957 he paid Land Tax on the plot (C-M.203).

In 1958 Simon Lopez complained to the Chilean authorities about an increased payment in taxes which he was called upon to make (C-M.207).

Part Two

Personal notes

124. Simon Lopez, Chilean, was born at Palena in 1904 (C-M.151).[1] Both his parents were Chilean. He arrived in California with them in about 1915, (C-M.199). He received a Chilean identity card in 1945 (Doc. No.104) and is a Chilean registered elector (Doc. No.108).

In 1952 he declined to comply with an Argentinian summons to a meeting at the house of Bautista Saez (see Plot 11) (C-M.221).

In 1957 the Captain of Carabineros at Palena certified that Simon Lopez was a citizen above reproach who had lived in the Valley of California for forty-five years (Doc. No.22).

In 1960 he married a Chilean, Aurora Sanchez Velasquez (Doc. No.21, p.81). They have two children.

125. The Argentine Memorandum states as follows at p.37, paragraph 62:

> "Lucas Lopez, who had come from Trevelin via Corcovado, Argentina, was settled in the zone by 1936 having bought some mejoras from Fortunato Saez; his son Simon Lopez, an Argentine, had been born in the province of Neuquen, Argentina."

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1 The statement at p.140 of the Ch.Mem. to Lopez having been born in Chaiten was an error.

126. The Government of Chile finds this assertion by the Argentine Government, made without any citation of supporting evidence, to be in clear contradiction with the facts set out above, and invites the Court to reject it.

PLOT NO.

7 (104-5) "SAN JOSÉ" or "LOS MALLINES"

The Plot

127. This plot appears on the Sketch Map (Ch(C-M)1) under the names of Nolfa Carrasco and Evaristo Jaramillo. The plot is said originally to have been part of Plot 6 occupied by Simon Lopez (Doc. No.21, p.81).

Nolfa Carrasco, now the widow of Evaristo Jaramillo, claims that she first occupied the plot in 1927 (Doc. No.41).

In 1947 Jaramillo applied to the Chilean authorities for "radicación" (Doc. No.38).

In 1950 Jaramillo was radicated in respect of this plot (C-M.174).

In 1950 Evaristo Jaramillo died and his death was registered at Futaleufú (Doc. No.60).

On an unknown date, but after 1950, Nolfa Carrasco requested the Chilean authorities to grant her a free title to this plot (Doc. No.41).

In 1951 a shooting incident took place in this plot which was reported to the Chilean carabineros and to the Judge at Palena (Doc. No.120).

Plot Two

In 1953 Nolfa Carrasco paid tax to the Chilean authorities in respect of this plot (Doc. No.42).

In 1962 Nolfa Carrasco and her children were granted free title to the plot by Chilean decree (Doc. No.88).

Personal notes

128. Evaristo Jaramillo Mora, Chilean, was born at Villarrica (Chile) in 1882 (Doc. No.21, p.76) and held a Chilean identity card issued at Puerto Montt. At one time, he, his wife and their children lived in Corcovado, Argentina. But they left because they were not allowed to own land there (C-M.251). In 1947 he applied to the Chilean authorities for "radicación" in respect of Plot 7 (Doc. No.38), which was granted and is evidenced by an order for radicación of 13 November 1950 (C-M.174) and an undated minute signed by the surveyor Carvajal (Doc. No.39). In 1948 he claimed and obtained recovery of a lost revolver from the District Judge of Palena (Doc. No.118).

129. The Argentine Memorandum states (at p.37) that Evaristo Jaramillo lived until 1938 in Lot 94/95 of Colony of the 16th of October and then moved to the California Valley with his wife, Nolfa Carrasco, and their children, of whom Guillermina, Alfredo, Rosalia, Guillermo, Sudelia Ana and Ernesto were registered in Argentina as having been born there.

130. The births of Guillermina, Alfredo and Alberto were all registered at Palena in 1952 (C-M.267, Doc. Nos. 55 and 56 respectively.).

Present residents

131. Nolfa Carrasco Baeza, Chilean, born at Lumaco (Chile) in 1901, holds Chilean identity card issued in 1943 (Doc. No.104). In 1962 she and her children obtained free title to the plot by a Chilean government decree (Doc. No.88).

132. The Argentine Memorandum, p.58, paragraph 91, states that a permit granted to Nolfa Carrasco in 1956 for approximately the same landholding as is comprised in Plot No.7 is still in force. But Nolfa Carrasco has sworn an affidavit (C-M.252) in which she denies that she has ever taken any step or signed any document, herself or by proxy, in order to apply to the Argentine authorities for the lands she legally owns in California.

133. In the list of persons of Argentine nationality stated in the Argentine Memorandum to be living in the disputed area appear (at pp.54-55) the names of certain children and grandchildren of Nolfa Carrasco. Save to the extent that reference is made below to such children and grandchildren, the Government of Chile makes no admission in this connection.

134. The following children and grandchildren of Nolfa Carrasco live with her:

- Ana, married to Julian Bravo Castillo, the son of Juan de Dios Bravo Maraboli (see Plot 18 below). They have five children.

- Alfredo Jaramillo Carrasco, Chilean, born 1930 in Palena (Doc. No.55), educated at the Palena State School (Doc. No.21, p.80, paragraph 16), obtained a Chilean identity card in 1946 (Doc. No.104), enrolled in Chilean military service in 1949 (Doc. No.107), registered as a Chilean elector (Doc. No.109). In 1962 he married Elvira Cayú Videla. They have had six children, of whom five are living.

The Argentine Memorandum, at p.58, paragraph 90, states that an Argentine occupation permit was granted to Alfredo Jaramillo in 1956. The Chilean Government has no knowledge of an application by Jaramillo for any such permit, and makes no admission thereof. In any event, it is after the critical date.

- Alberto Jaramillo Carrasco, Chilean, born in 1931, educated at the Palena State School, obtained a Chilean identity card in 1946 (Doc. No.104), enrolled for Chilean military service (Doc. No.107), a Chilean registered elector (Doc. No.108). In 1955 formally reports to the Chilean carabineros in Palena a shooting accident which occurred in his house, and was ordered

to appear before the District Court of Palena (Doc. No.116). He married a Chilean in 1952.

PLOT NO.

8 (104-18) "QUEMADO GRANDE"

The Plot

135. This plot now appears in the Sketch Map (CH(C-M)1) under the name of Dionisio Videla. He succeeded his father Tomas Videla, one of the earliest settlers in the Valley. (See paragraph 80 of Chapter III above.) Until 1938, Agustin Videla Peñaipil, another son of Tomas, lived with his father but he then moved to Plot No.10 (see below).

In 1949, Tomas Videla requested radicacion from the Chilean authorities (Doc. No.17).

In 1950 Tomas Videla filed a formal description of the land with the Chilean authorities (Doc. No.92).

Personal notes on present residents

136. Dionisio Videla, Chilean, was born in 1921 in Argentina (Doc. No.52). In 1955 he married Dionilda Jaramillo, a granddaughter of Nolfa Carrasco (Doc. No. 52). They have three children.

137. The Argentine Memorandum, at pp.60-62, paragraphs 94-95, states that Dionisio Videla obtained an occupation permit from the Argentine Government in 1956 for a holding approximately similar to Plot No.8. Dionisio expressly denies ever having applied for such

a permit (C-M.236). He also declares that he regards his plot as being in Chilean territory.

138. The Argentine Memorandum also refers to the application for a free title to a plot known as "El Azul" made by Videla to the Chilean Government in 1964. The Argentine Memorandum points out, quite correctly, that the description of this plot does not tally with that of Plot 8. The Government of Chile did not suggest that the plots were the same. The relevance of the application for "El Azul" (Doc.No.53) is that it shows Videla claiming to be Chilean and applying for title to land which is undoubtedly Chilean; and this fact renders it more unlikely that he would have considered Plot 8 to be in Argentine territory or would have sought to straddle the frontier.

139. The Argentine Memorandum concludes that therefore the only grant under which Videla holds Plot 8 is Argentinian. In formal terms this may or may not be correct (according to the truth of the facts); but as heir to Tomas Videla, Dionisio has all the rights latent in the fact of Tomas's occupation of Plot No.8 and in the request made by Tomas in 1949 to the Chilean authorities for "radicacion".

140. The fact remains that Videla's plot would be divided by the proposed Argentine line - at least as delineated in Chilean terms.

141. Aladino Cancino Jaramillo, a Chilean, born at Palena in 1942, works for Dionisio Videla (Doc.No.21,p. 85, paragraph 30).

PLOT NO.

9 (104-40) "PORVENIR"

The Plot

142. This plot appears on the Sketch Map (CH(C-M)1) under the name of Amelia Morales as successor of Leandro Videla Peñaipil who died in 1958.

The plot appears under the name of Floreano Saez Estencan in the 1938 Land Tax Roll (Doc. No.95), but is there called 'California'.

Videla stated in 1950 that the former occupant had been Floreano Saez, a son of Fortunato Saez (Doc. No.93), but that Videla had occupied the plot since 1937.

In 1945 Videla appears on Land Tax Roll in respect of "Porvenir" (Doc. No.96, p. 285).

In 1948 a Chilean notice to pay land tax in respect of this year is served on Videla (C-M.162).

In May 1950 Videla requested "radicacion" from the Chilean authorities in respect of this Plot (Doc. No.82).

In October 1950 Videla filed a descriptive statement of the plot with the Chilean tax authorities (Doc. No.93).

On 4 November 1950, Land tax was paid in respect of this plot (identifiable by the index number 842) for

the period 1938-1946 (C-M.173).

Personal notes

143. Floreano Saez Estancan, - the son of Juan Fortunato Saez and Mathilde Steincamp. Little is known of him. In 1936 he was recorded as the neighbour of Juan Balboa Arteaga (see paragraph 80 of Chapter III above) (Doc. No.7). In 1937 he filed a descriptive statement with the Chilean authorities of a plot called California, which may have included or be the same as Plot No.9 (Doc. No.50).

144. Leandro Videla was a Chilean, born at Pitrufquen, Chile, in 1899. He lived for a while in Argentina and then came to California. His widow gives the reasons why he left Argentina and states that he regarded California as Chilean territory (C-M.260).

Present residents

145. Amelia Morales Catrilaf. She was brought to California in 1953 by Leandro Videla. She succeeded to Videla's rights upon his death in 1958 (Doc. No.21, p.82, paragraph 20). She states that in residing in California she regards herself as being in Chilean territory (C-M.260).

- The daughter of Amelia Morales, Benita, born in Argentina. Her husband, Eliseo Cid Leiva, a Chilean born at Lonquimay (Chile) in 1929, lives with her. They came to California in 1963 with their six children

and settled on the plot of Bonita's mother (Doc.No.21, p.77, paragraph 7).

146. The Argentine Memorandum refers at p.53 to four children of Eliseo Cid. Three of them are stated to have been born in Argentina and to have had their births registered there in 1952, 1955 and 1960 respectively. Since these dates fall before the arrival of Eliseo Cid in the California Valley, they would appear to have little relevance. The fourth child is stated to have been born "at Rio Encuentro" in 1964 and to have been registered there in that year. The Chilean Government make no admission in this connection. The event is, in any case, one occurring after the critical date.

PLOT NO.

10 (104-55) "LOMAS BAJAS"

The plot

147. This plot appears in the Sketch Map (CH(C-M)1) under the name of Agustin Videla by whom and by whose wife and family it has been occupied since 1938.

In 1957 Videla filed a request with the Chilean authorities for an occupation permit and provisional title, claiming that he had occupied the land since 1938 (Doc. No.31).

Part Two   Personal notes

148. Agustin Videla Peñaipil, Chelean, was born at Palena in 1917 (Doc. No.19). He is a son of Tomas Videla (see Plot No.8 and paragraph 80 of Chapter III above). He is a registered Chilean elector (Doc. No.108). Until 1938 he lived with his father on Plot No.8.

In 1940 he registered an animal brand mark with the Chilean authorities at Achao (Doc. Nos.105 and 106). He obtained a Chilean identity card in 1943 (Doc.No.104).

In 1944 he was one of the signatories of a petition addressed to the Chilean Minister of Public Works (C-M.145). The signatories claimed to be Chilean nationals and said they wanted their children to feel one hundred per cent Chilean. They wanted to stop their children emigrating to Argentina. Accordingly, they asked for funds for widening and completing the road from Palena to Puerto Ramirez. This, it may be commented in passing, is not a document which would have been signed by a person who had any reason to believe that he was residing in Argentina.

In 1947 he was one of the settlers named in the request sent to Carlos Lillo (see above, Plot No.5) to be summoned to a meeting in Palena (C-M.160).

In 1951 he undertook to work the wood which Carlos Lillo offered to the Palena Committee for Local

Progress (C-M.177).

In 1957 he applied to the Chilean authorities for a provisional title to Plot No.10 (Doc. No.31).

In 1964 Vidola married Elcira Jaramillo Carrasco in Palena and the marriage was registered there (Doc. No.30). By then, however, they had already had nine children, including one, Diego, born in 1942 and registered for Chilean military service in 1961 (Doc. No.21 p.85, paragraph 29 and Doc. No.107).

PLOT NO.

11 (104-41) "LOS LIRIOS"

The Plot

149. This plot appears on the Sketch Map (CH(C-M)1) under the names of Julian Soto and Juan Bautista Saez Steincamp. No documentary evidence relating to the occupancy of this plot has yet been found, unless the plot be that described in the Descriptive Statement filed by Floriano Saez in 1937 (Doc. No.50). The boundaries there described were: North - Juan /Bravo/ Maraboli: South - Antonia Balboa; East - Pablo Carrillo; West - Cordillera. This description could be made to fit, in view of the interests at that time of Bravo to the north and Balboa to the south, but the reference to Carrillo on the east does not fit. It may possibly have been an error. Floriano was the brother of Bautista.

Part Two

It appears, however, that in 1952 at any rate, the plot was already in the occupancy of Bautista Saez. According to an affidavit sworn by him in 1965 (C-M. 222), a meeting took place at his house in the spring of 1952. It had been summoned, without the consent of Saez, by an Argentine Lieutenant of Gendarmes. The latter announced that the area fell within Argentine territory and "indicated with his hand that the limit between Chile and Argentina ran along the hills west of my house on which Cerro Mera is situated".

The affidavit continues:

> "Being the first time we were given a notification of this nature, and surprised that we might be in Argentine territory, we immediately informed the Carabineros and the Palena authorities of the situation, who told us not to worry in these localities because the gendarmes were mistaken."

Personal notes

150. Bautista Saez, Chilean, was born in 1918 in the California Valley. His father was Juan Fortunato Saez, one of the earliest settlers in the Valley. Bautista holds a Chilean identity card.

151. Julian Soto Cardenas, Chilean, born at Potrono de Malo (Chile) in 1934. At one time he lived in Argentina and came to California wishing to settle permanently in Chile and in the belief that he was leaving Argentina (C-M.242). In 1952 he is alleged to have been cohabiting with Adelina Toledo (Plot No.3

above). He was registered for Chilean military service in 1954 (Doc. No.107) and received a Chilean identity card in 1955 (Doc. No.104). He is married to Margareta Meza Garabito. They have one daughter, Rosa, married to Dionildo Saez (see Plot No.3 above).

PLOT NO.

12 (104-29) "LAS PAMPITAS"

The Plot

152. This plot appears on the Sketch Map (CH(C-M)1) under the name of Onofre Anabalon.

The use of the plot at an early date is referred to in an affidavit by Gumercinda Castillo Marin, the widow of Juan de Dios Bravo Maraboli, sworn in 1965 (Doc.No.5) She states that Juan Antonio Balboa (see above, paragraph 80 of Chapter III) grazed his cattle "in Chilean places called... Las Pampitas...". She says that

> "in 1932 my husband and I came to live in Chile, at the place called "Las Pampitas", a plot occupied at present by Onofre Anabalon Vega, on the banks of the River Tigre. In that place we were authorized to stay by Juan Antonio Balboa, because he occupied all that area. The winter of that year was very snowy and we thought of leaving that place. It was then that Juan Antonio Balboa authorized my husband to move to the place called California..."

At some time thereafter the plot was occupied by Carlos Domingo Lafuente Inostroza. In 1954 Lafuente exchanged "mejoras" and rights of possession with José Onofre Anabalon who had rights in Lot No.104-8 on

the Land Tax Roll, on the west side of the minor channel immediately opposite the Carrillo plot, No.4. This exchange was registered before the Civil Registrar of Palena in 1954 (Doc. No.24). Anabalon still occupies the plot.

Personal notes

153. Juan de Dios Bravo Maraboli was a Chilean who lived for a while in Argentina. The Chilean Government accepts the general proposition in paragraph 61 of the Argentine Memorandum, p.36, that Bravo moved to the valley of the River Engaño from Argentina, but believes, in the light of the affidavit of Bravo's widow, that the correct date was 1932 (Doc. No.5). It is admitted that the widow, Gumersinda, considers herself to be Argentinian.

Bravo's widow has also stated (C-M.246) that when her husband left the Argentine and came to California, he did so in the conviction that he was settling in Chile.

Bravo clearly considered himself Chilean. He was one of the signatories of the 1944 petition to the Chilean authorities in which the petitioners declared themselves and their children to be Chilean (C-M.145). In 1942 he had contributed 6 days work to the construction of the road from Palena to Puerto Ramirez (C-M.127).

In 1950 Bravo applied to the Chilean authorities for an occupation permit in respect of a plot which it is not easy to identify, the description being: "North, State Cordillera and Leandro Videla; East, State Cordillera; South, State Cordillera and Juan Rosales Vasquez; West, State Cordillera" (Doc. No.60). It is clearly not Plot 12, because his widow states that they left that plot in 1932 to move to a property of Balboa's called "California". The reference to Leandro Videla and Juan Rosales as neighbours suggests that the plot was inside the bend of the Tigre, possibly forming part of Land Tax Lot No.103-13 (Plot No.18, below). Bravo was referred to as the Eastern neighbour of Juan Rosales in the latter's request for "radicacion" made to the Chilean authorities in 1943 (C-M.135).

In 1951 Bravo was wounded in a shooting affair at the house of Nolfa Carrasco (Plot No.7), and accepted the jurisdiction of the Palena Court in respect of it (Doc. No.120).

In 1955 he sold his rights to Felix Galilea Martinez - rights to land which appears to have lain on both sides of the Tigre. The formal contract of sale was made in Puerto Montt (Chile) (Doc. No.54) and approval for the transfer was sought by Galilea from the Chilean Minister of Land and Colonization

(Doc. No.85). In the same year tax was collected by the Chilean authorities under the name of Bravo in respect of the transfer (Doc. No.86).

154. Carlos Domingo Lafuente Inostroza, Chilean, born 1901 (Doc. No.24) and died, a bachelor, in 1959 (Doc. No.25).

155. Onofre Anabalon Vega, Chilean, was born in Quitratué (Chile) in 1909. He is a registered Chilean elector (Doc. No.108) and holds a Chilean identity card issued in 1943 (Doc. No.104).

From 1920 to 1931 he lived in Argentina and then came to the California Valley (Doc. No.23). Once more, it seems improbable that a man who had returned to Chile (for he first settled west of the minor channel) in the circumstances in which he did should then knowingly exchange his plot for one on the Argentine side of the boundary - a suggestion which is implicit in the general Argentine contention. Indeed, Anabalon has stated expressly that in coming to live in California he believed that he had left Argentina (C-M.249).

In 1933 he made a declaration before the District Judge at Palena explaining the circumstances in which he cohabited with and later left Berta Barriga Troncoso (C-M. 30).

In 1939 he registered at Futaleufú, Chile, the

birth of his son Claudio, born in 1929 - presumably in Argentina.

In 1942 Anabalon made a contribution of provisions in connection with the construction of the road to Puerto Ramirez (C-M.127).

In 1947 Anabalon's Lot No. 104-8 was surveyed by the surveyor Carvajal (Doc. No.69) and in 1949 he was "radicated" (Doc. Nos. 70 and 71).

In 1957 the Captain of Carabineros at Palena gave Anabalon a certificate of good character (Doc. No.23).

Anabalon is married to Viviana Carrillo Saez who was born in Argentina, but is the daughter of Pablo Carrillo Lavoz and Dorila Saez Figueroa (see Plot 4 above), and has eleven children, all of them Chilean. Two of his children were enrolled for Chilean military service in 1958 and 1965 respectively (Doc. No.107).

There is nothing in the reference to Anabalon and his family at p. 38 of the Argentine Memorandum which is inconsistent with the above nor which fixes Anabalon with Argentinian character or allegiance.

PLOT NO.

13 (104-9) "LAS PAMPAS"

The plot

156. This plot appears on the Sketch Map (CH(C-M)1) under the name of Adeodato Mera, who succeeded his father Carlos Mera.

In 1950 Carlos Mera filed with the Chilean authorities a descriptive statement of the plot (Doc. No.27). He declared that the property was acquired by occupation following abandonment, having previously belonged to Juan Antonia Balboa.

Personal notes

157. Carlos Mera arrived in California in 1940 (Doc. No.21, p. 81, paragraph 19). He believed that he was in Chilean territory (C-M.258). In 1942 he contributed 6 days work to the construction of the road from Palena to Puerto Ramirez (C-M.127). His name appears in the register of animal brand marks kept at Achao (Chile) as having had a brand registered in 1949 (Doc. No.106).

158. Adeodato Mera Gomez, Chilean, born in Chile arrived in the Valley in or about 1940 (Doc. No.26). He received a Chilean identity card in 1943 (Doc. No. 104) and was registered for Chilean military service in 1945 (Doc. No.107). In 1952 he obtained a certificate of fair character from the Captain of Carabineros at Palena (Doc. No.26). This stated that Mera had an Argentinian wife and one Chilean son. (See also the Argentine Memorandum, p.38).

The Argentine Memorandum (at p.58, paragraph 91) claims that an occupation permit given to Mera in 1956 is still in force. Mera denies that he has ever put his signature on any document applying to the Argentine

authorities for the lands he owns in California and which he regards as being in Chilean territory (Doc. No.225).

159. Also resident on Plot 13 is Adiodato's uncle, Aristeo Mera Velasquez, a Chilean, born at San José de la Mariquina, Chile, in 1893 (Doc. No.21, p.81, paragraph 19).

PLOT NO.

14 (104-53) "CALIFORNIA"

The plot

160. This plot appears in the Sketch Map (CH(C-M)1) under the name of Alfredo Foitzick.

The Government of Chile has so far been unable to find any documents which relate specifically to the history of this plot, but it falls in the part of the Valley previously in the general occupation of Juan Antonio Balboa Arteaga.

Personal notes

161. Alfredo Foitzick Moncada, Chilean, was born in 1917 at Trumao (Chile) (Doc. No.48). He holds a Chilean identity card, issued in 1936 (Doc. No.104). He came to the California Valley in 1951 (Doc.No.49). He obtained a certificate of good character from the Captain of Carabineros at Palena in 1957 (Doc.No.49). He owns another plot of land "Costa Río Encuentro", on the western bank of the lower section of the River

Encuentro, in territory which Argentina acknowledges to be Chilean. He states that he occupied the land he now owns in the California - Valle Hondo because it was Chilean territory. He has refused Argentinian requests to sign applications for the occupation of the Valle Hondo plot (C-M.248).

Foitzick married a Chilean in 1942 and has eight children. The two eldest sons are registered for Chilean military service (Doc. No.97).

PLOT NO.

15 (104-7) "LAS HORQUETAS"

The plot

162. This plot appears on the Sketch Map (CH(C-M)1) under the name of Juan Hernandez.

Hernandez appears to have moved to this plot in or shortly before 1957. In that year he applied to the Chilean authorities for an occupation permit (Doc. No.33) and desisted from any further claim to Plot No.3 (see above, Plot No.3 and Doc. No.83).

The plot was previously known as "Los Altares" and appeared so enrolled in 1945 under the name of Rujo Flores Rosales. Later it was mentioned as fiscal land (Doc. No.21, p.79, paragraph 12).

Personal notes

163. Hernandez is a Chilean, born at Curacautin (Chile) in 1908. He married in Argentina, in about 1938, Maria Jofré [Cofre] Vega and returned to Chile

in 1940, settling first on Plot No.3. They have eleven children (Doc. No.21,p.79, paragraph 12). He states that he settled in California in the firm belief that it is Chilean territory (C-M.240) and he clearly regards himself as a Chilean. He is one of the residents of the California Valley who in 1947 provided the Surveyor Carvajal with information about attempts by the Argentine government to take a census (C-M.156).

The Argentine Memorandum refers, at pp. 38 and 54, to the Argentine nationality of the wife and four of the children of Hernandez. The Government of Chile observes that of the eleven children of Hernandez, the births of only four appear to have been registered in Argentina and the Argentine Memorandum contains evidence of only one registration.

The Argentine Memorandum also refers (at p.58)to an occupation permit said to have been granted to Juan Hernandez in1956 and still to be in force. Hernandez has declared that he has never signed any application to the Argentine authorities for the occupation of land in California or Las Horquetas (C-M.239).

PLOT NO.

16 (104-56) "RIO TIGRE"

The plot

164. This plot appears in the Sketch Map (CH(C-M)1) under the name of Pedro Rivera. In 1943

Rivera applied for an occupation permit for a plot of which the boundaries were described as follows: "North, fiscal ranges; East, fiscal lands; South, fiscal ranges; West, Lake El Tigre". The plot was said to be "in the place 'Lago Palena'." This description would appear to relate to Plot 16. (C-M.139).

Personal notes

165. Pedro Rivera Segundo Iribarra was a Chilean, born at La Union (Chile) in 1901 (Doc. No.65)[1]. He held a Chilean identity card issued in 1943 (Doc. No.104). His name appears in the 1938 Land Tax Roll for the first time under Index No.157 in respect of a plot called "El Tigro" (Doc. No.95 , p. 275). He appears to have settled in California in Valle Norte in about 1942 (see C-M.201 and 202). At any rate, in that year he contributed 6 days work to the construction of the road from Palena to Puerto Ramirez (C-M.127). In the 1945 Roll the same index number appears against a plot called "Los Coiques" in the name of Herminio Rivera Ibarra (Doc. No.96, p.285).

In 1957 he was granted by the Chilean authorities an occupation permit in respect of Plot No.17 (see below and Doc. No.67). He died in 1959. His death was

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1 **The reference at p.83 of Vol.3 of the Chilean Memorial to Rivera's birth at Cherquenco is an error.**

registered in Palena. (Doc. No.65). His rights were inherited by his brother Anastasio Rivera Iribarra (C-M.262).

PLOT NO.

17 (104-19) "LAS HORQUETAS"

The plot

166. This plot appears on the Sketch Map (CH(C-M)1) under the name of Pedro Rivera.

In 1957 he applied to the Chilean authorities for an occupation permit and provisional title for this plot. He stated that he had occupied the plot since 1944. (C-M.201).

In 1957 the Chilean Ministry of Lands granted him a provisional occupation permit in respect of this plot (Doc. No.67).

Pedro Rivera's brother states that Pedro never doubted that Plots 16 and 17 were in Chilean territory (C-M.262).

PLOT NO.

18 (103-13) "ESTRELLA"

The plot

167. This plot appears in the Sketch Map (CH(C-M)1) under the name of Felix Galilea.

The plot was originally occupied by Juan Antonio Balboa. With his consent, Juan Bravo and his wife moved to it in 1933 (Doc. No.5 and see above under Plot No.12).

In 1939 Juan Bravo filed a declaration for land tax purposes which indicates that he was in occupation at least from 1937 (C-M.121).

Juan Bravo himself gave this date to his original occupation (Doc. No.54).

In 1950 Juan Bravo requested an occupation permit for the plot (Doc. No.60).

In or about 1954 Juan Bravo filed a further declaration which covered the additional area he had in the meantime acquired north of the Rio Tigre (C-M.194).

In 1955 Juan Bravo sold the plot to Felix Galilea (Doc. No.54); Galilea sought official Chilean approval for the sale (Doc. No.85); and Bravo paid tax thereon (Doc. No.86).

Personal notes

168. For personal details of Juan Bravo, see Plot No.12 above.

169. Felix Galilea Martinez is a Chilean who was born in Spain but was naturalized as Chilean by decree in 1957. His name appears in the Palena Land Roll for 1965 against this plot (Doc. No.94, p.267).

PLOT NO.

19 (102-23) "CALIFORNIA"

170. This plot is marked on the extended Sketch Map (CH(C-M)1) under the name of Juan Rosales.

In 1928 the land was still occupied by Juan Antonio Balboa. The widow of a cousin of Juan Antonio's, Bartolomé Segundo Balboa, tells how in 1928 her husband went to live with Juan Antonio "on the plot which is to-day occupied by Juan Rosales" (Doc. No.4).

In 1943 Juan Rosales requested "radicación" in respect of his occupation of the plot (C-M.135). He named Bravo as his eastern neighbour. (Bravo, it will be recalled, later sold the neighbouring plot to Felix Galilea - see above, Plot No.18). The request of Rosales for "radicación" was granted in the same year (C-M.143).

In 1960-61, Rosales requested from the Chilean authorities a provisional title for this plot, stating that he had been radicated on it for more than 20 years (C-M.211). A free title was granted to him by a Decree of the Chilean Ministry of Lands in 1965 (C-M.220).

Personal notes

171. Juan Felix Rosales Vasquez, born in 1897 is a Chilean. He was so recognized by his neighbours. Juan Bautista Saez Steinkamps (see above, Plot No.11) spoke, in his affidavit made in 1965 (C-M.222) of

> "the settlers resident on the south bank of the River Tigre towards River Azul, that is to say, where the Chilean nationals Juan Bravo Maraboli, Juan Felix Rosales Vasquez, Leonidas Monje Delgado and Venancia Rosales lived..."

Rosales lived in Argentina for 34 years, but in 1932 he returned to Chile as a repatriate to take up permanent residence there. He brought with him 130 cows, 19 horses and 40 sheep (C-M.69).

In 1936, Juan Felix Rosales, referring to himself as "Chilean, stock farmer, repatriated from the Republic of Argentina" applied to the Chilean authorities for a provisional title to some land in the Province of Aysen (C-M.111).

In 1938 he registered the birth of his youngest son at Futaleufú (C-M.119). All his other children had been born before he returned to Chile (C-M.137).

In 1938 he occupied and cleared a plot just outside the disputed area, by name "La Porfia", bearing Land Tax Roll No.104-14, and in 1941 applied for a provisional title to the plot (C-M.124).He described the boundaries: "North - the plot occupied by Jose Casanova and State cordilleras; South - State cordillera; East - Arroyo Las Matreras; and West - Plot occupied by José Victor Sandoval". In 1943 he applied for "radicación" in respect of this plot as well as another (C-M.137) and this was granted in 1943 (C-M.142). In the 1945 Chilean Land Tax Roll he was entered as paying tax on this plot (Doc. No.96, p.285). In 1954 he applied for "radicación" of what appears to be the same plot (C-M.136). The "mejoras" of this

plot were sold by Rosales to Francisco Cardenas Velasquez in 1956 (C-M.195). Each party to the transaction applied to the relevant Chilean authorities for consent, which was granted, and the necessary taxes were paid (C-M.195,196,197,205,208,209,213,216 and 218)

In 1943 he applied for "radicación" of Plot 19 (C-M.135 and 137); which was granted the same year, (C-M.142 and 143). In the 1945 Chilean Land Tax Roll he was entered as paying tax on a plot called "Las Maravillas", which may be Plot No.19 (Doc. No.96, p.285 and C-M.184. See also C-M.182,183 and 191). In 1954 he applied for and obtained a provisional title of ownership in respect of this plot, saying that he had been in possession of it since 1939. (C-M.187,188, 190 and 198).

172. The Argentine Memorandum, p.39, paragraph 66, states that Rosales settled in the Valley of the Engaño in 1943, that he had formerly lived in Argentina and had eight Argentine children.

The Government of Chile admits that Rosales had lived in Argentina but points out that while Rosales may not have come to the Valley of the Tigre/Engaño until 1942, he had left Argentina ten years before that. As to the registration of the children, the Government of Chile accepts that such registration was

quite likely. Rosales himself, in an application to the Chilean authorities made in 1943, names six children and gives their ages. From this it appears that all save the youngest, whose birth was registered at Futaleufú (see above), must have been born while Rosales still lived in Argentina (C-M.137).

There can be no real doubt as to the Chilean character of Rosales or of his intention to reside in Chile. He was a repatriate who left Argentina because of unsatisfactory conditions there. He settled first in another part of Chile and then came to California. It is improbable in the extreme that he thought he was thereby returning to Argentina. In any event, in 1949 he was made Inspector of the Palena District in succession to Eleodoro Diaz (C-M.210). As such, he informed the Sub-delegate of Yelcho, his superior, of the Argentine incursion into California in 1952. (See Chilean Memorial p.338; C-M 180, and Annex No.30). In 1942 he had contributed money and four sacks of potatoes in connection with the construction of the road from Palena to Puerto Ramirez (C-M.127).

PLOT NO.

20 (104-13) "EL ROSAL"

The Plot

173. This plot is marked in the extended Sketch Map (CH(C-M)1) under the name of Leonidas Monje. He

moved there in 1939 from his father's plot further down the Tigre. Plot No.20 had previously been the property of Juan Antonio Balboa (C-M.263). (See also C-M.170).

In 1943 Monje applied to the Chilean authorities for "radicación" on this plot, described as bounded as follows: "North - River Tigre; East - Juan Rosales; South - State Cordillera; West - River Azul" (C-M.133 and 134). The plot can thus be seen to lie in the angle made by the confluence of the Tigre and the Azul. "Radicación" was granted by the Chilean Minister of Lands in the same year (C-M.138), and was implemented (C-M.140). There are records of tax payments made in 1962 for the year 1954 (C-M.214 and 215). Monje was granted a free title of ownership in 1965 (C-M.224).

Personal notes

174. Leonidas Monje Delgado is a Chilean, born in 1909. His birth was registered in La Union (Chile) in 1909 (C-M.1). His parents, who were Chilean, had lived in Argentina, but because of conditions there returned to Chile in 1924. They then settled on the east bank of the Río Tigre on a plot, Land Tax No. 104-20, bearing the name "Suc. Jose Monje" in the extended sketch map. Leonidas moved to Plot 20 in 1939. He never had any doubts that this plot was in Chilean territory (C-M.263). His acknowledgement of Chilean authority in the area of this plot is evidenced by the

steps, mentioned above, which he took in relation to the plot. In 1942 he contributed 6 days work to the construction of the road from Palena to Puerto Ramirez (C-M.127). In addition, in 1958, he lodged a complaint with the Chilean carabineros against Bautista Saez and Agustín Videla Peñaipil in respect of damage which he alleged they caused his cattle when passing through a field of his in the Azul Sector (C-M.20).

PLOT NO.

21 (104-26) "COLORADO"

The plot

175. This plot is entered in the extended Sketch Map (CH(C-M)1) under the name of Roberto Monsalve. It previously belonged to Venancio Rosales Garces. Rosales, a Chilean, states that he lived for a while in Argentina and then returned to Chile. He first lived north of Post 16, but then moved to a plot of land called "El Azul", which he states has always been recognised by all the settlers as Chilean. In picturesque language he says that "its limits stretch very far towards the rising sun on the mountain ranges". He concludes by stating that "some years ago he sold the land to senor Monsalve" (C-M.257). (See also C-M.171).

B. <u>Chilean administrative activity in the disputed area</u>.

176. The presentation, in the section A of this Chapter, of the material relating to the ownership or occupation of the plots in the disputed area and the Chilean identification of the settlers there resident has involved reference to a variety of activities which represent an exercise by the Chilean authorities of administrative competence throughout the disputed area. In contrast with the five categories of Argentine administrative activity set out in Section D of Chapter II above, the Chilean activity is on a quite different scale - wider in range of action, more frequent and greater in the period of years which it covers. It does not consist, as the Argentine conduct does, of intermittent and isolated happenings - in 1894, 1920, 1946, 1954 and 1956. It has all the marks of normalcy and continuity. This must be apparent both from the content of Section A above and from the Chilean Memorial Part Two, Chapter IV, Sections B and C.

177. Nonetheless, it may be of assistance to the Court if the Government of Chile now sets out in classified form the various types of Chilean administrative activity which are mentioned in the previous section. In so doing, the Government of Chile will <u>not</u>

repeat theanalysis of activity contained in the Chilean Memorial. It will merely supplement that material with additional evidence which has since come to hand. In general, it should be borne in mind that the Government of Chile has not thought it necessary to produce evidence relating to the period from 1955 onwards.

(1) Land titles (Ch.Mem., p.154)[1]

178. In 1943 Simón Lopez Delgado applied for "radicación" of plot 6 (C-M.129), which was granted in 1950 (C-M.174 and 158).

179. In 1943 Juan Felix Rosales applied for "radicación" of Plot 19 (C-M.135,137 and 142), which was granted in the same years (C-M.143). (See also C-M.187, 188,190 and 198).

180. In 1943 Leonidas Monje Delgado applied for "radicación" of Plot 20 (C-M.133), which was granted in the same year (C-M.138 and 140).

181. In 1950 Símon Lopez Delgado and Evaristo Jaramillo Mera were "radicated" in their plots (C-M.174).

182. In 1943 and 1957 Pedro Rivera applied for occupation permits in respect of Plots 17 and 18 (C-M.139 and 201).

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[1] This, and similar references in brackets attached to each heading, refer to the pages in the Chilean Memorial in which similar activities have already been described.

183. In 1960-1961 Juan Felix Rosales applied for a provisional title in respect of Plot 19 (C-M.211), which was granted in 1965 (C-M.220).

(2) Land Tax (Ch.Mem., p.162)

184. A provisional land tax roll prepared by the sub-delegate of Yelcho is reproduced as C-M 48. It is undated but would appear to be preparatory to the Land Tax Roll for 1930.

185. The Land Tax Roll for 1930 is reproduced at C-M.47. It includes the names of Juan A. Balboa Francisco Calderón, Pablo Carrillo, Lucas Lopez, and Fortunato Saez all of whom occupied plots in California.

186. In 1941 the Chilean Treasury requested payment of a tardy debt from Lucas Lopez (Plot 6) (C-M.125). In 1943 a certain amount was paid on this account (C-M.130).

187. In 1944-45 Juan Vicente Contreras (Plot 2) corresponded with the Chilean tax authorities about the assessment of tax on his land (C-M.148 and 149).

188. In 1948 tax was levied on Leandro Videla Peñaipil in respect of Plot 9 (C-M.162).

189. In 1950 Juan Vicente Contreras (Plot 2) was given a receipt for an informative declaration filed in respect of his land (C-M.168).

190. In 1950 tax was paid in respect of Plot 9 (entered under the name of Floriano Saez Estencam) for

the years 1938-1946 (C-M.173).

191. In 1952 Carlos Lillo was required to pay taxes on Plot 5 before being allowed to proceed with his application for a free title of ownership (C-M.181).

192. There appears below a Schedule showing the tax history of Plots 19, 20 and 21, prepared on similar lines to the Schedule on pages 164-167 of the Chilean Memorial. It is thought necessary to include this, because these three plots, occupied by Chilean settlers for many years, would fall into Argentina under the boundary for which she contends in these proceedings.

PLOTS 19, 20 and 21, ACCORDING TO THE CHILEAN LAND TAX ROLLS

(with references to present and former "landholders" and tax payers)

Present "landholder"	Roll 1965	Roll 1962	Roll 1957	Roll 1952	Roll 1945	Roll 1938	Previous Rolls
Plot 19: Juan Felix Rosales Vasquez	103-23 "California"	103-23 "California"	89-23 "California"	833 "Las Maravillas"	815 "Las Maravillas"	104 "California" (J.A.Balboa)	9 "California" (J.A.Balboa A.)
Plot 20: Leonidas Monje Delgado	104-13 "El Rosal"	104-14 "El Rosal"	90-14 "El Rosal"	802 "El Rosal"	785 "El Rosal"	104 "California" (J.A.Balboa)	9 "California" (J.A.Balboa A.)
Plot 21: Roberto Monsalve Schwerter (Germán Monsalve A.)	104-26 "Cordon Colorado"	104-27 "Cordon Colorado" (V.Rosales G.)	90-27 "Cordon Colorado" (V.B. Rosales)	831 "Cordón Colorado" (V.B. Rosales)	814 "La Paloma" (B.Rosales R.)		

Part Two

(3) Registration of births, marriages and deaths (Ch. Mem . p.173).

193. Death certificates were issued as follows:

1929 Matilde Steincamp Robinson, the wife of Fortunato Saez (C.M.25).

1932 Dorila Saez Figueroa, the wife of Pablo Carrillo Lavoz (C.M.81).

194. Since the prepartion of the Memorial in this case, a document has come to light which is of quite special interest and importance. It is a petition, drawn up on 15 October 1949 by the local citizens Progress Committee of Palena and forwarded by them to the Chilean Ministry of Justice (C.M.164). It contains a request that the Chilean Government should set up in Palena a local office for the registration of births, marriages and deaths, because of the difficulty of going to Futaleufú to effect such registrations. The petition referred to the fact that 30% of the people were living in concubinage, that many children were in consequence illegitimate and that Chilean parents even occasionally registered in Argentina the birth of children born in Chile.

The special significance of this petition, in relation to the present case, is that it is signed by a large number of local residents including the following residents of the disputed area: Simón Lopez,

Roberto Cid, Eulogio Videla, Agustin Videla, Evaristo Jaramillo, Juan de D. Bravo, Juan F. Rosales, Elvira Rosales R., Faustino 2º Lavoz, Venancio Rosales, L. Rosales R., Rosario Riquelme, Adeodáto Mera, Aristeo Mera, E. Jaramillo, Elvira Jaramillo, Carlos Lillo Vicente Contreras, Jose Onofre Anabalon, Juan Bravo, Leonidas Monje, Rujo Flores, Rosario Carrillo, Bartolome Balboa, Elcira Jaramillo, Gumercinda C. de Bravo and Guillermina Jaramillo.

It would seem highly unlikely that the people living in California would have participated in the communal activities of a Chilean town and added their name to a request for the development of Chilean administrative facilities there if they did not regard themselves as Chilean, the place they lived in as Chilean territory, Palena as their nearest town centre and Argentina as a foreign country.

(4) Animal brand register (Ch.Mem. p.174)

195. In 1927, so Florindo Ramirez Soto states (C.M.231), the Argentine authorities required the settlers in the California Valley to cancel their Argentine brand marks; and so, among others, Fortunato Saez, Pablo Carrillo and Francisco Calderon (for whose residence in the California Valley, see Doc. No.5), went to Tecka (Argentine) to cancel their registrations.

196. This was followed in 1928 by re-registration of

brand marks with the District Inspector in Palena by Francisco Calderon, Juan Bautista Soto and Demetrio Cardenas (C.M.8).

197. References are made in a document dated 13 November 1928 to brand marks of the following settlers in the disputed area: Pablo Carrillo, Juan Antonio Balboa, Francisco Calderon and Fortunato Saez (C.M.11).

198. In 1944 Juan Vicente Contreras (Plot 2) registered a brand mark at Achao (Chile) (C.M. 147).

(5) Legal Transactions (Ch.Mem., p.176)

199. In 1929(?) Bartolome Segundo Balboa recorded in Palena the sale of a horse to Juan Antonio Balboa (C.M.37).

200. In 1927 an agreement for cattle raising on a profit sharing basis between Fortunato Saez and Romon Nogoya (sic) was drawn up in Palena and countersigned by Eliodoro Diaz (C.M. 4 and 6).

201. In 1929 Pablo Carrillo certified the sale of a horse to Bartolome Segundo Balboa before the District Judge in Palena (C.M.32).

202. In 1930 Fortunato Saez formally acknowledged a debt to Messrs. Lausen & Co. (C.M.45). Although the document does not on its face state it was registered with the Chilean Authorities, it was found among the papers of Eliodoro Diaz and was therefore, presumably, lodged with him in his official capacity.

203. In 1932 Pablo Carrillo Lavoz registered at Futaleufú the gift of a horse to his cousin (C.M.67).

204. In 1934 Juan Fortunato Saez certified in Palena a sale of his property to Manuel Morales (C.M.87) and the Chilean authorities asserted the right to insist on prior authorization before such sales (C.M.91 and 94).

205. In 1951 the District Judge of Palena recorded a receipt given by E. Salvo S. to Julian Soto (Plots 3 and 11) in respect of payment by the latter for work done by the former (C.M.176).

206. In 1954 the Civil Officer of Palena recorded a lease granted by Adelina Toledo (Plot 3) to Heriberto Krause S. (C.M.192).

(6) Administrative, police and judicial activity
Ch.Mem., p.180)

207. Illustrations of administrative, police and judicial activity may be classed under the following heads:

Exercise of civil jurisdiction

208. An undated document, but after 1931, records that Fernando Figueroa Urra complained that Juan Balboa Arteaga was working the complainant's land without permission (C.M.82).

209. In 1931 proceedings were brought before the Palena District Judge by Diego Torres against Juan Antonio Balboa for the recovery of a debt (C.M.51).

210. In 1934 the civil court of Aysen was seized of an

action in debt brought by Alberto Iturbide against Juan Antonio Balboa (C.M.89 and 105).

211. In 1934 the civil court of Aysen was seized of an action in debt brought by Emilio Corball against Juan Fortunato Saez (C.M. 98).

212. In 1958 The Sub-Officer of Carabineros at Palena recorded a complaint made by Leonidas Monje Delgado (Plot 20) against Bautista Saez (Plot 11) and Agustin Videla Peñaipil (Plot 10) in respect of damage done to cattle (C.M.206).

Exercise of criminal jurisdiction

213. In 1934 German Vasquez Delgado ("resident on the bank of Rio Tigre") complained to the Carabineros of a theft of cattle and stated that he suspected Florindo Ramirez Soto (C.M.99, 100 and 101).

Issuance of certificates for transit purposes.

214. In 1928 certificates (presumably for transit purposes) were issued to Pablo Carrillo, Juan Antonio Balboa, Francisco Calderon and Fortunato Saez (C.M.11).

215. In 1928 transit certificates were issued to Francisco Calderon (C.M.7, 8 and 12) and to Juan Bautista Saez, Demetrio Cardenas (C.M.8) and Victoriano Retamal (C.M.10).

216. In 1929 transit certificates were issued to Transito Diaz and Fortunato Saez (C.M.22).

217. In 1942 a transit certificate was issued to Carlos

Lillo (Plot 5) (C.M.126).

218. In 1946 another transit certificate was issued to Carlos Lillo (Plot 5). This was accepted and counter-sealed by the Argentine authorities (C.M.154).

Assertion of general administrative authority over disputed area

219. In 1933 Juan Antonio Balboa complained to the Intendant of the Province of Aysen against his eviction from his land in 1931 (C.M.83).

220. In 1947 Carlos Lillo (Plot 5) was asked by the Head of the Carabineros Post at Palena to summon Tomas Videla Catalan, Jose Onofre Anabalón (Plot 12) and Agustin Videla Peñaipil (Plot 10) to a meeting (C.M.160).

221. In 1950 Carlos Lillo (Plot 5) was thrice summoned to meetings of the Palena Committee for Local Progress (C.M.165, 166 and 167).

222. In 1953 the heirs of Pablo Carrillo Lavoz complained to the Chilean authorities about the encroachment of Carlos Lillo upon their land and the alleged error of the surveyor Carvajal (C.M.185, 186, 189 and 193).

Grant of character references

223. In 1936 the Head of the Carabineros Post at Palena gave Pablo Carrillo Lavoz a certificate of good character (C.M.108).

224. In 1957 the Captain of Carabineros at Palena certified that Pedro Rivera had resided in the

California Valley for at least 15 years (C.M.202).

(7) Education (Ch.Mem., p. 189)

225. There are now available a number of documents (C.M.38, 46, 52, 56, 59, 61 and 62) which evidence the establishment in 1930 of a Chilean state school at Palena with eighty pupils. In themselves those documents do not prove any direct connection between that school and the residents of California. However, the fact that there was a link is evidenced by two items: First, in 1932, Fortunato Saez, a resident of California (Plot 2) was appointed a member of the examination commission of the school (C.M.77). Second, in 1942 there was a meeting of settlors in Palena to discuss the construction of a school for boys. The same meeting also discussed the construction of the road from Palena to Puerto Ramirez. It would appear from the list of those who agreed to help with the latter item that the following settlers in California participated in the meeting: Onofre Anabalon, Juan Rosales, Juan Bravo, Leonidas Monje and Pedro Rivera (C.M.127).

226. The continuing concern of the Chilean authorities with education in the California Valley is also evidenced by a letter in 1946 from the Provincial Inspector of Education to the Subdelegate of Yelcho (C.M.155) in which he includes in a list of four schools that ought to be opened in the valleys of Futaleufú and Palena "a

fourth between Palena and the Argentine frontier". It would seem that this must have been intended to refer to a school in the California Valley, for there is nowhere else that a school between Palena and the Argentine frontier could really be justified.

227. The statements (and documents referred to) in the last two paragraphs, as well as those in paragraphs 136 to 140 on pages 189 to 191 of the Chilean Memorial, would seem to dispose of the unsupported assertion on page 179 of the Argentine Memorial that "before 1955 the only school in the Sector had been the neighbouring Argentine National School No. 61 which the local children had attended".

Conclusion

228. While the Government of Chile contends that the indications of Chilean administrative activity cited above and in the Chilean Memorial are quite sufficient to establish firmly the main outlines of the pattern of Chilean government conduct in the disputed area, it nonetheless admits that the pattern has its blank spaces. But its incompleteness does not, in the submission of the Government of Chile, diminish its value in the present proceedings. The function of the reference to the Chilean loyalty of the inhabitants and the extent of Chilean government activity in the area is to demonstrate how the 1902 Award has been

fulfilled in the practice of the Parties. For this purpose it is not necessary for a Party to reach some absolute standard of governmental activity. It has merely to show that its behaviour was consistent with, or was a reflection of, the view that the area in question fell to it under the Award. In the submission of the Government of Chile the evidence which it has tendered, though not fully comprehensive, nonetheless shows that the disputed area has been consistently treated as Chilean.

229. It is pertinent to observe in this connection that the disputed area is a natural appendage of Palena and has administratively so been treated. As Palena is Chilean, so the disputed area is likewise.

230. But if the suggestion is made, for the purpose of countering the Chilean contention, that what matters is not the simple fact of the natural closeness of the area to Palena and its identification therewith, but rather its dependence upon communications through and trade with Argentina, then it is right that the following should be borne in mind: Once it is appreciated how relatively easy it was for the Argentine Government to maintain contact and even to assert administrative control over the disputed area, it can be seen how much more significant is the demonstration of Chilean administrative activity in the area. When conduct is

easy, the weight to be attached to such conduct is much less than the weight to be given to similar acts performed in adverse conditions. Every natural advantage favoured a display of Argentine control in the disputed area and the focussing of the inhabitants' relationship with "government" upon the neighbouring Argentine towns. Yet, notwithstanding this fact, the record shows that the centre of "administrative" gravity of the lives of the settlers in the disputed area was not in Argentina, in Esquel or Tecka, but in Chile, in Palena and, to some extent, Futaleufú.

PART THREE

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

PART THREE

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

Chapter I

REAFFIRMATION OF THE CHILEAN CONTENTIONS AND THE QUESTION OF THE "SETTLEMENT" RESULTING FROM THE 1902 AWARD

A. Reaffirmation of the Chilean Contentions

1. In Part Three of its Memorial the Chilean Government has stated its views on the question of "the extent, if any, that the course of the boundary between territories of the Parties in the Sector between boundary posts 16 and 17 has remained unsettled since the 1902 Award" within the meaning of Article 1 of the Compromiso. In Chapter 1 it summarised its contentions in regard to this question, and in the following Chapters of the Part it developed the grounds for these contentions by examining the constitution, rules and competence of the Mixed Boundary Commission, the non-definitive character of a partial tracing of the boundary in the Sector between Posts 16 and 17, the consideration of the boundary in that Sector first by the Commission and then by the two Governments and, finally, the developments subsequent to Chile's rejection of the line proposed by the Commission. In general, the Chilean Government finds nothing in the Argentine Memorial to cause it to modify its contentions in any material respect.

2. Accordingly, the Chilean Government asks the Court to note that it reaffirms all the contentions of fact and

of law in Part Three of its Memorial and maintains them to the fullest extent except in so far as they may be qualified or amended by anything which appears in the present Counter-Memorial. In the remainder of the present Chapter it proposes first to discuss the contentions of the Argentine Government regarding the "settlement" resulting from the 1902 Award and to explain Chile's position in regard to those contentions; and, secondly, to discuss the "settlement" of the boundary resulting from the Parties' fulfilment of the Award prior to 1941.

B. The Settlement resulting from the 1902 Award.

3. Chile's understanding of Article 1 of the Compromiso.

The Chilean Government explained in Chapter 1 of its Memorial that it understood the question of a possible "settlement" of parts of the boundary to arise in connection with the Argentine claim that Minute No. 55 of the Mixed Boundary Commission effected a "definite settlement between the Parties" of two segments of the boundary between Posts 16 and 17 within the meaning of Article 2 of the General Treaty of Arbitration of 1902 and that the "settlement" of these segments cannot now be reopened. At the same time, the Chilean Government pointed out that the terms of Article 2 of the 1902 Treaty are by no means so absolute as Argentina's diplomatic Notes appeared to imply; for the second sentence of the Article recognises that even in the case

of a "definite arrangement between the parties" there may be arbitration concerning questions which "arise representing the validity, the interpretation and the fulfilment of such arrangements". In pointing this out, it did not mean to indicate any doubts as to the validity of the 1902 Award. On the Contrary, in paragraph 126 of Part One it stated that the question posed in Article 1 of the Compomiso implies the recognition by the two Parties of the validity of the 1902 Award and Report; and in Chapter 1 of Part Three it underlined the particular relevance of the second sentence of Article 2 of the 1902 Treaty in regard to the validity of Minute 55. In other words, the Chilean Government assumed that the question in the Compromiso regarding the settlement of the boundary relates to the extent to which the course of the boundary between Posts 16 and 17, which was rendered uncertain by the deficiencies of the 1902 Award and demarcation in this Sector, has been "settled" by the acts of the Parties or of those of the Mixed Boundary Commission set up by them. The Argentine Government's presentation of this question is more elaborate and it will be convenient to examine it in the present Chapter before taking up that Government's contentions regarding the Mixed Boundary Commission.

4. Argentine thesis as to "settlement" of the boundary.

In Chapter 1 (paragraphs 9-10) of its Memorial the

Argentine Government, no less than the Chilean Government, underlines the validity of the 1902 Award. It further says that the Award constituted a "definite settlement" of the boundary between Posts 16 and 17 within the meaning of the 1902 Treaty. Next it contends that certain parts of the boundary between those Posts were finally "settled" by the 1902 Award and 1903 Demarcation and therefore no longer remain "unsettled" for the purposes of the Compromiso. It adds that even the other middle part, although "unsettled" for the purposes of the Compromiso, was nevertheless settled in principle by the 1902 Award; and from this draws the conclusion that with respect to this part the task of the Court is only to "interpret and fulfil" the Award and not to draw a new line without regard to the Award. Finally, it contends that in 1955 the Mixed Boundary Commission, by what it calls a "decision", applied the terms of the Award to those parts of the boundary which it alleges to have been "settled" by the 1902 Award and, in so doing, confirmed beyond doubt that they no longer remained "unsettled" at the date of the Compromiso.

In Chapter VIII of its Memorial (paragraphs 196 - 203) the Argentine Government repeats and elaborates the foregoing contentions. In regard to the 1903 demarcation it stresses the legal link between the Demarcation Commission and the 1902 Arbitral Tribunal

Pointing out that it had been stipulated that the British officer in charge was to be the "final referee" in cases of dispute, it further states that the 1903 Demarcation Commission had the arbitral function built into it. At the same time, it insists that the task undertaken by the Commission was a "demarcation simply and strictly so called". From these premises the Argentine Government draws the conclusion that "at least those parts of their demarcation as resulted in an unambiguous identification on the ground - e.g. the mouth of the River Encuentro - of points of delimitation laid down in the 1902 Award resulted in a final settlement of that part of the course of the boundary." It adds that the only conceivable ground on which a particular identification might be attacked would be if it were "manifestly mistaken"; and that the burden of proof would be against such a proposition. Then it observes that an "authoritative demarcation on the ground of even an ambiguous delimitation resolves in law the ambiguity and fixes the line beyond question"; and it concludes that "the question which parts of the Sector were 'settled' by the events of 1902-3 involves not only an examination of the Arbitrator's Award, the Report and the Map of 1902, but also which parts of it the 1903 Commission successfully identified and fixed on the ground."

The Argentine Government returns to the question in

paragraphs 216-7 of the same Chapter where, inter alia, it maintains:

(i) The 1902 Award must be assumed to have settled the whole line of the boundary in the Sector in principle, "and settled finally those parts of the boundary to which it refers in terms which are accurate." (Underlining added)

(ii) The fact that "the whole line must be accepted as settled in principle by the 1902 Award does not exclude the possibility of parts of that Award being, as a result of mistake or otherwise, unclear; and until the meaning of those parts of the Award is by some authoritative process clarified, the boundary may to that extent be said to be unsettled."

(iii) But even then the doubt as to those parts may have been resolved subsequently by some valid decision or agreement and the matter have thus become "settled"; in which case the settlement is equivalent to res judicata and the matter is beyond the reach of the legal effects of mistake.

It then asserts that "it is also evident, both from the logic of the legal situation and from the way in which the question is asked of the Court, that the examination of this question of settlement is prior to the question of mistake; and that it is only when the parts of the

boundary that have been settled have been identified, that the Court can usefully turn to consider the effect of mistake upon the other parts." (Underlining added)

5. Chile's position regarding the extent to which the 1902 Award and 1903 Demarcation settled the boundary between Posts 16 and 17. In so far as Argentina's thesis rests her case regarding an alleged settlement of the northern and southern parts of the boundary on an agreement or decision of the Mixed Boundary Commission, Chile's reply to the Argentine arguments will be developed in the following Chapters of this Part. Here it is proposed to examine that thesis, and the conclusions which Argentina seeks to draw from it, in its relation to the 1902 Award and 1903 Demarcation. As the Court will appreciate, the question of the extent to which the Award and Demarcation "settled" the course of the boundary in the Sector between Posts 16 and 17 is one which confronted the Mixed Boundary Commission itself at the outset of its task of demarcation long before the "Compromiso" was even thought of. Both the competence of the Commission to demarcate the boundary and the course of the line which it was authorised by the 1941 Protocol to demarcate hinged upon the extent to which the 1902-3 Award and Demarcation had been effective to settle the boundary in the Sector. Argentina's thesis by which she seeks to minimise the implications of the geographical

error and maximise the extent of the boundary "settled" by the 1902-3 Award and Demarcation is, in the submission of the Chilean Government, inadmissible both in fact and in law.

6. The Court will have noted that there is a considerable amount of common ground between the parties in their approach to the question of "settlement" for the purposes of Article 1 of the Compromiso. They are agreed that, notwithstanding the geographical error, the Award is to be treated as valid with respect to the Sector between Posts 16 and 17. They are agreed that for this purpose the Award in principle consists of the Award, the Report and the Map; and they are agreed that the Award has to be interpreted and applied in conjunction with the 1903 Demarcation. They are also agreed that, although "settled" in principle for the purposes of Article 2 of the 1902 Treaty, the course of the boundary in the Sector may be unclear as a result of mistake or otherwise and to that extent "unsettled" for the purposes of Article 1 of the Compromiso. Finally, they are agreed that a part of the boundary delimited by the 1902 Award, which was at one time "unclear" and "unsettled" in the sense of the Compromiso, might subsequently have become clarified and "settled" as a result of a valid decision or agreement binding upon the two countries.

7. Chile, on the other hand, parts company absolutely from the Argentine Government when the latter contends that "both from the logic of the legal situation and from the way in which the Question is asked of the Court the examination of this question of settlement is prior to the question of mistake". The logic of the legal situation leads to no such conclusion. The geographical error which "unsettled" the boundary between Posts 16 and 17 was contemporaneous with, if not antecedent to, the Award, and is indeed embedded in the Award itself. The initial - and basic - question of how far the boundary in that Sector was settled, not merely "in principle" but "finally", depends entirely on the extent of the impact made by the geographical error on the Award handed down by the Tribunal for this Sector. The Chilean Government claims no special priority for an examination of the geographical error, but it feels bound to insist that the questions of "error" and "settlement" are inextricably connected in examining the effect of the 1902 Award. They are two sides of the same coin; the area of "unsettlement" is necessarily coextensive with the area of the impact made on the Award by the error. The Argentine contention is evidently inspired by a desire at all costs to isolate from the impact of the geographical error the Cerro Virgen, whose status as an element in the boundary

awarded by the Tribunal is so inevitably thrown in doubt by that error.

8. In the view of the Chilean Government, the geographical error was of such a character that it necessarily "unsettled" the whole course of the boundary between Posts 16 and 17. The Tribunal had selected as two "fixed points" on the boundary (a) the mouth of the River Encuentro for cutting the River Palena and (b) what may conveniently be called Post 17 for cutting Lake General Paz. A misconception on the part of an Argentine expert (Lange) - however pardonable in the circumstances - had led the Tribunal to understand that streams which in fact are tributaries of the River Salto belonged to the River Encuentro; and that one of these supposed tributaries of the River Encuentro had its source on the slopes of a mountain referred to by the same expert as Cerro Virgen, but never seen by any member of the Tribunal. Seeking to delimit a water-line along the Encuentro to a high watershed but misled in the manner just mentioned, the Tribunal described in its Award a boundary which was to follow the course of the Encuentro to its source on the western slopes of the Cerro Virgen and thence to the peak of that mountain and along a high watershed to Post 17; but neither the Encuentro nor any of its tributaries has its source on any slope of the Cerro Virgen The result, in the submission of the

Chilean Government, was a total rupture of the course of the boundary described in the Award. This total rupture of the structure and unity of the Tribunal's formulation of its decision with respect to the Sector necessarily threw the whole line between Posts 16 and 17 into doubt, since it at once raised the question as to what, in the light of the actual geographical facts, was the Tribunal's decision with respect to the Sector. Owing to the geographical error, the two principal elements described in the language of the Award were wholly incompatible with each other and, in consequence, a fundamental legal question was posed as to the manner in which the Award ought, as a matter of law, to be interpreted and applied. In short, if the boundary had been settled "in principle" by the 1902 Award, the geographical error as to the location of the source of the Encuentro on the western slopes of the Cerro Virgen, foisted upon the Tribunal by the Argentine Expert, had left the whole line between Posts 16 and 17 "unsettled" within the meaning of Article 1 of the Compromiso.

9. The Chilean Government does not think that it need labour the point further. The facts regarding the geographical error and the resulting incompatibility of the several elements in the Tribunal's description of the boundary have been fully discussed in Parts One and Two of the Chilean Memorial and reviewed in Parts One and

Two of this Counter-Memorial. As to the legal aspects and the correct method of interpreting the 1902 Award, these will be gone into later in Part Five. For the present purpose - for indicating the fundamental character of the legal question of interpretation, posed by the error - it suffices to remind the Court of the extensive discussion of the various legal aspects of the problem of applying the 1902 Award which is to be found in paragraphs 194-239 of Argentina's Memorial and the radically different approach to that problem adopted by Chile in Parts One and Two of her Memorial. The Chilean Government, indeed, feels sure that the Court itself is fully sensible of the legal conundrum of interpretation posed by the geographical error and the reproduction of that error in the terms of the Award.

10. What has been said in the preceding paragraphs is really in itself sufficient to dispose of the Argentine Government's contention that, in addition to Boundary Posts 16 and 17, a segment of the boundary in the north and another in the south were <u>finally</u> settled by the 1902 Award. That contention apparently rests upon the proposition that any part of the boundary is to be considered as having been finally settled the description of which in the Award is "accurate" in the sense that the description does correspond to actual geographical facts. The boundary in any such part is said by Argentina to

have been "identified" by the Tribunal in its Award and thereby "finally settled". But the alleged "identification" begs the whole question of the effect of the geographical error on the meaning of the Award. Whatever may be the position in regard to the lower reach of the Encuentro from "watersmeet" to Post 16, the geographical error immediately and in the most direct fashion threw the gravest doubt upon the "identification" of the Cerro Virgen as a point upon the boundary and, in consequence, also upon the whole of the description of the line from the Cerro Virgen to Post 17. Only the Argentine expert's attribution of the tributaries of the River Salto to the River Encuentro had brought the Cerro Virgen on to the line of the boundary at all, and that attribution had turned out to be a complete misconception. In other words, the geographical error took away the whole root of the supposed "identification" in the Award of the segment of the line between the Cerro Virgen and Post 17.

11. In speaking of the supposed identification in the Award of the segment of the line between the Cerro Virgen and Post 17 the Chilean Government, like the Argentine Government, is treating the "Report" and the "Map" as part of the Award. The supposed "identification" of the Cerro Virgen in the Report was undermined

by the geographical error in precisely the same way and just as completely as in the Award. Both the Report and the Award described this part of the boundary line by reference to the details of a map which reproduced the geographical error of the Argentine Experts Lange and Moreno. Therefore, since the Award Map itself incorporated the misconception regarding the tributaries of the River Salto, any supposed "identification" on the map of the Cerro Virgen - Post 17 segment was equally open to question and "unsettled" in consequence of the geographical error. It is to be added that no member of the Tribunal nor any of its staff "identified" on the ground the Cerro Virgen or the line from the Cerro Virgen to Post 17. The supposed western branch of the River Encuentro and the Cerro Virgen were emanations from the Argentine experts which were not checked in any manner whatever by the Tribunal.

12. The Argentine Government, in contending that parts of the line in the north and in the south were finally settled by the Arbitration of 1902, refers not only to 1902 Award but also to the 1903 Demarcation. The Chilean Government, as already indicated, fully agrees with the Argentine Government concerning the legal link which exists between the 1902 Award and 1903 Demarcation; and that the erection of Posts 16 and 17

in their respective places by the Demarcation Commission was important as "settling" beyond question the positions, on the one hand, of the mouth of the River Encuentro and the intersection of the boundary with the River Palena and, on the other, of the intersection of the boundary with Lake General Paz. The Chilean Government is not, however, clear from the Argentine Memorial whether the Argentine Government is seeking to derive any larger "identification" effects from the 1903 Demarcation; in other words, whether it seeks to contend that the Demarcation as such constituted an "identification" and "settlement" of the segments of the line between Post 16 and "watersmeet" and between Cerro Virgen and Post 17 segments of the boundary. If so, the Chilean Government can see no basis whatever for such a contention. Captain Dickson, the officer concerned with the present Sector, demarcated the "fixed points" indicated by the Tribunal as governing points in the delimitation of the boundary - the intersection of the Palena at the mouth of the Encuentro and the intersection of Lake General Paz. But he made no attempt to trace on the ground the line of the boundary between the two Posts and never went anywhere near the Cerro Virgen. The 1903 Demarcation thus contributed nothing to the identification of the course of the boundary between the two fixed points.

Part Three

13. The Chilean Government cannot forbear from pointing out how ill it becomes Argentina to speak of the 1902 Award as constituting not merely a settlement in principle but a final settlement of the Post 16 - "Watersmeet" and Cerro Virgen - Post 17 segments of the line described in the Award. The Award itself had specifically designated the point of intersection of the River Palena - the mouth of the River Encuentro - as one of the obligatory points in the boundary; and the Demarcation Commission had identified that point on the ground and fixed it by the erection of Boundary Post 16. Yet, on discovering that the River opposite Post 16 - the river indisputably the River Encuentro - does not have its source anywhere near the Cerro Virgen but near the Cerro Herrero in the Cordon de las Virgenes, the Argentine Government sought to move the position of Post 16 further to the westwards and in the process transmute the River Encuentro into the River Salto. Furthermore, although as a result of the 1913-14 diplomatic correspondence Chile was led to believe that the Argentine claim had been abandoned and the course of the boundary in the north settled along the line of the River which has its source near the Cerro Herrero, it appears that the Argentine Boundary Commission did not hesitate even as late as 1954 to try to undermine the demarcation of Post 16 and the 1903 identification

and settlement of the River Encuentro (see Colonel Urra's Memorandum of 21st September 1954 at page 294 of the Chilean Memorial). Indeed, as the Court will recall, echoes of this line of argument were even heard at the hearing on 30th December 1965 (Transcript, p.42), when Counsel for Argentina sought to persuade the Court that, for the purpose of interpreting the 1902 Award, it ought to envisage Boundary Post 16 as having been wrongly sited opposite the River Encuentro instead of opposite the River Salto. No one to-day - not even Argentina - questions that the river opposite whose mouth Post 16 is sited is the River Encuentro; and the junction of this river with the Palena was designated by the Award an <u>obligatory</u> point on the boundary and was demarcated as it now stands by the 1903 Demarcation Commission <u>for that very reason</u>. When the Argentine Government has been so free in questioning a point on the boundary both designated as obligatory and demarcated, it scarcely seems to be in a position to contend that a segment of the boundary not designated as obligatory, not demarcated and never caught sight of by any member of the Tribunal or Demarcation Commission was "settled" beyond questioning by the 1902-3 Award and Demarcation.

C. The Settlement of the Boundary along the Line of the River Encuentro to its Source by the Fulfilment of the Award Prior to 1941

14. In Chapter IV of Part Two of its Memorial the Chilean Government presented to the Court a considerable volume of evidence relating to the fulfilment of the 1902 Award by the Parties and more especially to certain diplomatic exchanges between them in 1913-14 and to Chilean State activity in the California area. That evidence has been confirmed and supplemented by the further material which has just been discussed in Part Two of this Counter-Memorial. The contentions which the Chilean Government bases on the Parties' fulfilment of the Award are set out in its Memorial in Chapter II of Part Five and its submissions in Submissions (B) to (G) of Chapter V of that Part. In her Submissions, Chile has asked the Court, *inter alia*, to conclude that the diplomatic correspondence of 1913-14, together with the open, effective and continuous display of State activity by Chile in California, without any objection from Argentina, 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 their territories a line along the River Encuentro - the "major channel" - to its source on the slopes of the Pico de la Virgen.

Here the Chilean Government merely wishes to point out the relevance of this evidence in connection also with the Argentine thesis regarding the "settlement" of the boundary. The understanding and agreement resulting from the 1913-14 correspondence and the Chilean State activity had certainly been established prior to the conclusion of the 1941 Protocol and the constitution of the Mixed Boundary Commission. In other words, the meaning of the Award, rendered unclear and unsettled by the geographical error, had in large measure been made clear and "settled" through the acts of the Parties before the Commission even began its task of demarcation.

Chapters II, III and IV

THE 1941 PROTOCOL, THE ESTABLISHMENT OF THE MIXED BOUNDARY COMMISSION, THE PLAN OF WORK AND GENERAL DIRECTIVES AND THE REGULATIONS OF THE COMMISSION

15. In Chapters II-IV of Part Three of its Memorial the Chilean Government sought to digest for the information of the Court the pertinent elements of the 1941 Protocol and of the other acts and instruments which govern the functioning of the Mixed Boundary Commission. The Argentine Government has done likewise in Chapter V of its Memorial and, having regard to the expository and summary character of that Chapter, the Chilean Government does not think that it would serve any useful purpose for it to

comment in detail and seriatim on the Argentine account of these same matters. Such differences as appear between the two accounts are primarily differences of emphasis and, if necessary, it will be for the Court to appreciate the significance of these differences. In the present Counter-Memorial, therefore, the Chilean Government will limit itself to reserving its position in regard to any such differences and to underlining one or two particular points.

16. The essentially technical character of the functions of the Mixed Boundary Commission. The Argentine Memorial does little to bring out the essentially technical character of the functions entrusted to the Mixed Boundary Commission by the two Governments, which so clearly appears in the preamble and terms of the 1941 Protocol, in the travaux preparatoires of that instrument and elsewhere. The Chilean Government therefore thinks it desirable to draw the special attention of the Court to the evidence on this point. The boundary had already been determined by the 1902 Award and been made the subject of a first demarcation in 1903; and, as Argentina herself recognises in paragraph 102 of her Memorial, the Mixed Boundary Commission was to be a body charged only with the final demarcation of the boundary. This limited concept of the function of the Commission found direct and unambiguous expression in

both the Preamble and Article 1 of the Protocol. In the former the object of the Protocol is stated to be:

> "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, having specified that the Commission was to be "formed by technicians", defined its functions in similar terms:

> "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 co-ordinates of all the existing boundary posts and of those which it will set up."

Furthermore, the travaux preparatoires, which receive scarcely any attention in the Argentine Memorial, show that the draft of the Preamble and of Article 1 emanated from the Argentine side and that the technical character of the Commission's functions was insisted upon by the Argentine representatives (Chilean Memorial, pages 219-26). Nor does the Argentine Memorial recall that Article 3 of the Regulations issued by the Argentine Government on 31st March 1947 regarding the functioning of Argentine Boundary Commissions stated that:

> "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." (Underlinings added).

These general Regulations, issued by Argentina some five and a half years after the constitution of the Chilean-Argentine Mixed Boundary Commission, appear entirely to confirm that the functions entrusted to the Commission by the 1941 Protocol were intended to be essentially technical and limited to "demarcation" stricto sensu.

17. In Chapters II and IV of Part Three of its Memorial the Chilean Government has drawn attention to numerous other indications of the essentially technical character of the Mixed Boundary Commission; and there is no need to mention them again here.

18. Article 20 of the Plan of Work and the status of survey maps prepared by the Commission. In paragraph 110 of its Memorial the Argentine Government draws particular attention to Article 20 of the Plan of Work as setting out the "official documents" which the Commission is to use in its work, as indeed does the Chilean Government on pages 233-4 of its Memorial. The listed documents include the relevant Treaties and Awards, Minutes of the Erection of boundary posts and survey maps made by the Commission. In paragraph 121

of its Memorial the Argentine Government explains that at first the Commission's practice had been to place intermediate boundary posts at points believed to be on the boundary line and only thereafter to prepare a map, based on a survey, on which it plotted the line; but that in 1950 the Commission decided that in all cases the demarcation should be preceded by a survey map with the boundary line plotted on it. The Chilean Government does not question the correctness of this explanation but feels bound to observe that the Commission's decision to commence with the preparation of a survey map and to include these survey maps among the documents listed in Article 20 of the Plan of Work must be viewed in its right perspective. The Commission's task under the 1941 Protocol was to preserve existing boundary posts and to demarcate further the boundary laid down in the applicable Treaties and Awards. It had no power to alter that task and at the same time enlarge its own competence by listing survey maps in Article 20 of the Plan of Work - an internal document of the Commission - and then producing survey maps depicting its own version of the boundary. The Commission's decision that demarcation should always be preceded by the preparation of a map was a perfectly proper one - indeed one authorised by Article 3 of the Protocol; and the tracing on the map

of the Commission's understanding of the boundary - though not mentioned in the Protocol - was also perfectly proper as a technical operation to assist the demarcator delegates. But nothing in the Protocol or in any other instrument authorised the Commission to substitute its own delimitation of the boundary on the map for that laid down in the applicable Treaty or Award or its own cartographical version of the geographical features of the frontier territory for those actually existing on the ground. Article 20 of the Plan of Work was a directive given by the Commission to itself; it could not by its own directives confer on its own maps and tracings a status and effect not conferred on them by the instrument from which the Commission derived its competence.

19. That the Commission was incapable, in the absence of an express power to that effect, to extend its own competence by its own act the Chilean Government believes to be a self-evident proposition which needs no authority. But it is not without interest that the exclusively "subsidiary" value of working directives was stressed in the Jaworzina Boundary case (P.C.I.J., Series B, No.8, at pages 40-1), to which the Argentine Government has made reference in other connections. In that case, a "decision" of the Conference of Ambassadors had established a Delimitation Commission, whose powers

were set out in Article 2 of the "decision". Subsequently, the Conference drew up certain General Instructions for the functioning of the Commission and the question arose whether these instructions had, as they appeared to do, enlarged the competence of the Commission. By its decision, the Conference had in principle become functus officio with regard to the boundary, though it had reserved to itself a competence to take further decisions regarding the boundary in the event of the Delimitation Commission's proposing a modification of the line laid down by the Conference. This being the situation, the Permanent Court held:

> "The Commission formed by the decision of 28 July 1920, being a Delimitation Commission responsible to the Conference of Ambassadors, would no doubt be bound by the General Instructions. But the latter can only have subsidiary value and can neither extend nor reduce the powers defined by Article II of that decision. This Article forms an integral part of the decision itself." (Underlining added).

In that case the Ambassadors' "decision" was the constituent instrument of the Commission and the Commission's competence was defined in Article II of that decision. In the present case the constituent instrument is the 1941 Protocol and the Commission's competence is defined in Article 1. Originally, at least the Ambassadors had had the competence to fix the powers of the Delimitation Commission; yet they

could not by their General Directions extend or reduce its powers. *A fortiori* is it certain that the Mixed Boundary Commission, which derived its whole existence from the Protocol that defined its powers, could not by its Plan of Work extend or reduce those powers, in the absence of an express provision enabling it to do so.

20. *Article 21 of the Plan of Work and the Commission's Competence to interpret the official documents on the ground.* In paragraph 111 of its Memorial the Argentine Government notes that under Article 21 of the Plan of Work the Delegates of the Commission were to have the sole responsibility of interpreting, on the ground, the official documents listed in Article 20; and that the Delegates were required to take no account of suggestions made from outside the Commission. Again, the Chilean Government, which made a similar observation on page 234 of its Memorial, has no wish to dissent. It wishes, however, to recall the comment which it there made that the Delegates could not by this provision arrogate to themselves any larger function of interpretation than had been entrusted to them by the Protocol, namely, the function of interpreting the official documents *on the ground* for the purpose of materialising *on the ground* the boundaries delimited in the applicable Treaties and Awards. What has just been said in the two previous paragraphs about the inability of the Mixed Boundary

Commission to enlarge its competence by issuing directives to itself clearly applies to Article 21 of the Plan of Work with as much force as to Article 20.

Chapters V and VI

THE COMPETENCE OF THE MIXED BOUNDARY COMMISSION IN REGARD TO THE BOUNDARY BETWEEN POSTS NOS.16 AND 17 AND THE NON-DEFINITIVE CHARACTER OF A PARTIAL TRACING OF THE BOUNDARY

A. INTRODUCTION

21. In Chapter V of Part Three of its Memorial the Chilean Government has summarised the conclusions regarding the competence of the Mixed Boundary Commission which it invites the Court to draw from the 1941 Protocol and from the Commission's Plan of Work and Regulations; and in Chapter VI of that Part it has explained the reasons why, in any event, it regards the attribution of definitive effects to a partial tracing of the boundary between Posts 16 and 17 as incompatible with the 1941 Protocol. The observations contained in those two Chapters of its Memorial are, in the view of the Chilean Government, of critical importance in appreciating the legal implications of Minute 55. It therefore asks the Court to give them special attention when considering the arguments by which the Argentine Government seeks to establish that by Minute 55 the Commission was competent to, and did finally settle two segments of the line: (a) Post 16 to the "Watersmeet" on the Encuentro and (b) Post 17 to the Cerro Virgen.

Part Three

22. The arguments concerning this question in the Argentine Memorial are to be found partly in paragraphs 134-143 of Chapter VI and partly in paragraphs 240-265 of Chapter VIII. The main, essentially legal, argument is developed in Chapter VIII and is conveniently summarised in the following passage in paragraph 243:

> "The competence of the Mixed Commission to settle those parts of the boundary /the two segments/, by its unanimous decision, is considered, as a matter of law, to have been acquired either from the express powers given to the Commission by the 1941 Protocol, and confirmed by the subsequent practice of the Commission itself and by the subsequent behaviour of the two Governments which created it; or from implied powers which were necessary for it, if it was to carry out the task which it had been given by the Protocol. Yet again, although the decisions relating to the Sector were, after a significant interval, questioned by Chile, neither Government has ever questioned the competence of the Mixed Commission to reach other decisions, of the same character and effect, referred to below."

The other decisions alleged to be "of the same character and effect" concern certain other cases of discrepancy between the description of the boundary in the Award and the geographical features seen on the ground, and it is Argentina's exposition of the facts of these other cases which is to be found in paragraphs 134-143 of Chapter VI. These other cases, which play a large role in her argument regarding the interpretation of the 1941 Protocol by reference to the subsequent practice of the Commission and the two Governments, will be examined in due course. Before doing so, however, it is necessary to consider Argentine's general arguments regarding the express and

implied powers of the Commission under the terms of the Protocol.

B. The Argentine Thesis regarding the Commission's Powers under the Terms of the Protocol

23. Argentine view as to the general practice regarding boundary commissions. The Argentine thesis begins with certain observations concerning the general practice of States with regard to boundary commissions. "There is certainly no doubt", the Argentine Government says, "that commissions appointed by two or more Governments for the purpose of deciding boundaries have frequently been given power to make binding decisions which require no ratification or endorsement by the Governments which created them". In this connection it cites (a) the Colombia-Venezuela boundary arbitration, in which the Swiss Federal Council was the Arbitrator, (b) a "statement" of J.B. Scott in Judicial Settlement of Controversy between States in the American Union, (c) the Temple case and (d) the Award of King of Spain case.

24. Chile's observations on the general practice regarding boundary commissions. However true it may be that States have not infrequently conferred on boundary commissions power to make binding decisions which require no subsequent ratification or endorsement, it is no less true that, when States intend to empower a commission to determine the legal construction of a treaty or award or

to depart materially from its terms, this power is normally stated or clearly indicated in the terms of the instrument which sets up the commission.

25. Colombia-Venezuela Boundary Arbitration (1922). The passage cited in the Argentine Memorial is taken from the shortened report of this case in the International Law Reports (1919-22, p.371). The full report of the Award - in French - will be found in Volume 1 of the United Nations Reports of International Arbitral Awards (pp.223-298), where it will be seen that the case had a long and complex history, but for present purposes it suffices to draw the Court's attention to three points. First, in considering the effects of decisions of the Demarcation Commission set up by the Convention of 1898, the Tribunal did not attribute definitive effects to them by reference to any general theory as to the powers of boundary commissions. On the contrary, as even the abbreviated passage cited in the Argentine Memorial shows, the Tribunal did so by reason of the special and long-established practice of the two countries to confer "arbitral" powers on their Commissions in the relevant treaties (pp.281-3). Secondly, the 1898 Convention expressly required the Commission to refer back to the Governments in any case of doubt or disagreement. Thirdly, in considering its own competence under the Compromis, the Tribunal found it necessary to pronounce upon the powers of a future commission of demarcation

provided for in the Compromis itself. Again, it made no reference to any general concept of the powers of a boundary commission, but said (p.270):

> "La solution consistant à renvoyer aux experts les questions de délimitation ne serait toutefois pas practicable si le Compromis avait refusé aux experts le caractère arbitral. Pour statuer définitivement, il convient donc de rechercher la volonté des Parties sur le caractère de la mission des experts ....." (Underlining added)

26. The Statement of Professor J.B. Scott. The Chilean Government is in a slight difficulty in commenting upon the passage in the Argentine Memorial attributed to this authority, because it has not been able to find the citation on the page - page 1196 - of Volume 2 of Judicial Settlement of Controversy between States in the American Union given in the Memorial. The passage quoted by Argentina reads:

> "Where States enter into an agreement giving Commissions the power to exercise judgment as to the exact location of the boundary between them, they must suppose that such judgment will be exercised as to disputed locations and that, when exercised, it shall be binding upon them."

The page reference is in the middle of a long judgment of the Supreme Court in a boundary suit between the United States v. Texas but the Court does not appear to have made any such statement in that case. Where Professor Scott may have used the words attributed to him the Chilean Government has not been able to trace. But the passage cited by Argentina bears a certain resemblance to

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a sentence in the judgment of the Supreme Court in another boundary case, State of North Carolina v. State of Tennessee (235 U.S.1), a report of which appears in the same volume of Professor Scott's book at page 1696. The words found in the Court's judgment are somewhat different from those attributed to Professor Scott. It may be that somewhere Professor Scott generalised this statement in the manner represented by Argentina. As to that, the Chilean Government knows nothing. But if he did, he went some way beyond the meaning of the Court in that case. Each State (North Carolina in 1819 and Tennessee in 1820) had passed Acts appointing Commissioners to form a joint boundary commission, and each had provided in its Act that whatever the Commissioners did should be binding on it; and afterwards each State had "ratified, confirmed and established" the line located by the Commissioners. These facts were duly underlined by the Supreme Court, which also pointed out that in the area in question the Commissioners had had room for choice and judgment as to the location of certain ridges. Called on to decide whether one line of trees or another was the line located by the Commissioners and confronted with certain evidence of marked trees, the Court said:

> "Conjecture against this we cannot indulge. Imagination is not proof and, we repeat, whatever might be said of any particular piece of evidence standing by itself, their union and concurrence amount to demonstration. And, we repeat, it must

> have been supposed by the States when they constituted the Commission that judgment would have to be exercised and, when exercised, should be binding."

In short, in this case the Commission had been given a power of binding decision expressed in the widest terms, while the "exercise of judgment" in question related only to the location on the ground of a particular ridge.

27. The Temple Case (I.C.J. Reports, 1962, p.6). After noting that the map in this case was held by the International Court not to have been published on the authority of the Thai Cambodian Mixed Commission, the Argentine Government states: "it had been inherent in the arguments of both the parties before the Court, and in the findings of the Court itself, that a mixed commission could itself have had the competence to decide on a line without the need to submit for approval by the respective Governments the decision which the Commission had reached." It is certainly clear that the Court interpreted the Franco-Thai Treaty of 1904 as showing that the two Governments concerned had intended to confer on the Mixed Commission power to delimit the boundary with binding effect for the parties. But it seems equally clear that the Court contemplated that decisions of the Commission would be binding on the Governments only in the case of a valid delimitation: "In consequence, the line of the frontier would, to all intents and purposes, be the line resulting

from the work of delimitation, unless the delimitation were shown to be invalid." (p.17). Moreover, although it did not pronounce upon, it certainly did not discard, the Thai contentions that the delimitation in the area of the Temple could not be considered valid unless the departure there from the "watershed" line provided for in the Treaty was explicable as a mere "adaptation" of the line within the margin of discretion possessed by the Commission. On the contrary, having referred to these contentions, the Court said (p.22): "Whatever substance these contentions may have, taken by themselves, the Court considers that they do not meet the real issues here involved." The "real issues" were, of course, the facts that Thailand had afterwards accepted and recognised the line traced on the map as valid.

Three experienced members of the Court were rather more specific in expressing their views on this point in individual opinions. Judge Fitzmaurice, who concurred with the majority, indicated that but for the subsequent acceptance of the erroneous line by Thailand he would have felt bound to find in her favour (p. 55):

> "I personally consider that there is little reasonable doubt that, in this particular region, the true line of the watershed runs, and ran in 1904, along the line of escarpment. (Moreover, I could not myself regard the deviation from the line of the watershed at Preah Vihear as being covered by any discretionary powers of adaptation which the Mixed Commission might have possessed; but this matter is not in any event material....)."

Similarly, Judge Spender, who dissented from the Court on the main issue of "acceptance", insisted that the delimitation, to be valid, must conform to the treaty being applied. Having referred to the definition of the frontier in Article 1 of the 1904 Treaty, and to the power of the Commission to delimit it, he went on (p.103):

> "Whatever the delimitation made, however, it was not a delimitation at large, it was controlled by Article 1 of the Treaty which 'determined' the frontier. Subject to whatever power of adaptation the Mixed Commission may inherently have possessed, the delimitation had to be established on the basis of the criterion laid down in Article 1 which on the Dangrek was the line of the watershed <u>and only on the basis of this criterion. If it was not on the basis of this criterion, any purported delimitation would lack any legal force."</u> (Underlining added)

Thirdly, Judge Moreno Quintana, of Argentina, who also dissented, and who stressed his responsibilities as a representative of the American legal system, was no less insistent that the delimitation could not prevail over Article 1 of the Treaty (p.67):

> "It is this provision of the treaty which constitutes the legal title of the Parties to sovereignty over the temple area. It is consequently the inter-temperal law applicable to this case. <u>The frontier delimitation</u>

> work prescribed by Article 3 of the treaty and the line shown on maps are no more than its physical implementation and may in consequence be vitiated by error." (Underlining added).

Accordingly, Argentina's citation of the Temple case as authority for the proposition that a mixed boundary commission could itself have "the competence to decide on a line without the need to submit for approval by the respective Governments the decision which the Commission had reached" needs to be made subject to important qualifications. In conclusion, it may be pointed out that there is one fundamental difference between that case and the present: Thailand was there held by the Court to have accepted the erroneous delimitation by the Mixed Commission; Chile in the present case rejected it and called for a return to the position prior to the decision of the Commission.

28. The Award of the King of Spain Case (I.C.J. Reports, 1960, p. 192). The reference in the Argentine Memorial to the Mixed Commission set up by Honduras and Nicaragua under the Gomez Bonilla Treaty of 1894 needs little comment. It is an

instance where the States concerned deliberately conferred on a Mixed Commission wide powers to settle the boundary: "a Mixed Boundary Commission whose duty it shall be to settle in a friendly manner all pending doubts and differences, and to demarcate on the spot the dividing line which is to constitute the boundary between the two Republics." It shows that normally in such instances the States concerned make their intention plain by express words in the Treaty setting up the Commission.

29. Many other examples could be cited to show how the Parties normally make it plain in the Treaty when they intend to confer on a boundary commission wider powers than what Judge Moreno Quintana called the "physical implementation" of a line already laid down in the Treaty or in other instruments. If the constituent instrument in the Jaworzina Boundary case (P.C.I.J., Series B, No.8, at pages 38 - 9) was not a treaty but the "decision" of the Conference of Ambassadors, it also illustrates this point. There, Article 2 of the "decision" provided for a Delimitation Commission to "mark out locally the frontier line" described in Article 1 and expressly stated that the

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decisions of this Commission should be binding on the parties concerned. The Article then went on to provide that the Commission should have power "to propose to the Conference of Ambassadors any modifications which it may consider justified by reason of the interests of individuals or of communities in the neighbourhood of the frontier line and having regard to special local circumstances." The Permanent Court in commenting upon these provisions contrasted "the more important modifications" which the Commission was empowered to propose with "the certain degree of liberty" which it would have in the selection of the line - in the direction laid down - having regard to topographical features."

30. One other example may be mentioned: the Chamizal Boundary case (U.N. R.I.A.A., Vol. XI, at pages 319-21). Mexico and the United States had concluded a Treaty in 1853 defining their boundary along the Rio Grande and Rio Colorado and providing for the establishment of a Commission "to survey and mark out upon the land the dividing line stipulated by this Article." The Treaty then went on: "that line shall alone be established upon which the Commissioners may fix, their consent in this particular being considered decisive and an integral part of this Treaty, without the necessity of ulterior ratification or approval, and

without room for interpretation of any kind by either of the parties contracting." Again, when conferring large powers on the Commission to bind the two Governments, the parties used the most explicit language. In passing, it may be noted that, when invited to take into account certain observations in the records of the Commissioners that "the line they were fixing would thenceforth be invariable" the Tribunal said: "it seems clear that in making any remarks of this nature, the boundary Commissioners were exceeding their mandate, and that their views as to the proper construction of the treaties under which they were working could not in any way bind their respective Governments."

31. The treaty practice and jurisprudence of international tribunals thus tends to show that: (a) in considering the competence of a boundary commission to bind the Governments by its decisions, regard must always be had to the provisions of the instrument setting it up and to the circumstances of the case; (b) in principle, the task of a boundary commission, whether a delimitation or demarcation commission, is the "physical implementation", by a study of the actual ground, of a line already laid down by the parties; (c) a boundary commission may - but only within narrow limits - possess an inherent discretionary power to make minor adaptations of the prescribed line on the

ground to avoid local anomalies; but (d) unless the contrary is expressly stated, a boundary commission has no power to substitute its own line, or its own criteria for determining the line, in place of the line or the criteria laid down by the Governments which set it up.

32. Conclusions drawn by Argentina from the 1941 Protocol.

The Argentine Government begins its exposition of the 1941 Protocol in paragraph 245 by stating that Article 1 evinced the will of the Parties to achieve certainty and finality and, therefore, stability along their frontier and that both Parties regarded the Mixed Commission as having sufficient powers to enable it to accomplish this task. It then sets out the powers of the Commission under the Protocol, beginning somewhat curiously with Article 3; and, in referring to Article 8, it asks the Court to note that the Commission was not required to report to the Governments in any case where, in erecting boundary posts, the Commission was agreed upon the location of the dividing line.

In paragraphs 247-8 it says that, in setting out the tasks and powers of the Commission, the Protocol assumed that a boundary line had been established and that the line had been partially marked upon the ground in every Section of the boundary; but that in some places further and more precise demarcation might be

required. Then it deduces from Article 1 that the task of the Commission is concerned with the "frontier line" and not merely the repair or replacement of existing boundary posts. It considers this deduction to be confirmed by the provision in Article 6 whereby the Governments undertake to withdraw within six months from territories which pass from the jurisdiction of one nation to the other; for it is "impossible to withdraw behind a post". In the same connection, it cites a passage from the judgment in the Jaworzina Boundary case holding that the process of marking out a boundary does not merely consist of the actual placing of posts and stones to indicate the line but "must be held to include all operations on the ground" for the reason that "marking out must always be preceded by the fixing of the line".

Having patiently built up this elaborate foundation the Argentine Government then asks the Court to find that "Article 6 read as a whole must have the meaning that the authority conferred by that Article included the full power to decide upon a boundary line joining the boundary posts, for otherwise it is not possible for the respective Governments to withdraw in accordance with the second paragraph of the Article". Indeed, it boldly concludes: "It must be accepted that the power given to a Commission to demarcate would normally include

a power to decide the boundary indicated by the governing instrument and the effect of the Protocol is to give such a power to the Mixed Commission in order to apply, among other delimiting documents, the 1902 Award."

33. Chile's observations on Argentina's interpretation of the 1941 Protocol. The Argentine argument regarding the 1941 Protocol is a more sophisticated version of the argument put forward by the Argentine delegation in the Commission after Chile's rejection of some of the decisions recorded in Minute 55. That argument has already been examined and answered in Chapter VI of Part Three of the Chilean Memorial (especially pages 255-267), and the Chilean Government will here confine itself to stressing the fundamental contradictions and ambiguities inherent in the more sophisticated version in the Argentine Memorial.

34. The Chilean Government can certainly agree that the aim of the Parties to the Protocol was to achieve certainty and finality along their frontier. It can also agree that the Protocol assumes that a boundary had been established and partially marked on the ground but that more precise demarcation might be required. However, it does not at all follow that the two Governments intended to confer, or that the Protocol did confer, on the Commission "the full power to decide upon a boundary line joining the boundary posts".

On the contrary, the very fact that the Parties assumed the existence of an already established and partially marked boundary excludes the idea that they had in mind anything but the location on the ground of an already settled boundary - settled, that is, in the sense of Article 1 of the Compromiso. They did not have in mind the possibility that parts of the boundary might - to use Argentina's own words in the Memorial - "as a result of mistake or otherwise be unclear" and to that extent be "unsettled". In short the conclusion which Argentina seeks to draw from the Protocol is in direct contradiction with the assumption upon which it states the Protocol to have been based. It is also in direct contradiction with the language used throughout the Protocol. The latter nowhere speaks of a power "to decide upon" the line, but consistently of the replacement of existing posts, of the setting up of new intermediate posts where necessary to indicate a boundary line with more clarity and precision, of the location and descriptive details of posts, and of the location of the boundary line.

35. There is, indeed, an inherent - and possibly deliberate - ambiguity in the expression "full power to decide upon a boundary" used in the Argentine Memorial. Is it intended to embrace a power to decide upon the boundary line where - in Argentina's words - "as a

result of mistake or otherwise" it is "unclear" and to that extent "unsettled"? Or is it intended to refer only to a power to decide upon the exact location on the ground of a "clear" and "settled" boundary? At any rate, every word of the Protocol points to the conclusion that it was the latter power alone which the Parties had in mind, and conferred upon the Commission, when they concluded the 1941 Protocol.

What, it is permissible to ask, does Argentina mean when she concedes that, notwithstanding the 1902 Award, parts of the boundary as a result of mistake or otherwise may be unclear and to that extent "unsettled"? Evidently, she does not mean that the physical features of the ground may be "unclear" and "unsettled"; the ground is as it always was, although in 1902 it may have been misconceived. She can only mean that the meaning of the 1902 Award with respect to the Tribunal's definition of the line may by mistake or otherwise be rendered unclear and unsettled. But then the course of the boundary is a question of interpretation and of law, not merely of locating on the ground a "settled" line. "Deciding upon" the meaning of the Award is an operation of a very different colour from "deciding upon" the location of a clearly defined line on the ground, and is wholly outside the terms of the Protocol. Certainly, no one insisted on this point more strongly

than the Argentine Government in 1957, as will be seen in its diplomatic Notes cited on pages 378-384 of the Chilean Memorial.

36. The Argentine Government is, no doubt, correct when it says with reference to Article 8 that the Commission was not required to report to Governments in any case where, in erecting boundary posts, it was agreed upon the location of the dividing line. But Article 8 has to be read in the context of the Protocol as a whole: an instrument which, as Argentina herself stresses, assumes that a boundary line had been established and which speaks only of repairing boundary posts, erecting new intermediate posts where necessary and determining the exact geographical coordinates of all such boundary posts. In that context the only difficulty that was foreseen was the inability of the Commissioners to agree upon the exact location of the prescribed line of the boundary at particular places; and it is therefore natural enough that Article 8 should refer only to cases of "disagreement as to the location of the boundary line". But this does not provide any basis for concluding that, unless they disagreed, the Commissioners were not required to refer to the Governments questions as to the correct legal interpretation of the instruments the "physical implementation" of which on the ground was the sole task

entrusted to them by the Protocol.

37. There remains the Argentine argument that, having regard to the Commission's task under Article 1 of erecting new intermediate boundary posts where necessary and to the undertaking of the Governments in Article 6 to withdraw from territories which pass to the other, the Commission must be considered as concerned with the frontier line as well as with boundary posts. This argument it supports with a citation from the Jaworzina Boundary case, and seeks to drive home by saying that it is impossible to withdraw behind a post, only behind a line. What has been said about Article 8 applies no less to Article 6; it has to be read in the context of the Protocol as a whole. The boundary being assumed to be already established and partially demarcated, the Protocol was not primarily concerned with its delimitation strictly so called, but with its further demarcation i.e. its further materialisation on the ground. The tracing of lines on maps was not for that reason made one of the stated tasks of the Commission. The Argentine Government tries to elevate it into one by placing the preparation of an official map, as contemplated in Article 3, in the forefront of the powers of the Commission. But the map-making powers of the Commission under Article 3 are expressed to be both permissive and ancillary to the performance of the

specific tasks of demarcation entrusted to the Commission in Article 1. The Chilean Government does not, of course, deny that the Commission is "concerned with" the boundary line as well as with boundary posts, in the sense that it must first identify the boundary line on the ground in order that it may be in a position to place boundary marks where these are necessary for "materialising" it; and in this sense it accepts what was said in the Jaworzina Boundary case in this regard. But it feels bound to emphasise that, when the Permanent Court there spoke of "marking out" always being "preceded by the fixing of the line", it was referring to the fixing of the line on the ground and as a preliminary to demarcation. The expression (marking out), it had said, "must be held to include all operations on the ground". Accordingly, there is nothing in the language used by the Court in that case to justify the conclusion that a demarcation commission is competent to decide upon the legal construction of a treaty or award in order to determine the legal definition of the boundary to be demarcated.

38. As to the point that under Article 6 it is not possible for the parties to withdraw behind a post but only behind a line, the Chilean Government again does not dissent. Indeed, as will be indicated in the next paragraph, it considers that under Article 6 it is

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equally impossible to withdraw behind a mere segment of a line the direction of whose continuance is still unsettled. But although the Argentine Government's statement on this point is certainly correct, it does not justify the conclusion that the clear words of Article 6 limiting its operation to Minutes recording the location of boundary posts do not mean what they say. The provisions of the Protocol and its *travaux preparatoires* make it perfectly plain that the primary objective of the Parties was to have the boundary more sufficiently marked on the ground. This being their objective, and there already being a partially demarcated boundary, it is not in the least surprising that it was only with reference to new boundary posts that they envisaged possible changes of sovereignty and only to Minutes of erection of new posts that they attributed definitive effects. Furthermore, the erection of a boundary post on the ground was expected to furnish a certain guarantee of the correct observation of the course of the boundary over the ground. At the same time, a new *intermediate* boundary post would necessarily be placed in a certain relation to two already established posts which were in a certain degree of proximity to it; and the two Governments without doubt assumed that a new post would not be erected without the Commission's having located with certainty a

continuous boundary between the other two posts. Accordingly, it seems clear that the Commission could not, by any act of the Commission other than by a Demarcation Minute in the prescribed form, bring the provisions of Article 6 into operation; and this seems now to have been recognised by Argentina in paragraph 178 of her Memorial.

39. Argentina's argument that under Article 6 it is not possible for the Parties to withdraw behind a Post but only behind a line does, however, lend force to what is said in paragraphs 46-47 of Chapter VI of Part Three of the Chilean Memorial regarding the impossibility of attributing definitive effects to a decision relating to only a part of a line between two boundary posts. Chile there pointed out that any "approval" of only part of the line must be treated by the Commission as provisional pending the location of the whole course of the boundary in the Sector; for it would be wrong for the Commission to make any one part definitive before it has located the line throughout its length and has thereby established beyond all peradventure that the part in question does indeed constitute a segment of a continuous boundary between the two boundary Posts. Argentina, if she no longer claims that Minute 55 falls within the terms of Article 6, appears to assert that any decision unanimously reached by the Mixed Commission upon the

location of any segment of the boundary line has precisely the same immediate effects as those provided for in Article 6. But just as it is impossible for either country to withdraw behind a post, so it is not much more possible for either country to withdraw behind a small segment of a line. How, for example, could a withdrawl behind the alleged Post 17 - Cerro Virgen segment be expected without its first being decided whether the boundary does indeed run down the Arroyo Matreras to the Azul and thence back to the River Engano etc.? In truth, as pointed out in Chapter VI of Part Three of the Chilean Memorial, the difficulty is much more fundamental than that; for until the Commission has located a continuous boundary line between two Posts conforming to the Award, or at least the general line of the whole continuous boundary, there can be no complete finality about any one segment.

C. The Alleged Interpretation of the 1941 Protocol by Subsequent Practice

40. The Argentine Thesis regarding the Subsequent Practice of the Commission and of the Parties. The Argentine Government, as already mentioned, contends that in the practice of the Commission and in the practice of the two Governments the 1941 Protocol has been interpreted as conferring full powers on the Commission to "decide upon" the location of the boundary definitively with binding effect for the Governments without regard

to the requirements of Article 6 of the Protocol. It cites legal authority for the view that subsequent practice in the application of a treaty is a relevant consideration in interpreting the treaty; and it asks the Court in effect to hold that, in the light of the practice of the Commission and the Governments, the 1941 Protocol must be understood as having conferred those full powers on the Commission. It further contends that in the light of this practice both Governments must be considered to have "acquiesced in the legal efficacy of all the unanimous determinations of the course of the boundary line by the Commission".

41. The Law. The Chilean Government does not think that it would serve any purpose to comment in detail on the legal authority cited by Argentina in regard to "subsequent practice" as an element in treaty interpretation. This authority is familiar to international lawyers and the Chilean Government does not, of course, dispute that, under certain conditions, "subsequent practice" may throw important light on the meaning of a treaty. But it feels obliged to make three brief comments on the conditions under which "subsequent practice" may affect the interpretation of a treaty. In the first place, as indicated in Article 69, paragraph 3 (a), of the International Law Commission's

Draft Articles on the Law of Treaties, the practice must be such as "clearly establishes the understanding of all the parties regarding its interpretation". In the second place, as pointed out in paragraph 13 of the commentary to that Article, the practice must be concordant and its value varies according as it shows the common understanding of the parties as to the meaning of the terms of the treaty. In the third place, a practice cannot provide convincing evidence of the meaning attached by the parties to the treaty unless their acts are unequivocal with respect to that meaning.

42. The subsequent practice of the Commission and the Governments is far from providing consistent, clear and unequivocal evidence that the Protocol was regarded as empowering the Commission to bind the Governments by any and every decision which it chose to take respecting the location of the boundary. Such a conclusion, the Court will appreciate, would render the carefully drawn provisions of Article 6 quite otiose and on that account alone is not one which could lightly be accepted. Furthermore, as appears from the Jaworzina Boundary (see paragraph 19 of this Part) and Chamizal (see paragraph 30 of this part) cases, and as Argentina herself seems to concede, the practice of the Commission could not by itself enlarge the Commission's competence. The Commission, in the words of the homely saying, could not lift itself up by its own

bootstraps. Only the Governments which created that competence could enlarge it. In short, there would have to be both an assumption by the Commission of a larger competence and an endorsement of that competence by the Governments.

43. The Subsequent practice regarding the powers of the Commission. On pages 225-6 of its Memorial, the Argentine Government invokes the facts that: (a) the Commission decided in 1950 that demarcation should in every case be preceded by a regular survey and the making of a map and that "until the Chilean representatives challenged it in 1956", this had been interpreted by the Commission as a valid exercise of its powers under Article 3; (b) the Commission also decided that the boundary line should be plotted on the topographical sheets, which should be annexed to the Act recording the decision upon the particular stretch of the frontier line shown on the map (Regulation 18); and (c) the interpretations placed by the Commission on the extent of its own powers was acquiesced in by both Governments. Then on page 232 it makes a sweeping assertion that "All the proceedings of the Commission with regard to the boundary line in the Sector between Boundary Posts 16 and 17 were concluded on the basis that, if unanimity could be achieved, the Commission itself was the competent body finally to determine the boundary line as established by the 1902-3 decision."

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44. <u>Chile's observations on the alleged practice</u>. The Argentine Government's reference to the Commission's decisions in regard to survey maps and plotting on topographical sheets does not, in the Chilean Government's view, advance the Argentine argument at all. The Protocol, as pointed out on page 260 of the Chilean Memorial, may certainly be interpreted as implying the powers necessary to the discharge of the Commission's tasks, including the tracing of lines on maps. But these powers are merely ancillary aids to the discharge of the Commission's tasks. The same is true also of the express power to prepare survey maps specifically provided for in Article 3 as <u>permitted</u> to the Commission; for this power is associated in Article 3 with the "plan of work" of the Commission and is referred to as an "operation". The Commission undoubtedly being competent to take the technical decisions which it did regarding the preparation of survey maps and plotting of lines, the Chilean delegation and the Chilean Government had every right to assume that those decisions did not purport to arrogate to the Commission any competence not conferred on it by the Protocol. If the Chilean Commission, challenged the practice in regard to survey maps in 1956, it was because the events surrounding Minute 55 showed that the Argentine delegation was seeking to inflate the status of survey maps far beyond the ancillary function accorded to them in

Article 3 and virtually to substitute them for the ground. Part Three
The decision in 1950 had been to precede demarcation with a regular survey map.

45. The records of the Commission do not support the idea that it regarded the 1941 Protocol as conferring upon it complete power to bind the Governments or that it regarded its 1950 decision concerning survey maps as anything but a procedural measure to facilitate demarcation. Thus, if the Court will refer to the "Informative Report of the Argentine Chile Mixed Boundary Commission for 1942-1947" reproduced as Annex 21 to the Argentine Memorial, it will see on page 22 the statement:

> "The duty of the present Mixed Commission is limited to the erection of additional boundary posts where British demarcators left it to the parties because there could be no doubts regarding demarcation." (Underlining added)

If this statement was somewhat optimistic, as to there being "no doubts regarding demarcation", it was because it had been working in Sections V and VI where it had not encountered much difficulty in applying the Award. However that may be, the Commission in this "informative report" submitted to Governments to put them in the picture as to the first five years work of the Commission, was quite emphatic that the task of the Commission was concerned essentially with the erection of additional boundary posts to show on the ground the location of an already clearly settled line.

46. Later in the Informative Report the Commission indicated that it looked like running into difficulties in Section VII; and by 1950 these difficulties were causing it considerable preoccupation, precipitating the decision always to precede demarcation with a survey map. The records of the Commission in that year, to which Argentina does not refer, make it absolutely plain that the Commission had no thought of asserting full powers to bind the Governments by its decisions irrespective of the terms of the Protocol. Minute No. 41, recording the proceedings of the meeting of February 1950, includes a report of a Subcommission consisting of the Argentine delegate, Señor Dvoskin, and the Chilean delegate, Lt. Col. Urra, on the difficulties arising in connection with "determining, demarcating and plotting the tracing (traza) of the boundary line on Cerro Rojo, Cerro Principio, and in the Rio Encuentro zone" (Annex No. 10). Having set out the causes of the difficulties, the Subcommission made a number of specific suggestions for adoption by the Commission:

(a) the geographical errors must be corrected, survey maps being used to harmonise the Arbiter's criterion with the geographical facts of the land;

(b) each doubtful case must be specially studied, without allowing a solution in one case to be a precedent for another;

(c) boundary posts demarcated in 1903 must be treated as immovable;

(d) maps must be available beforehand not only

for demarcation but also for identification of natural boundary posts;

(e) where the boundary is a hydrographic feature, the posts erected on the banks should be regarded as only of a "witness" character.

Stressing the importance of the principles which it proposed the Subcommission suggested that they should be brought expressly to the notice of the respective Chancelleries. The Chilean Delegation then placed it on record that, because of their importance, it must defer its endorsement of them in order that it might first obtain the approval of its Chancellery; and the Argentine Delegation said that it would do the same with its Chancellery. Subsequently, at the meeting in November of that year, the Chilean Delegation is recorded in Minute 43 as having reported back to the Commission:

> "According to the thesis of its Chancellery, the Demarcator Delegates, <u>in the event of any discrepancy having arisen in the work and powers indicated in the first Article of the Protocol which might affect the implementation thereof would have to be the subject of study by the Chancelleries</u> and would have to be referred to them in conformity with the eighth Article of the same Protocol." (Underlining added)

The following year, the Chilean Delegation, consulted its Chancellery regarding the problems raised in the <u>Ap-Iwan</u> and <u>Principio</u> areas and at a meeting held on 31st July 1951 the Director of the Diplomatic Department insisted that "note be taken of these cases, in each Section of the Frontier, so that when the total demarcation has been completed, these be submitted to each Government so that

a treaty be drawn up whereby, by mutual agreement, both countries settle these problems." (Annex No. 11). And the same position was taken by the Chancellery at a similar meeting of consultation held on 16th July. 1953 (see Annex No.13). Moreover, as the Court is aware, the Legal Department of the Chancellery at once expressed a similar opinion in its Report of 28th November 1955, when confronted with the proposals of the Commission in Minute 55; and this opinion was at once accepted by the Chancellery and communicated to the Argentine Government. On the Chilean side, therefore, as soon as the problem of geographical errors was raised, and consistently thereafter, the Government took the standpoint that any marked "discrepancy" in the 1902 Award - any sensible rectification or modification - of the 1902 Award must be referred to the Chancelleries; and that this was its standpoint was made clear to the Chilean Delegation at the outset and duly reported by it to the Commission.

47. Before concluding these observations on the Chilean practice, it is perhaps necessary to say a word about the passages from a Chilean letter of 19th October 1943 which Argentina somewhat optimistically cites in paragraph 252 of her Memorial as evidence of Chile's recognition of the full competence of the Commission to bind the Governments. That letter was occasioned by the fact that the Argentine National Park Authority had been felling timber in a

frontier area where "the final boundary line has not yet been definitely drawn". The letter, it is true, refers to the Commission as "solely responsible" under the Protocol for "determining the Chilean-Argentine frontier" and also states that "it has been established that its decisions shall be regarded as definitive and irrevocable". But these expressions, designed to call attention in general terms to the existence of the Commission and to the powers given to it under Article 6, cannot legitimately be interpreted as carrying the meaning apparently attributed to them by Argentina. The object was simply to get the timber-felling stopped pending the Commission's demarcation of the area in accordance with the Protocol. The very last words of the passage cited by Argentina make this perfectly clear: "exploitation of the forest land in the frontier areas shall be refrained from until such time as the Mixed Commission has definitively demarcated the boundary".

48. That being the Chilean practice, no practice adopted unilaterally on the Argentine side could be effective to influence the interpretation of the clear words of the Protocol. But even on the Argentine side, the evidence does not appear to support the account of the practice given in the Argentine Memorial. Mention has been made in paragraph 24 above of the statement in the Informative Report that the duty of the Commission was limited to the

erection of additional boundary posts. In 1951, in commenting on Article 15 of the Plan of Work and Articles 5 and 6 of the Regulations, the Argentine Delegation expressly declared: "The Mixed Commission is only authorised to increase the density of boundary posts on the frontier, but never to change the boundary." This hardly appears to claim for the Commission those "full powers to decide upon a boundary" asserted by Argentina. But the matter is really put beyond all doubt by the unambiguous language used by Argentina in her diplomatic Notes of 30th April and 8th August 1957 - after full time to reflect and to draw the appropriate lessons from the incident of Minute 55. These Notes were evoked by Chile's proposal to add a lawyer to the staff of the Chilean Boundary Commission, and the relevant passages have already been set out at length on pages 379-381 and 383-4 of the Chilean Memorial. In those Notes, as the Court will see, the Argentine Government again and again insisted upon the purely technical, executive, rôle of the Commission - its task of "physical implementation" of the Award, to use Judge Moreno Quintana's phrase. Here, in order to emphasise how far removed are the statements in the Argentine Memorial from the actual practice of the Argentine Government, it may be permissible to recall one or two sentences from the Notes. In the Note of 30th April, having asked itself the rhetorical question: "Who

are then the technicians of Article 1 of the Protocol?"

The Argentine Government said:

> "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." (Underlining added)

And it went on to speak of the "express and limited terms of the Protocol". In its later Note of 8th August, having again insisted on the task of the Commission's being limited to replacing missing boundary posts, placing new posts where necessary and determining geographical co-ordinates, the Argentine Government explained its own understanding of the Commissioners' position when confronted with 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".

The Argentine Government then underlined, in particular, its understanding of what is meant by the "interpretation of documents" in the Plan of Work, i.e. in Articles 20 and 21:

> "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)

49. Thus the practice of both Delegations and of both Governments, so far from justifying the expansive interpretations of the Protocol and Plan of Work contended for in the Argentine Memorial, is in accord with the interpretations placed upon those instruments by Chile - interpretations which in turn correspond to the ordinary meaning of their provisions.

50. The particular cases invoked by Argentina. In Chapter VI of her Memorial, Argentina draws the Court's attention specially to five decisions of the Commission regarding (a) Cerro Principio, (b) Cerro Rojo, (c) Cerro Ap-Iwan, (d) the Customs House near El Coyte and (e) the Customs House at Alto Rio Mayo. It introduces these five decisions with t[illegible] suggestive statement that: "The Mixed Commission settled tracts of uncertain boundary, accomplishing its task without any prior reference to the two Governments, neither of whom ever questioned the finality of these settlements agreed upon by the Mixed Commission." And it seeks to impress on the Court "the particular significance" of some of these instances, promising to throw further light on their significance in Chapter VIII.

This further enlightenment appears in paragraphs 253 *et seq.* of Chapter VIII. The Chilean Government, Argentina

there says, has never questioned the finality and binding effects of the decisions unanimously reached by the Mixed Commission in other parts of the boundary recorded in Minute 55, namely Cerro Rojo and Cerro Ap-Iwan; and she underlines that in those cases the Commission plotted the lines on the maps but did not erect intermediate boundary posts, notwithstanding the fact that the line had been adjusted to take account of geographical realities. Similarly, she says that neither Government has challenged the decision of the Mixed Commission regarding the Cerro Principio, also recorded in Minute 55, where the line was again adjusted to take account of geographical realities, a new boundary post being in this case erected to mark the line more clearly.

Argentina then says that it was only on 18th April 1956 that Chile questioned the decisions of the Commission regarding the line between Posts 16 and 17 on the ground that the formalities required by Article 6 of the Protocol had not been fulfilled; and that the practice of the Parties makes clear that the decisions unanimously reached by the Commission upon the location of the boundary line were considered by the Governments as final and binding, quite apart from the requirements of Article 6 of the Protocol. In justification of that proposition she states:

"In the first place the decisions were never

submitted to the Governments for approval. They were formally recorded in the Acts of the Sessions of the Mixed Commission. Secondly, the erection of intermediate boundary posts and the drawing up of the Special Acts provided for in Article 6 of the Protocol were not considered as a necessary requirement which should be fulfilled in order to make such decisions finally binding upon the Parties. The erection of boundary posts and the drawing up of Special Acts were considered as the normal way of concluding the demarcation of a particular stretch of boundary if intermediate boundary posts were necessary, but the erection of such posts and the drawing up of Special Acts were not essential in order to make decisions reached unanimously by the Mixed Commission upon the position of the frontier line definitely binding upon the Parties."

Reverting to the same theme in a later passage, Argentina reiterates (paragraph 258):

> "what, therefore, makes the practice of the Mixed Commission of great legal significance is the consistent attitude of the two Governments towards that practice at all times and in all cases up to the Chilean attempt to reject selected portions of the Commission's decisions in Act No. 55 concerning certain parts of the boundary line in the Sector.
>
> For it is the fact that in parts of the frontier, with the sole exception of portions of the present Sector, both Governments acquiesced in decisions concerning the course of the boundary line, including cases where the Commission's decision clearly involved more than a purely technical and automatic process; and in regard to these decisions of the Commission neither Government did anything that even suggested by inference that such decisions required any act of approval or acceptance by the Governments in order to make them effective. There was, therefore, a concordant though tacit agreement between them, forming a common understanding of the legal position."

51. Chile's observations on Argentina's interpretation of the practice. As has already been shown in paragraphs 44 to 49 above, Argentina's interpretation of the practice

is simply not reconcilable with her own declared understanding of the Commission's position or with the attitude of the Chilean Delegation and Government recorded in the proceedings of the Commission.

Nor does it help Argentina in the least to say that "it was only on 18th April 1956 that Chile questioned the decisions of the Commission regarding the line between Posts 16 and 17 on the ground that the formalities required by Article 6 of the Protocol had not been complied with." As paragraphs 44 to 49 above also show, the Chilean Government had from the beginning made it plain that she did not regard the Commission as competent by itself to determine the line in cases of geographical error. Furthermore, the President of Chile had already on 24th February 1956 rejected the whole outcome of the Commission's proceedings respecting the Sector between Posts 16 and 17 at the meeting of October 1955. If the Chilean Government took up the question of the "formalities" required by Article 6 in its Note of 18th April, this was simply because the Argentine Government, in its Note of 6th March, had itself claimed binding effect for the so-called "decisions" in virtue of Article 6. To-day, Argentina realises that the reference to Article 6 in her Note of 6th March 1956 was a complete mistake. So, in paragraph 178 of her Memorial, she seeks to make the most of it by attacking Chile for "seizing

upon a mistaken reference in the Argentine Note of 6th March 1956 to Article 6 of the 1941 Protocol" and for seeking to use the provisions of this Article about the attestation of the location of boundary posts to deny final legal efficacy to these unanimous decisions of the Mixed Commission etc." This is really a most extraordinary accusation. What else could she expect the Chilean Government to do when she herself had sought to give a completely inadmissible interpretation to that very Article? Today, in truth, she realises that her Note of 6th March 1956 was not just a mistake but a complete blunder. It showed all too clearly that <u>Argentina herself then assumed that, if the definitive effects which she desired were to attach to the Commission's "approvals" of the two segments of the line in Minute 55, these must be brought within Article 6.</u>

52. One further point of a general character has to be made by way of preface to Chile's observations on the five particular cases invoked by Argentina. The Protocol, as both Parties recognise, was based on the fact that a boundary had already been laid down in 1902 and had been partially demarcated in 1903; and the objectives of the Protocol were the conservation of that boundary and its <u>further</u> demarcation where necessary. Therefore under the Protocol the Commission was to be composed of technicians and its functions were: (a) the replacement of boundary

posts which had disappeared or got into a bad state, (b) setting up new intermediate posts where necessary to indicate the boundary with greater clarity and precision, and (c) to determine the exact geographical coordinates of all such posts. Such being the technical character of the Commission and such being the clearly defined scope of its functions, the Governments had every right, in Chile's view, to assume that the Commission in the daily performance of its functions would act in general conformity with the Protocol and to interpret its acts on that assumption. Of course, the Chilean Government appreciated that in many places the frontier runs over mountainous and difficult ground; and that in consequence the Commission would need to have a certain margin of appreciation and judgment if it was to carry out its technical task of locating and demarcating the boundary on the ground. Having regard to all these considerations and to the occult mysteries of the Commission's technical operations, it was perfectly natural that the Chilean Chancellery should not wish to call in question the work of the Commission except when absolutely essential to protect Chilean interests. . Accordingly, quite independently of what is said below about the five particular cases, the Chilean Government considers that in the general circumstances of the work of the Commission it would be wholly inadmissible to interpret the abstention of either

Government from questioning a particular decision of the Commission as an acquiescence in an enlargement of its competence or a surrender of its right to object when it considers essential interests of its country to be threatened by an erroneous or irregular act of the Commission.

53. Customs Houses at Alto Rio Mayo and El Coyte. These cases are referred to in paragraphs 142 and 143 of the Argentine Memorial after the cases of the three "Cerros" (Principio, Rojo and Ap-Iwan), but they are earlier in date and will therefore be considered first. The Argentine Government appears to present both these transfers of frontier Customs Houses from Argentina to Chile as cases in which decisions of the Commission were regarded as definitive and binding by both Governments independently of the formalities prescribed in Article 6 of the Protocol. The Chilean Government finds Argentina's reliance on these two cases extremely puzzling, since both cases represent normal applications of Article 6 and confirm the correctness of Chile's contention to the hilt. In order that the Court may be able to get an accurate impression of these cases, the Chilean Government has reproduced in Annexes Nos. 18 to 27 to this Counter-Memorial the relevant diplomatic and other official documents relating to the transfer of each Customs House.

Alto Rio Mayo. This was the earlier case and, as

stated by Argentine, is mentioned in the "Informative Report" for 1941-7. Even the passage in that Report (Annex 21 of the Argentine Memorial, p. 45) is enough to give warning that this case is not susceptible of the interpretation now placed on it by Argentina:

> "After the Mixed Commission erected iron Boundary Post VI-9 and concrete Boundary Post, VI-10A, in the Coihaique Alto - Alto Rio Mayo zone, a small strip of land was left between the existing badly placed barbed wire fence and the dividing line. This strip, on which the Argentine Alto Rio Mayo Customs Post was situated, passed to Chilean soverignty.
>
> In compliance with the provisions of part of the final clause of Article 6 of the Protocol of 16 April 1941, the Customs Post which came under Chilean jurisdiction had to be evacuated."

The Court will thus observe that the transfer of this Customs House arose <u>in connection with the erection of two new boundary posts</u> in the vicinity, as a result of which it was found that the Argentine Customs House was on the wrong side of the line there located by the Commission in the course of its work of demarcation. If the Court turns to the official documents it will see that the Argentine authorities then very properly proceeded to vacate the building and offer it to Chile specifically in compliance with Article 6 of the Protocol. The Court will also see from the Deed of Gift and Transfer and the Argentine President's Decree Ratifying the Gift the serious importance attached by the Argentine Government to the observance of formalities in connection with

the transfer and the emphasis placed by it on compliance with Article 6 (see Annexes Nos. 23 and 24). In particular the Court is asked to note, first, that the Deed speaks of the "Boundary Commission entrusted with densifying the demarcation of the frontier line" .... having "verified that the above mentioned Customs Post building lies within Chilean territory at only 600 Metres from the international dividing line, north of the boundary post Camino Alto Rio Mayo (Chubut) Cohaique (Section VI No.9)...." and, secondly, that the Presidential Decree states specifically:

> "The President of the Argentine Commission on the Boundaries with Chile relates that when the Mixed Commission was delimiting the frontier in compliance with the terms of the Protocol of 16 April 1941, he verified when Pillar VI-9 was erected that the Argentine Customs Post on the international road from Alto Rio Mayo (National Territory of Chubut) to Cohaique (Chilean Province of Aisen) was found to lie within the territory of Chile...." (Underlining added)

Could anything be clearer?

El Coyte. This case pursued much the same course and paragraph 142 of the Argentine Memorial is far from giving an adequate picture of the practice of the Parties regarding the transfer of the Customs House. As the Argentine Memorial indicates, the Commission plotted the line in this area in the course of 1948, and the Argentine Government became aware that again one of its Customs Houses had been erected in Chilean Territory. Naturally, as in the previous case it prepared to hand over the

Customs House to Chile and meanwhile in 1950 a new boundary post No. VI-15A was erected by the Commission and duly attested in accordance with Article 6 of the Protocol. Only then - on 23rd September 1952 - did the Argentine Ambassador write to the Chilean Foreign Minister informing him that the Commission "has verified, on the carrying out of the densification of the demarcation of the boundary line, in compliance with the provisions of the Protocol of 16th April 1941, that the Building of the Argentine Customs House El Coyte (Chubut) happens to stand on Chilean territory. The above-mentioned building is situated some 400 metres approximately from the international dividing line ...." (Annex No. 25) Again, a solemn Deed of Transfer was executed (Annex No. 27) which, inter alia, recited the instructions given to the Argentine Ambassador in Santiago on 1st September 1952 to raise the matter with the Chilean Government. Those instructions ran:

> "I have the pleasure to inform Your Excellency that the Argentine-Chile Boundary Commission has verified, on carrying out the densification of the demarcation of the frontier line, in compliance with the provisions of the Protocol of 16 April 1941, that the building of the Argentine Customs Post at "El Coyte" (Chubut) happens to stand on Chilean territory. The above mentioned building is situated about four hundred metres from the international dividing line to the west of the pillar VI-15 A on the road joining the Argentine village "El Coyte" to the Chilean village of "Coyhaique" about

> two thousand and six hundred metres from the Carabineros Post "Puesto Viejo" which depends from the Chilean Customs at Puerto Aysen. In accordance with Article 6 of the above mentioned Protocol, both countries undertake to vacate the lands that should lie in the jurisdiction of one or another." (Underlining added).

And the statements regarding the verification of the error in the course of the "densification" of the demarcation and regarding the position of the Customs House close to the new boundary post VI-15A were later repeated in the body of the Deed.

54. In short, both the Customs House cases were dealt with strictly "according to the book" under the terms of Article 6 of the Protocol. In both the Commission located the error on the ground in the course of demarcation; in both the Commission erected new boundary posts in the vicinity of the area where the territory changed hands; in both the full formalities of Article 6 were observed; in both the Governments attributed the transfer of the Custom House from Argentina to Chile to Article 6 of the Protocol.

55. Cerro Principio, Cerro Rojo and Cerro Ap-Iwan cases.

These are dealt with in paragraphs 137 to 141 of the Argentine Memorial and illustrated on Argentine Maps Nos. A.34 and A.35. They are three cases in which there was some discrepancy between the terms of the 1902 Award and the geographical realities of the ground;

and in each of them the conclusion reached by the Commission was incorporated in Minute 55 which, of course, also contained the Commission's conclusions with reference to the Sector between Posts 16 and 17. The Argentine Government examines the cases in some detail, and it appears that it is to them that it primarily refers when it speaks of the Commission settling "tracts of uncertain boundary" and "accomplishing its task without any prior reference to the two Governments, neither of whom even questioned the finality of these settlements agreed upon by the Mixed Commission".

56. The Chilean Government, for reasons about to be stated, doubts whether the Court will find it necessary to make an exact appreciation of the facts of these cases; and it does not propose itself to examine them in detail in the present Counter-Memorial. At the same time, it has sought to collect in a group of Annexes (Annexes Nos. 9 to 17) a number of relevant records relating to these cases, so that the Court may have the material necessary to enable it to obtain a general picture of their handling in the Commission. Reference has already been made to certain passages in those records in paragraph 46 of this Part for the purpose of indicating the positions taken up by the respective Delegations and by the two Governments when

confronted with the possibility of difficulties arising from geographical errors. As the Court will recall, it was primarily the three "Cerros" which had drawn attention to these difficulties and, this having happened, reservations were expressed by the Chilean Commission and Government as to the possibility of the Mixed Commission's being able to resolve the difficulties definitively without reference to the Chancelleries.

57. The Chilean Government asks the Court to note the following points which, in its view, clearly emerge from the material placed before it relating to the three Cerros:

(a) The three cases all concern the tracing of the boundary in high mountainous and somewhat desolate areas[1].

(b) No human element - not even a single dwelling-house - was involved in the solution of the boundary in the areas concerned.

(c) The location of the boundary in the three areas engaged the attention of the Commission off and on from about 1945, and involved a number of technical studies and discussions within the Commission.

(d) So far from the Commission's making no

1 Cf. the description of the Ap-Iwan and Cerro Rojo areas in the "Informative Report for 1941-7" (Annex 21 to the Argentine Memorial, p.104).

reference to Governments both Delegations informed their Governments in 1950 of the difficulties which they were encountering in these areas in getting the geographical facts to coincide exactly with the terms of the Award (see extracts from Minute 43 on pages 286-7 of the Chilean Memorial). And the Chilean Delegation mentioned the matter to its Chancellery again in 1951 and 1953. On the first occasion it was suggested that "for the moment, it will be necessary to comply with the letter and spirit of the Award, placing these points on the frontier line and joining them, in each case, by the respective imaginary line." But the Chilean Delegation was immediately advised, as it was again on the second occasion that it would eventually be necessary to have the matter referred to the Chancelleries and dealt with by agreement (Annexes Nos. 11 and 13).

(e) The Commission intensified its technical studies, carrying out further inspections and surveys and exchanging memoranda. The relevant documents reproduced as Annexes Nos. 15 and 16 show the difficulty sometimes experienced by the Commission in these areas in arriving at an exact appreciation of the lie of the pertinent geographical features and the

hesitations of the two Delegations in arriving at their conclusions regarding the location of the line.

(f) The documents also show that in the Cerro Principio area the Commission had complicated its task by prematurely declaring the Cerro Principio a Natural Boundary Post in 1946 before it had begun its close study of the line in that area, and doing so with the full formalities prescribed in Article 6 for new boundary posts. They further show that, when the Chilean Delegation proposed that the Cerro Principio should nevertheless be followed and the true point on the watershed used instead, the Argentine Delegation objected on the basis of the obligatory force of Article 6. (See Annex No. 16).

(g) On 21st September 1954, by which time the Commission was approaching a decision in these cases, the Head of the Chilean Delegation sent to the Chilean Chancellery the memorandum a long extract from which appears on pages 291-5 of the Chilean Memorial. In that memorandum there occurs the following passage (page 293 of the Memorial):

> "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." (Underlinings added).

This passage could not fail to give the Chilean Government the impression that (a) the three "Cerro" areas were of very little importance to Chile and (b) the "contradictory appreciations" of various Chilean delegates had been partly responsible for the difficulty in those areas.

58. If the Court will refer to Annex No. 17, it will find the passage from Minute 55 which states the Commission's conclusions on the cases of the three Cerros. It will there see that paragraph (a), covering the Cerro Principio area, merely records:

> "(a) Having studied the line presented by the Chilean Commission on Sheet V-6 'Lake Cochrane Pueyrredón', Boundary Post V-5 'South Bank Lake Cochrane Pueyrredón' and Boundary Post V-9 (56) 'Aduana Robello', it is approved."

and that paragraph (c), covering the other two Cerros, also merely records:

> "(c) The Mixed Commission approves the line drawn on Sheet (V-14) 'Ap-Iwan' and 'Peak Cerro Ap-Iwan' on a scale of 1:10,000 with the approved line drawn thereon in order that it may be made to appear on Sheet (V-14) 'Ap-Iwan' on the same scale."

Furthermore, the passage concludes with an emphatic reservation made by the Commission with reference to

its conclusions in these cases:

> "The Mixed Commission resolves to place on record the fact that in the study of the lines drawn on the sheets (V-14) 'Ap-Iwan' and V-6 'Lake Cochrane-Pueyrredón' special decisions have had to be adopted which must not be regarded as precedents." (Underlinings added).

59. Thus, the position confronting the Chilean Government with respect to the areas of the three "Cerros" was entirely different from that with respect to the Post 16 - Post 17 area. First, in the cases of the three "Cerros", Minute 55 made no reference to the fact that it had not "been possible to make the proposed lines and the grounds therefor fit in, in every respect, with what is laid down in the Award", as it did in the case of the Post 16 - Post 17 Sector. Secondly, the solution adopted by the Commission was complete for the three "Cerro" areas, giving a continuous line between the existing boundary posts of the 1903 demarcation, whereas between Posts 16 and 17 the Commission had confessed its inability to produce a continuous line otherwise than by a compromise which required the approval of the Chancelleries. Thirdly, the boundary in the three "Cerro" areas ran over high mountainous ridges, unpopulated and of no known interest, whereas between Posts 16 and 17 the small mountain valleys of California held a well-established settlement of Chilean families administered by Chilean authorities. Furthermore, although initially the Chilean Chancellery

had had its attention drawn to an apparent difficulty in matching the geographical realities in these areas with the terms of the 1902 Award, there had been further technical studies and the Chancellery had been led by General Urra to understand that the Chilean delegates had confused the issues with "contradictory appreciations". These facts by themselves would, in the Chilean Government's submission, make it altogether inadmissible to treat Chile's omission to challenge the Commission's "approvals" of tracings of the boundary in the three "Cerro" areas as evidence that she interprets the Protocol as conferring on the Commission "full powers to decide upon a boundary" in cases where the legal meaning of the 1902 Award is "unsettled" by reason of geographical error or has "tacitly agreed" to an enlargement of its competence in that regard or has "acquiesced" in any such general competence being assumed by the Commission. And the same is true of any attempt to treat that omission as evidence of a waiver of the requirements of Article 6 of the Protocol as necessary for attributing definitive effects to decisions of the Commission. As pointed out in paragraph 21 above, subsequent practice of the parties to a treaty, to affect interpretation in that way, must <u>clearly</u> establish the <u>common</u> understanding of the parties by acts which are unequivocal as to the meaning which

Part Three

they give to the treaty.

60. Least of all is it admissible so to interpret Chile's omission to challenge Minute 55 with respect to the three "Cerro" areas when Chile at the very same time asserted her right to object to the conclusions in Minute 55 regarding the Post 16 - Post 17 Sector. In the Chilean Government's submission, its rejection of Minute 55 with respect to the Post 16 - Post 17 Sector is completely fatal to any attempt to deduce a Chilean acceptance of or acquiescence in an interpretation of the Protocol which would invest the Commission with "full powers to decide upon a boundary" in all cases, or which would dispense with the requirements of Article 6 of the Protocol. So far from Chile's reaction to Minute 55 indicating that she accepted or acquiesced in such an interpretation of the Protocol, it showed that she did not. And, when the Court recalls that Argentina in her first response to Chile's rejection of the decisions in Minute 55 at once invoked Article 6 and that in her diplomatic Notes of 30th April and 8th August 1957 she fiercely denied the competence of the Commission to enter into legal interpretations of the treaties or Awards they were applying, it will appreciate how completely ill-founded is the Argentine thesis regarding the "subsequent practice" of the two Governments.

61. Chile will examine the Argentine contentions as to her alleged acquiescence in the Commission's particular conclusions regarding the Post 16 - "Watersmeet" and Post 17 - Cerro Virgen segments of the boundary in the next Chapter. But she does not think it necessary in the present Chapter to deal in detail with the additional Argentine arguments regarding her alleged "acquiescence" in the "legal efficacy of all the unanimous determinations of the course of the boundary line by the Commission" which are developed in paragraphs 259-265 of the Argentine Memorial. What has been said above in regard to the "subsequent practice" of the two Governments as a basis for interpreting the 1941 Protocol or deducing a tacit agreement for the enlargement of the Commission's powers applies with no less force to that practice when invoked as a basis for deducing an alleged "acquiescence" or "préclusion". The additional contentions in paragraphs 259-265 are, indeed, only different legal moulds for presenting what is essentially the same argument. Accordingly, the Chilean Government does not feel that it would serve any useful purpose to embark on a discussion of the elements of legal authority adduced by Argentina in support of this line of her argument, though it reserves the right to comment upon it at the oral hearings, should Argentina seek to develop this line

of argument any further.

62. The Chilean Government proposes only to add a brief comment upon what appears to it to be a quite extraordinary statement in paragraph 263 of the Argentine Memorial. Referring to the effect of a "protest" as a means of preventing an inference being drawn from acts, the Argentine Government there states, or rather breaks out:

> "But in the present case the protest was too late to have this effect either in law or in logic; for the inference is already irresistibly drawn from Chile's unambiguous attitude towards that series of similar, but earlier, Mixed Commission decisions, and also from her attitude towards other parts of Act No. 55. It would be inequitable, not to say unconscionable, if a Government were able tacitly to reap the benefit of a series of such decisions favourable to itself, and then later effectively to protest at a subsequent decision that in part favoured the claims of the other Party." (Underlinings added).

Either this statement is an indictment of the whole work of the Commission or it is baseless; and, in the view of the Chilean Government, it is the latter. The task of the Commission is to mark out on the ground with as much precision as it can achieve the boundary laid down in the applicable Treaties and Awards. It has no business to give decisions "favourable" to one side or the other, and it does not do so. It seeks by technical means to locate on the ground the predetermined boundary, demarcate it on the ground where necessary and to fix the demarcation definitively by

geographical coordinates duly recorded. If prior to 1955 Chile had generally acquiesced in the Commission's conclusions, it was not because she thought that she had been "favoured". It was because she assumed that the Commission was going about its technical work with a fair measure of competence and no one had yet suggested the contrary. Although herself somewhat shaken by the events surrounding Minute 55 and the deficiencies which they revealed in her own Delegation at that time, she doubts whether Argentina means to imply that the great bulk of the Commission's work had been incompetent and defective. Nor has she any reason to suppose that the Argentine Delegation spent the years 1942-1955 giving decisions which it considered to "favour" Chile.

What, indeed, is this "series of similar, but earlier, decisions" favourable to Chile? Paragraph 263 of the Argentine Memorial leaves the Court totally in the dark on the point. Is the Court to infer that this is an oblique reference to the two Customs Houses at Alto Río Mayo and El Coyte? These are the only other cases mentioned in the Memorial. But, as has been shown in paragraph 32 above, the conclusion of the Commission, the reactions of the parties and the application of Article 6 all went strictly according to the Protocol. How can this possibly be said to be

a "similar decision" favourable to Chile? The Commission did its job, the Protocol operated according to its terms and that was all. On the necessary assumption that the Argentine Delegation did not go about its work with the set purpose of giving "decisions favourable to Chile", what can Argentina mean by a "decision favourable to Chile" unless it be that the decision resulted in territory passing from Argentina to Chile? The Court may think that, if there really had been a long series of such decisions, the proper inference to draw would be, not that Chile had acquiesced in an extension of the Commission's competence, but that Argentina had persistently encroached upon Chilean territory up and down the boundary. This inference the Chilean Government does not ask the Court to draw, only because it believes the statement in the Memorial to be totally lacking in substance.

63. Finally, with regard to the cases of the three "Cerros" the Chilean Government feels bound to add that it has never sought and does not now seek any undue "favour" from the conclusions of the Commission concerning the tracing of the line along those mountain ridges. The Chilean President, in rejecting the solution adumbrated in Minute 55 for the Post 16 - Post 17 Sector, gave instructions that the position should be restored to the "state existing prior to the said meeting of the

Mixed Boundary Commission". The Argentine Government did not in its Note of 6th March 1956 or in later Notes complain that this involved an unfair discrimination by Chile between the conclusions in Minute 55 concerning the Post 16 - Post 17 Sector and those concerning the three Cerro areas. On the contrary, the Argentine Government took the rejection for what it was - an objection to conclusions which Chile considered to be in contradiction with the 1902 Award and with the well-established Chilean settlement of the area; and in an effort to bolster up those conclusions it called in aid, albeit misguidedly, Article 6 of the Protocol. The ideas that the Commission "favoured" Chile in its conclusions regarding the three Cerros and that Chile acted "unconscionably" in taking exception only to the Post 16 - Post 17 conclusions first appear as arguments in the Memorial.

Argentina not having let fall a single word of dissatisfaction with respect to the three Cerro areas for ten years, and these areas not being before the Court for decision, the Chilean Government naturally reserves its whole position in regard to them. At the same time it recognises that demarcation has not taken place in these areas and that, whatever other legal or practical objections there may be to her doing so, Argentina is not prevented by Article 6 or

any other provision of the Protocol from raising the question of the validity of the Commission's conclusions concerning those areas.

CHAPTER VII

THE PROCEEDINGS OF THE MIXED COMMISSION RELATING TO THE BOUNDARY BETWEEN POSTS 16 AND 17

64. The Chilean Government has examined the Mixed Commission's handling of the problem in the Post 16 - Post 17 Sector in Chapter VII of Part Three of its Memorial, and Argentina has done likewise in paragraphs 144-171 (pages 135 - 163) of her Memorial. The Chilean Memorial sets out the facts and Chile's appreciation of them somewhat more fully than Argentina and, in consequence, Chile does not find it necessary here to add much to what has already been said in her Memorial. In the present Chapter Chile proposes to limit herself to a brief discussion of a few matters in the light of the way in which they are dealt with in the Argentine Memorial. For her substantive account of the facts and for her contentions relating to them Chile asks the Court to refer to Chapter VII of Part Three of her Memorial.

65. The Cerro Virgen. Page 140 of the Argentine Memorial sets out the passage from the "Informative Report" entitled "Study of the Frontier in Section VII" which is also reproduced on pages 282-3 of the Chilean

Memorial. On this passage Argentina comments that it shows the Commission to have been fully aware in 1947 of the problems to which the 1902 Award gave rise north of the Cerro Virgen but that it saw no problem as to the course of the boundary south of that Cerro. "In particular", it says, "the Commission was very clear that the boundary ran through the Cerro de la Virgen, which was to be regarded as a natural boundary post". Again on page 154, when commenting upon the Commission's conclusions recorded in Minute 55, the Argentine Government emphasises that "the Chilean representatives on the Mixed Commission were no longer asserting that Cerro Central was the mountain named 'Virgen' in the 1902 Award through which the boundary was to pass."[1]

66. The interest of this passage from the "Informative Report", in the view of the Chilean Government, is rather the way in which it shows how from the outset the Mixed Commission tended to misdirect itself in regard to the problem of interpretation which arose from the quite radical geographical error resulting from the Argentine expert's misconceived attachment of the

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1 Indeed, the Chilean Delegation had at no time asserted that the Cerro Central was the mountain named "Virgen" in the Award through which the boundary was to pass, or that Cerro Central was the same mountain as Pico Virgen, as stated on page 148 of the Argentine Memorial.

tributaries of the Salto to the Encuentro in 1902. Instead of asking itself how this error might affect the interpretation of the intentions of the 1902 Tribunal with respect to the whole course of the boundary between Posts 16 and 17 and, in particular, how it might affect the identification of the Cerro Virgen as a point on that boundary, the Commission altogether prematurely tended to assume the correctness of the last segment of the line the northern terminal of which was at the very centre of the confusion arising from the geographical error. In doing this, it completely reversed the concept of the 1902 Tribunal with regard to the boundary in this Sector, which was based on cutting the Palena at the mouth of the Encuentro and on joining this point to Post 17 by a line following the Encuentro to its source and thence ascending directly to an elevated local watershed along which it would continue until reaching Post 17. The "Informative Report" thus approached the tracing of the line in the Sector from the opposite direction to that of the Tribunal and mistakenly prejudged the identification and status of the Cerro Virgen as an intended point on the boundary this was the more inadmissible in that the Report emphasised that the "map used by the English Demarcators, from which the dividing line was traced, contains serious defects." If the Commission in the "Informative Report" jumped to premature conclusions regarding the Cerro Virgen as a

natural boundary post, no "Special Minute" was drawn up to give effect to that conclusion either then or at any time later.

67. In connection with the Commission's too facile assumption regarding the location of the Cerro Virgen on the boundary line laid down in the Award, the Court's attention is drawn to the document in Annex No. 28, which has come to the notice of the Chilean Government since it prepared the Memorial. This document forms part of a Report of the Argentine Ministry of Foreign Affairs and Public Worship for 1949-50 and is entitled "Matters concerning Boundaries and Studies relating to the Demarcation of Jurisdictions Frontier with Chile". In that Annex the Court will find the following passage:

> "A report was made on the problem considered by the Argentinian-Chilean Joint Commission bearing on the situation created by the impossibility to determine, demarcate and delineate on the topographical charts the international boundary in strict agreement with the outline of the frontier drawn on the topographical charts forming part of His British Majesty's Arbitration findings because some parts of this outline do not agree exactly with the geographical reality of the terrain, <u>a circumstance which undoubtedly has induced the former to mention as points on the line some hills which, by the new surveys, have been proved not to be on the fixed line. In the cases where the Arbitration, when describing the boundary line, actually mentions hills that are not on it, it is recommended to carry out the demarcation disregarding the said points."</u> (Underlinings added).

Whatever assumption the Argentine Delegation may have made about the Cerro Virgen, the above passage would seem to confirm that, <u>in the view of the Argentine Chancellery,</u>

whenever it is shown that a "Cerro" mentioned by name in the Award is not in fact on the line intended by the Arbitrator that Cerro should be disregarded in carrying out the demarcation.

68. As to the statement on page 154 of the Argentine Memorial that, by subscribing to Minute 55, the Chilean representatives on the Commission "were no longer asserting that Cerro Central was the mountain named Virgen in the 1902 Award," reference is made to the footnote to paragraph 65 above. While the general thesis propounded by the Chilean Delegation that the boundary laid down by the Award follows the Encuentro to its source on the slopes of a high watershed is correct, it is true that it went beyond the historical evidence when it sought to show that the Pico Virgen was indeed the mountain named Virgen in the Award. The Chilean Government, for its part, has made it clear both in its Memorial and at the oral hearings in December 1965 that it does not in any way dispute the identification of the Cerro Virgen as the "Cerro" mentioned in the Award. It considers that the Chilean Delegation was correct in its first belief that the course of the River Encuentro to its source on the slopes of a mountain forming part of a high watershed - which can only be a mountain of the Cordon de las Virgenes - is the basic determining element for locating the boundary laid down by the 1902 Award in this Sector. The Cerro Virgen, the

Chilean Government thinks, must be discarded for two reasons: first, if the Cerro Virgen is retained as a boundary point it is impossible to trace a continuous boundary along the Encuentro to Post 17 of the character intended by the 1902 Award; and secondly, the naming of the Cerro Virgen as a boundary point in the 1902 Award is inextricably mixed up with the fundamental geographical error regarding the tributaries of the Encuentro and Salto.

69. Furthermore, the Chilean Delegation's abandonment of the Pico Virgen when subscribing to Minute 55 has to be seen in perspective. The Chilean Delegation had been persuaded by the Argentine Delegation at the meeting of November 1955 to give up its own thesis, "approve" the segment between Post 17 and the Cerro Virgen and "propose" a compromise line along the Arroyo Lopez - Arroyo Mallines by reasoning based on an incorrect legal approach to the interpretation of the Award and on a map prepared by Argentine experts which gave a seriously incorrect representation of the relation between the "major" and "minor" channels. The defects of the map sheet have been pointed out on pages 299-301 of the Chilean Memorial and, in particular, the fact that the Arroyo Lopez was marked with a double line while the "major channel", twice its size, was given a single "hair" line. In other words, the interpretation placed by Argentina on the Chilean

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Delegation's abandonment of the Pico Virgen and "approval" of the Post 17 - Cerro Virgen segment is, in the view of the Chilean Government, invalidated by the defects in the map and by the fundamental legal defects in the whole of the Commission's conclusions in Minute 55 regarding the Post 16 - Post 17 Sector. The Chilean Delegation's change of position was, in short, as much vitiated by the errors of law and of cartography perpetrated by the Mixed Commission, as the conclusions of the Commission itself.

70. River Encuentro. The Argentine Memorial, in paragraph 147, refers to the above-mentioned passage from the "Informative Report" for 1941-7 in connection also with the River Encuentro. The final paragraph of this passage reads:

> "There are serious defects in the Map used by the British Demarcators on which the dividing line was plotted, especially in the section covering the hydrographic basin of the River Encuentro in its upper and middle course. For this reason the identification and materialisation on the ground of this Sector of the boundary line has caused difficulties which the Mixed Commission is at present trying to resolve."

On this the Argentine Government comments that it shows "that at the time the Mixed Commission considered that a problem existed concerning the River Encuentro". This observation is somewhat equivocal, since it may be taken to imply that the River Encuentro itself was even then regarded by the Commission as a "problem". But what the

Report says is that the Map of the 1902 Award had serious defects, especially in regard to the hydrographic basin of the River Encuentro in its upper and middle course, and that these defects made the location of the boundary difficult in the Sector.

In point of fact the records of the Commission contain a very clear statement as to the River Encuentro system by Lt.Col. Cumplido, a Chilean delegate, which is of the same date as the "Informative Report" (1947). The relevant extract from Minute No. 33 is set out on page 278 of the Chilean Memorial and, in view of the Argentine comment on the Informative Report, it merits a little further consideration. Lt.Col. Cumplido, as the Minute records, had been specially charged with the mission of "reconnoitring the ground" in order to report on the types of survey which would be possible in the area. As the records of the Commission contain no other document giving the results of an inspection of the River Encuentro system by the Commission on the ground, the report of Lt.Col. Cumplido has a special interest. The relevant passage reads:

> "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

> upper and middle course, through being very enclosed, would only permit of a direct survey by plane table provided the technical requirements were suitably lessened." (Underlining added).

There is no trace in this report or anywhere in Minute 33 that anyone in the Commission then saw any problem as to which watercourse is the River Encuentro or as to the relationship between the Arroyo Mallines and the "major channel".

71. The Argentine Government reverts to the River Encuentro in paragraphs 165-171 of its Memorial in commenting upon the proposal in Minute 55 for the middle section of the line. First, it emphasises that "the recommended solution was not intended to be an interpretation and fulfilment of the 1902 Award" but a course which the Commission took as "most suited to a practical solution". Then it observes that the recommended solution was that the boundary should proceed southwards along the River Encuentro to its source determined by the Commission to be at Portezuelo de las Raices and then "continue, as a compromise solution, from that source to the top of Cerro de la Virgen". Finally, having again emphasised the "compromise" character of the recommended solution and noted its rejection by Chile, the Argentine Government concludes:

> "This Court may well feel that, for the purpose of its task, the real value of paragraph (e) of Item 4 of Act No. 55 /the proposal for the middle section/ is in its identification of the course of

the River Encuentro by fixing its source at the graphical coordinates given /i.e. Portezuelo de la Raices./ (Underlinings added).

72. The Commission's so-called "identification" of the course of the River Encuentro and "fixing" of its source at the Portezuelo de las Raices are, in the submission of the Chilean Government, completely erroneous in fact and wholly invalid in law. It has set out its reasons for this submission with some fullness on pages 319-337 of the Memorial, to which it asks the Court to refer. Briefly, what occurred in this connection at the meeting of October 1955 was as follows. The Chilean Delegation, in the proposals which it placed before the Commission at the first session on 20th October, expressed its complete disagreement with the Argentine Delegation as to the course of the River Encuentro upstream of its junction with the Arroyo Lopez, and itself adopted the "major channel" as the line of the boundary in the north. Again, in its supplementary memorandum it recorded its express reservations regarding the nomenclature of the map sheets of the Commission, specifying that these reservations related to the "places referred to as "River Encuentro" and "Falso Engaño"." In short the Chilean Delegation took up a position with regard to the River Encuentro which was precisely the same as that:

(a) of the Argentine experts Frey and Alvarez in 1903 and 1907 respectively;

(b) of the Argentine Government itself in 1913-14;

(c) of the Chilean Government and local authorities consistently after 1914 and apparently also of the Argentine local authorities for some years;

(d) of Lt.Col. Cumplido in his technical report to the Commission in 1947;

(e) of General Helbling, Chairman of the Argentine Boundary Commission, and of General Levene, former Director of the Argentine Military Geographical Institute in 1952 (see page 341 of the Chilean Memorial).

Yet, almost at the end of the meeting the Chilean Delegation did a sudden volte-face, endorsed the joint proposal and at the same time subscribed to the statement in Annexure 5 that the source of the River Encuentro is at a point on the slope of the Portezuelo de las Raices. In the Minute itself the Commission referred to this point only as the source of the western arm of the River Encuentro, but in Annexure 5 the Commission gave the point as the source of the River Encuentro.

73. The last-minute volte-face of the Chilean Delegation is scarcely comprehensible, except on the basis either that the Delegation was misled by the misrepresentation of the "major" and "minor" channels on the map-sheets

of the Commission and the specious scientific arguments of the Argentine Delegation, or else that it abandoned its own appreciation of the geographical facts and of the meaning of the Award for the sake of reaching a compromise. The Chilean Delegation had maintained its initial position both in the Sub-Commission and in the full Commission until the penultimate session, and no new element of fact had been introduced into the debate at that session. General Urra, Chairman of the Delegation, made no attempt in his report to the Chilean Foreign Ministry to explain the reasons which now led him to suppose that the Arroyos Mallines - Lopez constitute the River Encuentro (see pages 347-9 of the Chilean Memorial). Nor did he give any such explanations in the supplementary report which he submitted when called upon to amplify his first report. He simply asserted, without giving any reasons, that California is "to the East of the River Encuentro and is not Chilean" (see pages 351-5 of the Chilean Memorial, especially page 354). Only when a storm of protest and criticism had blown up in the Chilean Congress did General Urra set down, in the memorandum reproduced as Annex 25 to the Argentine Memorial, the reasons by which he purported to justify his acceptance of the "minor channel" as the River Encuentro. This memorandum, although entitled "Ministry of Foreign Affairs", was produced by General

Urra without authority, and has no official character. It is Chapter III (pages 43-50 of the Annex) which contains his explanations regarding the River Encuentro and it is only necessary to glance at it to see how erroneous are those explanations and how completely he misdirected himself as to the implications of the geographical error in the 1902 Award regarding the source of the Encuentro.

74. General Urra's explanations. First, General Urra criticises the use of the term "branch", but says that since the term is used in the Report he will accept it. What never seems to have occurred to him either in writing the memorandum or in advancing the very complicated argument of the Chilean Delegation concerning the western branch of the Encuentro at the meeting of October-November 1955 is that the confusion of the "branches" of the Salto with those of the Encuentro in 1902 deprived the reference to the "western branch of the River Encuentro" in the 1902 Report of any relevance whatever. His explanations show that he was mistakenly preoccupied with identifying the "western branch of the Encuentro", as indeed clearly appears from his Little Chart of the Encuentro river system designated "Figura 11 Esquema General de los factores hidrograficos de la hoya del Rio Encuentro."

Secondly, General Urra prefaces his "geographical study of the basin of the River Encuentro" with the observation: "When the Arbitrator analysed the frontier

line without going over the actual terrain, <u>he looked towards the south of the valley which now forms the Arroyo Lopez and took it to be the River Encuentro</u>". There is not a vestige of foundation for this observation. Certainly none will be found in the pleadings or evidence of either side in the present case. If one thing is clear on the evidence it is that Sir Thomas Holdich never saw the Valley of the Arroyo Lopez - the California Valley; and wherever General Urra got the idea from, it was an error of the first magnitude. If this figment of General Urra's imagination operated on his mind at the penultimate session of the Mixed Commission in 1955, this might serve to explain how - and for what erroneous reasons - he became disposed to allow the Arroyo Lopez to be christened the River Encuentro.

<u>Thirdly</u>, General Urra simply asserts, without giving any scientific grounds for his assertion, that "the River Engaño was a watercourse constituting a hydrographic source draining into the River Palena (forming the western branch of the River Encuentro) and that subsequently this River Engaño found an outlet into the River Tigre or Salto, its course being diverted so that it became a tributary of the latter." He does not pause to ask himself the obvious question as to how, on the basis of his theory, the Portezuelo de las Raices could have come to be where and as it is. In fact, as Dr. R.P.Beckinsale

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explains in his Report (Annex No. 40), the physical evidence of the formation of the whole Río Encuentro - California - Río Engaño area is opposed to the thesis asserted by General Urra. The Portezuelo de las Raices was formed by lacustrine deposit, while the Engaño, the Mallines, the Lopez and the Encuentro all separately incised their own beds in draining the area towards the Palena. But in any event, General Urra's excursion into the possible geomorphological connection between the Río Engaño and Río Encuentro was quite irrelevant, since the only task entrusted to him was to locate on the ground and to demarcate the boundary laid down by the 1902 Tribunal and by 1902 the Portezuelo de las Raices had been in existence since time immemorial.

Fourthly, General Urra serves up as his own arguments advanced by the Argentine Delegation in the Commission regarding the "prevailing south-north direction" of the River Encuentro and regarding the rôle of the Mallines-Lopez as the "principal collector" for the area. His contention that the "prevailing direction" of the total River Encuentro is south-north is highly disputable. As pointed out by Chile at the oral hearings in December 1965, the major channel together with the lower-section have a prevailing north-westerly flow to the River Palena, which is at least comparable to the south-north flow of the minor channel plus lower-section; and at the same

time all the physical evidence points to the "major channel" - lower-section combination representing the unified stream of the Encuentro rather than the "minor channel" - lower-section combination. General Urra's observations that the Mallines-Lopez is the major river because it is the "base-level" of the "major channel" while the River Palena is the "base-level" of the Encuentro lacks any scientific justification. The same is true of his further observation that because the "major channel" falls by 450 metres whereas the "minor channel" has a minimum gradient, the true direction of the river must be that of the "minor channel". These are pure assertions; and it is remarkable that General Urra had nothing to say about the greater length of the major channel and the similarity of the formation of the major channel with that of the lower-section. Furthermore, as Dr. Beckinsale points out, the minor channel in fact falls into the major channel at the confluence, and is evidently the tributary stream, (see paragraph 4 (c)(v) of his Report, Annex 40). As to General Urra's arguments that the "river named as 'River Encuentro' by the Mixed Commission is the principal collector of the imbriferous basin" and that its valley is the chief valley of the orohydrographical basin, these arguments were borrowed from the Argentine Delegation and are open to all the objections set out on pages 321-2 of

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the Chilean Memorial. In addition, the Chilean Government submits, they are simply blown to pieces by the scientific explanations of the Historical origins of the Mallines, Lopez and Encuentro given by Dr. Beckinsale and by his careful account of their relation to each other.

75. In passing, it may be remarked that it clearly appears from General Urra's whole argumentation and from his phrase "the River named as River Encuentro by the Mixed Commission" that he considered the naming of the Arroyo Mallines - Arroyo Lopez as the River Encuentro to have been the act of the Mixed Commission itself in 1955. It may further be remarked that General Urra on the final page of his memorandum concludes:

> "Thus the true hydrographical basin of the Encuentro, in accordance with the terrain as it actually is and as faithfully reproduced in the cartography of the Mixed Commission, consists of the River Encuentro itself and its eastern tributaries such as the River Falso Engaño and others, and the most westerly course is the River Encuentro (Mallines, which flows into the Estero or rivulet Lopez and the latter in turn flows into the River Encuentro); the view that the boundary should be plotted along the River Encuentro along its headwaters is thus fully borne out." (Underlining added).

The Court will see from this passage that General Urra had failed altogether to observe that the Mixed Commission map, so far from faithfully reproducing "the true hydrographical basin of the River Encuentro", totally misrepresented the relative sizes of the "major" and "minor" channels. This aspect of the Commission's

alleged "identification" of the course and source of the River Encuentro will be further examined in the following paragraphs. Here, the Court is merely asked to note that General Urra did not detect this fundamental defect in the Commission's map. The Court is also asked to note the passage in brackets where General Urra states explicitly, as is indeed the fact, that the Mallines flows into the Lopez, not vice versa, and that it is the Lopez which, having collected the Mallines, flows into the River Encuentro. Characteristically he does not pause to say how this undoubtedly correct presentation of the structure of the "minor channel" can be reconciled with his scientific jargon about the Mallines being the "principal collector" or with his dogmatic assertion that "It is never the case that more than one river flows through a valley, ravine or floor of an orographical basin such as the basin with which we are concerned."

76. In short, in the submission of the Government of Chile, General Urra's explanations of his acceptance of the "minor channel" as the River Encuentro are riddled with errors and inconsistencies, while his preoccupation with the "western branch" of the River Encuentro shows that he fundamentally misdirected himself as to the legal implications of the geographical error regarding the tributaries of the River Encuentro

for the interpretation of the 1902 Award.

77. The Commission's defective survey-map. In paragraphs 166-7 of its Memorial the Argentine Government makes two points regarding the survey map used by the Commission in connection with its formulation of the "joint proposal" and its "identification" of the course of the River Encuentro. First, having stated that the Commission "had drawn up a map strictly in accordance with the procedure laid down by it", it emphasises that "the area included in the map comprises the zone within which the Mixed Commission expected that the boundary would be situated". And in this connection, it makes the point that no objection was ever raised from the Chilean side in respect of the area surveyed and mapped.

Secondly, it asks the Court to find significance in the titles given to Sheets VII-2 and VII-3 - Cerro de la Virgen and Río Encuentro respectively. It observes that the practice of the Commission was to entitle a Sheet with both the Argentine and the Chilean names of the most important geographical feature whenever there were different names adopted in each country. Then it asks why the Chilean representatives did not propose that Sheet VII-3 should be given a title which included the names Estero Lopez or Estero Los Mallines, which subsequently they proposed as alternative names for part of the River Encuentro.

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78. The Chilean Delegation did not draw attention at an earlier stage to the whole extent of the area opened up for debate in consequence of the geographical error. In the event, what happened was that those responsible for carrying out the aerial survey and preparing the map sheets worked on the basis of an area 5km. either side of the erroneous line drawn on the map accompanying the 1902 Award. The work was done in 1953 and, as the results came in, the Chilean Delegation began to address itself to the question of the actual line which it should propose. In a memorandum of 21st September 1954 to the Chilean Ministry of Foreign Affairs, General Urra sketched out his ideas regarding the boundary (Chilean Memorial, pages 291-5). On 25th October of the same year the Argentine Delegation handed over photographic copies of the relevant map sheets, VII-1, VII-2 and VII-3. In April 1955 the Argentine Delegation handed over further copies of the sheets showing the boundary traced in accordance with its proposals; and only at the end of August did General Urra give instructions to his staff to study and formulate in detail the line to be proposed by Chile. Inevitably, since this line followed the "major channel", it had to be presented, not on the relevant "map sheets" but on a map prepared in the Chilean Military Geographical Institute. But, as pointed out on pages 315-16 of

the Chilean Memorial, any omission on the part of Chilean Delegates with regard to the aerial survey could not possibly justify the Argentine Delegation in claiming that the Chilean proposal was thereby invalidated. The function of the Mixed Commission was to attempt to locate and demarcate the boundary in the Sector and to do so in accordance with the 1902 Award. If the Chilean thesis as to the course of the boundary was correct, it was the duty of the Mixed Commission to apply it on the ground and on the maps, notwithstanding any failings of the Chilean Delegation in its methods of work. The Court may well think that the very fact that the survey maps were prepared on the basis of a five kilometres strip on either side of the <u>erroneous line of the 1902 Map</u> shows that the Commission's initial approach to the problem of the Post 16 - Post 17 Sector misconceived fundamentally the effect of the geographical error on the interpretation of the 1902 Award.

79. As to the titles to the Map-Sheets, the conclusions which the Argentine Government seeks to draw from the supposed failure of the Chilean Delegation to ask for the names Lopez or Mallines to be added to the Río Encuentro sheet appear to the Chilean Government to be somewhat far-fetched. The names Lopez and Mallines were not and never have been, "alternative names" for any part of the River Encuentro. Indeed, it might

similarly be asked of Argentina why her delegation did not ask for the name "Falso Engano" to be included in the title. In any event, the most important feature in the sheet is the River Encuentro, the lower section of which was correctly portrayed, and therefore the sheet was adequately titled. Furthermore, the maps were produced in the Argentine Military Geographical Institute and handed over to the Chilean Delegation in the form of photographic copies. The Chilean counter-proposals and the Chilean map supporting those counter-proposals depicted the Arroyos Mallines and Lopez and the River Encuentro with their correct nomenclature and not with that of the Argentine-produced maps. Moreover, in its explanatory memorandum and again in its supplementary memorandum the Chilean Delegation underlined its disagreement with the Argentine concept of the River Encuentro and with the nomenclature used on those maps. The Argentine Memorial omits to take any account of these reactions on the part of the Chilean Delegation.

80. The Argentine Memorial omits to draw the Court's attention to a much more significant feature of Map Sheets VII-2 (Cerro de la Virgen) and VII-3 (Río Encuentro) - their extremely material and quite inexcusable errors in the presentation of the relative sizes of the "major" and "minor" channels and of the

structure of the Arroyos Mallines - Lopez. Some of these errors were pointed out on pages 299-300 of the Chilean Memorial, where stress was laid on the fact that on Sheet VII-3 the Arroyo Lopez, which is half the size of the major channel, is marked with a large double line in the same manner as the lower section downstream of the confluence, while the major channel is marked with the thinnest possible "hair" line. At the oral hearing on 30th December 1965 the Argentine Government appears to have suggested to the Court that the "hair line" shown on the Map Sheet for the "major channel" was correct in 1955 but needs modification to-day as a result of a land-slide. Counsel then said:

> "However, the representation of the River Falso Engaño immediately above the confluence with the River Encuentro on the Mixed Commission's map.... now requires modification, for above the confluence the River Falso Engano is subject to short-term changes of course, width of bed and volume. A recent landslide has diverted the river, so that the Mixed Commission's Map sheet no longer accurately represents its course. The River Falso Engano at its confluence with the River Encuentro is more than 5 metres wide and, like the Encuentro, should be represented on the map by a double blue line ...."

The Chilean Government cannot accept this suggestion as well-founded. The small fall of rock upstream of the confluence may have turned the flow of the "major channel" slightly but it certainly did not so change its bed as to justify the apparent suggestion of the Argentine Government that, as a result, the major

channel now, but only now, qualifies for the double line which it was not accorded in the survey Map, (see sketch map CH.(CM)6). If the Court will be good enought to look again at Argentine Map A 31, it will see a contrasting presentation of the "major" and "minor" channels in the vicinity of the confluence which, in the Chilean Government's submission, bears no relation at all to the actual facts either as they are now or as they were twelve years ago.

81. But the matter does not rest there. At the foot of Sheet VII-3 (Argentine Map A 31), where the Arroyo Mallines joins the Arroyo Lopez, the Little Mallines is marked by a substantial line noticeably thicker than that which marks the much larger Arroyo Lopez. Indeed, the little Mallines there appears to be larger even than the "major channel" at its confluence with the Arroyo Lopez. Then at the top of Sheet VII-2 (Argentine Map A.30) - at a spot to which the Minutes of the Head of the Field Mission and of Major Rushworth and the letters of the Argentine Agent have drawn particular attention - the little ditch, the stripling Encuentro as we are asked to believe, is marked with a firm line almost as far as its trickling source, while the longer, larger, course of the Arroyo Mallines, rising in the Cordon de los Morros and having a flow ten times that of the little ditch, has to be content with a broken, scarcely

visible, line.

82. In short, on the Commission's Map Sheets VII-2 and VII-3, made in the Argentine Military Geographical Institute, the Argentine Delegation's version of the River Encuentro, from its junction with the Palena almost to its very end under the Portezuelo de las Raices, is marked with a continuous thick "spine" not justified by the facts on the ground and making it appear to dominate the much larger watercourses of the "major channel", the Arroyo Lopez, and the upper Mallines.

83. Neither the compromise nor the Argentine line a proper interpretation of the 1902 Award. Before leaving the proceedings in the Mixed Boundary Commission relating to the boundary between Posts 16 and 17, the Chilean Government invites the Court's attention to two observations regarding the tracing of the line in this Sector, one by the Argentine Government and the other by General Urra.

On page 158 of its Memorial the Argentine Government states that "the recommended solution [i.e. the line from Portezuelo de las Raices straight across the Engano to the Cerro Virgen complex] was not intended to be an interpretation and fulfilment of the 1902 Award and was accordingly put forward merely as a proposal.. ..". (Underlining added). This statement is

certainly correct and, as the Argentine Government itself has put forward a different line in the Memorial, it seems to be common ground that the "compromise line" could not constitute a "proper interpretation and fulfilment" of the 1902 Award.

The line put forward by the Argentine Government in the Memorial is exactly the same as that which its delegation submitted to the Mixed Boundary Commission in 1955, as the Court can see from the description of that line on pages 301-2 of the Chilean Memorial. It is therefore of some interest to note that General Urra in his second report explaining what had happened at the meeting of October-November 1955 listed among "the conclusions come to on that occasion" the following (see page 352 of the Chilean Memorial):

> "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 Engano 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." (Underlining Added).

84. It is the Argentine Government which attaches so much importance to the conclusions of the Commission. The Chilean Government, as the Court is aware, considers

that the Mixed Commission misdirected itself fundamentally as to the effect of the geographical error on the meaning and application of the 1902 Award; and that its conclusions were further vitiated by fundamental geographical errors as to the course and source of the River Encuentro. The Chilean Government, therefore, contents itself with observing that the proceedings of the Mixed Boundary Commission clearly provide no support for the view that the line propounded by Argentina in her Memorial could be arrived at on the basis of "a proper interpretation and fulfilment" of the 1902 Award.

CHAPTERS VIII and IX

CONSIDERATION OF THE BOUNDARY BETWEEN POSTS 16 AND 17 BY THE TWO GOVERNMENTS AND DEVELOPMENTS SUBSEQUENT TO THE REJECTION OF THE LINE PROPOSED BY THE MIXED COMMISSION

85. The Argentine Government in Chapter VII of its Memorial has dealt comparatively briefly with the events and the diplomatic correspondence subsequent to the drawing up of Minute 55. Chile, on the other hand, in Chapters VIII and IX of Part Three of her Memorial has examined at some length the diplomatic exchanges between the two Governments before and after Minute 55 and the incidents and events in the Sector subsequent to that Minute. The Chilean Government,

therefore, having already covered the matters raised in Chapter VII of the Argentine Memorial, has little to add here to what it has said to the Court in Part Three, Chapters VIII and IX of its Memorial. It will limit itself to correcting one matter of fact in Chapter VIII in the light of a new document which has come to its notice since the delivery of the Memorial and to commenting briefly on a few points contained in the Argentine Memorial.

86. Commencement of Argentine incursions into California.

On page 338 of her Memorial, at the beginning of Chapter VIII of Part Three, Chile has stated that on 25th July 1952 the Commander of the local Argentine Gendarmerie suddenly appeared in the Rió Encuentro - California areas, interfering with the Chilean settlers and asserting that the boundary ran along the "minor channel" and thence across the Engaño directly to the Cerro Virgen complex; and that this incident brought the problem of the demarcation of the boundary between Posts 16 and 17 sharply to the attention of the two Governments. This statement is entirely correct, and the diplomatic exchanges between the two Governments began with the Chilean protest regarding this incident, delivered by the Chilean Ambassador on 21st August 1952 (Chilean Annex No. 45A at page 244). At the time of

writing the Memorial the Chilean Government was under the impression that this had been the first incident of the kind. An internal document in the Foreign Ministry has now come to hand, however, which shows that similar incidents had occurred at an earlier date. This is a letter of 26th May 1947 from the Chilean Consul in Esquel to the Chilean Minister of Foreign Affairs, the full text of which will be found at Annex No. 8 to this Counter-Memorial. The Consul there informs the Minister that Argentine Gendarmes from Carrenleufu have been penetrating into Chilean territory and trying to hinder the work of the surveyor of the Chilean Ministry of Lands, Mr. Carvajal; and that they had been telling the Chilean settlers that they were on Argentine territory and threatening them. The Consul's letter then goes on;

> "The Chilean-Argentine Mixed Boundary Commission this summer met in that zone and established that the right bank of the River Encuentro is Argentine and that the left bank is Chilean, and informed Carabineros in Palena and Gendarmerie in Carrenleufu accordingly, which means that both police forces were perfectly aware of the ground they patrol and have been instructed in that respect. Carabineros obey, but not so Gendarmerie, who seem to ignore the instructions received."

That the Consul understood the boundary to be the "major channel" is clearly evidenced by the fact that he referred to the Chilean settlers affected, namely Dionisio Ovalle S, Juan Hernandez G. and Leonilda Cid de

Contreras, all of whom lived south of the "major channel" and east of the "minor channel". The year 1947 was of course the year in which "Informative Report" was completed and in which Lt. Col. Cumplido, on the instructions of the Mixed Commission, "reconnoitred the ground" and reported on the forms of survey which could be undertaken along the River Encuentro (the major channel) and the Arroyo Mallines.

The Consul's letter then tells the Minister that these acts of the Argentine Gendarmerie "have been taking place for some time now to-date"; and that he has made several complaints to the heads of Gendarmerie at Esquel requesting them to instruct the personnel at Carrenleufú "to abstain from entering Chilean territory to threaten the settlers and much less to tell these people that the land they occupy is Argentine and that the surveys being made are void". It points out that Chilean settlers are obliged to go into Argentine territory for some of their supplies and that this gives the Gendarmerie the opportunity to make things difficult for them. It further states that the Consul has handled the matter with caution and tact and has made his verbal complaints in as friendly a manner as possible to avoid disagreeable friction between Carabineros and Gendarmerie and greater evils.

87. The Chilean Consul's letter certainly indicates

that the local Gendarmerie had made some incursions into California a few years before 1952 and had sought to interfere with the Chilean settlers. As the letter indicates, these incursions had been dealt with at the local level and had not been taken up between the two Chancelleries. Trespassing over the boundary occurred not infrequently along the extended and mountainous frontier between the two countries, and it was common enough that not every incident should be brought at once to the Chancelleries for action. In the present instance it was the determined incursion of the Commander of the Gendarmerie into California on 25th July 1952, his aggressive attempt to subject the Chilean settlers to Argentine jurisdiction, his statement that he was acting on the express orders of his superiors and his claim to be basing himself on the Provisional Map of the Argentine Military Georgraphical Institute that lifted the matter on to the diplomatic plane. But although the account on page 338 of the Memorial of the beginning of the diplomatic exchanges is for that reason true enough, the Chilean Government thinks it right, in the light of the new document, to correct the impression which the Court may have gained from the Memorial that the incident of 25th July 1952 was the very first occasion on which an Argentine gendarme made an incursion across the River Encuentro

into California.

88. The letter of the Chilean Consul at Esquel, the Court will observe, provides further evidence of the Chilean character of the settlers in California and of the clear understanding of the Chilean authorities in 1947 that California lay on the left - Chilean - bank of the River Encuentro. It also provides evidence that the Chilean settlers in California felt themselves to be in Chilean territory and regarded the Argentine Gendarmerie as "foreign police". Equally, it provides evidence of the Surveyor of the Chilean Ministry of Lands in California at that date carrying out his normal task of surveying the Chilean landholdings in the area..

89. A further letter from the subsequent Chilean Consul at Esquel dated 20th August 1952, has also come to light since the Chilean Memorial was prepared. It is included as Annex No. 30. and the Court's attention is directed to it for amplification of the description of the incident of July 1952 given on page 338 of the Chilean Memorial and for contemporaneous evidence of the reaction of the settlers.

90. <u>Chilean rejection of the Commission's Conclusions for the whole Sector between Posts 16 and 17.</u>

Paragraphs 173-178 of the Argentine Memorial set out Argentina's account of the reactions of the

two Governments to Minute 55. They lay considerable stress on the facts that (a) the Chilean Foreign Minister's statement to the Senate of 14 December 1955, (b) the Chilean Note of 19 December 1955, (c) the President's declaration of 25 February 1956 and (d) the further Chilean Note of 27 February 1956 all related to the "joint proposal" and made no reference to the Commission's decisions regarding the northern and southern segments. These facts lead the Argentine Government to make two observations. First, it observes that Argentina was led to believe that those decisions were final and accepted by both Parties. Secondly, it observes that "it was not until a Note, dated 18 April 1956, from the Chilean Foreign Ministry to the Argentine Ambassador in Santiago, that the Chilean Government questioned the binding effect of the unanimous decisions of the Mixed Commission relating to what may be conveniently referred to as the northern and southern parts of the boundary line in the Sector".

91. The Chilean Government has presented and analysed the relevant Notes and official statements on pages 360-370 of its Memorial. It is, of course, understandable that, the "joint proposal" having been specifically referred to the Chancelleries for decision, attention should have been focussed on that part of the line to which the proposal related. It is also understandable

that, the proposal having been presented by the Mixed Commission on photogrammatric maps drawn on a scale of only 1:50,000 and completely distorting the river system of the Encuentro, the Foreign Minister and his officials should not at once have realised all the implications of Minute 55. But the short delay in finding out all the meaning and consequences of Minute 55 and all the implications of the Commission's conclusions regarding the two terminal segments cannot be interpreted as a tacit recognition by Chile of the binding force of those conclusions.

92. Nor does the statement in the Argentine Memorial, that Argentina was thereby led to believe that Chile had accepted the Commission's conclusions regarding the two terminal segments, appear to carry any conviction. Having regard to the Commission's outright rejection of the Argentine proposal for joining Post 16 to the Cerro de la Virgen as incompatible with the 1902 Award, it was evident that, if the "joint proposal" were to fail of acceptance, the whole question of the boundary between Posts 16 and 17 must be in the melting pot. Furthermore, when confronted with Chile's rejection of the "joint proposal", the Argentine Government did not either in its public statement of 26 February 1956 or in its diplomatic Note of 6 March 1956 make the slightest suggestion that it believed Chile to have accepted the Commission's

conclusions regarding the terminal segments. On the contrary both in the public statement and in the Note the sole ground advanced by the Argentine Government for its considering the "decisions" in Minute 55 to be binding was the effect of Article 6 of the Protocol. Nor did the Argentine Government ever make any such suggestion in any of its subsequent diplomatic Notes. Furthermore, it is evident that, when the President of Chile gave instructions for the position to be restored to the state existing prior to the meeting at which Minute 55 was drawn up, the Argentine Government immediately interpreted this as an attempted rejection of the whole of the Commission's conclusions regarding the Sector. Otherwise, it is difficult to understand why, without even waiting for Chile's official notification through the diplomatic channel, the Argentine Foreign Minister should have made a public declaration on 26 February 1956 raising the question of the two terminal segments and specifically invoking Article 6 with respect to them.

93. In short, the significance which the Argentine Government tries to give to its assertion: "It was not until a Note dated 18 April 1956 ..... that the Chilean Government questioned the binding effect of the unanimous decisions of the Mixed Commission relating to what may be conveniently referred to as the northern and southern parts of the boundary line in the Sector" finds no

reflection in its own statements at the time. Indeed, as already pointed in Chapters V and VI of this Part of the Counter Memorial paragraph 60, the immediate, almost instinctive, appeal of the Argentine Government to Article 6 of the Protocol shows all too clearly that Argentina herself did not then imagine that the unanimity of the Commission could be enough to make its conclusions regarding the two terminal segments definitive and binding on the two Governments.

94. Relevance of Article 6 of the Protocol. Attention has already been drawn to the extraordinary accusation in paragraph 178 of the Argentine Memorial that Chile "seized upon a mistaken reference in the Argentine Note of 6 March 1956, to Article 6 of the Protocol" (see Chapters V and VI of this Part, paragraph 51). This accusation is, indeed, curious. Article 6 is the Article in which the two Governments had with great particularity spelt out the conditions under which they would consider an act of demarcation carried out by the Mixed Commission as "producing full effect" and as "firm and valid" so as to require them to treat the act as definitively determining the limits of their respective territories. In consequence, it was manifestly the legal provision which above all must be expected to govern the question whether any part of the boundary between Posts 16 and 17 had been settled by the Mixed Boundary Commission in a manner to

render it definitely binding upon Chile. And the Article had in the most explicit terms been invoked by the Argentine Government as binding Chile to accept the two terminal segments as having been finally settled by the Commission. Seeing that Article 6 provided no warrant for any such claim, Chile had no other course than to point this out. Otherwise, no doubt, Argentina would have come to the Court and said that Chile had "acquiesced" in the meaning which Argentina was seeking to give to Article 6.

95. Furthermore, the suggestion that it was merely a momentary aberration which led Argentina to invoke Article 6 and of which Chile tried to take advantage will not bear examination. As has been pointed out in Chapters V and VI of this Part (paragraph 53) it was Article 6 which Argentina had specified in 1947 as the legal basis of her obligation to transfer to Chile the Customs House at Alto Rió Mayo and again in 1952 for the transfer of the Customs House at El Coyte. As also pointed out in Chapters V and VI (paragraph 56 (f)), it was Article 6 which the Argentine Boundary Commission had invoked in 1954 when objecting to a proposal to disregard a previous declaration of the Cerro Principio as a natural boundary post. Indeed, in a diplomatic Note of 31 October 1950 answering a Chilean protest regarding the cutting of wood in a frontier area, the Minister of Foreign Affairs and Public Worship went so far as to say (Annex No.29):

> "Moreover, in the demarcation which has been practised on the frontier between Chile and Argentina, from early days up to the present the general norm has been adopted that the respective territories change of ownership at the moment when the special minutes erecting boundary posts are signed, and this has been ratified by the Protocol in force of 16 April 1941". (Underlining added)

If Article 6 does not receive express mention in this passage, there can be no doubt that it is to Article 6 that the final phrase refers.

96. Moreover, when the Court turns to Argentina's reactions to Minute 55 it will find ample evidence that she fully appreciated the need to bring the "decisions" on which she relied within the terms of Article 6. The storm in the Chilean Congress over the conclusions of the Commission regarding the Post 16-Post 17 Sector broke out at the end of December 1955; and the probability of Chile's rejection of those conclusions had already been apparent for some weeks when the Argentine Foreign Minister made his first official statement on the matter on 26 February 1956 (Chilean Memorial, pages 367-8). That statement was not therefore a hurried piece of extemporising but fully considered and in it Argentina explicitly and exclusively based her contention as to the definitive character of the Commission's decisions regarding the two terminal segments on Article 6. Similarly, in her first official communication to Chile on the matter made eight days

later - on 6 March - she again explicitly and exclusively rested her contention on Article 6.

97. Chile having pointed out in her Note of 18 April 1956 that none of the conditions prescribed in Article 6 had been complied with, Argentina made no reply for a period of ten months. She afterwards explained that out of tact, she had thought it proper to delay her reply to the Chilean Note, pending the completion of the investigation ordered by the Chilean Congress. This hardly seems a sufficient reason for leaving the purely legal point raised by Chile regarding the 1941 Protocol unanswered but it is the fact that only in a Note of 24 January 1957 did Argentina revert to the question of Article 6. Ten month's cogitation in the Argentine Chancellery had produced a radical change of front and the Note of 24 January 1957 contained an elaborate exposition of the present Argentine thesis that, notwithstanding Article 6, unanimous conclusions of the Commission are definitive and binding on the Governments without the formalities required by that Article. Argentina did not complain that the Chilean Government had "seized upon a mistaken reference" in her Note of 6 March 1956; instead, she went to considerable pains, in an argument running over some nine paragraphs, to try to justify her new interpretation of the 1941 Protocol.

98. Furthermore, Argentina does not seem to have

entirely convinced herself by her own arguments. Thus, in a Note of 30 October 1963 answering Chilean Protests regarding the erection of a wire fence at the northern end of the Hondo Valley, Argentina again placed her claim as to the definitive character of the "decisions" in Minute 55 squarely on Article 6 of the Protocol. Nor was this just a casual "mistaken reference". If the Court turns to the text of this Note in Annex No. 109 of the Chilean Memorial (Vol. 2 pages 585-7), it will see in paragraph 3 a carefully stated argument as to the definitive effects of Minute 55 produced by Article 6 and the text of the Article set out in full.

99. It is scarcely necessary to labour the point any further. But in view of the lateness of its date - only a few weeks before Chile referred to the Arbitrator - the Court may find it of interest to read the Argentine Note of 27 July 1964 where the Argentine Government was still invoking Article 6. The text of this Note is printed as Annex 114 to the Chilean Memorial and the relevant passage is on page 609 of Volume 2. Having been notified that the Chilean Carabineros would be patrolling again in the Valle Hondo area, the Argentine Government recalled what it had said in the Note of 30 October 1963 mentioned in the previous paragraph and added: "The events described in this Note occurred on Argentine territory, by reason of its 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 16 April 1941". (Underlining added)

100. No more should therefore now be heard of the Chilean Government's having "seized upon a mistaken reference in the Argentine Note of 6 March 1956 to Article 6 of the Protocol". The record shows that, notwithstanding the thesis which she advances in regard to the Commission's conclusions in Minute 55, Argentina has frequently, from the earliest days of the Commission until the eve of the present proceedings, indicated her recognition that it is Article 6 and the fulfilment of its requirements which determines the definitive effects of the Commission's works vis a vis the two Governments.

PART FOUR

FURTHER EVENTS AND DIPLOMATIC EXCHANGES

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Further events and Diplomatic Exchanges.

The Chilean Government annexed to its Memorial the relevant diplomatic correspondence up to the submission of the dispute to arbitration. In order to complete the picture and bring the correspondence up to date, it has annexed to this Counter Memorial the further diplomatic notes relative to the dispute which have been exchanged since the date of the Compromiso. These notes will be found in Annexes Nos. 31 A to 38.

PART FIVE

THE CONTENTIONS OF THE GOVERNMENT OF CHILE

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THE CONTENTIONS AND SUBMISSIONS OF THE GOVERNMENT OF CHILE.

Chapter 1.

INTRODUCTION

1. The Chilean Government has set out its detailed contentions and submissions in five Chapters in Part V of its Memorial. The Argentine Government, on its side, has summarized its submissions in Chapter X of its Memorial, prefacing these submissions with two Chapters entitled "Statement of Law". The second of the two Chapters entitled "Statement of Law" - Chapter IX - appears really to be concerned with Argentina's contentions and submissions as to how its statement of law in Chapter VIII should be applied to the Circumstances of the present case. Moreover, Argentina's "summary of submissions" in Chapter X is brief and expressed to be "without derogating from its detailed submissions". Accordingly, the Chilean Government proposes in this Part of its Counter-Memorial: (1) to examine the Argentine propositions of law set out in Chapter

VIII of its Memorial and to state Chile's views as to the law to be applied by the Court; (2) to examine the Argentine contentions and submissions contained in Chapters IX and X of the Argentine Memorial; and (3) to consider what, if any, changes or additions should be made to the Chilean contentions and submissions in the light of anything in the Argentine Memorial or of any fresh information that has come to its notice since the delivery of the Memorials.

2. Chapter VIII of the Argentine Memorial examines what the Argentine Government considers to be the principles of law applicable in the present case primarily from the point of view of its submissions regarding the alleged "settlement" of the boundary between Posts 16 and 17 by (a) the 1902-3 Award and Demarcation and (b) Minute 55 of the Mixed Boundary Commission. At the same time, in examining the law touching the problem of the 1902-3 "settlement", it gives its general views on the principles to be applied in interpreting the 1902 Award in the light of the geographical error. The Chilean Government, in Part III (Chapters V and VI) of this Counter-Memorial, has already dealt at

length with the Argentine arguments regarding the competence of the Mixed Boundary Commission and the legal effect of Minute 55. Accordingly, although later it will briefly revert to the law applicable to Minute 55, it has no need here to re-examine paragraphs 240 - 265 of the Argentine Memorial which relate to the alleged "settlement" of the two terminal segments by the Mixed Boundary Commission.

3. The general Argentine thesis as to the settlement of the boundary resulting from the 1902 - 3 Award and Demarcation has already been analysed and fully discussed in Part Three (Chapter 1, paragraphs 4 - 13). It has there been pointed out that the Parties are agreed that (a) the Award in principle comprises the Award, the Report and the Map; (b) the Award has to be interpreted and applied in conjunction with the 1903 Demarcation; (c) the Award, notwithstanding the geographical error, is valid and, in principle, settled the boundary for the purposes of Article 2 of the 1902 Treaty; (d) the course of the boundary in the Sector, although settled in principle, may nevertheless be unclear as a result of a mistake or otherwise and to that extent "unsettled" for the purposes of Article 1 of the Compromiso; (e) a

part of the boundary at one time "unclear" and "unsettled" because of mistake or otherwise could legally become settled afterwards as a result of a valid decision or agreement binding the two countries.

4. The divergence between the views of the Parties begins when Argentina contends:

(i) The 1902 Award must be assumed to have settled finally those parts of the boundary between Posts 16 and 17 to which it refers in terms which are accurate (paragraph 216(i)).

(ii) The examination of the question of the settlement arising from the Award is prior to the question of mistake (paragraph 217).

(iii) Only when the parts of the boundary that have been settled have been identified can the Court usefully turn to consider the effect of mistake upon the other parts (ibid).

5. In Part Three (Chapter 1, paragraphs 5 - 13) the Chilean Government has pointed out that logically the question how far the boundary in the Sector was "finally" settled in 1902

depends entirely on the extent of the impact made by the geographical error on the Award handed down by the Tribunal; that the consequence of the error here under discussion was to cause a complete rupture in the structure and unity of the boundary provided for in the Award; and that the questions of "error" and "settlement" are therefore inextricably connected in determining the effect of the 1902 Award. It has also pointed out how only the Argentine expert's erroneous attribution of the tributaries of the River Salto to the River Encuentro had brought the name of the Cerro Virgen on to the line of the boundary at all; how in consequence the error took away the whole root of the supposed identification in the Award of the segment of the line between the Cerro Virgen and Post 17; and how the Argentine Government itself has from time to time sought to treat as unsettled even the identified and demarcated "fixed point" on the boundary at Post 16. It only remains therefore to discuss the principles of law which are said by Argentina to justify her contentions regarding the "final settlement" of the two terminal segments by the 1902 Award.

Part Five

Chapter II

THE LAW GOVERNING THE INTERPRETATION AND EFFECT OF THE 1902 AWARD AND DEMARCATION IN THE SECTOR BETWEEN POSTS 16 AND 17

6. Argentine thesis as to the law governing the consequences of the geographical error. Argentina's thesis regarding the legal implications of the error are developed in paragraphs 224-32 of her Memorial, and begins with the statement that, once attention is turned from "fundamental" mistake that nullifies to the kind that merely creates a problem of interpretation, there is a parallel between the problem as it relates to treaties and as it relates to an Award. In both cases, according to Argentina, the task of the Court is limited to finding the legal meaning of the actual terms of the instrument and is not concerned with ulterior motivations. Referring to the 1964 Report of the International Law Commission in this connection (p. 27), Argentina makes the inconsequential observation: "The problem is usually, therefore, a linguistic crux and the method of its resolution is one of interpretation". In purported justification of this somewhat delphic statement, Argentina cites the

St. Croix River case (Moore, International Adjudications, Part Five Vols. 1 & 2) and the case of United States v. Texas (162 U.S.1), both of which involved mistakes on maps. In the former case, she says that the question was "what River was truly intended under the name of River St. Croix in the Treaty" and that in the Texas case "the problem was again approached by the Court as being one essentially of misdescription". And she concludes: "In all such cases, therefore, it is a matter of pure interpretation of language" (underlinings added). As to the present case, she contends that "the need for interpretation cannot be other than very limited in respect of a valid Arbitral Award the plain terms of which, for the greater part of the line in this Sector, can be traced immediately and with ease on any accurate modern map".

The "plain terms rule itself", in Argentina's view, requires that "the legal results of any mistake should be confined to the part of the boundary line the description of which is directly affected and rendered inaccurate by the mistake, and that they cannot in law invalidate those parts of the line laid down in 1902 that are clear." In this connection she cites a well-known passage from the Admission to the U.N. case (I.C.J. Reports 1950, at p8) regarding the interpretation of treaty provisions according to their natural and ord-

Part Five -inary meaning in the context in which they occur.

Adding that there is a dearth of authority in international law on the question of the severance of invalid or otherwise vitiated parts of an instrument from the remainder, she cites two passages from the individual opinion of Judge Lauterpacht in the Norwegian Loans Case (I.C.J.Reports 1957, at page 56). And she concludes: "Thus the question is: can the part affected by the mistake be separated from the rest of the instrument? If it can, it is the duty of the Court to do so."

Then, she tries to frighten the Court by raising the spectre of the awful consequences and chain reactions that may follow if it does not confine the effects of the mistake absolutely to "parts of the Award which as a result of mistake cannot, without some further legal process, be applied to the ground". "Once the Court allows itself to depart from the actual Award and to enter upon a course of speculation and hypothesis concerning possible repercussions of mistake upon this or that otherwise amply clear part of the line", says Argentina, "there is no rule or principle that would enable a halt to be called to the chain reaction thus engendered". And, by way of illustration, she pulls out once again her own pet speculation - inspired not by anything said by the Tribunal but by the mistakes of her own experts - that the 1902 Tribunal never meant to cut

the River Palena at the mouth of the Encuentro but at that of the Salto.

Before addressing herself to the problem of the error in the present case, Argentina sums up her argument regarding the general law relevant to its solution as follows (paragraph 230): "The function of the Court being basically one of interpretation of the 1902 decision, its task can be said to be to make the decision clear wherever it is found to be unclear, and to make it workable by filling any actual lacuna resulting from mistake."

7. Chile's Observations regarding the Law to be applied.
The Chilean Government can readily agree that the problem created by the error in the present case is one of interpretation. On the other hand, whatever may be the parallel between such a problem of interpretation as it relates to a treaty and as it relates to an Award, it is undeniable that the principles governing the solution of the problem in the present case are those applicable to the interpretation of judgments, not of treaties. What the applicable principles are Chile will examine in due course. But, even on the assumption that these principles are analogous to those for the interpretation of treaties, Chile feels bound to take issue at once with the Argentine Government's whole presentation of the legal considerations which should guide the Court

in solving the problem of interpretation which confronts it in the present case.

8. The Argentine Memorial presents the basic rule of treaty interpretation - that a treaty is to be interpreted in good faith in accordance with the natural and ordinary meaning of its terms - as if it required the literal interpretation of each term; and its citation of a single sentence in the International Law Commission's commentary on Article 69 of its Draft Articles on the Law of Treaties is wholly misleading on this point. Accurate though that sentence may be in itself, it cannot be read in isolation or without regard to the text of Article 69. The basic rule of interpretation formulated by the Commission in that Article reads -

> "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to each term:
>
> (a) In the context of the treaty and in the light of its objects and purposes; and
>
> (b) In the light of the rules of general international law in force at the time of its conclusion." (Underlining added).

And, referring to the words underlined in subparagraph (a), the Commission explained in its commentary (page 27): "The third principle is one both of common sense and good faith: the ordinary meaning of a term is not to be determined in the abstract but in the context of the treaty and in the light of its objects and purposes." (under-

lining added). In short, even the "plain meaning" of individual terms cannot be determined without reference to their context and to the objects and purposes of the instrument as a whole. The Report of the International Law Commission is therefore very far from giving support to the literal interpretation of a legal instrument phrase by phrase, for which Argentina seems to contend.

9. Thus, if the 1902 Award and Report were to be interpreted on the same basis as a treaty, the "plain meaning" rule itself would not permit the interpretation of the words describing the boundary between the Palena and Lake General Paz in isolation from the statements in both those instruments indicating the intention of the Tribunal to award all the basins entering the Palena below Post 16 to Chile.

10. The sense of the Argentine proposition, that the problem of interpretation created by error is usually "a linguistic crux", is by no means clear to the Chilean Government. If it is intended to imply that the problem is simply one of linguistics and of finding the literal meaning of the words used in the instrument, it appears to the Chilean Government to be inadmissible. In the first place, it disregards the importance of the context and of the objects and purposes of the instrument. In the second place, it disregards the effect which an

error may have in rendering ambiguous or obscure, or even absurd, the meaning of terms which, linguistically, may appear to have a clear meaning. Cases of this kind are indeed classic examples of cases where it is legitimate to have recourse to sources of interpretation additional to the text, as the International Law Commission has recognised in Article 70 of its Draft Articles on the Law of Treaties. This Article expressly provides that recourse may be had to further means of interpretation, including its travaux preparatoires and the circumstances of its conclusion, in order to determine the meaning when interpretation according to the ordinary meaning of the terms (a) leaves the meaning ambiguous or obscure or (b) leads to a result which is manifestly absurd or unreasonable in the light of the objects and purposes of the treaty.

11. Nor do the two judicial decisions mentioned by Argentina in paragraph 224 appear to support her argument. In the St. Croix River case, as she herself notes, the question considered by the Tribunal was "what River was truly intended under the name of the River St. Croix in the Treaty?"(underlining added). The question raised by the error was not considered to be one capable of solution simply by a literal interpretation of the Treaty word by word; the Tribunal took into consideration a large quantity of historical evidence in order to try

and determine the river truly intended in the Treaty.

The same is true of the case of United States v. Texas (162 U.S.1), where the Court took into consideration other provisions of the treaty, a large volume of historical evidence and the circumstances prevailing at the time of the Treaty in attempting to solve the problem resulting from an erroneous map which formed part of it. To say simply, as Argentina does, that "the problem was again approached by the Court as being one essentially of misdescription" thus gives a quite unbalanced view of the attitude of the Court. The following central passage in the judgment gives a clearer clue to the principles guiding the Court:

> "Undoubtedly, the intention of the two Governments, as gathered from the words of the treaty, must control; and the entire instrument must be examined in order that the real intention of the contracting parties may be ascertained. For that purpose the map to which the contracting parties referred is to be given the same effect as if it had been expressly made a part of the treaty. But are we justified, upon any fair interpretation of the treaty, in assuming that the parties regarded that map as absolutely correct, in all respects, and not to be departed from in any particular or under any circumstances? Did the contracting parties intend that the words of the treaty should be literally followed, if by so doing the real object they had in mind would be defeated?" (Underlinings added).

And in the course of its judgment the Court answered these questions in the negative.

12. The above-mentioned decisions do not therefore appear to justify the conclusion drawn from them by

Argentina that "in all such cases it is a matter of _pure_ interpretation of _language_". Nor do they appear to justify the conclusion apparently drawn from them in paragraph 226: "It follows from the "plain terms rule" that the legal results of any mistake should be confined to the part of the boundary line the description of which is directly affected and rendered inaccurate by the mistake." As to the passage from the International Court's judgment in the _Admission to the U.N._ case, this was not directed to a case of error. Moreover, although stating the "plain terms rule" in a somewhat strict form (indeed some have thought it too strict) the Court was careful to state the whole of the rule, not merely part of it as does Argentina. In short, it linked the natural and ordinary meaning of the words to their context and added a qualification as to cases where the ordinary meaning gives an ambiguous or unreasonable result. Accordingly, this case also does not appear to justify the Argentine thesis.

13. In paragraph 227 the Argentine Government broaches, if a little gingerly, the question whether it is legally permissible in the present case to "sever" the erroneous part of the Award and then to _fill_ "any actual _lacuna_ resulting from mistake". This question is indeed a delicate one for Argentina, because she is asking the Court to accept two segments of the boundary as settled,

to interpret the Award as requiring the Arroyos Lopez-Mallines to be regarded as the River Encuentro and then still to find itself with an actual lacuna which it can fill only by constructing a connecting link for which no justification can be found in the Award. Argentina's case, in short, asks the Court to eliminate from the boundary described in the Award the part covered by the mistaken words and thus leave a gap which the Court by clever dentistry is to fill with a new tooth of its own construction. How this conception of the Court's task is to be reconciled with Argentina's earlier thesis that the problem created by the error is essentially a linguistic one of misdescription and the method of its resolution one of interpretation she does not say. However great may be the "dearth of authority" in international law on the question of the severability of treaty provisions, some there is and this authority does not seem to give any support to the idea, apparently advanced by Argentina, that the principle of severability operates within the process of interpretation so as to entitle the interpreter to eliminate a part of an agreement or Award and then insert something else in its stead.

14. Certainly, neither of the two passages from Judge Lauterpacht's individual opinion in the Norwegian Loans case (I.C.J. Reports 1957, at page 56) appears to warrant

any such concept of the interpreter's function. Judge Lauterpacht was there addressing himself to the quite different question whether, given that one condition in an instrument is invalid and has to be struck out altogether without replacement, it is permissible to sever that condition and uphold the rest of the instrument. If this involves an element of interpretation in appreciating the essential or non-essential character of the condition as a determining factor in the consent of the Parties to the instrument, it does not permit any "filling of the lacuna" caused by the disappearance of the invalid condition. Similarly, the Government of Chile notes that in the discussion of "the severance of treaty provisions" in Chapter XXVIII of Lord McNair's text-book on the *Law of Treaties*, there is no suggestion that the principle of severance may operate as part of the process of interpretation. The discussion is subsumed under five headings, the last two of which are entitled:

> "(D) Whether a tribunal can save and apply a treaty provision by severing and eliminating from it a part which offends the requirements of validity",

> "(E) Whether the invalidity, either original or supervening, of a single treaty provision strikes the whole treaty with invalidity or affects only that provision".

Neither these nor any of the other three headings contemplate that in interpreting a treaty the interpreter

may eliminate an invalid provision and then proceed to fill the gap with a provision of his own devising. Nor is there any trace of any such process in the International Law Commission's Draft Articles on the Law of Treaties, to whose Article on the "separability of treaty provision" Argentina does not refer. The Article in question - Article 46 in the Commission's Report for 1963[1] - confines the operation of the principles of separability to cases of "nullity", "termination", "suspension of the operation of a treaty" or to "withdrawal from a treaty"; and the same is true of the final version of the Article adopted by the Commission in January 1966. Equally, Articles 69-71, setting out the rules for the interpretation of treaties, find no place for "separability" as a principle or means of interpretation enabling the interpreter to "fill the gap" with a provision of his own construction.

15. Another no less important aspect of the principle governing severance of treaty provisions is that in no circumstances is it permissible to eliminate a provision or part of a provision unless it is clearly and completely separable from the remainder of the treaty. Judge Lauterpacht, while recognising that it is legitimate and perhaps obligatory to sever an invalid condition from the rest of the instrument, underlined that this

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1 Yearbook of the International Law Commission, 1963, Vol. II, p.211.

is only on the basis that:

> "having regard to the intention of the parties and the nature of the instrument the condition in question does not constitute an essential part of the instrument" (underlinings added).

Judge Lauterpacht, it is to be observed, manifestly did not have in mind any mechanical process of literal interpretation, deleting with a blue pencil the offending provision and upholding the remainder regardless of the actual intention of those who drew up the instrument. This aspect of the principle of severance is also strongly emphasised in Article 46 of the International Law Commission's Draft Articles, which permits severance only on two conditions:

(a) the provision must be separable from the remainder of the treaty with respect to its application; and

(b) the acceptance of the provision must not have been an essential basis of the consent of the other party to the treaty as a whole.

Applying Judge Lauterpacht's test, the link between the source of the River Encuentro and the high watershed carrying the boundary on to Post 17 was, in the Chilean Government's view, an "essential part" of the provision of the 1902 Award which described a continuous completely integrated boundary for the Sector between Posts 16 and 17. Similarly, applying the International Law Commission's tests, but in the context of an Award, the words regard-

-ing that link between the source and the watershed were manifestly not separable <u>with regard to their application</u> from the remainder of the provision describing a continuous integrated boundary for the whole Sector. Equally those words manifestly did form an essential part of that provision in the mind of the 1902 Tribunal, which certainly intended in its Award to lay down a continuous integrated boundary for the whole Sector.

16. Argentina's contention that the Court should sever the erroneous part of the boundary and fill the resulting lacuna hardly seems reconcilable with her thesis that the 1902 Award "settled" the boundary between Posts 16 and 17 or with her thesis that the effect of the error was essentially a linguistic misdescription of the boundary awarded by the Tribunal. If, as both Parties agree, the Tribunal handed down a valid decision regarding the boundary in the Sector, the function of interpretation would seem to be limited to determining what, in the light of the actual geographical facts, was the boundary decided upon in its Award; or, adopting the words of the Supreme Court of the United States in the <u>Texas</u> case, to ascertain the intention of the tribunal "as gathered from the words of the Award" and to examine the "<u>entire instrument</u> in order that the <u>real</u> intention of the Tribunal may be ascertained" (underlinings added). The Argentine contention, in its complete disdain for the actual intention of the Tribunal, is indeed in striking

contradiction with all the legal authority which it cites. Not only in the Texas case but also in the St. Croix River Arbitration the Tribunal assumed that, having regard to the ambiguity or obscurity created by the error, its function was to determine the real intention of the Parties to the Treaty; and, as has just been seen, Judge Lauterpacht, in the Norwegian Loans case, stressed the intention of the parties as a governing factor in cases of severance. Even the International Court in endorsing the "plain terms rule" left no doubt as to its view that, where the terms of the treaty leave an ambiguity or lead to an unreasonable result, the function of the Court is to "seek to ascertain what the parties really did mean."

17. Further cases confirming the relevance of the real intention. A number of other cases could be cited to show that in cases of error or ambiguity in boundary treaties or Awards the solution is to be determined by reference to the real intention of the Parties or Tribunal. It will perhaps suffice to mention three further cases: Sovereignty Over Frontier Land; the Costa Rica - Nicaracuan Boundary Arbitration; and the Island of Timor Arbitration.

18. Sovereignty Over Frontier Land (I.C.J.Reports 1959, p. 209). This case concerned an alleged error in the transcription by a Mixed Boundary Commission of

a document defining the sovereignty in certain communes; The transcription was incorporated in a "Descriptive Minute" of the Commission and the Court ultimately held that in fact it had not been proved by the Netherlands that the alleged mistake had occurred. Although the Court was admittedly addressing itself to the different question of whether an apparent error was in fact one, its general approach to the interpretation of the situation is significant (at page 225):

> "The Netherlands contends, however, that it need not establish the origin of the mistake, since a simple comparison between the copy of the Communal Minute produced by it and that appearing in the Descriptive Minute reveals sufficiently that a mistake occurred. The matter is not, however, capable of being disposed of on this narrow ground. The Court must ascertain the intention of the Parties from the provisions of a treaty in the light of all the circumstances." (Underlining added).

In short, the moment that there was a prima facie indication of error, the Court's approach to its task was completely different from that in its Opinion in the Admission to the U.N. case. It must ascertain the intentions of the Parties from the provisions in the light of all the circumstances.

19. Costa Rica - Nicaraguan Boundary Arbitration. (Moore, International Arbitrations, Vol V, p.5074). The case concerned the starting point on the shore of the Caribbean Sea of the boundary between the two countries, the relevant provision of the Treaty of 15th

April 1858 being open to more than one interpretation. The Arbitrator, explaining the considerations which had led him not to accept the interpretation placed on the Treaty by either Party, said (page 5075):

> "Of these considerations the principal and controlling one is that we are to interpret and give effect to the Treaty of 15th April 1858 in the way in which it was mutually understood at the time by its makers. (Italics in the original text) ....
>
> Without attempting to reply in detail to every argument advanced by either side in support of its respective claim, all will be met and sufficiently answered by showing that those who made the treaty mutually understood and had in view another point, to wit, the eastern headland at the mouth of the harbour.
>
> It is the meaning of the men who framed the treaty that we are to seek, rather than some possible meaning which can be forced upon isolated words or sentences ...... (Underlinings added).

20. Island of Timor Arbitration (Wilson, Hague Arbitration Cases, p. 375). In this case a Mixed Commission had agreed on most of the boundary in 1899 and the results of its work had been incorporated in a Convention of 1904. Boundary Commissions then attempted to complete the boundary but disagreed regarding a section of a line and, in particular, regarding its starting point at the confluence of the Noel Bilomi and the Oe-Sunan rivers. In fact, there were two affluents at the place mentioned, but neither was called Oe-Sunan. The resulting difficulties having been submitted to arbitration, the arbitrator began by citing authority to show

that his task was "to seek the actual will and not to be held to the literal meaning of the expression" and "to look for the actual common intention of the parties, without dwelling on inexact expressions or names of which use might have been made either erroneously or..." (pages 401-2). Then, having examined some of the evidence, the Arbitrator said (page 423):

> "From what has gone before there evolves, in other words, the conviction that the will of the Contracting Parties ought to be interpreted in the sense that starting from point A situated on the Bilomi River, the frontier follows in a northerly direction the thalweg of the river Kabun or Leos..." (Underlinings added).

Reverting to the question, he later said (page 437):

> "The general principles for the interpretation of Conventions demand account be taken of the real and mutual intention of the Parties without pausing on inexact expressions or terms which possibly they may have used erroneously'. The Parties have, it is true, made a mistake in giving the name Oe-Sunan to the affluent coming from the north at Point A ....."

For this Arbitrator, therefore, the problem resulting from the erroneous description was one of ascertaining the real common intention of the Parties in the light of all the circumstances of the case. Before leaving this case the Chilean Government wishes to draw the attention of the Court to a passage near the end of the Award, where the Arbitrator mentions certain considerations as supporting the Netherlands rather than

the Portuguese version of the boundary line (page 441):

> "The line of the ridge proposed by the Netherlands Government between the source of the river Kabun (Leos) to the south, and the source of the Noel Meto to the north, is sufficiently natural to be laid out on land without great practical difficulties. It offers the advantage that the water-courses uniformly descend from that line of the ridge toward the territories all placed under Dutch sovereignty. The layout suggested by the Portuguese Government on the contrary would assign to different sovereignties the upper and the lower part of these several streams." (Underlinings added).

As the Court will appreciate, the "advantage" emphasised by the Arbitrator in this passage is precisely the consideration which the 1902 Tribunal emphasised in Article III of the Award for when it decided to cut the Rivers Manso, Puelo, Futaleufu and Palena (and indeed also the River Pico) at obligatory points, care was taken to preserve the integrity of the secondary basins, awarding the upper ones to Argentina, and the lower ones to Chile.

21. It may be added that Argentina herself does not appear always to have adopted so literal an approach to the problem resulting from a geographical error. In a boundary dispute with Bolivia, according to the account given in Manuel Mercado's "Historia Internacional de Bolivia" (pages 380-386), she seems clearly to have considered that "the real intention" of the Parties rather than the letter of the Treaty should govern the solution of the problem. Article 1 of the relevant

Treaty provides, inter alia, that the boundary shall;

> "continue until it meets the Esmoraca range, following by the highest peaks as far as the western head of the La Quiaca pass, and descending by this pass shall follow it to the point at which it meets the River Yanalpa, and shall continue its direction from west to east in a straight line as far as the summit of the mountain of Porongal; and from this point it shall descend to meet the western source of the river of that name (Porongal) and shall follow the waters of this river as far as its confluence with the Bermejo opposite the town of that name."

The difficulty was that the River Porongal did not flow towards Bermejo but in a quite different direction. Argentina, it appears, contended in the resulting negotiations that a different mountain, the Cerro Mecoya and a different river, the River Condado, corresponded to the intentions of the treaty and should therefore be considered as the relevant mountain and river, even if actually having other names.

22. Interpretation not Speculation or Revision. In paragraphs 228-9 of her Memorial, as previously mentioned, Argentina insists that the Court must confine "any effects of mistake to parts of the Award which as a result of mistake cannot, without some further legal process, be applied to the ground"; and raises the spectre of what might happen if the Court departs from this position. If the Court enters upon a course of speculation and hypothesis concerning possible repercussions of mistake upon this or that otherwise amply clear part of the line,

it will not, according to Argentina, be able to keep within its functions under the Compromiso. It may, says Argentina, have to reconsider the entire frontier line decided upon by Article III of the 1902 Award northwards beyond Post 16 and southwards beyond Post 17 and the positions of those Posts themselves. This, she adds, would involve speculation upon the motivation behind this part of the Award and a vain attempt at assessment of the influences which bore upon the mind of the Arbitrator. The Court, she exclaims, "might well come to the conclusion that the frontier would not have crossed the River Carrenleufu at the point at which it does cross and that Boundary Post 16 ought to have been placed further west, at the confluence of the River Carrenleufu and the River El Salto"; and so on.

23. The whole of this argument, in the view of the Chilean Government, is at once fallacious, extravagant and beside the point. It is fallacious because it begins with a complete _petitio principii_: namely, that the mistake does not affect the Cerro Virgen - Post 17 part of the boundary which, in Chile's view, it most certainly does. It is extravagant because it disregards not only the demarcation but also the explicit language of Article III of the Award fixing the points at Posts 16 and 17 as obligatory points on the boundary. It is also extravagant in that Argentina invokes the error of

her own expert concerning the head waters of the River Salto to question the location of the mouth of the River Encuentro, a quite different river. It is beside the point because in the present case it is not a matter of speculating on the "motivations behind the Award and the influences upon the mind of the Arbitrator" but of determining the meaning of the text of the Award by reference to its terms and to the circumstances in which it was drawn up. The Chilean Government, for its part, is asking the Court to deduce the meaning which Chile attributes to the Award from the terms of the Award itself while finding confirmation of that meaning in the circumstances of the 1902 Arbitration and in the subsequent acts of the Parties.

24. A recurrent theme of the Argentine Memorial is that the Court has no power under the Compromiso to revise the Award but only to interpret and fulfil it. To this theme it returns in paragraph 231, where it says:

> "The question at issue is the effect in law of a mistake of fact upon the meaning of the decision as it is expressed in the Award; it cannot be a question of speculation concerning quite different decisions that the Arbitrator could conceivably have preferred, had his geographical knowledge been more perfect, but which he did not in fact express in his Award. Just as municipal courts have adhered to the principle that the interpretation of a contract must stop short of making a new contract for the parties, so also, this Court cannot in the name of interpretation and fulfilment of the 1902 Award, replace the latter by a new and different Award." (Underlinings added).

Part Five

The Government of Chile is, of course, in agreement with the proposition that the Court cannot, in the name of interpretation of the 1902 Award, replace it by a new and different Award. The question of fulfilment it will discuss later. But, although to that extent in agreement with the Argentine Government, the Government of Chile is far from accepting the narrow concept, apparently embraced by Argentina, of a Court's powers of interpretation when confronted with an instrument which, owing to an error, fails to give accurate expression to the intentions of its framers. The weight of legal authority, as previously pointed out, is overwhelmingly in favour of the view that the function of interpretation in such a case is to ascertain from the terms ofthe instrument and the circumstances of the case the "real intention" of the framers of the instrument. This authority makes it no less clear that, when a Court so ascertains and gives effect to the "real intention", it is not, in law, to be considered as "replacing", "remaking" or "revising" the instrument. And this is so even although in the process of interpretation the Court may find itself compelled to set aside the "ordinary meaning" of the clauses or phrases which fail to give accurate expression to the ascertained intention of the framers of the instrument. By ascertaining and giving effect to the "real intention" the Court does not substitute its own view for that of the framers of the instrument; on the contrary, it merely realises their intention and gives that accurate expression to it which, owing to the error, is lacking in the instrument.

25. The Court may, indeed, think that of the two concepts of interpretation advanced by the Parties in the present case the one which does invite it to "replace

the 1902 Award with a new and different one" is that of Argentina. For Argentina is asking the Court to content itself with ascertaining the intention of the Tribunal with respect to two parts of the description of the boundary (even one of these is manifestly affected by the error) and then to replace the remainder of the description with "a new and different Award". The Government of Chile, on the other hand, is asking the Court to ascertain and give effect to the "real intention" of the 1902 Tribunal over the whole of the boundary described in the Award for the Sector; and, as will now be demonstrated, she is asking the Court to do this on the basis of the language of the Award itself.

26. The method of interpretation contended for by Chile. However close may be the analogies between a treaty and an arbitral award for purposes of interpretation, the interpretation of a judgment or award is clearly not on precisely the same footing as that of a treaty. Moreover, if the legal authority on the interpretation of international judgments and awards is not voluminous, the general principles seem reasonably clear. In the German Interests in Polish Upper Silesia case (P.C.I.J. Series A, No.13, at page 14), for example, the Permanent Court made certain observations of a general character which provide some guidance in the present connection. Dealing with the question whether the German Government

had made out a sufficient case for requesting an interpretation of two of its previous judgments, the Court observed:

> "The Polish Government also contends that the German request for an interpretation does not relate to the operative part of the judgment (which, according to the former Government, can alone be the subject of a request for interpretation), and asserts that it does not claim that the operative part contains a reservation of the kind referred to in submission No.1 of the German Government. The Court, however, is unable to take this view. For it is clear in any case that, although it is not contested that the terms of the operative part of the judgment do not contain the reservation in question, the fact that the grounds for the judgment contain a passage which one of the Parties construes as a reservation (the effect of which would be to restrict the binding force of Judgment No.7) or as affirming a right inconsistent with the situation at law which the other Party considers as established with binding force, allows of the Court's being validly requested to give an interpretation fixing the true meaning and scope of the judgment in question."

The significance of this passage is that the Court, in considering whether there was a dispute as to the "meaning and scope" of the judgment, did not limit itself to the operative part but examined the whole judgment and accepted a request based on the reasoning in the Judgment. Judge Anzilotti in a dissenting opinion adopted a more formalist approach to the question, but he also recognised that the Court's reasoning has nearly always to be referred to:

> "When I say that only the terms of a judgment are binding, I do not mean that only what is

> actually written in the operative part constitutes the Court's decision. On the contrary, it is certain that it is almost always necessary to refer to the statement of reasons to understand clearly the operative part and above all to ascertain the causa petendi. But, at all events, it is the operative part which contains the Court's binding decision and which consequently may form the subject of a request for an interpretation." (Underlinings added).

If in that case the Permanent Court had regard to passages in the two Judgments outside the operative parts, a fortiori must regard be had to a Tribunal's statement of reasons in order to resolve a problem of interpretation resulting from an essential error of fact.

27. The Government of Chile, as already emphasised, is not asking the Court of Arbitration to speculate regarding the motives or intentions of the 1902 Tribunal. It is asking the Court to ascertain and determine the "real intention" of the Tribunal from the Award as a whole. It is asking the Court to ascertain the true ratio decidendi - the true ratio legis - of the Award with respect to the Sector between Posts 16 and 17 and to say that this must prevail over the inaccurate description of the boundary introduced by error into the terms of the Award. It relies essentially on the language of Article III itself, where it provides:

> "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 Octobre, Frio, Humules, 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...." (Underlings added).

It also relies on a corresponding pasaage of the Report, which includes the following:

> "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 .... above a point in longitude 71°47' W., from the lower basins of the same rivers ...." (Underlinings added).

These passages, in the submission of the Government of Chile, show beyond any shadow of doubt that the *ratio decidendi* of the Award with respect to the Palena - Lake General Paz Sector was to cut the Palena at its junction with the River Encuentro and to leave all the basins of tributary rivers above that point to Argentina and all the basins of tributary rivers below that point to Chile.

28. That this was the *ratio decidendi* of the Award in the Sector is strongly confirmed by the fact that in the passage in question the Tribunal applied precisely the same principle to three other major rivers which intersect the Cordillera from east to west in a manner similar to the Palena. Indeed, in a later passage it did so to yet another similar River to the south of Post 17 - the River Pico.

29. It is, in the submission of the Chilean Government, Part Five no less clear that the "award" of the river basins above Post 16 to Argentina and of the river basins below Post 16 to Chile belongs to the operative part of the Award - to the "dispositif". The "award" of the river basins to the two countries is as much part of the Tribunal's decision regarding the determination of the boundary in the Sector as the words which purport to describe the course of the boundary between the Palena and Lake General Paz.

30. Since any boundary constructed between Posts 16 and 17 which passes through the Cerro Virgen must deny to Chile part of the basin of the River Salto, a river which flows into the Palena below Post 16, there is a manifest contradiction between the *ratio decidendi* stated in Article III and the descriptive words purporting to give effect to it. Furthermore, neither the Award nor the Report contains the slightest indication that the Tribunal had any intention of derogating from that *ratio decidendi* when attempting to define the course of the boundary resulting from it. In addition, the evident cause of the contradiction was that the Argentine experts Lange and Moreno (see Maps A.10 and CH.12 B.) conceived erroneously that certain of the tributaries of the River Salto belonged to the River Encuentro and transmitted this erroneous concept to the Tribunal.

Had this supposition in fact been correct, there would have been no contradiction between the Tribunal's description of the course of the boundary and its statement of the ratio decidendi of its Award. Moreover, it seems clear that the Tribunal itself believed there to be no such contradiction; for the map on which it delineated the boundary depicted the River Salto as a river all of whose basin would pass to Chile.

31. When a legal instrument, in itself valid and effective, contains provisions which contradict each other, it is evident that one provision has to give way to the other. In the submission of the Government of Chile, it is no less evident that, when one of the provisions formulates the ratio legis of the instrument with respect to the matter and the other is a descriptive provision purporting to give effect to that ratio legis, in principle it is the descriptive provision which must give way to the ratio legis of the instrument.

In addition, when there is not the slightest suggestion of even a suspicion of an error in regard to the formulation of the provision laying down the ratio legis for the matter and when, on the contrary, the descriptive provision is tainted with error, there can, in the submission of the Government of Chile, be no question whatever as to which of the provisions must, as a matter both of law and logic, give way to the other.

32. In the present case no suspicion of error at all attaches to the Tribunal's statement of its award of the upper basins to Argentina and of the lower basins to Chile. On the contrary, the accuracy of this provision as a statement of the Tribunal's _ratio decidendi_ is attested and reinforced by the Tribunal's application of the same principle in the same terms to four other rivers. But the provision describing the boundary between Posts 16 and 17 is seriously tainted with error. All are agreed that the provision is correct to the extent that it expresses the intention of the 1902 Tribunal that the boundary should follow the course of the River Encuentro to its source on the slope of a mountain forming part of a watershed. By naming that mountain the Cerro Virgen, however, the provision reveals that the Tribunal laboured under a serious geographical error when formulating the description of the remainder of the boundary in the Sector; for the Cerro Virgen is a mountain on none of whose slopes does the River Encuentro or any of its tributaries have its source. Accordingly, compelling reasons of both law and logic would seem to require that the inaccurate, error-infected, provision purporting to apply the _ratio decidendi_ in the Post 16 - Post 17 Sector should yield to the clear, certain, statement in Article III of the _ratio decidendi_ of the Award with respect to the boundary intended in that Sector.

33. The same conclusion must, in the submission of the Government of Chile, be arrived at even if the words of Article III awarding the upper basins to Argentina and the lower basins to Chile are regarded - in its view, incorrectly - merely as "reasoning" and not as part of the "dispositif" of the Award. The cardinal geographical error regarding the source of the River Encuentro's being on the western slope of the Cerro Virgen necessarily creates an ambiguity or obscurity in the "dispositif" as to the course of the boundary intended by the Award for the Sector. In order to resolve that ambiguity or obscurity recourse may and must be had to the context, namely, the full statement in Article III of the Tribunal's reasons for its Award for the Sector. The same contradiction then appears and the same considerations of law and logic compel an interpretation of the Award which prefers the clear and certain statement of the Tribunal's intentions in its reasoning to the inaccurate, error-infected, description in which it sought to give expression to that intention.

34. By way of illustrating its submissions on this aspect of the case the Government of Chile proposes to refer to one further arbitration in which it was itself one of the Parties, namely, the <u>Tacna-Arica Arbitration (Reports of International Arbitral Awards,</u> Vol.II, p.923, at pages 952-6). The other Party was Peru, and the

Arbitrator was the President of the United States. Among the issues in the arbitration was the proper interpretation of Article 3 of the Treaty of Ancona, which read as follows:

> "The territory of the provinces of Tacna and Arica, bounded on the north by the River Sama from its source in the Cordilleras on the frontier of Bolivia to its mouth at the sea, on the south ...." (Underlinings added).

Chile contended that the Article established a river line which must be defined and followed as the northern boundary irrespective of any Peruvian provincial boundary. Peru, on the other hand, insisted that the Article dealt solely with the provinces of Tacna and Arica as defined by Peruvian Law. Chile argued that the reference to "the two provinces" must be deemed to be "controlled by the described river line"; but there is in fact no river Sama which has "its source in the Cordilleras on the frontier of Bolivia". Confronted with this fact, Chile suggested to the Arbitrator that a Special Commission should be appointed to investigate and propose a boundary line in the area intervening between the head of one or other of the tributaries of the River Sama and the frontier of Bolivia.

Having pointed out that the framers of the treaty had had "little exact knowledge of the geography of the region" and had written into the treaty "an inaccurate description", the Arbitrator said (p.954):

> "Despite these difficulties, the Arbitrator finds certain controlling considerations in the construction of the treaty. <u>The fundamental question is the intention of the Parties and any artificial construction is to be avoided.</u> The Peruvian provinces of Tacna and Arica were well-known political divisions..... and the Peruvian province of Tarata was also a well-known political division .... <u>The argument that this reference to political divisions should yield to a described geographical boundary assumes that there is a definite geographical boundary laid down, which is not the case</u>, or that the description of a geographical boundary indicates an intention to include territory lying outside the provinces of Tacna and Arica, <u>when in truth the description of a geographical boundary which did not exist serves to indicate that they did not know where the geographical boundary lay which they were attempting to describe. The reference to the political divisions known as the provinces of Tacna and Arica cannot, in the judgment of the Arbitrator, be overridden by a description of a line which it is impossible to lay down as described."</u> (Underlinings added).

Later in the Award, having referred to certain diplomatic exchanges, the Arbitrator observed (p.955):

> "If Chile sought to include Tarata, she did not succeed in securing a reference to the province of Tarata in the description. If it was thought that the mention of the river boundary would effect this purpose, the fact remains that the description of the territory as that "of the provinces of Tacna and Arica" was put in the treaty <u>and the river line was deprived of controlling significance by its inaccuracy.</u> If it be assumed, as appears to be the fact, that the question of the inclusion of the territory of the province of Tarata was presented, <u>it is deemed to be decisive that the treaty does not set forth a river line exclusively and that the words "the territory of the provinces of Tacna and Arica" were retained</u> ..." (Underlinings added).

35. The analogy between the <u>Tacna-Arica</u> case and the

present one is obvious. Just as the River Sama was not in fact a river which has "its source in the Cordilleras on the frontier of Bolivia", so the Cerro Virgen is not a mountain which has the source of the River Encuentro on its western slope, or on any other of its slopes. Just as the Treaty of Ancon dealt specifically with the "provinces of Tacna and Arica", so the 1902 Award deals specifically with the upper and lower basins of the River Palena on either side of Post 16. The Arbitrator in the Tacna-Arica case declined to allow a specific expression of intention in the treaty to be overridden by an inaccurate geographical description of a line which it was "impossible to lay down as described". His reasoning, the Chilean Government submits, applies equally and even a fortiori to the present case, where the intention of the Tribunal to award the upper and lower basins on either side of the River Encuentro to Argentina and Chile respectively is categorical and clear, and there is no underlying ambiguity whatever with respect to that intention.

36. It is almost superfluous to add that the Tacna-Arica Arbitration is yet another international judicial decision which is diametrically opposed to the literal method of interpretation advocated by Argentina, and which emphasises that the proper method in these cases is to ascertain the "real intention" of the framers of the instrument.

Chapter III

RELEVANCE OF THE SUBSEQUENT PRACTICE OF THE PARTIES WITH RESPECT TO THE BOUNDARY IN THE SECTOR

37. In paragraphs 211-4 of its Memorial the Argentine Government seeks to persuade the Court of the irrelevance in law of the acts of the parties on the ground subsequent to the 1902-3 Award and Demarcation. First, in order to try and minimise the significance of the Chilean nationality and Chilean sympathies of the settlers in the valleys of California, it cites a dictum of Lord McNair in the Norwegian Fisheries case to the effect that the independent activity of private individuals is of little value unless supported by some form of governmental activity on the part of the claimant State. With this dictum the Government of Chile respectfully agrees, but it does not assist Argentina in the least in the present case; for in Part Two of her Memorial and Counter-Memorial Chile has adduced abundant evidence of Chilean State activity in connection with the Chilean settlers and their settlements.

38. Secondly, the Argentine Government advances the general argument that, under the Compromiso, this is a case concerning "the correct course of a boundary and not a case concerning rival claims to particular parcels of territory". It says that in the present

case "the decisions as to sovereignty follow from the determination of the boundary line" not vice versa; and that there can "be no question of any new acquisition of sovereignty by either Party, whether by occupation, prescription or otherwise". Acts of administration on the ground, she asserts, cannot in the present case be a root of title: "if performed on one side of whatever may be the correct 'course of the boundary' they are without legal significance, and if performed on the other side, they are merely unlawful".

39. This argument completely disregards the express reference in the Compromiso to "fulfilment of the Award" - a matter which is discussed in the next Chapter. Quite independently of the question of fulfilment, however, the Argentine analysis over-simplifies the present case and, as a result, seriously underestimates the legal significance of Chile's acts of administration on the ground. In the first place, the 1902 Award did not do more than settle the boundary between Posts 16 and 17 "in principle"; it did not settle the boundary on the ground except to the extent of the demarcation of the "obligatory points" at Posts 16 and 17. The geographical error caused the description of the course of the boundary to be ambiguous and obscure and, this being so, the subsequent acts of the Parties on the ground are clearly relevant as showing their understanding of the meaning

and effect of the Award in the Sector in the light of the actual geographical facts. Indeed, as the Court is aware, the Chilean Government contends that the diplomatic exchanges between the Parties in 1913-14 followed by the Chilean administration of the valleys of California constituted in fact and in law a common understanding and agreement between them that the boundary runs from Post 16 along the "major channel" to its source, leaving the valleys of California in Chilean territory.

40. On the face of it, Argentina's proposition that Chile's acts of administration on the ground are wholly irrelevant is, to say the least, a bold one when both Parties accept that the boundary laid down by the 1902 Tribunal cannot, owing to error, be applied on the ground as it is described in the Award and when itis over sixty years since the Award was given. Nor does that proposition find support in the jurisprudence of international tribunals, of which none is indeed cited in the Argentine Memorial. On the contrary, international jurisprudence is the other way, recognising the relevance of State activity in cases where the course of a boundary is uncertain. In the classic judgment of Judge Huber in the Ialand of Palmas Arbitration, for example, there occurs among many passages emphasising the significance of State activity as the criterion of

sovereignty the following (Reports of International Arbitral Awards, Vol. II, at page 840):

> "If, however, no conventional line of sufficient topographical precision exists or if there are gaps in the frontier otherwise established, or if a conventional line leaves room for doubt, or if, as e.g. in the case of an island situated in the high seas, the question arises whether a title is valid erga omnes, the actual, continuous and peaceful display of State functions is in case of dispute the sound and natural criterium of territorial sovereignty." (Underlinings added).

41. In this connection, the Court may recall that the Argentine Boundary Commission, in its memorandum of 7th April 1955 explaining the grounds on which it purported to justify the line which it proposed for the Post 16 - Post 17 Sector, made certain observations regarding the relevance of Chilean possession in the Palena area. (See pages 305-6 and Annex 47 of the Chilean Memorial). Having developed its reasons for contending that the Arbitrator, if he had known the true facts, would not have used the junction of the Palena and the Encuentro as a point on the boundary, the Argentine Commission gave as one of its reasons for not raising that question:

> "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." (Underlinings added).

And, reinforcing this reason, it added:

> "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).

42. That same "most absolute good faith of the Chilean Government" led it, as the evidence shows, on the basis of the Argentine Government's own statements in its diplomatic Notes to treat the channel which rises in the Cordon de las Virgenes as the boundary between the two countries, and the Chilean settlements in the valleys of California as under Chilean sovereignty. Furthermore, as the evidence examined in Part Two of the Chilean Memorial and in Part Two of the present Counter-Memorial abundantly shows, Chile openly, effectively and continuously administered the area. And, in consequence, "the possession exercised by Chile in the adjacent zone" - in the zone, that is, adjacent to the "Palena settlement" - became established in all the valleys of California.

43. In paragraph 214 of its Memorial the Argentine Government seeks to negative the relevance of Chilean administration of California by another argument: namely, by asserting that Chilean activity in the territory east of the "minor channel" has all been subsequent to the establishment of the Mixed Boundary Commission and, for the most part, subsequent to 1955. It there maintains that it would be contrary to every tenet of jurisprudence and contrary to common sense to

suggest that acts on the ground, begun by one Party after the setting up of a boundary commission and during its existence, could be relevant evidence as to the proper course of the boundary line. And it refers in this connection to the Minquiers and Ecrehos case, saying that the International Court made it clear in that case that even where, owing to "special circumstances", the evidence of acts subsequent to the "critical date" for allowing evidence might be considered by the Court, this ceased to be permissible where"the measure in question was taken with a view to improving the legal position of the party concerned".

44. This argument, as the Court will be aware from the information and evidence regarding Chilean administration in the California Valleys which is given in the Chilean Memorial, is founded on a wholly erroneous view of the facts. Chilean administration of California, so far from having begun after the establishment of the Mixed Boundary Commission, was already well-developed and being regularly and continuously exercised many years before that date. Chilean acts on the ground during the period of the existence of the Mixed Boundary Commission and Chilean State activity with respect to the area during that period were no more than the continuance or natural development of acts previously done and of

activity previously displayed by Chile. The new information and evidence presented to the Court in Part Two of the present Counter-Memorial strongly confirms and re-inforces the account given in the Chilean Memorial. It shows that at the time of the establishment of the Mixed Boundary Commission the settlers in California and the lands which they occupied or grazed had for many years been under Chilean administration and that the settlers regarded themselves both as being Chilean and as living in Chilean territory.

45. Nor, as already indicated above, can there be any question of Chile's acts on the ground having been measures "taken with a view to improving the legal position of the party concerned". On the contrary, just as Chile's exercise of sovereignty with respect to the Palena settlement had been based - in the words of the Argentine Commission - "on the most absolute good faith", so had its exercise of sovereignty with respect to the "adjacent zone" of California. Later on, when Argentine gendarmes began to challenge Chile's authority in the area, Chile continued to display and exercise her administrative activity in precisely the same manner. If she then took any special measures, by protest or otherwise, to assert her title to the territory, they were taken with a view not "to improving

her legal position" but to defending and maintaining a legal position which she had already asserted and acted upon for many years past.

46. Before leaving the question of the so-called critical date, the Chilean Government desires to recall that in the Minquiers and Ecrehos case the Court adopted a somewhat cautious attitude towards the arguments advanced by each of the Parties designed to exclude evidence of State activity posterior to a date alleged by the Party concerned to be "critical". It reserves the right, if necessary, to say more on this point at the oral hearings. Meanwhile, it contents itself with observing that the term "critical date" is used in more than one sense in the cases; and that in many cases it signifies simply an appreciation by the Court that on the evidence a particular date or period is critical in the sense that the existence or non-existence of a title in one or other Party at that time will on the facts be decisive of the merits of the respective claims of the Parties with regard to the whole case. The Eastern Greenland (P.C.I.J. Series A/B, No.53, at page 45) and Island of Palmas (U.N. Reports of International Arbitral Awards, Vol.II, p.870) cases furnish wellknown illustrations of this concept of a "critical date". It is also clear that there may be more than one critical date in a case. If in the present case

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there are critical dates in the sense in which that term is used in the above-mentioned judicial decisions, the first such date is the completion of the Demarcation in 1903; for on the completion of the demarcation of Post 16 Chile acquired under Article III of the Award a clear title to the river basins of all streams entering the River Palena below that point. In other words, on the completion of the demarcation, Chile acquired a clear title to the whole basin of the River Salto, including its upper waters, the River Engaño, and its tributaries, the river Azul and the Arroyo Matreras. The second such date is Argentina's recognition in the correspondence of 1913-14 of the fact that the river which enters the River Palena opposite Post 16 has its source in the vicinity of the Cerro Herrero; for by that recognition she impliedly recognised that the course of the river specified in the Award as the boundary between the two countries southwards of Post 16 is the course of the "major channel" and that the territory to the south and west of that river is Chilean under Article III of the Award. In other words, she impliedly recognised that, <u>inter alia</u>, the Arroyo Lopez - Arroyo Mallines valley - one of the valleys of California - was Chilean territory under the Award. If the 1903 Demarcation and 1913-14 correspondence should not for any reason

be thought to suffice to establish critical dates, then the Chilean Government submits that the immediately ensuing period of Chilean administrative activity with respect to California constitutes a period critical for the decision of this case. In that period Chile in good faith displayed and exercised, both with respect to the Arroyo Lopez - Arroyo Mallines Valley and to all the other valleys of California, the sovereignty which she believed herself to possess under the 1902 Award and the possession of which by Chile Argentina herself appeared to have recognised.

47. In short, having regard to (a) the 1903 Demarcation which definitively identified and settled the position of the mouth of the River Encuentro and the place of the cutting of the River Palena, (b) Argentina's recognition in 1913-14 that the River Encuentro has its source in the vicinity of the Cerro Herrero, and (c) the ensuing period of Chilean administrative activity in the valleys of California, the Chilean Government submits that the evidence establishes a definitive Chilean title to the areas in dispute; and that, in consequence, all Argentina's attempts to assert and display her sovereignty with regard to these areas were - in the language of the Permanent Court in the Eastern Greenland case (at page 45) - illegal and invalid.

CHAPTER IV

FULFILMENT OF THE AWARD

48. Under the Compromiso the Court to the extent that it finds the course of the boundary between Posts 16 and 17 to have remained unsettled since the 1902 Award is to report on that course "on the proper interpretation and fulfilment" of the Award. The Argentine Government states in Paragraph 220 of its Memorial that the question arises as to how far the word "fulfilment" may be held to qualify "interpretation". It then observes:

> "fulfilment is certainly not a legal term of art, and in its ordinary meaning would seem to refer simply to the faithful carrying out of an Award by the Parties to whom it is addressed, a meaning which it is given in Article XIII in the General Treaty of Arbitration of 1902".

However, it goes on to argue that in the Compromiso the word "fulfilment" is used in a different sense. Citing a "further meaning" given to the word "fulfil" in The Shorter Oxford English Dictionary it suggests that in the Compromiso "fulfilment" means "to make complete; to supply what is lacking in." Then it observes:

> "In such a sense, "fulfilment" may be thought to be a cogent way of expressing precisely what the Argentine Republic is asking this Court to do in the middle part of the boundary line in the Sector. But it is emphasised that this further meaning of "fulfilment", as making

complete or supplying what is lacking, very clearly excludes any question of revision, or change, or modification, in those parts of the 1902 Award that are clear - for this would not be to supply what is lacking but to supply an alternative for what is already there".

49. The so called "plain terms" rule of interpretation, so conspicuous in Paragraph 226 when the Argentine Government asks the Court to apply Article III of the 1902 Award, is absent here, when the Compromiso is in question and when it asks for the benefit of a "further" meaning for the word "fulfilment". Surprising also is the Argentine Government's reference to Article XIII of the 1902 Treaty of Arbitration in order to illustrate the "ordinary meaning" of that word. The Argentine Government is certainly correct when it says that in Article XIII the word "fulfilment" means fulfilment by the Parties and that this is its ordinary meaning. It is also being entirely logical when it refers to the 1902 Treaty in discussing the meaning of "fulfilment"; for it is under this Treaty that the case has been submitted to Arbitration and it is under this Treaty that the Compromiso was concluded. But why, the Court may ask itself, does the Argentine Government refer to Article XIII of the Treaty, which has nothing to do with the present case, when Article II, the very Article under which the case was submitted and the Compromiso concluded, also

contains the word "fulfilment" and the word there has the same meaning? Is it because in Article II the word "fulfilment" appears in significant proximity to the word "interpretation"? For that Article reads :

> "Questions which have already been the subject of definitive arrangements between the High Contracting Parties cannot in virtue of this Treaty be re-opened. 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."

Whatever may have been Argentina's reason for referring to Article XIII, the word "fulfilment" was, as the Court knows, included in the Compromiso with reference to the language found in Article II of the 1902 Treaty.

50. Argentina's contention at any rate is that the Compromiso in virtue of the word "fulfilment" enables the Court to fill, by a line of its own devising, the large gap in the boundary which necessarily appears in the middle of the sector if her method is adopted of applying a literal interpretation of two pieces of the Award at the northern and southern ends of the sector and of then treating the middle piece of the Award as completely missing owing to the error. In the view of the Chilean Government, there are several reasons why the Compromiso cannot be considered as enabling the Court to do any such thing. First, as pointed out in

the previous paragraph, the word "fulfilment" in the Compromiso is not open to the interpretation which Argentina seeks to put upon it. Secondly, the word does not "qualify" the word "interpretation" in the Compromiso, as Argentina appears to suggest. On the contrary, the word "and" is clearly used in its normal conjunctive sense, so that "fulfilment" is a basis for the Court's report on the case of the boundary which is complementary to, and not a substitute for, interpretation.

51. Thirdly, Argentina's piecemeal and incomplete interpretation of the Award is not reconcilable with the intentions of the 1902 Tribunal or with the legal process of interpretation as properly understood. It is not reconcilable with the intentions of the 1902 Tribunal, because that Tribunal undoubtedly intended to, and did, lay down a single continuous and complete boundary line for the sector between Posts 16 and 17. Argentina, however, asks that the Court should deduce from the language of the Award two discontinuous segments of a boundary at the extremities of the sector and to say that this deduction regarding the two segments both constitutes and exhausts the legal process of interpreting the Award; and she asks that under the rubric of "fulfilment" the Court should create a connecting boundary between the two segments as a substitute for the boundary awarded by the

Tribunal in that part of the line. This determination of some segments only of the boundary by so called interpretation cannot, the Chilean Government submits, legitimately be considered as falling within the legal concept of interpretation. This is evident from the very fact Argentina's "interpretation" cannot stand up as an interpretation of the provisions of the Award regarding the boundary between Posts 16 and 17 without the assistance of so called "fulfilment". Leave out "fulfilment" and, on Argentina's method of interpretation, there is no boundary deducible from the 1902 Award for the whole sector. Yet, as already stated, it is clear that the 1902 Tribunal intended to, and did, lay down a single continuous and complete boundary for that sector. Indeed, Argentina herself insists that the whole boundary was settled in principle by the 1902 Award and Demarcation.

52. Fourthly, the segments at either end of the boundary, which constitute the necessary premise for any "fulfilment" in the middle of the sector, are themselves arrived at by an interpretation which disregards the effect of the geographical error on the identification of the Cerro Virgen as an element in the boundary awarded by the Tribunal. Argentina asks the Court to shut its eyes to the facts that the Cerro

Virgen is not the mountain which has the source of the River Encuentro on its slopes, and that the 1902 Tribunal intended the boundary to follow that River to its source and thence ascend directly to the watershed on the mountain on which the source is found. She asks the Court in short to turn its back on any attempt to ascertain the true intentions of the Tribunal and to concoct a boundary on the basis of an illegitimate method of interpretation plus so-called fulfilment.

53. Fifthly, the fulfilment for which Argentina asks

(a) would violate a cardinal principal of the Award regarding the passing to Chile of the basins of all rivers which enter the River Palena below Post 16,

(b) would be wholly incompatible with the description of the boundary as proceeding continuously upstream along the River Encuentro until reaching the high watershed along which it is to pass to Post 17; and

(c) would result in a boundary splitting apart the communities of human beings in the area and in other respects offending the most elementary principles of sound boundary delimitation.

54. The word "fulfilment" in the Compromiso, the Chilean Government submits, empowers and requires the

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Court to base its report on the case of the boundary on the fulfilment of the Award by the Parties as well as on the interpretation of its terms. That is indicated not only by the provisions of Article II of the 1902 Treaty, but also by the very nature of the case dealt with in the Compromiso, when more than 60 years have elapsed since the Award was rendered. The Chilean Government rests its claim first, on an interpretation of the Award which seeks to ascertain the true intention of the 1902 Tribunal with respect to the single continuous complete boundary which is laid down for the sector and, secondly, on the evidence of the fulfilment of the Award by the parties in the sector. The utmost significance, it submits, is to be attached to the fact that the evidence of "fulfilment" strongly confirms and re-enforces the meaning of the Award which Chile presents to the Court as resulting from the interpretation of the provisions of Article III relating to the Post 16/17 sector <u>in the context of the Award as a whole</u> - the only proper legal method of interpreting those provisions. In other words, it asks the Court to attach the utmost significance to the fact that in the case submitted by Chile both elements of the Compromiso - interpretation and fulfilment - give the same result.

55. In conclusion, the Chilean Government would add that, even if the word "fulfilment" in the Compromiso is to be considered as covering fulfilment by the Court as well as by the Parties, it cannot be understood as applying to the filling of the gap operation envisaged by Argentina, which denies to the process of interpretation its proper function. On the other hand, the interpretation of the terms of the Award and their application to the ground necessarily leave a number of detailed questions for appreciation and determination by the Court. It is in the resolution of such questions that, in the view of the Chilean Government, the Court could legitimately be represented as having a certain role in the "fulfilment" of the Award under the Compromiso.

CHAPTER V

SUBMISSIONS OF THE GOVERNMENT OF CHILE

1. On the basis of the considerations, evidence and contentions set out in its Memorial and in the present Counter-Memorial, the Chilean Government maintains the Submissions presented to the Court in Chapter V of Part Five of the Chilean Memorial.

2. On the basis of these same considerations, evidence and contentions the Chilean Government submits that the Court of Arbitration should now reach the following further conclusions:

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(L) The Submissions of the Argentine Government summarised in Chapter X of its Memorial, together with the arguments and detailed submissions presented in the preceding Chapters thereof, should be rejected except insofar as they are not in conflict with the contentions and submissions contained in the Chilean Memorial and Counter-Memorial.

(M) The boundary line defined and submitted to the Court's consideration in Paragraphs 6 to 10 of the Argentine Submissions, with the exception of the part between Post 16 and the confluence of the major and minor channels is not the course of the boundary which results from the consideration of the question referred to the Court in Article I of the Compromiso, and must be rejected by the Court, inter alia, on the following grounds:

(i) The Argentine version of the boundary line is not justifiable as a "proper interpretation" of the 1902 Award. The method of interpretation adopted by Argentina disregards the cardinal rule of interpretation that the terms of an instrument must be interpreted in the context of the whole instrument and in the lig of its objects and purposes. It further disregards the effect of the geographical error in rendering ambiguous or obscure the meaning

of the Award and inadmissibly excludes any reference to the real intentions of the 1902 Tribunal in Article III of its Award.

(ii) The Argentine method of interpreting piecemeal the provisions of the Award relating to the Post 16 - Post 17 sector of the boundary without regard to the continuity or completeness of the boundary is wholly inadmissible and in flagrant contradiction with the evident intention of the Tribunal to lay down a single, continuous and complete boundary for the sector. Furthermore, this method of interpretation includes a recourse to the principle of the separability of provisions which is illegitimate in the case of the provisions formulating a single, continuous and complete boundary line, and which also has no place in the interpretation of instruments independently of questions of nullity, termination, suspension and the like.

(iii) The Argentine version of the boundary line is not justifiable as a "proper interpretation" of the 1902 Award equally because it is in flagrant conflict with a cardinal provision in the Award itself under which the Tribunal allotted to Chile the river basins of all rivers

entering the River Palena below Post 16.

(iv) The Argentine version of the boundary line is again not justifiable as a "proper interpretation" of the 1902 Award because it is irreconcilable with the whole concept of the boundary as it appears in Article III: namely, of a continuous unbroken line proceeding from north to south along the course of the River Encuentro to its source on the slope of a mountain forming part of a high watershed along which the boundary would continue to Post 17. It is further irreconcilable with that concept in that it does not follow the true course of the River Encuentro and does not proceed and ascend continuously along a river line to the high watershed. On the contrary, it introduces alternate land and river elements not provided for in the Award, introduces four additional river elements not contemplated in the Award, and for some distance descends one of these in a manner wholly out of keeping with the boundary described in the Award. In addition it arbitrarily divides the subordinate river basins of the River Salto/Engano system in a way which is in direct conflict with the principles applied in Article III of the Award.

(v) The Argentine version of the boundary line is also not justifiable under the Compromiso because it disregards the fulfilment of the Award by the Parties, as evidenced by the diplomatic correspondence of 1913/14, Chile's administrative activity in the area to the south and west of the major channel, and the treatment by both parties of the major channel as the boundary line for a considerable period.

(vi) The interpretation which Argentina seeks to give to "fulfilment in the Compromiso in order to provide a justification for her version of the boundary line puts an inadmissible construction on Article I of the Compromiso and at the same time presupposes that the Court will adopt an inadmissible method of interpreting piecemeal Article III of the Award.

(vii) Contrary to the contentions of the Argentine Government in Paragraphs 6 and 9 of its Submissions, no part of the boundary line between Posts 16 and 17 was finally settled by any unanimous decision of the Mixed Boundary Commission in Minute No. 55 in 1955 for the reasons explained in Part III of the Chilean Memorial and the corresponding part of the present Counter-Memorial and summarised

in the contentions and submissions of the Chilean Government in Chapters III and V of Part Five of its Memorial.

(viii) The Argentine version of the boundary line, in addition to being in conflict with the whole concept of the boundary laid down and the principles stated in the 1902 Award, is on practical grounds open to the strongest objections throughout a large part of its length. Among these objections is the fact that it disregards and disrupts the natural transit routes connecting the different valleys of the area and the links of these valleys with the town of Palena. Another is the fact that the "minor channel" is a completely impractical international boundary in a populated mountain valley. A third is the fact that in the valleys of the minor channel and of the Rivers Engaño and Azul the Argentine line would divide certain of the landholdings or separate a landholder from one of the plots which he possesses in the are A fourth is the fact that the line would split in two the small isolated community of human beings in the mountain valleys, leaving some

of the Chilean families of this community within Chile and converting others into dwellers in a foreign country.

VICTOR SANTA CRUZ JOSÉ MIGUEL BARROS

Agents for the Government of Chile.

A P P E N D I X

NOTES ON SOME OF THE MAPS, PLANS AND SHEETS ANNEXED TO THE ARGENTINE MEMORIAL

APPENDIX

NOTES ON SOME OF THE MAPS, PLANS AND SHEETS ANNEXED TO THE ARGENTINE MEMORIAL

In general, the following notes refer only to the maps not of Chilean origin contained in the Argentine portfolio. The comments are restricted, moreover, to the sector between boundary posts 16 and 17.

These notes are not exhaustive and it may be necessary to enlarge upon them in the course of the oral hearings.

MAP A1

"Map annexed to 1902 Award - Perez Rosales to Lake Buenos Aires - 1902 Tribunal - Scale 1:200.000, 1902".

This map is a copy of the map on the "Perez Rosales" to "Lake Buenos Aires" sector attached to the Arbitral Award of 1902.

Three points may be noted:

(a) That the Salto river appears as a different water course from the Encuentro, further west, and that the source of the Salto is presented as being on the 72° meridian line;

(b) That the line connecting "C. d. l. Virgen" with the northern point of the cutting of Lake General Paz - purporting to represent the boundary line in

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that sector - appears as a broken line.

(c) That "C. Colorado o El Morro" appears between the "Encuentro" and the Salto.

MAP A2

"Comparative extracts of the 1902 Award Map and related Maps. Drawn for the purpose of the present proceedings".

Attention is drawn to A) "Detail of Lange's Map 1902". It will be recalled that Lange's map (A10) dated 1901 appears to contain a representation of the boundary line as determined by the Arbitral Award in 1902. The "detail" appearing on Map A2 has no boundary line. No indication has been given of when this reproduction was made.

Special attention should be paid to the position of the words "Rio Encuentro", which appear on B) "The same sector on the map represented before the Tribunal, by the Argentine Republic". The name has been moved southwards on the map so as to be both south and north of the confluence of the "Engano" and the "Encuentro". This is particularly interesting because a comparison of "A)" and "B)" reveals that this change is the only one between Lange's map and Moreno's map.

MAP A3

"Chile, between 43° and 46° S - Annexed to Chilean Statement in 1902 proceedings".

It is interesting to observe that on this map the river Encuentro appears flowing from the east.

This correct representation of the Encuentro appeared on the "first Argentine map" presented to the British Arbitrator in 1901 (Map CH.10) (not reproduced with the Argentine Memorial) but did not so appear on the second Argentinian map.

It may be noted that even if Argentine Annex No.8 reproduces Dr. Steffen's account, the Argentine Memorial itself does not refer anywhere to the description of the Encuentro given by its discoverer, Dr. Steffen. It simply states:

> "From his observation point on Cuesta ("Ridge") 3, at 352 m. (see Map No.A9 and Annex No.8 p.14) he was able to see not only the confluence of these two rivers, but also the final stretch of the River Encuentro running into the River Carrenleufu". (Argentine Memorial, p.31, underlining added).

The precise words of the discoverer of the Encuentro were:

> "According to what could be seen from my observation point, the "abra" of this river descends from the east ..." ("Memorias e informes relativos a la Expedición Exploradora del Río Palena" - Santiago, 1895 - page 71, underlining added).

The word "abra" is a geographic expression concerning the general direction of a river or of a valley. In that sense "abra" may be translated as "valley fissure, or gorge". The difference between Steffen's own words and the paraphrase in the Argentine Memorial may be

significant.

The Argentine Memorial also does not mention the fact that the map prepared by the discoverer of the Encuentro (Map A9) showed the river clearly flowing from the east and not from the south.

MAPS A4 and A5

"Argentine Republic Map(s) used by Captain Dickson R.A. annexed to Argentine Reply in 1902 proceedings".

The Chilean Memorial refers to these sheets at page 119.

It is interesting to observe that on Sheet No.3 (Map A5) the eastern range (Cordón de las Vírgenes), which is so clearly depicted on the maps submitted by Argentina to the Arbitrator in 1900/1 (Map CH.10) (but not annexed to the Argentine Memorial) has disappeared. This range has been replaced by the word "Nevados". The heights of several of the mountains forming this range have also disappeared and their contour lines are drawn with dotted lines.

Reference may be made in this connection to a note which Steffen included in the 1909 edition of his report on the exploration of the Palena river:

> "It is also advisable to recall the fact that señor Moreno in the 'Plano Preliminar' attached to his above-mentioned work of 1897 (when that area had already been surveyed by the Argentine Boundary Commission) eliminates completely the high range culminating in Cerro Cuche, putting in its stead a big blank without mountains and

with the inscription 'undulating slopes and glens'". (Page 265). Appendix

In the same edition, in another note, Steffen referred to the representation of the area of the sources of the rivers Palena and Futaleufú in the 1897 "plano" of Dr. Moreno saying that:

> "No-one would suspect, for instance, that in the area north of the 43° parallel where a broad blank space appears, indicating a plateau with flat surface, there exist indeed the Esquel and Lelej sierras which in their greater extent have all the features which characterize mountain ranges". (Underlining added).

And Steffen added:

> "We might also ask why, apparently on purpose, the data on heights, so abundant in other parts of that 'plano' in the section of the divortium aquarum corresponding to the chains of Esquel and Lelej.... have been omitted?" (Underlining added - page 285).

Incidentally, these Maps A4 and A5 are mentioned by Argentina as "Copies without change.... from a map.... used in 1902 by Captain DICKSON". This is obviously a mistake since the demarcation represented on those sheets was made in 1903.

It ought also to be noted that on Map A5. the line between "C° d. l. Virgen" and boundary post 17 appears as a broken line. This may be recalled in connection with the following statement of the Argentine Memorial:

> "....There is no doubt about the identity of the water-parting referred to in the report of the Tribunal, depicted on the 1902 map, and observed by Captain Dickson in 1903 from boundary post 17". (Para 278, page 252). (Underlining added).

MAP A6

"Andean Region of the Territory of Chubut - P.Ezcurra - (1893)".

No particular comments seem to be required by this map except to say that it was prepared before the discovery of the River Encuentro.

MAP A7

"Territory of Chubut - P. Ezcurra - 1893".

This map, also drawn before the discovery of the Encuentro, is nonetheless interesting from the point of view of land settlement. It shows the colonization system (division in sections, fractions and lots) consistently used by Argentina until today.

MAP A8

"Territory of Chubut - Eng. Cobos - 1895".

This map, which appears to be the first Argentinian map concerning this area after the discovery of the Encuentro, correctly shows this river as being distinct from the River Salto and unconnected with the Engano lakes. The Argentine Memorial (page 30) refers to it as follows:

> "This map made in 1895 by Cobos shows a "R. Encuentro" flowing northward into the River Carrenleufu. The course of this river as depicted upon Cobos' map appears to be the same as that called Rio del Encuentro on the map made in 1894 by Dr. H. Steffen.... but Cobos shows the whole course of this river whereas Steffen depicts only its lowest, east to west, reach".

No reference has, however, come to the knowledge of the Chilean Government of any exploration of that area by senor Cobos or any other Argentine explorer, made before or in 1895, which would justify the course attributed to the Encuentro by senor Cobos on this Map A8.

In this connection it is interesting to contrast the course of the Rió Encuentro depicted on the 1898 map drawn by Lange (see below the remarks relative to Map A10). On the 1898 Map Lange placed the source of the Encuentro about four miles from Cerro Central and showed the river as flowing from an eastern source in much the same way as the major channel.

MAP A9

"El Rió Vuta-Palena - Dr. H. Steffen and O. de Fischer-1894".

This map concerning the Chilean explorations during which the Encuentro was discovered, represents this river as it was seen by its discoverer: flowing from the east into the Palena (see above note on Map A3).

MAP A10 (1)

"Lange's Survey - G. Lange - 1:100.000 - 1900/01

(1) Map A10 will be considered together with the 1898 Lange map (Sub Comision No.8, Sección Norte, 1° de Agesto de 1898) though the latter is not in the Argentine portfolio but was introduced by Argentina during the oral hearings of December 1965.

Appendix (unpublished)"

It is unnecessary to stress the importance of Map A10 and its relevance to these proceedings.

Attention is drawn, as far as the disputed area is concerned, to the following points:

(a) Map A.10 (dzted 1900/01) bears a representation of the "boundary line" as it appears on the Arbitral Award map of 1902. The Argentine Memorial alludes to this fact stating that: "it is not known when that boundary line was marked upon the map; it was not marked on it for the purpose of the present proceedings".

The Argentine Memorial provides a further explanation in the following terms:

> "That this line did not feature on Lange's original can be deduced from the facts that such a broken red crossed line does not appear in the detailed key shown at the lower right margin of the map, and that the red line is superimposed on the original drawing, from the date, 15th August 1901, above Lange's signature and from the formal date 1900-1901 on the map itself" (Page 35).

If the map, as stated, was really finished on 15th August 1901 (i.e. before Sir Thomas Holdich's surveying journey) it was impossible for the original map to have "featured" the boundary line determined by the Award more than a year later and it is therefore hardly necessary to introduce the process of deduction.

Anyway, it should be noted that the above-mentioned red crossed line stops precisely where the course of the "rio Encuentro" starts being depicted with a broken line.

(b) "R. el Salto" appears on Map A.10 as a distinct water-course from the "Encuentro". The source of the Salto appears on the line of the 72°, that is over 15' distant west from "C. d. l. Virgen".

(c) Map A.10 did not feature, between the Palena river and the Engaño, any contour lines north of the summits of the transversal ridge shown between the two rivers. The dotted contour lines which appear on Sheet No.3, Map XVIII ("The Second Argentine Map") (Map CH.10), which is said to be based on Map A.10 would therefore seem to have been added by Moreno on some other basis.

(d) The report to which Map A.10 is said to have been attached refers to several geographic features such as "Valle Hondo", "Cerro Virgen", "Las Lagunitas" etc., as if they had been already discovered and named on previous explorations. That these names were already known to Lange is the more likely because when Lange introduced a new name for a feature, he said so expressly and furnished the reason for the name chosen by him (see for instance his explanation on the naming of the Engano Lakes).

The questions must therefore be posed: Who discovered and named Valle Hondo, Cerro Virgen, Las Lagunitas, Valle Norte, Cerro del Salto? Was it Lange himself in a previous expedition in this region? Are there in the Argentine Archives other reports on Argentine explorations which remain unpublished, as Lange's map did for over 60 years?

The answers to these questions may be significant.

During the oral hearings in December 1965 a new Lange map was produced by Argentina. This map had not been included or even mentioned in the statement of the early explorations of the area in the Argentine Memorial, page 28 et seq.

The first mention of this map was made by Mr. Bathurst in the hearing of December 29th 1965. When answering a question of the Court on the mapping of the disputed area he alluded to a map made by "Gunardo Lange (in) 1898 (on an) unknown scale". Mr. Bathurst added that this map had come to light in the Archives of the Argentine Government "as a result of a further search being made" in response to a question raised by the Court. (page 28 of the transcript).

During the hearings, the Chilean Government asked for a copy of this map which was later supplied through the Solicitors for Argentina. The Chilean Government through its Solicitors also tried to obtain additional

information on the exploration of Lange which this map 1898 seemed to indicate. As may be seen by the letter dated 21 April 1966 from Messrs. Coward Chance & Co. to the Chilean Government's Solicitors, the reply was:

> "2. No report relating to the map prepared by Lange in 1898 has been discovered yet, but we are enquiring again. It would appear that the lines shown on the map depict the route taken by Lange on that particular expedition". (Annex No. 39(37)).

No further information has been received by the Chilean Agents on this subject.

The following comment is made therefore on the basis of the photographic reduction of the original 1898 map furnished by Messrs. Coward Chance & Co., on the assumption that the Court has been or may be provided with a similar copy of the map.

The map shows Lange's route leaving the house of Steinkamp on the northern bank of the Palena river, crossing the river and travelling therefrom to the mouth of the Encuentro. On that journey he first crosses a minor tributary of the Palena and then goes round a mountain referred to as "Pº Fierro", crosses again a tributary of the Palena having its source near Cerro Herrero and then reaches the eastern bank of a water course, which the map calls "Rio Encuentro" at a point estimated to be about two miles from its junction with the Palena. On this junction, there appears on the map a number (240?) which seems to correspond to a measurement

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of the height of the point.

It may be observed that this map cannot be considered as a reproduction of Steffen's map of 1894. This 1898 map contains indeed several features which do not appear on Steffen's map.

Particular attention is drawn to the fact that on this map of Lange, the river Encuentro appears represented with much more detail than its discoverer recorded on his 1894 map. In particular, it should not pass unobserved that the "Rio Encuentro" shown on this 1898 Argentinian map is represented clearly flowing from the south east and, what is more remarkable, its source is represented as being less than 7 kilometres from Cerro Central.

In the light of this map, it may be asserted that what Lange saw and depicted as Encuentro in 1898 can only be the "major channel".

MAP A11

"Hydrographic sketch of the Zone Lake General Paz - River Palena - Argentina-Chile Mixed Boundaries Commission (Chilean element) (1945/48)".

This "hydrographical sketch" is not one of the official documents mentioned by Article 21 of the "Plan of Work and General Directives of the Mixed Boundary Commission". Nor is it mentioned in any Minute of the meetings of the Mixed Boundary Commission; nor is it included in the annexes to those minutes. A thorough

examination of the files of the correspondence exchanged between the Chilean element of the Mixed Boundary Commission and its Argentinian counterpart reveals no direct or indirect allusion to this sketch which Argentina attributed to "the Chilean element of the Mixed Boundary Commission".

In any case, it should be recalled that according to the Plan of Work and General Directives, even "the opinions of the Delegates as expressed at the meetings <u>will be of a personal nature and shall not represent the opinion of the Delegation of the country to which they belong</u>". In the light of this provision, it is unnecessary to emphasize that this sketch of unknown origin can not represent the opinion of the "Chilean element of the Mixed Boundary Commission" much less that of the Government of Chile.

Nevertheless, in this sketch it is interesting to observe:

a) The water courses which the Chilean Memorial calls "major" and "minor" channels are depicted with lines of approximately the same width, while the Palena River is shown with a double line. This suggests that an attempt was being made to distinguish between the widths of different rivers, and that the major channel was not considered a subordinate to the minor channel.

Since the sketch states that it was based on

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Argentine air photographs, it may be presumed that these photographs revealed that the "major" and "minor" channels deserved to be depicted at least with the same symbols in the maps of the area. It being so, the distorted and inaccurate representation of the Encuentro/Lopez/Mallines system shown by Sheets VII-2 and VII-3 of the Mixed Boundary Commission is still less understandable.

b) Arroyo Lopez (which in A11 appears without a name) is represented as more substantial than its tributary the Mallines, also unnamed in the sketch.

c) The Rio Salto is correctly represented. It bears also the name "Tigre" at its confluence with the Palena, which indicates that its source is in the Engano Lakes, as is the case. The "Azul" is also represented as a tributary of the Salto or Tigre flowing from the west.

d) The true Encuentro appears in the sketch as "Rio Engaño" a name which, as is well known, has been given for at least the last 60 years to the water course which has its source at the Engaño lakes.

MAP A12

"Chile between 43º and 44ºS - From the book 'Report on the Arbitral demarcation of the Argentina-Chile Frontier (Bertrand) Santiago 1903".

It need only be said that this sketch map repeats

the error of the Award Map of 1902. In other words, it repeats the mistake contained in the Lange 1901 Map and in Sheet No. 3 (Map XVIII) prepared by Moreno for the Argentine "Short Reply".

The water courses in the disputed area are not given names, with the exception of the Palena river.

It is perhaps interesting to add that Senor Bertrand referred to the series of plans from which the Map A12 has been extracted, as follows:

> "These plans are simply a lineal and autographic reproduction of the maps submitted to the Arbitrator, where the more important corrections have been introduced". (Underlining added). (Report presented by the Chilean Expert to the Chilean Foreign Minister on 16 October 1903).

MAPS A13, A14, A15, A16 and A17

All these maps are seen to repeat the same error of linking the Encuentro system with the Engaño system, an error which crept into the Arbitral Award Map as a consequence of Moreno's Map XVIII.

MAP A18

"Lago Nahuel-Huapi" - "American Geographical Society of New York 1930".

This map of American origin is clearly a reproduction of the previous maps containing the error of Moreno's 1902 map. The "R. Enquentro" (sic) is linked to the Engaño lakes by Rio Engaño.

MAP A19

"El Valle del Palena-Carrenleufu - From the book "Patagonia Occidental" by Dr. H. Steffen - 1944".

This map, published in 1944, contains a reproduction of the Arbitral Award Map mistake.

Again, it may be pointed out that "Rio del Salto" appears as a river wholly different from the Encuentro and half way between the international boundary and "Rio del Torrente".

MAP A20

"Quellon-Palena-Futaleufú - Chilean Military Geographic Institute 1945".

Once again, the hydrographical features of the 1902 Map are reproduced. No further comment seems to be called for.

MAP A21

"Air Navigation Map (Castro Aisen) - Chilean Military Geographic Institute - 1946".

The purpose of this map, as stated on its title, is to serve for air navigation purposes. In respect to the disputed area it is a very sketchy map:

a) It repeats the mistake derived from Moreno's map on Lange's exploration.

b) The Engaño lakes have disappeared.

c) The Engaño river appears without a name.

d) The Palena river appears interrupted on the Argentine side of the boundary; its source is not shown in Lake General Paz but on the eastern slopes of Cordón de las Vírgenes.

Nevertheless, as in all maps, the River Salto appears as different from the Encuentro and quite distant from the boundary line through all of its course.

MAP A22

"Puerto Montt-Rio Chubut - U.S. Army Map Service - 1954".

This map "copyright 1954 by the American Geographical Society" appears to have been prepared by the U.S. Army Corps of Engineers.

Attention is drawn to the warning printed on the left lower quarter of the map: THE DELINEATION OF INTERNATIONAL BOUNDARIES ON THIS MAP MUST NOT BE CONSIDERED AUTHORITATIVE.

Indeed, between River Palena and Lake General Paz the "international boundary" does not follow even the river called there "R. Encuentro". The "boundary" cuts the Palena east of Post 16 and half way between the mouth of the Encuentro and the Cajón (which bears no name on this map). The "boundary" also cuts the lower course of the Encuentro.

The Engaño Lakes appear draining into Lake General Paz and are not shown as the source of River Engaño. The

River Engano itself is not named and its sources may be detected either on the eastern slopes of the Cº de la Virgen's minor range or on the eastern slopes of the Cordón de las Virgenes.

MAP A23

"Puerto Montt-Rio Chubut" - U.S. Army Map Service - 1956"

This map, compiled and drawn by the American Geographical Society of New York "and copyrighted by the Society in 1956" appears as a "provisional edition". Indeed it is, for all practical purposes, a reproduction of Map A22. Nevertheless, the warning on the delineation of the international boundary has disappeared.

Insofar as the topography of the disputed area is concerned, it may be observed in the small sketch at the foot called "relative reliability", that Map A23 is mainly "adjusted from compiled maps".

It is interesting to observe in this map - published after the Buenos Aires meeting of 1955 - the following features:

a) The "international boundary" does not follow any part of "R. Encuentro", but cuts the lower part of the river, descending across the River Engaño to Cerro de la Virgen. Furthermore the purported boundary does not cut the Palena at the junction of Palena/Encuentro, but further east, half way between the "Encuentro" and what would appear to be "Arroyo Cajón".

b) The junction of the "Encuentro" and the Palena is displaced west.

c) The Engano lakes do not appear as sources of the River Engaño and are shown draining into Lake General Paz.

d) The "Cordon de las Virgenes" appears as a much more important range than the Cerro de la Virgen minor range.

e) The name "R. del Salto" covers part of Rio El Azul which has no name on this map.

MAP A24

"San Carlos de Bariloche - I.C.A.O. (Argentina) 1957".

This map is referred to as "Edición 1957" but on the left hand side it reads "Información Aeronáutica JUNIO 1962".

With reference to the sector between posts 16 and 17 the following remarks may be made:

a) There is no "River Encuentro" represented (neither the true Encuentro nor the "minor channel").

b) The whole area of California appears as "inexplorado" (unexplored) which would seem remarkable for a map said to have been compiled in 1957.

c) The name "R. El Salto o Tigre" is assigned to a river having its source over five miles from the line which would appear to represent the boundary.

d) The Palena/Carrenleufu river appears represented

represented with a dotted line (unsurveyed?) over the whole of its course in Argentine territory. Part of the Lake General Paz also appears represented with dotted lines.

e) The "Cordón de las Virgenes" appears as an important range from Cerro Herrero to the Engaño Lakes, with a general height of between 4.921 and 6.890 feet; two of its summits appear in the range of the 6890-8858 feet.

MAP A25

"Monte Maca - U.S. Coast and Ceodetic Survey - 1942".

This copy is headed "advance proof subject to correction".

On the left hand side it reads: "Boundaries do not necessarily carry the approval of the countries involved".

The "boundary line" seems to follow partially a river therein called "Rio Engaño"; but after some eight miles south of the confluence of that river with the Palena, it bends west towards "Pico Moro". After describing a curve towards north east, the line proceeds south to the cutting point of Lake General Paz.

Neither the true Encuentro nor the Argentine version of this river appear depicted in this map. Cordón de las Virgenes appears as a snowy massif.

MAP A26

"Las Cordilleras Patagónicas". From the book 'Patagonia Occidental by Dr. H. Steffen. 1944".

Between the Palena/Carrenleufu River and Lake General Paz, the "Chile-Argentine boundary" appears to cut the river slightly west of the junction of an unnamed tributary. Further south, the "boundary" runs parallel to this tributary and cuts it bending east. Thereon, the line proceeds south to Lake General Paz.

The map bears no reference to Rivers Encuentro, Engaño or Salto.

MAP A27

"Wall Map of Chile - Prof. Alejandro Rios V. and Anguita F. 1941".

This map, published in 1941, contains a rather sketchy representation of the "disputed area". Between the Carrenleufú/Palena river and Lake General Paz the whole area has no rivers and no other geographical features.

MAP A28

"Geomorphological Map of Palena - Prof. Reynaldo Börgel O. 1965".

This map appears, indeed, to have been "prepared and drawn by Geomorphologist Reynold Börgel on 15 June 1961" (see right lower corner of the plate).

The Argentine Memorial refers to this map as "one of

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the latest manifestations of changes of names on Chilean maps" (page 91). Mr. Bathurst, leading Counsel for Argentina, also referred to it in the December 1965 hearings but recognized that it was "not an official map but the result of independent research" (page 39 of the transcript). On that occasion, a coloured version of Map A28 was introduced.

Since this map is admittedly a private work, and since some references to its author were made in the December hearings, it has been thought advisable to obtain Professor Börgel's comments on this map.

Professor Börgel has prepared a memorandum which is reproduced hereunder as his personal views on Map A28 and as his interpretation of some of the features of his map:

"EXPLANATION OF MAP A28"

"1. This map is geomorphological. Consequently, the signs which appear thereon correspond to individualized forms according to their external aspect, without a bearing on detail which may exist between them.

2. Fifteen fundamental forms have been selected. The rivers have been identified by lines, without indicating the absolute or relative dependence which they maintain with their form. Nowhere in the map has that intention been made manifest.

3. The fundamental form of this map is the "old glacilacustrine depression" or Valley of California. It occupies the main part of the map and spreads in secondary branches toward the north west and south-west. It appears cut off by another form in Avanzada California. The "old glacilacustrine depression" is traversed by many water courses: Palena or Carrenleufu, Encuentro, Lopez, Mallines, Engaño, etc. It corresponds to No.3 in the conventional signs.

4. The outcrop in non-colonized rock (No. 11) and the monoclinal residual ridges (grupas) (No.12) together with the peaks affected by a snow process (No. 9) correspond to the positive forms of the map. That is to say, they correspond to the high and dominating features which surround by the east, west and north west the depressions and valleys of the region. The high importance of the relief in the eastern section of the sheet, may be observed.

5. The glacial berms supported on tumbled lacustrine terraces (No. 7) follow the depression or valley of California in the greater part of its extension. This fact allows the identification of the depression of California as a compact form of glacilacustrine base with terraces which have no connection with any fluvial system. On the contrary, the water sources which reach the California depression from the eastern side of the map, break through these terraces forming a fluvial valley.

6. The form referred to as "lacustrine and others in bas de pente" (No. 14) bears a close relation to the previous form (No. 7) because the water courses descending from the east accentuate, on breaking this formation, the fluvial nature of the valley. It may be noted that this form goes on escorting the depression or valley of California, for which reason it may be said to form part of the glacilacustrine unit which is described in paragraph 3 above.

7. The form "course of river in narrow and deep valley" (No. 15) which follows the line of river called Encuentro in the map, indicates the existence of a deep fluvial valley inserted in a broader form which would be the old glacial valley and which allows an observation of the contour lines which escort this form.

8. The lacustrine terraces (No. 2) identified in Avanzada California, correspond to a lacustrine origin form superimposed on primitive glacial forms. Probably, the lake in California has modeled an old central moraine: that which at present separates the northern California valley from the southern and western California.

9. The amphitheatres of old glaciers (No. 8) - the present marshes or "mallines" - represent, in consideration of their extension, the main sources

of feeding. Those found in the part south of Pico Virgen are visibly important.

10. The remaining forms which appear in this map, are forms of detail, which do not interfere in the least with the outstanding forms above defined.

(Signed) R. Börgel

Santiago, 7 March 1966".

In connection with this map, Mr. Bathurst said in the December oral hearings that he was instructed that "Avanzada de California" is translated as "Advanced California (Transcript, page 27). This instruction would appear to be erroneous: "Avanzada California" is the name which usually is given to the Carabineros Post which is situated near the bend of the River Engaño.

MAPS A29, A30 and A31

"Lago General Paz-Palena - Argentina-Chile Mixed
Boundaries Commission 1951/53"
"Cerro de la Virgen - ditto - 1952/53".
"Rio Encuentro - ditto - 1952/53".

The Chilean Memorial and this Counter-Memorial comment extensively upon these three maps. Therefore, it will only be stressed here that these sheets contain an evident misrepresentation of the whole hydrographic system Encuentro/Lopez/Mallines.

The contrast represented therein between the "major" and "minor" channels so far as the relative width of

both channels is concerned, is false. In addition, the width of Arroyo Lopez would have justified the use of a line thicker than the line used for the Mallines. To have done this would, of course, have suggested the tributary nature of the Mallines and this was avoided by depicting the Lopez with a thin line. Further south (on Sheet VII-2, Map A30) the line of the Mallines from its source until it bends to the north is represented with the dotted line reserved for dry streams of less than 5 m. width; but the line representing the so-called "Encuentro" continues south practically to the marshes which constitute the international boundary in this area according to the Argentine submission.

Furthermore, the small lake in square 20/22-56/58, appears in Map A30 draining into the Engaño river. This drainage has been added after the first edition of Sheet VII-2.

On Sheet VII-2 (A30) there is a further feature which ought to be noted. It is the subordinate tributary nature of the watercourses flowing from the western slopes of "Cerro de la Virgen", vis-à-vis the river Azul which Sheet VII-2 calls "Rio el Salto o el Tigre".

Finally, in spite of these sheets being mentioned as "copied without change" from the original, it should be added that small changes have been introduced unilaterally by Argentina: some dotted lines representing

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several minor water courses have been modified.

MAP A49

"Field Sheet Argentina-Chile Mixed Boundaries Commission 1952-53 (unpublished)".

The preliminary nature of this sketch is shown by the hand written suggested alterations which appear on it.

Obviously, the use of the name "Rio Encuentro" for the "minor channel" cannot pass without comment by the Chilean Government.

Further, this sheet adds strength to the Chilean contention that the "amjor channel" has never been called "Falso Engaño".

Leaving aside the names attributed to water courses, this sketch also reveals that in the first attempts of the Mixed Boundary Commission to chart the area, no one thought that the "minor channel" deserved to be represented with a symbol suggesting a bigger bed width than the "major channel". In fact, on this map A49, it is clear that both "channels" were believed to deserve at least the same symbol. This equal representation for both channels was not maintained in Sheet VII-3, prepared on the basis of Map A49.

In the oral hearing in December 1965, leading Counsel for Argentina referred to a 1965 landslide in terms which suggested that he understood it to be the reason why

Sheet VII-3 now contains a wrong depiction of the "watersmeet". But Map A49 ("prepared in 1952/1953 by the Mixed Boundaries Commission") appears to contain a correct representation of the watersmeet, as it exists today, while (amazingly so) Sheet VII-3, also drawn in 1952/1953, on the basis of Map A49 introduces the substantial distortions which have been objected to by the Chilean Government for over ten years. No one has suggested that a landslide took place between the drawing of Map A49 and the drawing of Sheet VII-3.

This map A49 is also interesting because it confirms all the data on the Chilean settlement of California which have been furnished with abundant supporting evidence, in the Chilean Memorial and in the Chilean Counter-Memorial. For instance, the square showing the fenced property of N(olfa) Carrasco appears bissected by the "minor channel" which, according to Argentina, is the international boundary in that sector.

But on Sheet VII-2, the same property seems to end at the "minor channel".

There is still a further comment. The "minor channel" appears with a dotted line about 500 metres south of the home of Nolfa Carrasco. Sheet VII-2 (based on this Map A49) for reasons which the Argentine Memorial leaves unexplained, prolonged the continuous line for over one kilometre south appearing therein until square 22/24-62/64.

MAP A50

"Reduction of Maps Nos. A29, A30 and A31 - Argentine Boundaries Commission - 1955 (unpublished)".

On this map which purports to be a "reduction of the aerophotogrametric survey" and is stated to be "reduction of maps A29, A30 and A31", it may be noted that:

a) the "minor channel", contrary to Sheet VII-2 but more in consonance with the geographical reality appears with the fragmented line revealing its subordinate nature, some 1.000 metres south of its junction with Arroyo Lopez.

b) The name "Rio El Salto o El Tigre" has been boldly displaced south suggesting that this river has its source in the neighbourhood of "Cº d. l. Virgen". On Sheet VII-2 the name "El Salto o El Tigre" appears to be attributed to the important water-course flowing from the west and represented with a continuous double line: El Azul. On this Map A50, by the subtle displacement of a few letters, a change of the source of the Salto would appear to be suggested.

c) Of course it need hardly be added that on this purported "reduction of A29, A30 and A31" there appears a "boundary line" which does not appear on the map A29, A30 and A31.

d) Furthermore, the name "Portezuelo de las Raices"

freshly coined by Argentina, and apparently borrowed from the name of the plot of Simón Lopez (See Doc. No.90) appears as an unexplained addition.

e) The names of the Chilean settlers Bravo, Rosales, Lafuente and Rivera (who appear on Sheet VII-2 at the south of the bend of the Engaño) have disappeared from this "reduction" which cannot be explained since the name of other Chilean settlers have been maintained east of the "minor channel".

MAP A51

"Enlargement of Sector - Río Encuentro - Palena taken from maps Nos. A4 and A5 (overlay for Map A50) - Argentine Boundaries Commission 1955 (unpublished)".

This map does not seem to deserve any particular remarks since it appears to be an enlargement of the map used by Captain Dickson in 1903 (see remarks on Map A5).

MAP A54

"Map with transparent overlay showing boundary claimed in these proceedings by the Argentine Republic - Prepared for the purpose of the present proceedings".

The basis of this map (Sheets VII-1, VII-2 and VII-3) has already been mentioned when dealing with maps A29, A30 and A31.

MAP A55

"Map showing the various lines for the boundary".

This sheet contains a very striking representation

Appendix

of the problems posed by the tracing of the boundary line between boundary posts 16 and 17 as a consequence of the erroneous map prepared in 1902 by the Argentine Expert Dr. Moreno. In this respect it is noteworthy that between "Cº d. l. Virgen" and the northern bank of Lake General Paz there appear four different lines.

The reason is unknown for the broken line which has been chosen to depict the Engaño Lakes and part of the true Encuentro (which on this map appears as "Falso Engaño").

This sheet purports to represent the boundary lines suggested by the Chilean Boundary Commission in 1955 and the line "which according to the Bicameral Chilean Commission is the correct one". But both lines appear as reaching Cerro Central, a feature which has never been a part of any boundary line.

The Argentine Memorial makes the same mistake (paragraph 160, page 154) when stating that "the Chilean representatives on the Mixed Commission were no longer asserting that Cerro Central was the mountain named 'Virgen' in the 1902 Award through which the boundary was to pass".

The reason for this error of Argentina is unknown since neither the Chilean Congress nor the Chilean Government nor the members of the Chilean Boundary Commission have ever asserted that the boundary should

pass through Cerro Central which is a well known geographical feature different from Pico Virgen.