



ARGENTINE-CHILE FRONTIER CASE

COUNTER MEMORIAL

SUBMITTED BY THE ARGENTINE REPUBLIC

Vol. I

June 1966



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ABBREVIATIONS

In this Counter Memorial and its Appendices the following abbreviations are used :-

- | | |
|--|--|
| Arg. Mem. | - Argentine Memorial |
| AM <u>or</u>)
Argentine)
Memorandum) | Argentine Memorandum on Land Use,
- Settlement and Circulation of
Local Trade of January 1966. |
| CM/1 | - Chilean Memorial, Volume 1. |
| CM/2 | - Chilean Memorial, Volume 2. |
| CM/3 | - Chilean Memorial, Volume 3. |
| Transcript | - Revised Transcript of Oral
Hearings of the Court in
December 1965. |

CHAPTER 1

INTRODUCTION

1. This Counter Memorial is filed on behalf of the Argentine Republic in accordance with Order No. 7 of the Court of Arbitration dated the 6th January 1966, whereby the date for the filing of the Counter Memorials on behalf of both parties was fixed as the 2nd May 1966, which date was postponed to the 20th June 1966 by Order No. 9 of the Court.

2. This Counter Memorial will confine its attention to considering and meeting the arguments raised in the Chilean Memorial and by the Counsel for Chile at the oral hearings in December 1965. It is not proposed in this Counter Memorial to repeat the arguments already put forward on behalf of the Argentine Republic, except where necessary to point the differences between the arguments advanced on behalf of each Party. With the intention of restricting this Counter Memorial to those matters which are strictly necessary for the determination of the issues between the Parties, it is not proposed to point out exactly in what respects the contents of the Memorials of the Parties differ, nor in what respects they are in agreement.

It will clearly be necessary to discuss certain important issues which arise between the Parties, and certain matters of importance in these proceedings upon which the Parties are agreed. However, the Argentine Republic wishes to state at this stage in the Counter Memorial that, insofar as any matters raised on behalf of Chile are not considered in this Counter Memorial and cannot be said to have been dealt with in either the Memorial of the Argentine Republic or at any other stage of the present proceedings, such matters cannot be accepted as being admitted either in part or in whole by the Argentine Republic.

The present proceedings have already collected a very large amount of detail in regard to many aspects of the case, and the Argentine Republic feels that it would unnecessarily burden the Court if each issue of fact, however insignificant it may appear, had to be dealt with in detail and either admitted, discussed or denied. Accordingly this Counter Memorial joins issue upon all the main issues between the Parties in these proceedings, but where there is inconsistency on matters of detailed fact the Argentine Republic must reserve its position in regard to any such questions which are not dealt with either in this Counter Memorial or in its Memorial.

3. The Argentine Republic must completely reserve its position as regards the interpretation placed by the Chilean Government in its Memorial upon the provisions of the Treaties, Protocols, Agreements, and all other international instruments which govern the whole extent of the Argentine-Chilean boundary. In particular, the Argentine Republic makes the following specific reservations and comments:-

(i) The strongest objection is taken to the following statement in the Chilean Memorial (CM/1 p.18), which statement is categorically rejected: that prior to the 1881 Treaty -

"the land and marine areas affected by their disagreement, and over which Chile believes she had good right and title were Patagonia, the Magellan Straits, the great Island of Tierra del Fuego and neighbouring islands".

Patagonia and parts of the other places mentioned have always been part of Argentine territory and Chile has never had any rights over them. In this connection it is to be remembered that the first Chilean Constitution of 1822 had already declared that the boundary of the Republic of Chile was the Cordillera de los Andes.

(ii) The 1881 Treaty was reached by agreement between the Parties, but this does not mean that the principle of "uti possidetis" was completely deprived of all influence.

(iii) The strongest objection is taken to the unilateral interpretation put by Chile upon Article III of the 1881 Treaty when it states (CM/1 p.18) that:

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

(iv) Argentina ceded to Chile part of the Magellan Straits to avoid grave conflicts; "Chilean sovereignty"

in these Straits is limited by Article V of the 1881 Treaty which states:

"The Straits of Magellan is neutralised for perpetuity, and its free navigation is secured to the flags of all nations. With the view of securing said liberty and neutrality no fortifications nor military defences which may thwart that purpose shall be erected on the coast." This limitation took primarily into account the naval and navigational interests of Argentina in the southern seas.

(v) The 1881 Treaty makes no reference whatever to "the territories and islands south of the Magellan Straits". Argentina interprets Article III of the 1881 Treaty in a sense which differs widely from the Chilean interpretation; namely, that there are islands which are not specifically mentioned but which nevertheless are part of Argentine territory.

(vi) The implication in the Chilean Memorial that "Chile was led to the acceptance of the 1881 Treaty mainly by reason of her continuous engagement in war on her northern borders" (CM/1 p.18) is rejected. The 1881 Treaty was freely concluded between the Parties, and no advantage was taken by Argentina of the war between Chile and her northern neighbours, a war which resulted, in the event, in enlargement of Chilean territory.

(vii) Objection is taken to Chile's general attitude towards the 1881 Treaty. When reference is made to territory which by that Treaty is recognised as Argentine, the Chilean Memorial (CM/1 p.18) uses the expressions "gained by Argentina" and "and the latter received under Article 3"; but when it refers to territory recognised as Chilean by the same Treaty, it uses the word "confirmed". In truth it was Argentina which, faithful to its traditional policy of pacific settlement of disputes, ceded territory to avoid grave conflicts.

4. There were annexed to the Memorandum of the Argentine Republic on Land Use, Settlement and Circulation of Local Trade filed with the Court in January 1966 a number of documents. Those documents, marked Annex A to Annex T; are now formally incorporated as Annexes to this Counter Memorial, but it is not

considered necessary to reproduce such documents solely for the purpose of annexation. There are also annexed to this Counter Memorial certain other documents and maps to which reference is made in the text and of which an index is to be found at the end of this Counter Memorial.

5. The Court will have noticed that there are some discrepancies in the names used by each Party with regard to certain geographical features relevant to this case. In this Counter Memorial the same terms will be used in relation to geographical features as were used in the Memorial of the Argentine Republic. In any case where geographical names used by the Argentine Republic differ from those used by Chile, the Argentine Republic does not admit the validity of such names put forward on behalf of Chile.

6. The Court will have learned from the Memorials filed in the present proceedings and from the Oral Hearings in December 1965 that there are a number of statements of fact and arguments on which there is apparently agreement between the Parties. While it is not necessary to catalogue all such statements and arguments, it is important to draw attention to

some which relate directly to the Question to be answered by the Court. Among those which are accepted by both Parties are the following :-

- (i) The Court is not asked to report upon the proper interpretation and fulfilment of the 1902 Award in any respect other than the course of the boundary line which has remained unsettled between Boundary Posts 16 and 17.
- (ii) The Court has no competence to recommend the re-location of either Boundary Post 16 or Boundary Post 17.
- (iii) The validity of the 1902 Award is not in issue; accordingly it is not open to the Court to disregard any part of the 1902 Award dealing with any part of the boundary line in the Sector.
- (iv) The relevant Articles of the 1902 Award are Articles III and V and by virtue of the latter the Report of the 1902 Tribunal and the Maps annexed to the Award were made integral parts of that Award.
- (v) The River Encuentro flows into the River Carrenleufu opposite Boundary Post 16.
- (vi) The boundary line south of Boundary Post 16

runs up the River Encuentro as far as the confluence with it of the River Falso Engano.

- (vii) The question which arises in connection with the River Encuentro is one of identification.
- (viii) The "peak called Virgen" (1902 Award), "Cerro Virgen" (1902 Report) and "C.d.l. Virgen" (Award Map) refer to the same geographical feature, namely, that shown as Co. de la Virgen on the 1965 Chilean 1:100.000 Map (CH 27, 28, 29).
- (ix) The Parties are also agreed upon the identification of the southernmost stretch (approximately nine kilometres) of "the local waterparting" (1902 Report) to Boundary Post 17.

7. Some matters which must be of significance in consideration of the present case are either insufficiently dealt with or not dealt with at all in the Chilean Memorial. While these matters are considered in more detail in the succeeding parts of this Counter Memorial, it may be useful at this stage to draw attention to certain factors which play little or no

part in the arguments made on behalf of Chile:-

- (i) The lack of any adequate explanation why the Court should accede to Chile's invitation to discard or ignore the actual text of the Award and of the Report, and the corresponding line drawn upon the Award Map and approved by the Arbitrator; or why the Court, in seeking the proper interpretation and fulfilment of a binding and valid Award, should now regard itself as being concerned with "the construction of a line rather than with the identification of points". (CM/1 p.117).
- (ii) An adequate appreciation and cartographic interpretation of the 1902 Award Map "upon which the boundary which We have decided upon has been delineated..." (Award, Article V).
- (iii) The choice by Chile of 1952 as the critical date (CM/1 pp. 15, 478), notwithstanding the fact that before the Report of the Chilean Bicameral Commission in 1956 the proposed boundary line which is now put forward on behalf of Chile had never appeared in any official or unofficial document or map,

either published by the Chilean Government or otherwise, or been proposed at any stage of the proceedings of the Argentina-Chile Mixed Boundaries Commission relating to the Sector now under consideration.

CHAPTER 2

GEOGRAPHY AND CARTOGRAPHY

8. In this chapter the errors of a geographical and cartographical nature in the Chilean Memorial and on the maps annexed thereto will be examined.

1902 Award Map and its sources

9. The first error of consequence is the failure of Chile to appreciate the role played by maps in the formulation of the 1902 Award. It seems clear, from all the evidence available, including Chile's own evidence, that the boundary in the present disputed area was first formulated on the Argentine field maps which later formed the basis of Sheets 2 and 3 (maps A3 and A4), which themselves in turn came to form part of the 1902 Award Map. Those words descriptive of geographical features in the document submitted by Chile as "The Holdich draft definition of the boundary" (CM/2, p.114), in the Report and in the Award are clearly taken from those field maps (c.f. CM/1 p.39). At the time of the 1902 Award the words "peak called Virgen" and "Cerro Virgen" in the Report and the Award can only be understood by reference to the Award Map. Indeed those words could not have been used in those

documents but for the prior existence of those field maps. An understanding of the 1902 Award Map and its antecedents is therefore an essential prelude to any interpretation of the words of the 1902 Award and Report. The Chilean Memorial makes no attempt to assess the overall quality of the Award Map; it deals only with what it takes to be the mistake which the Award Map contains; for the rest Chile is content to dismiss the Map as "inadequate and erroneous cartography" (CM/1 p.6) and "heavily marred by error". (CM/1 p.80).

10. An appreciation of the origins and quality of the 1902 Award Map is contained in Appendix A to this Counter Memorial. The main conclusions of that appreciation are as follows :-

- (i) The 1902 Award Map, as acknowledged by both Parties, (Arg. Mem. p. 27 and CM/1 p.8) is derived from Sheets 2 and 3 forming part of Map XVIII of the Argentine Short Reply, 1902.
- (ii) Sheets 2 and 3 were compiled in 1902 from a series of field maps made between 1898 and 1901 by Juan Bach, Gunardo Lange and Juan Waag.

- (iii) These field maps; referred to by Colonel Sir Thomas Holdich as "good, honest work" (CM/2 p.69) are indeed accurate for their day and age within the limitations imposed by the methods employed to make them, their scale and the nature of the terrain they represent. It is possible to identify on the ground today almost all the geographical features marked upon them.
- (iv) The nature of the two mistakes on one of them, Lange 1902, (A10), can be defined and, as set out in Appendix A, a reasonable explanation given for them.
- (v) The quality of the maps, and so of the Award Map itself, is such that it would not be difficult for one, skilled in the use of maps in the field, to trace along the ground the course of the red line marked on the Award Map; he would need only to avoid being distracted by the fact that along one relatively short part of the line there was no river as the map depicted.

Role of the Argentine Field Maps in the 1902 Arbitration

11. It appears probable that Colonel Sir Thomas Holdich had his first sight of Argentine field maps in January 1902 before he left for South America. In

a letter (Annex 26 p. 1) dated the 9th January 1902 to Mr. Francis Villiers, an official of the British Foreign Office, he states: "I have seen the Argentine Expert (Dr. Moreno) who has promised me the maps and data which he had reserved for his final reply to the Chile statement". The same day, the 9th January 1902, again writing to Mr. Villiers and referring to Dr. Moreno, Holdich states: "I have received all his latest maps". (Annex 26 P. 4).

12. The importance placed upon maps by the 1902 Tribunal is apparent from the fact that they requested both Parties to furnish them with "any fresh evidence of a topographical nature such as a new survey of any part of the disputed territory" (Letter dated the 21st May 1901, Major E. Hills, Secretary of the Tribunal, to the Argentine Legation, London,) (Annex 26. p. 6), even after the submission by the two Parties of their answers to their opponents' statements.

It is apparent from Colonel Sir Thomas Holdich's Narrative Report (CM/2 Annex 18.) that he made use of Argentine field maps while, as Chief of the Technical Mission he was travelling in the vicinity of the

frontier areas with which he was concerned. He states that his geographical examination was only "rendered possible by the existence of maps of the country to be dealt with", and goes on to describe the nature of the maps and surveys from which it is clear he is referring to Argentine field maps, which he states were fairly complete in contrast to information from Chilean Surveyors who "had practically no topography to produce" (CM/2 pp66-69).

13. In his description of his journey south from the Colony of 16th October he states; "We did, in fact, actually compare all the geographical features of importance with their representation on the Argentine mapping", later when he was at Vargas' settlement in the valley of the Carrenleufu he records a reference to the "accurate topography evidenced in the Argentine map".

Before he arrived back in England on Saturday the 26th July 1902, it is apparent that Holdich had already prepared a description of a suggested boundary line, for on Monday the 28th July he wrote to the Permanent Under Secretary of State for Foreign Affairs that he had "already submitted

the M.S. of the 'Narrative Report', the technical 'Geographical Report' and a suggested line of boundary which I consider might be advantageously adopted, together with the original maps" to General Sir John Ardagh one of the three members of the Tribunal (Annex 26, p 8).

14. The Argentine field maps were thus most probably the sources for what eventually became the boundary of the 1902 Tribunal, as Holdich envisaged they should be when he suggested in his Narrative Report that if both Parties were satisfied with the accuracy of the maps it "would at once be open for the Tribunal to discuss or decide upon a boundary of compromise on the map basis" (CM/2 p.67).

15. Thus as Chile states, "It would appear, indeed, that Sir Thomas had seen at least some of the new maps even before he produced the draft definition of the boundary" (CM/1 p.39). It appears to Argentina that he had not only seen them but that they were among the maps he used in the field. As Chile states, in the

document said to be the Holdich draft definition (CM/2 Annex 23), the reference to Cerro Virgen could only have derived from Lange's map of 1902. The name Cerro de la Virgen had appeared on no previous map, and Argentine Map XVIII, Sheet 3 (A5) on which it subsequently appeared had not, by late July 1902 yet been prepared. On the 8th August 1902 Colonel Sir Thomas Holdich, again writing to Mr. Villiers, in a reference to maps which must have included Sheets 2 and 3, states; "The maps under preparation by Dr. Moreno are well advanced. He submits them to me from time to time for approval" (Annex 26 p. 10).

16. Whilst, therefore, Chile is correct in saying that "There is nothing to shew that it was the Second Argentine Map [Sheets 2 and 3] which decided him [Holdich] upon the use of the Encuentro for determining the boundary in this area" there is considerable evidence that the Argentine maps which formed the bases of Sheets 2 and 3 were well known to Sir Thomas for a period of over seven months prior to August 1902, during which time they would have been available to him in the

field and when he came to make up his mind about what he was going to suggest as the boundary line.

17. Chile supposes that the error in the 1902 Award Map lies in the fact that if one follows the River Encuentro, as Chile identifies it, from Post 16 to its source one does not reach the western slopes of Cerro Virgen (CM/1 p.73). This is not surprising in view of the fact that the Tribunal's Report, as has been shown in Appendix A, is not referring in any sense whatsoever to the River Falso Engano which Chile alone wishes to call the River Encuentro. Chile states moreover that if the river called Encuentro by the Argentine Government is followed to its source it is found not to reach the western slopes of the Cerro Virgen, or again, in reverse, "it is impossible to trace any river from a source on the western slopes of the Cerro Virgen to a junction with the Palena at Post 16" (CM/1 p. 74). This Argentina does not seek to deny but both these statements are equally true of the river claimed by Chile to be the river Encuentro. If the River Falso Engano is followed to its source it is found not to reach the western slopes of the

true Cerro de la Virgen, or again in reverse, it is impossible to trace any river from a source on the western slopes of Cerro de la Virgen which would join by way of the River Falso Engano the River Carrenleufu (Palena) at Boundary Post 16.

Demarcation of Boundary Post 16

18. The question of the demarcation of Boundary Post 16 is treated in Chapter VII of Part One of Volume I of the Chilean Memorial before any consideration is given to the question of geographical error on the 1902 Award Map. This failure to deal with the 1902 Award Map before considering the 1903 Demarcation confuses the understanding of the history of the case. Only if Captain Dickson's demarcation is considered in the light of the Award Map can an understanding of subsequent events be obtained.

19. The question of the demarcation of Boundary Post 16 is examined in Appendix B to this Counter Memorial. It is concluded that Boundary Post 16 instead of being placed "in approximate W. Lon. $71^{\circ}47'$ which should be opposite the junction of the Encuentro" as described in the so called Holdich draft definition

of the boundary; or in longitude $71^{\circ} 47'$ W. "opposite the junction of the River Encuentro" as the Report has it; or at the obligatory point on the River Palena as the much less precise words of the Award have it; was instead placed at a point on the River Carrenleufu at longitude $71^{\circ} 42'$ W., opposite a river which had been called River Encuentro nine years before..

The Identification of the River Encentro from Boundary Post 16

20. Both parties are now however agreed that whether Boundary Post 16 was misplaced or not by Captain Dickson in so placing it the British demarcator established in a manner binding upon the Parties that the river joining the River Carrenleufu at that point was the River Encuentro.

But the Chilean interpretation of the Award and Report identifies the River Encuentro mentioned in that Award and Report in such a way as to make it include the River Falso Engano. Chile states that this coincides "not only with the objective requirements of the situation but also with Sir Thomas Holdich's intention to adopt the line of a river which would lead him directly to an elevated

watershed connected to Post 17". (CM/1 p. 98).

21. The first ground put forward to support this view is stated, at page 103 of the Chilean Memorial, as arising from the intentions of Colonel Sir Thomas Holdich. At page 108 it is proposed that the River Encuentro referred to in the 1902 Award must be equated with the Chilean identification of its "River Encuentro" as the only way of meeting the purpose and intent of Colonel Sir Thomas Holdich. However paragraphs 21-26 show set out the virtual lack of knowledge of the Encuentro river system in 1902, and establish that it was unknown to him. The idea that the identity of the "true" River Encuentro can be discovered in the manner suggested discloses first a lack of appreciation of the mistake underlying the boundary line laid down in 1902 for the Sector, and, second, it suggests as a method of identifying a geographical feature an entirely novel and unacceptable method involving speculation about unexpressed ideas by a person who had never seen the river system or investigated its pattern.

22. Both Parties agree that from its confluence with the River Carrenleufu upstream to the confluence with it of the River Falso Engano, this river is the River Encuentro. Above that confluence, according to the

Argentine evidence the River Encuentro can be followed to its source at co-ordinates X 5163550 Y 1523670. (see Arg. Mem. p. 162). Chile maintains that the River Falso Engano is the River Encuentro.

23. Two bodies of geographical evidence demonstrate the untruth of the Chilean contention. The first concerns the development of river nomenclature in the area since the location of Boundary Post 16 in 1903. According to the Chilean evidence no Chilean official called the River Falso Engano 'River Encuentro' until 1947. Whenever prior to 1947 either Party had to give this river a name, they both called it River Engano. The second body of evidence will demonstrate the unsoundness of Chilean deductions made from facts of physical geography concerning the so called "major" and "minor" channels.

River Names'

24. The extent of international understanding on the use of geographical names is very limited but it may be said that each government is deemed to be the authority for the geographical names used within its national territory and new names require the approval of the government of the territory in which it is

proposed to apply them. The International Geographical Congress in 1899 decided that native names should prevail over others. This principal was supported by the Royal Geographical Society (1901) the German Foreign Office (1903) and the United States Geographic Board. The same Congress also decided that, where there are no native names, or where they cannot be established with certainty the names given by the first discoverers should prevail. This principle had been enunciated in 1862 by the British Admiralty in its "General Instructions for Hydrographic Surveyors" which said - "those [names] which have been stamped upon places by the first discoverers are held sacred by the common consent of all nations" (Aurousseau, The Rendering of Geographical Names, London 1957).

1919

25. When the 1919 Argentine Agricultural Surveys were carried out it is clear that the location of Boundary Post 16 caused difficulty. That it was and is a considerable distance east of its intended position as shown on the 1902 Award Map is clearly apparent in the Reports for Lot 14 and Lot 18. In the Report dealing with Lot 14 the Surveyors' calculations show that although on the "official map" it is at least

20,000 metres from an iron boundary marker near the River Hielo to the boundary, their measurements showed that between the same marker and Boundary Post 16 on the ground it is a distance of 11,000 metres; on this calculation Boundary Post 16 is in fact located 9,000 metres east of the position shown as the crossing of the River Carrenleufu by the Award line on the Award map. The Report for Lot 18 confirms this. It says that the actual distance from the same iron marker, in this report described as being at the western limit of the Extension of the Colony of 16th October, to Boundary Post 16 is half that shown between the position of the western limit of the Colony and the Boundary on the 1902 Award Map.

26. The map made by the Surveyors of the Argentine Commission of North Chubut of Lots 12, 13, 16, 17, 18, 23, 24 and 25 (Map AM9) for the first time names and correctly depicts the Arroyo Cajon. It also shows the actual position of Boundary Post 16. In spite of their misgivings about its position noted above the Surveyors clearly accepted, presumably because of the very presence of Boundary Post 16 at that spot, that the river opposite the Boundary Post 16 was the River Encuentro, as indeed it is. Given this acceptance,

as noted in the December Oral Hearings, (Transcript p.25), it is not surprising that two remarkably similar patterns of drainage; the "h" pattern shown on the 1902 Award Map comprising part of the River Salto (mistakenly labelled Encuentro) and the Engano, and the "h" pattern comprising the Encuentro together with its east bank tributary, were confused. The latter river and its tributary came to be labelled with the names of the former, Encuentro and Engano.

27. The 1919 Argentine Agricultural Survey of South Chubut included Lots 4, 5, 6 and 7. A map showing these Lots was annexed to the Argentine Memorandum (A.M.7.). The map includes what is clearly the upper part of the true River Engano, a representation of one of the Lakes of the Engano and the international boundary in the vicinity of Cerro de la Virgen. The Survey of the South Chubut Commission was apparently not visually linked on the ground with that of the North Chubut Commission and neither Commission surveyed the land between the southern margin of Lot 23, which is a little south of the homestead of P. Carrillo as the map AM9 shows it and the northern margin of Lot 4, just north of the position of Cerro de la Virgen, as marked on the map AM7. There is therefore a belt

of unmapped ground some 13 to 14 kilometres wide between the two surveys.

28. The international boundary shown on these maps is clearly recognisable in terms of the modern map, due allowance being made for the unsurveyed zone. In the north it follows the river opposite Boundary Post 16, as shown on the detailed maps of Lots 18 and 23 (AM8 and AM9), to a point south of P.Carrillo's homestead. In the south it follows a line recognisable as being that of the water-parting north from Boundary Post 17 to Cerro de la Virgen, the "western branch" and part of the main reach of the River Salto. The same course of the boundary is shown on Map A57 annexed to this Counter Memorial which is a map compiled of the whole area of the Southern Chubut Survey. This map names Cerro de la Virgen.

29. Thus in 1919, Argentine Agricultural Authorities were able to define on the ground the boundary from Boundary Post 16 to a point which is a close approximation to the source of the River Encuentro as ascertained by the Mixed Boundaries Commission in 1955, and from Boundary Post 17 northwards via the Cerro de la Virgen and the western branch approximately

to the position of the confluence of the River Engano with the River Salto.

30. Not until 1940 is there any evidence of activity by Chilean Surveyors in the vicinity of the disputed area. In 1940 a report by a Chilean military officer, shows that a study was made, on behalf of the Chilean army of the valley of the River Palena (extracts from the Report are to be found in Annex No. 27). That report contemplated a third order triangulation survey in the Palena Sector for a topographical survey of between 100 and 200 square kilometres. Though no detailed map is included in the report, the several 'camps' used by the surveyors and named in the Report are all west of the River Encuentro. There is no evidence that in 1940 these official surveyors regarded any land east of that river as being part of Chile or that any river north-east of that which Argentine calls the Encuentro was called Encuentro by Chile. This is entirely in accordance with Argentine belief and practice before and after this date and, as will be shown, with Chilean belief until 1947.

1943-4

31. The first fieldwork of the Mixed Boundaries Commission in Sector VII was carried out during the field season 1943-4. Evidence of this is contained in the Informative Report (Arg. Mem. Annex 21 p.53) which states that Engineer Cobos, the Argentine Delegate, visited Boundary Post 16. He travelled alone as Lieutenant-Colonel Munoz, the Chilean Delegate, had not yet arrived in the Sector. This visit by Cobos must have taken place between the 27th October 1943 and the 28th December 1943. There is no evidence that the river names in the area gave rise to any difficulties.

1944-5

32. No further activity on behalf of the Mixed Boundaries Commission took place until the field season 1944-5 when triangulation was carried out through the disputed area from Lake General Paz to Cordon de las Tobas. The Delegates in charge of these activities of the Demarcating Sub-Committee of the Mixed Boundaries Commission were Engineer Cobos (Argentina) and Lieutenant-Colonel Guzman (Chile). The two of them reviewed Boundary Post 17 and designated it VII-2 (17) on the 19th February 1945.

33. On the 6th July 1945 Engineer Cobos wrote a report on his activities in the area during the previous field season. (Annex No. 28). From this report it is clear that he made a tour of inspection of the Engano and Encuentro valleys in the company of Lieutenant-Colonel Guzman (Chile). The report describes the geography of the area as he saw it and is accompanied by a sketch map (A.58) which Cobos states (Annex 28 p.10) "was drawn up on the basis of the exploration and data obtained between 19 and 27 April by Lietenant-Colonel Claudio Guzman the Chilean Delegate" and himself.

34. This sketch map shows the geographical nomenclature in use in the area in 1945. The river draining into the River Carrenleufu at Boundary Post 16 is called the River Encuentro; it is shown as having two branches, the western is called River Encuentro, the eastern is called River Engano. As Cobos states "The Encuentro River has a small tributary flowing into it from the east, which is shown on the map. This is the river which present-day inhabitants call the Engano River". (Annex 28 p.12). It is thus clear that what Argentina today calls the River Falso Engano was in 1945 called the River Engano and what Argentina today

calls the River Encuentro was in 1945 called the River Encuentro. Further the names of these two rivers on Cobos' map are identical with those on the map (AM9) of the 1919 Survey.

35. On Cobos' map the boundary from Boundary Post 17 to the Cerro Virgen is quite correctly labelled "Linea del fallo de su majestad britanica". Boundary Post 16 is located opposite the River Encuentro and the boundary is shown as following the River Encuentro to the confluence with it of the River Engano (called Falso Engano today) and then upstream along the River Encuentro to its source. Cobos then continues the boundary line across the River Salto or Tigre (the River Engano of the 1902 Award Map and of today) up to Cerro Virgen. Cobos remarks (Annex 28, p.19) that the boundary shown on his map is "the frontier line of His Britannic Majesty's Award as it is interpreted at the present time by the inhabitants of the frontier zone", i.e. April 1945.

36. Additional evidence as to the Chilean use of river names at this time, 1945, can be ascertained from a map annexed to the Argentine Memorial as A.11. This map, prepared in 1945 by the Chilean Boundaries

Commission from aerial photographs, was sent to Cobos by a Chilean official Lieutenant-Colonel Rodolfo Concha, who was a colleague of Lieutenant-Colonel Guzman on the Chilean Boundaries Commission and the Mixed Boundaries Commission on the 25th July 1945, accompanied by a letter (Annex 29). On this map the River Falso Engano is called River Engano and the name River Encuentro is given to the whole of that river which Argentina has, since at least 1919, called the River Encuentro. The River Engano of the 1902 Award Map is labelled River Tigre.

37. Thus in 1945 Argentine and Chilean members of the Mixed Boundaries Commission employed the same names for rivers in the Encuentro system and their practice was identical with that used by the Argentine Agricultural Surveyor who in 1919 called the eastern tributary of the Encuentro the Engano and the western branch by the name of the lower reach - the River Encuentro.

38. Having accepted the inhabitants' name of Engano for the small tributary flowing into the Encuentro from the east, Cobos and Concha could not employ that name for the tributary flowing into the River Salto

from the east. They both refer to that river, which Lange had called Engano and which is shown on the 1902 Award map as the Engano, by the name of the main stream i.e. River Salto or Tigre.

1946-7

39. The field activities of the Mixed Boundaries Commission were renewed in the area in the season 1946-47. The Chilean Delegate, Lieutenant-Colonel Cumplido, visited the Encuentro valley during February 1947. It was intended that he should be accompanied by Lieutenant-Colonel Carbonell, the Argentine Delegate, but this did not happen, Cumplido carried out his inspection without his Argentine colleague. He gave a short verbal report to the Mixed Boundaries Commission on the 28th February 1947 (Arg. Mem. Annex 20 p. 22).

40. In this report Cumplido's usage of river names appears to be completely at variance with earlier practice, both Chilean and Argentine. He infers that what had been called, since at least 1919, the River Engano, is "the middle and upper river reaches of the Encuentro"; and that the western branch of the River Encuentro, called since at least 1920 the River Encuentro, is "the Los Mallines rivulet".

The worth of these personal views, soon in fact abandoned by Cumplido himself, and arrived at without the benefit of Argentine advice may be judged against the background of the Cobos report and map, the Chilean Delegate Concha's map, A.11 and the 1920 Agricultural Survey.

41. Cumplido's views might therefore be dismissed as naive did they not express the germ of the Chilean claim of today that the River Falso Engano is the River Encuentro. The first set of documents adopting Cumplido's novelties are those which relate to the survey of Surveyor Carvajal, placed in evidence by Chile. This evidence comprises extracts from his notebooks, a map drawn three years after his survey and his affidavit drawn up fifteen years later still. (CM/3 Documents 127, 126 and 128). It is pertinent to enquire as to the precise date of his survey and the authority under which it was conducted.

42. The answer to the first of these enquiries is contained in his notebooks; he started his traverse around the bounds of some of the landholdings in the Encuentro valley on the 1st February 1947. Starting in the south at plots 20 and 19, those of Jaramillo

and Lopez, he then proceeded north to survey plot 17, that of Carillo, before moving still further north on the 20th February 1947 to plot 13, that of Parada (these plot numbers are to be found on Document CH 126). The completion of the survey of this plot also enabled him to complete that of plot 16, Anabalon. He did not then move north to survey plot 12 as might have been expected but turned west to survey plots 11, 6, 10 and 7, before returning on the 13th March 1947 to survey plots 12, 9 and 8. The three last mentioned plots are in the bend of the River Encuentro opposite Boundary Post 16 and it may be asked why Carvajal kept away from that area when he might have been expected to have surveyed it soon after the 20th February 1947. It is not without interest therefore to find that the Mixed Boundaries Commission Delegate Cobos (Argentina) was in the area at that time, in company with Delegate Cumplido (Chile) when they reviewed Boundary Post 16 on the 5th March 1947. On the 13th March, four days after the last meeting of the Mixed Boundaries Commission for that field season had been held in Trevelin, Argentina, (Arg. Mem. Annex 20 p.22), Carvajal returned to survey plots 12, 9 and 8 adjacent to the frontier at Boundary Post 16. On the 25th March

1947, he returned to the area south of the River Falso Engano and surveyed plot 14, Contreras. On the 9th April he was surveying plot 18, Lillo, and on 18th April 1947 plot 15, Ovalle. On the 18th April also he started a survey, which he did not complete, of the land to the east of plots 14 and 15. He says he failed to complete this survey. It was later claimed that at about this time he was interfered with by the Argentine Gendarmerie, but it is probable that he was told to withdraw from Argentine territory by the Carabineros following a request from the Argentine Gendarmerie (see Annex 30 p.).

43. Thus when Cumplido on the 28th February 1947, immediately after his visit to the Encuentro Valley, was saying to the Mixed Boundaries Commission where he could, if required, carry out a ground survey and where he could not because the ground was covered by trees, there was in fact at that moment a survey in progress.

44. Cumplido must have been aware of Carvajal's presence in the area because a Chilean member of the Mixed Commission Staff, a subordinate of Cumplido's, gave

instructions to Carvajal to carry out the survey in the upper Encuentro valley. On the 19th February 1956 Carlos Lillo declared to the Chilean Bicameral Commission that "in 1947 Capt. Sepulveda ordered the Agricultural Experts who were at Palena to measure the lands he Lillo was occupying, and Expert Ernesto Carvajal measured the land....." (Arg. Mem. Annex 24, p.203). Carvajal was clearly operating under the instructions of a member of the Chilean element of the Mixed Boundaries Commission as Lillo's declaration and Carvajal's own movements show. It is not surprising therefore to find that Carvajal's nomenclature for the River Encuentro agrees with that of Cumplido in that he calls the river which had up to 1947 been called by both Parties the River Engano (now known as the River Falso Engano) the River Encuentro. It will be noted with interest that in his 1965 Affidavit (Doc. CH.128, CM/3 p. 398) Carvajal states that the names of geographical features he employed were those "understood in the area both by the settlers and the authorities".

45. Now, the settler whose land bordered the south bank of the river whose name was changed from Engano to Encuentro by Cumplido and Carvajal was Contreras (see plot 14 CH. Doc. No. 126). On the 19th July

1947 this Chilean, the name of whose farm was and is "El Engano", made a statement to the Argentine authorities who were investigating the Carvajal activities in which he stated that where he lived "is located on the right hand bank of the Encuentro River" and that he always thought that where he lived "was Argentine territory, because it was the authorities of this country who had authorised him to settle there." (See Annex 30 p. 10).

46. His neighbour, Ovalle, in a statement, also made on 19th July 1947, (see Annex 30 p. 4) said that Lot 23 (a reference to Argentine Lot numbers not the Chilean plot numbers shown on Carvajal's map CH Doc. No. 126) where he lived "is situated between the Encuentro and Engano Rivers and hence on the right-hand bank of the Encuentro River." He further states that where he lives is Argentine territory.

47. Hernandez, residing near Ovalle, also states on 19th July 1947 (see Annex 30 p. 7) that where he lived "is situated on the right-hand bank of the Encuentro River and is situated in Argentine territory".

Thus in 1947 three people who lived in the angle between the rivers Encuentro and Falso Engano, south of the latter and east of the former, stated that they

lived on the right bank of the River Encuentro, thus clearly indicating that they, the men on the spot, called the river, which Cumplido wished to call "Los Mallines" and Carvajal the "Arroyo Falso Engano" the River Encuentro as everyone had, it appears, since 1919. Ovalle also states that the other river was called the Engano. This also is entirely in conformity with local practice during at least the previous twenty-seven years.

48. There is thus substantial evidence to suggest that the settlers at and near the confluence of the River Falso Engano and the River Encuentro in 1947 called the River Falso Engano, the River Engano and the River Encuentro, above and below the confluence with it of the River Falso Engano, simply by the name River Encuentro. This is entirely in conformity with previous practice. Only Cumplido and Carvajal wished to change these names. Both changed the name River Engano to River Encuentro, but concerning the name they wished to give to the other river, the real Encuentro, they differed, one called it "Los Mallines", the other "Falso Engano". Carvajal in his affidavit of 1965 states that his Falso Engano was formed "by the streams Lopez and Mallines" but

in his notebooks of 1947 the stream now known as Lopez is labelled Falso Engano and there is no mention of a stream Lopez.

The Monograph of Cerro Mera

49. But Cumplido was not consistent in the names he used for rivers. He and Cobos both signed a Monograph designating Cerro Mero a principal trigonometrical point. (Annex 31). The earliest date on which they could have done this was after Cumplido's appointment to the Mixed Boundaries Commission at the Plenary Session No. 22, 16-21 Dec. 1946, with effect from the 29th November 1946. It may be supposed that the drawing up of this Monograph and the Review of Boundary Post 16, the monograph for which also bears their signatures, were all part of the work of the season 1946-7. It is interesting to find therefore that this Monograph for Cerro Mera signed by

Cumplido says:

"How to get to the point:

Leaving the new Post of the Corcovado Gendarmerie you cross the River Encuentro (so called by the people of the neighbourhood) and follow this towards the south, then you ascend the slope of Las Raices, through the land of Tomas Videla; you cross the River Tigre (Engano according to the English Map) until you reach the land of Maraboli, from which point you begin the ascent. (It is essential to have a guide in order to reach the summit of this mountain)".

50. Clearly the description is of a route from the Gendarmerie Post at Carrenleufu to Cerro Mera along the length of the Encuentro River to the Portezuelo de la Raices and across the land of Tomas Videla (now of Dionisio Videla). This leaves no doubt that the river to be followed is the River Encuentro and that it was so called by the people of the neighbourhood. There is no mention of the name "Los Mallines" or "Falso Engano" used for this river in other contexts by Cumplido and Carvajal. Thus whatever may have been Cumplido's personal opinions as stated in Act No. 33 on 28th February 1947 by the end of that field season he had recanted and was in agreement that the River Encuentro was that river which his compatriot Concha had called the Encuentro in 1945, i.e. they both agreed with the long held Argentine view.

51. In 1952 the Chilean Carta Preliminar, sheet 4372 Palena, shows a radically different view of the geography of the area between Boundary Posts 16 and 17 as compared with earlier maps. The Lagunas del Engano are shown as flowing into Lake General Winter (Paz), a view of the direction of their outlet corrected by Lange in 1898 when he called them Engano to signify the "deception" he was correcting.

But the representation of these lakes is not the only startling innovation on this 1952 map. As can be seen by comparing the 1952 Carta Preliminar with the 1965 Chilean 1:100,000 map used for CM.27, 28 and 29, the name Cerro de la Virgen was given in 1952 to a mountain east of the River Encuentro in the vicinity of a chain which Chile in 1965 calls Cordón de los Morros. But Cerro de la Virgen before 1952 was recognised by Chile as being that mountain which Argentina, since Lange first mapped it, and the 1902 Award Map, call the Cerro de la Virgen. This is clearly shown on the 1945 Chilean Map, All. The Chilean geographical formula of 1952, as was described in the Argentine Memorial, p.92, enabled the international boundary to be drawn on this map in such a way as to meet the terms of the 1902 Report which states that the boundary shall follow the Encuentro along the course of its western branch to its source on the western slopes of Cerro Virgen. The underlying reasoning seems to have been that if the terms of the 1902 Arbitration do not fit the geographical facts in a manner it is supposed they should, then it is permissible to "move" the geographical features mentioned in that Award and Report until they do fit it in that manner. Of course mountains and rivers

cannot be moved physically but names on maps can.

52. The difficulty with the boundary line drawn according to the Chilean formula as shown on the 1952 Carta Preliminar was that it led into trouble south of the new "Cerro de la Virgen", as shown on that map. Instead of meeting the terms of the Report and following "the local water parting southwards to the northern shore of Lago General Paz", it crosses a river in order to reach B.P. 17. Why this line was drawn in this way is a mystery, the words of the Report could have been met quite easily on the map by drawing the boundary around the head of Valle Norte and around to Cerro del Salto. But this solution would still have been in error first because the map is incorrect in separating the Lakes of the Engano from the River Salto drainage basin, and secondly, in any event would be totally at variance with the line drawn on the 1902 Award Map. This error had a number of repercussions on later maps as will be shown. Thus the attempt represented by the 1952 map to fit the geography to the Report misfired and would appear

to have been abandoned.

1953

53. Between the 24th November 1952 and the 24th March 1953 a field mission of the Argentine-Chile Mixed Boundaries Commission carried out a plane-table survey. The maps it produced, A48 and A49, were used to collect the names to be used on the Mixed Commission 1:50,000 map sheets. The survey was carried out by Senors Cerruti and Robledo (Argentina) observed by Senor Luis Alvarez and Major A. Alfaro (Chile). The signatures of the first three of these appear on the Sheets. Major Alfaro of Chile the second Chilean observer later recorded his full agreement to these map sheets, (see Annex 32). Map sheet A49 carried a reference number 4572-28-4 corrected to 4372-28-4; 4372 is the reference number of the Chilean Carta Preliminar Palena Sheet. On the map Sheet A49, the name Rio Encuentro is given to the southerly

continuation of the River Encuentro above the confluence with it of the River Falso Engano. The latter river is labelled Rio Engano followed by the word 'falso' in brackets. This is a clear indication that the name Engano, in use for this river since before 1919 was now recognised for what it was, a confusion with the River Engano of the 1902 Award Map. It is quite clearly not the Falso Engano of Carvajal's 1947 Survey. The name Mallines or Los Mallines is not employed on the map and Arroyo Lopez, although marked above its confluence with the River Encuentro is not named. Thus the nomenclature agreed by the officers of both Argentina and Chile in 1953 was in accordance with the general practice of both countries.

1954

54. Examination of the approach to the River Encuentro problem proposed by Colonel Urrea, Head of the Chilean Commission, in a memorandum to the Chilean Foreign Ministry in 1954 (CM/1 pp. 291-95) throws interesting light on Chilean attitudes towards the naming of rivers and mountains. Urrea sets out to

"formulate an immovable criterion which shall enable us to gain much, or at least not to lose in those regions in which we have a positive interest"

(CM/1 p. 295)

55. He suggests:

1. That the Encuentro problem "threatens the populated zone of California and at one time threatened the populated zone of Palena." (p.293).
2. That although Argentina had argued that the River Encuentro, "the present boundary", was not the river which appeared on the Award Map and that Boundary Post 16 was erroneously located, these arguments had been defeated and the principle of the immovability of Boundary Posts had been established.
3. That this principle must be maintained because it followed from it that Argentina was prevented from arguing that the line of the River Salto should be the boundary.
4. That what is the western branch of the River Encuentro should depend upon the terms of the Award. This would seem to

imply that Chile should give the name Encuentro to whichever river best fits the terms of the 1902 Award.

5. That the "real proper and convenient location of the Cerro de la Virgen", i.e. the mountain chosen to be the Cerro de la Virgen, must fit the terms of the Award and the river selected to be the River Encuentro.
6. That the Chilean denial that the Trigonometrical Point with the name Cerro de la Virgen was on the frontier line must be maintained, i.e. that the peak called Virgen of the 1902 Award was not the mountain called Cerro de la Virgen.

Urrea's emphasis is upon the words of the 1902 Award not upon those of the Report. He described what amounts to a process of seeking rivers and mountains to fit a particular set of words, those of the Award, rather than those of the Report, as had been attempted on the 1952 Carta Preliminar, thus giving a territorial advantage to Chile.

56. On the 25th October 1954 the Mixed Boundaries Commission's maps, Sheets VII-I, VII-2 and VII-3, were

delivered to Chile. These were later signed by General Urrea, (as he had become) Colonel Saavedra and Col. Figueroa for Chile, General Helbling, Senor Dvoskin and Major Gomez for Argentina. Sheet VII-3 names as the River Encuentro the river known by that name to the local inhabitants even before 1919, the Argentine Agricultural Surveyors in 1919; to the local inhabitants, to Engineer Cobos (Argentina) and by the experts of the Chilean Boundaries Commission who constructed map A.11 in 1945; to those people whose property bordered it in 1947, and Cobos (Argentina) and Cumplido (Chile) of the Mixed Boundaries Commission in 1947.

57. Sheet VII-3 of the Mixed Boundaries Commission shows as the Rio Falso Engano that river which was called Engano by the Argentine Agricultural Survey in 1919, by the local inhabitants, by Engineer Cobos (Argentina) and by the experts of the Chilean Boundaries Commission in 1945; and by those people who lived next to it or close by it in 1947; and which was called River Engano (falso) by Cerruti and Robledo (Argentina) and Alvarez (Chile) in 1953. It thus corrects the long standing misconception that this river is the Engano of the 1902 Award Map.

58. In the Chilean Memorial (C.M./1 p. 299-301) criticisms are made of these map sheets on the ground that they suffer from "fundamental error" and these criticisms are made in spite of the fact that the Chilean members of the Mixed Boundaries Commission, "the highest geographical authority in the country" (CM/2 p.227) signed them and thereby signified their approval of them. The first criticism is that they do not cover the area through which Chile now wishes to draw the boundary line. This is not surprising when it is realised that Chile's interest in that area did not become apparent until after these map Sheets were made. (See Arg. Mem. para 166 pp.159-160 and Map A47).

59. The worth of the criticisms that the name Rio Encuentro was "gratuitously" attached to a "newly christened Encuentro" by Argentina may be judged by reference to the history of the name of that river so far outlined. Thirty-five years, to take a conservative period, is a long time for a river to have had a name and yet be regarded as having been newly christened. Equally the view that the River Falso Engano on these map Sheets "was deprived of the name Rio Encuentro by which it had hitherto been known"

(C.M./lp.300) is a view of the history of the matter which does no justice to the facts. The statement in the Chilean Memorial on page 303 that the Chilean government knows that "in order to produce the desired boundary line, the Argentine Delegation switched the name Encuentro from the major to the minor channel" is absolutely untrue as may be judged by reference to the history of the river names so far outlined.

60. Chile further complains that the river named Encuentro on the map Sheets is shown as having its source in the valley whereas if that river is defined in Chilean terms it has its source 2 Kilometres to the east, on the slopes of Cordon de los Morros. It is a very strange argument in which the facts are redefined and then a complaint made that the original definition is wrong because it does not match the changed definition. What is a fact is that the Mixed Boundaries Commission, in the map Drawing No. 1 of Annex number 5 of Act 55, traced from the Mixed Commission Map Sheets, VII-2, labelled the River Encuentro, above the confluence with it of the River Falso Engano, with the name Rio Encuentro and indicated and named its source "Naciente de Rio Encuentro", (CH24. A) at a point precisely where the source of the Encuentro

is depicted on the sheet Cerro Virgen (VII-2).
This Drawing is signed by both Chilean and Argentine
members of the Mixed Boundaries Commission.

61. The criticism that the River Falso Engano
was not depicted by a double blue line has been
commented upon previously (Transcript p.40).

62. On 9th December 1954 Argentina proposed a
"status quo" in the area and depicted her proposals
on a map, the cartography of which Chile says was
defective (C.M. p. 295 and p.342). This map showing
"Bajo Jurisdiccion Argentina" and "Bajo Jurisdiccion
Chilena" also shows the River Encuentro in its proper
position.

1955

63. On the 7th April 1955 the Argentine
proposals for the boundary line between Boundary Posts
16 and 17 were presented to the Chilean element of the
Mixed Boundaries Commission in the form of tracings
over the Mixed Boundaries Commission's Map Sheets
VII-I, VII-2 and VII-3. (A.M. 50,51)

64. On the 30th of August 1955 General Urrea

(Chairman of the Chilean Boundary Commission) instructed Lieutenant Colonel Saavedra (Chilean Chief Delegate) in a Chilean internal memorandum, No. 88, "to determine the frontier line in such a way that the Chilean argument can permit of ample defence of the 'California zone' " (A.M. Annex 24, p. 105). Between the 20th September 1955 and 5th October 1955 a new map, scale 1: 50,000, was produced by Chile from trimetrogon air photos taken in 1944 (A.52, CH 22)

65. On this new map, which became the basis of the Chilean claim which was put forward at the meeting of the Mixed Boundaries Commission on the 20th October 1955, more geographical name changing is apparent. For the first time, as Chile has acknowledged, (Transcript p.17) the name Pico Virgen appears on a map. This Pico Virgen would appear to have the same location as the Cerro Central of earlier maps. The name River Encuentro is applied to the River Falso Engano as on Carvajal's map. The name of the stream which had, in 1947, been changed by Carvajal from River Encuentro to "Arroyo Falso Engano" and by Complido to "Los Mallines" is changed once more and becomes "Estero Lopez". Carvajal's "Arroyo Los Mallines" of 1947 becomes "Estero Mallines".

66. Thus the objective of Urrea's instruction to fit the geography of the terms of the 1902 Award to provide an ample defence of the "California zone" is at last cartographically achieved, there is now a river on the map which has been given the name River Encuentro along which the boundary is made to run to a peak called Virgen, placed there to receive it.

67. Although on the 1955 Chilean airphotogrammetric map, scale 1:50,000 (AM.52, CM.22) the Lakes of the Engano are shown quite correctly as having their outlet through the River Engano, the Chilean proposed boundary drawn on the tracing overlay (CH.22) crosses the River Engano between mountains whose altitudes are given as 1930 m. and 1790 m. This failure to follow a water parting as required by the 1902 Report does not appear in the description of this proposed line at page 312 of the Chilean Memorial. The description there given does not disclose that this line crosses the River Engano thus failing utterly to comply with the terms of the 1902 Report. This conflict is dismissed in the Chilean Memorial as a misconception of a Chilean cartographer.

68. The outcome of the 55th Plenary Meeting which

began on the 20th October 1955 in Buenos Aires was the abandonment by the Chilean Delegates of their proposal in the face of the Argentine refutation of it. They signed copies of the Mixed Boundaries Commission's 1:50,000 map, sheets VII-1, VII-2 and VII-3 (see Arg. Mem. para 169 p.161-2)

1957

69. Chilean efforts to find a better fit for the terms of the 1902 Award and Report were resumed in 1957. A detailed survey by one Pizarro drawn up in October 1957 in the Ministry of Lands and Colonisation, Department of Survey, Aisen, shows the ultimate step in the process. On this map (produced by the Agents for Chile to the representatives of Argentina) the head of the Falso Engano is shown as having two branches, one labelled "Brazo Oriental Rio Encuentro" the other "Brazo Occidental Rio Encuentro". The map shows the source of the latter as being on the western slopes of a Pico Virgen. The boundary is drawn along this branch, the western branch, and through the Pico Virgen. Thus on this map the geographical terms of the 1902 Report are met as well as those of the 1902 Award. When the Argentine Memorial was written the existence of this map was unknown to Argentina. The then earliest known map

to show the so-called River Encuentro (in fact the River Falso Engano) as having two branches was the Geomorphological Map of Palena of 1963-4 (A.28). On this map, it will be recalled, one branch was labelled "Eastern Branch" the other, an unnamed western branch, was followed by the boundary to a mountain labelled Pico Virgen. In the December Oral Hearings, (Transcript page 38), this latter map was quite correctly described by one of the Agents for Chile as the private work of Professor Börgel. The Court will note the similarity in river pattern and nomenclature in these two maps.

1959

70. The Carta Preliminar 1959 purports to express only the words of the 1902 Award in its representation and naming of the River Falso Engano as the Encuentro and the Cerro Central as the peak called Virgen, and it would appear that the 1957 attempt to also express the words of the Report as well as those of the Award on a map had been abandoned.

Summary of Chilean cartographic attempts to match the words of the 1902 Award and Report

71. Thus since 1947 it is possible to trace

successive Chilean attempts to produce maps made to meet the words of the 1902 Award and Report. In 1947 Carvajal's view of river names was consistent with a desire to meet the terms of the Award. In 1952, on the Chilean Carta Preliminar, an attempt was made to meet the terms of the 1902 Report as well as those of the 1902 Award by regarding the upper Encuentro (as known to Argentina) as the "western branch" and by shifting the name Cerro de la Virgen to a mountain in what today Chile calls Cordon de los Morros. In 1955 the Chilean cartography was changed to a form which again purported to meet the terms of the 1902 Award. The name Encuentro was given to the Falso Engano and Cerro Central was renamed Pico Virgen. The difficulty of not having a "western branch" was met by changing those words of the Report into "western stretch" in the verbal description accompanying the map and in seeking to suggest that those words really applied to the east-west reach of the River Falso Engano. In 1957 the words of the Award together with those of the Report were temporarily back in favour; the River Falso Engano was given two branches, (Pizarro map). But by 1959 this cartography seems to have been abandoned and the Carta Preliminar of that year showed once more a picture of rivers and mountains which purported to reflect the 1902

Award alone. This version has been retained through to 1966 but in the present proceedings a new attempt is being made to account for the lack of a "western branch", a source of embarrassment since the River Falso Engano is without question an eastern tributary of the River Encuentro. The words of the 1902 Report are not now interpreted, as they were in 1955, as "western stretch"; they have now become, it is said, "a reference without meaning". (CM/1 p.113)

72. The two props of Chilean cartographic argument in the period since 1947 have been that the River Falso Engano was the River Encuentro and that the Cerro Central - or some peak nearby - was really the peak called Virgen. During 1965 the latter prop was abandoned; Cerro Central was restored to the map with Pico Virgen alongside it and as stated by Counsel for Chile in the December Oral Hearings, (Transcript p.18), Pico Virgen is no longer "a name to which the Government of Chile attaches any particular importance", it is a name "of convenience" and the Chilean Government does not contend that the Pico Virgen "is the mountain which was referred to in the 1902 Award as Cerro Virgen". But in the 1902 Award, Report and Map the peak called Virgen (Award) or Cerro Virgen (Report) are indissolubly

linked with the River Encuentro by the words of the Report which state that the boundary should follow "the Encuentro along the course of its western branch to its source on the western slopes of Cerro Virgen". If the mountain which Chile has off and on for the past 10 years wished to identify as the peak called Virgen of the 1902 Award is now abandoned, it follows that the river she has used off and on since 1947 to get to that peak called Virgen must also be abandoned. The two are linked parts of the same line each dependent on the other.

73. Even if the Chilean abandonment of the view that Pico Virgen equals Cerro de la Virgen does not lead to the inevitable collapse of the view that the River Falso Engano is the River Encuentro, it is submitted that sufficient evidence has been given here to demonstrate that the River Falso Engano never was the River Encuentro, except in the eyes of those Chileans who wished to fit the terms of the 1902 Award and Report to it in order to draw a boundary line "in such a way that the Chilean argument can permit of ample defence of the 'California zone' " as General Urrea put it.

74. The "western branch", that persistent embarrassment to earlier Chilean attempts to meet the terms

of the 1902 Report and to its present claim, is in 1965 also abandoned to its fate, to become "a reference without meaning". This is a remarkable end for a geographical feature, so clearly recognisable on the 1902 Award Map and one which over the years Chile has tried so hard to create in the river system of the Encuentro.

75. Chile has now reached the position where the only contact between the Chilean claim and the geography in the 1902 Award, Report and Map are the words "River Encuentro". Chile seeks to identify and locate this river where in Chile's view it fits the so called "principles" or factors of the 1902 Arbitrator. But that identity and chosen location are precisely those which Chile has for the past seven years sought to justify on entirely different grounds, i.e. that they then fitted the plain words of the 1902 Award. In truth what Chile now seeks to do is to rewrite the 1902 Award without reference to the true geography contained in that Award.

Maps on which the real River Encuentro is marked and named

76. The name River Encuentro is given to that river which has its source at X5163550 Y1523670 on the

northern margin of Portezuelo de los Raices and its
confluence with the River Carrenleufu opposite Boundary
Post 16, on the following maps:-

<u>No.</u>	<u>Title</u>	<u>Sheet or Map No.</u>	<u>Author</u>	<u>Scale</u>	<u>Date</u>
AM9	Chubut Frac. D. Sec. I/III	-	Argentine Agricultural Survey	1:250,000	1919
A58	Datos de la Zona Rio Encuentro - LAGO VINTTER	-	Engineer Cobos (Argentina)	1:200,000	1945
All	Croquis Hidrografico de la Zona G. Paz - Rio Palena	-	Chilean Boundaries Commission	1:140,000 (approx.)	1945
A49	Field Sheet	4372-28-4	Argentina - Chile Mixed Boundaries Commission	1:50,000	1952/3
A30	Cerro de la Virgen	VII-2	" "	"	1952/3
A22	-	-	U.S. Army Map Service	1:1,000,000	1954
Arg. Mem Annex 24 p.76	Proyecto de "Status Quo"	-	Argentine Government	1:150,000	1954
A50	Reduction of Maps Nos. A29, 30 and 31	-	Argentine Boundaries Commission	1:100,000	1955
A23	-	-	U.S. Army Map Service	1:1,000,000	1956

The Physical Characteristics of the River Encuentro

77. The second ground on which the Government of Chile supports its contention as to the identification of the River Encuentro rests on the physical characteristics of that river (C.M./1 pp. 108-111). Chile seeks to do this by ascertaining which of two rivers, the so called "major" and "minor channels," may be taken to be the upstream continuation of the lower section of the River Encuentro.

The expressions "major" and "minor channels" are defined in the Chilean Memorial in terms of the conclusions Chile wishes the Court to reach. The reiterated use in the Chilean Memorial of these terms would be objectionable had not Counsel for Chile described them as no more than "neutral words" (Transcript p.12). In this Counter Memorial these terms are not used, the usual river names are employed.

78. Chile's first argument under this head concerns the relative lengths of the River Falso Engano and the River Encuentro above the confluence (CM/1 p.109). Length is not a relevant criterion by which to judge this matter. There is no geographical rule which states that the longest stream in a drainage basin must carry the name of the main stream to its most distant source. The Missouri above its confluence with the Mississippi is

longer than that part of the Mississippi upstream of the confluence, but the shorter river (i.e. the Mississippi) carries the name of the river below the confluence. Similar examples are to be found in many parts of the world including Argentina, where the River Desaguadero, the tributary, is longer than the Colorado. That the tributary, the River Falso Engano, is now longer than the River Encuentro is explained by the fact that what were the headwaters of the Encuentro now form the River Engano, part of the River Salto system. The reason for this change in drainage pattern has been described in the Argentine Memorial on p.67. The River Encuentro was formerly approximately 36 kms long.

79. A supplementary Chilean argument relates to the relative heights of the sources; (CM/1 p.110) that of the River Falso Engano is stated to be higher than that of the River Encuentro. This is not disputed. But it follows from this that the gradient of the channel of the River Encuentro is less than that of the River Falso Engano, as befits the major stream. In general the gradient of a river channel is inversely related to the size of the river. If, as in this case, the gradient of the River Encuentro is substantially less than that of the River Falso Engano it follows that

the River Encuentro is the major stream.

80. The second argument used by Chile relates to the relative discharges of the two rivers (CM/1 p.110). In this context it should be noted that a tributary may have a bigger discharge than the main stream. For instance in Chile the River Blanco, a tributary of the River Aconcagua has the greater volume. (H. Fuenzalida, Geografia Economica de Chile, Vol. 1., p.282).

The volumes of water in the Rivers Encuentro and Falso Engano vary seasonably. From November to February the Falso Engano has the larger volume as it is then being swollen by summer snow melt from Cerro Central and neighbouring mountains. Between April and November it is the Encuentro that has the greater volume of flow as it is fed throughout the year by springs from the base of glacial deposits in the Portezuelo de las Raices. The River Encuentro is much less influenced by summer snow melt than is the Falso Engano. Heavy rain at any time but particularly in January and February during snow melt causes the Falso Engano to rise more quickly than the River Encuentro.

81. It will be noted that the Chilean data on the

relative volumes of these two rivers (CM/2 pp.648-51) were taken in the months of January and February when the River Falso Engano certainly has the larger volume, but no comparison is made of their relative volumes at other times of the year when, according to local evidence, a contrary result would have been obtained.

The members of the Field Mission will have been able to make their own evaluation of relative discharges at the time of their visit.

82. The third Chilean argument attempts to relate the calibre of the load of the Rivers Falso Engano and Encuentro to their discharges (C.M./1 p.110). It is true that at their confluence the River Falso Engano brings into the main valley somewhat larger calibre material than is being carried by the River Encuentro. But again this is not unusual but rather to be expected of any tributary which, like the River Falso Engano, has a steeper gradient than the main stream, especially when that tributary is again, like the River Falso Engano, a short distance upstream of the confluence, incised into a narrow rock gorge, the cutting of which in geologically very recent times, has contributed to the tributary's large calibre bed load.

83. The fourth Chilean argument seems to regard

this rock gorge and that on the River Encuentro below Carrenleufu as evidence of the "continuity" of the two rivers (C.M./1 p.111). The east to west gorge on the River Encuentro like that on the River Falso Engano is a result of glacial diversion. The pre-glacial course of the River Encuentro was most probably due north from Carrenleufu roughly along a line parallel to the lowest reach of the Arroyo Cajon. At that time the River Encuentro probably formed a headwater of a river which flowed eastwards along the line of the present westward flowing River Carrenleufu. In this area many rivers flow through rock gorges just before they are confluent with a more important river, the River Encuentro with the Carrenleufu, the River Salto with the Carrenleufu, the River Engano with the Salto, and the River Falso Engano with the River Encuentro. The existence of two gorges in a river system has no bearing upon the question as to whether they are both on the main stream or one on the main stream and one on a tributary or for that matter whether both are on tributaries.

84. Chile does not include under the heading of the physical characteristics of the Encuentro in her Memorial any consideration of the most striking physical characteristic of the Encuentro river system, that is the continuity of the Encuentro valley above

and below the confluence with it of the River Falso Engano. This lineal continuity is not interrupted in any way by the confluence of the valley of the Falso Engano. It stands out clearly on the Geomorphological map "Palena" (A.28) and even more clearly, as the Court will have observed during the December Oral Hearings, on a relief model. On the contrary, in the December 1965 Oral Hearings the Field Mission was asked by Chile "to note the essential continuity of the south-east to north-west course of the river from the Cordon de las Virgenes to the junction with the Palena . . . a certain essential continuity in the direction and general force of the river stream right to point 16. The only interlude in that persistent south-east to north-west course is the interlude at the two right-angled bends, and as is appreciated this is a very short little reach of the whole river". (Transcript pp.61-62). In fact as a glance at the Chilean maps CH. 27, 28 & 29 will show the combined courses of the River Encuentro and River Falso Engano nowhere flow along a straight line between the so called Pico Virgen and the confluence of the River Encuentro with the River Carrenleufu. Everywhere the course of the two rivers departs well to the south or to the north of this line; not only in the two right-angled bends Counsel for Chile refers to but

also in the upper reach of the River Falso Engano which for the most part pursues a course south to north across the supposed "essential continuity in direction".

85. The Chilean Memorial employs a method of naming the River Encuentro and its tributaries which appears to be without geographical precedent. By this method each reach of a main stream is named according to the name of the tributary which enters the main river above that reach. In this way the Arroyo Lopez is deemed to give its name to that reach of the River Encuentro which runs from the confluence of the Arroyo Lopez to the confluence of the River Falso Engano. Similarly the name Arroyo Mallines is given not only to a tributary of the River Encuentro but also to the River Encuentro itself between the confluence of Arroyo Mallines and Arroyo Lopez.

86. The absurdity of this system of river nomenclature from a purely geographical point of view is self evident; if it were permissible to label a stretch of a main stream by the name of a tributary immediately upstream, then part of the River Carrenleufu should be called the River Encuentro below the confluence with it of the River Encuentro. Presumably it would be called the River Encuentro until joined by the River Salto when the Carrenleufu (Palena) would change its name to Salto if it

did not already have the name Culebra below the confluence of that river at Palena. The logical result of this process of naming would be that no main river would ever have a single name but would only exist as the sum of the names of its tributaries.

87. The Argentine view as to which is the "major" and which the "minor" channel has been expressed quite adequately by General Urrea, President of the Chilean Boundaries Commission, in Chapter III of his Report of 1956 (Arg. Mem. Annex 25).

88. Reclus, a French Geographer, thus described the attitude of geographers towards this whole problem,

"The expert who engages in the thankless task of determining the main branch of a river has consequently to take account of the most diverse characteristics: the volume of the waters, the length of the visible channel, the general direction of the valley, the nature of the geology; but whatever the result of his investigations, he must finish by giving way to all-powerful tradition. It is that and not science which has named the rivers...."

Elisee Reclus, La Terre (Vol. 1 Les Continents) 4 edn, Paris 1877, p.352.

But that all-powerful tradition does not permit "making the Encuentro follow the course of the lower section and the major channel" (*) as Chile seeks to do. (C.M./1 p.121).

(*) Emphasis added.

Source of the Encuentro

89. That "all-powerful tradition" (paragraph 88 above) has on the contrary established that the River Encuentro is the river which continues, to the south, the line of the River Encuentro below the confluence with it of the River Falso Engano. Now, a river may be said scientifically to have many sources, as many in fact as there are finger tip tributaries in its drainage network, but all-powerful tradition often establishes one of these as the source. In the case of the River Encuentro, however, the establishment of the location of the source was not left in the hands of tradition but was arrived at deliberately and with forethought by the Mixed Boundaries Commission in 1955.

Its location was specified in Act No. 55 by means of a grid reference on a 1:50,000 map to the nearest metre, (Arg. Mem. para. 83, p.84) on another 1:50,000 map the same point was marked and named "Naciente del Rio Encuentro". That there is a stream which has its source in a permanent spring at this point has been separately determined by an independent authority attached to the Field Mission. Rarely if ever can a river have had its source so unequivocally fixed. As late as December 1955 Chile itself recognised the same point as "the source of the western branch of

the River Encuentro".

In a Note No. 996/181 addressed by the Chilean Ambassador in Buenos Aires to the Argentine Foreign Ministry on the 19th December 1955 (Arg. Mem. Annex 16, pages 4 to 8), referred to in paragraphs 175 and 176 of the Argentine Memorial (pages 165 et seq.) and in paragraph 98, Chapter VIII of Part Three of the Chilean Memorial (at pages 360-361), after referring in general terms to the joint proposal sent by the Mixed Commission to the two Governments and embodied in Annex 5 of Act No. 55, the Chilean Government stated:

"Although the Chilean Ministry for Foreign Affairs feels that this proposal is to be commended, it nevertheless considers that the suggested line is not fully in accord with the Arbitration Award which fixed the frontier or with the Report of the Arbitration Tribunal, for the reasons stated in Act No. 55 of the XVth Plenary Meeting, which indicates that this procedure is adopted "having regard to the fact that the projected line and the reasons thereof put forward by the Argentine and Chilean Commissions could not be made to accord fully with the terms of the Award of H.M. Edward VII and the Report of the Arbitration Tribunal, because the source of the Western branch of the River Encuentro is not on the Western slopes of the Cerro de la Virgen but at the junction of the graphical coordinates X = 5163550 and Y = 1523670".
(Emphasis added).

Thus, in this Note, the Chilean Government was adhering to the determination made by the Mixed Commission in relation to the true source of the true River Encuentro.

CHAPTER 3

THE PROPER INTERPRETATION

90. This Court is required to determine the course of the boundary line in this Sector according to the proper interpretation and fulfilment of the 1902 Award. Moreover the Court is required by the Agreement for Arbitration (Compromiso) to make its report in accordance with international law; there is no question, therefore, of the Court having been given a competence to devise a new line, to compromise, or indeed to report on the course of the boundary according to any criteria other than those which are by rules and principles of international law pertinent to the proper interpretation and fulfilment of an award. The task of this Court is like that of the Judicial Committee of the Privy Council in the Labrador Boundary Case (1927) 43 T.L.R.289, where it was said:

"... but the duty of the Board is not to consider where the boundary in question might wisely and conveniently be drawn, but only to determine where, under the documents of title which have been brought to their notice, that boundary is actually to be found".

What is to be interpreted.

91. First, it is to be noted that what falls to be

construed is not a treaty but an award - a res judicata-
the validity of which is not questioned by either
Party.

Secondly, the 1902 Award comprises not only the Award strictly so-called but also the Report of the Tribunal upon which the Award was based and the Award Map upon which the boundary line was marked, and approved by the Arbitrator. It is hardly necessary to cite authority for the relevance to the process of interpretation of a map that is not merely annexed to, but is made part of, a boundary award. Its relevance is in any case made clear by Article V of the 1902 Award, which specifically refers to the Map for a "more detailed definition of the line of the frontier", and "upon which the boundary which we have decided upon has been delineated by the members of Our Tribunal, and approved by Us." It would, therefore, be nonsensical to try to interpret the Award without reference to the Award Map. It is a conspicuous weakness of the Chilean case that, the line claimed by Chile being, in its excursion to the east and in its return therefrom, at odds with the line depicted upon the Award Map, Chile is prevented from giving to that Map the degree of importance that it ought properly to have. Chile has sought in its Memorial to justify this shyness towards the Award

Map by the statement that the Map is "so heavily marred by error" (CM/1 p.80). This statement is, of course, a misleading exaggeration; the extent of the influence of error upon the Award Map has been evaluated in Chapter 2 above (see also Appendix A to this Counter Memorial).

92. Thirdly, the 1902 Award with its accompanying Report and Map, though at all times the principal "document of title", does not stand alone. Both Parties are agreed that its meaning is to be considered in the light of the 1903 Demarcation which settled the location of the Boundary Posts 16 and 17; "established", to use words of the Chilean Memorial (CM/1 p.72), "in a manner binding upon the Parties" that the River opposite Boundary Post 16 was "the Encuentro within the meaning of the Report and the Award"; and so entrenched parts of the river systems of the Encuentro and the Salto as necessary elements of the Award line. Consequently both Parties for many years thereafter regarded the boundary as following first what is in fact the River Encuentro and then what is in fact the "Western branch" and "source" of the Salto: witness, e.g., every official Chilean Map until 1952 (see also Chapter 4 below)

93. The problem of interpretation, therefore, is how to interpret these basic documents, having regard to the mistake under which the Arbitrator laboured, i.e. the confusion of what are in fact two different river systems, the River Salto and the River Encuentro. The purpose of the present Chapter is to answer the Chilean case so far as it relates to this question of the interpretation strictly so-called of the 1902 Award and to the legal effect of the 1903 Demarcation. The differing views of the Parties on the effect of the decision of the Argentina-Chile Mixed Boundaries Commission, the attitudes and claims of the Parties from time to time, and the relevance, if any, of the acts of the Parties on the ground, will be considered in later chapters.

"The principles of interpretation".

94. "It is taken for granted", says the Chilean Memorial (CM/1 p.95) "that in general the principles of interpretation of a judicial award are the same as those for any other legal instrument.....". Within limits this has doubtless some elements of truth. Nevertheless, it is suggested that the Court should approach this proposition with some caution, for it elides a material distinction. An award constitutes

a res judicata. It is not, as a treaty is, the product of the common will of the parties to it; on the contrary, an award has an objective existence independent of the wills of those who are subject to its obligatory force; its obligatory force does not derive from its acceptance by the Parties or from their consenting to its terms: it flows Ipsso jure from the award itself. Thus, for example, there can be no question of consulting preparatory work in order to elucidate the "intention" of the "parties"; and conversely, facts subsequent to the award have a strictly limited relevance. Dr. Shabtai Rosenne, considering the interpretation of a judgment. (The Law and Practice of the International Court (1965) vol.1, p.428) puts it this way:

"The general principle-which applies with equal force to the preliminary question of the admissibility of the request - is that interpretation cannot go beyond the limits of the judgment. This, itself, derives from the general principles of law embodied in the notion of res judicata."

It quickly becomes evident, however, that the Chilean view of the "principles of interpretation" is directed always towards diverting attention from the actual provisions of the 1902 Award for the boundary line in the Sector now under consideration, and towards generalities. Thus, at the very

outset in the summary statement of the Chilean contentions, it is stated (CM/1 p.11) that:-

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

It is perhaps useful to compare this call for an immediate plunge into "principles" of the Award with the official comment on Article 69 of the International Law Commission's Draft Articles on the Law of Treaties (G.A. 19th Sess. Official Records, Supp. No. 9 (A/5809)):

"This article is based on the view that the text must be presumed to be the authentic expression of the intentions of the parties; and that, in consequence, the starting point of interpretation is the elucidation of the meaning of the text, not an investigation ab initio into the intentions of the parties".

Later (CM/1 p.95) the Chilean Memorial selects, for mention, three "aids" to interpretation:-

"the Court will read the Award as a whole, with a view to determining its general purport and meaning, will refrain from attributing to words or phrases a meaning which would not be in conformity with the paramount purposes and principles of the Award, and will have regard to the facts and documents leading up to the Award as assisting towards an understanding of the intention of the draftsmen."

95. It can scarcely be denied that this is an incomplete statement of the principles of interpretation: a statement in which what is omitted is as significant as what is included. For what is

omitted is to relate these "aids" and "principles" to the object of interpretation, viz. the actual terms of the instrument to be interpreted: the actual words used in the Award and the Report for the boundary line in the Sector in question; the line drawn upon the Award Map for this Sector. For although the Court must certainly have regard to the Award as a whole, the primary instrument is the provisions of the Award for this Sector.

96. Not only is it the actual provisions of the Award that constitute the object of the interpretation: it must also be true that it is the actual provisions of the Award that constitute the primary evidence of any underlying principles. To consult the principles first would be an unwarranted inversion of the normal method of interpreting any juridical instrument. The point is made very clearly by Judge Sir Gerald Fitzmaurice in regard to the International Court's practice in the interpretation of treaties (B.Y.I.L. (1957) Vol. xxxiii, p.207). If it were not the case, he says, that the text is the primary consideration,

"it would logically involve that, after only a cursory reading of the text, interpretation would begin with an independent investigation, ab extra, of the intentions of the parties;

and only after these had been ascertained and established would the text be seriously considered, and its meaning and effect finally determined. In actual fact this is never the modus operandi. Interpretation starts, as it must, with a careful consideration of the text to be interpreted. This is so because the text is the expression of the will and intention of the parties. To elucidate its meaning, therefore, is ex hypothesi, to give effect to that will and intention. If the text is not clear, recourse must be had to extraneous sources of interpretation; but the object is still the same - to find out what the text means or must be taken to mean."

97. Thus the process of interpretation should not begin, as Chile urges, with a consideration of supposed "principles which the Tribunal and the Arbitrator followed in 1902"; but with the actual terms of the Award for this Sector which, it should be remembered, both parties agree is an instrument the validity of which has not been affected by the mistake. To begin by trying to discover "principles" is to do precisely what Judge Sir Gerald Fitzmaurice says is, in actual fact, "never the modus operandi."

98. Thus, to construct a line, as the Chilean Memorial urges the Court to do, which is not inconsistent with the "general purport of the Award as a whole", but is not reconcilable with the Award line in the Section, is not to interpret the Award for this Sector but to rewrite it. For no matter how

far the search for "aids" to interpretation may range, resort to them is for the purpose of discovering the meaning to be attributed to the actual words used in the Award and in the Report, and of the line drawn upon the Award Map and approved by the Arbitrator. The task laid upon this Court by the Agreement for Arbitration (Compromiso) is not to suggest a line that is not inconsistent with what Counsel for Chile called the "ratio decidendi" of the Award as a whole (Transcript p.49); but to report upon the course of the boundary according to the proper interpretation of the Award: a process that must take full account of all the terms of the Award in this present Sector. The legal position is again admirably summarized in the Comment in the International Law Commission's Report already cited above:

"... Moreover, the jurisprudence of the Court contains many pronouncements from which it is permissible to conclude that the textual approach to treaty interpretation is regarded by it as established law. In particular, the Court has more than once stressed that it is not the function of interpretation to revise treaties or to read into them what they do not, expressly or by necessary implication, contain" (emphasis supplied)

The Plain Terms Rule

99. If the basic principle is that the process of interpretation is to be directed at the elucidation

of the actual terms of the instrument to be interpreted, it will also scarcely be denied that the starting point of interpretation is "the plain terms rule": that plain words are to be understood in their plain meaning, and that where the meaning of a provision is clear on the face of it, it is not permissible to "interpret" it in such a way as to read into it a different meaning.

This basic rule curiously receives no mention in the Chilean Memorial. Yet it is a rule that is supported by the constant practice of the International Court of Justice, not only in the interpretation of treaties, but also in its interpretation of its own Judgments and Opinions. The rule was stated very clearly by the Court in the Admission to the United Nations case (I.C.J. Reports, 1950, p.8) in this way:

"...the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur. If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter."

and again (ibid;. pp.13,14):

"It is a cardinal principle of interpretation that words must be interpreted in the sense which they would normally have in their context, unless such interpretation would lead to something unreasonable or absurd."

It is not suggested, of course, that the simple application of the plain terms rule will provide the

whole answer to the problem of interpretation in a case where there is an element of mistake: but it is insisted that the process of interpretation cannot do otherwise than to begin with the ordinary meaning of the terms of the instruments of the Award in the context in which they appear in this Sector; particularly so, when the language to be interpreted consists mainly of the names of known and identifiable geographical features.

The "Dominating Consideration" of the Arbitrator.

100. It is stated by the Chilean Memorial (CM/1 p.454) that the 1902 Tribunal was searching for "a boundary which would combine as far as possible the conditions of an elevated watershed with geographical continuity"; and this, we are told, was "the dominating consideration" (CM/1 p.11). Further, says the Chilean argument, the "sole function" of the Encuentro "is to provide a connection, the element of geographical continuity, between 'the lofty water-parting' which forms the line between Boundary Posts 15 and 16 and the 'local water-parting' which was intended to form a substantial part of the line between Posts 16 and 17" (CM/1 p.57). If then this "local" water-parting was a principal component of the chosen line - as it surely was - it

would seem logical to see first which water-parting was chosen and whether it can be identified with precision.

101. Now, it is a striking feature of the terms of the 1902 Award for the boundary line in the relevant Sector that the description of that part of the boundary line that runs southward from the Cerro de la Virgen to Lake General Paz bears a meaning that is not only plain on the face of it but is in fact not capable of bearing any other than its plain meaning; and the earlier attempt by Chile to misplace the peak called Virgen mentioned in the 1902 Award having been abandoned, it may be assumed that the plain meaning of these words is agreed by both Parties. Moreover, the depiction of this part of the Award Line on the Award Map is accurately plotted, and is fully consonant with the geographical realities, there having been no element of mistake operating upon the mind of the Arbitrator in respect of the frontier in this part of the Sector.

102. Chile does not now attempt to deny the plain meaning of these terms; instead, observing that they are irreconcilable with a line that follows the River Falso Engano, Chile seeks to show that this clear part of the line is "dependent" upon the

definition of the Encuentro line. Thus Chile attempts to reverse the normal process of interpretation by making the meaning of the clear part dependent upon the interpretation to be given to the unclear part.

103. Yet nothing could be clearer than that words, whether plain or not, are to be understood relative to the context in which they appear; and there is no getting away from the fact that the unambiguous line from Cerro de la Virgen southwards is a part of the context in which the rest must be interpreted. In short, the interpretation of the boundary line running southwards from Boundary Post 16 should take account of the requirement that it must follow a course which can lead to Cerro de la Virgen. This is made very clear in the words of both the Award and the Report. The Boundary line is not merely to follow the River Encuentro, but, in the fuller words of the Report, "follow the Encuentro along the course of its western branch to its source on the western slopes of the Cerro Virgen. Ascending to that peak, it shall then follow the local water-parting southwards..." Thus, as has been shown in Chapter 2 above, the River Encuentro is indissolubly linked with the peak called

Virgen (in the Award), Cerro Virgen (in the Report) and C.d.l. Virgen (marked on the Award Map). The strength of that link has been impressively recognized by Chile in the early stages of the formulation of its claim, when the watercourse claimed to be the River Encuentro of the Award was always furnished with a "Virgen peak" above its source. Indeed, although the attempt to misplace the peak called Virgen of the 1902 Award was abandoned in the December 1965 hearings, its beguiling overtones are still to be heard in the Chilean Memorial which speaks of the boundary line as following the River Encuentro "to its source on the western slopes of the Pico de la Virgen" (CM/1 pp.11 & 12); and of a line following a river "which has its source on the western slopes of the pico de la Virgen" (CM/1 p.14).

"The true course of the River Encuentro"

104. The former Chilean pretension of the identity of her so-called Pico de la Virgen with the peak called Virgen of the 1902 Award having now been abandoned, the converse thesis has been adopted in the Chilean Memorial of trying to persuade the Court to disregard, or even to discard as irrelevant, those words of the Award and the Report that are irreconcilable with the proposition that the River Falso Engano is the River Encuentro of the 1902 Award. It is a fact

not without significance that, of the words describing the course of the boundary between the crossing of the River Palena and the crossing of Lake General Paz, the only words that survive this Chilean "interpretation" are "follow the Encuentro..." in the Report, or "follow the River Encuentro..." in the 1902 Award; for even the "water-parting" of the Chilean line is certainly not that "local water-parting" described in the 1902 Tribunal's Report, but is a different line which begins by following a range of mountains which was known to the Tribunal of 1902, seen by Colonel Sir Thomas Holdich, and discussed in argument before the Tribunal (see Chilean Reply, London, 1902, Vol IV, pp. 1354-5), yet not chosen by the Arbitrator as the water-parting line of the 1902 Award; and which nevertheless has to end by following what is in places an indeterminate water-part, in order to join the water-parting described in the Award, for only thus can it arrive eventually at Boundary Post 17.

105. Where an interpretation is found to be based upon an alleged identification of only one feature of the description of the boundary line in the Sector, which identification moreover inescapably requires the suppression of the whole of the remainder of the description of that line, this fact might well be

thought in itself to call in question the correctness of the interpretation. Chile has, nevertheless, having now no alternative, pursued this course relentlessly, so that her interpretation of the "true course of the river Encuentro" (CM/1 p.10) depends, inter alia, upon the establishment of all the following propositions: that the precise line of the River Encuentro was not an essential element in the Report and the Award (CM/1 p.14); that the words "western branch" are a "reference without meaning" (CM/1 p.113); that the reference in the Award and Report to the Cerro de la Virgen was "quite incidental" to the reference to the source of the River Encuentro, and was accordingly subordinate to the latter (CM/1 p. 15); and that accordingly "it is not possible to find the correct water-parting until the source of the correct river is 'identified'" (CM/1 p.116) and that the course of the boundary from Cerro de la Virgen southwards is accordingly "dependent" upon the location of the source of the River Encuentro (CM/1 pp.116 ff.)

106. Why are all these elements of the Award to be discarded or explained away? The reason given is that they are attributable to the "totally erroneous structure and course given to the River Encuentro in the 'Second Argentine Map' which was used by the Tribunal

to illustrate its Award" (CM/1 p.455, see also p.456). The impression is thus sought to be given that the Award was not itself subject to mistake but rather that the element of mistake is to be found merely in the actual descriptions of features which are derived from a faulty map; and in the depiction of the line on the map itself. That the attempt thus to drive a wedge between the Award and the Award Map is contrary to Article V of the Award and is indeed at variance with the history of the Award, has already been made clear. But there is another reason why the Court should approach this Chilean stratagem with some caution.

For to say that the structure and course of the Award river line in this middle portion of the Award line are totally erroneous is to beg the very question that this Court must answer. On what premise are they totally erroneous? After all it is the fact that the "western branch", the headwaters, and source under the western slopes of the Cerro Virgen, of a river, are depicted on the Award Map so accurately that they are readily identifiable on a modern map or on the ground, and moreover in the same location. Further, these waters are in fact part of a continuous river line from the River Carrenleufu to Cerro Virgen (and indeed, for that matter, from Boundary Post 16 following

the River Carrenleufu and then the River Salto). It is not therefore so easy to brush these features aside as part of a "totally erroneous" structure. On the contrary, it might be thought that there arises, at least, a presumption that a so correctly described and depicted portion of the line would be an element of the correct boundary line on any proper interpretation of the Award. It might be thought also to provide cogent evidence that whatever might be the "River Encuentro" of the Award it was not the River Falso Engano. "The relevance and value of the reference to the Cerro Virgen in the descriptions of the boundary by the 1902 Tribunal was therefore directly and inextricably linked to the supposed connection between that mountain and the source of the River Encuentro", says Chile (CM/1, p.456): it does not seem to be fully appreciated by Chile that this argument cuts both ways.

107. But the fact of the matter is that the Chilean thesis is in no way directed to establishing the line that is described and depicted in the Award; for the Falso Engano line is totally irreconcilable with the actual words of the Award and with the line drawn upon the Award Map. The sole link that Chile has attempted to forge between her line and the Award is the alleged

identification of the Falso Engano with the real - the "actual" - course of the River Encuentro. The difficulty that this thesis, even if established in fact, is at odds with all else in the Award, is dealt with, first by dismissing the Award Map as "totally erroneous" - which it is not - and then by abstracting the "western branch" as "without meaning", and discarding the Cerro de la Virgen as "irrelevant"; but keeping the purely general language of the Award and Report - such as the phrase "its source on the western slopes" - and using it to describe what is in fact not the Award line but the line of the River Falso Engano, and the water-parting "dependent" from the peak above the source of that river.

108. The actual location of the features has, of course, to be supplied with some link, however tenuous, with the Award; and since this cannot be done from the terms of the Award it has to be done by making each one dependent for its location upon the previous one, thus making the whole dependent upon the alleged identification of the "true course" of the Encuentro, working always from north to south because the system will only work that way when the only supposed point of the connection with the Award

is at the northern end. Thus, to illustrate the various stages from the words of the Chilean Memorial:

"...the essential criterion for determining the first part of the boundary line laid down by the 1902 Tribunal southwards from Post 16 is the identification of the actual course and source of the River Encuentro" (CM/1, p.455; emphasis supplied).

So, at the outset, the question of the course and source of the river is abstracted from the evidence set out in the Award, Report and Map and directed towards what is alleged to be the "actual" course. This is justified by the further proposition that "...the precise line of the Encuentro was not an essential element in the Report and the Award" (CM/1 p.14). Here, of course, no mention is made of the line drawn upon the Award Map and approved by the Arbitrator. For the location of the remainder of the line the "dependency" theory is pressed into service: "... the essential criterion for determining the second part of the boundary laid down by the 1902 Tribunal is the identification of the mountain peak on whose slopes the source of the River Encuentro is actually situated" (CM/1 p. 455): and further, "... it is not possible to find the correct water-parting until the course of the correct river is identified" (CM/1 p.116). Cerro de la Virgen as a fixed point is disposed of by saying that it "was

quite incidental to the reference to the source of the Encuentro" (CM/1 p.14) and that "the fact that this river does not lead to the western slopes of the Cerro Virgen is irrelevant" (CM/1 p.14). Nevertheless it is thought politic to define the "correct boundary" as being "represented only by the river which has its source on the western slopes of the Pico de la Virgen" (CM/1 p.14), so as to make it, if not consonant with what is said in the Award and Report, at least reminiscent of it.

109. Thus the only link between the Chilean line of 1965 and the 1902 Award is found in the words "River Encuentro"; and even this feature is identified by an argument ab extra which produces a result at variance with every other word of the Award and the Report and irreconcilable with the line drawn on the Award Map and approved by the Arbitrator. This is no interpretation of the Award, however liberally that process be defined; it is rather an ingenious parody of the Award written on the theme of the River Falso Engano.

110. It will be noted, however, that, even accepting for the sake of argument that so cavalier a treatment of the Award were permissible in law, the viability of

the Chilean argument even on its own premises depends absolutely upon the establishment of the truth of the assertion that the River Falso Engano is the "true course of the Encuentro"; the whole thesis depends upon this identification drawn not from the 1902 Award but from the history of river names in the area. This proposition is the uni-pivot upon which the whole structure of the Chilean argument is mounted, and Chile's only foothold in the provisions of the Award. If this is destroyed there is nothing left of any part of the Chilean theory of interpretation. For Chile itself in effect recognises that to depart from the actual provisions of the Award even in relation to this one remaining term, and to put forward the Falso Engano eo nomine as a river line that may be said to be in conformity with the "paramount principles and purposes" of the Arbitrator of 1902, would be to ask the Court too obviously not to interpret the Award for this Sector but to rewrite it; an operation which is outside the competence of this Court as defined in the Agreement for Arbitration (Compromiso).

111. That this proposition, which Chile itself makes absolutely necessary to its case, cannot be sustained, has already been demonstrated beyond doubt in Chaper 2

above. The geographical and geological arguments by which Chile has sought to show that the River Falso Engano is the River Encuentro have been dealt with there: but this argument of Chile about the so-called major and minor channels is not in any case decisive. What is decisive against the Chilean thesis is the overwhelming evidence concerning the river names, which shows beyond any doubt that the river which is known to Argentina as the Encuentro is properly so called; and that it was generally accepted to be the River Encuentro of the 1902 Award both below the confluence with it of the River Falso Engano as well as above that confluence. Furthermore, it has been shown that the River Falso Engano, though it was for many years called "Engano", was never called the River Encuentro by anyone until it was given that role in Chilean claims. This geographical evidence sweeps away the premise upon which the whole structure of the Chilean "interpretation" of the 1902 Award rests.

"The Dependent Part of the Description".

112. But the question of the identification of the "true course of the River Encuentro", though decisive against the Chilean case on interpretation, is not the only obstacle. Even if the geographical evidence were not

so strong against the Falso Engano theory, this interpretation would still require for its survival the suppression or subordination of the rest of the terms of the Award and the Report for the boundary line in this Sector and of the corresponding part of the line drawn upon the Award Map. It is proper, therefore, to consider on their own merits the legal devices by which these provisions of the Award are sought to be avoided.

113. The law leans strongly against any such avoidance. It is at odds with the hope Chile expresses that the Court "will read the Award as a whole"; and at odds with the well-recognized rule in regard to treaties, which must, if "in general the principles of interpretation of a judicial award are the same as those for any other legal instrument" (CM/1 p. 95), be applied to the interpretation of the 1902 Award. That rule is that "it is to be taken for granted that the parties intend the provisions of a treaty to have a certain effect, and not to be meaningless. Therefore, an interpretation is not admissible which would make a provision meaningless, or ineffective" (Oppenheim, International Law, Vol.1, 8th ed., 1955 p.955) A legal text should be interpreted in such a way as

to give a meaning to each provision of the text.

114. Chile in effect recognises this presumption of the law when the Chilean Memorial seeks to provide positive justification for the admittedly bold plan of subordinating or suppressing all those parts of the 1902 Award that are clear in their plain meaning and accurately depicted upon the Award Map. The Court will recollect that the attempted justifications consist of what may conveniently be called (i) a theory of impossibility; (ii) a theory of the uni-directional line; and (iii) a theory of dependence. It is necessary to consider each of these arguments briefly.

115. First, the Chilean theory of impossibility: in the summary statement of its case, Chile (CM/1 p.10) says this:

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

In a literal sense this may be true, and indeed a truism; for if it were possible to draw a line connecting all the geographical features strictly "in the manner therein stated", there would be no question

for this Court to report upon. The fact remains, nevertheless, that it is entirely possible to draw a line "which connects all the geographical features named in the Award and the Report": this is precisely what the Argentine line does; and it is surely what any interpretation of the 1902 Award must endeavour to do.

The Chilean anxiety to contend that it is not possible to connect all the geographical features in the manner stated in the Award and the Report is understandable, considering that the Chilean line does not connect any of those geographical features named in the Award and the Report between the River Carrenleufu and Lake General Paz, for the simple reason that it employs only one of them, viz: "River Encuentro", and gives to this a meaning which involves discarding the rest. In short, this supposed "impossibility" is the consequence of the Chilean "interpretation", not a reason for it.

116. Secondly, there is what may be called the theory of the uni-directional line: i.e. a line that can be traced from A to B but not from B to A. The Chilean Memorial (CM/1 P. 12) asserts, in its summary statement of the Chilean contentions:

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

This argument is of great interest, not only on account of its idiosyncrasy, but also because of the light that it sheds on the nature of the Chilean case.

It must be assumed that, by the phrase "language of the Tribunal" Chile means the words of the 1902 Award, or the Tribunal's Report or both: i.e. a description of the geographical features by which the course of the boundary line may be identified. Certainly, this description of the boundary line does in fact proceed from north to south, and it is hence necessary to proceed in this direction when actually reading the Award or the Report. But the assertion that it is necessary to proceed in this same direction in order to "interpret" the language of the 1902 Award can only mean that the language of the Award interpreted, as it were, from north to south, yields a result different from that which it yields if interpreted proceeding from south to north. Considering that the language of the Award is concerned only to describe a line, this is a remarkable proposition. It is difficult to understand how a line, identified by its terminal points and by points along its course, should, if plotted in one direction, be different

from the line plotted from the same description in the reverse direction: or, for that matter, from a random plotting of the identifying features.

117. The fact of the matter is that the Chilean argument about the "direction" of the interpretation process is meaningless except when it is coupled with the third Chilean theory, that all that part of the line south of the source of the River Encuentro is "dependent" on the line of that river (though this line itself is "not an essential element") so that the river line may, and should be, interpreted independently of its context in the other provisions of the Award, these latter being thereafter fabricated to conform with what has already been independently determined to be the river line.

118. But even if the dependence theory - for which there is no shred of evidence in the 1902 Award, in the Tribunal's Report or on the Award Map, and which contradicts Chile's own admission that the water-parting was the "dominating consideration" - were viable in itself, it would not achieve the result desired by Chile. For in this part of its argument Chile is dealing with the question of the proper interpretation

of what was said in 1902. And if what Chile alleges to be the dependent part of the line is clearly and accurately described, it follows that the river line, properly interpreted, must, whatever its course elsewhere, lead eventually to the point from which the "dependent" portion of the line subtends.

119. Moreover, the notion of a line in which each feature is "dependent" upon the one immediately to the north of it, is in no way reconcilable with the actual history of the drafting of the Award. It is apparent from the maps of the time, as well as from the history of the exploration of the area, that the 1902 Tribunal had at its disposal a number of maps which showed with varying degrees of accuracy the area to the north of the River Carrenleufu and the area to the south of latitude of Cerro Colorado (particularly in the central portion of the Sector). As already explained above the mistake operated only in the bridge between these two areas, so the Arbitrator was unable to connect the two parts accurately. Hence the confusion between the Rivers Encuentro and Salto. But if one is trying to understand and interpret what was done in such a situation one is not to proceed from the north or for that matter from the south. One can and should look at the whole Sector and try to do

exactly what the Arbitrator did, i.e. to relate the northern part and the southern part. In any case, to require for the purposes of interpretation that the part of the line that was accurately plotted should be dependent on that part that was directly affected by the mistake might reasonably be considered obtuse.

Conclusions

120. The foundation for the process of interpretation is the fact that neither Party has contested the validity of the 1902 Award. The Award is a res judicata, the binding force of which is independent of the wills of the Parties.

This binding Award being the object of the interpretation, it is therefore necessary to examine and to construe the actual provisions of the instruments of the Award for this Sector: viz. what is actually said in the Award and in the Report and the line that is drawn upon the Award Map.

Moreover the interpretation must begin, both in law and in commonsense, with the first canon of interpretation that plain terms are to be understood in their plain sense unless and until it can be shown that this leads to an unreasonable or absurd conclusion.

121. For this normal and reasonable method of interpretation, Chile would have the Court substitute one which proposes in effect to disregard all the actual provisions of the 1902 Award except for the injunction to "follow the Encuentro"; to inject into these words an understanding of the course of that river which is derived ab extra and which even so can find no sanction in the history of river names in the area; and which moreover is so completely irreconcilable with everything else that is said in the Award and the Report or drawn upon the Award Map, that all of it has in effect to be discarded as "inessential", "without meaning", or just "dependent". The Chilean arguments amount virtually to an admission that the line claimed by Chile is irreconcilable with the actual provisions of the Award and the Report or with the line on the Award Map.

Thus the Chilean case is essentially an invitation to the Court to construct a new line for the Sector under cover of a process of "interpretation". Indeed the Chilean Memorial states this in so many words: "First it must be recalled", says the Chilean Memorial, "that the Court is concerned now with the construction of a line rather than with the identification of points" (CM/1. p.117 - emphasis supplied).

122. Chile attempts, therefore, to forge another link between its line and the Award, by the use of certain so-called "principles which the Tribunal and the Arbitrator followed in 1902". It may readily be conceded that where the words of an instrument are not plain on the face of them recourse may be had to "further means" to assist in the interpretation; but it is still the actual provisions of the instrument that have to be interpreted. To use "principles" per se and in isolation, not to assist in discovering the meaning of the actual provisions but rather in substitution for them, is to cross the line between interpretation and revision.

Such a procedure could only be proper if the provisions of the 1902 Award with respect to this Sector were a nullity; but the Parties are in agreement that this is not the position, and in any case such a finding is not possible under the terms of the Agreement for Arbitration (Compromiso). If, indeed, the position were otherwise, and it were permissible to draw a new line simply in accordance with what Chile has stated to be the "principles" underlying the Award, it is not without interest to note that this would open the door to the proposition that the line most certainly in accord with those principles, as they are stated by

Chile, would obviously be one following not the River Falso Engano but the River Salto. However, it is the Argentine position that such "principles" cannot be used per se and in isolation as a basis for the process of "interpretation" of the 1902 Award and that in any case Chile's examination of these so-called principles is both partial and in many respects incorrect. This question is dealt with in Chapter 5.

CHAPTER 4

"THE FULFILMENT OF THE AWARD"

123. Chapter IV of Part Two of the Chilean Memorial begins (CM/1 para.49, p.123) by quoting from the Agreement for Arbitration (Compromiso), Art. I(1), whereby the Court is asked (as the Chilean Memorial puts it) "to report as to what 'on a proper interpretation and fulfilment' of the 1902 Award is the course of the boundary in the relevant Sector"; and the Chilean Memorial then offers to the Court "material on the basis of which the Court can consider the question of the fulfilment of the Award by the Parties and now by the Court".

The partial quotation from the Agreement for Arbitration (Compromiso) is itself misleading because it fails to add that the Question to the Court relates only - "To the extent, if any, that the course of the boundary ... in the Sector ... has remained unsettled since the 1902 Award". The Chilean "material" on "the question of the fulfilment of the Award by the Parties" is nevertheless subsequently claimed as having brought about "the only settlement of the boundary which has taken place in the Sector" (CM/1 para.(44) p.474), and "the fulfilment of the Award ... now by the Court"

amounts, for Chile, to nothing less than an assumption "that the Court will wish to take into consideration, recognize and give effect to the conditions of fact which have developed ... and as they exist today" (CM/1 pp.123, 124) or, to quote words used earlier in the Chilean Memorial (CM/1 p.16) and most strenuously contested, both in law and fact, by Argentina - "The present Court should also, when determining the boundary between Posts 16 and 17, pay regard to the extent of Chilean occupation in the area".

The Meaning of Fulfilment

124. It is therefore important that the Court, at the outset of its task, should determine what is the meaning of the term "fulfilment" in the Agreement for Arbitration (Compromiso). It may be useful here, to cite the context in which the word fulfilment appears; for "fulfilment" is not a term of art and its meaning must be gleaned from that context. The Question the Court has to answer is this :

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

Thus the Agreement for Arbitration (Compromiso) is quite

specific. The Court is not asked, nor given the competence, to construct a boundary line; it is asked to report on the course of the unsettled boundary line according to the "proper interpretation and fulfilment" of the 1902 Award. What, then, is meant by the "fulfilment" of the 1902 Award?

The first point that emerges is that fulfilment, like interpretation, is a notion that is relevant only to any part of the boundary line that remains unsettled, and therefore in need of interpretation. There is no warrant for the notion that any part of the boundary line in the Sector has become settled on account of its "fulfilment" in any sense which that word could bear in the Agreement for Arbitration (Compromiso).

Secondly, fulfilment refers only to "fulfilment of that Award"; there is no fulfilment in the air. Fulfilment is therefore strictly qualified by the Award itself; and the only fulfilment within the meaning of the Agreement for Arbitration (Compromiso) is fulfilment which is consistent with a proper interpretation of the 1902 Award. Fulfilment in this context can only be a realization of the Award, and realization of the Award implies essential conformity with its terms. To speak of a fulfilment of the Award that was at odds with the proper meaning of the Award would be nonsensical. Thus

if the Parties had at some time after the Award agreed upon a line at variance with the Award line, there might be a binding settlement: but it would not be a fulfilment of the Award. The only meaning of fulfilment, therefore, that can be extracted from the Agreement for Arbitration (Compromiso) is of something that is always the handmaiden of interpretation of the 1902 Award.

125. That interpretation of the Award is the primary notion and fulfilment is secondary to it, is by implication conceded in the Chilean form of pleading; even construing the notion of "fulfilment" as widely as the Chilean Memorial permits itself to do. For Chile nowhere feels able actually to assert that the "fulfilment" argument will in law stand up by itself. The "fulfilment" chapter is preceded by one devoted to an elaborate attempt to argue that the line for which Chile now contends is indeed the correct interpretation of the 1902 Award; by interpretation is here apparently meant interpretation stricto sensu, for there is no trace of "fulfilment" in the Chilean sense to be found in any part of this interpretation argument.

It is perhaps surprising that the line which so

solicitously takes account of "the conditions of fact which have developed in and in relation to the area of the relevant Sector since the date of the Award and as they exist today" (CM/1 p.124) should turn out to be the same line precisely as that which was said to result purely from an interpretation of the Award arrived at without having any regard to these other considerations.

126. Yet it is not suggested explicitly anywhere in the Chilean Memorial that the Court would have the competence, on the basis of the "fulfilment" material, to draw a line which was in any way at variance with a proper interpretation of the Award; on the contrary, the Chilean Memorial avoids meeting this test of the relevance of the "fulfilment" material by tailoring Chile's "interpretation" line - even at the cost of seeming to strain the limits of interpretation - so as to make it at all points coincident with the "fulfilment" line. Thus there is implicit in the very organization of the Chilean Memorial the recognition that, under the terms of the Agreement for Arbitration (Compromiso), the primary task of the Court is one of interpretation strictly so-called; that fulfilment is merely ancillary to this (see

CM/1, p.477, para.(B)), and that the Chilean line cannot be sustained unless it can be established as a proper interpretation, strictly so-called, of the 1902 Award.

127. Consequently, there is no warrant for the use of "fulfilment" as a sort of legal "hold-all" for any activities of a Party that might prejudice the question of interpretation. There must always be a line beyond which what a Party does is not a fulfilment of the Award, but is nothing more or less than a breach of it: where that line is, can only be established by reference to the proper interpretation of the Award.

128. It is necessary now to consider those legal questions to which, it is argued by Chile, the fulfilment material could be relevant.

Chile claims the relevance of this kind of evidence under three different headings. "In the first place", says the Chilean Memorial, "it constitutes conduct of the Parties to which reference may be made as an aid in interpreting the legal instrument which governs the relations between them" (CM/1 p.16). Secondly, says the Chilean Memorial (ibid.), the behaviour of the Parties may raise an estoppel. Finally, says the Chilean Memorial, "The present Court should also, when

determining the boundary between Posts 16 and 17, pay regard to the extent of Chilean occupation in the area" (CM/1 p.16).

These three arguments will now be considered seriatim.

Governmental activity as evidence of an interpretation placed upon the Award by the Parties.

129. Chile argues that governmental activity in the form of "undisturbed and uninterrupted occupation and control" will "constitute conduct of the parties to which reference may be made as an aid in interpreting the legal instrument which governs the relations between them" (CM/1 p.16).

It may immediately be agreed that the consistent subsequent conduct of both, or all, parties to a treaty can, in certain circumstances, be material evidence of the proper interpretation of the treaty - and indeed this proposition is relied upon by Argentina in its Memorial in relation to the competence of the Argentina-Chile Mixed Boundaries Commission. Whilst not conceding that a res judicata is by any means on all fours with a treaty, it may be agreed also that in certain circumstances the consistent practice of all the parties bound by an award could

be persuasive evidence of their understanding of the interpretation of the Award. The practice, however, must be the clear practice of all the parties; not merely a course of conduct adopted by one of them pursuant to its own view. Thus, Article 69, 3(b) of the International Law Commission's draft articles on the law of treaties refers to -

'Any subsequent practice in the application of the treaty which clearly establishes the understanding of all the parties regarding its interpretation'.

And the comment on this provision says:

"The value of subsequent practice varies according as it shows the common understanding of the parties as to the meaning of the terms. The practice of an individual state may, it is true, have special relevance when it relates to the performance of an obligation which particularly concerns that state." Thus in the Status of South West Africa Opinion the International Court of Justice said (I.C.J. Reports, 1950, pp. 135, 136):

'Interpretations placed upon legal instruments by the parties to them, though not conclusive as to their meaning, have considerable probative value when they contain recognition by a party of its own obligations under an instrument.'

"But, in general, the practice of an individual party or of only some parties as an element of interpretation is on a quite different plain from a concordant practice embracing all the parties and showing their common understanding of the meaning of the treaty".

130. But it will be clear to the Court from Volume II of this Counter Memorial that there was never

in fact any Chilean "undisturbed and uninterrupted occupation and control" in the disputed area. On the contrary, the fact is that there was, at first and for a long time, "undisturbed and uninterrupted occupation and control" by Argentina; it was this occupation and control that was later increasingly interrupted by Chilean incursions. It is manifest from Chilean protests and complaints that their own activities, far from being met with acquiescence on the part of Argentina, were met with measures which completely negate the existence of any common understanding on the boundary line now being claimed by Chile. Further, the whole history of the establishment and work of the Argentina-Chile Mixed Boundaries Commission is irreconcilable with the existence of any such common understanding. It is impossible to say that there could have been a common understanding on the present Chilean line when the fact is that Chile's own notion of where the line runs began to take shape only in 1955, and even so the waterparting element was to be completely revised as late as 1956. Moreover, as will be demonstrated below, the Chilean official maps themselves, certainly up to and including the Chilean Carta Preliminar of 1952, completely negate the possibility of the existence of any kind of

understanding between the Parties in regard to a Falso Engano line, by proving that this line was not even an understanding of Chile itself.

131. Indeed, the only agreement between the Parties was that expressly made by them, through their respective representatives on the Mixed Boundaries Commission; this was to the effect that, first, the definitive locations of Boundary Posts 16 and 17 were agreed; secondly, the identification of the line of the boundary from Boundary Post 16 was along the course of the River Encuentro as far as the confluence with it of the River Falso Engano; thirdly, the identification of the source of the River Encuentro was agreed as being at the co-ordinates established by the Mixed Boundaries Commission (see Arg.Mem. p.158) and, as shown on Map No.CH.24A; fourthly, the identification of Cerro de la Virgen was agreed as a point through which the boundary line should pass (see Acts Nos. 37, 39 (Annex) and 43, Arg. Mem. Annex 20 p. 26, Annex 21 p. 119, Annex 20 pp. 41, 43) and fifthly, the identification of the course of the boundary line along the waterparting described in the Award between Cerro de la Virgen and Boundary Post 17 was also agreed (see Act No. 55, Arg. Mem. Annex 23 p.2).

Estoppel: the 1913-15 Diplomatic Exchanges.

132. "Secondly" says the Chilean Memorial, the conduct of the Parties "precludes or estops Argentina from contending that the line of the Encuentro is in fact anything other than Chile treated it as being in the period subsequent to the Award and particularly after the correspondence of 1913-14" (CM/1, p. 16). The argument appears to be (see Transcript pp.50, 70) that certain communications exchanged between the Parties in the years 1913-15 (see CM/2 pp.150-159 for some but not all of these letters) resulted in an understanding between the Parties which amounted to a "settlement" of part of the frontier line south of the River Carrenleufu; and that later Chilean activity in the area "consolidated" the title thus obtained. Reference in this connection was made by Counsel for Chile in the December 1965 Oral Hearings to the Temple Case, which he said, "confirms that if the parties adopted an interpretation and this is at variance - as it was in that case - slightly with the original treaty agreed between the parties, that interpretation may, nevertheless, prevail" (Transcript p.51). This argument, which Counsel for Chile described as "a cardinal aspect of our presentation of this problem" (Transcript p.52) and as "of quite vital and decisive importance" (Transcript p.50), calls for a number of observations.

133. In the first place, the situation in the present case is the converse of that met with in the Temple Case. It will be recalled that, in the Temple Case, Cambodia had produced a map of the frontier, and Thailand, having failed to question the accuracy of this map until many years afterwards, was then held to be precluded from questioning the accuracy of the map, even though it was in fact at variance with the settlement it was supposed to embody. In the present case it was the Argentine Government which initiated the diplomatic exchange and its purpose was precisely to call in question the accuracy of the placing of Boundary Post 16 by Captain Dickson in 1903. Not that this was a new idea in 1913: the Court will remember that Senor Frey, the Argentine officer with Captain Dickson's Party, had expressed to Captain Dickson his view that the Post had not been placed in the correct position (see Arg. Mem. Annex 13, p.13).

This question concerning the correctness of the placing of Boundary Post 16 was therefore raised anew in the Argentine Notes of the 9th December, 1913 and of the 26th January, 1914 (and these will be found in CM/2 pp.150-159), asking merely for a joint appointment of officers to inspect and report. This request was repeated in Argentine Notes of the 9th December, 1914 and the 6th October, 1915, the texts of which are

neither mentioned in nor exhibited to the Chilean Memorial. They are now submitted to the Court as Annex 33 to this Counter Memorial. To these repeated requests for a joint inspection of the Boundary Post Chile failed to respond.

134. Thus these four Argentine Notes were, if not formal protests, all communications whose explicit purposes was to question the placing of Boundary Post 16 and to reserve the Argentine position in regard to it. There could be no conceivable argument that this raises an estoppel against Argentina; estoppel and acquiescence flow from the failure to deny, not from the denial of, an assertion. The Chilean argument, however, relies apparently upon the attempt to extract an estoppel from the eventual cessation of Argentine representations, following upon these exchanges. After 1913-14, said Counsel for Chile in the December 1965 Oral Hearings (Transcript p. 51), the matter seems to have been dropped.

135. But in fact there was no period of inaction immediately following the two Argentine Notes that Chile annexed to its Memorial (CM/2 pp.150, 159). On the contrary there followed two further Argentine Notes (Annex 33 to this Counter Memorial), each

insisting upon the need to appoint engineers to investigate the location of Boundary Post 16; and to these two further notes Chile apparently made no reply, and did not appoint a Chilean officer to carry out the joint investigation that Argentina had proposed. Is it really being suggested by Chile that where a State reserves its position four times in the space of two years it may be held to have accepted that which it is reserving against, because, its last two Notes having evoked neither an affirmation nor a denial from the other party, it failed to persist further in the unilateral correspondence? To hold that a Government, as a direct result of a consistent series of protests, may be precluded from further questioning that which is the very subject of its protests and reservations, is a truly astonishing inversion of the principle of the Temple Case, and one which would introduce an intolerably quixotic element into the conduct of international relations.

136. It is of course, as far as the main substance of the Notes goes, an academic point: for the sole purpose of the Argentine Notes was to question the location of Boundary Post 16, and it is now common ground between the Parties that Boundary Post 16 is accepted as fixed

for the purposes of the present Arbitration. The Court may wonder, therefore, that Chile should make inferences drawn from the indeterminate correspondence of 1913-15 a "cardinal aspect" of the presentation of Chile's claim; for this seems on the face of it to be beating at an already open door.

The reason, which is a somewhat curious one, is apparently to be found in the use that is sought to be made of one sentence in the Argentine Note of the 9th December, 1913 (CM/2 pp.150-1). This sentence, after drawing attention to Captain Dickson's placing of Boundary Post 16, goes on to say that -

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

Counsel for Chile seemed in the December 1965 Oral Hearings to be trying to fashion out of this sentence a sort of admission by Argentina that, if the placing of Boundary Post 16 were accepted - as it now has been - it would follow that the line could not pass through the "peak called Virgen"; though it would appear from

the Chilean anxiety displayed even in the 1950's to find a peak called Virgen for its claimed line to pass through, that Chile itself had been singularly unimpressed by this supposed admission.

137. It is perhaps doubtful in any case whether any weight ought to be attached in a case of this nature to one sentence in one dispatch of fifty years ago; though this argument by Chile is interesting as showing the need Chile feels somehow to lend an appearance of maturity and continuity to its presently claimed line. But in any case the sentence must be understood alongside the maps and the geographical knowledge of the period; and it was true that Captain Dickson had not placed Boundary Post No. 16 in the position depicted on the Award Map (See Appendix B); and that this had indeed seemingly resulted in a distortion of the course of the boundary both north and south of the River Carrenleufu, as can readily be seen on any modern map. The Argentine Government was, of course, mistaken in supposing, therefore, that the Boundary Post had not been placed opposite the River Encuentro; but it was natural enough to suppose that the Boundary Post might have been placed opposite a river further to

the east than the Encuentro of the Award Map. No doubt the Argentine Government was confused about the position: indeed, why else should they be asking for a joint investigation? It is inconceivable, however, that this state of doubt, inquiry, and desire for a joint investigation on the spot, could result in an estoppel - much less a settlement.

138. It will not have escaped the notice of the Court, however, that in the correspondence there is not a single word in either of the replies from the Government of Chile to the first two Argentine Notes to suggest, even by inference, that the proper course of the boundary line in the relevant Sector is along the course of the river which Chile now calls the upper course of the River Encuentro, viz. the River Falso Engano. If the Government of Chile really had regarded the Argentine Note as the basis of a "settlement" of the course of the Encuentro line, it is simply not credible that Chile would have failed in its replies to the first two of those Notes to advert to this supposed "agreement" and have failed to reply at all to the third and fourth Argentine Notes.

139. But indeed there is explicit evidence that Chile had no thought at this time of any such boundary line,

for it should be noted that a Memorandum dated the 26th December 1913 (annexed to CM/2 pp.152-155) mentioned generally at CM/1 p.92` was delivered by the Chilean Ministry for Foreign Affairs to the Argentine Ambassador in Santiago, in reply to the Argentine Memorandum dated the 9th December, 1913.

As may be seen from the second paragraph of this Chilean Memorandum, the matters dealt with in the second paragraph of the Argentine Memorandum under reply had been the subject of a Report from the Director of the Chilean Land Survey Office, the text of which Report was entirely incorporated in the Memorandum. This Report was framed by a Chilean Expert to oppose the suggestion made in the Argentine Memorandum, namely, to use the words of the Chilean Expert himself, "that the boundary post Number 16 on the River Carrenleufu erected by Captain Dickson is not in the place indicated in the Arbitral Award, opposite the mouth of the River Encuentro, but more to the East of that point, opposite the mouth of another different river which has its source in the vicinity of the Peak Herrero".(CM/2 p.153)

It is apparent from the text of the Report of the Chilean Expert that Chile regarded as erroneous the suggestion which had been made by the Argentine

Government in 1913 - that Boundary Post 16 had been placed by Captain Dickson opposite a river which had its source in the vicinity of the Peak Herrero. The Chilean Expert concluded that the co-ordinates and bearings given by Captain Dickson (including the bearing given to Cerro Cucho of 37° which the Expert said should be read as 57°) all tended to demonstrate that the boundary post was fixed opposite the mouth of the River Encuentro and did not favour the suggestion made by the Argentine Government that it had been placed at the mouth of another river which had its source in the vicinity of the Peak Herrero.

140. The truth of the matter is put beyond all doubt by the same Chilean Note of the 26th December 1913 which concluded with the words: "Three maps of the region are attached hereto" (CM/2 p.155). Of these three maps, that which covered the present Sector had certain indications of triangulation points marked upon it by the Chilean Government; yet the Chilean Government had not marked upon it a boundary line following the River Falso Engano; nor had they altered, or commented upon, the existing depiction upon that same map of a boundary line which (a) manifestly did not follow the River Falso Engano and (b) did go through Cerro de la Virgen. This map is now annexed

to the present Counter Memorial as Map A59 and is thus presented to the Court for the first time in these proceedings. If any Temple Case type of estoppel is to be found in the 1913-14 exchanges it is surely here: a map, with some Chilean markings upon a Chilean base, indicating the boundary line in a place which cannot possibly be reconciled with the present Chilean claim, is sent by the Government of Chile to the Government of Argentina appended to an official diplomatic Note and attention specially drawn by the Government of Chile to the map. It would be difficult to find a neater case of an estoppel situation.

Estoppel: Later Chilean Maps.

141. The evidence of the Maps is not confined to the map which accompanied the 1913 Chilean Note. Later maps are possibly more significant.

(i) The position in 1928 is depicted on a 1:500,000 map prepared by the Chilean Lands and Colonization Office (Map A17). This shows the frontier line following a River Encuentro in a clear north-south direction to Cerro de la Virgen, which is also marked. The map makes no attempt to show a boundary line passing through the eastern range now called by Chile the Cordon de las Virgenes, though Cerro Central is clearly marked nearly 20 kms. east of the nearest point

of the boundary line.

(ii) In 1940 there was published in Memorial Tecnico del Ejercito de Chile (See Annex 27 to this Counter Memorial) a map which formed part of the work of a Commission of the Chilean Military Geographical Institute; this map again shows the frontier line as one following a river which clearly is not the Falso Engano, and also shows it quite plainly as a line which passes over Cerro de la Virgen which peak is indicated in its correct position.

(iii) On Sheet 14 of a map also prepared by the Chilean Military Geographical Institute (Map A20 CH.20) in 1945, much the same boundary line is indicated but here with certain important additional details. The settlement of Palena is shown well to the west of the boundary line and thus in Chilean territory; yet the boundary line still follows the river southward and eventually reaches Cerro de la Virgen. Cerro Central is again marked, this time some 40 kms. east of the boundary line.

(iv) The Carta de Navegacion Aerea No. 6, again prepared, in 1946, by the Chilean Military Geographical Institute, for the Chilean Air Force, shows the same course of the boundary as that on the map last described.

(v) In 1951 a Chilean map prepared under the instructions

of the Director of the Department of Roads (of the Ministry of Transport and Means of Communication), and published with a report in Revista Geografica de Chile, 1952 (See Annex No.34) shows the frontier line passing the place called El Azul which the Chilean Maps of 1965 show as being opposite the confluence of the River Engano with the River Salto. Thus, the boundary is here defined in terms of a readily - identified Chilean settlement.

(VI) The next stage in the story of the Chilean official maps was in 1952 when there was published a new Chilean map based upon aerial survey, the Chilean Carta Preliminar 1952, which was annexed to the Argentine Memorial as Map A 32. This is a most interesting map because it shows so very clearly that at this time (i.e. during the work of the Argentina-Chile Mixed Boundaries Commission in the Sector), Chilean ambition was beginning a modest augmentation, still however, very far from the claim to which she is now attempting to give a history extending back to 1913. The following features should be noted on this map of 1952:

- (a) The river Falso Engano is clearly depicted but is given no name (what might at first impression be mistaken for the name of the stream is the name

of a settlement here called "Encuentro",
indicated by an empty circle);

(b) Nevertheless, the frontier marked on this
Chilean map by Chile still does not follow the
River Falso Engano but follows the river which
Argentina knows as the River Encuentro;

(c) The line does, however, diverge at the
southern extremity of the Encuentro valley to
follow an unnamed stream, and "Co de la Virgen"
is misplaced to the east to make this slightly
modified line fit in with the terms of the 1902
Award and of the Report.

Thus as late as 1952 an officially prepared and
published Chilean map indicated quite clearly that
at this time, in the opinion of the Chilean Government,
the boundary line did not follow the River Falso
Engano and it did follow the watercourse known to the
Argentine Government as the River Encuentro, at any
rate as far as the confluence with it of an unnamed
stream, apparently the Arroyo Mallines.

142. It is not until 1955, in the Chilean 1:50,000
aerophotogrammetric map (Map A52), that the Chilean
maps give an indication of what may be called the
preparatory work for the present Chilean claim.

This map shows, for the first time in a map made available to Argentina, the River Falso Engano as the "River Encuentro"; and this is the map that not only shows a "Pico Virgen" above the source of the River Falso Engano, but also suppresses the name of true Cerro de la Virgen, though the feature itself is indicated by the contour lines. It was on this map that the present Chilean claim in that stretch of the boundary line was first traced (see Map A.53).

143. Thus, certain important propositions are consistently substantiated until 1955 by a whole series of Chilean official maps or officially approved maps (a list of these maps is at para. 147 below). These propositions are:

- (a) that the River Falso Engano is not the upper course of the River Encuentro;
- (b) whatever the Falso Engano might be called the course of the boundary line does not follow it, but continues southwards along the main valley;
- (c) the boundary line must pass over Cerro de la Virgen and follow the local waterparting southwards;
- (d) the boundary line so depicted left the

eastern range of mountains, including Cerro Herrero, Cerro Central and what later "came to be called" (see CM/1 p.9) Pico de la Virgen well to the east of the boundary line and entirely within Argentine territory.

144. The significance in law of officially published maps need not be laboured. Thus, for example, C.C. Hyde says (A.J.I.L. vol. 27 (1933), p.315):

"...Thus a map published by a State, or under its auspices, or purporting to reflect its position, and which it has been disposed to utilize as a means of publicly revealing its position, may be fairly accepted as establishing that when issued it represented what that state deemed the limits of its domain. Moreover, when a series of maps of such a kind, appearing within a few decades, tell the same story and depict substantially the same limits, the conclusion is justified that they mark a frontier beyond which the interested state cannot go without some fresh and definite and respectable process of acquisition, such as one embodied in a treaty of accession. Thus, in the course of a boundary arbitration the most obvious function of an official map issued under the auspices of a particular litigant may be that of holding that litigant in leash."

145. Thus, the principle of the Temple Case operates in a way which is the converse of that suggested by Counsel for Chile in the December 1965 Oral Hearings. After the exchanges of 1913-14 says the Chilean Memorial (CM/1 p. 16) - "The Argentine Government did not thereafter by word, note or deed, challenge

the Chilean position until 1952". This statement is intended to carry the implication that the Chilean position was during that period what it is now. This implication is the reverse of the truth.

The Chilean position maintained throughout the correspondence of 1913-14 was that Boundary Post 16 was correctly located by Captain Dickson. This proposition in no way requires that the boundary should thereafter follow the River Falso Engano and thence some "dependent" line which apparently even Chile herself was not able to formulate finally until November 1956. It is impossible to believe that, had "the Chilean position" been what it has become today, Chile would have omitted to mention it even by implication at any stage of the 1913-14 exchanges; that Chile would have omitted to indicate its version of the boundary on any of its published official maps until 1959; that the Chilean expert members of the Mixed Boundaries Commission would have agreed to a decision on the line from Cerro de la Virgen southwards that takes no account of the present Chilean claim, or to a proposal for the middle of the Sector that likewise is irreconcilable with the present Chilean claim.

146. In the Temple Case the estoppel was worked by one map to which the party estopped did not object in time. In the present case it is not a question of one map: it is a question of every Chilean map from the time of the 1902 Award until after the date that Chile itself has chosen as "the critical date", viz: 1952. It is difficult to conceive of a clearer case of estoppel than this case; for the situation speaks for itself.

147. The following list shows the depiction of the boundary line between Boundary Posts 16 and 17 on Chilean Maps "published by Chile or under its auspices or purporting to reflect its position" between 1906 and 1959 :-

Map(a)	Date	Direction of the Line
A13	1906	Follows the course of the line on the Award Map
A14	1907	ditto
A15	(1910)	ditto
A16	1910	ditto
A17	1928	ditto
(In Annex No.27)	1940	ditto
A27	1941	ditto
A20	1945	ditto
A21	1946	ditto

Map (a)	Date	Direction of the line
(in Annex No.34)	1952	Follows the course of the line on the Award Map (but south of the place marked El Azul the line follows what is probably a representation of a Communal boundary.
A32	1952	Follows the river known to Argentina as R. Encuentro and then an unnamed tributary apparently the Arroyo Mallines (b)
A53	1955	Follows the R.Falso Engano to a Pico Virgen, thence southwards to cross the R. Engano to reach B.P. 17
A33	1959	Follows the line of the present Chilean claim

(a)

As all the maps, except those in Annex Nos.27 and 34 are fully described in the Table of Maps, Plans and sheets in the Argentine Memorial (pp.261-268), only their numbers are here given.

(b)

For details of this change, see Arg. Mem. page. 88.

"The extent of Chilean occupation in the area"

148. In its "summary statement of Chilean contentions", the Chilean Memorial states as the tenth and final contention that "The Present Court should also, when determining the boundary between Posts 16 and 17, pay regard to the extent of Chilean occupation in the area" (CM/1, p.16).

The Court will readily recognise that, though made

the last point of the summary statement of Chilean contentions, this is the statement upon which Chile is pinning its hopes of persuading the Court to report in favour of the Chilean claim; but this very wide suggestion, unlike those relating to interpretation and estoppel, is unsupported by legal argument or legal categories. Indeed, there is no pretence that this suggested use of "fulfilment" has anything to do with the interpretation properly so called of the 1902 Award; yet this Court has not been created for the purpose of "determining the boundary", but of reporting on the course of any unsettled portions of the boundary according to the proper interpretation and fulfilment of the 1902 Award.

Further, there has evidently been a shift in the meaning of "fulfilment" in this Chilean attempt to relate it to "occupation in the area": for whereas the other two uses of fulfilment proposed by Chile refer always to "fulfilment" as comprising the alleged behaviour of both Parties ("action by Chile and acquiescence by the Argentine", CM/1 p.16), the Court is in this later proposition given what amounts to an open invitation to drive a coach and pair through the terms of the Agreement for Arbitration (Compromiso) and rewrite the 1902 Award line having regard simply

"to the extent of Chilean occupation in the area". This important, though unexplained, shift in the meaning of "fulfilment" as used by Chile, appears again in another part of the Chilean Memorial where it is suggested, under the general heading of "The Fulfilment of the Award", that "the Court will wish to take into consideration, recognize and give effect to the conditions of fact, which have developed in and in relation to the area of the relevant sector since the date of the Award and as they exist to-day" (CM/1 pp.123-4).

149. It must first be said that there is an important element of contradiction between the suggestion on CM/1 p. 124 that the Court might take into account "conditions of fact... as they exist to-day"; and the allegation in the summary statement of contentions (CM/1 p.15), that "The Parties have effectively fulfilled the Award on this basis [i.e. the presently - claimed Chilean line] for half a century, from 1902 until the question was put in dispute in 1952".

Thus, assuming though not conceding, that the "critical date" was as late as 1952 (see CM/1 pp.478-9), the Chilean case must be, as indeed the Chilean

Memorial states it to be, that on the 25th July 1952 "Chile already possessed a valid title to the areas in question" (CM/1 p.479); but if this was so, it follows that "conditions of fact" in the area "as they exist to-day", or indeed at any time since 1952, could not affect the issue one way or the other. Thus even accepting, for the purpose of argument, the premises on which Chile herself relies in her "fulfilment" argument, it follows from these premises that "conditions of fact, which have developed in or in relation to the area" since the 25th July 1952, are otiose to the task of the Court. This is not, of course, to admit that "Chilean occupation" would be relevant at any time since 1902 to the proper interpretation and fulfilment of the Award: it is simply to point out that "Chilean occupation" after 1952 must in any event be irrelevant even accepting Chile's own premises.

150. Next it is necessary to consider the nature of those "conditions of fact" on which Chile relies and to make an elementary but important distinction between the acts and attitudes of private persons and the acts of governments: a distinction which the Chilean Memorial elides.

The Irrelevance of acts and affiliations of private persons.

151. In international law, the only kind of activity that could at any time be relevant to a question about territorial sovereignty is activity by governments themselves: i.e. acts of administration and government of such a nature as are, unless mere usurpation, explicable only as acts of territorial sovereignty. Indeed the principle is once correctly stated in the Chilean Memorial (CM/1, p.16): "uninterrupted occupation and control of the area by Chile, undisputed for fifty years", constituting "action by Chile" in which Argentina is, moreover, alleged to have acquiesced (emphasis supplied). All this, if it could be demonstrated, as a matter of fact, would be a consideration known to international law; one which could in certain circumstances be relevant to a question of territorial sovereignty, though not to the interpretation and fulfilment of an existing boundary award constituting a res judicata.

152. On the other hand, the mere presence in a particular area of private persons of this or that affiliation, sympathy, or nationality or ambition is neither here nor there. Yet much of the Chilean material amounts to no more than this: that persons possessing Chilean nationality are or have been.

living in the disputed area. This is not evidence of "occupation" or "control" of territory, whether in legal principle or as a matter of political reality.

Argentina has always attracted large numbers of immigrants from neighbouring States; in particular, there are, and always have been, in Argentina, especially in the Patagonian Provinces, concentrations of immigrants of Chilean nationality and origin. Argentina has not sought to prevent this nor has ever imposed the requirement of political assimilation of the immigrant population. It would be unfortunate, to say the least, if such immigrant settlements in frontier districts were ever supposed to be relevant to the interpretation and fulfilment of an international boundary award. Such a supposition would mean that a State might lose territory as a consequence of pursuing a liberal immigration policy; and would give the imprimatur of law to a method of generating territorial claims of which recent European history yields some not very attractive examples.

153. If the mere presence in frontier districts of people hailing from a neighbouring country were once held relevant to the interpretation of a boundary line, there would be few international boundaries that would

be safe from the corrosive effect of such a doctrine; and its application in this small part of the Argentine-Chile frontier, far from producing stability, would have the effect of dissolving a settled international frontier in perhaps a score of other and more important sectors, in some of which the proportion of Chileans in the total population of the district reaches a high percentage.

154. Furthermore, even activity of a State as sovereign, if it be merely in respect of its own nationals, is in no way evidence of the possession of territorial sovereignty.

As Professor D.H.N. Johnson has put it:

"A further consequence of the requirement that the possession be exercised a titre de souverain is that it is not enough for the state to show proof of legislation regulating its own nationals in the area concerned. A state may legislate for its own nationals anywhere in the world, whether in foreign countries or on the high seas, without any consequence affecting the status of those countries or of the high seas following from such legislation. It is only if the State has legislated for the territory as such, and this legislation has been acquiesced in by the other state or states concerned, that there has been an exercise of sovereign power sufficient to found a title to that territory on the basis of prescription."

(British Year Book of International Law (1950)

vol. XXVII, p. 345)

But for reasons which will now be considered, even legislation by a government for the territory as such is not relevant to the interpretation and fulfilment

of an existing, valid award.

The irrelevance of adverse prescription.

154. There can be no question in the present case of the acquisition of a new sovereignty by virtue of the unilateral activities, even governmental, of one Party. There can be no title by "occupation" in the strict sense because no part of the territory has at any material time been a res nullius. Neither can there be any question of either Party establishing a root of title to sovereignty by any form of adverse prescription. For the acquisition of an adverse title would carry the inescapable implication that the territory in question had been the territory of the other Party according to the proper interpretation of the 1902 Award; and as has been pointed out already, in the terms of the Agreement for Arbitration (Compromiso) the word "fulfilment", just as much as the word "interpretation", is qualified by reference to the 1902 Award. Whatever "fulfilment" may or may not mean, it cannot reasonably be suggested that a unilateral and adverse taking by one party of territory adjudged by the Award to the other Party is a "fulfilment" of that Award. This must be the position if the proposition, accepted by both Parties, that the whole of the

frontier was in principle delimited by the 1902 Award, is to have any meaning. The point was well stated, arguendo, in the St. Croix River Arbitration (Moore, International Adjudications, Mod. Ser. Vol. 1, p.240):

".....premisng that having exceeded the boundary in any instance can no more affect the title to that part of the country, which is within the real boundary, than a man's enclosing through a mistake of land marks a part of his neighbour's field with his own, can destroy or lessen his title to that which is really within his own legal bounds."

It is not only that "occupation" is irrelevant in theory and in principle to the question for this Court; its irrelevance has at all times been confirmed and demonstrated by the attitudes and behaviour of both Parties, as will now be shown.

The attitude of the Parties to "occupation".

155. The Parties to the present Arbitration agreed indeed upon the irrelevance of occupation in the Acts of 1900 and 1901 (see Annex 35) by which they sought to ensure the success of the 1902 Arbitration. Thus, in an Act dated the 29th December 1900, they agreed:

"Not to bring about nor to permit the bringing about of any act which tends to detract from the outcome of the settlement which shall be made by the arbitration in conformity with the Treaties of 1881 and 1893, the Agreement of 1896 and the Act of 1898, a settlement which shall be accepted and maintained, notwithstanding any previous action carried out through ignorance

or error concerning the situation of the boundary, or an account of acts executed in the part of the Cordillera whose ownership is disputed, neither the one nor the other being able to have any effect upon the results of the definitive demarcation."

156. Again, the establishment of the Argentina - Chile Mixed Boundaries Commission by the 1941 Protocol demonstrates that both Argentina and Chile were then at one over the complete irrelevance of the governmental activity performed at any time by either country in areas adjacent to the boundary. For it is apparent from the submissions made by both Parties to the present Arbitration that they are agreed that the Mixed Boundaries Commission was established to achieve the final demarcation of their common frontier line as determined by the delimiting instruments, and that these instruments - i.e. the several treaties and the awards which established the entire boundary between Argentina and Chile - were to be applied by the Mixed Boundaries Commission as they stood. Thus the Chilean Memorial defines the function of the Mixed Commission as "the proper interpretation and application of the Treaty or Award governing the boundary in the Sector " (CM/1 p.265).

157. Furthermore, both Parties appear to be agreed, as may be seen in their respective Memorials, on the

the purposes of the corresponding occupation".

158. Both Parties acted upon this provision of Article VI of the 1941 Protocol. Two examples may be found in the Argentine Memorial (paras. 142 and 143, pp.134 and 135) in which the change in jurisdiction led to the transfer to Chile of land, and of buildings erected by Argentina, in previously uncertain frontier areas.

159. It is, therefore, clear that the Argentina-Chile Mixed Boundaries Commission was not to apply to the ground the interpretation that had been adopted by one Party, nor for that matter one which by coincidence each had severally adopted, as to where the boundary line ran. The Mixed Boundaries Commission was solely concerned with the establishment, for the purposes of demarcation, of the location of the boundary line as described in the delimiting instruments; if it found that the interpretation of one or both of the Parties did not coincide with the boundary line established in the delimiting instruments, the effect of Article VI of the 1941 Protocol was that the country mistakenly exercising jurisdiction in the other's territory was to make way for the other within a period not

exceeding six months.

160. Neither was the Mixed Boundaries Commission concerned with what Counsel for Chile called "the human element on the ground". (Transcript p.69).⁽¹⁾ Both Argentine and Chilean Delegations composing the Mixed Commission entirely disregarded this factor which was considered irrelevant, and with reason: for, in South America particularly, where tightly-knit foreign communities are a frequent phenomenon in many countries, especially in frontier areas, to have regard to the presence of such communities in interpreting a boundary line, would be to attempt to settle one dispute at the price of spawning a host of new ones.

(1) Within the Argentina-Chile Mixed Boundaries Commission, the Chilean Delegate, Major Mardoqueo Munoz Moraga - one of the draftsmen of the 1941 Protocol - is recorded in Act No. 38 (Arg. Mem. Annex 20, p.28) as having stated on the 25th October 1948:

"... the international boundary is the line indicated by the treaties or awards and cannot be the line as given material form by private persons desirous of populating the region. Moreover, the situation in which the settlers might become involved owing to the change of sovereignty which might arise is provided for in the Protocol of 16th April 1941. In no way can the Mixed Commission subordinate its judgment to the interests of the settlers or to the judgement the latter had in setting up their wiring or fences."

Conclusion

It remains, therefore, the firm position of the Republic of Argentina that the material which Chile has assembled under the general rubric of fulfilment is irrelevant to the question of the proper interpretation and fulfilment according to international law of an existing and admittedly valid boundary Award. Nevertheless, it is proper that the allegations of fact that have been made by Chile should be answered also on the basis of fact. Accordingly, Volume II of this Counter Memorial consists of an examination and appreciation in some detail of the material put forward in Part Two of Volume I of the Chilean Memorial.

CHAPTER 5

DIPLOMATIC EXCHANGES SINCE 1941

Attitudes of the Parties after 1941

161. The Chilean Memorial claims significance for some diplomatic exchanges between the Parties as affording some support to the Chilean contention that "settlement" of the boundary line took place as a result of the "fulfilment" of the 1902 Award by the Parties.

162. This Counter-Memorial has already dealt, in Chapter 4 with the diplomatic exchanges in the years 1913-1915 and now turns to consider, in the present Chapter, the diplomatic exchanges after the establishment of the Argentina-Chile Mixed Boundaries Commission in 1941. The present Chapter in this Counter Memorial first refers to these Notes as evidence of the attitudes of the Parties after 1941 and then goes on to analyse in particular the contents of some of these Notes in relation to the Chilean submission that "after 1914 both Parties in fulfilling the Award acted on the basis that the boundary from Post 16 southwards was the course of the river - the true River Encuentro - which has its source on the slopes of the Cordon de las Virgenes, and that California was Chilean" (CM/1, page 464).

163. After 1941 both the Argentine and Chilean Governments in fact adopted the position that during the work of the Argentina-Chile Mixed Boundaries Commission, established by the 1941 Protocol, and pending definitive decisions by that Commission as to the location and demarcation of the boundary line, any claim or unilateral action by one Party purporting to alter the situation in any frontier area should be as far as possible avoided and should in any case be considered irrelevant to the final settlement of the course of the boundary. This attitude can be clearly inferred from the diplomatic correspondence between the two Governments during that period.

164. Mention has already been made, in paragraph 252 (page 226) of the Argentine Memorial, of Note 207, dated the 19th October 1943, addressed by the Chilean Embassy in Buenos Aires to the Argentine Foreign Ministry (Annex 36, pp. 1.). In that communication, the Chilean Government complained of the forest exploitation that was being carried out by the Argentine local authorities in the frontier area of River Huahum (to the north of the Sector under consideration in this Arbitration) where, as the Note said, "the final boundary line has not been

definitively drawn". Chile requested this exploitation to "cease until such time as the Mixed Commission has definitively demarcated the boundary" (Arg. Mem. pp. 226-227).. Significantly the Note was supported by the assertion that "it has been established that its decisions [those of the Mixed Commission] shall be regarded as definitive and irrevocable". The Argentine Government agreed to the request and ordered that the works should cease (see Annex 36 pp. 4).

165. More directly concerned with the Sector at present under Arbitration is the Memorandum presented to the Argentine Foreign Ministry by the Chilean Embassy in Buenos Aires on the 26th June 1947 (see Annex 30). The Memorandum stated that according to information received by the Chilean Government from the Chilean Consulate at Esquel, the Argentine Gendarmes posted at Carrenleufu had interfered in the works carried out "in Chilean territory" by the Chilean Surveyor Ernesto Carvajal, and that the same sort of thing had happened with some Chilean settlers. The Memorandum added that it was clear that the Argentina-Chile Mixed Boundaries Commission had (i.e. by June 1947) "established that the right hand bank of the River Encuentro is Argentine and the left hand

margin, Chilean", but that the Gendarmerie, in spite of having been informed of that decision, had not taken it into account.

As a matter of fact, the only final decision taken up to that date in that area by the Mixed Commission consisted of the review of Boundary Post 16 (See Arg. Mem. p.137). No final decision as to part of the course of the boundary was in fact to be reached before 1955.

The Chilean Memorandum added that in view of the fact that the Chilean settlers were dependent upon Argentina for furnishing themselves with basic supplies and that the Gendarmerie had established a Customs Post in the region, the situation called for regulation "in an amicable manner" and requested that the Argentine Government should issue the necessary instructions to the Chief of the Gendarmerie Post at Carrenleufu.

166. By a Note dated the 17th July 1947 (see Annex 30 p. 2) the Argentine Foreign Ministry replying to the Chilean Memorandum stated that :

(1) According to the information in possession of the Argentine Foreign Ministry, in the zone of the Carrenleufu Post the Mixed Boundaries

Commission had not yet determined the boundary between both countries, having decided to carry out a topographical survey as a step preliminary to the plotting and the marking out of the boundary line. Thus, the Argentine Government reserved its position as to the statement contained in the Chilean Memorandum, whatever the intention underlying it might have been, which made reference to works carried out by senor Ernesto Carvajal "in Chilean territory". (The Chilean Memorandum did not reveal that Carvajal was a Chilean official, nor did it claim that his activities were of an official nature).

(2) Notwithstanding the absence of a final demarcation, and admitting that this fact might probably have been the cause of difficulties in the area, the Argentine Foreign Ministry had transmitted the Chilean Memorandum to the competent authorities in order that they would facilitate the normal development of the activities of settlers living in areas adjacent to the boundary.

The 1952 Diplomatic Exchanges.

167. Consideration is now given to the questions raised by the Chilean Note of the 29th August, 1952, which is referred to in the Chilean Memorial (CM/1 pp.192, 289, 338 et seq; CM/2 Annex 45A pp.243-246). On the 21st August, 1952, the Chilean Ambassador in Buenos Aires had protested orally to the Argentine Foreign Minister about certain action attributed to the Gendarmerie posted at Carrenleufu with regard to the settlers living in the disputed area. In the Note that the Chilean Ambassador sent to the Argentine Foreign Minister on the 29th August, 1952, it is recorded that the latter had in the conversation of the 21st August, expressed regret about the incidents and had given an assurance as to the maintenance of the existing "status" in those regions until the completion of the demarcation entrusted to the Mixed Boundaries Commission.

168. An Official Statement published by the Argentine Foreign Ministry on the 21st August, 1952, had also stated that the existing situation in the area should be maintained until the corresponding demarcation was completed by the Mixed Boundaries Commission (CM/1 p.340). Within the Mixed Commission itself the

alleged incidents were referred to at the meeting of the 9th October, 1952, and the Chilean Delegation suggested that instructions should be sent to the Argentine Gendarmerie and to the local Chilean civil authorities and Carabineros to prevent either of them taking any action until the frontier had been definitively demarcated (Act No. 49, Annex 37). The Argentine Delegation agreed to this suggestion and confirmed that its Government had already given such instructions (ibid).

169. These exchanges confirmed that both Parties accepted that the settlement of any question relating to the course of the boundary line between the two countries should be made by the Mixed Commission and, if so made, should be final.

170. The Chilean Memorial attempts to draw conclusions from the 1952 Chilean Note. These supposed conclusions must now be examined.

In the first place, the Chilean Government submits in its Memorial that Chile held, undisturbed and uninterrupted until 1952, the possession of the territory to the east of the River Encuentro and to the south of the River Falso Engano which is claimed

by Chile in the present Arbitration. The Chilean Memorial puts forward the year 1952 as its own chosen "critical date" and refers to it as the time when the Argentine authorities "first" disturbed the alleged Chilean uninterrupted possession of such territories in the relevant Sector (CM/1 pp.478, 479). These assertions of fact are clearly refuted by the evidence produced below in Volume II of this Counter Memorial.

Secondly, Chile seeks to draw from this Note an Argentine admission as to the Chilean status of "California" (CM/1 p.341).

It is necessary to draw the attention of the Court to the contents of this Note and of those which followed it, in order to prove their failure to support this second Chilean conclusion.

171. It is a principle in the interpretation of legal instruments in general that the words used in them should be read with the meaning which they had at the time when they were written.

Therefore, in reading the diplomatic correspondence exchanged between the Governments of both Parties relating to the relevant Sector the Court should, it is submitted, give to the words,

especially those which refer to places, the meaning they had at the time when the Notes were written.

172. As stated in the Chilean Memorial (see CM/1 p.340) the Note of the 29th August 1952 was addressed by the Chilean Ambassador in Buenos Aires to the Argentine Minister for Foreign Affairs after an Official Statement of the Argentine Government had been issued and handed over to the press for publication (see para. 168 above). In this Official Statement the Argentine Government had referred to newspaper reports according to which "the National Gendarmerie is alleged to have served notices of ejection on the populations of Rio Encuentro and California in the territory of Chubut". (see CM/1 p.340). The Statement referred also to the instructions issued by the Minister of the Interior to the Commander of the Gendarmerie Post at Carrenleufu "to maintain the existing status until the Argentine-Chilean Mixed Boundary Demarcation Commission carries out the appropriate demarcation" (ibid.).

173. The Argentine Government was acting, therefore, upon the understanding underlying the 1941 Protocol, according to which it was the Argentina-Chile Mixed Boundaries Commission which was the competent body

to demarcate the boundary line between the two countries in conformity with the delimiting instruments and that, the existing status should be maintained until the demarcation had been carried out. If, as a result of the demarcation, it later appeared that either Government had exercised jurisdiction in territories belonging to the other country the former would withdraw from those territories within a period of six months.

174. The following is the relevant passage of the Note of the 29th August 1952 to which the Chilean Government seems to attach great importance:

"Since the Ministry for Foreign Affairs and Worship, in its statement, referred to the settlements of Rio Encuentro and California as belonging to the Territory of Chubut, I am obliged to state that after it was pointed out to that Chancellery that this was incorrect, I was informed that in the opinion of the competent Argentine Technical Officials the River Encuentro is the boundary and that California is at present Chilean and that the reference to the Territory of Chubut in the aforementioned statement was a 'slip'" (Annex 36 p. 8).

From this passage in the 1952 Note, the Chilean Government in its argument makes the following inference (CM/1 page 341):

"The Argentine Government took no exception to this extremely clear and pointed declaration by the Chilean Government ... Not unnaturally, the Chilean Government understood from these exchanges that the Argentine Government recognised the existing status of California to be Chilean".

175. This might have been a correct conclusion if the premise on which it is based were true, i.e., that what was known to both Parties to be "California" in 1952 was the same area as was later, in 1960, to be designated by Chile (by Decree No. 1768, see Arg. Mem. p.180) as the new district of "California" (which Decree was protested by the Argentine Government).

As was pointed out by Counsel for Argentina (Transcript page 26) in the December 1965 Oral Hearings, by 1952 the name "California" had only appeared on two Chilean maps as indicating an area to the north-east of the confluence of the Rivers Salto and Engano, and west of the River Encuentro and Portezuelo de las Raices. The two Chilean maps referred to are those annexed to the Argentine Memorial as Maps A11 and A32. This same area is also named "California" in the 1945 Cobos' map (and described in Cobos' Report of 1945: see Annex 28 and Map A58) as well as in the diagram (CM/2 p.249) accompanying the proposal for a status quo arrangement contained in the Argentine Note dated the 9th December 1954, which Note will be considered below.

176. The Chilean Ambassador stated in his Note to the Argentine Foreign Minister of the 29th August

1952 that he was "informed that in the opinion of the Argentine technical officials the River Encuentro is the boundary and that California is at present Chilean..." (see para. 174 above). Moreover, the Chilean Memorial (at CM/1 page 341) quotes an internal report sent to the Chilean Foreign Ministry on the 5th September 1952 in which the Chilean Ambassador in Buenos Aires states that he had "come to the conclusion that there does not exist any edition of the maps of the zone in which the locality California appears as Argentine territory". This assertion and the alleged "opinion of the Argentine technical officials" could hardly have been different, because what the Argentine central authorities understood at that time by the term "California"- that is to say, the area North of the River Engano and west of the River Encuentro, between the Rivers Salto and Encuentro - must be seen in the light of the above mentioned maps, and was then, as today, considered by Argentina as Chilean territory. The internal report mentioned above, of which the Argentine Government had no knowledge until the filing of the Chilean Memorial in December 1965, mentions, in connection with the Chilean Ambassador's "conclusion", that the latter had personal interviews with two Argentine officials. It should be pointed out that

the personal "conclusion" of the Chilean Ambassador can hardly support the assertion, made in the Chilean Memorial, that the Argentine Republic recognised in 1952 the "Chilean status" of a new "California" as it is now understood by Chile after a post-1955 process of expansion of names and ambitions towards a large sector of Argentine territory.

177. Therefore, it is apparent that the Argentine Government did not regard the territory known to it as "California" in 1952 to be within the jurisdiction of the Argentine authorities; and so of course it acknowledged that its earlier reference, in the Official Statement of the 21st August 1952, to "California" as part of Chubut (Argentina) was a "slip" ("lapsus").

178. The "status" to which the Argentine Minister for Foreign Affairs was referring in this Statement as that which should be maintained until the Mixed Commission had demarcated the boundary, related to the area of the Encuentro Valley in general, and its meaning was that the then existing state of things would be maintained unaltered pending demarcation of the boundary line by the Mixed Commission. There is no warrant for the Chilean gloss on this straightforward

statement by which they seek to read into it a reference to a pretended "Chilean status" for the area (CM/1 p. 479).

Further diplomatic exchanges before the XVth Plenary Meeting of the Argentina-Chile Mixed Boundaries Commission.

179. It certainly would have been surprising if the Chilean Government had failed to protest against clear representations made to it by the Argentine Government concerning the "status" of certain territory comprised within the Sector now under consideration by this Court if Chile had a different view of that status. But the facts show that the Chilean Government did not dissent from the Argentine view.

180. The Argentine proposal for a status quo expressed in a Note dated the 9th December 1954 (CM/2 pp. 247-249) and in the diagram annexed to it was never objected to by Chile as including an inaccurate statement of the status of the relevant Sector; this remains a just observation even though agreement on the proposal was never reached because Chile did not accept that the proposed arrangement should embrace "all sectors, not yet demarcated, of the frontier line" (see for the Argentine Note dated

the 9th December 1954 (CM/2 p. 247).

181. The Chilean Government's reply was by a Note to the Argentine Ambassador in Santiago, dated the 14th September 1955 (CM/2 p.256-258). It stated that the Chilean Government had "carefully" studied the Argentine Government's suggestion and added :-

"5. Reverting to the proposal contained in Your Excellency's Note No. 179, my Government considers that the maintenance of the "status quo" recognised by the Argentine Government in the Official Statement above-mentioned, while the Chilean-Argentine Mixed Boundary Commission is establishing the geographical coordinates and boundary posts which are required to indicate more objectively the demarcation which Chile and Argentina have recognised as a frontier, ought to be sufficient to prevent this class of incident and it does not judge essential to extend the said "status quo" to all the Sectors, even those not reviewed, of the frontier line, seeing that this line has been clearly indicated in the Arbitral Award of 1902, there not existing any sector which is not demarcated and which could be considered outside the said Arbitral Award.

6. However, in the desire to avoid any friction and incident between the two countries which may affect the cordial relations existing between them, my Government will instruct its Boundary Commission to try and reach a definitive solution of this problem at the next Plenary Meeting of the Chilean-Argentine Mixed Boundary Commission which is to be held in Buenos Aires in the second half of the month of October in the present year".
(Emphasis added)

182. The objections or reservations of the Chilean Government in relation to the diagram which accompanied

the Argentine proposal were raised for the first time in the Chilean Memorial in the following manner :

"Towards the end of 1954 - on 9th December - the Argentine Government, through its Embassy in Santiago, made a proposal for a formal exchange of Notes by which the two Governments would undertake to maintain the status quo in certain zones depicted in an accompanying diagram as under Chilean and Argentine jurisdiction. This diagram, the cartography of which leaves much to be desired, purported to place California under Chilean jurisdiction but only by limiting the area called California on the diagram to one part of California to the extreme west. The rest of the area, which California embraces was depicted as under Argentine jurisdiction. The Note was left without reply until further incidents occurred in August 1955, as a result of which a reply was sent to the Argentine proposal on 14th September 1955" (CM/1 para 66, page 295).

The Chilean Government in its Memorial has failed to make a thorough examination of the Chilean reply quoted in paragraph 181 above. The Chilean Memorial (CM/1 p.342) criticises the "cartography of the diagram" as "defective" because, "apart from placing California to the north-west of the Rio Engano, it depicted the little Arroyo Mallines as the River Encuentro". But the fact remains that Chile has failed to explain the motive for the Chilean Government having failed to object to it at the time. Nor does the Chilean Memorial give any explanation of the reasons for its acceptance of the status quo for the relevant Sector, as had been proposed by the Argentine Government. It merely suggests that it was a consequence of

"further incidents having taken place in the Encuentro and California area during August 1955 the Chilean Foreign Minister addressed a Note of 14th September 1955 to the Argentine Government, recalling the latter's proposal and giving a somewhat different focus to its own acceptance of the status quo" (see CM/1 page 343).

183. The Chilean Government in its Memorial goes on to state (CM/1 p.345) that this "somewhat different focus" consisted in the insistence placed by the Chilean Foreign Minister on the fact that "the frontier in the Sector had already been clearly indicated by the 1902 Award and demarcated so that the establishment by the Mixed Boundary Commission of the Geographical coordinates and Boundary Posts 'required to indicate more objectively the demarcation' ought to be sufficient to prevent incidents".

This is a surprising statement since the Chilean Note in question did not express, even by implication, that "the frontier in the Sector" had already been clearly indicated by the 1902 Award and demarcated; if such had been the case there would have been no necessity for a status quo; nor would it have been necessary for the Chilean Government to instruct

the Chilean Boundary Commission to "try and reach a definitive solution of this problem at the next Plenary Meeting of the Chilean-Argentine Mixed Boundary Commission which is to be held in Buenos Aires in the second half of the month of October in the present year" (see para 181 above). Nor did the Chilean Note claim that the status mentioned in the Official Statement made by the Argentine Government in 1952 was something different from that which had later been proposed as a status quo for the relevant Sector, in the Argentine Note 179 dated the 9th December, 1954 (CM/2 pp. 247-249).

184. It should be observed that the Chilean Government in its Memorial has interpreted its own Note in a manner which is not consistent with its contents. For it is apparent that the status quo was accepted by Chile as far as it concerned the relevant Sector, though it rejected it as a concept to be applied to all Sectors, not yet demarcated, of the frontier line as had been proposed by the Argentine Government in its Note of the 9th December 1954.

185. The conclusion that may be drawn from the foregoing analysis of the diplomatic exchanges

preceding the decisions of the Argentina-Chile Mixed Boundaries Commission which were embodied in Act No. 55 is, in the submission of the Argentine Republic, the following: the area referred to, in the correspondence between the Parties summarised above, as "California" lay to the west of the River Encuentro, to the east of the River Salto and to the north of the lower course of the River Engano, some kilometres south of the Chilean township of Palena. The efforts of Counsel for Chile at the December 1965 Oral Hearings to explain the seeping nature of the name California (Transcript p. 20) cannot throw doubt upon what that name meant in the years 1952-1955 for the Governments of both Chile and Argentina.

186. It should be noted that, immediately after the XVth Plenary Meeting of the Mixed Boundaries Commission in October 1955, the Argentine Government proposed a modus vivendi for the relevant Sector according to which, pending final agreement on the joint proposal put forward by the Mixed Commission in Annex 5 of Act No. 55, the Chilean Carabineros would not pass to the east of the River Encuentro and the Argentine Gendarmerie would operate only to the east of that river. In a Note dated the 19th December 1955

addressed by the Chilean Embassy at Buenos Aires to the Argentine Foreign Ministry (Arg.Mem. Annex 16, pp.4-8), the Chilean Government accepted the Argentine proposal for such a modus vivendi. In itself this was important; but the real significance of the Note lies in its identification of the River Encuentro as a river having its source at the coordinates ascertained by the Mixed Commission, an identification which shows clearly the river to which reference was being made by the name "River Encuentro".

187. The material passages in the Note about the River Encuentro and the modus vivendi are as follows :

"Although the Chilean Ministry for Foreign Affairs feels that this proposal is to be commended, it nevertheless considers that the suggested line is not fully in accord with the Arbitration Award which fixed the frontier or with the Report of the Arbitration Tribunal, for the reasons stated in Act No. 55 of the XVth Plenary Meeting, which indicates that this procedure is adopted having regard to the fact that the projected line and the reasons thereof put forward by the Argentine and Chilean Commissions could not be made to accord fully with the terms of the Award of H.M. Edward VII and the Report of the Arbitration Tribunal, because the source of the western branch of the River Encuentro is not on the Western slopes of the Cerro de la Virgen but at the junction of the graphical co-ordinates X = 5163550 and Y = 1523670'..... I also have to inform Your Excellency that, in accordance with the terms of your Memorandum of the 2nd of the present month, the Argentinian Charge d'Affaires in

Santiago submitted proposals, which were accepted by the Government of Chile, suggesting that, pending the start of conversations, and in order to avoid possible frontier incidents in the region, the Chilean police should not cross to the East of the River Encuentro and that the Gendarmery should confine its activities to the East of the said river. The Ministry of the Interior has been duly informed of this agreement and asked to issue appropriate instructions to the Carabineros." (Arg. Mem. Annex 16 pp. 5, 6, 8).

188. The reference to the Chilean Carabineros passing to the east of the River Encuentro makes it clear that the reference was to the River Encuentro as described in the Argentine Memorial in the present Arbitration; if the Chilean Government had been referring to the boundary line it now claims, that is to the River Falso Engano, the reference to the Carabineros passing into Argentine territory would have been a reference to their passing to the north.

189. The Chilean Note is also important because it records the Chilean Government's disposition to accept, as a status quo line, the line of the Mixed Commission's "joint proposal" for the central part of the boundary in the relevant Sector.

190. The Note also shows that the only obstacle to Chilean acceptance, at that time, of that "joint

proposal" as the definitive boundary was the requirement of a treaty between the two countries because, as the Note put it, the source of the River Encuentro was (as the Note recognised) at the coordinates mentioned and not on the western slopes of Cerro de la Virgen (Arg. Mem. Annex 16 pp. 5-6). The Chilean disposition to accept the "joint proposal" dissolved in the face of internal political pressures at the beginning of 1956, and the problem thus still awaits solution from the present Arbitrator.

Further Diplomatic Exchanges after the XVth Plenary Meeting.

191. The present Counter Memorial will not attempt to enumerate and correct all the inaccuracies or partial quotations from diplomatic correspondence which appear in the Chilean Memorial with reference to the period of time between the XVth Plenary Meeting of the Mixed Boundaries Commission and the submission of the present case to Arbitration. One important inaccurate statement must, however, be mentioned.

192. The Chilean Memorial, in paragraph 101 of Chapter VIII of Part Three, states that the statement of the President of Chile of the 24th February 1956 "constituted a definitive rejection by Chile of the

boundary line suggested by the Mixed Boundary Commission in Minute 55" (CM/1 p.367). The Memorial adds (ibid.) "Equally, by insisting that the position must be restored to what it was prior to the fifteenth plenary meeting of the Commission the President rejected the whole outcome of the proceedings at that meeting, including the purported 'approval' of the line in the area Lake General Paz - Cerro Virgen".

193. The Argentine Government wishes to draw the Court's attention to the fact that when the Governments of Argentina and Chile referred to the Mixed Boundaries Commission's "joint proposal", reference was being made to the part of the line of the boundary in the Sector (as it now is) between the confluence of the River Falso Engano with the River Encuentro, and Cerro de la Virgen. This is made evident in the Chilean Note dated the 16th February, 1956 (CM/2 pp.305-308) where the following statement occurs:

"As Your Excellency is aware, the Chilean-Argentine Mixed Boundary Commission at its 15th Plenary Meeting held in this City between the 20th day of October and 1st day of November of last year, agreed to submit for the consideration and decision of the Governments of the two countries a joint proposal intended to solve this problem.

The said joint proposal which contains a proposed frontier line, is entitled

'Description of the tracing proposed by the Chilean-Argentine Mixed Boundary Commission for the decision of both Chancelleries' and is set forth in Minute 55 corresponding to the said Plenary Meeting, Annexure No. 5."

Therefore, when referring to the "joint proposal" (to which alone "Annexure No. 5" related) the President of Chile in his Statement was referring only to the intermediate length of boundary line in the central part of the relevant Sector.

194. It is therefore not permissible to say, as the Chilean Memorial states (CM/1 p.367), that the Chilean President "rejected the whole outcome of the proceedings at that [XVth] meeting", since in his Statement he only rejects "the proposed tracing suggested by the Chilean-Argentine Mixed Boundary Commission ... and which was under study at the respective Chancelleries" (see CM/1 p. 366). It should also be noted that all other Chilean Notes sent to the Argentine Government between the 19th December 1955 and the 18th April 1956 had also referred to this same "joint proposal", i.e. that relating to the central length of the boundary line in the Sector.

195. This Counter Memorial will not weary the Court with a commentary on all the statements made in Part

Four of the Chilean Memorial about alleged incidents in the disputed area. However, the first paragraph of Section A of Chapter I cannot be allowed to pass without comment.

That paragraph reads as follows (CM/1 p. 409) :-

"In January 1958 incidents began to recur in the disputed zone. Chilean Carabineros found seven Argentine Gendarmes, commanded by an Auxiliary, escorting a certain senor Miguel Casarozza (A) while he pastured his sheep and cattle in the Chilean area called "Los Laguitos". The Argentines were asked to withdraw, but refused to do so, alleging that they were on Argentine territory. The Chilean Ambassador in Buenos Aires was then instructed to request the withdrawal of the Gendarmerie from Los Laguitos. The Argentine Government agreed, provided that the free grazing of cattle was permitted; the Chilean Government agreed to this compromise and the Gendarmerie were withdrawn".

The Argentine Government offered no compromise, as described or at all, and made no such agreement as this paragraph in the Chilean Memorial suggests.

CHAPTER 6

CHILE'S STATEMENT OF "PRINCIPLES" UNDERLYING THE 1902 AWARD.

196. The present Counter Memorial now considers the Chilean Memorial's statement (CM/1 p.11) that the task of the Court in its interpretation of the 1902 Award is one calling for "the consideration of the principles which the Tribunal and the Arbitrator followed in 1902". As has been pointed out in Chapter 3 above, the Chilean argument is not calling these principles in aid to assist in interpreting the actual provisions of the 1902 Award for the Sector at present under consideration; it is calling on them to provide an apologia for a line which has in effect been derived in substitution for those actual provisions.

197. In the present Chapter, by way of preface, it is necessary only to note the two basic propositions upon which Chile places reliance:

- (a) "It is taken for granted", says the Chilean Memorial (CM/1 p.95), "that in general the principles of interpretation of a judicial award are the same as those for any other instrument"; and Counsel for Chile has told the Court (Transcript p.80) that Chile relies

upon what are "basically principles of interpretation of treaties";

- (b) Chile then asks the Court to have recourse to "the paramount purposes and principles of the Award"; "certain general principles upon which the Tribunal of 1902 acted"; its "dominant principle"; "the essential ratio decidendi, the essential principle" (CM/1 p.95 and Transcript pp. 49, 57 and 73).

198. This, Counsel for Chile asks the Court to accept (Transcript p.73), is no more than interpreting the works of the 1902 Award "in their proper context". The Chilean argument however fails to refer to the undoubted canon of interpretation that it is "the natural meaning of the words in their context" which is to be sought (per Judge Anzilotti in Austro-German Customs Regime Opinion, 1931 P.C.I.J. Ser. A/B No. 41, p.62). The Chilean argument disregards "the natural meaning" of the word "context" itself; "context" means "The parts which immediately precede or follow any particular passage or text and determine its meaning" (Shorter Oxford English Dictionary, Third Edition revised, Vol. 1, p.381). The Chilean argument expands "context" beyond the four corners of the documents making up the 1902 Award, and invites the Court to venture upon speculation about the "principles"

and "purposes" of one or some of those who advised the Arbitrator in 1902 and about the "factors" which influenced their minds. Although the Chilean Memorial urges the Court to read the Award as a whole with a view to determining "its general purport and meaning" so that it may "refrain from attributing to words or phrases a meaning which would not be in conformity with the paramount purposes and principles of the Award" (CM/1 p.95), the Chilean argument in fact asks the Court to disregard the natural meaning of words or phrases in their context in the documents making up the 1902 Award, to reject some as "a reference without meaning" (CM/1 p.113) and others as being a "quite incidental" point of reference (CM/1 p.15); when words or phrases descriptive of geographical features are to be interpreted, to ignore them completely must surely be to deprive them of all meaning rather than to attribute to them "a meaning which would not be in conformity with the paramount purposes and principles of the Award". It is sufficient here to remind the Court that international law does not sanction this excursion into "principles" or "purposes" divorced from the terms of the legal instrument. As the Permanent Court of International Justice said in its Advisory Opinion in the Access to Port of Danzig Case

(1931) P.C.I.J. Ser. A/B No.43, pp.142-145:

".....The Court is not prepared to adopt the view that the text of the Treaty of Versailles can be enlarged by reading into it stipulations which are said to result from the proclaimed intentions of the authors of the Treaty, but for which no provision is made in the text itself."

The Documents called in aid by Chile.

199. The arguments put forward in Chapter V, Section C-2, are, in the main, based upon the preparatory documents relating to the 1902 Arbitration which have been found in the archives of the British Government. Most of the so-called preparatory documents upon which the Chilean Memorial relies are undated and unsigned (see CM/2 Annexes 19, 20, 21, 22 and 23) and one (Annex 19) is in a different handwriting from the others. The Chilean Memorial, however, claims these documents to be "documents of the Arbitration Tribunal" (CM/1 p.46), that all members of the Tribunal considered them (CM/1 p.38), that "they form the basis of the Tribunal's Report" (ibid), and that "it seems clear beyond any reasonable doubt that they were composed by Sir Thomas Holdich" (ibid). The only clear evidence is that the Tribunal heard from Holdich a verbal (i.e. oral) description of the frontier line, which after some discussion was agreed to (at the Tribunal's Seventh Meeting:

CM/2 p.35) and that subsequently (at the Eighth Meeting) it considered only "The draft of the Report" (CM/2 pp.35,36). 200. Apart from doubts about the provenance of the documents themselves, it is suggested that the Court should approach this Chilean invitation with caution. "Preparatory work" may, in certain circumstances, be useful, and its use legally permissible, in the interpretation of the words used in a treaty; but this instrument was not a treaty; nor, it must be emphasized, was Colonel Sir Thomas Holdich the Arbitrator. The effect of this part of the Chilean case is to distract attention from the actual terms of the Award and Report, and from the actual boundary line delineated on the Award Map, and to seek refuge from them in generalities. The Court may well wonder at the happy concurrence of events whereby the cogitations of Sir Thomas, the "proper interpretation" of the Award, and its "fulfilment" down the years by Chile, all point ineluctably to a line which, by some unexplained quirk, Chile herself did not begin to see at all plainly till 1955.

201. No mention is made in the Chilean Memorial of the difference between the relative freedom which the Arbitrator enjoyed in 1902 after it had been recognised that neither Party would challenge the vires of a compromise award, and the position of the present Court,

whose task it is to report on what on the proper interpretation and fulfilment of the 1902 Award is the course of the boundary in the part or parts of the Sector where it has remained unsettled since 1902. Even if the documents submitted by Chile were to be preparatory documents of the Arbitrator and even if their study were to yield supposed "principles" it is not permissible to use preparatory work either to distort the plain meaning of clear terms or to ignore them altogether in order to draw a new boundary line in substitution for that which the original documents describe.

Thus it is clear that any consideration of such "principles" must take into account the whole of the evidence which is available; not merely the so-called "preparatory documents", but, also and indeed primarily, the terms of the Award, the Report of the Tribunal, and the depiction of the boundary line on the Map forming part of the Award.

202. In Chapter V of Part One of the Chilean Memorial, Section C is headed (CM/1 p.44) - "The Principles underlying the Report and the Award". That Section first states the grounds upon which it is suggested that the Report and the Award were "a Compromise".

The "Compromise"

203. It is well to begin consideration of the element of "compromise" by reminding the Court how it was that the 1902 Arbitrator found it possible to make an Award of a compromise line. None of the documents from which the Arbitrator derived his authority and his terms of reference authorized a compromise decision; the 1902 Arbitration was for a decision on the proper interpretation of the legal instruments which then governed the boundary between both countries. It was only after the Arbitration was under way that those who were concerned in it on behalf of the Arbitrator learned, separately from each Party, that each would accept, indeed would welcome, a compromise solution, in the form of an Award (see Arg. Mem. Annex 7, p.3). So it was, as it were, by an understanding that King Edward VII discovered that a compromise solution would not be objected to by either Party.

204. The Chilean Memorial (CM/1 p.50) submits that it "can be seen" that the compromise fell into two parts; first, it is said, there was to be a compromise as to the way in which the provisions of the 1881 Treaty were to be interpreted; and, second, there was to be a compromise as between the competing interests and claims of the two Parties. The observation which

the Argentine Republic desires to make upon this statement is as follows.

205. As each Party in 1902 put forward its own interpretation of the relevant treaties, and as the two rival boundary line claims were respectively founded upon these differing interpretations, it necessarily follows that a compromise between the rival claims was equally a compromise between the rival contentions on the proper interpretation of the treaties. There was not, however, any compromise "as to the way in which the provisions of the 1881 Treaty were to be interpreted". No novel or unorthodox way or method of interpretation was decided upon by the Tribunal or by the Arbitrator, or suggested by the Argentine Republic or, so far as the latter is aware, by the Republic of Chile. The compromise related to the result and not to the method of interpretation. "The factors governing the compromise between the interest and claims of the Parties".

206. This is the sub-heading of Section C-2 of Part One, Chapter V, of the Chilean Memorial (CM/1 p.50). Here the Chilean Memorial does not, as it seems to do in the heading of Section C (CM/1 p.44) and in the summary in paragraph 11 (i) at page 11 of its first volume, suggest that these

are "principles" which the Tribunal and the Arbitrator followed in 1902.

207. The truth of the matter is, however, that the only idea that can be called a "principle" that guided those who prepared the Report was to construct "a line of compromise" (CM/2 p.57), "a central line" (Arg. Mem. Annex 7 p.4), "a central meridional dividing line" (CM/2 p.107), "a central or intermediate line" between "each of the boundaries claimed" (CM/2 p.57).

It is not without significance in this connection to remind the Court that Cerro de la Virgen lies centrally between the rival claims of Argentina and Chile as they were advanced in 1902.

208. In drawing this "central meridional line", described in Article III of the 1902 Award, as a compromise, certain "factors" may well have worked upon the minds of those engaged in the task; one of the documents (Annex No. 21, CM/2 p.106) referred to "certain conditions" which might "be found to militate against the idea of a central meridional dividing line" - value, occupation and strategic considerations (CM/2 p.107). Of course, he who seeks to bring about a compromise between rival claims may well, where territory is in issue, have to consider

the value of the property to be divided, the present occupation and strategic considerations. This Counter-Memorial considers this further, in relation to the relevant sector, later in this Chapter.

209. The Chilean Memorial recognizes that the Chilean case is advanced not at all by the argument that a compromise line was decided upon and that was, so far as possible, a central meridional line between the competing claims of the two countries. Nor, of course, are the three factors of value, occupation and strategic considerations sufficient for the Chilean case, for none could, even if applicable in 1966, justify the present Chilean claim, because the task of the present Court is not to construct a new line as a compromise, but to report on the proper interpretation of a line decided upon by the 1902 Award.

210. So the Chilean Memorial seeks to find additional principles, as they are termed, employed by the 1902 Tribunal in deciding upon its recommended line. Chile purports to find another "principle" in a reference in one of the "preparatory documents" to the desirability of achieving a line which would "combine as far as possible the conditions of an elevated watershed with geographical continuity" (CM/2 p.107);

this was, it is said, a "dominating consideration" (CM/1 p.51). As this further supposed "principle" is itself not, as appears from the Chilean Memorial, entirely sufficient for Chilean purposes, the Chilean Memorial adds a "second consideration" (CM/1 p.52). It is said to be that of maintaining, so far as possible, "the integrity of river basins" (ibid.), a "general principle" (see Transcript p.56), which the Chilean Memorial purports to deduce from a study of the entire boundary line decided upon by the 1902 Arbitration. These "considerations" are examined later in this Chapter.

The application of the factors.

211. Section C-3 of Chapter V of Part One of Volume 1 of the Chilean Memorial deals with "The application of the factors".

The start of this Chilean analysis is cautious: paragraph 71 (CM/1 p.55) states - "The precise manner in which the various factors enumerated above played a role in the determination of the boundary line between Posts 16 and 17 must largely remain a matter of conjecture". Some aspects of this question are, however, clear.

212. In the first place, with respect to the value of the property to be divided, the Chilean Memorial

states - "There is no direct evidence that in the Sector between Posts 16 and 17 it was a factor of major importance" (CM/1 p.58) and that "it was not one to which [Colonel Sir Thomas Holdich] could give much relevant effect" (CM/1 p.53).

213. Nor is it seriously suggested in the Chilean Memorial (CM/1 pp.61, 62) that strategic considerations played any important part in determining the course of the boundary in the Sector.

Yet the Chilean Memorial suggests that "strategic considerations" point in the direction of the "Cordon de las Virgenes" as Chile calls the range east of the Sector, and it blames upon allegedly inadequate maps a supposed ignorance of this range on the part of Holdich; an ignorance which caused him to fail to choose it as the boundary. The Chilean Memorial does not recall that Holdich saw this eastern range as he passed from north to south with the Technical Commission (see CM/2 p.74) and that the Commission stated that, although inconvenienced by wind and weather - "We did, in fact, actually compare all the geographical features of importance with their representation on the Argentine mapping and had we been favoured with steady sunshine and clear skies throughout this part of the reconnaissance I doubt whether we should have

effected much more" (CM/2 p.74).

214. The reference in the Chilean Memorial (CM/1 p.62) to the "Second Argentine Map" also calls for comment. In the first place, if the Chilean Memorial's remark about this map is intended to suggest that the Argentine Republic should have submitted to the 1902 Arbitrator a map which showed in detail territory far east of the line which Argentina was then claiming, the answer is that it was for Chile to provide the Arbitrator with whatever maps he required to assess the value of the Chilean claim.

A second comment is this. If selective presentation of evidence is being suggested there, the partial quotation in paragraph 19 on page 28 of the Chilean Memorial is a good example; the Chilean Memorial there quotes from page 1354 of the Chilean Statement to the 1902 Arbitrator. The quotation is designed to support the statement that in 1902 neither Party described or discussed "in any detail the features of the area in the relevant Sector" (CM/1 p.28), which certainly includes the eastern range under discussion in paragraph 79 of Chapter V (CM/1 pp.61-62). It is therefore remarkable that the Chilean Memorial fails to reveal that Chile's own Statement in 1902, in continuation of the quoted passage (CM/1 p.28)

went on after the words "prominent summits" (the last words of the quotation) as follows :-

"the extent, mutual connection direction and height of the different ranges, in a word, all the features which should be taken together into account in determining the orographical "main chain" in a mountain system, being completely unknown. The absolute heights of Mounts Serrano, Morro, Maldonado, Gacitua, Caldera, Puntiajudo, which have been selected by the Argentine Expert for the tracing of his line, are not even known with precision, and it is at least problematical if they surpass in height Mounts Herrero, Central and the rest of the summits of 1800 to 2200 metres which have been determined in the so-called "lateral ridge" of the Cordillera to the north of Lake General Paz".

Indeed on the "Second Argentine Map" the limits of this range are clearly defined by form lines and the principal summits, C^o. Central and C^o. Herrero, are named and their position approximately indicated. The range is also marked with the word "Nevados", an indirect indication of its considerable elevation. 215. Furthermore, the map presented by Chile to the 1902 Arbitrator in 1901 (CH9) defines quite clearly the eastern flanks of this range and indicates the heights of five of its summits and names a sixth - C^o Sangriento. The first map presented by Argentina to the 1902 Arbitrator (CH10) also defined the eastern range and indicates the heights of two of its summits - C^o Central (2050 metres) and C^o Herrero (1860 metres.)

216. Consequently, contrary to what the Chilean Memorial states, there is no doubt that with the aid of this information the Arbitrator of 1902 was "in a position to assess the relative merits of the mountain ranges from a strategical point of view" (c.f. CM/1 p.62).

217. With regard to the third so called "principle" or "factor" - "present occupation" - it is clear also that those concerned in the preparation of the Tribunal's Report did not attach any influential significance to occupation in the Sector at the time of the Award. As is quoted at page 54 of Volume 1 of the Chilean Memorial, Colonel Sir Thomas Holdich had adopted the view that it was "only where considerable communities are distinctly integrated by race and tradition or by natural facility of intercourse with either one Republic or the other, that the Tribunal need be concerned with the claims to which it would give rise" (CM/2 p.109). And when the Chilean Memorial considers the factor in relation to the boundary line in the Sector (as it now is), it relegates to an unimportant role the occupation at the perimeters of the disputed area; the probable answer, says the Chilean Memorial (CM/1 p.60), would seem to be that Holdich observed the settlements of Steinkamp, Day, Illin and Figueroa, and in order to allow the cattle

of these to have ample areas in which to graze and wander, he decided to "move the boundary westwards" (CM/1 p.60). What "boundary" he moved "westwards" and from where he moved it is unspecified. Here again, if one is speculating why the line was drawn west of such settlements as there were, it must be apparent that the desire to decide upon a central meridional line explains its location.

218. If therefore none of these "factors" played any, or any significant, part in the Arbitrator's decision which is now before the present Court for interpretation, what of the other "principles" or "considerations" described by Chile?

219. The Chilean Memorial (CM/1 pp.56-57) states that in the sector "save for where he followed the course of the Encuentro Sir Thomas was adhering ... to the principle of the elevated watershed". As a statement of fact this is manifestly true; but it is possible to disagree with the suggestion that this modus operandi amounted to a "principle". The important point, however, is that this watershed selected by the Arbitrator is clearly identifiable, both in the text of the Tribunal's Report and upon the Award Map. This waterparting is also to be distinguished quite clearly on any large scale map of the Sector south of Cerro de la Virgen. It is also clear, as has already been

pointed out in this Counter Memorial, that Colonel Sir Thomas Holdich in travelling adjacent to the disputed area clearly rejected the possible choice as a local waterparting the so called "Cordon de las Virgenes", of the eastern flanks of which mountain range he had a view as he passed from north to south. This conscious selection and clear identification of the waterparting south from Cerro de la Virgen to the place at which Boundary Post 17 came to be located is, even if it were a clear application of the "principle" claimed by Chile to be the "dominating consideration", an embarrassment to the Chilean case. Chile's case must, for its success, avoid the Cerro de la Virgen, in its true location and designation, and most, but not all (see Chapter 1, para. 6), of the waterparting southwards from it. Accordingly, the Chilean Memorial is forced to invent a new theory, namely the theory of dependency (CM/1 p.116), which has already been discussed in Chapter 3 above, in order to argue that "it is irrelevant.... to say that Sir Thomas Holdich assumed that the line of the Encuentro led to the Cerro de la Virgen" (CM/1 p.103). It now appears to be doubly true that the fact of the matter is that it was the selection of this waterparting "the dominating

consideration", and that the line between it and Boundary Post 16 is the dependent element.

220. It must be remarked that the reference in the preparatory document (CM/2 Annex 21 p.107) to "geographical continuity" involves not only subordination to the dominant consideration of a "boundary of compromise", but in addition the reference is always used as a qualification to the consideration of an elevated watershed, and not as a separate concept.

This was to mean that the boundary of compromise, the central meridional line, would follow "as far as possible" the conditions which an elevated watershed with geographical continuity would provide. It is therefore untrue to say as does Chile that the function of the River Encuentro was to provide an "element of geographical continuity". (CM/1 p.57).

The integrity of river basins

221. The Chilean Memorial argues that there was in 1902 an additional "principle" which was applied by the Arbitrator, namely, that of respect for "the integrity of river basins". It remains now to see whether there was any such "principle" - for no such principle is mentioned in any of the so called preparatory documents - and whether or not, if it did exist, it affects the conclusions suggested above

in this Counter Memorial.

222. The Chilean Memorial, in its summary at page 11, paragraph 11 (ii), puts forward an argument that a further "principle" adopted by the Tribunal of 1902 was that "when it proved necessary to cross a river"; it was necessary to ensure that "thereafter the boundary line respected the integrity of the basins of the tributaries of that river". This so-called "principle" was referred to in the Oral Hearings of December 1965; at page 56 of the Transcript Counsel for Chile described the "principle" as one which, in the opinion of Chile, Colonel Sir Thomas Holdich and the Tribunal in 1902 "attached a very real importance".

223. There is, however, no reference to this alleged principle in any of the preparatory documents so frequently referred to by Chile. If, as is suggested in the Chilean Memorial, the considerations relevant to the making of the 1902 Award were stated previously in those preparatory documents, it is very surprising that such references are not to be found.

224. It is the submission of the Argentine Republic that no such "principle" was followed by the 1902 Arbitrator. The only references in any relevant documents to the division of the basins of transverse rivers running across the Cordillera into

the Pacific Ocean are contained in Article III of the Award and in paragraphs 21 and 22 of the Report of the Tribunal. It is clear that, in Article III of the Award, the references to basins are inserted simply as a means of identifying the waterpartings between them. Where it is necessary to define a waterparting the briefest means of so doing is to name the river basins which that waterparting must, by definition, separate. The limit of any drainage basin is a series of waterpartings; an identification of the basin ipso facto described the waterpartings. As Chile admits, this so-called principle "is clearly implicit in the application of the watershed system" (CM/1 p.52). Thus the so-called principle is no more than the result of a shorthand method of describing a waterparting.

225. In the description of the boundary line in Article III of the 1902 Award the references to river basins are made in connection with the boundary line north of the River Palena (River Carrenleufu) and south of River Pico, but not to the boundary line in the area between the River Carrenleufu and Boundary Post No. 18. For this length of the boundary the words of the Award include no mention of river basins; they decree that "the boundary shall follow the River Encuentro to the peak called Virgen and thence to the line we have

fixed crossing Lake General Paz". The supposed principle of the integrity of river basins has on this evidence no relevance in the Sector in dispute.

226. In so far as the boundary line of the 1902 Award does not follow waterpartings but crosses rivers, it is clear that the so-called "integrity of river basins" has become incapable of being preserved. Indeed, the decision by the Arbitrator in 1902 to draw a compromise line between the claims of the two Parties, which, as the 1902 Tribunal clearly appreciated, necessitated crossing rivers, precluded the Tribunal from regarding the "integrity" of river basins as a principle.

As has been shown above, its advisers never even attempted to suggest adoption of such a "principle".

227. Chile states that "the effect of crossing a river is arbitrarily to divide the river at that point into an upper river and a lower river" (CM/1 p.53).

This is a truism, but the Chilean Memorial goes on to say :

"When a tributary of that river flows into a particular sector (whether upper or lower) then the boundary line is so defined that the whole basin of that tributary falls within the territory of the Party to which that sector belongs. The division of a river and then also of its tributary systems is deliberately avoided" (CM/1 p.53).

This is incorrect on two counts, as may be realised from a consideration of the terms of the 1902 Award itself.

228. Chile fails to appreciate that in the area north of the Sector the 1902 Award makes the boundary line cross the River Puelo, having already determined that the boundary shall cross its tributary the River Manso. The integrity of the basin of the River Puelo is thus doubly violated by the terms of the 1902 Award.

After decreeing that the boundary line should pass through the fixed point on the River Palena (River Carrenleufu) the 1902 Award further decides that the boundary should cross Lake General Paz, which is part of the basin of the River Carrenleufu, and then cross a tributary of the River Palena (River Carrenleufu), namely the River Pico; thus having the effect of dividing the whole basin of the River Carrenleufu into five portions, three of which were awarded to Chile and two to Argentina.

It is quite clear that the "integrities" of the basins of the Rivers Puelo and Palena (River Carrenleufu) were not a consideration which played any part in the advice of the 1902 Tribunal.

229. Further, the so called "principle" of the integrity of river basins can have no application whatsoever where, as is the case with the River Encuentro, the boundary line is made by the terms of the 1902 Award to follow the course of a river. In such situations any idea of a principle of the

integrity of river basins is utterly destroyed by the very words of the instrument in which Chile purports to find evidence of such a principle. The Chilean Memorial recognises the inapplicability of the so-called "principle" in such situations, for it states that the principle was followed by the 1902 Tribunal "except, of course, where the boundary follows the line of a river" (CM/1 pp. 52, 57). As is shown on the 1902 Award Map the basin of the River Encuentro was clearly divided by the boundary line, and furthermore divided in such a way as to leave no possible room for doubt that the whole of the basin of the River Engano and of its tributaries was given by the 1902 Award to Argentina.

230. The final submission of the Argentine Republic on this Chapter are therefore as follows.

The abstraction of so-called "principles" from the notes of an arbitrator's advisors, not in order to assist in interpreting what he provided, but to support a substitute line, is not a process that can conceivably be brought within the rubric of the 'interpretation and fulfilment' of an existing and valid Award. In fact the only clear "principle" that can be abstracted from these materials is that the 1902 Arbitrator in his search for a compromise

line, wished as far as maybe to follow a central meridional line between the rival claims.

231. The Arbitrator of 1902 sought a compromise solution only after it was established that this would be acceptable to both Parties. If the line decided upon in 1902 was a compromise, there cannot be in the present proceedings any question of a further compromise, for this would ex hypothesi upset the balance of the earlier compromise. There is therefore no foundation for the Chilean statement that "in interpreting the extent of the zone which he award to Chile, a liberal approach should be adopted, rather than a restrictive one, in an attempt to match, on the Chilean side, the ample value of the area granted to Argentina" (CM/1 p.59).

232. There is no evidence that the so-called factors of occupation, value or strategy played any significant part in the choice of the 1902 boundary line for this Sector, and therefore could not be considered relevant to its interpretation.

In order to draw a compromise line between the claims of the two parties along a central meridional dividing line, the 1902 Arbitrator employed, as far as possible, a line of elevated watershed with geographical continuity but he

nowhere enunciated or in practice followed what Chile calls "the principle of the integrity of river basins". On the contrary, in the length of boundary described in Article III of the 1902 Award between Perez Rosales and Lake Buenos Aires the boundary line crosses the principal rivers and some of their tributaries and actually follows river lines in three places including the River Encuentro.

CHAPTER 7

THE MIXED BOUNDARIES COMMISSION

233. Comparison of the arguments put forward on behalf of both Parties reveals that the contentions relating to the relevance of the work of the Argentina-Chile Mixed Boundaries Commission show that there is a considerable amount of common ground between the Parties upon this question. However, while the Argentine Republic invites this Court, in carrying out the task placed upon it by the Question in Article I (1) of the Agreement for Arbitration (Compromiso), to draw certain conclusions from the work of such Mixed Commission, the conclusion at the end of the arguments advanced by Chile is that no assistance of any kind can be obtained by the Court from such work. One of the principal reasons for this conclusion appears to be the argument that, because the Mixed Boundaries Commission did not reach a determination as to the course of the whole length of the boundary between Boundary Posts 16 and 17, no conclusion of the Mixed Commission can have any validity or be of any assistance to the Court. It will be seen from the contents of this Chapter that the submission of the Argentine Republic

is that such an argument by Chile is wrong in law, in fact, and in the light of all the work of the Mixed Commission, both in regard to the relevant Sector and in regard to other parts of the frontier in which work has been carried out by it. Certain other arguments raised in the Chilean Memorial concerning the work of the Mixed Commission are also considered in this Chapter.

234. Part Three (pages 202-408) of Volume I of the Chilean Memorial is entitled - "The question whether there has been any settlement of the boundary between Posts 16 and 17". Paragraph 1 of Chapter I (CM/1 page 202) states that Part Three of the Chilean Memorial will consider the question of "the extent, if any, that the course of the boundary between the territories of the Parties in the Sector between Boundary Posts 16 and 17 has remained unsettled since the 1902 Award". The paragraph then continues by referring to certain exchanges between the Parties and Her Majesty's Government relating to the activities of the Argentine-Chile Mixed Boundaries Commission, and in particular Act No.55 of 1955.

235. There is no reference in this Part (Part Three) of the Chilean Memorial to any other mode of "settlement"

of any part of the boundary line apart from the activities of the Mixed Boundaries Commission, and in particular there is not found, either in this Part of the Chilean Memorial or in any other Part, any reference to the important consideration raised in the Argentine Memorial as to the possibility of "settlement" of some part or parts of the boundary line between Boundary Posts 16 and 17 by the 1902 Award itself. Accordingly, except for one comment no further consideration will be given in this Chapter of this Counter Memorial to the question of "settlement" of any part of the boundary line in the Sector by the 1902 Award itself but the Argentine Republic refers the Court again to the argument upon this subject in its Memorial (Arg. Mem. pp.211-214). The comment which the Argentine Republic wishes to make here on the question of "settlement" brought about by the 1902 Award itself is this. As has been noted in Chapter 1, paragraph 6 above, two lengths of the boundary line, one in the north and the other in the south of the Sector, are common to the claims of the Parties, who must, therefore, be agreed that those lengths of the boundary line represent a "proper interpretation" of the

1902 Award. This being so, these two parts, at least, were "settled" by that Award, a "settlement" which is confirmed by the relevant unanimous decision of the Mixed Boundaries Commission.

236. Paragraph 2 of Chapter I of Part Three of the Chilean Memorial refers to the General Treaty of Arbitration of 1902, and in particular to Article II thereof. That paragraph of the Chilean Memorial purports to suggest that by reason of the wording of Article II, if by decisions of the Mixed Commission some prima facie "settlement" had taken place of any part of the boundary line, such "settlement" would be "wholly invalid", and by reason of the wording of Article II open to investigation by this Court, on the ground that the "settlement" had been arrived at by a fundamental error of fact.

The Argentine Republic wishes to observe that the competence of the present Court of Arbitration is defined by the terms of the Agreement for Arbitration (Compromiso), and not by Article II of the 1902 Treaty. This Court has not had referred to it the question of the validity of any "settlement" of any question, but it is required to decide, as a preliminary or first stage of its

task, the extent, if any, to which the boundary line in the Sector has been "settled" either in or since 1902. The Chilean arguments relating the legal effectiveness of the decisions of the Mixed Boundaries Commission, as it relates to the Question put to the Court, will be dealt with below.

237. The title of Part Three of the Chilean Memorial includes the phrase "any settlement of the boundary between Posts 16 and 17". This phrase might give the Court the impression that its task involves consideration only of the question whether there had been a "settlement" of the entire course of the boundary between Boundary Posts 16 and 17. It is to be remembered that the wording of the Question submitted to the Court has, for the material words, the following phrase - "to the extent, if any, that the course of the boundary between the territories of the Parties in the Sector between the Boundary Posts 16 and 17 has remained unsettled since the 1902 Award". This wording clearly involves consideration of the question whether any part or parts of the course of such boundary has or have been settled. As noted below, certain arguments advanced on behalf of Chile seem to suggest that no settlement of any part can

have taken place unless the whole course of the boundary in the Sector has been so settled. The Court will have seen from the Argentine Memorial that it is not submitted that the whole course of the boundary in the Sector under consideration has been "settled" within the terms of the Question; nevertheless, it is beyond argument as a matter of language that the Court is fully empowered to consider whether or not there have been settlements of any part or parts of the boundary line in the Sector.

238. There would seem to be some inconsistency in the submissions made by Chile in its Memorial as to the conclusion which it wishes the Court to reach upon the question of "settlement" of any part of the boundary. In paragraph 4 (xvi) of Chapter I of Part Three it is submitted as follows :- "Accordingly, there has been no "settlement" of any part of the boundary between Posts 16 and 17 through the proceedings of the Mixed Boundary Commission, and it falls to the Court of Arbitration to report its conclusion on what, on the proper interpretation and fulfilment of the 1902 Award, is the course of the boundary throughout the whole of the Sector" (CM/1

l.p.208). However at CM/1 pages 474-475, in Part Five of the Chilean Memorial, at Contention (44) the following words occur - "Accordingly, the only settlement of the boundary which has taken place in the Sector between Posts 16 and 17 is that which occurred as the result of the fulfilment of the 1902 Award by the Parties between 1902 and 1952 ... (paragraph (14) to (24) of these Contentions)". If it is intended that the latter argument is put forward as a ground for suggesting that "settlement" has taken place with regard to the whole of the boundary line in the Sector, the arguments relating thereto on behalf of the Argentine Republic are to be found in their appropriate place in this Counter Memorial. If on this Chilean argument the whole of the boundary in the Sector were to be regarded as "settled", the Court would have no need to move to the second part of its task, namely, a consideration of the proper interpretation and fulfilment of the 1902 Award. It is assumed here, however, that there remains on the part of Chile a denial that the operations of the Mixed Commission have had any effect upon the outstanding question between the Parties. This Chapter will accordingly be confined to the arguments raised in

Part Three of the Chilean Memorial.

239. The basic fallacy of the Chilean argument. The Chilean Memorial deals at considerable length with the history and proceedings of the Mixed Commission, and its submissions are summarised in paragraph 4 of Chapter I of Part Three (CM/1 pp.204-208). The arguments relating to the validity of any decision of the Mixed Commission are based upon a fundamental assumption that the line of boundary now put forward in the Chilean Memorial is correct (see sub-paragraphs (vi), (vii), (viii) and (xiv) of paragraph 4). If such an assumption were properly made, it would no doubt follow that the work of the Mixed Commission was misconceived. But this argument is a logical fallacy. The approach required of the Court by the Question put to it is first to consider whether any part of the boundary in the relevant Sector has been "settled", and then to go on to decide, in relation to such parts as have remained unsettled, where the true course of the boundary line lies in accordance with the proper interpretation and fulfilment of the 1902 Award. Since the Question so clearly requires such an approach, the Court cannot be asked to reject any consideration of "settlement" of any part

of the boundary line in the Sector by assuming as a first step that the argument of either one Party or the other is correct. By so doing, the Court would nullify any purpose of the first part of the Question; the Question would then have to be answered as if it simply required the Court to determine the course of the boundary line between Boundary Posts 16 and 17 without any other considerations.

240. In the submission of the Argentine Republic, the correct and proper approach of the Court should therefore be an historical one, with a view to answering the first part of the Question - "to the extent, if any, that the course of the boundary has remained unsettled....." Although no express reference has been made in the Question to the activities of the Mixed Commission, it is clear from the Memorials of both Parties that those activities form an important part of the consideration of this part of the Question. While Chile seeks to show that the work of the Mixed Commission in the Sector during more than a decade is without legal significance for present, or other, purposes, the Argentine Republic places the greatest importance upon this part of the Question, particularly

in view of the Protocol of 1941 which placed the demarcation of the whole frontier between the two Parties in the hands of the Commission. It should hardly be necessary to remind the Court again that any determination in relation to the work of the Mixed Commission in the Sector would touch upon the validity of its work in other parts of the frontier, both parts where work has already been carried out, and parts where work is still being done.

241. Chapter II of Part Three of Volume 1 of the Chilean Memorial sets out the Chilean view of the origin and form of the Protocol of 1941. The Argentine Republic does not dissent from the statement on CM/1 pages 209-210 that the Mixed Commission had its origin in the uncertain character of the boundary in certain parts of the frontier. However the restrictive assertion that the proposal for the creation of the Commission "related only to improving the means of identifying the line of the boundary on the ground" (p.210) cannot be accepted by the Argentine Republic as the Court will have seen from the Argentine Memorial.

242. Chapter II of Part Three of the Chilean Memorial, in describing the particular Articles of the Protocol of 1941 appears to place great emphasis upon the

assertion that the Mixed Commission was to be a "technical" one with only administrative powers. It is not clear exactly what connotation is intended by this description; if it is simply descriptive of the task of demarcation for which the Mixed Commission was set up, it does not appear to advance any particular argument in favour of Chile. If, on the other hand, it is intended to have a restrictive effect in purporting to convey that the Mixed Commission was not of the normal nature of a boundary demarcating commission, then such an interpretation is not in accordance with the language and purpose of the Protocol as reflected and confirmed in the subsequent practice of the Commission itself and of the Parties which established it. It is suggested in Paragraph 15 of Chapter II (CM/1 p.224) that the final declaration contained in the 1941 Protocol shows that the Parties had not intended to give the Mixed Commission "the power to refashion the course of the boundary and in the process alter an existing determination of the boundary by an arbitral tribunal". No such argument has been put forward by the Argentine Republic and accordingly it is not necessary to consider such an assertion in any detail. What is asserted by the Argentine Republic

is that the Mixed Commission, among other functions for which it had authority, had the authority to carry out the task of - to use the words of the Chilean Memorial -

"Identifying on the ground the line of the boundary in conformity with the applicable Treaties and Awards" (CM/1 page 244, paragraph 33 (b)).

The full arguments of Argentina upon the interpretation of the 1941 Protocol are set out in its Memorial.

As the Parties are in agreement upon this function of the Mixed Commission, it only remains to consider as a matter of historical fact whether or not the Mixed Commission did identify upon the ground any part of the boundary line in the relevant Sector.

243. Chapter III of Part Three of Volume 1 of the Chilean Memorial refers to certain administrative Decrees passed by both Parties relating to the appointment and regulation of the delegates on either side who were to form the Mixed Boundaries Commission. At CM/1 pages 227 - 228 it is stated that the Chilean Decree No. 2071 "subordinated the Chilean Commissioners to the instructions of the Ministry of Foreign Affairs of Chile⁷, whenever necessary, for carrying out the clauses of the Protocol". However, the Chilean Memorial does not suggest that this Decree

alters the terms of the 1941 Protocol; the internal Chilean procedure only required its Delegates, "whenever necessary", to seek instructions in carrying out their duties on the Commission. No question of ratification of decisions of the Mixed Commission by the national governments is raised by the terms of this Decree.

244. Chapter IV of Part Three sets out the terms of the Works Plan and Regulations of the Mixed Commission, and this Chapter calls for no further comment here, the subject having been fully dealt with in the Argentine Memorial. The Court may have seen that translations of these provisions annexed to the two Memorials differ in a number of places. The Argentine Republic relies upon its own translations and must reserve its position over translations submitted by Chile which differ from its own. Examples of such differences in translation are :-

- (1) At page 235 (CM/1) of the Chilean Memorial, reference is made to Article 23 of the Works Plan and General Provisions of the Mixed Boundaries Commission and it is stated that "Article 23 [provides] for an 'annual informative report' of its proceedings, which is to be forwarded by the delegations

to their Governments as a private document" (Emphasis added). It should be noted that Article 23 of the Works Plan establishes the "annual informative report" not as a "private document" but as a document which was to be a confidential government document.

- (2) The second sentence of Article 28 of the Works Plan is translated in the following manner at page 236 (CM/1) of the Chilean Memorial: "At those places where it is desirable to interpose new boundary posts, it will carry out the determination of the boundary conforming strictly to what is laid down in the official documents referred to in Article 20". (Emphasis added). It should be noted that Article 28 of the Works Plan did not subordinate, as the Chilean translation implies, the power of the Mixed Commission to determine the boundary line (conforming strictly to the delimiting instruments) to the "desirability" to "interpose new boundary posts". It is submitted that the correct translation of the second sentence of the said Article is as follows :

"At points where intermediate boundary posts are required, it will proceed to the marking out strictly in accordance with the official documents listed in Article 20".

(Emphasis added) (Arg.Mem.
Annex 18)

245. Chapter V of Part Three sets out the assertions made on behalf of Chile as to the competence of the Mixed Boundaries Commission. Paragraph 33 (CM/1 p.244) agrees that the course of the boundary in the Sector had in principle been determined by the 1902 Award in application of the earlier Treaties, and in the present Sector had been demarcated on the ground to the extent of the erection of the two Boundary Posts 16 and 17. This paragraph, however, does not cover in any way the extent of the competence of the Mixed Commission described in paragraphs 243-265 of the Argentine Memorial (pp. 216-239). If it be necessary, such considerations should be added to that set out in paragraph 33(b) of Part Three of the Chilean Memorial quoted above in this Chapter (para. 242.).

246. Paragraph 34 of this Part of the Chilean Memorial (CM/1 pp.246,247) refers to the technical duties of the Mixed Boundaries Commission in connection with boundary posts and states - "At the same time

the Commission was, no doubt, competent - and indeed bound - to read the terms of the Award in conjunction with the geographical facts for the purpose of ascertaining and materialising on the ground the course followed by the boundary as laid down in the Award" (p.246). This is said to be the limit of the competence of the Mixed Commission, which had no power to go further if there was -

" a radical divergence between the geographical facts actually found on the ground and the terms in which the Award defined the course of the boundary..." (p.246).

These statements are accepted by the Argentine Republic as correctly stating the tasks which, in suitable circumstances, the Mixed Commission might have to undertake. It is those tasks which, it is submitted, were undertaken by the Mixed Commission in the Sector relevant to the present case and which justified the conclusions which were reached by it and embodied in its Act No.55 of 1955.

To take only one example, if the Commission read the term "peak called Virgen" in the Award ("Cerro Virgen" in the Report) in conjunction with the geographical facts, they found no "radical", or indeed any, divergence between the term used and the geographical facts actually found.

247. Chapter VI (paragraphs 35-47) of Part Three of the Chilean Memorial is devoted to arguing that the decisions of the Mixed Boundaries Commission relating to parts of the boundary line between Boundary Posts 16 and 17 have no effect simply because the Mixed Commission did not determine in accordance with its competence the whole course of the boundary line between those two Boundary Posts. The conclusion contended for is summarised at CM/1 page 205 as follows :

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

This conclusion is set out in rather different terms in paragraph 46 at pages 264 and 265 of the Chilean Memorial as follows :-

"...both common sense and good faith in the execution of the 1941 Protocol would in any event debar the Commission from approving definitively any one segment of the boundary line between two existing Posts until the whole course of the boundary between those posts had been identified in conformity with the applicable Treaty or Award and it had thereby been established that the course of the boundary laid down for the whole Sector indubitably embraces the segment in question".

It cannot be agreed that this conclusion is supported either by commonsense or good faith; but this will be considered below. For the moment it will suffice to say that there is no justification for making such a sweeping limitation upon the Mixed Commission's powers and the manner of their exercise by the Commission which had been carried on for a number of years in various parts of the frontier without any objection from either Party.

248. This Court will already have appreciated that the limits of the "Sector" submitted to its consideration have been chosen by reason of the extent of the dispute between the Parties. The "Sector" was not a recognised division of the frontier during the work of the Mixed Commission. (The confusion between "Sector" and "section" is repeated in paragraph 47 at CM/1 p.266).

The boundary marks set up by the British Demarcating Commission in 1903 were located according to general directions given by Colonel Sir Thomas Holdich in 1902 (CM/3, Annex No.27B p.131D). These general directions stated the duty of the British Officers to be the location of pillars, or boundary

marks, "in those parts of the boundary indicated by the Tribunal, and to decide in cases of uncertainty where such boundary marks are to be placed" (ibid., Para.6). Such directions, followed by the Demarcating Commission in 1903, resulted in the boundary line not being divided in a number of regular lengths. When the Mixed Boundaries Commission came to consider the division of its own work, it was decided that for the purposes of that work the frontier would be divided into 16 sections (not Sectors between Boundary Posts) from south to north. The relevant Section was Section VII being 44°S to 42°S (see Arg.Mem.,paragraph 109, page 111). An examination of the work carried out by the Mixed Commission on Sections V and VI shows that a sub-division (in those Sections, as in Section VII, by reference to degrees of latitude) was adhered to by the Mixed Commission, and in due course that Commission in 1950 and 1951 came to the conclusion that the production of an accurate map of an area approximately 5 kilometres wide on both sides of the boundary was a prerequisite to the final demarcation on the ground (see Arg. Mem. paragraphs 121 and 122, pages 118 and 119). Typical sheets of such a map have already been annexed to the Argentine Memorial

as Maps A 34 to A 46, and an examination of such sheets shows that in no case was the Mixed Commission concerned with dividing up the boundary into sectors between the original Boundary Posts placed by the 1903 British Demarcating Commission.

The Mixed Commission proceeded in every case upon the basis that it would work, in accordance with the decisions reached by it, upon various parts of the frontier and that only where any particular part of the frontier caused difficulty over tracing or demarcation would any further procedure be considered. In the case of the boundary line in what is now known as the "Sector", it will be recalled that in Act No.55 the frontier in this area was dealt with in three parts; the first of these stretched from well north of Boundary Post 16 to the confluence of the River Falso Engano with the River Encuentro; the central portion was from that confluence to Cerro de la Virgen; and the final length was from Cerro de la Virgen as far as parallel 44°S. (i.e. south of Lake General Paz).

249. In this same connection it should be noted that, as may be seen from the Argentine Memorial (p.127), the Mixed Boundaries Commission had by

1952, finally demarcated the boundary line in Section VI of the frontier, between parallels 44°S and 46°S. No Boundary Posts were considered necessary to be erected, at the two extremes of the boundary line in that Section, nor were the extremes of this Section determined by "natural" boundary posts or by boundary posts erected by the British Demarcators in 1903.

It must be noted, moreover, that during the demarcation of Section VI, which lasted several years, the boundary line in that Section was divided into seventeen lengths, each corresponding to one sheet prepared by the Mixed Commission on which the approved boundary line was plotted. (As already noted, examples of those sheets were annexed to the Argentine Memorial as Maps A36 to A46.) The Court may have seen that the boundary line plotted on each of those sheets and approved by the Mixed Commission does not necessarily have boundary posts at each end. Yet, neither the Chilean Government nor the Argentine Government questioned at any time the definitive character of the approval by the Mixed Commission of the several lengths of the boundary line which composed Section VI.

The same could be said with regard to those cases in which the demarcation of the whole Section between two degrees of latitude has not yet been achieved, as is the case in the present Sector now under the consideration of this Court. The Court is asked to look at Map A.35 ("Ap.Iwan V-14") belonging to Section V of the frontier. As has already been mentioned in the Argentine Memorial (pp.131-134), in this length of the boundary line the Mixed Commission was faced with problems concerning the proper course of the boundary line in the Cerro Rojo and Cerro Ap-Iwan areas. These problems were settled in Act No.55 and the boundary line in Sheet V14 was definitively approved, in a manner favourable to Chile, by the Mixed Commission without any boundary post having been placed thereafter on any part of that part of the boundary line. Here again neither Government has at any time questioned the definitive settlement effected by the decision of the Mixed Commission of that length of the boundary.

250. The Chilean argument put forward in paragraph 46 at CM/1 pp. 264-266, discussed above, therefore takes no regard of the practical considerations facing the Mixed Boundaries Commission or of its unanimously approved Work Plan. Apart from this

consideration which would seem to govern the question, commonsense itself would also be exercised against the contentions so put forward. The Mixed Commission, in carrying out its task of tracing out the boundary line, would be expected to continue with whatever plan of work it had adopted for a particular season in a regular manner until it reached some particular point of difficulty. Commonsense would then expect that such a point of difficulty would have to be identified, and a suitable attempt made to resolve it. In the present case the Informative Report of the Mixed Commission for the period 1941 to 1947 (Arg. Mem. Annex No.21.) shows that the members, both Argentine and Chilean, of the Mixed Commission carrying out a study of the frontier in Section VII had no difficulty in identifying the boundary from the south at parallel 44°S as far north as Cerro de la Virgen. North of that peak, which the Report described as one "which must be considered as a natural boundary post", it decided that the difficulty in the present case began. (The Court will recall in this context that in the 1903 Demarcation arrangements - "It was agreed that wherever the boundary is defined by strong, well-marked and unmistakable topographical

features, no demarcation is necessary" (Arg.Mem. Annex 11, p.1. cf. CM/2 p. 131A which puts the word "artificial" before "demarcation"). Since at all times up to 1955, the Mixed Commission made its decisions unanimously, it can hardly be suggested that such a procedure was in any way improper or outside the powers of the Commission. Indeed no such suggestion is made in the Chilean Memorial. Further, since it is now common ground between the Parties that the Cerro de la Virgen described by the Mixed Commission is the same mountain as the "peak called Virgen" named in the 1902 Award, it would hardly be in accord with commonsense to conclude that the Mixed Commission had acted wrongly in acting as described in its Informative Report.

251. The "common sense" argument adduced by Chile to show that the Mixed Commission either could not take, or ought not to have taken, definitive decisions upon two parts of the boundary line in what is now the Sector, one in the north and one in the south, would have serious implications for the present Court if there were any substance to it. This is because in the present case, as has already been pointed out, two lengths of the boundary line in the Sector, one in

the north and the other in the south of the Sector, are common to the claims of the Parties, who must, therefore, be agreed that those lengths of boundary line represent a "proper interpretation" of the 1902 Award. If common sense dictated a consideration of the entire boundary line throughout the Sector, then the Court would have to disregard these two lengths which are common to the claims of both Parties, and take a look at the whole; a look which might well cause them to think that the location of Boundary Post 16 should be reconsidered, or that the boundary line might run westwards from Boundary Post 16 along the River Carrenleufu and then follow some line to the south.

252. The second ground raised in the Chilean Memorial at paragraph 46 of Part Three (pp.264-266) is that of "good faith". The paragraph referred to does not make clear in what sense it is suggested that the actions of the Mixed Commission were not in good faith. As stated above, the Mixed Commission at all times reached its decisions unanimously, and the work involving the boundary in the "sector" stretched over the years 1944 to 1955. The Argentine Republic is not taking this reference in the Chilean

Memorial as a suggestion that there was any breach of good faith on the part of the Argentine element in the Mixed Commission in regard to such work at any time during those 11 years. The decisions recorded in Act No.55 were arrived at after a lengthy and detailed discussion by all the members of the Mixed Commission, and indeed were justified subsequently by the Chairman of the Chilean element, General Urrea, as is shown by his Memorandum annexed to the Argentine Memorial as Annex No.25.

253. The task of the Mixed Commission was to identify the frontier in any relevant part, and such identification required application of the terms of the 1902 Award, and any other relevant documents. Since the Award and its accompanying documents made no reference to any placing of Boundary Posts, it can hardly be expected that an application of that Award to the ground and the identification of the line so formed could be made solely by relation to the Boundary Posts later put up by the Demarcating Commission of 1903. It must be concluded that the argument that the Mixed Commission could only definitively approve the whole of the boundary line between pre-existing posts placed in 1903

cannot be well founded.

254. The Chilean Memorial in paragraph 47 of the same Chapter (CM/1 p.266) goes on to say that - "Quite apart from the considerations of common sense and of good faith" in the application of the 1941 Protocol, Articles 15 and 29 (c) of the Works Plan "appear to recognize that resolutions of the Commission can become definitive only when its work for the whole Sector in question is complete. These Articles and Article 23 also indicate that the work in a Sector is not to be considered complete until each separate stage has been carried through to a finish" (Emphasis added). (As already pointed out in paragraph 248 above the reference to "Sector" is erroneous and misleading).

Articles 15, 23 and 29(c) do not give any basis for this argument put forward in the Chilean Memorial, that the work of the Mixed Boundaries Commission for a given "Sector" is not definitive until the "work for the whole Sector in question is complete" (CM/1 p.266).

255. Article 15 of the Works Plan (Arg.Mem. Annex 18 p.6) is concerned with the information to be given to the Governments for the purposes of Article VI of the Protocol of 1941 relating to the changes in

territorial jurisdiction resulting from demarcation. This information by each Delegation, composing the Mixed Boundaries Commission, to its Government should, according to Article 15, include the forwarding to the Governments of the following documents: (a) a certified true copy of the relevant Acts; and (b) the map drawn showing the frontier line plotted and approved by the Mixed Commission. Article 15 of the Works Plan also provides that "these documents will be sent to the respective Governments within thirty days following the final completion of demarcation of the frontier on each topographical Sheet of a Section".

This paragraph of Article 15 contains no implication that the decisions of the Mixed Commission concerning parts of the boundary line do not have a definitive character. It only provides that information to Governments for the purposes of Article VI of the 1941 Protocol, regarding changes of jurisdiction, should be given within thirty days following the demarcation of the frontier plotted on the relevant topographical Sheet. This provision cannot be interpreted, as suggested in the Chilean Memorial, as affecting the

definitive character of each decision of the Mixed Boundaries Commission, covering separate lengths of the boundary line as plotted on each topographical Sheet; it relates to a stage reached when a topographical Sheet is completed by plotting on it a length of boundary line, whether or not boundary posts appear at each end of that line, and does not postpone the delivery of the information until the plotting of any greater length of boundary has been decided upon, so as to make the decision relate to a length of line which has preexisting boundary posts at each end.

256. Article 23 of the Works Plan (See Arg. Mem. Annex 18, p. 9) is concerned with the "Annual Informative Report" on the activities on the Mixed Boundaries Commission and with the "Final Legal-Technical Report by Sections". This Article also gives no basis for the argument put forward in paragraph 47 of the Chilean Memorial, since the only possibly relevant provision of that Article is concerned with the "Final Legal-Technical Report by Sections" which is to be drawn up - "When all works on a given Section of the frontier have been completed" by the Mixed Commission. It cannot be inferred from this Article that a decision taken

by the Mixed Boundaries Commission with respect to the course of the boundary line in a Section, or part of a Section, or the final demarcation of a Section or part of a Section, becomes definitive only after the Final Legal-Technical Report for that Section has been drawn up by the Mixed Commission; or that, in this context, the term "Section" has a special meaning of a length of boundary between pre-existing boundary posts. The Report is merely for the information of the Governments and not a formal stage in the process of decision by the Mixed Commission.

257. Article 29 of the Works Plan (Arg. Mem. Annex 18 p.11) provides the procedure to be followed by the Mixed Commission in cases when the "Delegates fail to agree, on the basis of the survey of the area and the information available, on the course which the boundary line should follow between two boundary posts". The Chilean Memorial invokes paragraph (c) of this Article to support its argument that the lengths of boundary approved by the Mixed Commission in the relevant "Sector" are not definitively settled, because the Commission did not approve the whole of the boundary line in the "Sector". It should be noted first that Article 29 of the

Works Plan is applicable only to cases of disagreement between the Delegates on the Mixed Commission but does not apply to cases where the decision is reached with the unanimous agreement of all the Delegates, as is the case of the decisions embodied in Act No.55 of the Mixed Boundaries Commission. But the unsoundness of the Chilean argument - that disagreement on a small length of the entire line between boundary posts - would suspend action by the Commission on that entire length - is put beyond doubt by Article 30 of the Works Plan (Arg. Mem. Annex 18 p.12). Article 30 provides that, if the situation envisaged in Article 29 (c) - the provision relied on by Chile - arises, "the work of demarcation will not be suspended but will continue wherever agreement has been reached in the same section" (Arg. Mem. Annex 18, p.12; emphasis added).

258. Chapter VII of Part Three of the Chilean Memorial (CM/1 pp.268-337) describes the proceedings of the Mixed Commission relating to the Sector submitted for the consideration of this Court. Most of this Chapter is the recital of the historical facts leading up to and including the decisions recorded in Act No.55 which are more fully set out in the Argentine Memorial at paragraphs

144-171, pages 135-163, and accordingly calls for no further comment here. However certain minor points in Chapter VII should be referred to to avoid any possible confusion.

259. The Acts of the Mixed Commission and the accompanying documents annexed to them are extremely lengthy, but do make clear, where necessary, the difference between the statement of opinions during the general discussions of the Commission, and the conclusions reached by the Mixed Commission unanimously. Chapter VII of Part Three of the Chilean Memorial contains a number of extracts from the records of the discussions of the Mixed Boundaries Commission, but the Court will have no doubt of the different weight to be attached to such records and to the formal resolutions of the Commission itself.

Since all such conclusions were freely and unanimously reached by the Commission, it is not necessary, except in the case of Act No.55, to analyse the exact stages which led up to their adoption.

260. Paragraphs 59 and 60 of Chapter VII of Part Three (CM/1 pp.285-287) do not record the sequel of the discussion there referred to concerning

the boundary at Cerro Rojo and Cerro Principio. Although the Chilean attitude was that any disagreement among the delegates required the application of Article VIII of the 1941 Protocol, the two elements of the Mixed Commission in fact reached agreement in the cases of Cerro Rojo, Cerro Ap-Iwan and Cerro Principio, and its decisions thus made have never been questioned by either Party (see Arg. Mem., paragraphs 137-140, pages 128-133).

261. Paragraph 65 of Chapter VII of Part Three contains reference (CM/1 p.291) to a Memorandum sent by the Chairman of the Chilean element of the Mixed Commission to his own Ministry of Foreign Affairs. This document would appear to have been an internal document, of which the Argentine Republic had not therefore any knowledge at the material time, and which consequently cannot be adduced as evidence of Argentine acquiescence at that time. However it is not without interest to note that in the passage quoted at CM/1 page 293 the Chilean Chairman points out the contradictions possible between a proposed course in relation to the line of the boundary in the Sector (as it now is), and the Chilean position put forward in relation to lines traced or to be traced

on Sheets V-6 and V-14, those being the discrepancies which had been discovered in relation to Cerro Ap-Iwan, Cerro Principio and Cerro Rojo, which are fully discussed at pages 128-133 of the Argentine Memorial. The extract from the Memorandum of General Urrea quoted shows the Memorandum to be an appreciation of the courses of action open in the various parts of the frontier where problems existed and a consideration of what attitude on behalf of Chile would be most favourable to the interests of that country. It would accordingly be wrong to conclude, as the Chilean Memorial does at CM/1 page 296, that such Memorandum shows in some way that the area now in dispute and claimed by Chile was then accepted unquestionably as belonging to Chile. On the contrary, it would seem that the Memorandum is examining the possible arguments, and their possible consequences, which might result from making a claim to this territory, about which clearly the Chilean Chairman had grave doubts as to which side of the boundary it should properly lie. The purpose of this Memorandum was to provide a basis for a policy which would secure the disputed area for Chile, even at the expense of yielding less important territory in other parts of the frontier,

in cases where there was a discrepancy between the terms of the 1902 Award and the geographical facts.

262. Paragraph 69 of Chapter VII (CM/1 pp.299-303) contains various criticisms of "the three map sheets" (Sheets VII-1, VII-2, VII-3 Maps A29, A30 and A31) which had been prepared under the procedure of the Mixed Commission. The first sentence of the paragraph implies that the sheets were Argentine productions in which Chile had had no part, an implication which is later stated expressly, for example at CM/1 pages 329 ("the Argentine sheets"), 331 ("the Argentine sheets") and 335 ("the map sheets prepared by the Argentine Geographical Institute and used by the Commission"). The Court should not be misled into believing that the Mixed Commission's "three map sheets" were introduced into the Commission by the Argentine element in any irregular manner. The paragraph in the Chilean Memorial entirely omits any consideration of the fact that those map sheets were prepared in accordance with the procedures laid down and accepted by the Mixed Commission, and under supervision at all times of delegates or technical experts of both Parties.

Furthermore during the proceedings recorded in Act No.55, the Chilean delegates on the Mixed Commission, in an explanation of their proposal, formally stated that the sheets were prepared by the Mixed Boundaries Commission, and not by Argentina alone (see Arg.Mem. Annex 22,p.19, paragraphs 1 and 2). (The procedure followed is fully set out in Arg.Mem. para.150 pp.142 and 143). To say that such map sheets contained serious defects is to suggest that the representatives of both sides were responsible for such defects.

It will be recalled that the determination of the area to be mapped, the aerial photography, the preparation of the maps, the subsequent checking in the field, and all other stages of the making of the Sheets had been attended by experts or delegates from both Parties.

263. The complaint made is that "the sheets depict the several features necessary to support the Argentine proposals but exclude altogether from the map the features essential to the consideration of the Chilean claim" (CM/1 pages 299-300). "The Chilean claim", whether this means the Chilean proposal made later in the Mixed Commission or the different Chilean claim made in 1956, did not exist

at the time when the maps were prepared, and accordingly it is not surprising to find that the map sheets do not extend as far as the area and the line later claimed on behalf of Chile. On the contrary, the maps show beyond doubt that both Chilean and Argentine boundary experts considering the problem at that time were agreed upon the area "on both sides of the boundary" (see Arg.Mem. Annex 18 p.9) with which they were to be concerned. The fact that Chile later laid claim to a line many kilometres to the east of that area cannot affect the validity of the map sheets then prepared; for the fact is that Chilean claims since 1955 have been greatly at variance with any boundary being considered by the Mixed Commission in the period 1944-1954.

264. The discrepancy in one of the Mixed Commission map sheets with regard to the width of the River Falso Engano was mentioned (Transcript page 40) at the Oral Hearings of December 1965 by Counsel for Argentina, and it is not necessary to repeat the comment here. The complaints further made by Chile at page 300 (CM/1) of the Chilean Memorial as to the naming of the river system of the River Encuentro

are made by Chile because such naming does not fit in with the case now put forward on its behalf, but it cannot be over-emphasized, in the opinion of the Argentine Republic, that in the period 1950-1954 such names were placed upon the map sheets of the Mixed Commission with the full agreement and concurrence of the boundary experts then forming part of the Mixed Commission and representing Chile. Accordingly a protest made in 1965 as to the validity of that naming cannot be accorded any weight, in view of the obvious reason for the making of such a protest, namely that such naming is highly inconvenient to the Chilean case now put forward. Thus, examination of the grounds upon which Chile suggests that the map sheets contained "inadequacies and errors" (CM/1 p.335) amounting to a "fundamental error of fact" (CM/1 p.480) which deprive the decisions of the Mixed Commission of binding force "unless afterwards ratified by them [the Parties]" (CM/1 p. 336) shows that these alleged errors consist in substance of the failure to include certain territory in the area of the map sheets and alleged misnaming of river features. None of these alleged defects could of themselves be sufficient to vitiate the map sheets, or decisions based upon them; for each

depends upon accepting a proposition which Chile has still to prove.

265. Paragraphs 70-79 of Part Three of the Chilean Memorial set out the course of the discussions, and summarise the contents of the documents exchanged, between the Parties' representatives on the Mixed Commission at their meeting at Buenos Aires in October 1955. Such considerations and conclusions were fully dealt with in the Argentine Memorial at paragraphs 152-171 at pages 143-163, and it does not appear necessary to summarise at length the differences between the two statements in the respective Memorials.

It remains necessary to consider whether any, and if so what, arguments are put forward on behalf of Chile in its Memorial for asserting that the unanimous decisions of the Mixed Commission made in Act No.55 and relied upon by Argentina in its Memorial are not to be considered as effective. At page 324, paragraph 78, of CM/1 it is suggested that as a matter of urgency the Chilean Delegates in the last days of the meeting acquiesced in a compromise solution. However it is quite clear from the terms of Act No.55 that only part of the

decisions made was in any sense a compromise, as that Act so states. That was the joint proposal relating to the part of the frontier in the Sector (as it now is) between the confluence of the River Falso Engano with the River Encuentro as far south as Cerro de la Virgen. There is no suggestion from the terms of the Act or from any other source that any of the several other decisions made by the Mixed Commission on this occasion were in any sense compromise decisions.

266. Paragraphs 80-84 of Part Three, pages 329-337, of Volume 1 of the Chilean Memorial, discuss the legal significance of Act No.55. The replies which the Argentine Republic would wish to make to such arguments are clearly set out in its own Memorial at pages 214-239, paragraphs 240-265, and in the preceding parts of this Chapter. It is however of interest to note that in paragraph 82 at pages 333-334 of the Chilean Memorial (CM/1) the following passage occurs :-

"The third segment, running from Cerro Virgen to Boundary Post No.17 on the north shore of Lake General Paz, is admittedly reconcilable with the actual words of a passage in the Award."

This passage is, of course, a limited and grudging admission; indeed the only "actual words of a passage

in the Award" which relate to this so-called "third segment" are the words "and thence" in the passage in Article III of the 1902 Awards - "follow the River Encuentro to the peak called Virgen, and thence to the line which we have fixed crossing Lake General Paz" (Arg. Mem. Annex 1 pp. 2-3). The fact is that the so-called "third segment" running from Cerro de la Virgen to Boundary Post 17 is in fact the line plainly described in the words of the Report of the 1902 Tribunal and the line drawn upon the Award Map, and approved by the Arbitrator.

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