

CASE CONCERNING A BOUNDARY DISPUTE BETWEEN ARGENTINA AND CHILE CONCERNING THE DELIMITATION OF THE FRONTIER LINE BETWEEN BOUNDARY POST 62 AND MOUNT FITZROY, 21 OCTOBER 1994

AFFAIRE CONCERNANT UN LITIGE FRONTALIER ENTRE LA REPUBLIQUE ARGENTINE ET LA REPUBLIQUE DU CHILE PORTANT SUR LA DELIMITATION DE LA FRONTIERE ENTRE LE POSTE FRONTIERE 62 ET LE MONT FITZROY, 21 OCTOBRE 1994

Determination of a boundary line in a sector of the frontier between Argentina and Chile — The force of the *res judicata* of an international award applies to the award and to the concept used therein — Interpretation and implementation of an international award — Competence of international judges: *ultra vires* decision; excess de pouvoir and the rule of non *ultra petita partium* — Continental and local water-parting — Subsequent conduct of the parties as a means of interpretation of an international award.

Détermination de la ligne de démarcation dans un secteur de la zone frontalière entre l'Argentine et le Chili — L'autorité de la chose jugée vaut, dans le cas d'une sentence internationale, pour la sentence arbitrale et pour les concepts sur lesquels elle se fonde — Interprétation et application de la sentence arbitrale — Compétence des juges internationaux : décision *ultra vires*; excès de pouvoir et application de la règle *non ultra petita partium* — Séparation entre eaux territoriales et plateau continental — Comportement subsequent des parties en tant que moyen d'interprétation de la sentence internationale.

Mr. Rafael Nieto Navia, *President*;

Mr. Reynaldo Galindo Pohl, Mr. Santiago Benadava, Mr. Julio A. Barberis and Mr. Pedro Nikken, *Judges*;

Mr. Rubem Amaral Jr., *Secretary*;

Mr. Rafael Mata Olmo, *geographical expert*.

In the dispute concerning the line of the frontier between boundary post 62 and Mount Fitzroy, *between*

The Argentine Republic, represented by

Her Excellency Susana Ruiz Cerutti, Ambassador to the Swiss Confederation and the Principality of Liechtenstein.

His Excellency Ambassador Federico Mirrè, delegate to the Comisión técnica mixta del Frente marítimo del Río de la Plata.

His Excellency Ambassador Horacio A. Basabe, Director of the Arbitration Office.

As Agents:

Mr. José María Ruda, former President of the International Court of Justice, member of the International Law Institute.

Mr. Daniel Bardonnet, professor at the University of Law, Economics and Social Sciences, Paris, member of the International Law Institute.

Mr. Santiago Torres Bernárdez, former Secretary of the International Court of Justice, member of the International Law Institute.

As Counsel:

General Luis María Miró, President of the National Commission on International Boundaries.

Engineer Bruno Ferrari Bono, member of the National Academy of Geography of the Argentine Republic.

Mr. Eric Brown, Emeritus Professor of Geography, University College, London.

As experts:

Captain Federico Río, Deputy Director of the Arbitration Office.

Counsellor Bibiana Lucila Jones, Arbitration Office.

Counsellor Eduardo Mallea, Arbitration Office.

Counsellor Gustavo C. Bobrik, Arbitration Office.

Counsellor Alan C. Béraud, Arbitration Office.

Embassy Secretary Pablo A. Chelía, Arbitration Office.

Mr. Alejandro Suárez Hurtado, Vice-Consul in Rio de Janeiro.

Embassy Secretary Holger F. Martinsen, Arbitration Office.

Mrs. Luisa Lemos, Argentine Embassy in Berne.

Mrs. Liliana Pérez Malagarriga de Bounoure, Argentine Embassy in Berne.

Mrs. Ursula María Zitnik Yaniselli, Arbitration Office.

Mr. Gustavo R. Coppa, Arbitration Office.

Mrs. Nora G. Veira, Arbitration Office.

Mrs. Andrea S. Fatone, Arbitration Office.

Mrs. María Elena Urriste, Arbitration Office.

As Advisers and Assistants:

and

The Republic of Chile, represented by

His Excellency Ambassador Javier Illanes Fernández, National Director of State Frontiers and Boundaries, Ministry of Foreign Affairs,

His Excellency Ambassador Eduardo Vío Grossi, Director of Legal Affairs, Ministry of Foreign Affairs, member of the Inter-American Juridical Committee,

As Agents:

Mr. Elihu Lauterpacht, CBE, Director of the Research Centre for International Law, University of Cambridge, member of the International Law Institute.

Mr. Prosper Weil, Emeritus Professor at the University of Law, Economics and Social Sciences, Paris, member of the International Law Institute.

His Excellency Ambassador Ignacio González Serrano, head of the Arbitration Agency office in Rio de Janeiro,

As Counsel:

Mrs. María Isabel volochinsky Weinstein, lawyer, Ministry of Foreign Affairs.

Mr. César Gatica Muñoz, geographer, head of the Department of Boundary Studies, Ministry of Foreign Affairs.

Mr. Eduardo Martínez de Pisón, Doctor of Geography, Professor of Physical Geography, Autonomous University of Madrid.

Mr. Eugenio Montero C., lawyer, Arbitration Agency.

Mr. Sergio Gimpel F., Master of Geographical Sciences, Professor of Physical Geography, University of Chile.

Mr. Miguel González Polanco, topographer, Ministry of Foreign Affairs.

Mrs. Marcela Javalquinto Lagos, geographer, Ministry of Foreign Affairs.

Miss Marta Mateluna R., cartographer, Arbitration Agency.

Miss Cecilia Zamorano V., cartographer, Arbitration Agency.

Mr. Anthony Oakley, lawyer, Professor of Civil Law, University of Cambridge.

Mrs. María Teresa Escobar, interpreter, Arbitration Agency.

Mr. Raúl Boero, interpreter, Arbitration Agency.

Mrs. Ana Morales R., secretary, Ministry of Foreign Affairs.

Miss Viviana Morales A., secretary, Arbitration Agency.

Miss Marcela Leal G., secretary, Arbitration Agency.

As Advisers and Assistants:

the Court, composed as above, pronounces the following Award:¹

I

1. On 31 October 1991 Argentina and Chile signed in Santiago the Arbitral *Compromis* set out below:

The Government of the Argentine Republic and the Government of the Republic of Chile,
Whereas by the Presidential Declaration on Boundaries signed in Buenos Aires on 2 August 1991 the two Governments took the decision to submit and agreed on the bases for submitting to arbitration the line of the frontier between the Argentine Republic and the Republic of Chile in the sector between boundary post 62 and Mount Fitzroy,
Have agreed as follows:

¹ This Award quotes from some French sources. In order to help the reader, translations have been provided in footnotes. These footnotes are not part of the Award. Quotations from Spanish sources are translated directly in the body of the text.

Article I

The two Parties request the Court of Arbitration (hereinafter "the Court") to determine the line of the frontier in the sector between boundary post 62 and Mount Fitzroy in the Third Region, defined in section 18 of the report of the 1902 Arbitral Tribunal and described in detail in the last paragraph of section 22 of the report.

Article II

1. The Court shall reach its decision by interpreting and applying the 1902 Award in accordance with international law.

2. For this purpose, the specific principles, guidelines, criteria or rules used in the solutions adopted pursuant to the Presidential Declaration of 2 August 1991 concerning other sections of the frontier line shall not constitute precedents.

Article III

1. The Court shall be composed of the following members: Mr. Reynaldo Galindo Pohl, Mr. Rafael Nieto Navia and Mr. Pedro Nikken, appointed by the Parties by common accord; Mr. Julio Barberis, appointed by the Government of the Argentine Republic, and Mr. Santiago Benadava, appointed by the Government of the Republic of Chile.

2. The President of the Court shall be elected by its members from among their own number.

3. The Secretary of the Court shall be appointed by the Court in consultation with the Parties.

Article IV

The Court shall be constituted in Rio de Janeiro on 16 December 1991.

Article V

Any vacancy arising in the Court shall be filled in the manner specified in chapter II, article 26, of annex No. 1 of the Treaty of Peace and Friendship of 29 November 1984. When the vacancy has been filled, the arbitral proceedings shall continue from the point at which the vacancy occurred.

Article VI

The Court shall sit at the headquarters of the Inter-American Juridical Committee in Rio de Janeiro, but some meetings or hearings may be held at other places in that city.

Article VII

1. The working language shall be Spanish.

2. If any of the oral submissions are made in some other language, the Secretary of the Court shall make the necessary arrangements for their simultaneous interpretation into Spanish.

3. Documents submitted by the Parties as annexes to the memorials and counter-memorials in English or French shall not require translation into Spanish.

Article VIII

1. The written proceedings shall consist of the submission of memorials and counter-memorials.

Each Party shall submit a memorial before 1 September 1992.

Each Party shall submit a counter-memorial before 1 June 1993.

The memorials and counter-memorials shall be transmitted by the Secretary of the Court simultaneously to each Party.

Failure to submit any of the documents within the indicated time limits shall not impede or delay the arbitral proceedings.

There shall be no other written submissions by the Parties, unless the Court decides otherwise for the purposes of its deliberations.

2. The oral presentations shall begin on 1 October 1993.

3. Either Party may submit additional documents up to four weeks before the beginning of the oral presentations. After that date new documents may be submitted only with the consent of the other Party.

4. The Court may, having heard the opinion of the other Party, extend the time limits referred to in this article if either Party so requests at least 15 days before the expiry of the time limit in question.

5. The Parties may, by common accord, request the Court to reduce the time limits referred to in this article.

6. The Court shall endeavour to pronounce its Award before 1 March 1994.

Article IX

Each Party shall grant the members of the Court, its staff and the authorized representatives of the other Party free access to its territory, including the sector between boundary post 62 and Mount Fitzroy, but such authorization shall not be construed as enhancing or impairing the rights of either Party to the dispute.

Nor shall such authorization signify any change in the *status quo* prevailing at the time of the signature of this *Compromis*.

Article X

Each Party shall appoint one or more agents for the purposes of the arbitration, who may act individually or jointly.

The agents may be assisted by legal counsel, advisers and any other personnel, as each Party sees fit.

Each Party shall communicate to the other Party and to the Court the names and addresses in Rio de Janeiro of its respective agents.

Article XI

The Court shall be empowered to interpret the *Compromis*, decide on its own competence and establish rules of procedure which have not been agreed between the Parties.

Article XII

1. The Court's decisions shall be governed by the provisions of chapter II, article 34, of annex No. 1 of the Treaty of Peace and Friendship of 29 November 1984. However, they shall be adopted by the affirmative votes of at least three of the judges.

2. The Court may take any decisions necessary for settling points of procedure and conducting the arbitration until the pronouncement and execution of the Award.

3. The Court shall state the reasons for its Award. It shall state the names of the judges who participated in its adoption, the way in which they voted, and the date on which the Award was pronounced. Each judge shall have the right to append to the Award a separate or dissenting opinion.

4. The Award and other decisions of the Court shall be notified to each Party by delivery to their respective agents or to the consulates of the Parties in Rio de Janeiro. Once the Award has been notified, each Party shall be free to publish it.

Article XIII

The hearings shall be held in private, except the meeting constituting the Court or any other meetings agreed upon by both Parties.

The documents of the arbitration proceedings and the records of the oral hearings shall not be published until the proceedings have concluded.

During the arbitration both the Court and the Parties shall furnish public information only about the current stage of the proceedings.

Article XIV

The Court may employ experts, following prior consultation of the Parties.

Article XV

The Award shall specify the persons responsible for its execution, and the manner and time-frame of its execution, including any demarcation work which it may order, and the Court shall remain constituted until it has approved such demarcation work and notified the Parties that in its opinion the Award has been executed.

Article XVI

The Parties shall bear equally the costs of the functioning of the Court.

Article XVII

The Award shall be binding on the Parties, final and unappealable, and its implementation shall be entrusted to the honour of the two Nations.

Without prejudice to the provisions of chapter II, article 39, of annex No. 1 of the 1984 Treaty of Peace and Friendship, the Award shall be executed without delay and in the manner and within the time limits specified by the Court.

Article XVIII

Any matters not covered by this *Compromis* shall be governed by the provisions of chapter II of annex No. 1 of the Treaty of Peace and Friendship of 29 November 1984.

Article XIX

Once the Award has been executed, the documents and records of the arbitration shall be kept by the Secretary-General of the Organization of American States.

Article XX

This *Compromis* shall be registered by the Parties with the Secretary-General of the United Nations in accordance with article 102 of the Charter of the United Nations.

Article XXI

This *Compromis* shall enter into force on the date of its signature.

Signed in Santiago on 31 October 199.

2. The *Compromis* set out above (hereinafter “the *Compromis*”) was preceded by a Declaration of 2 August 1991, in which the Presidents of Chile and Argentina decided to submit this dispute to arbitration. On 30 October 1991 the two Parties also signed a headquarters agreement with Brazil for the Court to sit in Rio de Janeiro. At the invitation of the Secretary-General of the Organization of American States, the Court sat at the offices of the Inter-American Juridical Committee.

3. Argentina appointed as its agents Her Excellency Susana Ruiz Cerutti, Ambassador to the Swiss Confederation and the Principality of Liechtenstein, and His Excellency Ambassador Federico Mirré, delegate to the Comisión técnica mixta del Frente marítimo del Río de la Plata. His Excellency Ambassador Horacio A. Basabe was appointed alternate agent.

Chile appointed as its agents His Excellency Ambassador Javier Illanes Fernández, National Director of State Frontiers and Boundaries, and His Excellency Ambassador Eduardo Vío Grossi, Director of Legal Affairs, Ministry of Foreign Affairs.

4. In accordance with article IV of the *Compromis*, the Court was constituted on 16 December 1991 in a ceremony at the Palacio de Itamaraty in Rio de Janeiro. At a meeting held on that date the Court elected Mr. Rafael Nieto Navia as its President. In consultation with the Parties the Court appointed Minister Rubem Amaral Jr., Executive Coordinator of the Legal Advisory Service of Brazil’s Ministry of Foreign Affairs, as its Secretary.

5. On the date of the constitution of the Court the agents of the Parties agreed on a “Memorandum of Understanding”, which reads:

The agents of the Argentine Republic and the Republic of Chile have agreed on the following principles to be applied during the arbitration referred to in the *Arbitral Compromis* concluded in Santiago on 31 October 1991:

1. In presenting their cases the Parties shall not use the services of lawyers or experts who are nationals of States bordering on the Argentine Republic or the Republic of Chile or who have the same nationality as any of the judges appointed by common accord.

2. The memorials, counter-memorials and any other documents which may be submitted shall not be printed but type-written.

3. The maps and diagrams submitted to the Court may be originals or colour or black-and-white photocopies or photographic copies. All such documents shall bear an indication of the location of the originals of the copies submitted to the Court.

4. Both Parties shall provide the Secretary of the Court with 25 (twenty-five) copies of each document submitted to the Court of Arbitration.

5. Any visits by the Court or by appointed experts to the area of the dispute shall enter the area through the territory of one of the Parties and leave it through the territory of the other Party.

In witness whereof they have signed this memorandum in Rio de Janeiro on 16 December 1991.

6. In accordance with article XI of the *Compromis*, on 14 May 1992 the Court adopted its “rules of procedure”.

7. The memorials were submitted to the Court on 31 August 1992. The *Compromis* stipulated that the counter-memorials should be submitted before 1 June 1993. However, on 30 March 1993 Chile and Argentina requested an extension of the established time limits and suggested new time limits for the proceedings. The Court accepted the suggestion of the Parties and, accordingly, decided that the counter-memorials should be submitted on 16 August 1993 and that the hearings would begin on 11 April 1994.

8. The counter-memorials were submitted to the Court on 16 August 1993. On that same date a resolution of the President was communicated to the Parties, setting 15 January 1994 as the time limit by which they must communicate the elements referred to in rule 16.1 of the rules of procedure.

9. The Court decided to visit the area subject to the arbitration, and this visit, at the suggestion of the Parties and for reasons of the weather, took place in early February 1994. At the session of the Court held between 4 and 8 October 1993 lots were drawn to decide through which country's territory the visit to the area should begin and the order in which the arguments would be submitted at the hearings. The lots were drawn in the presence of Mrs. Susana Grané and Mr. Ignacio González, Consuls-General of Argentina and Chile, respectively, in Rio de Janeiro. The outcome was that the visit would begin through the Republic of Chile and that Chile would also begin the oral presentations.

10. At that same session the Court requested its President to make the necessary arrangements for the appointment of a geographical expert, after consulting the Parties. On 11 January 1994 Dr. Rafael Mata Olmo, Professor of Geography at the Autonomows University of Madrid was appointed as geographical expert, and he submitted in writing the undertaking referred to in rule 18 of the rules of procedure.

11. The visit to the area was preceded by a session of the Court in Rio de Janeiro on 3 and 4 February 1994. On 5 February the judges travelled to Chile, accompanied by the Secretary of the Court and the expert. They were received by the President of the Republic, Mr. Patricio Aylwin, and the Minister for Foreign Affairs, Mr. Enrique Silva Cimma. From 8 to 11 February the Court toured the sector of the frontier lying between boundary post 62 and Mount Fitzroy and inspected on the ground the boundary line claimed by each Party. For the first two days the Court was accompanied by the agents and other personnel of Chile and an Argentine observer, while for the last two days the visit was conducted in the company of the agents and other personnel of Argentina and a Chilean observer. On 12 February the President of Argentina, Mr. Carlos Menem, and its Foreign Minister, Mr. Guido Di Tella, visited the Court at El Calafate. On that same date the Court travelled to Buenos Aires, where it concluded its visit on 14 February.

12. In accordance with rule 14.1 of the rules of procedure, on 18 March 1994 the Parties submitted additional documents to the Court.

13. The hearings were held from 11 April 1994 in the conference room of the library of the Palacio de Itamaraty, Rio de Janeiro, made available for the Court's use by the Government of Brazil. The Chilean case was presented by its agents, Mr. Javier Illanes Fernández and Mr. Eduardo Vío Grossi, its coun-

sel, Mr. Elihu Lauterpracht, Mr. Prosper Weil and His Excellency Ignacio González Serrano, and its advisers, Mr. César Gatica Muñoz and Mr. Eduardo Martínez de Pisón. The Argentine case was presented by its agents, Her Excellency Susana Ruiz Cerutti, His Excellency Federico Mirré and His Excellency Horacio A. Basabe, its counsel, Mr. José María Ruda, Mr. Daniel Bardonnet and Mr. Santiago Torres Bernárdez, and its adviser, General Luis María Miró. The hearings concluded on 18 May 1994.

14. In its memorial Argentina argued for the following conclusions:

In the light of the facts and arguments set out in this memorial, the Government of the Argentine Republic requests the Court of Arbitration to decide that, on the basis of the correct interpretation and application of the 1902 Arbitral Award in accordance with international law, the line of the frontier between the Argentine Republic and the Republic of Chile in the sector between boundary post 62 and Mount Fivzroy is constituted by the line described in the preceding chapter and depicted on maps III *a*, *b*, *c*, *d* and *e* contained in the annex to the atlas in this memorial.

This line is described in paragraph 39 of chapter 12 of the Argentine memorial in the following terms:

The line begins at boundary post 62 on the south shore of Lake San Martín at 324 metres above sea level ($X = 4584177$; $Y = 1449178$), proceeds to Cerro Martínez de Rozas at altitude 1,521 metres ($X = 4583170$; $Y = 1446330$), then follows a generally west-south-west direction for 3.5 kilometres. In this part of its course the line separates the waters of the River Martínez de Rozas from the waters of several unnamed watercourses which also discharge into Lake San Martín. The line continues along the Cordón Martínez de Rozas in a south-south-west direction as far as Cerro Tobi at altitude 1,736 metres ($X = 4578900$; $Y = 1442180$) for 5.1 kilometres and continues in the same direction for 3.8 kilometres as far as an unnamed peak at altitude 1,767 metres ($X = 4575870$; $Y = 1442080$). In this part of its course the line separates the basin of the River Martínez de Rozas from the basin of the River Obstáculo. At altitude 1,767 metres the local water-parting changes direction, forming an elbow towards the north-east and descending to the Portezuelo de la Divisoria, at an altitude of about 690 metres ($X = 4576900$; $Y = 1440380$). This *portezuelo* (pass) separates the waters which run northwards towards Lake Redonda and through it and along the River Obstáculo to Lake San Martín from the waters which run southwards through Lake Larga, Lake del Desierto and the River de las Vueltas towards Lake Viedma.

From the peak at altitude 1,767 metres and as far as the Cordón Marconi the local water-parting is also the continental water-parting.

From the Portezuelo de la Divisoria the line continues for 1.5 kilometres in a generally west-south-west direction before turning north-west for 3.2 kilometres as far as Cerro Sin Nombre at altitude 1,629 metres ($X = 4578330$; $Y = 1437020$). From this point the water-parting continues along the summit-line between Cerro Sin Nombre and Cerro Trueno in a generally westerly direction as far as Cerro Trueno at altitude 2,003 metres ($X = 4579230$; $Y = 1433270$). Between the peak at altitude 1,767 metres and Cerro Trueno the line covers a distance of 11.1 kilometres. In this part of its course it separates the waters of the basin of the River Obstáculo, which discharges into Lake San Martín, from the waters of Lake Larga and the basin of the River Diablo, which discharge into Lake del Desierto.

The line continues from Cerro Trueno in the same direction and after 900 metres turns south-south-west until it reaches Cerro Demetrio at altitude 1,717 metres ($X = 4574512$; $Y = 1430054$) after 6.5 kilometres. It then turns west-south-west for 2 kilometres, descending to the Portezuelo El Tambo ($X = 4573389$; $Y = 1427928$) at an altitude of about 807 metres. From this pass the water-parting continues southwards for 4 kilometres as far as Cerro Milanesio at altitude 2,053 metres ($X = 4569210$; $Y = 1428510$). In this part of its course the line, which follows the Cordón Cordillerano Oriental, divides the waters which run down to Lake Chico, a tributary of the southern arm of Lake San Martín-O'Higgins, from the basin of the River Diablo which, as stated, discharges into Lake del Desierto.

From Cerro Milanésio the line runs westwards for 2 kilometres, then southwards for 4.5 kilometres and westwards for 1.5 kilometres before turning south-south-west for 7.5 kilometres. In this part of its course, still along the Cordón Cordillerano Oriental, it separates the streams and glaciers which descend to the Ventisquero Chico from the basins of the Rivers Cañadón de los Toros, Milodón, El Puesto and Cóndor or del Diablo, which flow into the River de las Vueltas and are fed by the Milodón Norte, Milodón Sur and Cagliero Este and Sur glaciers.

The line then turns in a generally westward direction for 3 kilometres, passing across Cerro Gorra Blanca at an altitude of 2,907 metres (X=4557500; Y=1421250). It then takes a generally south-south-westerly direction for 4.2 kilometres. It next runs westwards for a further 500 metres before taking a south-south-west direction for 1 kilometre to descend to Marconi Pass (at an altitude of about 1,560 metres). From this pass the line takes a generally southerly direction, climbing to Cerro Marconi Norte at altitude 2,210 metres (X = 4550210; Y = 1417110), and continues in the same direction for 10 kilometres, still along the Cordón Cordillerano Oriental, as far as Cerro Rincón at altitude 2,465 metres (X = 4542650; Y = 1417800). In this section the line separates the Ventisquero Chico, which runs towards Lake San Martín-O'Higgins, and the other glaciers situated to the west from the Gorra Blanca Sur and Marconi glaciers, which feed the River Eléctrico, which itself flows eastwards, i.e., towards the River de las Vueltas.

From Cerro Rincón and in the direction of Mount Fitzroy the local water-parting, still running along the Cordón Cordillerano Oriental, maintains its easterly direction and passes across Cerro Domo Blanco at altitude 2,507 metres (X = 4542660; Y = 1419590), Cerro Pier Giorgio at 2,719 metres (X = 4543350; Y = 1420200) and Cerro Pollone at 2,579 metres (X = 4544230; Y = 1420990) before reaching Mount Fitzroy at 3,406 metres (X = 4542219; Y = 1424383). In this eight-kilometre stretch the water-parting separates the basin of the River Eléctrico, which is fed by the Pollone and Fitzroy Norte glaciers, from the basin of the River Fitzroy, which is fed by the Torre glacier.

15. In its counter-memorial Argentina stated:

In the light of the facts and arguments set out in the Argentine memorial and in this counter-memorial and bearing in mind the relevant evidence submitted and in accordance with the 1991 *Compromis*, the Argentine Republic respectfully requests the Court of Arbitration:

1. To reject the line of the frontier in the sector between boundary post 62 and Mount Fitzroy proposed in the Chilean memorial;
2. To decide and declare, on the basis of the correct interpretation and application of the 1902 Arbitral Award in accordance with international law, that the line of the frontier in the sector between boundary post 62 and Mount Fitzroy is constituted by the line described in chapter 12, paragraph 39, of the Argentine memorial and depicted on maps IIIa, b, c, d and e contained in the envelope attached to the atlas in the said memorial.

16. In accordance with rule 28 of the rules of procedure, on the termination of the hearings Argentina submitted the following conclusions:

In the light of the facts and arguments set out in the Argentine memorial, in the Argentine counter-memorial, and during these oral hearings and bearing in mind the relevant evidence submitted and in conformity with the 1991 *Compromis*, the Argentine Republic respectfully requests the Court of Arbitration:

1. To reject the line of the frontier in the sector between boundary post 62 and Mount Fitzroy proposed by Chile in its final conclusions submitted on 17 May last;
2. To decide and declare, on the basis of the correct interpretation and application of the 1902 Arbitral Award in accordance with international law, that the line of the frontier in the sector between boundary post 62 and Mount Fitzroy is the local water-parting described in chapter 12, paragraph 39, of the Argentine memorial and depicted on maps IIIa, b, c, d and e contained in the envelope attached to the atlas in the said memorial.

17. In its memorial Chile argued for the following conclusions:

16.1 Chile respectfully requests the Court to decide and declare that the line of the frontier in the sector between boundary post 62 and Mount Fitzroy is the following:

16.2 From boundary post 62, at coordinates $X = 4584177$, $Y = 1449178$ and at altitude 324 metres, the frontier ascends to the Cordón Oriental and continues southwards, following the local water-parting until it reaches a summit at 1,767 metres, approximately at coordinates $X = 4575870$, $Y = 1442080$. The two countries agree on this first section of the frontier.

16.3 The frontier continues southwards, following the series of water-partings which are formed on the Cordón Oriental, until it reaches Mount Fitzroy at a summit of 1,810 metres, approximately at coordinates $X = 4551920$, $Y = 1434500$.

16.4 It descends to the valley of Lake del Desierto, following the water-parting, which leads it to a point on the bank of the River Gatica or de las Vueltas, approximately at coordinates $X = 4549640$, $Y = 1432400$. It crosses the river in a straight line 360 metres long to reach a point approximately at coordinates $X = 4549310$, $Y = 1432260$.

16.5 From that point it crosses the valley in a south-west direction, following the local water-parting shown on the Mixed Commission's map, to a point on the bank of the River Eléctrico, approximately at coordinates $X = 4546290$, $Y = 1430010$.

16.6 It crosses this river in a straight line 250 metres long to reach a point approximately at coordinates $X = 4546200$, $Y = 1429780$.

16.7 Finally, it ascends to the north-east spur of Mount Fitzroy and then follows the local water-parting, which leads it as far as the summit at 3,406 metres, at coordinates $X = 4542219$, $Y = 1424383$.

16.8 This line corresponds to the one described by Chile at the meeting on 22 June 1991 of a subcommission of members of the Mixed Boundary Commission and shown on the transparent sheet which is superimposed on the 1:50,000 map produced by the Commission.

16.9 This line has been depicted on a reduction of the said map, which is included in atlas No. 31.

18. In its counter-memorial Chile stated:

Chile formally confirms the requests set out in paragraphs 16.1 to 16.9 of its memorial and respectfully requests the Court to reject the pleas contained in the Argentine memorial, except in so far as the line claimed therein coincides with the line claimed by Chile.

19. In accordance with rule 28 of the rules of procedure, on the termination of the hearings Chile submitted the following conclusions to the Court:

Chile respectfully requests the Argentina-Chile Court of Arbitration, on the basis of the arguments put forward in its memorial, counter-memorial and oral submissions, to accept its formal requests set out in paragraphs 16.1 to 16.9 of its memorial of 31 August 1992, which it confirms in full in this document.

Chile further respectfully requests the Argentina-Chile Court of Arbitration, in consequence, to reject the requests made by Argentina in this dispute.

II

20. Since the time when they became independent States, Chile and Argentina sought to determine the boundaries of their respective territories in accordance with the 1810 rule of *uti possidetis*. For example, article 39 of the Treaty of Friendship, Trade and Navigation concluded between the Argentine Confederation and Chile on 30 August 1855 provides that both "Contracting Parties recognize as the boundaries of their respective territories the bound-

aries which they held to be such at the time of their separation from Spanish rule in 1810 and agree to defer issues which have arisen or may arise in this connection, with a view to discussing them at a later stage in a peaceful and friendly manner . . .". This Treaty entered into force in April 1856.

21. In accordance with the aforementioned article 39, the two countries signed the Boundary Treaty of 23 July 1881, article 1 of which provides that:

The boundary between the Argentine Republic and Chile from North to South as far as the parallel of latitude of 52°S. is the Cordillera of the Andes. The frontier line shall run in that extent along the most elevated crests of said cordilleras that may divide the waters and shall pass between the slopes which descend one side and the other. . .

22. On 20 August 1888 a new agreement for the physical demarcation of the boundaries established in the 1881 Treaty was signed. articles I and II provided that, within two months from the date of the exchange of the instruments of ratification, which took place on 11 January 1890, each State would appoint an expert and five assistants to help him. The function of the experts would be to "fix on the ground the demarcation of the lines indicated in articles 1, 2 and 3 of the Boundary Treaty" (art. III). Chile appointed Mr. Diego Barros Arana as its expert, and Argentina Mr. Octavio Pico. The two experts met for the first time in Concepción on 24 April 1890.

23. From 1881 Argentina and Chile sent missions to the southern region of the continent in order to improve the existing geographical knowledge of the region. As a result of these missions it was established that in the Patagonian region the continental water-parting frequently diverges from the Andes range and has to be sought to the east thereof, and that in some places the range is submerged in the Pacific Ocean. These studies gave rise in both countries to interpretations which differed from the Boundary Treaty and meant that Argentina could have ports on the Pacific and Chile's territory could extend as far as the Patagonian plains.

24. In September 1891 Mr. Barros Arana, who had been removed from his post in December 1890, was re-appointed as expert by the Chilean Government. The experts met in Santiago on 12 January 1892 in order *inter alia* to draft the instructions for the demarcation commissions. On that occasion the Chilean expert suggested that the instructions should include a general interpretation of the 1881 Treaty. To this end he put forward the argument that the Treaty had specified the continental *divortium aquarum* as the boundary between the two countries. The Argentine expert disagreed with the Chilean proposal and sent a report to his Foreign Ministry. The two experts met again on 24 February and signed the instructions for the commissions of engineers which were to begin the demarcation work.

25. The questions of the continental *divortium aquarum* and of possible Argentine ports on the Pacific were the main differences concerning the 1881 Treaty but not the only ones. The differences paralysed the demarcation work, which was resumed only after the entry into force of the Additional and Explanatory Protocol of 1 May 1893 following the exchange of its instruments of ratification on 21 December 1893.

26. The text of the first and second articles of the Protocol reads:

FIRST—whereas article 1 of the treaty of 23 July 1881 provides that “the boundary between Chile and the Argentine Republic from north to south as far as parallel of latitude 52°S. is the Cordillera of the Andes” and that “the frontier line shall run along the most elevated crests of said Cordillera that may divide the waters, and shall pass between the slopes which descend one side and the other”, the experts and the subcommissions shall observe this principle as an invariable rule of their proceedings. Consequently all lands and all waters, to wit: lakes, lagoons, rivers and parts of rivers, streams, slopes situated to the east of the line of the most elevated crests of the Cordillera of the Andes that may divide the waters, shall be held in perpetuity to be the property and under the absolute dominion of the Argentine Republic; and all lands and all waters, to wit: lakes, lagoons, rivers and parts of rivers, streams, slopes situated to the west of the line of the most elevated crests of the Cordillera of the Andes to be the property and under the absolute dominion of Chile.

SECOND—The undersigned declare that, in the opinion of their respective governments, and according to the spirit of the boundary treaty, the Argentine Republic retains its dominion and sovereignty over all the territory that extends from the east of the *principal chain of the Andes* to the coast of the Atlantic, just as the Republic of Chile over the western territory to the coasts of the Pacific; it being understood that by the provisions of said treaty, the sovereignty of each State over the respective coast line is absolute, in such a manner that Chile cannot lay claim to any point toward the Atlantic, just as the Argentine Republic can lay no claim to any toward the Pacific. If in the peninsular part of the south, on nearing parallel 52°S., the Cordillera should be found penetrating into the channels of the Pacific there existing, the experts shall undertake the study of the ground in order to fix a boundary line leaving to Chile the coasts of said channels; in consideration of which study, both governments shall determine said line amicably.

27. The experts met again at the end of December 1893. On 1 January 1894 they signed the instructions for the demarcation work in the Cordillera of the Andes and in Tierra del Fuego. On that occasion Mr. Barros Arana, referring to the 1893 Protocol, stated that the term

“*principle chain of the Andes*” meant the unbroken line of summits which divide the waters and constitute the separation of the basins or hydrographic regions flowing to the Atlantic in the east and to the Pacific in the west, thus establishing the boundary between the two countries according to the principles of geography, the Boundary Treaty and the opinion of the most distinguished geographers of the two countries.

The Argentine expert stated that

... he regretted his colleague’s insistence on establishing the definition of what was meant by *principle chain of the Andes*, since that was not within the terms of reference of the experts, who were merely demarcators of the frontier line between the two countries. ..

28. In view of the differences between the experts over the interpretation of the 1881 Treaty and the delays which this had caused in the demarcation work, Argentina’s Minister Plenipotentiary in Santiago, who had moreover been appointed as expert, concluded an agreement with Chile’s Foreign Minister on 6 September 1895, article 3 of which provided that, if the subcommissions could not agree on the location of a boundary mark, the matter should be submitted to the experts for resolution. But that provision did not authorize the subcommissions to suspend their work, which should continue with the following boundary marks until the whole of the dividing line had been demarcated. Another article stated that, if the experts could not reach agreement, the whole matter should be referred to their Governments with a view to settlement of the differences in accordance with the treaties in force.

29. On 17 April 1896 an agreement was reached for submission of the differences between the experts to a ruling by the Government of Her Britannic Majesty. Articles I and II of this agreement state:

II.—Should disagreements occur between the experts in fixing in the Cordillera of the Andes the dividing boundary-marks to the south of the 26°52'45", and should they be unable to settle the points in dispute by agreement between the two Governments they will be submitted for the adjudication of Her Britannic Majesty's Government, whom the Contracting Parties now appoint as Arbitrator to apply strictly in such cases the dispositions of the above Treaty and Protocol, after previous examination of the locality by a Commission to be named by the Arbitrator.

III.—The experts shall proceed to study the district in the region adjoining the 52nd degree of latitude south, referred to in the last part of article II of the Protocol of 1893, and they shall propose the frontier-line to be adopted there in the event of the case foreseen in the above-mentioned stipulation. Should there occur divergence of views in fixing the frontier-line it shall be also settled by the Arbitrator designated in the Agreements.

30. In September 1896 Mr. Francisco P. Moreno was appointed as the Argentine expert and he met with his Chilean colleague Mr. Diego Barros Arana in May 1897 in Santiago, Chile; they adopted a number of measures to accelerate the demarcation work.

31. With a view to deciding on "the general line of the frontier", the experts met in Santiago, Chile, from 29 August 1898. At the meeting held on that date the Chilean expert presented his version of the line, accompanied by a map in which each of the most relevant points through which the line passed was marked with a number. He said that in establishing his line he had followed

solely and exclusively the demarcation principle established in the first article of the 1881 Treaty, a principle which should also be the invariable rule in the experts' proceedings, according to the 1893 Protocol.

He also stated that:

the proposed frontier line runs along all the most elevated crests of the Andes, which divide the waters and constantly separate the flows of the rivers belonging to each country.

32. At the meeting on 3 September 1898 the Argentine expert, Francisco P. Moreno, put forward his proposal for the general line of the frontier; and he submitted a text and a map, on which each of the relevant points through which the proposed line passed were marked with numbers (see para. 44).

33. Once each expert had proposed a general line of the frontier, the issue was submitted to the two Governments for consideration. On 15 September 1898 the Chilean Foreign Minister and the Argentine Minister in Santiago met to study the experts' materials. The Foreign Minister stated at that time: "The Government of Chile defends and maintains in its entirety the general line of the frontier indicated by its expert"; while the Argentine Minister stated: "The Argentine Government also defends and maintains in its entirety the general line of the frontier indicated by its expert". On 22 September the two experts met again in order to determine the points at which the proposed lines coincided and those at which they diverged. With regard to the divergences, they both stated that:

since it has not proved possible to reach any direct agreement, the Minister for Foreign Affairs of Chile and the Envoy Extraordinary and Minister Plenipotentiary of the Argentine

Republic have agreed on behalf of their respective Governments to submit to Her Britannic Majesty copies of this document, the materials of the experts and the international treaties and agreements in force, in order that, in accordance with the second clause of the *Compromis* of 17 April 1896, she may resolve the differences referred to above.

34. The experts met again in Santiago on 1 October 1898. With regard to the points and sections at which the general line of the frontier proposed by each of them coincided, they resolved “to accept them as forming part of the dividing line in the Cordillera de los Andes between the Argentine Republic and the Republic of Chile”.

35. On 23 November 1898 the Parties requested the Government of Her Britannic Majesty to act as arbitrator, and the request was accepted on 28 November. The British Government then appointed the Arbitral Tribunal, which consisted of: Lord Macnaghten, Lord of Appeal in Ordinary and member of the Privy Council; General Sir John Ardagh, member of the Royal Geographical Society; and Colonel Sir Thomas Hungerford Holdich of the Royal Engineers, Vice-President of the Royal Geographical Society. The Tribunal was constituted and held its first meeting on 27 March 1899.

36. In May 1899 the Parties began their presentations to the Tribunal. Between January and May 1902 a commission headed by Colonel Holdich toured the disputed area and prepared its reports, which it submitted to the Tribunal; the reports contained the frontier line proposed as the basis for a solution and, at the Tribunal’s request, it was depicted on a map. Between September and October 1902 the Parties delivered their final arguments before the Tribunal. At its session on 19 November 1902 the Tribunal approved and signed its report to His Britannic Majesty [Edward VII], with the corresponding maps. Paragraph 10 of this report offers a summary of the arguments put forward by the Parties:

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

The following paragraphs from this document are also of interest for the purpose of appreciating the general tenor of the report of the 1902 Court of Arbitration:

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

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

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

On the next day King Edward VII signed the Arbitral Award. It describes the boundary line which had been decided upon and adds:

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

37. Even before the Arbitral Award had been pronounced, Chile and Argentina agreed in an instrument dated 28 May 1902 "to request the Arbitrator to appoint a commission to fix on the ground the boundaries described in his Award". The Arbitrator appointed as commissioner for the demarcation Colonel Sir Thomas H. Holdich, assisted by the following British officers: Captain B. Dickson, Captain W.M. Thompson, Captain C.L. Robertson, Captain H.L. Crosthwait and Lieutenant H.A. Holdich.

38. The experts of the two countries, Mr. Alejandro Bertrand and Mr. Francisco P. Moreno, agreed with the British Commissioner some of the general arrangements for the demarcation work. They agreed that no demarcation would be needed in the places where the boundary was clear and defined beyond doubt by the topography of the land. Boundary posts would be erected only to mark the points at which the boundary line crossed rivers or lakes and the high points of passes, and in open areas where the topographical features were such that it was difficult to determine the frontier.

39. The area was divided into four sections and it was decided that each of them would be the responsibility of a commission headed by a British officer and including one or more representatives of each Party. The demarcation work was done during the summer months of 1903. Once each commission had completed its work, the British officer in charge submitted a report which was attached to the final demarcation report prepared by Colonel Holdich, dated London, 30 June 1903. The Chilean and Argentine representatives submitted separate reports to their Governments.

40. On 16 April 1941 the Governments of Chile and Argentina concluded a protocol in order to "determine the means of replacing boundary posts which had disappeared, erecting new posts on the sections of the Chilean-Argentine frontier where they were needed, and determining the exact coordinates of all such posts". In order to carry out this work the Parties created a Mixed Commission staffed by technical experts from both countries. The Commission divided the frontier into 16 sections and, since its creation up to the present time, has been working steadily at the tasks assigned to it.

41. A dispute between the Parties concerning the line of the frontier established by the 1902 Award between boundary posts 16 and 17 erected by the British Demarcation Commission was submitted for decision to Queen Elizabeth II, who pronounced her award on 9 December 1966 (hereinafter "1966 Award") (*Reports of International Arbitral Awards*, hereinafter "R.I.A.A.", vol. XVI, p. 111 *et seq.*).

42. From the beginning of the century Argentina and Chile have had at their disposal binding means of dispute settlement. This includes the Treaty of Peace and Friendship signed by the Parties in Vatican City on 29 November 1984, which establishes a system for the peaceful settlement of disputes. The present arbitral proceedings have been instituted by the Parties pursuant to this Treaty.

III

43. With regard to the section of the boundary which is the subject of the present dispute, the differences had already arisen at the meetings of the experts in 1898. At the meeting on 29 August 1898 (see para. 31) the Chilean expert proposed the following boundary line for the area between Lakes San Martín and Viedma:

Number 326, an unnamed range, separates the waters of the sources of the Chilean rivers, which probably discharge into the Pacific through the Baker Channel, from the sources of the Argentine River Corpe or Chico which flows to the Atlantic.

Points 327 to 329 separate the waters of the streams flowing into Lake Tar and Lake San Martín, which discharge into the Pacific inlets, from the streams flowing into the Argentine Lake Obstáculo.

Point 330 is a section of the range which separates the waters which form the Argentine stream Chalia from the sources which feed Lake San Martín, which discharges into the Pacific inlets.

Point 331, Cordillera del Chaltén, which divides the hydrographic basin of Lake Viedma or Quicharre, which flows to the Atlantic via the River Santa Cruz, from the Chilean streams which discharge into the Pacific inlets.

The expert provided a map depicting the boundary line, with identification numbers.

44. In turn, at the meeting on 3 September 1898 (see para. 32) the Argentine expert proposed the following boundary line:

From the summit of Cerro San Clemente, following the general summit-line of the chain, the frontier line will continue as far as Cerro San Valentín and thereafter along the summit-line (301) of the slopes of the chain, cutting across the River Las Heras, as far as the pass indicated with the number 1.070 (302) on the Argentine map. From that point the line will continue south-south-east to the crest of the same snow-covered chain (303), which dominates Lake San Martín on the western side, cutting across the outlet from the lake and running along this crest over Mount Fitzroy (304) . . .

The Argentine expert also provided a map depicting the proposed boundary line, with identification numbers.

45. As already stated (see para. 33), Chile's Minister for Foreign Affairs and Argentina's Minister Plenipotentiary in Santiago met in that city on 22 September 1898 in order to study the experts' materials. On that occasion they established that No. 331 on the line proposed by the Chilean expert coincided with No. 304 on the line proposed by the Argentine expert, and that the lines differed with respect to the section marked by Mr. Barros Arana with the numbers 271 to 330 and by Mr. Moreno with the numbers 282 to 303. This difference, like the other differences between the experts as to the general line of the frontier, was submitted to Her Britannic Majesty for decision.

46. The Arbitral Award of 20 November 1902 established the boundary in this area as follows:

The further continuation of the boundary is determined by lines which we have fixed across Lake Buenos Aires, Lake Pueyrredón (or Cochrane) and Lake San Martín, the effect of which is to assign the western portions of the basins of these lakes to Chile and the eastern portions to Argentina, the dividing ranges carrying the lofty peaks known as Mounts San Lorenzo and Fitzroy.

The Court's report gives the following description:

From this point it [the boundary] shall follow the median line of the Lake [San Martín] southwards as far as a point opposite the spur which terminates on the southern shore of the Lake in longitude 72°47'W, whence the boundary shall be drawn to the foot of this spur and ascend the local water-parting to Mount Fitzroy. . .²

The Award includes the corresponding maps (see para. 36).

47. During the demarcation work in this region Captain H.L. Crosthwait erected a boundary post on the southern shore of Lake San Martín. This work was made extremely difficult by the very bad weather, so that he was unable to erect an iron post but only a cairn of stones, the geographical coordinates of which, according to the report of the British Commissioner, are longitude 72°46'0"W and latitude 48°53'10"S (*Boundary Commission Reports*, p.44). An iron post was erected at this point on 23 March 1903.

48. Captain Crosthwait did not explore the region lying between Lake San Martín and Mount Fitzroy and he did not erect any boundary markers on Mount Fitzroy. He only surveyed Fitzroy from a distance of about 100 kilometres, from the eastern shore of Lake Viedma. He stated that it stood out splendidly and that its shape was characteristic and unmistakeable (*Boundary Commission Reports*, p. 20).

49. The report of the British Demarcation Commission states that it is accompanied by illustrative maps and photographs. The official published version of this report does not contain maps or photographs. However, these maps were transmitted to the Foreign Ministries of both Parties. The map submitted by Captain Crosthwait is on a scale of 1:200,000 and bears his signature; it indicates the place where the boundary post was erected and contains a delimitation of the boundary in this area which differs from the map of the Arbitral Award.

50. On 10 March 1966 the Mixed Boundary Commission replaced, on the same spot, the boundary post originally erected in 1903 which bears the number 62. During its visit to the area in February of this year (see para. 11) the Court inspected boundary post 62 and Mount Fitzroy. The agents of both States agreed *in situ* on the identification of these two points.

² NOTE BY THE SECRETARIAT:

The term "spur" has been translated differently by the two Parties, who have based arguments on their translations. For example, for Chile "spur" can mean "*estribación*" (see, for example, memorial, pp. 13 and 67) or "*cordón*" (see, for example, oral submissions, record of 19 April 1994, pp. 47 and 61). In Argentina's view, "spur" should be translated as "*espolón*" (see, for example, counter-memorial, p. 150) or "*contrafuerte*" (see, for example, counter-memorial, p. 153).

51. Although there is agreement between the Parties on the two extreme points of the boundary in this sector, the Mixed Commission could never arrive at a definition of its course between those points. On 29 August 1990 the Presidents of Chile and Argentina signed a joint declaration in which they decided to instruct their respective delegates to the Mixed Commission to prepare within 60 days “a complete report on the latest situation with respect to the outstanding issues of the demarcation of the international boundary”. The Commission met in Buenos Aires on 10 September 1990 and included in its report on the still outstanding demarcation issues the “sector between boundary post 62 as far as the limit of the Third Region, defined in section 18 of the report of the 1902 Arbitral Tribunal and analyzed in detail in the last paragraph of section 22 of that report” (record No. 132, annex I).

52. On 21 August 1991 the Presidents of the two countries decided to submit this issue to arbitration, in accordance with the 1984 Treaty of Peace and Friendship. The *Compromis* was signed by the Foreign Ministers of the two countries on 31 October 1991 (see para. 1).

IV

53. The geographical space lying between boundary post 62 and Mount Fitzroy is roughly rectangular in shape, running north-north-east/south-south-west; it extends from the southern shore of Lake San Martín-O’Higgins ($48^{\circ}51'S$) as far as the Fitzroy range and the confluence of the Rivers Eléctrico and de las Vueltas ($49^{\circ}16'S$). As the crow flies, the two extreme points are 48 kilometres apart. The average width of the area is 12 kilometres, with a maximum of almost 18 kilometres between Marconi Pass and the Cordón del Bosque. The area lying between the lines claimed by the Parties is approximately 481 square kilometres. The altitude is very variable, ranging between 250 metres at Lake San Martín-O’Higgins and 3,406 metres on Mount Fitzroy.

54. The most outstanding feature of the landscape of the region is its relief, which has all the characteristics of the Patagonian Andes with regard to lithology, tectonics and glacial morphology. The mountains are arranged in three big groups or main linear formations, running north-north-east/south-south-west, following the main line of the longitudinal fractures of the range.

55. The first of these linear formations, situated immediately to the east of Campo de Hielo Sur, consists in its first section of a chain of peaks separated by passes and gaps of glacial origin, between which are located the peaks known as Dos Aguas, Colorado, Trueno, Demetrio and Milanesio, with altitudes ranging from 1,600 to 2,000 metres. Beyond Cerro Milanesio the formation becomes more marked, less broken and higher. Its name then changes to Cordón Gorra Blanca, the high point of which is Cerro Gorra Blanca (2,907 metres). From Gorra Blanca towards the south the formation connects, across a broad glacial pass known as Marconi Pass, with the Cordón Marconi which terminates at Cerro Rincón (2,465 metres). From this point originates a sharp and twisting spur, running west-east, which terminates at the summit of Fitzroy, a mountain of considerable size with a peculiar conical shape and batholithic granite structure.

56. Towards the east the region's second orographic linear formation, also running north-north-east/south-south-west, is a low-lying area extending from the southern shore of lake San Martín-O'Higgins to the southern limits of the area. In its northern part this depression forms a threshold or pass at an altitude of about 700 metres—a difference of altitude of 450 metres with respect to Lake San Martín-O'Higgins and 200 metres with respect to Lake del Desierto, i.e., an average gradient in both directions of 4 in 100. This pass is the source of the River Obstáculo, which flows into Lake O'Higgins-San Martín on the Pacific slope; it is also the source of a watercourse which flows southwards and feeds Lake Larga, which in turn drains into Lake del Desierto. The waters of this latter lake flow out through the River de las Vueltas or Gatica towards Lake Viedma on the Atlantic slope. Lake del Desierto is narrow, elongated and rectilinear, enclosed between steep sides and about ten kilometres long by one wide. In the north-east it receives the waters of the River Diablo and in the north, as stated, the waters of Lake Larga. In the east it is fed by short streams draining the rain- and melt-water from the mountain chain in the immediate vicinity. The southern outlet of the lake gives birth to the River de las Vueltas or Gatica which, a short distance downstream, flows into a gradually widening valley. Its volume increases considerably from that point, with the contributions of the glacial-and snow-melt rivers and streams which rise on the Gorra Blanca and Marconi spurs and the Fitzroy chain.

57. The third orographic feature is a linear formation situated in the east of the region, which is less broken than the first formation described above, although it is also much wider and lower. This is the reason for the current absence of active glaciation. The height of its peaks ranges between the 1,521 metres of Martínez de Rozas and the 2,101 metres of an unnamed peak situated at the beginning of the Cordón del Bosque; there are many passes and indents, some of them barely higher than 1,000 metres, which introduce a degree of discontinuity in the summit-line. In its northern part this linear formation is called the Cordón Martínez de Rozas, and in its southern part the Cordón del Bosque, with a section unnamed in the toponymy used by Argentina in this arbitration lying between the two. In the toponymy used by Chile in this arbitration this formation, as a whole, has been designated the Cordón Oriental. In any event, its southern sector faces Mount Fitzroy to the south-west, being separated from it by the depression described above, through which run the River de las Vueltas or Gatica and one of its tributaries, the River Eléctrico.

58. The action of the ice, which is still a major feature of the high ground to the west and south-west and which must have covered a large part of the region in the Pleistocene glacial maximum, is a fundamental factor in an understanding of the relief described above, the result of glacial erosion and sedimentation.

59. The climate is damp and cold, in keeping with the region's latitude and altitude and its proximity to the South Pacific, with sharp internal variations depending on the relief. Precipitation is abundant, in excess of 1,000 mm a year, although it can be much greater in the high peaks in the west. The average annual temperature is about 7°, with a short mild summer and a long season of frosts.

60. The vegetation cover depends closely on the orographic features and the climate described above. There are still large areas of Patagonian Andean forests of *lengas* and Antarctic beech in an almost virgin state.

V

61. Article I of the *Compromis* assigns to the Court the following specific mandate:

The two Parties request the Court of Arbitration (hereinafter “the Court”) to determine the line of the frontier in the sector between boundary post 62 and Mount Fitzroy, in the Third Region, defined in section 18 of the report of the 1902 Arbitral Tribunal and described in detail in the last paragraph of section 22 of the report.

Article II.1 of the *Compromis* states:

The Court shall reach its decision by interpreting and applying the 1902 Award in accordance with international law.

Article XI adds:

The Court shall be empowered to interpret the *Compromis*, decide on its own competence and establish rules of procedure which have not been agreed between the Parties.

62. Before ruling on the points which are the subject of this dispute, the Court wishes to state some thoughts on the nature of the dispute, the applicable law and the scope of its functions, topics on which different opinions have been offered during the proceedings.

63. The Court is an independent jurisdictional organ established by the *Compromis* of 31 October 1991 pursuant to the 1984 Treaty of Peace and Friendship. This Court is not a successor to the Tribunal of King Edward VII; it is not subordinate to any other arbitration body and is entirely independent. Its function is stated clearly in the *Compromis* and consists of determining the line of the frontier between boundary post 62 and Mount Fitzroy established in the 1902 Award, which has been recognized by the Parties as *res judicata* and is not subject to any procedure of review, appeal or annulment.

64. In order to determine whether a body created by two or more States for the purpose of resolving a dispute is jurisdictional, administrative or political in nature, the international practice relies on the characteristic elements of the proceedings conducted by those States before the said body (see article 3, paragraph 2, of the Treaty of Lausanne—Frontier between Turkey and Iraq, P.C.I.J., *Collection of Judgments*, Series B, No. 12, pp. 26 and 27; Award in the matter of an arbitration concerning the border between the Emirates of Dubai and Sharjah, 1981, p. 58). In this sense, the proceedings conducted by the Parties before this Court are proper to a jurisdictional organ. This conclusion is based on the *Compromis* and the relevant provisions of the 1984 Treaty. Among the characteristic elements of the proceedings, attention must be drawn to the power of the Court to rule on its own competence (art. 29 of annex I of the 1984 Treaty; art. XI of the *Compromis*), which is typical of jurisdictional organs.

65. The Court is called upon to determine the boundary line in a sector of the frontier. This determination must be made on the basis of the 1902 Award, which the Court must interpret and apply in accordance with international law. Accordingly, the Court is not limited by the text of the Award but may apply any rule of international law binding on the Parties.

66. According to the *Compromis*, the Court has to interpret and apply the 1902 Award. A difference has emerged between the Parties concerning which documents constitute that Award. Argentina maintains that the Award itself,

the Tribunal's report and the Arbitrator's map constitute the Award. Chile added to those documents, at some point in the proceedings, a fourth element—the demarcation.

Article V of the 1902 Award states on this point:

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

The 1966 Court, however, took the view that the 1902 Award consisted of the decision itself, the Tribunal's report and the Arbitrator's map (*R.I.A.A.*, vol. XVI, p. 174). In the present case this Court sees no reason to depart from that precedent.

67. A decision on a boundary issue and the demarcation of the boundary are two distinct acts, each of which has its own legal force. In the original dispute the Parties assigned to the British Crown, in the *Compromis* of 17 April 1896, competence to pronounce the Award (see para. 29), while they assigned it competence to demarcate the line in the agreement of 28 May 1902 (see para. 37). If it had been understood that the demarcation formed part of the act of pronouncing the Award, this latter agreement would not have been necessary. This is consistent with the international practice according to which, whenever the parties to a boundary dispute wish the arbitrator to carry out the demarcation, they request him to do so and request him expressly, since the demarcation work is not included in the pronouncement of the Award.

68. A decision with the force of *res judicata* is legally binding on the parties to the dispute. This is a fundamental principle of the law of nations repeatedly invoked in the legal precedents, which regard the authority of *res judicata* as a universal and absolute principle of international law (Mixed Franco-Bulgarian Court of Arbitration, Award of 20 February 1923, *Recueil des décisions des tribunaux arbitraux mixtes institués par les traités de paix*, vol. II, p. 936; Trail Smelter case, Arbitral Award of 11 March 1941, *R.I.A.A.*, vol. III, p. 1950).

69. In the present case the Parties have not contested the authority of *res judicata* of the 1902 Award and have accordingly acknowledged that they are legally bound by its provisions.

70. The force of *res judicata* of an international award applies, primarily, to its operative part, i.e., the part in which the Court rules on the dispute and states the rights and obligations of the parties. The legal precedents have also established that the provisions of the preambular part, which are the logically necessary antecedents of the operative provisions, are equally binding (see Interpretation of Judgements Nos. 7 and 8—Chorzów Factory (P.C.I.J., *Collection of Judgments*, Series A, No. 13, pp. 20 and 21; Case concerning the delimitation of the continental shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic, Decision of 10 March 1978, *R.I.A.A.*, vol. XVIII, p. 296). As argued (para. 122), the meaning of the concepts used in an arbitral award are also covered by the *res judicata* and none of the parties may alter it.

71. In the law of nations the question of interpretation has been linked for more than two centuries with the teachings of Christian Wolff, the inspiration of jurists of following generations. He defined interpretation as the conclusion which is reached in a specific manner concerning what someone meant to indicate by his words or other signs (*Ius naturae methodo scientifico pertractatum*, VI, ch. III, para. 459), i.e., in our case, to “determine the intention of the Arbitrator”, in the words of the 1966 Award (*R.I.A.A.*, vol. XVI, p. 174).

72. International law has rules which are used for the interpretation of any legal instrument, be it a treaty, a unilateral instrument, an arbitral award, or a resolution of an international organization. For example, the rule of the natural and ordinary meaning of the terms, the rule of reference to the context and the rule of the practical effect are all general rules of interpretation.

73. There are also norms which establish standards of interpretation for specific categories of rules. For example, with regard to the interpretation of awards, the 1966 Arbitrator stated:

The Court is of the view that it is proper to apply stricter rules to the interpretation of an Award determined by an Arbitrator than to a treaty which results from negotiation between two or more Parties, where the process of interpretation may involve endeavouring to ascertain the common will of those Parties. In such cases it may be helpful to seek evidence of that common will either in preparatory documents or even in subsequent actions of the Parties. But with regard to the 1902 Award, the Court is satisfied that, in order to determine the intention of the Arbitrator, it is not necessary to look outside the three documents of which the Award consists. (*R.I.A.A.*, vol. XVI, p. 174)

74. The interpretation of an award has, moreover, a singular feature, already established in international case law, which has stated:

The interpretation of a decision involves not only determination of the meaning of the text of the operative points of the decision but also determination of its scope, meaning and purpose in accordance with its reasoning. (Inter-American Court of Human Rights, Velásquez Rodríguez case, interpretation of the Award of Compensatory Damages, Award of 17 August 1990 (art. 67 of the Inter-American Convention on Human Rights), Series C, No. 9, para. 26).

75. Interpretation is a legal operation designed to determine the precise meaning of a rule, but it cannot change its meaning. With regard to the interpretation of awards, the Arbitral Award of 14 March 1978 concerning the delimitation of the continental shelf between Great Britain and France (see para. 70) puts forward some considerations which merit quotation:

... account has to be taken of the nature and limits of the right to request from a Court an interpretation of its decision. “Interpretation” is a process that is merely auxiliary, and may serve to explain but may not change what the Court has already settled with binding force as *res judicata*. It poses the question, what was it that the Court decided with binding force in its decision, not the question what ought the Court now to decide in the light of fresh facts or fresh arguments. A request for interpretation must, therefore, genuinely relate to the determination of the meaning and scope of the decision, and cannot be used as a means for its “revision” or “annulment”. . . . (*R.I.A.A.*, vol. XVIII, p. 295).

The International Court of Justice has supported the same argument with regard to the interpretation of treaties (*I.C.J.*, *Reports 1950*, p. 229; *Reports 1952*, p. 196; *Reports 1966*, p. 48).

76. It is a principle of hermeneutics that a text must be interpreted so as to produce effects consistent with international law and not in conflict with it (Case concerning right of passage over Indian territory, preliminary objections, *I.C.J.*,

Reports 1957, p. 142). In other words, a text may not be interpreted in such a way that its effects are in conflict with international law. In the specific case of international awards, whose legal validity is not in dispute and which have the force of *res judicata*, they must be interpreted in such a way that they do not produce the result that the judge or arbitrator has handed down his decision in violation of rules of the law of nations. Accordingly, in the discharge of its jurisdictional function a court called upon to interpret a legal rule must ensure not only that its decision is based on and consistent with international law but also that the decision does not produce results contrary to international law.

77. The competence of international judges is limited by the functions assigned to them by the parties in the case. Their powers are also limited by the extreme claims which the parties put forward in the hearings. To exceed these functions or powers means deciding *ultra vires* and rendering the decision null by reason of *excès de pouvoir*. The same rule is applicable to the interpretation of awards. The International Court of Justice has ruled that:

Interpretation can in no way go beyond the limits of the Judgment, fixed in advance by the Parties themselves in their submissions. (Request for interpretation of the Judgment of November 20th, 1950, in the Asylum Case. Judgment of 27 November, 1950, I.C.J., *Reports 1950*, p. 403)

One manifestation of the application of this rule is the assertion made in paragraph 16 of the report of the 1902 Tribunal, according to which the decision is "within the limits defined by the extreme claims on both sides".

VI

78. In the present case Argentina has argued that Chile's request amounts to reclaiming territory lying farther to the east than Chile's extreme claim in the 1898-1902 arbitration. According to Argentina, Chile seeks to achieve this purpose by interpretation of the 1902 Award. Chile's extreme claim at that time had been the continental *divortium aquarum*, which meant that the Atlantic basins would remain under Argentine jurisdiction and the Pacific basins under Chilean jurisdiction. Now, in contrast, Chile (see paras. 17, 18 and 19) is requesting jurisdiction over part of the basin of the River de las Vueltas or Gatica, which is on the Atlantic slope.

79. Argentina argues that, if this Court allowed that claim, it would be deciding that the 1902 Award granted to Chile territory which it had not claimed at that time and, therefore, the decision of King Edward VII would be vitiated by *excès de pouvoir*.

80. This argument is set out in the Argentine memorial in the following terms:

Chile always argued before the 1902 Arbitrator . . . that the continental *divortium aquarum* was the boundary between the two countries and that meant indisputable, clear and definitive recognition of the fact that the basins of the rivers and lakes which flow to the Atlantic belong to the Argentine Republic.

Chile could not now present an argument by means of which it sought, 90 years later, to claim territory which it had recognized as Argentine in the 1902 arbitration (pp. 336-337).

The Court . . . cannot establish a boundary *de novo*. Its function is to identify accurately a boundary already established in accordance with the spirit of the treaty within the extreme claims of the Parties.

The 1902 Arbitrator would have acted in excess of his powers if the boundary which he adopted had exceeded the lines claimed by the Parties (p. 357).

81. The Argentine counter-memorial reiterates the same argument. It states that Chile's extreme claim in the 1898-1902 arbitration was that the 1881 Treaty and the 1893 Protocol should be interpreted to mean that the international boundary was constituted by the natural and effective continental water-parting. It mentions in support of its argument several passages from the documents and in particular a map submitted by Chile to H. B. Majesty. It goes on to state that, as a consequence of Chile's extreme claim, the basin of the River Gatica or de las Vueltas was not included in Chile's request and that, therefore, the Arbitrator could not have awarded it to that country.

The counter-memorial states:

The Arbitrator determined the boundary, and could not have done so in any other way, within the extreme claims of the Parties. If he had not done so and if the boundary had passed beyond those claims, the Award would undoubtedly have been affected by one of the clearest and most indisputable grounds of annulment (p. 396).

It then cites the passage from paragraph 16 of the Tribunal's report which states that the boundary decided upon lies within the extreme claims of both sides and adds:

This was a very serious legal limitation which the Tribunal had the wisdom to mention expressly in its report. What it decided was *within the extreme claims of the Parties* and not beyond them. If it had acted otherwise it would have acted *ultra petita* beyond the competence assigned to it by the Parties (p. 399, emphasis in the original).

In the oral submissions Argentina developed the same argument at length. We may cite here, by way of example, the following passage of the reasoning repeated several times before this Court.

Like this extreme claim and plea to the Arbitrator, Chile's natural and effective continental water-parting in 1898-1902 also has very important legal consequences for the interpretation of the 1902 Award by this Court.

The question inevitably arises, since Chile is now requesting, in this arbitration, a frontier line, allegedly established by the 1902 Award, which goes beyond the content of its extreme claim and request in 1898-1902.

This, Mr. President, clashes with a fundamental legal principle of international law and also of internal legal rules. We are referring of course to the principle of *non ultra petita partium*.

By virtue of this principle the British Arbitrator could not award to Chile in 1902 more than Chile requested from him in the arbitral proceedings conducted before him (record of 26 April 1994, pp. 30-31).

82. Chile acknowledged the legal relevance of the rule *non ultra petita partium*. During the oral submissions the Chilean delegation stated:

Investi par le *Compromis* de la mission de définir le "recorrido de la traza del limite" par l'interprétation et l'application du Laudo de 1902, votre Tribunal ne peut dépasser les "limits

defined by the extreme claims on both sides" de 1902. Contrairement à ce que l'on a parfois laissé entendre dans cette enceinte, ce n'est pas là, pour votre Tribunal, je le note en passant, un problème de *petita* ou de compétence territoriale. C'est une exigence de fond. Ne pas dépasser les limites extrêmes des deux cotés de 1902, c'est une exigence de fond qui repose tout simplement sur l'obligation imposée à votre Tribunal par le *Compromis* de prendre sa décision par la voie de l'interprétation et l'application du *Laudo* (record of 10 May 1994).³

83. Chile, however, denies that its present claim goes beyond what it requested from the British Arbitrator in 1898-1902. Chile argues in its counter-memorial that the extreme claims of the Parties in the 1898-1902 arbitration were indicated by lines on maps and that the Arbitrator also fixed the boundary by drawing a line on a map. If these lines are compared, Chile argues, its present claim does not exceed the extreme claim put forward in the 1898-1902 arbitration.

Chile's counter-memorial states:

In this region the line claimed at that time by Chile was drawn further to the south of the true continental water-parting, which was not identified until the end of the 1940s. Accordingly, the boundary line and the area now claimed by Chile are essentially within the perimeter claimed at that time (p. 11).

...with respect to the expression of Chile's interpretation of the determination of the boundary, what is really important is the line drawn on the map (p. 46).

For the moment it is sufficient to stress that the claims of the Parties were both submitted to the Tribunal in the form of lines drawn on maps and that, without adhering to those lines, the Tribunal also represented its decision by means of a line drawn on a map (p. 46).

As Chile has stated and will feel obliged to explain later, the extreme limits of its claim in the 1902 arbitration were determined not by its general commitment to the theory of the continental water-parting but by the lines actually identified by Chile in 1898, drawn on maps submitted to the Tribunal by Chile and Argentina, and regarded by the Tribunal as the expression of the limits of the Chilean claim (p. 62).

84. In the oral submissions Chile reiterated its argument that in the 1898-1902 arbitration its claim consisted of a boundary delineated on a map and it developed at length arguments relating to the geographical knowledge of the time. According to Chile, it is impossible to interpret its 1898-1902 claim on the basis of current geographical knowledge but rather of such knowledge at the time, when there had still been unexplored areas and other areas about which little was known. This concept was repeatedly stated in the oral submissions, of which the following passage is an example:

Je voudrais tout d'abord dénoncer, pour ne plus avoir à y revenir, l'inacceptable manipulation temporelle qui sous-tend l'argumentation argentine que j'espère avoir résumée sans l'avoir trahie. Le Chile n'a pas revendiqué en 1902, nous dit-on, et le *Laudo* ne lui a pas attribué en 1902, nous dit-on, la moindre parcelle du bassin atlantique du Lago Viedma et du Río de Las Vueltas; par conséquent, conclut-on, le Chile ne peut pas revendiquer aujourd'hui, et votre Tribunal ne peut pas lui accorder aujourd'hui, la moindre parcelle de ce bassin. Ce raisonnement est proprement effarant car il ne s'agit pas du même bassin dans

³ Entrusted by the *Compromis* with the task of determining "the line of the frontier" by interpreting and applying the 1902 Award, your Court cannot exceed the "limits defined by the extreme claims on both sides" in 1902. Contrary to what has sometimes been intimated in this room, this is not for your Court, I note in passing, a problem of *petita* or of territorial competence. It is a fundamental requirement. Not to exceed the extreme claims on both sides in 1902 is a fundamental requirement based simply on the obligation imposed on your Court by the *Compromis* to reach its decision by means of interpretation and application of that Award).

la prémisses et dans la conclusion. Dans la première partie du raisonnement, il s'agit de ce que l'on croyait *à cette époque* constituer le bassin atlantique du Lago Viedma et du Río de Las Vueltas: dans la seconde partie du raisonnement, il s'agit de ce que l'on sait *aujourd'hui* constituer le bassin atlantique du Lago Viedma et du Río de Las Vueltas. On sait *aujourd'hui* que le *divortium aquarum* continental court autrement qu'on ne l'imaginait il y a un siècle. On sait *aujourd'hui* que le bassin du Río Gatica ou de Las Vueltas s'étend beaucoup plus vers le nord qu'on ne le pensait en 1902 et qu'il n'a pas du tout la configuration qu'on lui supposait alors. Et l'on connaît *aujourd'hui* une Laguna del Desierto dont on ne soupçonnait même pas l'existence il y a un siècle. Lorsque nos adversaires s'appuient, comme ils le font avec tant d'insistance, des dizaines de fois, sur la séquence du "bassin Viedma, dont fait partie le bassin Vueltas, auquel appartient la Laguna del Desierto", c'est à une donnée totalement inconnue en 1902 qu'ils se réfèrent—puisqu'à *cette époque* la région où on sait aujourd'hui que se trouve la Laguna del Desierto était considérée comme située sur le versant pacifique et que l'existence même de la Laguna était inconnue (record of 13 April 1994, pp. 28-29, italics in the original).⁴

85. As can be seen from these paragraphs, there are divergences between the Parties as to what Chile's extreme claim was in the 1898-1902 arbitration. In order to determine what that claim was it is necessary to refer to what Chile actually stated at the time and not to what Argentina or Chile today assert the claim to have been. In fact, the extreme claims of the Parties in the 1898-1902 arbitration were set out in accordance with criteria which both defined their aspirations and justified them or invested the documents submitted to the Arbitrator with meaning. It would be impossible to interpret what was decided at that time in accordance with criteria presented to the 1991 Court but which were not validated in the original decision, for that would be to take up matters which were not covered by the 1902 Award and which, in consequence, cannot serve as a basis for interpreting it. This Court believes, therefore, that Chile's extreme claim in 1898-1902 must be sought in that country's presentations before that Arbitrator.

86. At the meeting on 29 August 1898 (see para. 31) the Chilean expert stated that the boundary between the two countries was formed by the "natural and effective water-parting of the South American continent, between parallels 26°52'45" and 52°."

⁴ I should like first of all to reject, so that I do not have to return to it, the unacceptable manipulation of time which underlies Argentina's argument, which I hope I have summarized accurately. Chile did not claim in 1902, we are told, and the Award did not assign to it in 1902, we are told, the least part of the Atlantic basin of Lake Viedma and the River de las Vueltas; accordingly, it is concluded, Chile cannot today claim, and your Court cannot assign to it today, the least part of that basin. This argument is truly outrageous, because the premise and the conclusion are not talking about the same basin. The first part of the argument refers to what was believed *at that time* to constitute the Atlantic basin of Lake Viedma and the River de las Vueltas: the second part refers to what is known *today* to constitute the Atlantic basin of Lake Viedma and the River de las Vueltas. It is known *today* that the continental *divortium aquarum* follows a different line from what was thought a century ago. It is known *today* that the basin of the River Gatica or de las Vueltas extends much further towards the north than was thought in 1902 and that it does not have at all the configuration attributed to it at that time. And it is known *today* that there is a Lake del Desierto whose existence was not even suspected a century ago. When our adversaries base their argument, as they do so insistently, dozens of times, on the sequence of "Viedma basin, part of which consists of the Vueltas basin, to which Lake del Desierto belongs", they are referring to a piece of information entirely unknown in 1902—since *at that time* the zone in which Lake del Desierto is known to be situated today was believed to lie wholly on the Pacific slope, and the Lake's very existence was unknown.

87. Chile maintained throughout the 1898-1902 arbitration that, according to the 1881 Treaty and the 1893 Protocol, the boundary was provided by the continental water-parting, which it also called *divortia aquarum*. For example, in its first submission before the Arbitral Tribunal in May 1899 Chile stated:

After the lengthy exposition of facts given in the preceding pages, it is impossible to argue reasonably that the boundary agreements between Chile and the Argentine Republic have established any other demarcation rule than the *divortia aquarum* (Appendix to the submission on behalf of Chile in reply to the Argentine Report submitted to the Tribunal constituted by H.B. Majesty's Government acting as Arbitrator, hereinafter "*appendix*", Paris, 1902, vol. V, p. 91).

Other similar references may be found in the *appendix* on pages 95, 113 and 115. In the same submission Chile asserts that the continental water-parting is "a natural, entirely known and visible line . . . which the existing Treaties have declared to be the 'geographical condition of the demarcation' and the 'invariable rule' with which the persons carrying out the demarcation must comply" (*appendix*, vol. V, p. 123). In the conclusions of its first submission Chile requested the Arbitrator to use the continental water-parting as the criterion for delineating the frontier in accordance with the treaties in force.

88. Chile put forward the same argument in its reply to the Argentine memorial. Reference may be made, for example, to chapters XXI and XXIII of this submission (Statement presented on behalf of Chile in reply to the Argentine report submitted to the Tribunal constituted by H.B. Majesty's Government acting as Arbitrator, hereinafter "*Chilean Statement*", London, 1901, vol. II, pp. 644 *et seq.* and 700 *et seq.*). Several passages illustrating this assertion are cited in paragraph 93 of this Award.

89. On 27 October 1902 Chile, commenting on Argentina's final statement, reiterated the idea that the 1881 Treaty and the 1893 Protocol established as the boundary the principle of the continental water-parting. The following passages are clear in this respect:

The Tribunal will have seen that due consideration has been given in chapters XX to XXV of our Statement to every sentence of this and the other clauses of the Treaties and Protocols that have any bearing on the boundary demarcation. The existence of "a sole and absolute rule" of demarcation—that is to say of an "invariable rule"—in the Treaty is officially declared by the two Nations in the Protocol of 1893; and it has been exhaustively proved (*Chilean Statement*, pp. 702 to 705) that *there is no other possible invariable rule* contained in the Treaty, but that of water-parting (Some remarks on the final statement presented to the Arbitration Tribunal by the Argentine representative, hereinafter "*Some Remarks*"; italics in the original).

The *Continental divide* as the basis of the Boundary Treaty is not a "Chilean Doctrine", but has been laid down as the guiding rule in the Covenant as the outcome of prolonged negotiations and has been upheld by the Argentine Representatives in particular (*Chilean Statement*, ch. IX, X and XI); (*Some Remarks*, italics in the original).

. . . according to the Chilean interpretation officially laid down by the Expert Señor Barros Arana, the "main chain" alluded to in the Protocol of 1893 cannot be other than that which conforms with the "geographical condition" of the demarcation established by the Boundary Treaty and Protocol, that is to say the one which divides the waters, constantly separating the streams which flow to either country. . . (*Some Remarks*).

90. In view of the passages cited above, this Court concludes that Chile claimed before the Arbitrator as the boundary established by the 1881 Treaty and the 1893 Protocol the line of the continental *divortium aquarum*.

91. The Court must now determine how the Chilean claim has to be interpreted in those cases in which the maps submitted by Chile represented the line of the *divortium aquarum* with some divergences from the reality on the ground or in those other cases in which the line was unknown because the areas were unexplored. This matter is of special importance in view of Chile's assertion that this claim was better represented on a map than by means of its underlying concept (see paras. 83 and 84).

*93. In 1898 the Chilean expert stated:

... although in its most extensive and important parts the ground across which the dividing line runs is sufficiently well-known, and even extensively surveyed, and although the hydrographic origins of the rivers and streams which flow away to both sides is generally well-established, it must nevertheless be pointed out that the topographical location of the proposed line is entirely independent of the accuracy of the maps and that, for this reason, this line is none other than the natural and effective water-parting of the South American continent, between parallels 26°52'45" and 52°, and can be demarcated on the ground without carrying out any more topographical operations than are necessary for determining what the course of the waters would be in places where they do not physically run (statement of the Chilean expert, record of 29 August 1898).

In its arguments before the Arbitrator, Chile stated:

The water-parting is one of those topographical features which are most easy to identify and mark on the ground. It is based on the natural geography and obeys perfectly clear physical laws. Neither maps nor complicated topographical studies are needed for its identification. A simple ocular inspection is all that is required to perceive where a river or stream rises and the natural direction which its waters take (*appendix*, vol. V, p. 92).

It is interesting to note that this same opinion was stated in almost the same words and more or less at the same time by the Chilean expert when he told the Argentine expert, in his note of 18 January 1892: "The reason why the 1881 negotiators took the line of the water-parting as the demarcation line in the Cordilleras is the same reason as is recommended by sound principles of geography and international law. It is, in fact, a single line, easy to define, locate on the ground and demarcate, and it is designated by nature itself and not open to any ambiguities or errors" (*appendix*, vol. V, pp. 92-93).

When the article says that "the boundary line shall run along the highest summits of the said Cordilleras *which divide the waters*, we understand that *the waters* are the *whole* of the waters flowing over the conterminous territories; waters which, being compelled by natural laws to choose between two opposite directions of outflow, must involve the existence of a natural divide, the easy identification and necessary continuity of which leads to its being recognized as wholly adequate to serve as the international boundary (*Chilean Statement*, vol. I, p. 313; italics in the original).

It is in fact perfectly conceivable that two bordering States should adopt for the delimitation of their frontiers a principle of demarcation which, when applied to unexplored regions, should result in one of them profiting by a larger portion of territory. This is conceivable because, on such a hypothesis, both parties negotiate on conditions of perfect equality, both being aware of the risks they are running and accepting them deliberately. What is not conceivable, within the limits of the spirit of loyalty which should prevail in the adjustment of international Treaties, is that any validity should be supposed to attach to the acquisition of an enormous advantage by one of the parties, who is conscious of obtaining it, at the expense of the other, who is unaware of its loss (*Chilean Statement*, vol. II, pp. 467-468).

* Note by the Secretariat: skipping of paragraph number from 91 to 93 is in the original text.

Given any boundary line—such as would exist after effecting the demarcation referred to in the first paragraph of article 1 of the Protocol—it is as impossible to imagine that a “lake” or “lagoon” lying to the east of the line should not belong to the Argentine Republic, as to imagine that any “parts” of a river should not belong to the country in which the whole of it lies (*Chilean Statement*, vol. II, p. 489).

. . . Señor Barros Arana invariably maintained that no previous scientific survey of the ground was needed in order to discover *which* was the line ordered by the Treaties, although an ocular inspection was sometimes necessary to ascertain *where* the line lay, and although a simultaneous or subsequent survey was also necessary for delineating the line on a map, so that the extent of the respective territories near the frontier might be known (*Chilean Statement*, vol. II, p. 560; italics in the original).

Moreover, it must not be forgotten that, on the one hand, any deficiency of geographical information on the part of the Chilean Expert could involve no worse consequence than the subsequent discovery—when the demarcation was being carried out—that the course of the dividing line differed from what might at first have been anticipated; but this could never entail any difficulty in the identification of the line itself, since the rule of following the water-parting could give rise to no ambiguity in practice (*Chilean Statement*, vol. II, p. 640; italics in the original).

In order to prevent any misunderstanding on this score, it was usual . . . to close the sentence by an enumeration of the principal watercourses on each side, or the mention of their ultimate drainage. Sometimes this was omitted, either because it was not thought necessary, or because part of the region and its watercourses were unexplored. In any case it cannot be doubted that if such formulae as the above-quoted represent a single principle of demarcation, this principle can be no other than the principle of water-parting (*Chilean Statement*, vol. II, p. 660).

. . . the only fact then positively known about the southern regions of both countries, north of the 52nd parallel, was that there was a Pacific drainage and an Atlantic drainage, and that a line of separation between them *must* exist somewhere. (*Chilean Statement*, vol. II, p. 662; italics in the original).

Given the state of knowledge of Patagonia south of 38° in 1881, there is no question that the *existence* of an arcifinious frontier in that region, such as would fulfil the various conditions required by the Argentine Representative, was by no means an assured fact; on the contrary, exaggerated notions had been repeatedly circulated as to the very easy access to one side from the other. On the other hand, the *existence* of waters flowing to the Pacific and of waters flowing to the Atlantic all along the respective coasts and proceeding from the region of the boundary, was an undoubted fact, and that these opposite water flows *must have a line of separation somewhere* was an inevitable consequence of it (*Chilean Statement*, vol. II, p. 672; italics in the original).

. . . it is indisputable that the only line which can be identified on the ground without any discussion or ambiguity in all places save those where the water-parting is doubtful, is the water-parting line itself; the water-parting as understood by the Chilean Expert—the only water-parting line that can be correctly called by that name from one extremity to the other—because if subordinate and partial water-partings be taken into consideration, the expression would cease to be definite and the stipulation founded on it would cease to be valid (*Chilean Statement*, vol. II, p. 673).

The manifest assumption in article 1 of the Boundary Treaty—that the frontier line indicated therein to the North of the 52nd parallel had a necessary and unequivocal existence on the ground, save where the water-divide should not be clear, and consequently could be no other than the water-divide itself—was confirmed by the terms of the Convention, with the one qualification that in 1881 it was not thought necessary to place landmarks on the ground except where the boundary line might not be clear, while in 1888 the expediency of carrying out the demarcation along the whole line was recognized (*Chilean Statement*, vol. II, pp. 697-698).

The principle of the water-parting has always been regarded as a mathematical principle in boundary demarcation, and is usually applied both in the case of countries having separate river systems originating in unexplored mountains or low divides, and in the case of those whose features have been mapped out beforehand.

The advantages of the method in the former case are obvious: two opposite flows of water *must* have a line of separation somewhere, and thus at least the *real existence* of a continuous line is secured (*Chilean Statement*, vol. II, p. 738; italics in the original).

... it is likewise assumed that the line shall be marked out first *on the ground*, and that the data shall then be collected for the sole purpose of *drawing the line on the maps* (*Chilean Statement*, vol. II, p. 748; italics in the original).

The primary water-parting being identified at points separating the basins of well known—though possibly unsurveyed—Chilean and Argentine watercourses, the said divide could easily be demarcated, point by point, and the nearest points on either side conducive to the identification of the line would be the origins of opposite headstreams; for this reason the Protocol enjoins that the latter shall be included in the survey, so as to enable their delineation on the map (*Chilean Statement*, vol. II, p. 751).

The “natural water-parting” consequently is that which is actually effected at the places where Nature has determined that it should be (*Chilean Statement*, vol. II, p. 802).

The Tribunal knows that the opinion of the Chilean Expert as to which was the principle of demarcation established by the Treaty did not depend on maps, and that he never proposed to subordinate the demarcation to maps, since no maps were needed to know that a real and unique line of water-parting existed between Chilean and Argentine territories, or to find and identify such line on the ground (*Chilean Statement*, vol. III, p. 889).

The Chilean line is a single one, easy of determination on the spot and on any map, independent of technical errors and of incorrect names in the maps (*Chilean Statement*, vol. IV, p. 1250).

First of all, it must be observed once more that the course given by the Expert of Chile to his boundary line is entirely independent of those maps, since it obeys a definite principle whose application to the ground is not affected by the more or less accurate details of the cartographical picture shown in the map (*Chilean Statement*, vol. IV, p. 1322).

In 1881 and 1893, the water-divide, which was established as the geographical condition of the demarcation between the two countries, was, therefore, supposed to take place in the labyrinth of ranges and mountain masses west of Lake San Martín, which was assumed to belong to the Atlantic basin. When, shortly before the official tracing of the boundary line by the Experts, it was ascertained beyond doubt that the lake discharged its waters into the Pacific, the Expert of Chile had no cause for deviating from the principle laid down by the Treaty and sanctioned by its practical application in the regions where the frontier line had already been accepted, and consequently included the whole basin of Lake San Martín within the territory of Chile, just as he had acted in the case of Lake Buenos Aires and Lake Resumidero (*Chilean Statement*, vol. IV, pp. 1505-1506).

As we have explicitly demonstrated in different parts of our Statement (pp. 563-564, 884-886, 1483-1485) any deficiency of geographical information in the Chilean maps is of no importance to the question of the boundary demarcation, since the line submitted by the Chilean Expert, based on a fixed principle and not subject to any individual appreciation of certain features of the ground, can be recognized everywhere in practice, even if the details be not always correctly traced in the maps (*Some Remarks*).

94. This Court concludes that Chile, in its presentations to the 1898-1902 Arbitrator, established an order of priority among the manifestations of its wishes (the written texts and the maps) and asserted that the natural and effective continental water-parting prevailed, i.e., the water-parting present in nature, over its representations on maps and regardless of the accuracy thereof. The same criterion applies to the unexplored regions and to the ones which have been insufficiently explored.

95. The conclusions reached by the Court are entirely in accordance with the principles of good faith and contemporaneity.

96. In fact, these conclusions are not based on isolated passages or passages susceptible of different interpretations but on precise texts which manifest Chile's intention in that arbitration clearly and conclusively. Nor is it a question of isolated assertions but of reiterated ones.

97. The conclusions are also based on the geographical knowledge available to the Parties in 1902. At that time there were still unexplored areas of the frontier and other areas which were insufficiently known, something which is not the case today. Chile argued that neither the inaccuracy of the maps nor the lack of knowledge of a region could serve as an excuse for not applying the invariable criterion of demarcation which, in its opinion, was the continental water-divide. It asserted that the same principles should also be applied to the unexplored regions, even when the outcome was uncertain, and that it was ready to accept the consequences. Thus, the conclusion of this Court to the effect that Chile claimed in any event the natural and effective continental water-parting has been established on the basis of the geographical knowledge of 1902, i.e., in strict conformity with the principle of contemporaneity.

98. It is now necessary to determine what Chile's extreme claim was in the 1898-1902 arbitration with respect to the boundary sector subject to the decision of this Court. This claim is presented in the *Chilean Statement* and on one of the maps submitted to the British Arbitrator and identified as "plate X". Concerning the water-parting between Lakes San Martín and Viedma, Chile states:

The Chilean Expert's line, always traced along the continental water-divide, runs in the stretch corresponding to No. 330 of the official proposal, on the "section of Cordillera which separates the waters which form the Argentine stream Chalia from the tributary sources of Lake San Martín which drains in the inlets of the Pacific". (record of August 29, 1898); (*Chilean Statement*, vol. IV, p. 1515).

Chile then gives the following description:

... the plateau situated to the south of Lake San Martín, which separates the sources of streams flowing into that lake from those flowing to the River Chalia and Lake Viedma, gradually rises and breaks as it stretches from east to west, until it forms snowy ridges and ranges. In view of such an imperceptible transition, the Chilean Expert had no reason for considering as excluded from the "Cordillera" a plateau which, from the point of view of orographical dependency, undoubtedly forms a ramification of the Andean system. The heights measured by the first Chilean sub-Commission along the line of the *divortium aquarum*, 727,558,952,1059,1988 1789 and 2095 metres, show the gradual elevation of the ground from east to west, until it forms a group of snowy hills, whence flow towards the Pacific a series of southern affluents of Lake San Martín, and towards the Atlantic side, the head-streams or sources of the River Chalia and the River Hurtado, a tributary of Lake Viedma.

On the summit of 2095 metres the *divortium aquarum* turns to the N.N.W. to enter a region still very little known, bordering on the north the basin of the River Gatica (Río de la Vuelta of the Argentine maps), which in the lower part of its course attains 80 metres in breadth, and the sources of which, judging by the great volume of their waters, are probably situated far above the point to which it has been explored. At its bend to the south the dividing line, the details of which have not yet been determined in this region, reaches point 331 of the Chilean enumeration situated, in conformity with the Record, on the "Cordillera del Chaltén which divides the hydrographical basin of Lake Viedma (or Quicharre) that drains into the Atlantic through the River Santa Cruz, from the Chilean sources which drain into the inlets of the Pacific" (*Chilean Statement*, vol. IV, pp. 1515-1516; italics in the original).

99. According to the text transcribed above, at the time of the arbitration the upper basin of the River Gatica or de las Vueltas, also called “de la Vuelta”, had not even been explored and, therefore, its origins were unknown. During the present Court’s visit to the area (see para. 11) and bearing in mind the cartography of the time, particularly the map of Riso Patrón, a distinguished Chilean geographer of that era, the members were able to verify which part had then been unexplored.

100. According to the *Chilean Statement*, Chile claimed as the boundary a line bordering in the north the basin of the River Gatica or de las Vueltas. In other words, it claimed Lake San Martín and its whole basin, which drains to the Pacific, and left on the other side of the frontier the basin of the River Gatica or de la Vuelta, which drains into Lake Viedma, which flows to the Atlantic.

101. It is now necessary to settle the question of whether the boundary claimed by Chile leaves on the Argentine side the natural and effective basin of the River Gatica or de la Vuelta or only the then known part of that basin.

102. The passages transcribed from the *Chilean Statement* must be interpreted in the light of the general criterion of that statement, which has been analyzed in paragraph 87 *et seq.* According to that criterion, it must be concluded that Chile’s extreme claim in 1898-1902 consisted of the natural and effective continental *divortium aquarum*, which separated the basin of the Gatica or de la Vuelta from the Pacific slope.

103. Plate IX submitted by Chile in that arbitration allows the same conclusion. On that map the course of the continental *divortium aquarum*, which had been surveyed at that time, appears as a solid red line, and its assumed course in the area still unsurveyed appears as a broken or pecked line. This map depicts the River Gatica or de la Vuelta with an unbroken blue line, but the upper part of the basin, still not surveyed at the time, appears as a broken blue line. The limits of the sources of the River Gatica or de las Vueltas, which corresponded to the limits of the continental water-divide, were shown with a pecked line, in contrast to the solid line which depicts the continental water-divide throughout the basin of Lake San Martín, whose contours were known.

104. The location of these two pecked lines, i.e., of the continental *divortium aquarum* and of the origins of the River Gatica or de la Vuelta, clearly shows what the meaning of Chile’s extreme claim was. It was that the claimed boundary passed to the north of the natural and effective sources of the Gatica or de la Vuelta basin, which was left in its entirety on the other side of the frontier, regardless of its extension.

105. The Court concludes that, in the light of the terms in which Chile expressed itself at the time, both from the conceptual and from the cartographic standpoint, the essential thing was not the actual points which were to constitute the frontier line on the maps but that this line should effectively perform the function of separating the basins of Lake San Martín and the River Gatica or de las Vueltas.

106. The interpretation of the 1902 Award should thus keep in mind that Chile's extreme claim in that arbitration was the line of the natural and effective *divortium aquarum*. Therefore, according to international law the terms used by the British Arbitrator to define the frontier between the point on the southern shore of Lake San Martín where boundary post 62 stands today and Mount Fitzroy could not be assigned an effect which would award to Chile territory which, by extending beyond the said line, is located beyond that extreme claim. Such a result would be equivalent to concluding that the 1902 Award violated the law of nations by breaking the rule *non ultra petita partium*.

107. These conclusions require some clarification with respect to the point on the frontier corresponding to Mount Fitzroy. In fact, when the experts of the two Parties met in 1898, each of them proposed what, in his opinion, was the general line of the frontier according to the 1881 Treaty and the 1893 Protocol (see paras. 31 and 32). With regard to the sector of the frontier which is the subject of this arbitration, the Chilean expert proposed as point 331 on his map that the line should pass along the "Cordillera del Chaltén which divides the hydrographical basin of Lake Viedma (or Quicharre) that drains into the Atlantic through the River Santa Cruz from the Chilean sources which drain into the inlets of the Pacific". The Argentine expert proposed as point 304 on his map that the frontier should pass across Mount Fitzroy. In September 1898 the Minister for Foreign Affairs of Chile and the Argentine Minister Plenipotentiary in Santiago confirmed that point 331 in the Chilean proposal coincided with point 304 in the Argentine proposal (see paras. 43-45). At the time it was believed that Mount Fitzroy, which formed part of what Chile called the Cordillera del Chaltén, was located on the continental water-divide in that Cordillera.

108. During the arbitral proceedings of 1898-1902, and as a result of the technical work done by the Parties, it was verified that Mount Fitzroy was located to the east of the continental water-divide. This was confirmed in the *Chilean Statement* (vol. IV, p. 1517) and in Captain Crosthwait's report. In addition, the British demarcation commissioner, Sir Thomas Holdich, refers in his final report to Mount Fitzroy and states the "probability that that mountain is not on the main water-parting—a matter which, of course, requires further proof and does not invalidate the Award".

109. In the present arbitration the Argentine memorial states that there was agreement between the two Governments that Mount Fitzroy was a point on the boundary (p. 92). Chile stated in its counter-memorial that it "shares Argentina's opinion that there was agreement between the two Governments that Mount Fitzroy was a point on the boundary" (p. 46). According to the Parties, as a result of this agreement the 1902 Award had the boundary pass across Mount Fitzroy, which was situated on the Atlantic side. The interpretation must therefore be that Chile's extreme claim, described in paragraph 94, was altered, according to Argentina, so that the boundary line, within the so-called Cordillera del Chaltén, should make the necessary inflection to touch Mount Fitzroy. To sum up, then, Chile's extreme claim in 1898-1902 concerning the frontier sector submitted to the decision of this Court was the natural and effective continental *divortium aquarum*, except in the case of Mount Fitzroy.

110. In the course of the proceedings Chile argued that its extreme claim in 1898-1902 was not accepted by the Arbitrator and that, therefore, it lacks any legal force today. This Court, however, points out that the application of the rule *non ultra petita partium* in this case is based only on a comparison of the extreme claim of one Party to an international dispute with the claim of that same Party with respect to which the Court is called upon to interpret the Award which settled the dispute. The admission or rejection of that extreme claim by the Arbitrator is irrelevant to the application of the rule.

111. Nor should one forget paragraph 16 of the report, where it was expressly stated that “the question submitted to us is not simply that of deciding which of the two alternative lines is right or wrong, but rather to determine—within the limits defined by the extreme claims on both sides—the precise boundary line which, in our opinion, would best interpret the intention of the diplomatic instruments submitted to our consideration”. The Award, consequently, without accepting or rejecting definitively the claims of the Parties, sought to delineate a frontier which, situated between the two claims or coinciding sometimes with one and sometimes with the other, would offer a balanced solution to the dispute. What the Award did not accept was the Chilean position that the continental *divortium aquarum* had to be the sole criterion of delimitation, but there are several sections of the frontier which run along the continental water-parting because the Award so decided. It cannot therefore be argued that the Award definitively rejected the Chilean claim or that the interpretation that a segment of the frontier coincided with the continental water-divide conflicts with the Award.

112. In addition to the rule *non ultra petita partium*, Argentina has also based its claim on the argument that the territories included in the sector to which this dispute refers were outside the competence of the British Arbitrator, and on the doctrine of estoppel (*venire contra factum proprium non valet*). Both arguments are based on the recognition which, in Argentina’s opinion, Chile had accorded to Argentina’s sovereignty over those territories. These issues have been extensively debated in this arbitration. However, an analysis of these arguments does not alter the earlier conclusions and, therefore, the Court does not think it necessary to rule on them.

VII

113. Now that the limits to the Court’s work of interpretation have been established, it must determine the meaning of the provisions of the 1902 Award and apply them.

The Award itself states:

The further continuation of the boundary is determined by lines which we have fixed across Lake Buenos Aires, Lake Pueyrredón (or Cochrane) and Lake San Martín, the effect of which is to assign the western portions of the basins of these lakes to Chile and the eastern portions to Argentina, the dividing ranges carrying the lofty peaks known as Mounts San Lorenzo and Fitzroy.

114. The report adds, with regard to the sector which is the subject of the present dispute:

From this point it [the boundary] shall follow the median line of the Lake [San Martín] southward as far as a point opposite the spur. . . on the southern shore of the Lake in longitude 72°47'W., whence the boundary shall be drawn to the foot of this spur and ascend the local water-parting to Mount Fitzroy. . .

115. The Parties are in agreement on the two extreme points of the frontier sector in dispute, boundary post 62 and Mount Fitzroy, as the Court has indicated in paragraph 50 of this Award. Therefore, the dispute turns on the determination of the boundary line between those two points.

116. Argentina states that the Award does not contain a definition of “water-parting” and that, therefore, this concept should be interpreted according to its current meaning at the time (memorial, pp. 447-449) by applying the interpretation rules of practical effect and the object and purpose of the juridical act. It also points out that it would be appropriate to take into account the arguments put forward in the *Chilean Statement* because it was Chile which introduced the notion of *divortium aquarum* into the 1898-1902 arbitration.

117. According to the Argentine memorial, a water-parting has four essential characteristics: (i) it is a line which, at each of its points, separates river basins; (ii) it is a line which cannot cross rivers or lakes; (iii) it is an unbroken line; and (iv) it is a single line between two predetermined points (p. 525).

118. Argentina has stressed that the essential thing is the concept of “water-parting”, while it regards the adjectives “local” and “continental” as of subsidiary importance (memorial, p. 530). With regard to the meaning of these adjectives, it assigns to “continental water-parting” the meaning of a line which divides the waters which drain towards the Pacific in the west from the waters which drain towards the Atlantic in the east; in contrast, it considers that the term “local water-parting”, in the meaning which it has in the Award, refers to the line dividing the waters in a specific sector between two predetermined points, as in the case of boundary post 62 and Mount Fitzroy.

119. According to the Argentine counter-memorial, the terms have to be understood in their meanings and context current at the time. When the Arbitrator called the dividing line between boundary post 62 and Mount Fitzroy a “local water-parting”, he would have used that term in the current meaning of “local”, i.e., relating to a space situated between two previously determined points. Any water-parting between two points on a topographical surface could be described as “local”, regardless of whether it coincided in part of its course with a section of the continental water-parting (p. 124).

120. In its memorial Chile states that the continental water-parting “represents, on the American continent, the separation of the waters which discharge into the Atlantic and those which discharge into the Pacific” (p. 17). In contrast, “local water-partings separate waters which flow to a single ocean” (p. 18). The Chilean memorial concludes from these definitions that “logically, a water-parting cannot be, simultaneously, both “continental” and “local”, because the waters which it separates cannot flow simultaneously to both

oceans but only to one of them” (p. 18). On this conclusion Chile founded one of its criticisms of the line proposed by Argentina in the present arbitration, which runs for part of its course along the continental water-divide. The memorial states, consequently, that “there is no continuous “local water-parting” which carries the line from boundary post 62 to Mount Fitzroy” (p. 20), i.e., that the description of the boundary in the 1902 report does not conform with the geographical reality.

121. During the oral submissions, however, the line proposed by Chile was defined as a genuine local water-parting, although it cuts across surface water and also coincides in one segment with a continental divide. Having concluded these arguments, in its “Summary of the main points of Chile’s position” (point III.1) Chile asserted that there was a local water-parting between the two extreme points of the sector submitted to arbitration:

The Chilean line is the only one determined by the requirement that the local water-parting, in the correct interpretation of this term, should ascend from boundary post 62 to Mount Fitzroy (record of 11 May 1994, p. 82).

Chile accepted in the same document that the proposed line, conceived by Chile as a local water-parting which would run along the so-called “Cordón Oriental” coincided in part of its course with the continental divide (III.6). The notions of continental water-parting and local water-parting would not, therefore, be mutually exclusive, as the Chilean memorial asserted.

122. The Court has already referred to the force of *res judicata* of the 1902 Award and has stated that, according to the case law, it applies both to the operative part of the decision and to the preambular part, which is a necessary antecedent of the operative part (see paras. 68-70). It must now be added that in the international legal system *res judicata* also applies to the meaning of the terms used in the propositions which make up an arbitral award and that this meaning cannot be altered by any use subsequent to the decision or by the evolution of the language, or by the acts or decisions of one of the parties to the dispute.

123. Accordingly, some consideration must be given to the concept of “water-parting”. This concept appears in the 1881 Treaty (“the frontier line shall run. . . along the most elevated summits of these Cordilleras which divide the waters. . .”) and it took on particular relevance in the 1898-1902 arbitration because Chile argued at the time that, according to that Treaty and the 1893 Protocol, its boundary with Argentina was constituted by the continental *divortium aquarum*. Chile submitted to the Arbitrator fuller and more accurate studies concerning the notion of water-parting. The following passages from Chile’s written submissions to the British Arbitrator show how it presented its conception of water-parting at that time:

How a river can cross a cordon which serves as a division of waters is a thing impossible to understand, since the condition of dividing the waters and of being traversed by a watercourse are incompatible and contradictory (*Chilean Statement*, vol. I, p. 272).

. . . the Chilean Government have never applied the expression “*Water-parting line*” to a line that is crossed by watercourses large or small (*Chilean Statement*, vol. I, p. 386; italics in the original).

Thus specified stretches of *water-parting* lines only are to be followed, and from the place where one ends to the place where another begins, if the boundary follows a *water-course*, it also is specified and is called a *river* and not a *water-parting* (*Chilean Statement*, vol. I, p. 389; italics in the original).

To sum up, the Chilean Republic not only has given no "categorical recognition" to the terms "*divortium aquarum*" or *water-parting* line ever being applied to a line cut by *water-courses*—a recognition which would amount to a misuse of technical terms—but she has made no such misuse in the case quoted by the Argentine Representative, nor in any other case whatever (*Chilean Statement*, vol. I, p. 389; italics in the original).

... when it is said that a line between two points divides *the waters*, a line is meant which does not allow of *any water* coming across it from one point to the other (*Chilean Statement*, vol. II, p. 656; italics in the original).

Whether termed "continental" or not, the "line of *the water-parting*" or the "*divortium aquarum*", applied—as they are in articles 1 and 2 of the Treaty—to the whole boundary line as far as the 52nd parallel, mean a line "through which no water flows", to use Gilbert's expression; and on that part of the South American continent with which we are dealing—at least from 27°40' to 50°42'S.—no line, save the continental divide, can be drawn which is not crossed by *watercourses* (*Chilean Statement*, vol. II, pp. 664-665; italics in the original).

... by the strictest rules of interpretation, as laid down by Hall, the terms "which divide the waters", "line of the *water-parting*", "*divortium aquarum*" must be taken in the "customary meaning" they have in Treaties, which is that of a mathematical line that no superficial drainage line can cross within the extent to which any of the aforesaid expressions are intended to apply (*Chilean Statement*, vol. II, p. 690; italics in the original).

The same terminology has always been used in South America, that is to say, when "*water-parting* line" has been or is mentioned with reference to a certain extent of territory, it has always been, and always is, understood to mean a line which is not crossed by any *watercourse* within the extent of territory referred to (*Chilean Statement*, vol. II, p. 796).

... within the extent in which the boundary is said to follow the main chain, it is understood that it will follow "*la ligne de partage des eaux*", the *water divide*: in other words, that *no water* shall cross it *in that extent* (*Chilean Statement*, vol. II, p. 816; italics in the original).

... when the rule of *water-parting* is given in a Treaty for a *certain extent* or for *separate extents* of a boundary line, it is always understood that *no watercourse shall be crossed* by the said boundary line *within the extent* or *within each of the extents*, to which the said rule is to be applied (*Chilean Statement*, vol. II, p. 818; italics in the original).

... not a single case can be quoted in which a boundary line subject to "pass between 'vertientes' starting, descending or flowing in opposite directions", or any similar formula, has been made by the demarcators *to cut a stream within the section to which such a formula applies* (*Chilean Statement*, vol. IV, p. 1618; italics in the original).

124. The paragraphs transcribed above show that Chile maintained that the *divortium aquarum* consisted of a line which separates the waters belonging to basins which have different outlets. Thus, it is impossible for this line to cut across a *watercourse* at any point in its trajectory because, if it did so, it would cease to be a *water-parting*.

125. The Argentine presentations to the British Arbitrator also contain a concept of *water-parting*. The following passages from one such presentation expound this concept:

In a vast extension of the frontier, the culminating edge of the Cordillera de los Andes—the dividing line of the waters belonging to it—coincides with the Continental divide. In that extension the chain does not give passage to the streams which rise outside of it. The Experts, therefore, had no substantial difference in those places, nor in those in which the

Cordillera has its bifurcation foreseen in the Treaties (Report presented to the Tribunal appointed by Her Britannic Majesty's Government, hereinafter "*Argentine Report*", London 1900, vol. I, p. ix).

Both Experts have referred to the water-parting line, but in different forms: for the Chilean Expert, the water-parting line to be accounted is that of the South American Continent, without taking into consideration whether the phenomenon takes place within the Cordillera de los Andes or not; for the Expert of the Argentine Republic, the water-parting line is nothing more than the detail which serves him as a secondary rule to designate in the main chain of the Cordillera de los Andes the topographical boundary between the two countries.

This difference in their respective points of view explains the divergences which have arisen between the Experts when arranging the landmarks, the right or wrong placing of which is to be a matter for the decision of Her Britannic Majesty's Government (*Argentine Report*, vol. I, pp. ix-x).

In the main chain . . . the line should run along its watershed, i.e., along the edge of the intersection of its slopes (*Argentine Report*, vol. I, p. x).

It is not a case of discussing the different kinds of watershed that exist in nature. The only thing that must be borne in mind is that the Treaties only determine the watershed of the high crests, the *divortium aquarum* of the Andes, the watershed of the main chain, and the continental divide is never mentioned in them (*Argentine Report*, vol. I, p. 210; italics in the original).

The Argentine-Chilean frontier is, therefore, situated within the Andes, in its main and dominant chain, and runs along the most elevated crests—along its watershed.

In presence of the terms employed in the International Convention, the line must be subject to two distinct conditions, viz:

1. To be within the Cordillera de los Andes.
2. To run along the most elevated crests of the Cordillera that may divide the waters of the same (*Argentine Report*, vol. I, p. 211).

When he [the Argentine negotiator] specified the *divortium aquarum* of the Andes, he was aware that the watershed referred to was no other than that which belonged to "the most elevated crests"; as it was in that form, and so understanding those terms, that the convention had been drawn up. He knew that a watershed is the line of intersection of two slopes or inclined surfaces, and hence that the watershed of the Cordillera de los Andes is the culminating line formed by the intersection of its eastern and western declivities (*Argentine Report*, vol. I, p. 215; italics in the original).

In regard to this argument, we may again note the erroneous tendency shown in the Statement read by the Chilean Representative to convert the watersheds into continental divides. It is therein explicitly recognized, in accordance with the already quoted opinion of Señor Bertrand, that there are an indefinite number of *divortia aquarum*; but if in a Treaty or in a book, the word "waters" is met with, the Chilean Statement takes for granted at once, without further investigation, that it refers to the separation of the hydrographic basins of the rivers that are tributaries of the Atlantic and Pacific Oceans, although there may be no reference to basins, rivers or oceans. The watershed referred to in the Protocol of 1893 is that of the Cordillera, it is that of its most elevated crests, as the boundary cannot be removed from the most elevated crests still less from the Cordillera itself. What reason, therefore, is there for saying that article 3 has laid down the rule for the continental divide? Would it not be more logical to say that if care has been taken to omit all reference to continent, to oceans or to hydrographic basins, it is because after the discussions that had taken place, it was desirable to abandon once and for all the theory which is based on such features? (*Argentine Report*, vol. I, pp. 269-270; italics in the original).

Therefore, whatever be the standpoint from which we examine article 3 [of the Protocol of 1893], the conclusion is always identical. It lacks anything bearing on determining the general rule for the boundary, and in the actual case on which it legislates it repudiates the interoceanic water-divide and makes it unmistakeable that the boundary should pass over the Cordillera even though it should bifurcate: that it should pass over its most elevated crests, and that when the bifurcation exists the Experts, by studying the geographical conditions, shall proceed to settle the differences that may arise (*Argentine Report*, vol. I, p. 271).

According to the Chilean Representative, the Chilean Expert, when deciding upon the definitely traced portion of the frontier, stated that the division of the waters was borne in mind; that this was the manner in which the stipulations of the boundary Treaty were carried out; and that such was the interpretation which in the practical application had been given to the words, "*main chain of the Cordillera*". The Argentine Expert does not object to these conclusions if they are correctly interpreted, because it is true that in the high ridge of the central chain of the Andes, as considered by Señor Barros Arana, i.e., the main chain along *the whole extent in which the frontier line has been agreed upon* with the exception of the part comprised between Mount Copahue and the Santa María Pass—*occurs the division of the waters of the continent, as well as the division of the waters of the Andean Cordillera*, properly so called, in its main chain; but it is likewise a fact that the Argentine Expert *has not taken any account of the continental water-parting*, as that is not stipulated in the Treaties, *but taken into account the watershed of the main chain of the Andean Cordillera, because it is this that was stipulated*, in order to define the high frontier ridge in this chain (*Argentine Report*, vol. II, p. 404; italics in the original).

To draw a line satisfying these conditions within the letter and the spirit of the Treaties, has been the purpose of the Argentine Expert.

The line planned by the Chilean Expert in this part of the boundary was drawn through the same points, and so has been accepted *because it is situated in the main chain of the Cordillera de los Andes*.

At all the points wherein the line dividing the waters has coincided with the Cordillera, properly so called, in its general line of lofty summits, even though some few still loftier rear themselves to the right and left, it is these points that have been chosen by the Argentine Expert for tracing the political line of separation. But where the *divortium aquarum* does not coincide with the said Cordillera, as the boundary between the two countries is the *Cordillera de los Andes*, and not the water-divide, the line must be marked out along the mountain range (*Argentine Report*, vol. II, p. 414; italics in the original).

The Chilean Representative was doubtless influenced by the phrase "main chain of the Andes which divide the waters", and by the mention made of some streams which the Paso de las Damas separates. As to the former, it may be remembered that the Chilean Representative admitted before the Tribunal something which is demonstrated by the most trivial observation, viz. that in each chain there is a dividing line of its own waters. It is not at all strange, therefore, that the Record should specify the fact of the local divide effected on the crests, and especially seeing that the boundary line cannot pass over any part whatever of the chain—over its sides for instance—but over the topmost ridge, from whence the waters descend by the two slopes of the chain (*Argentine Report*, vol. II, p. 446).

126. The transcribed passages show that the concept of "water-parting" used by Argentina is the same as the one used by Chile. An important proof of this point is provided by the fact that in the cases of coincidence between the *divortium aquarum* and the line of the most elevated crests of the main chain of the Andes the experts of both countries were in agreement as to the line of the frontier.

127. In none of the written documents which constitute the 1902 Award, i.e., the decision itself and the Court's report, is there any indication that the Arbitrator's intention was to deviate from the concept of "water-parting" which had been submitted to him by the Parties, which moreover coincided with the normal meaning assigned to that term at the time. On the contrary, the statement in paragraph 15 of the report that "... the orographical and hydrographical lines are frequently irreconcilable" is inseparable from the notion of a claim based on the hydrography contained in paragraph 10 of the same report, which refers to "a hydrographical line forming the water-parting between the Atlantic and Pacific Oceans, leaving the basins of all rivers discharging into the former within the coast-line of Argentina; and the basins of all rivers discharg-

ing into the Pacific within the Chilean coast-line, to Chile". Paragraph 14 of the report uses an identical concept: "The line of continental water-parting occasionally follows the high mountains, but frequently lies to the eastward of the highest summits of the Andes, and is often found at comparatively low elevations in the direction of the Argentine pampas".

128. In order to determine what the meaning of this expression was at the time it is useful to refer to the work by A. Philippson entitled *Studien über Wasserscheiden* (Leipzig, 1886) which, according to the *Chilean Statement* (vol. II, p. 792), was "the best-known monograph on water-divides". This work defines a water-divide in the following manner:

A water-divide is the line which divides from each other two separate directions of surface flow of the waters or, in other words, the line at which two slopes of the land surface intersect vertically (pp. 15-16).

This concept coincides with what is stated, in the present dispute, in appendix A of Chile's counter-memorial, according to which

... a water-parting is the line which marks the limit between two opposed directions of water flow on a land surface. That is to say, it corresponds to the line which separates the surface flows of waters which have different destinations (p. A/235).

129. In addition, topography teaches that, between two points on a land surface located on the same continent or island there is always one and only one water-divide. This principle was applied in the Arbitral Award of 14 July 1945 by Mr. Braz Dias de Aguiar in the frontier dispute between Ecuador and Peru (the Award is unpublished but a copy of the original is kept in the archives of this Court).

130. The concept of "water-parting" fulfils an essential function in the 1902 Award, and any alteration of its meaning would also alter the import of the rulings. The Court considers that the concept of "water-parting" in the 1902 Award is protected by the *res judicata* and is not susceptible of any subsequent change through usage, evolution of the language, or acts or decisions of one of the Parties to the dispute.

VIII

131. The water-parting between boundary post 62 and Mount Fitzroy is described in the 1902 Award as "local". The Court must now consider the context within which this term is used in the 1902 Award, as well as the common characteristics attached to it, and determine whether there exists in this connection a general practice of the Award which reveals the meaning of the terms used by the 1902 Arbitrator in his description of the frontier in the sector.

132. The 1902 report refers repeatedly to water-partings. In some instances it adds the qualification "local" or "continental", but at other times it uses different qualifiers, such as the basins which the water-parting separates or the appearance of the places through which it passes. The cases in which the report uses the term "local water-parting" have some common characteristics. It can be verified that all the instances of "local water-parting" refer to lines drawn between two specific points. Similarly, all these references save one

(between Cerro Rojo and the summit of Cerro Ap Ywan) are to sectors in which the frontier crosses a river or lake or ascends from surface water, so that its point of departure does not coincide with a “continental water-parting”.

133. With regard to the graphic representation of the local water-parting on the Award map, the boundary in the sector which is the subject of this dispute is depicted, for most of its extent, by a pecked line. This was a schematic and tentative representation, and not a conclusive one, of the result of applying the relevant part of the Award. By defining the frontier as a “local water-parting”, the Arbitrator opted for a natural feature whose exact location was not known. This assertion is borne out by the fact that the two maps signed by the 1902 Arbitral Tribunal and the three demarcation maps signed by Captain Crosthwait, copies of which were submitted by the Parties to this Court, show fairly significant differences in the course of the pecked line.

134. The 1966 Award stated with reference to the 1902 Award map:

A pecked line is the normal indication for a feature which is known to exist, but whose position has not been accurately located (*R.I.A.A.*, vol. XVI, pp.150-151).

There is no reason to abandon this concept in the present case, in which the pecked line also represents tentatively a geographical feature, the “local water-parting” between boundary post 62 and Mount Fitzroy, whose existence was known but whose course had not been accurately located.

135. In the 1898-1902 arbitration the term “local water-parting” was used in its ordinary meaning. Both in English and in Spanish the adjective “local” designates something specific to a place or limited to an area, in contrast to something of a general nature. So it appears in the presentations of the Parties:

Naturally within each block of highlands the two long slopes are separated by a *water-parting line*, and each of these local divides may be referred to as “the water-parting line of the Cordillera de la Costa” within the particular block to which the expression is applied. Such local water-partings are frequently adopted as departmental or district boundaries in Chile, but we fail to see how this fact could be interpreted in support of the conclusion that Chile has recognized that a water-parting line may be “traversed by other waters” (*Chilean Statement*, vol. II, pp. 386-387; italics in the original).

The Argentine Republic does not reject the watershed if it is located in the principal chain of the Cordillera de los Andes. The line of the Argentine Expert follows in the main range the special watershed that is produced therein, and when doing so he naturally disregards the many other watersheds to be found in lateral mountains or in plains (*Argentine Report*, vol. II, p. 458).

Plate LXX, fig. 2, represents the landscape to the east of the foothills of the Cordillera, the valley of Cholila, the last eastern spurs of the Cordillera, the eastern ridge outside the range, and the low plains where the abnormal continental divide is produced, and which can only be considered as a *secondary local watershed* (*Argentine Report*, vol. III, p. 797; italics in the original).

The terminology of the 1902 Award considers a local water-parting to be one which runs between two points, at least one of which is not located on the continental divide. When the Award uses the term “local water-parting” it also specifies the point from which the water-parting begins and the point to which it extends. The same terminology, with identical meaning, was used in the 1966 Award (see para. 146).

136. In the present arbitration Chile has put forward various arguments to demonstrate, on the one hand that no local water-parting runs between boundary post 62 and Mount Fitzroy, and on the other hand that the concept of “local water-parting”, in the sense in which it was used in the 1902 Award, has specific characteristics which differentiate it from the common concept of water-parting. The Court will now proceed to analyze these two lines of reasoning.

Chile defined the local water-parting in its memorial as the line which separates waters which flow to a single ocean (see para. 120). If this definition is applied to the 1902 Award in respect of the determination of the frontier between boundary post 62 and Mount Fitzroy, the conclusion will be that there could not have been any local water-parting between those extreme points and that, accordingly, the Award could not be applied on the ground. In fact, boundary post 62 is situated in the Pacific basin, while Mount Fitzroy is on the Atlantic slope, so that the water-parting between them would separate, at least in one of its parts, waters which flow to different oceans.

137. The rule of practical effect, embodied in uninterrupted and constant legal practice, states that a provision must always be interpreted in such a way as to have a certain effect. If this rule is applied to the proposition in question here, the result is that the term “local water-parting” used by the 1902 Arbitrator in this sector, must be interpreted so as to have an applicable meaning and outcome. Accordingly, the definition of local water-parting as the line which separates waters which flow to a single ocean, which appears in the Chilean memorial as an *a priori* premise, cannot be accepted by the Court. In any event, in the oral submissions Chile asserted that the boundary line which it is claiming is a local water-parting between boundary post 62 and Mount Fitzroy, so that Chile admits the existence of such a divide between those points.

138. Chile has also stated that, although technically a water-parting cannot transect surface watercourses, when the 1902 Award refers to “local” water-partings, such transections would be possible. For example, in the oral submissions Chile asserted that, although a water-parting cannot cross rivers “as a matter of pure theory”, “. . . the report itself shows that the Tribunal was using that term in a different way relating to a particular sector of the boundary in question” (hearing of 10 May 1994, p. 79). In support of this assertion Chile cites the cases of the Rivers Mayer and Mosco, in which, it argues, this circumstance is found in the Award.

139. In the case of the River Mayer we must bear in mind what the 1902 report has to say about the frontier in that sector:

. . . it [the boundary] shall follow the water-parting between the basin of the Upper Mayer on the east, above the point where that river changes its course from north-west to south-west, in latitude 48°12'S., and the basins of the Coligué or Bravo River and the Lower Mayer, below the point already specified on the west . . .

According to this text, the frontier should follow a water-parting between the upper and lower basins of the River Mayer, which cannot actually occur unless the line cuts across the river at some point. Now, the point at which the basins should divide was specifically established: “where that river changes its course from north-west to south-west, in latitude 48°12'S.” At this point the frontier,

descending along a water-parting, should cut across the river in order to ascend once again along another water-parting between the same upper and lower basins of the River Mayer, assigning the former to Argentina and the latter to Chile.

140. Furthermore, the work of the Mixed Boundary Commission confirms that the Parties did not assign the segment of the frontier which crosses the River Mayer the status of "local water-parting". Annex No. 10 of record No. 133 of 24 November 1990 states:

In these two sections the boundary is defined by the local water-parting between the point of entry and boundary post IV-6 "bend of the River Mayer south bank" and between boundary post IV-7 "bend of the River Mayer north bank" and the point of exit from the basin; both sections of the water-parting separate tributaries of the River Mayer.

141. The interpretation agreed by the Parties in the Mixed Boundary Commission confirms, then, that there are two sections of water-parting in the sector and that the extreme points are situated on opposite banks of the Mayer. In contrast, the segment which joins those extreme points by crossing the river does not have the status of water-parting. It is the frontier itself which crosses this river bed, not a water-parting. The paragraph of the report referred to in paragraph 139 does not therefore help to demonstrate that the 1902 Award had used the term "water-parting" as a line which could cut across surface water-courses or that it had done so without indicating the point at which such a crossing should occur.

142. The circumstances are different in the case of the River Mosco. This river is not mentioned in the 1902 report. It is depicted with a thin line and unnamed on the Award map, where the frontier is shown as touching it and would in fact seem to cut across its upper part. However, the report assigned to Chile the lower Mayer basin, of which the Mosco is a part, so that the whole of this latter river must have been Chilean and could not be cut by the frontier. This was confirmed by the work of the Mixed Boundary Commission, whose map showing the frontier in this sector (Argentina-Chile Mixed Boundary Commission, Cocovi-Villa O'Higgins (IV-16), scale 1: 50,000) shows that the whole of the River Mosco is located in Chilean jurisdiction and that the frontier does not cut across this tributary.

143. Chile has repeatedly cited a passage in the 1966 Award in support of its argument that a water-parting may cut across rivers or streams. According to this passage,

The general practice of the 1902 Award was for the boundary line to follow either the Continental Divide or local surface water-partings, crossing over river tributaries as necessary (*R.I.A.A.*, vol. XVI, p. 180).

144. The Court recognizes the value for the interpretation of an award of reference to its general technique or working method, which are described as the "general practice" in the 1966 Award. When an award systematically treats similar matters in a similar way, or when a common meaning can be identified as assigned to repeatedly used terms or expressions, this establishes a useful framework for their interpretation.

145. However, this citation from the 1966 Award, when it talks about a line which may cross rivers "as necessary", is referring to the "boundary line" and not to water-partings. There are no grounds for interpreting this to mean

that there existed in the 1902 Award a general practice which would allow a local water-parting to cross rivers. Therefore, the passage cited by Chile does not support the proposition of a water-parting which crosses rivers.

146. Furthermore, the immediate continuation of the passage cited above confirms the meaning of the terminology of the 1902 Award, which refers to a local water-parting and mentions the point from which it begins and the point to which it extends. This terminology was used, with exactly the same meaning, in the 1966 Award:

Applying this practice to the boundary between Point B and Cerro de la Virgen, the boundary ascends from Point B by way of a small lake to the local water-parting to Point C. From this point the boundary line follows the local water-parting through points D, E, and F to point G on top of a hill just east to the River Engaño. From this point it crosses the River Engaño by a straight line to Point H. It continues by a straight line to point I, on the water-parting north of Cerro de la Virgen. It then follows the local water-parting to point J at Cerro de la Virgen (*R.I.A.A.*, vol. XVI, p. 180).

147. Moreover, to argue that a local water-parting can cross rivers conflicts with the general concept of water-parting accepted in the 1902 Award in its usual meaning, which has the force of *res judicata*.

148. Chile has also argued that, in the terminology of the 1902 Award, the hydrographic element depends on the orographic, so that when a water-parting is mentioned it is in reference to a dividing spur, which is always the main factor of the frontier. From this standpoint the hydrographic element would be determined by the orographic. For example, Chile stated in the oral submissions:

Chile has from the beginning (as is shown in its Memorial) presented as its first line of argument the proposition that when the Tribunal directed that the boundary should follow a water-parting, it was directing that the boundary should follow the orographic feature identified by that water-parting—the ridge, the chain, the cordón—which carried that water-parting (record of 10 May 1994, pp. 69-70).

Chile added:

As the Tribunal will appreciate, in Chile's basic approach, the distinction between a local water-parting and a continental water-parting is not important. It is enough that the ridge has been identified by the named local water-parting (record of 10 May 1994, p. 70).

In the "Summary of the main points of Chile's position" submitted at the end of the hearings, Chile stated:

It was the Tribunal's practice to identify an orographic feature (a spur) by reference to a hydrographic feature (a water-parting). The example of what occurred on the Ibáñez-Pallavicini peninsula confirms this practice yet again (record of 11 May 1994, p. 83).

149. The Court has already shown that, according to the submissions in the 1898-1902 arbitration and the text of the Award, throughout those proceedings the two Parties were as one in using the notion of water-parting in its customary sense and that the Arbitrator did likewise. It cannot therefore be concluded that the intention of the Arbitrator or of the Tribunal which supported him, which was of acknowledged professional skill and scientific rigour in matters of geography, was to assign to precise terms a different meaning from their correct technical one. Anyone who argues that a term used in a legal text has an exceptional or unusual meaning, different from its ordinary meaning, must prove it. In this case the only consideration invoked to support this assertion (the Ibáñez-Pallavicini peninsula) does not refer to the Award but to

the practice of the Mixed Boundary Commission which, as pointed out below, may be useful for analysis of the legal situation of the sectors where it carried out its work but proves nothing about the intention or the meaning of the terminology used by the 1902 Arbitrator (see para. 170). This Court does not find that the necessary proof has been furnished in the present arbitration.

150. Chile has also argued that, by their very nature, “local” and “continental” water-partings are mutually exclusive. Accordingly, a water-parting between two points which coincides in part of its course with a continental water-parting could not be described as local. But in a section of Chile’s line the two water-partings do coincide. Regardless of the length of the section in which this occurs, the proposed line would not, therefore, be local and would not be consistent with what, according to Chile’s interpretation, the Arbitrator had decided, quite apart from the fact that this circumstance weakens Chile’s criticism of the Argentine line, which has the same characteristic.

151. The Court commissioned its geographical expert to identify the water-parting between boundary post 62 and Mount Fitzroy. The local water-parting between these two extreme points, according to the identification made by the expert, is as follows:

From boundary post 62 ($X = 4584177$; $Y = 1449178$), situated at an altitude of 324 metres on the south shore of Lake San Martín-O’Higgins, it ascends in a west south-west direction to Cerro Martínez de Rozas (1,521 m). In this section it separates the waters which flow to the River Martínez de Rozas from several unnamed streams which discharge directly into Lake San Martín-O’Higgins. From Cerro Martínez de Rozas the water-parting continues south-south-west along the summit-line of the Cordón Martínez de Rozas, which divides the basins of the Rivers Obstáculo and Martínez de Rozas, to reach an unnamed peak at altitude 1,767 metres.

From this peak the water-parting turns north-west, descends to the pass situated between Lakes Redonda and Larga and then ascends, first in a west-south-west direction and then north-west, to an unnamed peak (1,629 m), before continuing in a west-north-west direction to Cerro Trueno (2,003 m). In this section the water-parting runs between the basins of the River Obstáculo to the north and the River Diablo and other small streams which flow into Lake del Desierto to the south.

After Cerro Trueno the water-parting runs south-south-west, passes across Cerro Demetrio (1,717 m) and the Portezuelo del Tambo and reaches the summit of Cerro Ventisquero or Milanesio (2,053 m). In this section the water-parting separates the basin of the River Diablo, a tributary of Lake del Desierto, from the basins of the streams and rivulets which flow into Lake Chico.

From Cerro Ventisquero or Milanesio the water-parting follows a mainly south-south-west direction, reaching the Cordón Gorra Blanca and continuing along it as far as the summit of Cerro Gorra Blanca (2,907 m). This section separates the basins of various tributaries of the Rio Gatica or de las Vueltas, including its glacial headsprings (River Cañadón de los Toros, River Milodón, Puesto stream, River Cóndor, River Eléctrico) from the streams and glaciers which flow into the Ventisquero Chico.

From Cerro Gorra Blanca the water-parting continues southwards along a snow-covered ridge, descends westwards from the southern end of this ridge to the Gorra Blanca (Sur) glacier along a spur and continues on the surface of the glacier to Marconi Pass, following a south-south-west course determined by the contour lines of the 1:50,000 map of the Argentina-Chile Mixed Boundary Commission.

From Marconi Pass the water-parting ascends to Cerro Marconi Norte (2,210 m) and continues southwards to Cerro Rincón (2,465 m) on the summit-line of the Cordón Marconi, which separates first the Ventisquero Chico and the Marconi glacier and then the Viedma and Marconi glaciers.

From Cerro Rincón it turns eastwards, separating the basin of the River Eléctrico to the north from the basin of the River Fitzroy and the Viedma glacier to the south, passes across Cerros Domo Blanco (2,507 m), Pier Giorgio (2,719 m) and Pollone (2,579 m) and terminates at the summit of Mount Fitzroy (3,406 m).

152. Chile has repeatedly argued during the present arbitration that a line such as the one described above does not conform to the intention of the 1902 Award because it coincides for much of its extent with a proposal of Captain Robertson which, according to the preparatory work for this Award, was submitted to the Arbitral Tribunal by Sir Thomas Holdich—a member of the Tribunal—but was rejected by it.

153. The Chilean memorial cites the part of Captain Robertson's proposal to draw a line close to the Cordón Occidental, in which Robertson, referring to the proposed line, says that:

It is a line which has the disadvantage that, even when it divides more or less equally the zone disputed by the two countries, in fact assigns to Argentina all the territory which has any potential value, while it assigns to Chile an almost impenetrable mass of rugged and inhospitable peaks (emphasis in the Chilean memorial, p. 48).

Chile adds that "it is very clear that the Tribunal rejected the proposal of following the Cordón Occidental and, instead, preferred a line which ran more to the east, using a spur which can only be the Cordón Oriental" (p. 139).

154. Argentina's counter-memorial also refers to Robertson's proposal but only to demonstrate the knowledge which the Arbitrator had of the geography and to emphasize that the proposal left the basin of the River Gatica or de las Vueltas in Argentine territory (p. 95).

155. In fact, Captain Robertson produced two proposals which were submitted by Sir Thomas Holdich to the Tribunal and formed part of the preparatory work of the Award. They start at a point to the south of Cerro Rasgado and proceed thence, one on the west and the other on the east, separated by up to 32 kilometres. The Arbitrator drew his line basically along an intermediate course between the two, but in an area to the north he drew it still further to the east than the easternmost line in the proposal, thereby favouring Chile.

156. Nevertheless, what appears in the preparatory work are merely proposals which the Arbitrator might or might not accept. The interpretation of the 1902 Award contains no ambiguities which would justify application of the rule allowing recourse to the preparatory work. But the Arbitrator also drew a pecked line which ran towards Gorra Blanca, at which point it coincided with the

Robertson proposal referred to in the Chilean memorial. That is to say, in this sector the Arbitrator did not reject the proposal in its entirety and it cannot be concluded that the Tribunal disowned any alleged agreement with the proposal.

157. Nor can the Court accept Chile's argument that the application of the 1902 Award in the light of geographical knowledge acquired subsequently would be tantamount to its revision by means of the retroactive assessment of new facts (see para. 84). The 1902 Award defined, in the sector with which this arbitration is concerned, a frontier which follows a natural feature which, as such, depends not on an accurate knowledge of the terrain but on its actual configuration. The land remains unchanged. Thus, the local water-parting between boundary post 62 and Mount Fitzroy existing in 1902 is the same as the one which can be traced at the time of the present arbitration. Thus, this Award does not revise but instead faithfully applies the provisions of the 1902 Award.

158. Furthermore, in this arbitration there should be no suggestion of the retroactive application of subsequent grounds or knowledge. In fact, although the disagreement between the Parties concerning the boundary line manifests itself also in a differing allocation of areas of land, that does not affect the nature of the Court's task as interpreter of the 1902 Award. Its decision is declaratory of the content and meaning of the 1902 Award, which in turn was declaratory with respect to the 1881 Treaty and the 1893 Protocol. As a consequence, the Award of this Court, by its very nature, has *ex tunc* effects, and the boundary line decided upon is the one which has always existed between the two States Parties to this arbitration.

159. At one stage in this arbitration Chile argued that a water-parting could not run across areas of ice (counter-memorial, pp. 185 and 189). Leaving aside the technical problems implicit in such an argument, it does not carry decisive weight in this case, since Chile recognized in the hearings that, in the practice of the Mixed Boundary Commission, there are several precedents in which a water-parting is depicted as crossing areas of ice (record of 19 April 1994, pp. 37-44).

160. The line described in paragraph 151 is consistent with the provisions of the three instruments which make up the 1902 Award. In fact, this line coincides with the actual decision of Edward VII for the area of which the sector subject to the present arbitration is a part ("the dividing ranges carrying the lofty peaks known as Mounts San Lorenzo and Fitzroy") and also satisfies the requirement stated in the Tribunal's report ("...the boundary shall be drawn to the foot of this spur and ascend the local water-parting to Mount Fitzroy"). Furthermore, this line is consistent with the Award map. On this map the boundary line is depicted in the northern part of the sector by a solid line and in the remaining part by a pecked line. The solid line marks the limit of the explored area at the time of the arbitration and the pecked line does likewise in the area unexplored at that time (see *R.I.A.A.*, vol. XVI, p. 152). In this latter part the line indicates only the direction in which the boundary line heads (in this case towards Mount Fitzroy), and it cannot be claimed that it follows the twists and turns of the water-parting, precisely because the water-parting was located in an unexplored area and its course was therefore unknown.

161. The line decided upon by this Court does not exceed Chile's extreme claim in the 1898-1902 arbitration. Therefore, according to international law it does not attribute to the 1902 Award the effect of having violated the rule *non ultra petita partium* (see para. 106). Nor does it exceed the extreme claims of Argentina in that and in the present arbitration.

IX

162. The Parties have based many arguments on their conduct subsequent to the 1902 Award. Such subsequent conduct, as the 1966 Award pointed out, does not throw any light on the intention of the 1902 Arbitrator.

... As for the subsequent conduct of the Parties, including also the conduct of private individuals and local authorities, the Court fails to see how that can throw any light on the Arbitrator's intention (*R.I.A.A.*, vol. XVI, p. 174).

163. Such conduct is not directly related to the Court's mandate, since it involves facts subsequent to the Award which the Court is required to interpret. The Court has been requested to decide on the frontier line between boundary post 62 and Mount Fitzroy established by the 1902 Award and not to investigate whether the subsequent conduct of the Parties has altered the frontier determined by that Award. However, the two Parties have agreed to bring such conduct before the Court, assigning it different degrees of relevance. The Court must take care that in its analysis of the facts thus presented it does not deviate from the strict performance of its function, but it cannot avoid making some reference to the matter.

164. Both Parties have submitted to the Court documents subsequent to the Award in three areas: cartography, the effective exercise of jurisdiction in the territory lying within the sector which is the subject of this dispute, and the demarcation work carried out by the Mixed Boundary Commission.

165. Chile has argued that, although its official cartography in the decades following the Award depicted the Arbitrator's line, which passed across Cerro Gorra Blanca, Argentina's official cartography, consistently up to a few years ago, followed the Demarcator's line, which is very similar to the Chilean claim in the present arbitration.

166. In analysing this fact, regardless of whether it is fully authenticated, it must be borne in mind that those official maps not only established the line of the frontier but also indicated geographical features, in particular hydrographic basins.

167. The frontier has been delineated differently on the official maps of the Parties. However, no matter what the significance or direction of this line, an examination of the maps shows a definite tendency to locate the basin of the River Gatica or de las Vueltas in Argentine territory, a fact of particular relevance since the "local water-parting" is a frontier which follows a natural feature separating hydrographic basins. The official maps of Chile published

up to 1958, as well as all the official maps of Argentina published up to the present, show the boundary in the sector which is the subject of this dispute as bordering, in the north, the basin of the River Gatica or de las Vueltas. Decisive weight should not therefore be attached to the maps in support of Chile's contention in this arbitration that a part of the basin of that river might belong to Chile.

168. The arguments concerning the subsequent conduct of the Parties also included the effective exercise of jurisdiction in the sector. Such arguments were put forward mainly by Chile, whose central authorities made a number of land grants in those areas, both to Chilean settlers and to foreigners, and its local authorities had also exercised public functions there.

169. The evidence submitted to the Court shows that these acts of jurisdiction have not been exercised with the necessary consistency, lack of ambiguity and, in some cases, effectiveness for them to be assigned legal consequences relevant to the present case. Furthermore, none of these acts included the publication of maps or plans indicating that they affected the basin of the River Gatica or de las Vueltas. In view of these characteristics of the acts which Chile says that it had carried out in the sector, it is not reasonable to draw decisive consequences from the failure of the Argentine Government to protest, especially in the light of Argentina's confidence in the Chilean cartography of the time, which located the basin in Argentina. In a similar context the decision of the International Court of Justice in the case concerning the Temple of Preah Vihear is relevant here:

... the Court finds it difficult to regard such local acts as overriding and negating the consistent and undeviating attitude of the Central Siamese authorities to the frontier line as mapped. (Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgement of 15 June 1962. I.C.J., *Reports 1962*, p. 30).

170. The Parties have also argued that the practice of the Mixed Boundary Commission contains precedents which support their respective claims: in the case of Argentina, because the Commission abandoned the distribution of territory shown on the map of the 1902 Award and faithfully followed the water-parting as actually determined on the ground; in the case of Chile, to point out that in one instance the Commission abandoned the water-parting decided on in the Award and opted for a dividing range as a more visible and reliable boundary. In any event, the Court notes that the work of the Mixed Boundary Commission could have some relevance, where interpretation of the 1902 Award is concerned, to its analysis of the legal situation of the sectors in which the work was carried out, and its value as a precedent would be considerable on that assumption. But this work, obviously, could not have influenced the intentions of the 1902 Arbitrator or his Award concerning the sector between boundary post 62 and Mount Fitzroy. It does not therefore alter the conclusions which this Court has already reached in this respect.

X

171. For the reasons stated above,

THE COURT

by three votes to two decides that:

I. The line of the frontier between the Republics of Argentina and Chile between boundary post 62 and Mount Fitzroy in the Third Region, referred to in the Award of H.M. Edward VII, and defined in section 18 of the report of the 1902 Arbitral Tribunal and described in the last paragraph of section 22 of the said report, is the local water-parting identified in paragraph 151 of the present Award.

II. The course of the line decided upon here shall be demarcated and this Award executed before 15 February 1995 by the Court's geographical expert with the support of the Mixed Boundary Commission.

The geographical expert shall indicate the places where the boundary posts are to be erected and make the necessary arrangements for the demarcation.

Once the demarcation is completed, the geographical expert shall submit to the Court a report on his work and a map showing the course of the boundary line decided upon in this Award.

For: Mr. Nieto Navia, Mr. Barberis and Mr. Nikken; *against:* Mr. Galindo Pohl and Mr. Benadava.

Done and signed in Rio de Janeiro today, 21 October 1994, in Spanish in three identical originals, one of which shall be kept in the archives of the Court and the others delivered on this date to the Parties.

Rafael Nieto NAVIA
President

RUBEM AMARAL JR.
Secretary

Mr. Galindo Pohl and Mr. Benadava append their dissenting opinions.

DISSENTING OPINION OF MR. REYNALDO GALINDO POHL

I. CIRCUMSTANCES OF AND REASONS FOR THE DISSENTING OPINION

1. *The origin of the dissenting opinion*

1. I had wished to concur with the unanimous or at least majority position of the members of this Court of Arbitration. That did not happen owing to differences on the most important points on which the Court had to pronounce.