

partings was a necessity from the outset. And even on this basis two or four successive water-partings can be chosen, even though the advantage lies with the one lying closest to the line on the Arbitrator's map because the purpose of the exercise is to identify that line. There are therefore grounds for giving preference to the line consisting of successive local water-partings which fits best and closest with the line of the Arbitrator's map.

It must be pointed out that the possibilities described here involve crossing Lake del Desierto, which was not taken into account in the arbitral proceedings because each Party maintained that it lay entirely within its territory. Now, when the experts draw the pecked line of the Arbitrator's map on a map of today, it emerges that the pecked line, once identified on the ground, crosses Lake del Desierto at an angle, leaving about a third of the volume of its water to the north and two-thirds to the south. Thus, Lake del Desierto would be crossed even when the line of the Arbitrator's map is followed exactly.

Since this exposition is not concerned with the drafting of an award, it can close without going into the details of the line which is most consistent with the combined requirements of the Arbitrator's map and the arbitration report. Furthermore, on the basis of the summary description given here the cartography experts would be able to identify it, in an idle moment, to satisfy their curiosity.

And thus I bring to an end this protracted discourse, whose length may be excused, I hope, by the subtle and delicate nature of this dissenting opinion.

Reynaldo Galindo POHL

DISSENTING OPINION OF MR. SANTIAGO BENADAVA

I regret that I do not support the decision taken by the majority of the members of this Court. I explain below the reasons for my dissent.

I will not refer to each and every one of the points on which the Award is based nor will I cite, except in a few instances, the texts of the Award. Instead, I will present the line of reasoning which has led me to dissociate myself from the majority view and vote against the Court's decision.

The Court's task

The task entrusted to this Court by the Parties is defined in article I of the *Compromis* of 31 October 1991: "to determine the line of the frontier in the sector between boundary post 62 and Mount Fitzroy . . ." The method by which this is to be achieved is specified in article II, paragraph 1: "The Court shall reach its decision by interpreting and applying the 1902 Award in accordance with international law".

Both Parties recognize that the 1902 Award is fully valid and that the present case is concerned only with interpreting and applying it, not with revising or amending it. The interpretation of the Award cannot lead to revision of what the 1902 Arbitrator decided with the force of *res judicata*.

The interpretation of the 1902 Award by this Court has not been requested by means of an application for interpretation submitted to the same Arbitrator who pronounced the Award. This Court is independent of the 1902 Tribunal and of any other body. Its competence to carry out the task entrusted to it derives from the agreement between the Parties expressed in the 1991 *Compromis*.

The 1902 Award consists of three instruments: the Award itself, signed by Edward VII, the report which the Arbitral Tribunal submitted to the King, and the maps on which the Tribunal drew the line decided upon, which was approved by the Arbitrator. The intention of the Arbitrator must be understood on the integrated basis of the instruments which convey it.

The Court's first duty in interpreting the Award is to try to discover the natural meaning which is to be attributed to its terms, in the context of these terms and taking into account the circumstances of the Award's pronouncement. If by applying this criterion the interpreter can assign a conclusive meaning to the texts, he will need to go no further; but, if this cannot be done, he will be allowed to use other auxiliary means such as, for example, the preparatory work of the Award which is being interpreted.

In any event, as it performs its function of interpretation the Court must take account of the geographical reality facing the 1902 Arbitrator when he pronounced his Award. In contrast, it must disregard any geographical circumstance which was unknown at the time of the first arbitration.

The Award which has prompted this dissenting opinion bases its decision on two fundamental points:

1. The whole area claimed by Chile in the present arbitration lay outside its extreme claim in the 1898-1902 arbitration and therefore outside the territorial competence of the 1902 Tribunal. As a result, the 1902 Award should not be interpreted in such a way as to assign to Chile an area which it did not claim in the 1898-1902 arbitration.

2. The line between boundary post 62 and Mount Fitzroy, described in paragraph 151 of the Award, corresponds, according to the Award, to the local water-parting indicated by the 1902 Award in this area. This line is basically the one proposed by Argentina.

I shall take these two points up one by one:

First question: Was the area currently in dispute outside the Chilean claim in the 1898-1902 arbitration?

This Award, citing statements made by the Chilean expert in 1898 taken from written submissions by Chile to the 1902 Tribunal, concludes that Chile adopted as the general criterion for defining its claim in the earlier arbitration the principle of "the natural and effective continental water-parting... , i.e., the water-parting present in nature . . .", regardless of its representation on the maps (para. 94). This was the principle which, according to Chile, faithfully interpreted the boundary agreed in the 1881 Treaty and the 1893 Protocol.

The Chilean claim had been limited, according to the Award, to the Pacific basins and Chile had thus abandoned any claim to Atlantic slopes, including the basin of the River Gatica or de las Vueltas, which "was left in its entirety on the other side of the frontier *regardless of its extension*" (para. 104).

The Award goes on to say that the Court must reject any interpretation implying that the British Arbitrator broke the rule which prohibited him from deciding *ultra petita partium* (awarding more than requested) by assigning to Chile territory situated to the east of its extreme claim (para. 106).

The position taken by the Court on this point is basically the same as the one constantly asserted by Argentina during the various stages of the present arbitral proceedings.

Chile's extreme claim in the 1898-1902 arbitration

I am not convinced that Chile's extreme claim between 1898 and 1902 amounted to no more than a theoretical principle divorced from the maps on which it was depicted.

The records of the experts demonstrate the importance attached to the maps which each of them produced. In fact, each expert submitted to the other a depiction of the course of the general frontier line which he advocated, in accordance with the delimitation principle which he supported, on a map and as a numerical list of points and sections. The points of agreement and disagreement were identified by comparing the lists of toponyms, points and sections.

This conclusion is confirmed by the Argentine map which appears in the annex to the Argentine memorial as No. 19. This map, published in 1902 shortly after the conclusion of the arbitration, depicts in detail the proposals made by the Argentine and Chilean experts at their meetings in 1898.

As Judge Galindo Pohl states in his dissenting opinion appended to this Award, "the principles came on the scene as the basis, foundation and legal justification of concrete lines which were represented by points and sections designated by numbers and described by toponyms, as can be seen from the records of the experts".

During the 1898-1902 arbitral proceedings both Chile and Argentina submitted to the Tribunal several maps showing the lines of their respective claims. These lines gave graphic expression to the principle which each Party maintained as its extreme claim. In the course of the arbitration a number of areas were explored and geographical knowledge was acquired which led to modification of the maps and a more accurate depiction of the line which each Party represented as the expression of its territorial claim. The map labelled "plate IX" was the last one submitted to the Arbitrator by Chile on which it presented its territorial claim.

The maps and the lines drawn on them crystallized the claims of the Parties and confirmed the Tribunal's view of the extent of the area subject to its decision.

Chile's extreme claim consisted of the continental water-parting, as known at the time of the arbitration, and was shown on the maps submitted to the British Tribunal and used by it.

The Court's perception of the extreme claims of the Parties in the 1898-1902 arbitration seems to me of fundamental importance.

In his "Narrative Report of the Chile-Argentine Boundary Commission" Holdich underlines the importance of the maps in the preparatory work of the Award. Among other terms and statements the "Narrative Report" contains the following very significant ones:

1. . . . the field would be at once open for the Tribunal to discuss or to decide upon a boundary of compromise *on the map basis* (our italics).
2. . . . there was a most satisfactory general agreement between the values of most of the important points fixed when the two sets of maps were critically examined.
3. I am confident that we may take the Argentine maps as they stand and depend on them . . . as the basis for any decision that the Tribunal may advance.

It is therefore perfectly clear that, according to Holdich, a boundary of compromise would be decided "on the map basis".

Furthermore, it seems obvious to me that the Arbitrator adopted his compromise solution on the basis of the lines proposed by the Parties.

And it could not have been otherwise. In order to adopt a compromise boundary between these claims the Arbitrator had to work within a specific spatial ambit. And this ambit had necessarily to be circumscribed by the lines which, on the maps which he used to pronounce his Award, represented the extreme claims of Chile and Argentina.

If the 1902 Arbitrator had decided to pronounce exclusively on the basis of one or other of the *principles* advocated by Chile and Argentina, he might perhaps have dispensed with the lines which illustrated these principles on the maps; but from the moment when, with the authorization of the Parties, he opted for a compromise boundary he had to draw this boundary within a spatial ambit which could only have consisted, at the time, of the lines which illustrated the principles advocated by each Party on the map which he used for his decision.

It would have been a *logical and practical impossibility* for the 1902 Arbitrator to have decided upon a compromise boundary between two abstract principles or concepts. The compromise boundary was a line which lay between the two competing lines, not between two conflicting principles. It is possible to divide and distribute an area whose perimeter is known but not one whose perimeter is unknown.

Thus, the 1902 Arbitrator could not have defined a boundary and drawn a line representing it across an area one of whose extreme points (the continental divide) was "moveable", i.e., which could be shifted as the geographical knowledge of the area improved. And it should even be asked what would have happened if he had defined a boundary in a given zone by means of a local water-parting which was perfectly identifiable on the ground and then,

many years later, it turned out that the natural and effective continental water-parting lay . . . to the west of the Arbitrator's line. Which would have prevailed: the Arbitrator's boundary or the "moveable" continental divide?

I think, therefore, that the 1902 Tribunal's perception of the extreme claims of the Parties consisted of the lines shown on the maps which they submitted to it (particularly Argentine map XVIII-8), which depicted these claims graphically.

A mere glance at the final maps made available to the 1902 Arbitrator (either Argentine map XVIII-8 or the Chilean map on plate IX) makes it obvious that the line representing Chile's extreme claim clearly lay within the area of the present dispute. This area was, therefore, covered by the Chilean claim in the 1902 arbitration. This was also the understanding of the Arbitrator since, believing that this area lay within his territorial competence, he drew within it the line of the frontier between Chile and Argentina.

The frontier line on the Arbitrator's map

Article V of the Award states:

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.

Thus, the Arbitrator's map is a component of the Award, and the frontier line was delineated on this map by the 1902 Court.

During these proceedings Argentina has recognized the importance and value of the Arbitrator's map:

Thus when a "map" is part of the international instrument subject to interpretation, as in the present case, its value as evidence of the meaning and scope of the instrument in question is legally and logically obvious (Argentine counter-memorial, p. 65).

And the Award maps constitute the graphic representation of the criteria established and defined in the other two documents. Consequently, the two documents referred to in article V are in reality complementary to and declaratory of the Award itself (Argentine memorial, pp. 441-442).

Argentina itself has also cited the Arbitrator's map in support of its argument that the boundary decided upon by the Award in the disputed area passes across Cerro Gorra Blanca, a geographical feature which is represented on the map but not mentioned either in the Award or in the arbitration report.

However, Argentina argues in this submission that the Arbitrator's map is merely indicative of the real boundary, which would be identified on the ground by the demarcation work in the relevant stretch of the frontier. This conception of the line, which renders it devoid of meaning, if not totally non-existent, seems to me unsustainable.

In my opinion, the line drawn on the Arbitrator's map has great legal force. It is not an arbitrary line. It represents the essential course of the frontier and indicates its general direction. In addition, this line shows the distribution of territory which the Arbitrator proposed to make in the area.

The pecked part of the line on the map should not be discounted. The Arbitrator did not treat the solid and pecked parts of the line differently. As the 1966 Award pointed out in the Palena/Rio Encuentro case: "A pecked line is the normal indication for a feature which is known to exist but whose position has not been accurately located". (United Nations, *R.I.A.A.*, vol. XVI, pp. 150-151)

In its pecked part the line can be only approximate, but this does not mean that it is superfluous. If the pecked section was devoid of legal significance, the Arbitrator would not have drawn it. But he not only drew it but stated in the Award that a *more detailed* description of the line of frontier would be found in the report and in the line drawn on his map.

It cannot be denied that the pecked line might possibly require adjustment when it is applied on the ground. But the same is true of the solid line, as is demonstrated by the practice of the Mixed Boundary Commission. This fact does not divest the line of value as an indicator of the general direction of the frontier.

The line on the Arbitrator's map shows graphically that the area which it crossed lay within Chile's claim and the territorial competence of the 1902 Arbitrator. The Arbitrator could not have allowed a line, solid or pecked, to pass through territory which he regarded as outside his competence.

The line on the Arbitrator's map has moreover a very important function: it is an essential element for resolution of the fundamental issue of the course of the frontier line between boundary post 62 and Mount Fitzroy.

The line drawn on the Demarcator's map

The significance of the line drawn on the Demarcator's map has been assessed differently by the Parties.

Argentina has argued that the Demarcator's task was to mark on the ground, by erecting boundary posts, points on the frontier line decided upon by the Award. The 1903 demarcation was not a delimitation (which had already been effected in the previous year) and therefore it is not an integral part of the 1902 Award. The 1903 maps produced by the demarcators are official evidence of the boundary posts erected. Their purpose was not to amend or alter the Award line but only to identify the position of each boundary post erected. In all matters unconnected with the task of demarcation entrusted to the Demarcator—to erect boundary post 62—his maps have, for the purposes of the 1902 Award, merely the possible value of the Demarcator's personal reading of the Award's provisions.

Chile has argued that the demarcation is part of the 1902 Award and report and that the Demarcator's map constituted the final and authorized representation of the frontier decided upon by the Award. On this map, according to Chile, the Demarcator altered the representation of the frontier.

In his submission before the Court Professor Lauterpacht, one of Chile's counsel, spelled out Chile's position on this point:

Indeed, in law, the Demarcator's final maps must be held to have replaced the Award maps. Should I be wrong in this submission, then the authoritative quality of the demarcation and of the Demarcator's map as a contemporary interpretation of the Award by someone specifically appointed to apply (and therefore interpret) the Award and its map, must be upheld. (record No. 4 of 14 April 1994, pp. 82-83).

In the agreement of 28 May 1902 on demarcation of the frontier between Chile and Argentina the two Governments agreed "to ask the Arbitrator to appoint a commission to fix on the ground the boundary to be determined by his Award".

The Parties did not agree to authorize this commission to adapt or modify the Award line. The commission only received from the Parties competence to fix on the ground, by technical operations, the boundary determined by the Award.

The demarcation arrangements agreed between the experts of Argentina and Chile—the "General Directions" given by Holdich to the officers responsible for the demarcation—and the other circumstances of the demarcation should, in my view, be interpreted against the background of the demarcation agreement of 28 May 1902, which establishes the terms of reference of the Demarcation Commission.

I am not convinced, then, that the Demarcator had been authorized to amend or replace the line of the Arbitrator's map and that, therefore, the line drawn on his own map had that effect.

However, I think that the Demarcator's map, although it does not coincide with the line drawn by the Arbitrator, does support the general direction of this line. Both lines run in the same direction through the area now in dispute. Both confirm that the spatial ambit within which both the Arbitrator and the Demarcator worked was within their respective spheres of competence.

How and why did the 1902 Arbitrator award Atlantic territory to Chile?

The Arbitrator's knowledge of the course of the continental *divortium aquarum* could not have been different from that of the Parties themselves at the time of the 1898-1902 arbitration, which they represented on the maps submitted to the Tribunal.

These maps were:

- (a) The ones sent by each of the Parties to the Marquis of Salisbury in 1899;
- (b) The one submitted to the Arbitral Tribunal by Argentina in 1901 (map X);
- (c) The map submitted by Chile to the Arbitral Tribunal in 1902 (plate IX); and
- (d) Map XVIII-8, sent to the Arbitrator by Argentina in October 1902. This is the map which the Arbitrator regarded as the most satisfactory of the imperfect maps of the era, and so he used it and accompanied his Award with a line representing the boundary decided upon in the region.

On all these maps the continental *divortium aquarum* was represented in the region subject to the present dispute by a north-south line which turned west and then followed a generally east-west direction; the waters which flowed southwards from this line to discharge in the Atlantic Ocean constituted the Atlantic basin; those which flowed northwards from the line to discharge in the Pacific Ocean constituted the Pacific basin.

This was the 1902 Arbitrator's understanding of the course of the continental *divortium aquarum* in the region and it was used as the basis for the preparatory work of the arbitration.

This was also the understanding of the *divortium aquarum* shared by the Parties and it determined the form in which they represented their respective claims on the maps.

It has not been proved in the present arbitration that the 1902 Tribunal had any other geographical information than was contained on the maps which the Parties furnished to it, in particular map XVIII-8, which the Arbitrator used and appended to the Award.

There is no doubt that at the time the geographical knowledge of the region was incomplete, for it had been little explored, so that the line of the continental *divortium aquarum* showed some variations from map to map. It is also certain, as was to be discovered many years later, that the continental *divortium aquarum* was shown in the wrong place on the maps furnished by the Parties to the 1902 Tribunal. But that is another matter. My concern is to emphasize that the 1902 Arbitrator's understanding of the location of the continental *divortium aquarum*, and of the Atlantic and Pacific basins separated by it, derived exclusively from the geographical information which the Parties shared and furnished to him during the arbitration. This information led the Arbitrator to conclude that the area in dispute located to the north of the continental *divortium aquarum* on the maps of the time was in the Pacific basin of Lake San Martín-O'Higgins.

From this geographical standpoint the Pacific basin of this lake seemed to extend rather more to the south than it does in fact, even encompassing the continental *divortium aquarum* depicted on the maps of the era.

Thus, it is understandable that, when he defined the frontier in the area, the 1902 Arbitrator should believe that he was dividing the Pacific basin of Lake San Martín as it was known on the basis of the geographical knowledge reflected on the maps.

This is clear from the 1902 Award itself, as we shall now explain.

Article III of the Award describes the limit decided upon by the Arbitrator from Pérez Rosales Pass to Mount Fitzroy. The penultimate paragraph of this article 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.

Between Lake San Martín and Mount Fitzroy, as the Arbitrator saw it, there was only one basin: the Pacific basin of the lake. The Arbitrator used a straight line to divide Lake San Martín between Chile and Argentina, and he also divided *the basin* of this lake, as he understood it, by means of a local water-parting, assigning the western part of the basin to Chile and the eastern to Argentina.

Of course, the division of what the Arbitrator considered to be the Pacific basin of Lake San Martín had necessarily to be effected by a local water-parting. The continental divide, which separates Atlantic from Pacific basins, cannot be used to divide a single basin—in this case the basin of Lake San Martín—into two parts: one western and the other eastern. What is more, the continental water-parting lay well to the south of the area at present in dispute and followed an east-west direction.

It is revealing that Captain Robertson realised that the continental water-parting in the zone covered by his report was *an utterly unsuitable [boundary]* (*Annex of Documents*, Argentine counter-memorial, vol. A, No. 2, “Report on the Southern Section of the Chile-Argentina Boundary”).

Accordingly, when the Arbitrator defined the boundary in the area currently under dispute he did so in the absolute conviction that it was on a Pacific slope lying within the lines representing the opposing claims of the Parties.

It was not until more than 40 years later that the United States aero-photogrammetric survey “filled in” the central blank area on the maps, verified the true course of the continental divide, which “rose” from the lower to the upper part of the map, and made it clear that the area in dispute did not belong to the Pacific basin of Lake San Martín, as had been believed up till then, but to the Atlantic basin of Lake Viedma.

It could perhaps be argued hypothetically that if the 1902 Arbitrator had had an accurate knowledge of the area’s geography he would not have awarded to Chile any part of the Atlantic basin of the River de las Vueltas. That is possible. But neither the Arbitrator nor the Parties had such knowledge, and the Award was pronounced on the basis of what was known at the time and not of what came to be known subsequently. Following this line of speculation it might also be supposed that if the Arbitrator had not awarded to Chile any part of the Atlantic basin of the River de las Vueltas he would have compensated Chile with a larger part of the Pacific basin of Lake San Martín.

The report must be interpreted in the light of the geographical knowledge on which it was based

Geographical knowledge acquired subsequent to the Award cannot be used as the basis for its interpretation. The Award and the instruments of which it consists must be interpreted in the light of the circumstances of the time and, in particular, the geographical knowledge of which the Arbitrator took cognizance in pronouncing the Award. The task of this Court is to try to interpret the frontier which the 1902 Arbitrator fixed for the disputed zone and not the one which he would have fixed if he had had an accurate and full understanding of the true geography.

Several precedents from the case law confirm this view.

The Permanent Court of International Justice, in its Interpretive Judgment No. 8, had occasion to state:

Moreover, the Court, when giving an interpretation refrains from any examination of facts other than those which it has considered in the judgment under interpretation, and consequently all facts subsequent to that judgment (P.C.I.J., *Collection of Judgments*, Series A, No. 13, p. 21).

And the Court of Arbitration which heard a dispute between France and Great Britain concerning delimitation of the continental shelf stated in its 1978 interpretative decision:

[Interpretation] 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 (United Nations, *R.I.A.A.*, vol. XVIII, p. 296).

This is also the opinion of the most authoritative doctrine. As Charles de Visscher writes:

L'arrêt soumis à interprétation est le cadre dans lequel celle-ci se meut et d'où il ne lui est jamais permis de sortir. Il en résulte que l'arrêt interprétatif écarte toute appréciation de faits non envisagés dans l'instance principale. (*Problèmes d'interprétation judiciaire en droit international public*, Paris, 1963, p. 256).⁵

The effect of res judicata

The Award—as both Parties acknowledge—is valid and is protected by the effect of *res judicata*. What was resolved by the Award is resolved. The Award became a legal reality sufficient in itself and having its own content.

Given the clear meaning of the Award which, in my opinion, accorded to Chile a substantial part of the basin of the River de las Vueltas, this decision must be respected, and there is no need to try to unravel the formulas which the Parties used to present their extreme claims in the 1898-1902 arbitration. The *res judicata* rules, and it prevails over such formulas in the event of any inconsistency with them.

* * *

I have tried to demonstrate above that:

(1) Chile's extreme claim in the 1898-1902 arbitration included a large part of the basin of the River Gatica or de las Vueltas. This is clear from the lines which represented this claim on the maps submitted by the Parties to the 1902 Tribunal.

(2) On these maps the continental divide was placed in the southern part of the zone currently in dispute and followed an east-west direction. This geographical information led the Arbitrator to think that the territory situated to the north of the continental divide thus depicted was part of the Pacific basin of Lake San Martín-O'Higgins and not of the Atlantic basin of the River de las Vueltas. On this understanding the Arbitrator proceeded to divide what he believed was a Pacific basin by means of a local water-parting. Pursuant to this decision Chile was awarded a large part of the basin of the River de las Vueltas.

(3) The Award map shows clearly that the 1902 Arbitrator, when he drew the

⁵ The judgment subject to interpretation is the framework in which the interpretation operates and from which it is never allowed to depart. The result is that an interpretative judgment eschews any assessment of facts not considered in the principal court.

line shown on this map through the zone currently in dispute, believed that the zone was within the scope of his decision. The Demarcator's map confirms this.

(4) Forty-three years later, aero-photogrammetric surveys by the United States established that the continental divide in the region takes a different direction, more to the north, and that the disputed zone is not part of the Pacific basin of Lake San Martín-O'Higgins, which does not extend so far south, but is part of the Atlantic basin of Lake Viedma.

(5) The 1902 Award is valid and binding on the Parties. It produced the effect of *res judicata*. What it decided is decided, even if it was decided on the basis of geographical information which almost half a century later proved wrong. The new geographical discoveries constituted a "new fact" which cannot alter what was decided by the Award or serve as the basis for its interpretation.

(6) The fact that the Arbitrator awarded to Chile territory which was believed to be Pacific but proved to be Atlantic cannot be regarded as a decision taken *ultra vires*. The Arbitrator acted within what he thought were the extreme claims of the Parties as graphically represented on the maps which they submitted to him.

Second question: The line drawn by this Court and the continental water-parting

This has been one of the most controversial key points in these proceedings. That is understandable. The arbitration report, which gives "a more detailed definition of the line of frontier", states that the boundary between the point on the southern shore of Lake San Martín which it designates and Mount Fitzroy is "the local water-parting".

According to Argentina, a "local water-parting" in the sense of the Award is one which separates waters in a specific sector between two specified points. In Argentina's opinion, there is nothing at all to prevent a local water-parting from including a stretch of the continental divide. It would not thereby lose its local character. In the present case, Argentina argues, there is a local water-parting between boundary post 62 and Mount Fitzroy which, although coinciding in part of its course with the continental water-parting, corresponds to the line between the two points defined by the 1902 Arbitrator.

Several Argentine submissions state that in the present case the local water-parting between boundary post 62 and Mount Fitzroy "coincides" with a stretch of the continental divide. This language is ambiguous. The two water-partings can never "coincide". What happens in the present case is that the water-parting between the two points contains a section of the continental divide.

Chile, however, makes a sharp distinction between continental and local water-partings. A continental water-parting is one which separates waters flowing to different oceans; a local water-parting is one which divides waters flowing to one same ocean. According to Chile, a local water-parting cannot include segments of the continental divide without losing its local character.

The distinction between continental and local water-parting is noted in the preparatory work of the 1898-1902 arbitration. For example, the "Additional Document" submitted to the Arbitrator by Holdich in April 1899 refers to "... [chains or ridges] broken here and there by the passages of rivers which rising on the slopes of one side of the chains pass through the axis of the chain to the other side. . ." In such cases, he adds, the water-parting would be "local" and not "continental" ("Chile Hearing Book", 13 April 1994, document No. 1).

This passage gives one to understand that, according to Holdich, a local water-parting, in contrast to a continental one, divides waters which flow to one same ocean.

Argentina itself recognized the same distinction. For example, the "Argentine Evidence of 1901" states:

It is impossible to imagine that the line which separates waters running to the two oceans should penetrate into the inlets of one of them. The simple fact of the penetration would show that the watershed was local and not general, since the waters, in spite of separating, would fall only in one of the seas (p. 280).

The arbitration report mentions three kinds of water-parting: water-parting (unqualified), continental water-parting and local water-parting.

The term "continental water-parting" (*divortium aquarum*) has not given rise to any difficulties of interpretation. It separates waters flowing to the Pacific from those flowing to the Atlantic. It is used three times in the report.

The term "local water-parting" appears seven times in the report. In all seven cases the local water-parting separates waters flowing to one same ocean: the Pacific. In all these cases it also constitutes a boundary between a point situated on the bank of a river or lake and a peak (or vice-versa) or a boundary between two peaks. In no case does the water-parting so named encompass a section of the continental divide.

What is more, the report itself, having stated that the frontier between boundary post 62 and Mount Fitzroy is the local water-parting, adds in the same paragraph that the frontier shall follow "the continental water-parting to the north-west of Lake Viedma". It seems to me very significant that in one six-line paragraph the Arbitrator should name two different kinds of water-parting, for this indicates the care with which he used the terms.

The generic term "water-parting", which appears 17 times in the report, refers either to a continental water-parting or, more often, to a local one. At times it also denotes a "mixed" line which combines a local water-parting with a segment of the continental water-parting.

The report was very precise and consistent in its use of the different categories of water-parting. It never designated as local water-parting a line which included a segment of the continental. The Arbitrator, consistent with the general practice of the Award, would simply have designated such a line "water-parting" without any qualification.

Thus, it is not admissible to describe a "mixed" water-parting as "local water-parting" by the sole fact that it runs between two points in a specific area or locality. By the same criterion it would be possible to describe as "local" a segment of the continental divide which formed the boundary between two points, and this seems to me absurd.

The line which the 1902 Arbitrator prescribed as the frontier between the south shore of Lake San Martín-O'Higgins and Mount Fitzroy was, in his opinion, a local water-parting in the strict sense (not a "mixed" one). And it must have been so because the Arbitrator used it to divide what he believed was a Pacific basin of Lake San Martín-O'Higgins—and one same basin, be it Atlantic or Pacific, can only be divided by a local water-parting, not by a "mixed" one.

Furthermore, at the time of the arbitration the continental divide was located on the maps to the south of the zone currently in dispute and therefore it could not be used by the Arbitrator, not even in part, in the sector in which he used a local water-parting.

This Court relies on the principle of practical effect to confirm that the water-parting running between boundary post 62 and Mount Fitzroy corresponds to the local water-parting envisaged in the report as the boundary between the two points. I think that, by doing so, the Court has gone too far. This water-parting is not a local one in the sense used in the 1902 Award. And it is not the function of the interpreter to "improve" the instrument which he is interpreting—in this case the 1902 Award—in order to bring it into line with what he regards as its full purpose.

Thus, my conclusion on this point is that the frontier prescribed by the Arbitrator between the current boundary post 62 and Mount Fitzroy was the local water-parting in the sense which I have defined and not a water-parting which includes a section of the continental divide, as Argentina proposes.

Now, it is an indisputable fact that there does not exist on the ground, between the two specified points, a continuous local water-parting separating only waters flowing to one same ocean.

However, the Award of this Court concludes that the water-parting between boundary post 62 and Mount Fitzroy is a local water-parting which does not lose its local character because it includes in part of its course a section of the continental divide.

The subsequent conduct of the Parties

The subsequent conduct of the Parties illustrates their understanding of the meaning and scope of the 1902 Award. Although such conduct is not a decisive criterion of interpretation, it does help to point the direction and support the conclusion reached by the interpreter.

From the voluminous materials submitted by the Parties to this Court I have identified two categories of acts: the production of official maps by both Parties, and their administrative acts relating to the zone.

The cartography, taken as a whole, shows that up to 1953 Chile depicted on its official maps of the zone a frontier which followed the line of the Arbitrator's map, while Argentina used on its official maps, up to 1969, a frontier which corresponded in general terms with the line on the Demarcator's map. Not once up to those dates did the Parties depict any substantially different lines on their official maps.

The most important and significant of the administrative acts cited seem to me to be the Freudenburg Concession, granted by Chile in 1903, and the land titles, also Chilean, granted to Ismael Sepúlveda (1937) and Evangelista Gómez (1939), the limits of which lay to the south and east of the frontier claimed by Argentina in this arbitration.

These administrative acts were published in legal form. But Argentina never entered any protest, reservation or claim with respect to them, as it would have done if it had considered that they infringed its sovereign rights in the region.

Argentina did not prove in these proceedings that before 1965 it carried out any administrative acts in the area which has been the subject of this arbitration.

The claims of the Parties in the present arbitration

The task of this Court is to decide on the course of the frontier line between boundary post 62 and Mount Fitzroy. In carrying out this task it is not obliged to opt for either of the lines proposed by the Parties. The line claimed by each Party in these proceedings is no more than a proposal made to the Court. The Court may accept one or the other, or neither of them, depending on whether it considers that the proposed line corresponds to the frontier between boundary post 62 and Mount Fitzroy prescribed by the Award.

A. The Argentine line

In my opinion, the line proposed by Argentina as the course of the frontier between boundary post 62 and Mount Fitzroy does not satisfy the essential condition laid down in the arbitration report for the frontier in this sector: to follow a local water-parting. The Argentine line is a "mixed" line consisting of a segment of the continental divide and segments of local water-partings.

It must be borne in mind that the report's description of the frontier between boundary post 62 and Mount Fitzroy is very brief and concise ("and shall ascend the local water-parting to Mount Fitzroy"). Each word has its meaning within this context. To disregard the word "local" is to rob this brief description of an essential element and thus to vitiate its content.

The line proposed by Argentina is, moreover, undermined by the fact that the 1902 Arbitrator disregarded the Robertson-Holdich frontier proposal, at least in the area to the north of Cerro Gorra Blanca.

In fact, Captain Robertson, a member of the Technical Commission, made two alternative proposals for the boundary line between the neighbourhood of the River Mayer and Mount Fitzroy. The first proposal coincides from Cerro Trueno to Cerro Gorra Blanca with the current Argentine claim; the second lies further to the east along the continental divide identified on the map of Riso Patrón. Both proposals were examined by Holdich, who decided to put to the Tribunal a line corresponding to Robertson's first proposal.

As noted in the preparatory work, the Arbitrator disregarded the line recommended by Colonel Holdich and drew another line lying rather more to the west. The reason why he did this, without doubt, was to award to Chile more territory along the frontier from the extreme north of the Florida Peninsula in order to avoid, in the words of Robertson's report, assigning to Argentina "all the territory which has any potential value" and to Chile "an almost impenetrable mass of rugged and inhospitable peaks".

Nor does the line claimed by Argentina follow the direction of the Arbitrator's line, which, as I have pointed out, represents his intention with respect to the course of the frontier and the distribution of the territory delimited by it. On the contrary, the Argentine line ignores the Arbitrator's line and takes a totally different direction. Argentina thus disregards one of the basic instruments of the 1902 arbitration and renders it devoid of any real meaning.

As I see it, the assertion that the line claimed by Argentina does not correspond to the frontier decided upon by the Award is confirmed by the fact that Chile carried out sovereign acts to the south and east of the Arbitrator's line without the Argentine Government entering any protest or reservation. I refer in particular to the Freudenburg Concession and to the grants of land titles to Ismael Sepúlveda and Evangelista Gómez. Nor has Argentina proved that it carried out any administrative acts relating to the disputed zone before 1965.

Furthermore, almost all of the many official Argentine maps produced between 1903 and 1969 depict the frontier in the zone as following basically the Demarcator's line.

My conclusion is, then, that the course of the frontier between boundary post 62 and Mount Fitzroy proposed by Argentina does not correspond to the frontier line between these two points decided upon by the 1902 Arbitrator.

B. *The Chilean line*

According to Chile, it was the practice of the 1902 Court to define the frontier line fundamentally in terms of mountain ranges on which the water-partings follow the summit-line to its end. In the sector between the present boundary post 62 and Mount Fitzroy the 1902 Court defined the frontier line along the Cordón Oriental as "the local water-parting which ascends to Mount Fitzroy". Therefore, Chile is proposing a line which from boundary post 62 follows the Cordón Oriental to its end and then continues in a straight line to Mount Fitzroy.

The Chilean thesis is based primarily on the term "dividing ranges" used in the Award to refer to the "further continuation of the boundary" (art. III, penultimate paragraph).

However, although I admit that there is a close geographical correspondence between a mountain range and a water-parting which runs along it, I do not think that I can disregard, just as I have not disregarded them in my consideration of the line proposed by Argentina, the literal categorical terms used by the arbitration report to describe the line of the frontier between the point at which boundary post 62 is located today and Mount Fitzroy: the local water-parting in the sense which I have defined.

Now, the line proposed by Chile, like the one proposed by Argentina, is a "mixed" line consisting partly of continental divide and partly of local divides which cross two rivers: the River de las Vueltas and the River Eléctrico. It therefore does not meet the requirements of "local water-parting" in the sense used in the report and does not correspond to the frontier established by the Arbitrator between boundary post 62 and Mount Fitzroy.

It must be added that the Chilean line differs from the one drawn on the Arbitrator's map, which up to 1953 was shown as the frontier on the official Chilean maps. This line, in order to reach Mount Fitzroy, makes a significant incursion into the part of the basin of the River de las Vueltas recognized as such during the 1898-1902 arbitration.

The foregoing considerations lead me to conclude that the frontier line proposed by Chile between boundary post 62 and Mount Fitzroy is not consistent with the line decided upon by the 1902 Arbitrator in this sector.

What ought to have been the criterion for determining the course of the frontier line between boundary post 62 and Mount Fitzroy?

The fact that there is no continuous local water-parting between boundary post 62 and Mount Fitzroy makes it impossible to apply the delimitation criterion prescribed by the Award for this sector of the frontier. Only for the first 12 kilometres between these two points is there agreement between the Parties on the course of the frontier.

Beyond those 12 kilometres the Court ought to have made an effort to define a frontier line which would best interpret the intention of the 1902 Arbitrator, taking into account the two instruments in which he described the boundary which he had devised for this sector: the arbitration report and map.

The report adopted the local water-parting as the means of delimitation between boundary post 62 and Mount Fitzroy. The map depicted graphically the general direction of the frontier between these two points.

To my mind, a line which best interprets the intention of the 1902 Arbitrator would be one which, running mainly along local water-partings, would follow the general course of the line drawn on the Arbitrator's map and leave to Chile the territory situated to the north and west of such a line, including Lake del Desierto.

However, in its Award this Court decided to accept basically the same line as the one proposed by Argentina because it believes that this line corresponds to the local water-parting enjoined by the arbitration report as the frontier between boundary post 62 and Mount Fitzroy. By effect of this decision the Award leaves under Argentine sovereignty all the territory in dispute in the present arbitration.

* * *

The principal grounds of disagreement which I have stated with regard to this Award have obliged me to dissent from the decision contained therein and to vote against it.

Santiago BENADAVA