DECISION OF THE TRIBUNAL WITH RESPECT TO THE APPLICATION FOR REVISION AND SUBSIDIARY INTERPRETATION OF THE AWARD OF 21 OCTOBER 1994 SUBMITTED BY CHILE, DECISION OF 13 OCTOBER 1995

DECISION DU TRIBUNAL CONCERNANT LA DEMANDE DE REVISION ET D'INTERPRETATION SUBSIDIAIRE DE LA SENTENCE DU 21 OCTOBRE 1994, PRESENTEE PAR LA REPUBLIQUE DU CHILI, DECISION DU 13 OCTOBRE 1995

Condition of admissibility of a request for revision: error of fact and error of law, *tertium non datur* — Distinction between revision and appeal.

Principle of contemporaneity — Principle of stability of frontiers — Principle of equity — Recourse to an expert does not constitute a delegation of competence by the Tribunal — Subsequent conduct of the parties Relevance and accuracy of maps.

Mobility of frontiers — Determination and demarcation of boundaries — Water-parting and glacier-parting (*divortium aquarum* and *divortium glaciarum*) — Movement of geographical features.

Interpretation of an award: requirement of disagreement (i.e., divergence of opinion) in relation to a specific term or paragraph — Question susceptible of resolution by means of interpretation — Interpretation cannot exceed the limits of the award — Impossibility of execution of an award.

Conditions déterminant la recevabilité d'une demande de révision: erreur de fait ou erreur de droit, *tertium non datur* — Distinction entre révision et appel.

Principe de contemporaneite — Principe de la stabilité de frontières — Principe d'équité — Le recours à un expert ne constitue pas une délégation de competence par le Tribunal — Comportement subséquent des parties — Pertinence et précision des cartes.

Mobilité de frontières — Détermination des frontières et établissement des lignes de démarcation — Séparation des eaux et des glaciers (*divortium aquarum* et *divortium glaciarum*) — Déplacement de données géographiques.

Interprétation d'une sentence: exigence de désaccord (c'est-à-dire existence d'opinions dissidentes) concernant un terme ou un paragraphe précis — Question susceptible d'être résolue par l'interprétation — L'interprétation ne peut outrepasser les limites de la sentence — Impossibilité d'exécution de la sentence.

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 Olmos, *geographical expert*.

In the matter of the revision and subsidiary interpretation of the Award of 21 October 1994 submitted by the Republic of Chile, the Court composed as above renders the following Decision:[1]

[1] This Award quotes from some French sources. In order to help the reader, translations have been added in footnotes. The footnotes are not part of the Award. Material quoted from Spanish sources is translated directly in the body of the text.

I

1. On 31 January 1995 Chile filed with the Court a document entitled "Presentation by the Government of Chile to the Argentina-Chile International Court of Arbitration of an application for revision and subsidiary applications concerning interpretation and manner of execution lodged against the Award of 21 October 1994". Notice of this document had been given to the President of the Court by Chile's agents in a note dated 23 January 1995, which further requested "suspension of the demarcation and execution of the said Award".

2. The rules of procedure adopted on 14 May 1992 provided for the submission of applications for interpretation of the Award but not for revision. Accordingly, on 22 February 1995 the Court resolved:

> I. Without implying a ruling by the Court on the admissibility of the Chilean document, to instruct the Secretary to transmit to the agents of the Argentine Republic the "Presentation of the Government of Chile to the Argentina-Chile International Court of Arbitration of an application for revision and subsidiary applications concerning interpretation and manner of execution lodged against the Award of 21 October 1994" in order that, within a time limit of ninety (90) days, they might formulate any comments which they wished to make on this document.
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> II. The reply of the Argentine Republic concerning the application for revision and the subsidiary applications shall be transmitted to the agents of the Republic of Chile, who shall have a period of thirty (30) days to make their comments. Chile's comments shall be transmitted to the agents of the Argentine Republic in order that, within a period of 30 days, they may submit their comments thereon, with which the presentations of the Parties shall conclude.
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> III. The Court may, if it sees fit, request the Parties to give additional explanations to clarify any aspect of the matters discussed.
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> IV. The Court will apply, as necessary, the rules of procedure adopted by the Court on 14 May 1992.

3. In accordance with this resolution, on 22 February 1995 the Chilean document was transmitted to Argentina.

4. On 24 May 1995 Argentina presented a document entitled "Comments of the Argentine Republic on the document of the Republic of Chile dated 31 January 1995, which are submitted in accordance with the resolution of the Court of Arbitration of 22 February 1995". This submission consists of two separate documents: one in reply to Chile's application for revision and the other relating to the subsidiary application concerning interpretation.

5. On 23 June 1995 Chile filed a second document, entitled "Chilean Replication".

6. On 23 July 1995 Argentina submitted its second document, entitled "Comments of the Government of the Argentine Republic on the document of the Republic of Chile dated 23 June 1995, which are submitted in accordance with the resolution of the Court of Arbitration of 22 February 1995".

7. In its submission of 31 January 1995 Chile makes the following request with regard to the revision of the Award:

> Accordingly and for the reasons stated, Chile requests the Court to accept this application and to decide on a new course of the frontier line between boundary post 62 and Mount Fitzroy which is in conformity on the one hand with the stable, single and continuous na-

ture of the frontier decided upon by the 1902 Award and, on the other hand, with the requests submitted by Chile during the present proceedings, or, as a subsidiary application, a line which is in conformity with the general direction and distributive effect of the line drawn on the map of the 1902 British Arbitrator.

8. In its subsidiary application concerning interpretation Chile makes the following requests:

> . . . Chile requests the Court to interpret its Award in such a way that the geographical reality on the ground prevails over the identification made by the expert, i.e., that the Demarcator should determine on the ground itself the true location of the local water-parting and that, in cases where this is not possible, he should draw a straight line linking the point to which the water-parting extends from the north to the next point located to the south from which it is possible to make a credible identification of the said water-parting.
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> . . . Chile requests the Tribunal to interpret its Award and the manner of its execution so as to provide that, with regard to the description given by the expert in paragraph 151 of the Award, the expert shall identify the course of the Arbitrator's line on the ground itself in such a way that it separates waters at all its points.
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> . . . Chile requests the Court to explain, in the event that it decides that the expert should determine on the ground itself the "*natural feature*" which constitutes the frontier, how this assignment is compatible with the duty of the Court to "*determine the line of the frontier between boundary post 62 and Mount Fitzroy*", a duty which, according to the legal precedents, cannot be delegated (italics in the original).

9. In its second document Chile requests with respect to the revision of the Award:

> IV. Since the Award of 21 October 1994 has been "wholly" the result of errors of fact resulting from the hearings or documentation in the case, Chile respectfully requests the Court to revise paragraph 171 (I) of the said Award in accordance with what is stated by Chile in paragraph 28 of its Presentation of 31 January 1995.
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> V. In consequence, Chile requests the Court to decide that the line of the frontier in the sec or between boundary post 62 and Mount Fitzroy is the one defined by Chile in the conclusions of its written submissions and oral arguments, reproduced in paragraphs 17-19 of the Award; or, failing that, to decide that the said line shall be in conformity with the general direction and distributive effect of the line drawn on the map of the 1902 British Arbitrator.
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> . . .
>
> VII. In the event that the Tribunal considers that, in the language of article 40, the Award has been "wholly" the result of an error of fact resulting from the hearings or documentation in the case, Chile respectfully requests it to accept that the Award is "partly" the result of such an error and therefore to revise the sixth subparagraph of paragraph 151 of the Award so as to take into account the considerations set out in paragraph 24 of the Chilean submission of 31 January 1995 and the content of paragraphs 233-246 of the present document. Accordingly, Chile requests the Court to rule that, from the summit of Cerro Gorra Blanca until it arrives at Mount Fitzroy, the frontier line shall follow the course described in paragraph 234 of this replication. This line, which is shown on the map contained in figure No. 8, represents the intention of the 1902 Arbitrator, in particular in that the line follows a north-south direction, which was manifestly what the Arbitrator intended for this section, as can be deduced from his map. This line, which separates glaciers without ever running across ice-covered ground, is consistent, as far as the application of the geography desired by the Award allows, with the *ratio decidendi* of the Award. It is a more direct line, which represents a permanent frontier not subject to the inherent variability of ice-covered ground, which does not gross glaciers and which corrects the most important error of fact in the Award.

VIII. For all these reasons Chile further requests the Court to rule that the demarcation shall be effected in due course by the Court's expert, counting on Chile's participation in the assistance which the Court has stipulated should be furnished to the expert in this work by the Chile-Argentina Mixed Boundary Commission.

10. The frontier line is "described in paragraph 234" by Chile in the following terms:

. . . the suggested line follows the water-parting southwards from the summit of Cerro Gorra Blanca to the summit of Cerro Neumayer. Still following the water-parting, it continues southwards, then south-east and south-west, descending to the valley of Lake Eléctrica. The frontier line crosses this valley by a straight line which, in this stretch of about 500 metres, does not constitute a water-parting. The suggested frontier line then continues southwards along a water-parting, ascending by the northern spur of the range of Cerros Pollone and Pier Giorgio, and having reached the summit of Cerro Pollone continues south-east along the water-parting which runs towards Mount Fitzroy.

11. In its document of 24 May 1995 Argentina makes the following request with respect to the application for revision:

Thus, the Argentine Republic requests the Court to reject in its entirety the application of the Government of Chile, submitted on the basis of article 40, paragraph 2, of annex No. 1 of the Treaty of Peace and Friendship of 1984, for the reason that the facts cited are inconsistent with the grounds set forth in the said rule and, as early as possible, to approve the demarcation and notify the Parties that the Award has been executed in accordance with articles XV and XVII of the 1991 *Compromis*.

12. With regard to the subsidiary application concerning interpretation the Argentine submission states:

The Argentine Republic, in conclusion and in the light of the observations set out above, requests the Court of Arbitration to:

(*a*) *Reject* in its entirety the *subsidiary application* concerning interpretation and manner of execution lodged *against* the Award of 21 October 1994 by the Government of Chile, and

(*b*) Approve the demarcation made by the geographical expert and notify the Parties that the Award of 21 October 1994 has been duly executed in accordance with the provisions of articles XV and XVII of the 1991 *Compromis* (italics in the original).

13. In its document of 23 July 1995 Argentina makes the following request:

Accordingly, the Argentine Republic requests the Court to:

1. *Reject* the third part of the Chilean document of 23 June 1995 and the relevant part of its plea, for the purposes both of the request for revision submitted pursuant to article 40 of annex No. 1 of the 1984 Treaty and of the request for interpretation and manner of execution provided for in article 39 of the said Treaty;

2. *Reject* the alleged third error and the amplifications and modifications implied by the other alleged errors and Chile's requests contained in the document of 23 June; and

3. *Reject* the figures, sketches, transparencies, diskettes, cartridges and other materials of a supposedly technical nature which accompany the Chilean document of 23 June 1995. Reiterating the final paragraph of its Comments of 24 May 1995, Argentina further requests the Court to:

4. *Reject in its entirety the application of the Government of Chile*, submitted on the basis of article 40, paragraph 2, of annex No. 1 of the Treaty of Peace and Friendship of 1984 and the *pleas* contained in the documents of 31 January and 23 June 1995, for the reason that they are inconsistent with the grounds stated in the aforementioned provision; and

5. *As early as possible, approve the demarcation and notify the Parties that the Award has been executed* in accordance with articles XV and XVII of the 1991 *Compromis* (emphasis in the original).

II

14. The operative part of the Award of 21 October 1994 stated:

> 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.
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> The geographical expert shall indicate the places where the boundary posts will 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.

15. In accordance with the provisions of the Award, the geographical expert began the demarcation work on 23 January 1995. The work was completed on 3 February 1995, and a precise indication was given of the places where the boundary posts were to be erected. The Chilean members of the Mixed Boundary Commission did not take part in the work.

16. During its session from 20 to 25 February 1995 the Court received the report of its geographical expert, entitled "Report of the Court's geographical expert on the surveying and topographic demarcation work preceding the erection of the boundary posts on the water-parting between boundary post 62 and Mount Fitzroy identified in paragraph 151 of the Award". It also received from the expert the map referred to in the Award. On 22 February 1995 the Court resolved to defer approval of this work until it reached its decision on the document of the Chilean Government dated 31 January 1995.

III

17. Article XVIII of the 1991 *Compromis* states that any matters not covered by the *Compromis* shall be governed by the provisions of chapter II of annex No. 1 of the 1984 Treaty. Since the *Compromis* contains no provision on revision of the Arbitral Award, chapter II, article 40, of annex No. 1 of the 1984 Treaty becomes applicable, and this article specifies the cases in which a request for revision is admissible. It states:

> Any Party may request the revision of the decision before the Tribunal which rendered it provided that the request is made before the time-limit for its execution has expired, and in the following cases:
>
> 1. If the decision has been rendered on the basis of a false or adulterated document;
>
> 2. If the decision is wholly or partly the result of an error of fact resulting from the hearings or documentation in the case.
>
> For this purpose, any vacancy occurring in the Tribunal shall be filled in the manner established in article 26 of this annex.

18. This article constitutes the specific treaty rule which the Court must apply in reaching its decision on the application for revision. Chile has cited only the ground referred to in paragraph 2 of article 40, so that the Tribunal will not consider the possibility referred to in paragraph 1—falsification or adulteration of a document.

19. Paragraph 2 of the article refers to a possible "error of fact" in the arbitral Award. This paragraph stipulates three conditions which must be satisfied if the error is to lead to revision of the decision: (*a*) there has to be an error of fact; (*b*) this error must result from "the hearings or documentation in the case"; and (*c*) the decision must be wholly or partly the result of such error. To these specific conditions must be added, obviously, the conditions prescribed by general international law.

20. Paragraph 2 states that there must be an error of fact. It therefore excludes the possibility of requesting a revision by alleging errors of law.

21. The other condition states that there must be an error resulting from "the hearings or documentation in the case". This condition represents a typical characteristic of revision and is one of the features which clearly distinguish revision from appeal. In an appeal a court may amend any error of fact or law in the decision against which the appeal is interposed. Furthermore, the Court may reassess the evidence produced, correct the reasoning and modify the decision, replacing it with a different decision. In contrast, in an application for revision pursuant to the 1984 Treaty this Court is not authorized to correct any error of law in the Award, nor is it authorized to reassess the evidence, correct the reasoning on which it has based its decision, or adopt definitions different from the ones originally used. Revision authorizes amendment of the Award only in so far as it is the result of an error resulting from the hearings or documentation in the case. For this reason, every request for revision must identify the hearing or document from which the error resulted.

22. This distinction has been established by the legal precedents. For example, the decision of the Mixed Franco-German Court of Arbitration of 29 July 1927 states in the Baron de Neuflize case:

> . . . la révision—seul recours qui puisse être introduit contre un des jugements rendus par le Tribunal arbitral mixte—ne saurait être confondue ou assimilée avec l'appel ou la cassation . . .la révision ne se motive pas, devant une juridiction souveraine, par le bien ou le mal jugé de la sentence, ni par conséquent par la critique d'une doctrine de droit ou par l'appréciation différente des faits, ou même par les deux raisons à la fois, mais uniquement par l'insuffisance d'information par rapport aux faits. . .
>
> . . . il ne saurait, en effet, être question d'apprécier, en matière de révision, si le Tribunal a exactement ou non interprété un ensemble déterminé des faits. . . l'appel n'existe pas en ce qui concerne la juridiction des Tribunaux arbitraux mixtes. . . (*Recueil des décisions des tribunaux mixtes institués par les traités de paix*, vol. VII, pp. 632-633).[2]

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[2] . . . revision—the only recourse which may be interposed against one of the decisions rendered by the Mixed Court of Arbitration—must not be confused with appeal or cassation, or assimilated to them;. . . revision is not based, in a sovereign jurisdiction, on the merit or demerit of the decision, nor, in consequence, on criticism of a legal doctrine or on a differing assessment of the facts, or even on both grounds at once, but only on the insufficiency of information about the facts. . .

. . . in fact, in matters of revision, it should not be a question of assessing whether the Court has interpreted correctly a given set of facts . . . appeal does not exist with respect to the jurisdiction of the Mixed Courts of Arbitration. . .

Furthermore, the International Court of Justice, in the case concerning the Arbitral Award of the King of Spain of 23 December 1906, stated:

> . . . the Court will observe that the Award is not subject to appeal and that the Court cannot approach the consideration of the objections raised by Nicaragua to the validity of the Award as a Court of Appeal. The Court is not called upon to pronounce on whether the arbitrator's decision was right or wrong (I.C.J., *Reports 1960*, p. 214).

23. In the present arbitration the Award is not susceptible of appeal. On the contrary, article 36 of chapter II of annex No. 1 of the Treaty of Peace and Friendship of 1984 states: "The decision shall be binding on the Parties, final and unappealable". The language of this provision is reproduced word for word in article XVII of the 1991 *Compromis*.

24. It is now necessary to analyze, in the light of the considerations set out above, the "errors of fact" cited by Chile as the basis for its request for revision of the Award.

IV

25. It is first necessary to examine paragraphs 4 to 10 of Chile's submission of 31 January 1995, which refer to certain "errors of fact" which "have their origin, in Chile's opinion, in the errors of law and the flaws in the Court's interpretation of the 1902 Award" (para. 4). For Chile, these errors are the following: (*a*) "the 1994 Court has violated the principle of contemporaneity established by abundant international legal precedents, according to which the interpretation of a judicial decision is designed to determine what has been decided in the light and in the context of the facts known at the time of the decision and not what might have been decided in the light and in the context of facts learned subsequently" (para. 5); (*b*) "it has also violated the principle of the stability of frontiers", for ". . . by confining itself to an examination of events prior to the 1902 Award as being the only ones relevant to its interpretation the Court disregarded the legal importance of events subsequent to the said Award" (para. 7); (*c*) "the 1994 Award impaired the force of *res judicata* of the 1902 Award since, as stated, it did not attach any relevance to the lines on the maps of the Award and the Demarcator, and even diverged from them, as if these maps, and especially the first one, were not part of the Award and, in consequence, not covered by the *res judicata* and were absolutedly superfluous" (para. 8); (*d*) "the Court has delegated its competence to its expert (see para. 151 of the Award), thus transforming its legal power of *decision* into the mere verification of a geographical point" (para. 9, italics in the original); and (*e*) "it has not applied the principle of equity, an integral part of the Award which it had to interpret and apply and of general international law" (para. 10).

26. Having stated these grounds, Chile continues:

> Finally, Chile is convinced that in the 1994 Arbitral Award, impaired in its interpretation of the 1902 Award by the flaws and errors of law described above, the Court exceeded its competence or interpreted it incorrectly, thus providing reason, if the relevant means of appeal had been available, for lodging an appeal on these grounds (para. 11).

27. In the international legal order there are two types of error: errors of fact and errors of law. The first refers to factual circumstances and the second to application of the law. There are only errors of fact or of law. *Tertium non datur*. Thus, legal admissibility cannot be accorded to intermediate categories or mixed cases such as "flaws" (paras. 4 and 11), "errors of fact which are the result of errors of law" (para. 4), or "errors of fact which are the result of the flaws in the Court's reasoning" (para. 19). Chile recognizes in this passage that the grounds which it has brought forward constitute errors of law and that "if the relevant means of appeal had been available", it would have been able to lodge an appeal against the Award. In the light of the provisions of chapter II, article 40, of annex No. 1 of the 1984 Treaty, this recognition is sufficient for such alleged errors to be rejected as a ground for revision.

28. However, the Court will comment on Chile's assertion that the Court confined itself to an examination of events prior to the 1902 Award as the only ones relevant to its interpretation and thus paid no heed to the legal importance of events subsequent to the Award, in particular the subsequent conduct of the Parties (para. 7).

29. In its Award this Court concluded that the subsequent conduct of the Parties did not help to throw any light on the intention of the 1902 Arbitrator. This was also pointed out in the Award of 9 December 1966 of Her Britannic Majesty (hereinafter "1966 Award"):

> . . . 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).

30. The present Court also concluded that such conduct is not a matter directly connected with its terms of reference, since it relates to facts which occurred subsequent to the Award to be interpreted. However, in the light of the submissions, arguments and evidence brought forward by the Parties, it did in fact examine the particulars of their subsequent conduct. As stated in the 1994 Award, in this respect the arguments of the Parties concentrated on three areas: the maps, the effective exercise of jurisdiction in the disputed sector, and the demarcation work of the Mixed Boundary Commission. All these matters were analyzed in the Award (paras. 164-170), and it was concluded that they did not have the result of vitiating the Court's conclusions as to the interpretation of the 1902 Award.

31. This Court cannot overlook the fact that it is alleged that the Award disregarded "the maps which the Parties produced and followed for more than 50 years", as stated in paragraph 7 of the Chilean submission of 31 January 1995. The Court examined in scrupulous detail every one of the maps furnished to it. In its Award it pointed out that "an examination of the maps shows a definite tendency to locate the basin of the River Gatica or de las Vueltas in Argentine territory" (para. 167), and this applies to all the official Chilean maps up to 1958. The Court did not think it necessary to refer to other points before concluding that, in this context, "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" (*ibid.*).

32. Bearing in mind the fact that the Award did not come out in favour of Chile's claim, the Court preferred not to cite the many other arguments against its point of view. Now, given Chile's criticism of the Award, the Court will refer to some of those cartographic matters which were not essential supports of its earlier conclusions but which demonstrate that it was in no way remiss in its cartographic analysis so as to harm the stability of Chile's frontiers or its rights.

33. The first cartographic depiction of Lake del Desierto on an official map of the Parties is the one found on the "Provisional map of the Argentine Republic, sheet 90—LAGO SAN MARTIN", updated in 1944 and published in 1945 (atlas of the Chilean memorial, No. 21; atlas of the Argentine memorial, p. 43). On this map, an official and public document, Lake del Desierto is shown in Argentine territory. Although this was a new and evident fact, Chile did not assert any right or make any protest but instead passively accepted the new Argentine map.

34. Chile's conduct, moreover, was more than passive, even in the period since the details of the geography of the sector became fully known. As a result of the aero-photogrammetric survey commissioned by Chile from the United States Air Force, from 1947 Chile knew that a stretch of the water-parting between boundary post 62 and Mount Fitzroy coincided with the continental divide. Six years later it published the 1953 "Preliminary Map" of its Institute of Military Geography (atlas of the Chilean memorial, No. 24; atlas of the Argentine memorial, pp. 50-51). On this map the whole of the basin of the River Gatica or de las Vueltas, including Lake del Desierto, was shown in Argentine territory. In addition, the frontier ran for part of its course along the continental divide in the sector, now fully known. Moreover, the frontier depicted on this Chilean map coincides substantially with the delineation of the frontier decided upon by this Court in its 1994 Award.

35. Chile's 1953 map was the result of an analysis by its geographical authorities of the question of what should be the line of the frontier between boundary post 62 and Mount Fitzroy in view of the new geographical knowledge. It was following a debate in the Chilean Senate in 1957, held at the request of a Senator, that the 1953 map was withdrawn from circulation, together with another map of 1956 which was mentioned several times during the aftermath of the Senate debate but was not submitted to this Court. The Senator levelled very strong criticism against the Director of Chile's Institute of Military Geography—a Chilean Army General—in office at the time when the criticized maps had been produced, describing him as incompetent and even using such expressions as "high treason", "demotion" and "execution by firing squad" (second meeting of the Chilean Senate on 28 May 1957).

36. The person who was Deputy Director of Chile's Institute of Military Geography at the time of the production of the maps in question—also a Chilean Army General—offered a public defence of the Institute and its cartography in terms which left no doubt that in the opinion of Chile's highest geographical authority these maps were the ones which were most faithful to the 1902 Award (*El Mercurio*, 17 July 1957).

37. The prestige and competence of the Institute of Military Geography were never questioned in the arbitration which led to the Award of 21 October 1994. The fact that activities or work of this Institute were subjected, at some time or other, to attacks or criticism by sectors of Chilean society does not impair the value of such work as an expression of the position of Chile's highest geographical authority. It is immaterial, with regard to the effects which might be attributed to the maps, that Chile withdrew from circulation the official map or maps which placed Lake del Desierto and the whole of the basin of the River Gatica or de las Vueltas in Argentina. *Nemo potest mutare consilium suum in alterius injuriam.*

38. Thus, there was no need to include in the Award a more protracted examination of the maps in order to confirm the conclusion already reached by the Court (see paras. 31-32).

39. The Court will also refer to the singular statement by Chile in its submission of 31 January 1995, in which the Court is accused of abandoning its responsibility and delegating it to the geographical expert. The same matter is raised in paragraph 33 of this Chilean submission as a subject for interpretation. The Court decided in its Award that the course of the frontier line between boundary post 62 and Mount Fitzroy is the local water-parting between these points. The Court directed its expert to identify this course; and, in the operative part of the Award, it attached importance to the description given in paragraph 151. A mere reading of the 1994 Award is sufficient to demonstrate, beyond the reach of doubt, that no responsibility whatsoever was delegated.

40. This is what happens, moreover, in any dispute, be it national or international, when a technical question (physical, biological, mechanical, chemical, geographical, etc.) is the subject of argument. When the question relates to whether a given industrial activity produces harmful polluting effects for third parties, or whether the collapse of a building was due to faulty construction, or whether a product has the chemical composition stated on its packaging, the judge has recourse to an expert on the subject and asks him to make analyses and studies and produce conclusions. It is absurd to think that in any of these cases it can be concluded that the judge has delegated his responsibility to the expert.

41. Paragraphs 12 and 21 of the Chilean submission of 31 January 1995 cite as grounds for revision the concept of "local water-parting" used in the Award. Chile states that the report, in order to reach its conclusion, "had, in particular, to alter profoundly the meaning of local water-parting". It is also alleged that the Court "was obliged to distort the meaning of the 1902 Award", and further on, in paragraph 20, the Court is again accused of "not applying correctly the concept of local water-parting in conformity with the 1902 Award". Chile also asserts that "as the contemporary evidence indicates", a local water-parting is "a water-parting which separates waters flowing to one same ocean". Chile thus reiterates several times what it said during the present arbitration, but it does not indicate now, nor did it during the arbitration, what this "contemporary evidence" is.

42. Nevertheless, in its document of 23 June 1995, under the heading "The error of fact in the present case: general considerations" (paras. 65, *et. seq.*) Chile asserts that "the Court has decided *in law* that the frontier between boundary post 62 and Mount Fitzroy should follow the *water-parting* as the said Court interprets this notion. Such a decision *in law* is not questioned by the application for revision submitted by Chile" (para. 65, underlining and italics in the original). Thus, Chile expressly acknowledges that the definition of "water-parting" is a question of law, which as such it does not dispute. On the other hand, Chile states that what it is attacking is the "*factual* accuracy of the identification made by the expert and endorsed by the Court" (para. 67, emphasis in the original).

43. Thus, the concept of "local water-parting" used in the Award is a question of law which is not at issue in the application for revision.

V

44. Other alleged errors relate to the fact that the Court delineated a section of the water-parting on glaciers. This topic takes up a large part of the two Chilean submissions, in which a number of grounds are developed, sometimes conjointly or linked in various ways. The Court will identify each of them and analyze them separately.

45. In the document of 31 January 1995 Chile cites the following grounds of error in connection with this topic: (*a*) delineation of the boundary on glaciers; (*b*) delineation of the boundary line by following the water-parting over the surface of glaciers, which are essentially moving and changing; (*c*) assertion that the boundary line determined is the same as the one which existed in 1902; and (*d*) delineation of the boundary on a certain glacier sector shown on the 1:50,000 map of the Argentina-Chile Mixed Boundary Commission, which is not consistent with the current geographical situation.

46. These grounds for revision are also developed in the document of 23 June 1995. But this later submission adds a new ground to the effect that the boundary fixed in the Award does not follow a "single, continuous and uninterrupted water-parting between two *termini*, and, as such, one which divides waters at all its points". This error is supposed to arise because the line decided upon by the Court crosses several water-courses and glacier flows.

47. (*a*) In its document of 31 January 1995 Chile states that in the glacier sectors of Gorra Blanca Norte, Gorra Blanca (Sur) and Marconi Pass "it is impossible to identify a water-parting running across glaciers, thus demonstrating its impractibility as a means of defining the frontier" (para. 22). Then, in paragraph 194 of the document of 23 June 1995 Chile reiterates what it said in its counter-memorial to the effect that "the possibility of fixing a water-parting on the glaciers in any manner remains subject to a formal reservation by Chile".

48. The question of the possibility of delineating a boundary on glaciers had already been considered in the 1898-1902 arbitration. At that time Chile stated:

> In any case, the Chilean line continues, as it has consistently done all along, by the actual and real water-parting, subject to the "invariable rule" of the demarcation, whether it leads to the highest peaks or crests, to the snowfields among glaciers, or to lower points among the Andean ranges and masses (*Chilean Statement*, vol. 4, p. 1517).

49. In the present arbitration the question of delineating a frontier across glaciers was extensively debated. Chile acknowledged expressly in its counter-memorial (para. 12.22, *in fine*) that in the practice of the Mixed Boundary Commission "the boundary has occasionally been marked across glaciers". What is more, during the hearings Chile reiterated that there are several precedents in which a water-parting is delineated over zones of ice (record of 19 April 1994, pp. 37-44). The Court (Award, para. 159) took its decision on this controversy in the light of all the evidence and arguments of the Parties. It concluded that it was possible to delineate a boundary in glacier areas. This conclusion is based on the Court's concept of what an international frontier is and, by its very nature, it cannot be vitiated by one of the errors specified in of chapter II, article 40, of annex No. 1 of the 1984 Treaty.

50. (*b*) Chile states that it argued repeatedly before the Court "that it was not possible to delineate frontier lines by following water-partings across the surfaces of glaciers because such surfaces are essentially moving and changing" (document of 31 January 1995, para. 16). In the same paragraph it states that "the surfaces of glaciers are subject to constant movement and change which render them unsuitable as sites for the delineation of frontiers by means of water-partings". Chile also states that

> the frontier between boundary post 62 and Mount Fitzroy should have been established by the 1902 Award in accordance with the provisions of the many international legal precedents concerning all frontiers in a precise, complete, single, stable and definitive manner throughout its extension (para. 17).

51. In paragraphs 77 *et seq.* of its document of 23 June 1995 Chile presents what it regards as conclusive evidence that the glaciers of Cerro Gorra Blanca and Marconi Pass are moving. After offering this evidence Chile concludes:

> As can be seen, it is demonstrated that the surface of the glaciers in the zone is undergoing constant and considerable change (para. 84).

The Chilean document adds that the movement of the glaciers

> . . . is a real physical fact true of all the Earth's glaciers and has been recognized in glaciological studies since the eighteenth century by the international scientific community (p. 35, footnote 10).

52. In paragraphs 85 *et seq.* Chile states that during the arbitration it repeatedly pointed out that the surfaces of the glaciers are subject to permanent movement and are therefore by their nature variable. In this connection it cites many passages from its documents submitted to the Court. For example, in annex No. 4 of its counter-memorial Chile stated:

> In view of the behaviour of glaciers, any water-parting which is supposed to be established on them constitutes an unstable line owing to the permanent changes in the ice cover and, in addition, to the absence of distinguishable features on the ice (para. 4.69).

53. Chile seems to start from the assumption of the absolute immobility of a frontier as a condition of its validity. Nothing in this world is completely immobile. Cicero recognized this long ago when he said of material things: *Omnia alia incerta sunt, caduca, mobilia*... Similarly, Thomas à Kempis, in a classical work of Christian mysticism, meditates on the things of this world and sees them passing *sicut nubes, quasi naves, velut umbras*...

54. A similar position is taken from the legal standpoint. Chile refers to "many legal precedents", which it does not cite, according to which the whole frontier has to be "precise, complete, single, stable and definitive". However, as a legal concept the stability of frontiers does not depend on possible changes which may occur in the ground across which the frontiers run, changes which constitute a strictly physical phenomenon. This is what the international practice really demonstrates, for it offers various instances of frontiers defined by moving geographical features (see, for example, art. 11, para. 1, of the treaty between Belgium and the Netherlands of 8 August 1843—Parry, *The Consolidated Treaty Series*, vol. 95, p. 229; art. 4, para. 1, of the treaty between Poland and the USSR of 15 February 1961—United Nations, *Treaty Series*, vol. 420, p. 166), as well as other examples of multiple frontiers (see for example, the treaty between Belgium and the Netherlands of 22 October 1950—United Nations, *Treaty Series*, vol. 136, p. 33 *et seq.*; the treaty between the Netherlands and Germany of 18 January 1952—United Nations, *Treaty Series*, vol. 179, p. 149 *et seq.*; the treaty between Austria and Bavaria of 25 March 1957—*Bayerisches Gesetz- und Verordnungsblatt*, 1958, No. 16, pp. 168-174; decision of 31 July 1989—*Revue Générale de Droit International Publique*, 1990, p. 255).

55. During the 1898-1902 arbitration Chile acknowledged as a fact "recognized in glaciological studies since the eighteenth century by the international scientific community" (see para. 51) that movement is a physical phenomenon affecting glaciers in general. It also knew since the 1898-1902 arbitration that "the natural and effective water-parting, i.e., the "invariable rule" of the demarcation" could be situated on "the snowfields between glaciers" (see para. 48). Thus, Chile cannot now cite as a ground for revision of the Award the fact that it delineated the frontier in one sector by following water-partings across the surface of glaciers and that such surfaces are essentially moving and changing. If this circumstance constituted an error of fact, then the Chilean claim in the 1898-1902 arbitration would have suffered from the same defect.

56. Although the mobility of glaciers in general is a well-known fact of nature, the Court must point out that the specific mobility of the surface of the glaciers in the area of Cerro Gorra Blanca and Marconi Pass, to which Chile refers in paragraph 16 of its document of 31 January 1995 and elsewhere, has not been proved in the arbitral proceedings, either by maps or photographs or any other means. The only study on this topic, rigorous in its scientific approach and graphic and cartographic expression, is the one contained in annex 4 of the Chilean counter-memorial. This study, however, does not confirm the movement of the ice-fields in question.

57. The cartographic materials submitted with the Chilean documents of 31 January and 23 June 1995 lack in some cases the scientific rigour necessary for proving such mobility; and in other cases they tend to prove the opposite of what they are supposed to prove, for they demonstrate the relative altimetric and morphologic stability of the surface of the glaciers, on the scale of the maps, in the Gorra Blanca-Marconi Pass sector. Furthermore, these are documents submitted to the Court subsequent to the Award of 21 October 1994, so that they are not documents in the case.

58. Chile is mistaken in its argument that the delineation of a frontier line on the surface of a glacier, which is moving, has the consequence of fixing a frontier which is also moving. In fact, once the frontier has been determined on a moving glacier or along a river whose *thalweg* shifts its course, it can happen that the frontier follows the changes in the ice-field or the *thalweg* of the river or that it remains fixed. The option is open for the parties to agree that the frontier shall follow the shifts of the glacier or *thalweg* or to "fix" the frontier at the moment when it is delineated. This is done by indicating the geographical coordinates of the points which make up the frontier line.

59. A boundary is an eminently legal concept. An international boundary consists of the contact line of the spatial spheres of validity of two State legal orders. In contrast, in its submissions Chile postulates a physical concept of boundary and thus concludes that a frontier on a glacier is subject to the same shifts as the glacier. But this occurs only if a legal rule so prescribes and it does not depend on the natural conditions.

60. The Court's decision to delineate the frontier along the water-parting on a glacier, regardless of the fact that the glacier may move, was a legal decision and therefore it cannot be vitiated by one of the errors of fact specified in chapter II, article 40, of annex No. 1 of the 1984 Treaty.

61. The topographical concept "water-parting" denotes a feature of the topographical surface of the Earth. It is a line between extreme points at which opposed sloping planes converge. This is the source of its hydrographic significance. It is logical that such a line should separate actual or theoretical flows of water.

62. The international practice knows cases of frontiers which, while relying on water-partings, run for part of their course over ice-fields and glaciers. This occurs on the frontier between Switzerland, Italy and France in the stretch between the vicinity of Monte Rosa and Mont Blanc, which passes across the massif of Monte Cervino (Matterhorn). The frontier follows the water-parting which separates the basins of the Upper Rhone to the north and the River Dora Baltea (Aosta Valley) to the south. In many of its sections the water-parting—the line which determines the frontier—runs over ice-fields and the sources of glaciers, following the contour lines representing the relief of the topographic surface (*cf.*, map No. 2515, Zermatt-Gornergrat, Landeskarte der Schweiz, 1:25.000, 1988; map No. 5006, Matterhorn-Mischabel, Landeskarte der Schweiz, 1:50.000, 1982; and the map of the Massiccio del Monte Bianco, 1:50.000, of the Central Geographical Institute of Turin). A similar situation is found in the neighbourhood of Mount Everest, on the frontier between China and Nepal,

where the water-parting separates the big basins of the Tibetan Bramaputra to the north and the Ganges to the south. Although for much of its extent the frontier runs along very pronounced snow-covered summit-lines, there are also cases in which the frontier, defined by a water-parting, is located on the surface of glaciers, following the contour lines (*cf.*, Mount Everest, 1:50.000, Swiss Foundation for Alpine Research/Boston Museum of Science, 1991).

63. The Chilean counter-memorial implicitly admitted the possibility that in exceptional cases water-partings may define frontiers on glaciers, when it stated that:

> . . . the *majority* of international frontiers which cross glaciers have been defined by means of geodesic lines instead of water-partings (para. 12.24, italics added).

64. Chile maintained during the arbitration that it is difficult and even impossible to delineate frontier lines by following water-partings on the surface of glaciers. However, it also referred repeatedly to the continental water-parting between Cerro Gorra Blanca and Marconi Pass. Such passages from its counter-memorial include the following:

> . . . It is feasible, of course, to determine on this map (the map of the Mixed Boundary Commission) the directions of the glacier flows and the continental water-divide in order to appreciate the concepts on which the Argentine frontier line is based (annexes of Chilean counter-memorial, 4/4).
>
> . . . The assumed continental divide, by separating the lines of flow of the two slopes, is theoretically consistent with the concept of water-divide derived from nineteenth and early twentieth century sources (annexes to the Chilean counter-memorial, 4/5).
>
> . . . Two lines have been drawn on the surface: the continental divide and the boundary claimed by Argentina (annexes of Chilean counter-memorial, 4/8).

The map in figure 2 of annex 4, entitled "Efluente Glacier and upper part of the Gorra Blanca Glacier. ***Lines of surface flow***" (emphasis added), depicts the continental water-parting in a way consistent with the one identified by the Award in the section between Cerro Gorra Blanca and Marconi Pass. In addition to this map there is paragraph 4.17 of the same annex 4, which states:

> *Continental water-parting*. It is established by separating the lines of flow of the Pacific slope, channelled towards the Chico glacier by way of the Efluente glacier, from the lines of flow of the Atlantic slope which descend by way of the Gorra Blanca glacier to the valley of the River Eléctrico (emphasis in the original).

In this paragraph Chile referred to the water-parting which it had drawn as an alternative to the one drawn by Argentina, both on the surface of glaciers. In other words, Chile acknowledged, at least in this zone and in contradiction with its current position, the possibility of delineating the topographical water-parting on the surface of the ice.

65. (*c*) The third error cited by Chile in connection with the glacier zone is that, in contradiction with the Tribunal's decision, the local water-parting established as the frontier by the 1994 Award is not the same as the one which existed in 1902. In paragraph 14 of the document of 31 January 1995 Chile states:

> What Chile maintains in this application is, therefore, that, at least in the section in question, as will be demonstrated, the local water-parting decided upon by the 1994 Court of Arbitration is not the same as the one which could have been delineated in 1902 and that, in consequence, the Court has based its decision on an error of fact.

The same argument is repeated in paragraphs 11, 13, 15, 17, 18 and 20 of this document. The Chilean submission asserts that the statement in the Award to the effect that "the boundary line decided upon is the one which has always existed between the two States Parties to this arbitration" (para. 158) is incompatible with the delineation of the frontier on glaciers, which are moving.

66. The second Chilean document expounds this alleged error at length and presents what it regards as adequate proof. On the basis thereof Chile concludes:

> As can be seen, it is proved that the glacier surface in the zone is undergoing constant and considerable change. With all the more reason it should be concluded that the change in this glacier relief between 1902 and the present has been very extensive, rendering the physical identification of the expert's line with the line of the 1902 British Arbitrator impossible (para. 84).

67. In paragraphs 105 and 106 of the same document Chile arrives at the conclusion that the Court started from the premise that the local water-parting between boundary post 62 and Mount Fitzroy is "a permanent and stable natural feature", and that from this proposition the Court concluded that "the local water-parting currently identified in the Cerro Gorra Blanca-Marconi Pass sector is the same as the one which existed in 1902". This statement by the Court is alleged to be vitiated by error. Paragraph 108 underlines that, as stated earlier in the same document, this is indeed an error of fact:

> . . . *this Court has not said that the line . . . by means of a legal fiction* should be held to be *the same line as the one decided upon by the 1902 British Arbitrator but it has asserted the physical identity of the two lines, i.e., their complete equality.* This is therefore an error of fact and not an error of judgement or legal opinion (para. 96, italics and underlining in the original).

68. Chile asserts that the Court's statement to the effect that the line decided upon corresponds to the geographical reality both of 1902 and of today "constitutes the *ratio decidendi* of the Award" (para. 69). It then adds that this statement "is, undoubtedly, a logically necessary antecedent of the decision adopted" (para. 92) and that it is "a decisive factor in the Court's *ratio decidendi*" (para. 94).

69. The following are the paragraphs of the Award which, in Chile's opinion, are vitiated by error of fact:

> 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. Accordingly, 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.

70. Paragraph 157 of the Arbitral Award is a rejoinder to a Chilean argument, part of which is reproduced in paragraph 84 of the Award. Chile argued before this Court that, in order to determine the boundary claimed by Chile in the 1898-1902 arbitration, account had to be taken of the geographical knowledge of the time. The Court decided (para. 85) that in order to determine what Chile's claim was in that arbitration "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 this connection the Court cited many passages from the Chilean submissions in the 1898-1902 arbitration (para. 93) and came to the conclusion that in the Chilean claim

> 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 (para. 94).

The Court concluded that the determination of the frontier in terms of the natural and effective water-parting was in accordance with the principle of contemporaneity because that was precisely what Chile had claimed in the 1898-1902 arbitration (paras. 95 and 96).

71. What the Court states in paragraph 157 is that the water-parting is not delineated on the basis of the geographical knowledge at a given time but on the basis of its actual configuration. The Court confirmed that the term "local water-parting" used in the 1902 Award referred to the local water-parting actually existing on the ground and that therefore the course of the frontier line, as it should be delineated in 1994, should also follow the local water-parting actually existing on the ground, which is, in this sense, the same as the 1902 local water-parting. This is the framework within which the Court states that "the land remains unchanged" and that "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".

72. The contradiction which Chile believes it has noticed in paragraph 158 of the Arbitral Award does not exist. In fact, the Parties never demarcated the course of the frontier line between boundary post 62 and Mount Fitzroy. The 1994 decision identifies this course and states that, since the Award is an interpretative one and therefore declaratory, its legal effects date back to the 1902 Award. This means that from the legal standpoint the line currently identified is *held to have existed* since that time. The statement in paragraph 158 indicates the date from which the Award's legal effects are produced, and this occurs regardless of whether the glaciers have moved. This is a legal assertion unrelated to the factual situation.

73. Chile interprets paragraph 157 of the Arbitral Award differently from the interpretation given here (see para. 71). As a hypothesis, the Court is willing to accept that the present local water-parting might be different from the one which existed in 1902 in the sector subject to arbitration. It is now necessary to examine this hypothesis.

74. The Parties requested the Court to determine the present course of the frontier line between boundary post 62 and Mount Fitzroy. The pleas of Argentina and Chile and all the evidence which they presented were intended to

prove to the Court what the present boundary is. Similarly, during the visit to the area the representatives of the Parties showed the Court what was, in their opinion, the international boundary at the time and they never referred to the boundary which had existed in 1902. In accordance with the requests of the Parties, the Court determined the present boundary in the sector subject to arbitration and described it in the Award itself (para. 151).

75. The fundamental requirements in the Arbitral decision are the determination of what is currently the boundary between the two countries and the description of the course of the frontier given in paragraph 151. These requirements have been satisfied by the Court in every detail.

76. After describing the course of the frontier line the Court says that the line decided upon is the same as the one which existed in 1902. It is now necessary to determine the legal force of this reference to 1902 and its implications for the operative part of the Award.

77. Chile states that this reference "is, undoubtedly, a logically necessary antecedent of the decision adopted". This statement requires proof. The Award of 31 July 1989 concerning the maritime frontier between Senegal and Guinea-Bissau, which was cited by Chile for other purposes in these proceedings, stated:

> De l'avis du Tribunal, la rélation entre ces deux propositions n'est pas un cas de corollaire dans lequel la vérité d'une proposition peut être déduite de l'autre par une simple opération de logique formelle. La Guinée-Bissau n'a pas apporté la preuve ou la démonstration de ce que la rélation logique qui existe entre les normes soit celle d'un corollaire. La simple affirmation qu'entre deux propositions il y a une certaine rélation logique n'est pas suffisante (*Revue Générale de Droit International Public*, 1990, pp. 234-235).[3]

78. In the present case Chile has not demonstrated that the reference to the 1902 boundary is a logically necessary antecedent of the decision. It has not done so because no such logical relationship with the operative part of the Award exists. The Court decided by interpreting and applying the 1902 Award that the frontier between the Parties is the present local water-parting, and it is legally immaterial whether it is the same as the one which physically existed in 1902. The Court could have omitted this date or it could have stated that the water-parting was the same as the one which existed in 1492 when Columbus reached the Americas or at some other date. The logical relationship between the operative part of the Arbitral Award of 21 October 1994 and the reference to the local water-parting of 1902 in paragraph 157 is similar to the one between that operative part and the statement in paragraph 59 of the Award about the average annual temperature in the area of the arbitration. If instead of 7° the Court had said 15°, its statement would perhaps not be accurate but it would be legally immaterial with respect to the operative part of the decision.

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[3] In the opinion of the Court, the relationship between these two propositions does not constitute a corollary case in which the truth of a proposition can be deduced from the other proposition by a simple operation of formal logic. Guinea-Bissau has not proved or demonstrated that the logical relationship between the rules is that of a corollary. The mere assertion that there is a certain logical relationship between two propositions is not sufficient.

79. In conclusion, even on the hypothesis considered above the grounds for revision, as submitted by Chile, do not satisfy the conditions set out in chapter II, article 40, of annex No. 1 of the 1984 Treaty. In fact, the Award is neither wholly nor partly the result of an error. The basis of the Award is the concept of local water-parting (para. 171.I).

80. (*d*) In connection with the question of the delineation of the frontier in areas of glaciers, Chile also puts forward as a ground"for revision the fact that the Court made use of the 1:50,000 map produced by the Argentina-Chile Mixed Boundary Commission, which does not reflect the true situation. The Chilean position is based on the description of the local water-parting in the sector between Cerro Gorra Blanca and Marconi Pass contained in a passage of paragraph 151 of the Award. Chile quotes this passage *in part* in its submission of 31 January 1995:

> from Cerro Gorra Blanca the line of the water-parting . . . 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 (para. 15; carry points in the original).

81. In its document of 31 January 1995 Chile asserts that the contour lines on the map of the Mixed Boundary Commission "are not consistent with the actual situation" (para. 13). It adds that "it is an error to believe that what this map establishes is consistent with the reality". Further on Chile reiterates its argument:

> the contour lines shown on this map, determined on the basis of photographs taken in 1966 and partially supplemented in 1980, are not the same as those which have been depicted subsequently or those which presumably exist today (para. 15).

The Chilean document also states that the map of the Mixed Boundary Commission needed to meet further requirements "before achieving the status of an official document" (paras. 16 and 19).

82. Chile repeated the same argument in several passages of its document of 23 June 1995:

> As has been explained in connection with the preceding error, the map of the Mixed Boundary Commission submitted during the proceedings contains contour lines which have been used by the Court's geographical expert to identify the frontier line. However, these contour lines are not consistent with the actual situation on the ground, at least in the area of the Cerro Gorra Blanca and Marconi Pass glaciers (para. 134).
>
> Of course, the water-parting identified with the frontier must be consistent *with the geographical reality* on the ground and not with the situation represented on an obsolete map: a situation which existed in 1966 but exists no more (para. 140; underlining in the original).
>
> The line of the water-parting, identified by the Court with the frontier, must be consistent with the *current geographical situation, i.e., with how the land lies at the present time* and not with a situation which existed in 1966 but does not exist now (para. 146; underlining in the original).
>
> The Court of Arbitration has therefore committed an error in accepting on the basis of a mistaken fact—contour lines inconsistent with the true situation—that its line defined as the "*local water-parting*" and identified by the Court's expert in paragraph 151 of the Award is consistent with the current geographical situation (para. 148; italics in the original).

83. According to the same Chilean document, the water-parting referred to in paragraph 151 of the Award could only be delineated by following the contour lines of the map whose accuracy Chile impugns, and the expert is not authorized to identify the true line on the ground. Chile states:

> It would be completely unacceptable to argue that the Court's expert gave a general description of the line in the part dealing with the Cerro Gorra Blanca and Marconi Pass glaciers when he said that it follows "*a south-south-west course*" and that he was moreover authorized to adjust the line decided upon by the Court in the light of the situation on the ground when he made the demarcation with which he had been charged or when he drew the line on a map, and that he would thereby correct the discrepancy between the contour lines on the map of the Mixed Boundary Commission and the situation on the ground (para. 141, italics in the original).
>
> . . . the reference to "*south-south-west course*" is merely descriptive and *does not affect the duty of the expert to identify the line by contour lines and does not instruct him, in any way at all, to seek by other means the true line on the ground.* This is confirmed by a sentence in one of the operative paragraphs of the 1994 Award, which states that ". . . *the course of the line decided upon here shall be demarcated and this Award executed . . . by the Court's geographical expert with the support of the Mixed Boundary Commission . . .*" (our emphasis). Accordingly, *it is clear that the precise line has already been determined by the Award itself and that the expert is left only with the task of demarcating it and depicting it on a map and not the task of determining what this line is* (para. 143, underlining and italics in the original).

84. In order to respond to these assertions the Court must first quote, without any omissions, the passage from paragraph 151 of the Award concerning the sector between Cerro Gorra Blanca and Marconi Pass:

> 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.

85. According to this text, the geographical feature which is determined "by the contour lines" on the map of the Mixed Boundary Commission is not, as Chile claims, the section of the water-parting running from the summit of Cerro Gorra Blanca to Marconi Pass. From the summit of Gorra Blanca until it reaches the surface of the Gorra Blanca (Sur) glacier the water-parting is precisely identified by means of geographical features in the following terms: "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". The line then arrives at the surface of the glacier, and it is from this point that the geographical fact actually determined by the contour lines is the "course", i.e., the direction of the path taken by the water-parting between *one point* on the surface of the glacier and another point at the southern end of Marconi Pass. This description fulfils the function of "identifying" the course of the water-parting, for the contour lines, a two-dimensional means of representing the surface relief, constitute a suitable cartographic criterion for this purpose. The Court knew, on the basis of the information available to it (surveying in two over-flights, oblique and vertical photographs, and maps), that the water-parting runs on the surface of the Gorra Blanca (Sur) glacier as far as Marconi Pass. It also knew that the surface of the Gorra Blanca (Sur) glacier and the

surface of Marconi Pass have the shape of an elongated ridge which is gently convex, following a curve of very wide radius. The relief of this ridge can be determined cartographically by means of the contour lines on the map of the Mixed Boundary Commission, and when this has been done the course of the water-parting will have been determined as well, for it necessarily runs along the ridge. The identification of the exact course of the water-parting, defined in the Award in terms of its direction, would have to await the demarcation work which the Award entrusted to the expert.

86. The geographical expert, in accordance with the operative part of the Award, went over the ground and was able to verify that the course produced from the map of the Mixed Boundary Commission is consistent with the physical reality. On 27 January 1995 he surveyed and walked the water-parting in Marconi Pass over a stretch of about four kilometres, as far as the beginning of the southern slopes of Cerro Gorra Blanca. In his report he states:

> Following this survey and even without the results of the topographical measurements, *it is confirmed that the direction of the water-parting is south-south-west as it comes from Gorra Blanca glacier*, as stated in the Award and as had been previously concluded from analysis of the aerial photographs and study of the 1:50,000 map of the Mixed Boundary Commission (underlining in the original; report of the Court's geographical expert on the surveying and topographical demarcation work preceding the erection of the boundary posts on the water-parting between boundary post 62 and Mount Fitzroy identified in paragraph 151 of the Award).

87. The Court must now take up the Chilean assertion quoted earlier to the effect that "it would be completely unacceptable to argue that the Court's expert" is authorized to adjust the line decided on by the Court to the reality on the ground when he carries out the demarcation entrusted to him or when he draws the line on a map, thereby correcting "the discrepancy between the contour lines of the map of the Mixed Boundary Commission and the situation on the ground" (document of 23 June 1995, para. 141).

88. In his task of executing the Award the expert had to comply with what the Court had decided, and the demarcation could not ignore the places expressly mentioned by the Court. However, paragraph 151 of the Award contained some points which required identification on the ground, such as the precise location "of the pass [Portezuelo de la Divisoria] situated between Lakes Redonda and Larga", or the water-parting which links a point on the surface of the Cerro Gorra Blanca glacier with 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". If these identifications had not been necessary, the Award would have been accompanied from the outset by a suitable map. However, the Award entrusted the preparation of this map to the expert when it directed:

> 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 (para. 171 *in fine*).

89. The expert's report and the map have been approved by the Court by a resolution of today's date in the terms stated in the resolution. By virtue of this approval the said map is now the cartographic expression of the Award.

90. Chile had a procedural opportunity to verify and monitor all the activities of the expert on the ground. It preferred to stay away, and it does not now seem appropriate to use the extraordinary recourse of an application for revision to make good Chile's non-participation in the demarcation work.

91. The Court must now emphasize that the 1:50,000 map of the Mixed Boundary Commission has been invoked and used repeatedly by Chile in the present arbitration. Points 16.5, 16.8 and 16.9 of the conclusions of the Chilean memorial, which the Award reproduced in its paragraph 17 and which refer to the boundary line claimed by Chile, state:

> 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.
>
> 16.8. 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 depicted on the transparent sheet which is superimposed on the 1:50,000 map produced by the Mixed Commission.
>
> 16.9. This line has been depicted on a reduction of the said map, which is included in the atlas as No. 31.

These conclusions were confirmed by Chile in its counter-memorial and at the termination of the oral hearings (Award, paras. 18 and 19).

92. In addition, the Chilean memorial referred to the map of the Mixed Boundary Commission in the following terms:

> The positions of the two Parties were given their most recent expression in 1991 in the form of two lines each drawn by one of the Parties on a map which, with the sole exception of some details of minor importance, has been agreed in the Mixed Boundary Commission. This map is included as No. 31 in the Atlas, and a reduced and simplified version of it appears on the opposite page (*figure 1*) (para. 1,13, emphasis in the original).

93. Map No. 31 in the atlas of the Chilean memorial reproduced sheets IV-8 to IV-13 of the 1:50,000 map of the Mixed Boundary Commission. This map is preceded by a sheet containing some technical data and the statement: "There are no differences between Chile and Argentina on the content of these sheets". It is then added that the only disagreement is on the position of Cerro Bonete.

94. The Chilean counter-memorial also used the map which Chile now impugns. Its annex 4 contains three figures (1, 2 and 3), which had been produced on the basis of the 1:50,000 map of the Mixed Boundary Commission, and each one of them states this expressly. It is particularly important to point out that the "block-diagram" representation of the sector of Cerro Gorra Blanca and Marconi Pass (figure 3) depicts the "continental water-parting obtained from the contour lines of the same map", referring precisely to the 1:50,000 map of the Mixed Boundary Commission. As the Court has already noted (see para. 52), this annex 4 enters a reservation "with respect to the possibility and appropriateness of identifying such a [water-] parting on glaciers or under them (4.7); in contrast, however, it makes no reservation whatsoever about the accuracy of the map of the Mixed Boundary Commission.

95. During the arbitration the Court requested from the Parties a 1:50,000 map showing the line claimed by each of them. Chile's agents replied to the Court's request in a note dated Santiago, 14 January 1993, in which they state:

> In connection with another request by the Court, which you have conveyed to us, i.e., for the Court to be provided with a map of the zone on scale 1:50,000 depicting the lines of the two Parties, we are happy to transmit ten copies of the 1:50,000 map prepared by the Chile-Argentina Mixed Boundary Commission. On this map the representatives of Chile and Argentina indicated their preliminary versions of the line at the meeting of the subcommission of members of the Mixed Commission on 22 June 1991 (record No. 135, annex No. 3). These lines, which are the ones which the two Parties advocate in the present arbitration, were drawn by the representatives of Chile and Argentina on transparent sheets which are superimposed on the map sheets. They did likewise with the toponymy of the region. In order to facilitate the use of the map we have transposed both types of information to the map itself. And there is yet other information of a technical nature, also on transparent sheets, but since none of this information amounts to more than details of no great importance for the Court's purpose, it has not been transposed onto the map, although it is being sent separately for the benefit of the expert which the Court may decide to appoint.

96. During the hearings Chile also used the map which it now impugns. In the hearing on 11 April 1994 one of Chile's agents stated:

> . . . the establishment and the work of the Mixed Boundary Commission, in particular its work on the disputed line, were described in appendix B of the Chilean memorial.
>
> To sum up, it was concluded:
>
> . . .
>
> Four: that in 1991 the cartographic work in question had almost reached its final stage, requiring only the agreement of the Parties with respect to the toponymy and the definitive delineation of the frontier, both of which requirements must of course be satisfied before the maps can be officially published by the Mixed Commission, thus fully discharging the mandate contained in the 1941 Protocol (record of the hearing on 11 April 1994, pp. 67-68).

At the same hearing Chile's agent added:

> I respectfully invite the members of the Court to follow the course of this line on the model of the zone which Chile has constructed in strict conformity with the map of the Mixed Boundary Commission (*ibid.*, p. 70).

97. Further, at the hearing on 10 May 1994 one of Chile's lawyers, explaining the figure in which Chile represented the continental water-parting obtained from the contour lines of the map of the Mixed Boundary Commission between Cerro Gorra Blanca and Marconi Pass, stated:

> This is the real line of the continental water-parting in this area drawn topographically on the basis of the contour lines that appear in the agreed mixed boundary commission map (record of the hearing on 10 May 1994, p. 43).

98. The passages cited in the preceding paragraphs show that Chile repeatedly used the 1:50,000 map of the Mixed Boundary Commission in the arbitration and that it never criticized, rather it confirmed, the map's accuracy. A familiar passage from the Judgment of the International Court of Justice in the case of the Temple of Preah Vihear states:

> It is an established rule of law that the plea of error cannot be allowed as an element vitiating consent if the party advancing it contributed by its own conduct to the error, or could have avoided it, or if the circumstances were such as to put that party on notice of a possible error (I.C.J., *Reports 1962*, p. 26).

Chile's conduct with respect to the map of the Mixed Boundary Commission during the arbitration, in the light of the passages reproduced above, precludes it from now alleging that the map contains mistakes which were never alluded to during the proceedings.

99. Chile has put forward some arguments to try to distance itself from its conduct during the arbitration with respect to the 1:50,000 map of the Mixed Boundary Commission. It has stated in this connection that the said map was still not an official document of the Commission. The Court notes here that the relevant point is not whether the map was an official document of the Commission but whether Chile used it without reservation, regardless of its definitive, provisional or official status in the Mixed Boundary Commission.

100. Chile has also stated that it used superimposed transparent sheets and not the map itself to indicate the line which it was claiming as the frontier. This explanation does not have any reasonable foundation, since the lines on these sheets and the map constitute a whole. Without the map the transparent sheets would show lines drawn in a vacuum and devoid of meaning.

101. In its document of 23 June 1995 Chile maintains that it is immaterial that its agents provided the Court with the map of the Mixed Boundary Commission. This document states:

> - The line added by Chile—the only one which it had to justify—did not pass over ground covered by glaciers, so that the problem did not arise as far as Chile was concerned.
>
> - The Chilean memorial (p. 191) describes the map of the Mixed Boundary Commission as a work of indisputable technical quality which is available to the Court "*as the basis for the studies which it may see fit to carry out*". It does not state that the map is sufficient for other more complicated purposes such as determination of water-partings on glaciers (para. 113, italics and underlining in the original).

102. Chile never asserted during the arbitration that the accuracy of the map was confined to the line claimed by Chile, nor did it enter any reservation about its accuracy in the areas covered by glaciers. The map is indivisible, and Chile cannot now claim that the fact of having used it means that it only approved the aspects of interest to Chile and not the others. Moreover, as pointed out above, Chile stated that there were "no differences between Chile and Argentina on the content of these sheets".

VI

103. In its document of 23 June 1995 Chile imputed another error of fact to the Award: that of having decided upon a "single, continuous and uninterrupted water-parting between two *termini*, one which, as such, divides waters at all its points". This error is supposed to arise because the line decided upon by the Court crosses several watercourses and glacier flows.

104. In order to demonstrate the crossing of watercourses Chile appended two maps to its document:

> *Map 3*: Restitution on a scale of 1:10,000 of the 1966 photograms used for the 1989 map of the Mixed Commission. This map, which shows the Cerro Gorra Blanca-Marconi Pass section, depicts the watercourses, gullies or small ravines identified by a detailed study of the contour lines on this scale. It also depicts the frontier line of the 1994 Award, and it will be observed that this line crosses such watercourses no less than 10 times, and that it therefore does not have the character of water-parting. Obviously, a break in the continuity of the frontier is also produced, which prevents it from reaching Marconi Pass.

Map 4: Survey carried out by the Aero-photogrammetric Service of the Chilean Air Force in January 1995 (two copies of the photograms from this survey are transmitted to the Court, one for Argentina and the other for the Court's expert). This survey—for purposes of corroboration—carried out the same operation as the one described with respect to map 3. The results are the same, even though the crossings of the watercourses occur in different places owing to the big changes in the topography of the Gorra Blanca Sur glacier and Marconi Pass between 1966 and 1995 (para. 164).

Chile adds:

This simple operation to demonstrate the discontinuity of the line by means of a technical enlargement of the map of the Mixed Boundary Commission is therefore perfectly legitimate, since, as already pointed out:

—It used the same photograms as the ones on which the said map of the Mixed Boundary Commission is based. In other words, we are talking about the same information as the information on which the map is based, now made more visible by use of a larger scale.

—These photograms were delivered to the Court and were available to the expert, so that he could have used them in the same way as Chile is now doing. What Chile has done is to transfer onto paper information contained on these photograms which, owing to its scale of 1:50,000, the map of the Mixed Commission could not show. In other words, the information has always been available to the Court (para. 165).

105. This ground for revision was raised on 23 June 1995. On that occasion Chile submitted a new application referring specifically to this ground (see paras. 9, 10 and 46). Argentina requested the Court to reject this ground (see para. 13) for the reason, amongst others, that in Argentina's opinion it had been submitted after the expiry of the procedural time limit.

106. Given the manner in which this question is settled in the present Decision, the Court does not think it necessary first to decide whether the ground cited by Chile was submitted after expiry of the time limit. However, it will comment on this ground for revision.

107. (*a*) Firstly, it is necessary to comment on the 1:10,000 maps submitted by Chile. These maps, on a considerably larger scale than the map of the Mixed Boundary Commission or the maps appended to the Chilean document of 31 January 1995, are claimed to offer a more accurate representation of the true topographical situation on the ground. For this purpose the contour lines have been thickened and drawn at intervals of 10 metres. However, in areas of almost flat or slightly inclined glacier topography, such as the topography of the sector of the Gorra Blanca (Sur) glacier and Marconi Pass, the altimetry is established partly on the basis of estimates and extrapolations because of the difficulty, at times the manifest impossibility, of photogrammetric restitution. Such altimetric estimates thus impair the evidentiary rigour and force of maps which are intended to demonstrate considerable changes in the glacier topography by means of a comparison of the contour lines.

108. On the maps submitted by Chile watercourses running on the surface of a glacier are depicted by a solid blue line. The Court's geographical expert has been unable to identify, either from photographic evidence produced by over-flying the zone between Cerro Gorra Blanca and Marconi Pass, or by means of his own surveying of the area, or from the 1975, 1980 and 1984 photograms, or from the 1995 ones (on which map 4 is based), any watercourses or drainage system such as the ones Chile shows on maps 3 and 4.

109. Nor does it seem that Chile has identified on the ground the watercourses indicated on its maps. This is demonstrated by the fact that in its presentation of maps 3 and 4 Chile states "[the maps] depicting the watercourses, gullies or small ravines *identified by a detailed study of the contour lines*" (document of 23 June 1995, para. 164, emphasis added). This latter assertion, moreover, indicates that Chile has used the contour-line method to identify watercourses on the surface of glaciers, which does not fit with its criticism of the Court for having used the same method.

110. The hydrographic systems shown by Chile on its maps 3 and 4 are therefore the result of an estimate based on the contour lines of the 1:10,000 maps, which in turn are also partly based on estimates. Thus, these cartographic materials lack the necessary scientific rigour to sustain the Chilean claim.

111. (*b*) Chile "has depicted the frontier line of the 1994 Award" on "maps 3 and 4", a line which allegedly crosses watercourses and is not consistent with the depictions of the water-parting in the locality submitted to the Court by Chile on the sketches annexed to its document of 31 January 1995. The expert submitted to the Court on 21 February 1995 his report and the map showing the frontier line resulting from his work in the sector, but the Court expressly delayed its approval of these documents (see para. 16), which were not transmitted to the Parties and remained available only to the Court.

112. The Court has made a comparison of the frontier delineated by the geographical expert on his map in the sector between Cerro Gorra Blanca and Marconi Pass with the "Award line" depicted by Chile on the maps annexed to its document of 23 June 1995, and it has verified that the two lines coincide. Furthermore, the Chilean line is interrupted at precisely the same point at which the expert took the first coordinates at the foot of Cerro Gorra Blanca.

113. The Court does not know how Chile came to know the frontier line drawn by the geographical expert on the basis of his field work, especially as Chile did not take part in that work.

114. (*c*) As already stated, Chile submitted maps supposedly showing the river network on the glacier between Cerro Gorra Blanca and Marconi Pass and demonstrating that "the line of the Award" crosses watercourses. The Court carried out a cartographic exercise based on the 1:10,000 maps submitted by Chile. In this exercise it started from the assumption that the river courses depicted on these maps actually exist. On the basis of this assumption the Court delineated the water-parting resulting from acceptance that these maps also reflect the reality on the ground. The result is that the water-parting runs, generally speaking, more to the west than the line decided upon by the Court, i.e., that it is more detrimental to Chile than the line on the map approved by the Court on today's date.

115. The Court could not make a corresponding adjustment to the frontier line because the damage which such a move would inflict on Chile would run up against the prohibition on *reformatio in pejus*, a general principle of law applicable to the revision of an award. Furthermore, the line shown on the map which the Court approves today constitutes the real and effective water-parting and does not cross surface watercourses.

116. (*d*) Nor could the Court, in order to correct this hypothetical error, accept the line proposed by Chile in paragraph 234 of its document of 23 June 1995 (see para. 10), which descends to the valley of Lake Eléctrico and "crosses this valley by a straight line". This proposal, put forward for the first time in the said document, far from correcting the alleged error which Chile finds in the line of the 1994 Award, would make it worse, for the new boundary suggested by Chile crosses, beyond the reach of doubt, river courses of the Eléctrico basin, for which reason, as Chile admits, in this section it "does not constitute a water-parting".

117. (*e*) In its document of 23 June 1995 Chile asserted that the Award contained another error in that the boundary fixed by it crosses glacier flows.

118. Maps 5 and 6 submitted by Chile to show the alleged glacier flows are based on the same topography as maps 3 and 4 discussed above and suffer from the same technical problems. Furthermore, although during the arbitration there was extensive discussion of the possibility of delineating water-partings on the surface of a glacier, the question of the parting of glacier flows or the crossing of such flows was not submitted to this Court for decision. None of the claims of the Parties in the 1994 arbitration was based on a frontier delineated by following the line of the *divortium glaciarum* but only the line of the *divortium aquarum*, and these two concepts are not necessarily the same. The point was raised only in passing and was not used as an argument in support of the claims of the Parties during the proceedings. In any event, the Court took its decision on the basis of the concept of water-parting and not glacier-parting.

VII

119. In paragraph 23 of its document of 31 January 1995 Chile states that "the line identified by the Court's expert, as it crosses a marshy area known as "Portezuelo de la Divisoria", is affected by an error of fact". Chile adds that in the season of rains or thaw flooding occurs in the marshes and "the water-parting is hidden beneath the water" (*sic*). In this topography the water-parting "changes its course easily and suddenly". This alleged error is not cited in the second Chilean submission.

120. With regard to the alleged easy and sudden shift of the water-parting's direction and on the assumption that this assertion is well-founded, the Court refers to what is stated in section V of this Decision concerning the movement of geographical features which define frontiers. The members of the Court visited the Portezuelo de la Divisoria, situated between Lakes Larga and Redonda, toured the area and reconnoitred it from the air by helicopter. Its decision was taken in full knowledge of the reality on the ground. There is therefore no error of fact "resulting from the hearings or documentation in the case".

121. The geographical expert carried out very detailed work in the Portezuelo de la Divisoria, as is clear from the report submitted to the Court. In particular, in annex VII of this report the expert indicates his determination

of the 700-metre contour line and the ground levels in the Portezuelo. In the figure "LEVELS OF THE PORTEZUELO DE LA DIVISORIA" the expert has determined accurately the high point of the Portezuelo on its north-south axis and the way in which, from this point, the slope descends in both directions, with a gradient of 4 in 100 for the first 500 metres southwards in the direction of Lake Larga and 3 in 100 for the same distance northwards in the direction of Lake Redonda. Chile had a procedural opportunity to verify all this work and, if it did not do so, it was because it decided not to attend, and it cannot now make good this omission by submitting a request for revision.

122. In paragraph 25 of its document of 31 January 1995 Chile states that paragraph 160 of the Award of 21 October 1994 makes another mistake when it says that the established frontier "is in accordance with the Award map". This argument is further developed in the document of 23 June 1995, beginning from paragraph 205.

123. The allegedly erroneous text of the Award reads:

> 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.

124. The conclusion reached by this Court in the passage reproduced above is an interpretation of the solid and pecked lines shown on the 1902 Award map, in accordance with the interpretation of such lines made in the 1966 Award. The 1994 Award stated that the established frontier is in accordance with the 1902 Award map, as the Court interpreted this latter instrument with respect to the significance of its pecked line as evidence of what it had already decided. This is an interpretation by the present Court which, as such, cannot be described as an error of fact and therefore does not constitute one of the grounds for revision specified in chapter II, article 40, of annex No. 1 of the 1984 Treaty.

125. A further alleged error, also connected with the line depicted on the map of the 1902 Award and cited by Chile in its document of 31 January 1995, is that

> . . . the Court's expert has not taken into account the fact that, according to the map of the 1902 Award, from Cerro Gorra Blanca the Arbitrator's line follows a path as far as Mount Fitzroy which consists of a line running along the ranges of Cerros Neumayer, Pollone and Pier Giorgio (para. 24).

126. The Court observes that the ranges mentioned by Chile are not identified on the Award map. The error which Chile has alleged in this connection is itself a specific manifestation of Chile's criticism of the interpretation of the legal

value of the pecked line on the map of the 1902 Award, as recorded in paragraph 124. The Court relies on what is stated there in order to conclude that this is not a question of fact but of law and it is not therefore susceptible of revision.

VIII

127. On the basis of the foregoing arguments the Court concludes that the errors of fact which Chile has alleged do not constitute grounds for revision of the Award of 21 October 1994.

IX

128. In view of the Court's conclusion concerning Chile's request for revision of the Award, it is now necessary to examine the request for a subsidiary interpretation submitted by that country.

129. Chile refers in this connection to article 39 of chapter II of annex No. 1 of the Treaty of Peace and Friendship of 1984, which reads:

> Unless the Parties have agreed otherwise, the disagreements which may arise between the Parties about the interpretation or the manner of execution of the arbitral decision may be brought by any Party before the Tribunal which rendered the decision.

This provision is applicable to the present arbitration by virtue of the provisions of article XVIII of the Arbitral *Compromis* of 31 October 1991.

130. The interpretation of a decision is a legal exercise, on whose meaning and scope the Court ruled in its Award of 21 October 1994 (paras. 71-76).

131. Article 39 of chapter II of annex No. 1 of the Treaty of Peace and Friendship states that "the *disagreements which may arise between the Parties*. . . may be brought by any Party before the Tribunal which rendered the decision. . ." (emphasis added). Similarly, rule 32 of the rules of procedure states that "*in the event of disagreement*. . . either Party or both may submit a request to the Court. . ." (emphasis added).

132. The international legal precedents also require a disagreement between the Parties in order for a request for interpretation of a decision to be admissible. For example, the Permanent Court of International Justice, in the interpretation of its Judgments No. 7 and 8, stated:

> In order that a difference of opinion should become the subject of a request for an interpretation under article 60 of the Statute, there must therefore exist a difference of opinion between the Parties as to those points in the judgment in question which have been decided with binding force (P.C.I.J., *Collection of Judgments*, Series A, No. 13, p. 11).

In turn, the International Court of Justice, in its Judgment on the interpretation of its decision on the right of asylum, stated:

> Article 60 of the Statute provides, moreover, that interpretation may be asked only if there is a "dispute as to the meaning or scope of the judgment". Obviously, one cannot treat as a dispute, in the sense of that provision, the mere fact that one Party finds the judgment obscure when the other considers it to be perfectly clear. A dispute requires a divergence of views between the parties on definite points. . .(I.C.J., *Reports, 1950*, p. 403).

The legal precedents have also established that it is sufficient for the two parties to have expressed themselves differently concerning the meaning and scope of the judgement, but it is not required, however, that the difference should be openly expressed in a specific manner (P.C.I.J., *Collection of Judgments*, Series A, No. 13, pp. 10-11; I.C.J., *Reports 1985*, p. 218).

133. The question raised must moreover be susceptible of resolution by means of interpretation. In its 1994 Award (para. 75) this Court states that interpretation is "a legal operation designed to determine the precise meaning of a rule, but it cannot change its meaning". The Court cited a passage from the arbitral decision of 14 March 1978 concerning the delimitation of the continental shelf between Great Britain and France which may usefully be repeated here:

> . . . 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, pp. 295-296).

134. There are several precedents in the international case law concerning interpretation of treaties in which the court has declared that it is called upon to interpret the treaty and not to revise it (I.C.J., *Reports 1950*, p. 229; *Reports 1952*, p. 196; *Reports 1966*, p. 48; Arbitral Award of 31 July 1898, *Revue Générale de Droit International Publique*, 1990, p. 270). Following these precedents this Court can declare that, in connection with the request for "a subsidiary interpretation" submitted by Chile, it may interpret its Award but may not change it.

135. Furthermore, the legal precedents teach that the interpretation of an award cannot exceed the limits of the award. The Permanent Court of International Justice, in the case of the interpretation of its judgment of 20 November 1950, stated:

> . . . an interpretation—given in accordance with article 60 of the Statute—of the Judgement of 12 September 1924, cannot go beyond the limits of that judgment itself. . .(P.C.I.J., *Collection of Judgments*, series A, No. 4, p. 7).

Similarly, the International Court of Justice, in the interpretation of its Judgment of 20 November 1950, stated:

> The interpretation can in no way go beyond the limits of the Judgment, fixed in advance by the Parties themselves in their submissions (I.C.J., *Reports 1950*, p. 403).

136. The International Court of Justice has summarised the conditions for the admissibility of a request for interpretation in the following manner:

> It is however a condition of admissibility of a request for interpretation . . . not only that there be a dispute between the parties as to the meaning or scope of the judgment, but also that the real purpose of the request be to obtain an interpretation—a clarification of that meaning and scope . . . So far as the . . . request for interpretation may go further, and seek "to obtain an answer to questions not so decided", or to achieve a revision for the Judgment, no effect can be given to it (I.C.J., *Reports 1985*, p. 223).

137. The interpretation must be requested with respect to a specific term or paragraph and cannot be requested with respect to the decision in general. The International Court of Justice, in a passage quoted earlier, speaks of "di-

vergence of views between the parties *on definite points*" (I.C.J., *Reports 1950*, p. 403, emphasis added). This requirement is confirmed by the relevant legal precedents. The Court would cite, by way of example, the decision of 26 February 1870 of the Peru–United States Mixed Commission (Moore, *History and Digest of International Arbitrations to which the United States has been a Party*, Washington, 1898, vol. II, pp. 1630 *et seq.* and 1649); and the decisions of the Inter-American Court of Human Rights of 17 August 1990, which interpret a specific term in the awards pronounced in the Velásquez Rodríguez and Godínez Cruz cases (Inter-American Court of Human Rights, Series C, No. 9, para. 31; Series C, No. 10, para. 31).

X

138. Chile acknowledged that, at the time of submission of its request, there was no disagreement between the Parties concerning the interpretation of the Award of 21 October 1994. However, it stated that disagreement "might well arise in connection with the notification by the Court of the request made by one of the Parties for interpretation of the Award with a view to its prompt and proper execution". Chile added that "the application for a subsidiary interpretation has been made in the terms described, requesting that it should be notified to the other Party in order that it may state whether it agrees with the interpretations indicated by Chile earlier in this document" (para. 34).

139. Despite Chile's request, Argentina did not indicate either agreement or disagreement with Chile's interpretation but limited itself to stating that there had been no disagreement on the topic in question. The Argentine reply stated that it was contrary to article 39 of annex No. 1 of the 1984 Treaty to submit a request for interpretation in order that a disagreement should arise subsequently (document of 24 May 1995, "Interpretation and manner of execution", para. 18).

140. From the documents submitted by the Parties it is concluded that there is no current dispute between them concerning the interpretation of the Award of 21 October 1994.

141. Chile submitted its "recourse" for a hearing "concerning interpretation and manner of execution" of the Award (see, for example, the title of the document of 31 January 1995 and pp. 1, 29 and 31). In fact, in paragraphs 30 and 31 of this document Chile states that the request is submitted in order that the "Demarcator" may know what guidelines he is to follow in the performance of his task. In this connection the Court points out that, at the appropriate time, it gave the geographical expert all the necessary instructions to ensure that the course of the frontier line indicated in its Award was consistent with the precise meaning of the Award. Having verified that the expert duly complied with these instructions, the Court has approved by a resolution of today's date, in the terms stated in that resolution, its report and the map produced in compliance with paragraph 171-II of the Award of 21 October 1994.

142. Nevertheless, the Court wishes to refer to Chile's three pleas reproduced above (para. 8).

143. In the first plea Chile requests the Court to interpret its Award to mean that the "Demarcator" should determine on the ground itself the true location of the local water-parting and, in cases where this is not possible, to draw a straight line instead of the water-parting.

144. The expert's report shows that there were no places where it was impossible to identify the local water-parting. On the other hand, to accept the request that a straight line should be drawn instead of the water-parting would constitute an actual modification of the Award which would go much further than a mere interpretation.

145. Chile's second plea seeks to secure interpretation of the Award and its manner of execution to mean that the expert "shall identify the course of the Arbitrator's line on the ground itself in such a way that it separates waters at all its points". The expert, on the Court's instructions, has already identified the line of the *divortium aquarum* decided upon in the Award which, as such, separates waters at all its points.

146. Chile's third plea states that "in the event that it decides that the expert shall identify on the ground itself the "natural feature" which constitutes the frontier", the Court will have to how this is compatible with its own duty to decide upon the frontier line between boundary post 62 and Mount Fitzroy. This plea is a repetition of what Chile says in its statement of the the grounds for revision with respect to the functions and work of the expert, to which the Court has given a due reply (see paras. 39, 40 and 87 *et seq.*).

147. Having stated these considerations, the Court's conclusion is that the request submitted by Chile for a subsidiary interpretation of the 1994 Award is denied.

XI

148. The Court cannot fail to offer comments on what is stated by Chile in the third part of its document of 23 June 1995 as "general conclusions" thereof.

149. Chile concludes that the four alleged errors cited in this document create a situation of "practical impossibility of executing the Arbitral Award, a notion fully accepted in international law" (para. 224). It adds:

> It is for this reason that Chile alerts the Court of Arbitration to the implications for the Arbitral Award, in terms of the impossibility of its execution, in particular of ordering the drawing of a line which must seek water-partings on the surface of the ice, and in general of prescribing an impracticable method of delimitation. There thus exists a seed of discord concerning execution of the Award. In acting on these bases, *a priori*, Chile relies on a principle of legal practice according to which it is preferable to resolve a dispute in its earliest manifestations (para. 231, underlining in the original).
>
> Chile requests the Court to correct such errors in order to produce an Award which can be executed and which will bring the present dispute to a final conclusion. Accordingly, Chile suggests to the Court, below, a formula which will avoid drawing the frontier line across the Gorra Blanca-Marconi Pass zone of glaciers, which would have the effect of avoiding *the impossibility of execution* of the Award which is the subject of this application (para. 232, underlining in the original).

150. Chile then puts forward a new plea (see para. 10) designed to provide a remedy for the alleged practical impossibility of executing the Award of 21 October 1994 by establishing a boundary line as a straight line crossing the valley of Lake Eléctrico and containing a section in which the boundary, in Chile's own words "does not constitute a water-parting".

151. The Court rejects these arguments. Its Award does not contain any of the alleged errors of fact cited by Chile. Therefore, such errors cannot be adduced to assert that it may be impossible to execute the Award of 21 October 1994. According to article XV of the 1991 *Compromis*, the Parties placed the execution of the Award in the hands of the Court, so that it cannot be asserted that there is "a seed of discord concerning [its] execution". It is perfectly possible to execute the Award since there are no places where it has proved impossible to identify the local water-parting which constitutes the frontier decided upon by the Award.

152. The Court has already explained that it could not accept the new plea contained in paragraph 234 of the Chilean document of 23 June 1995 (see para. 116). Furthermore, to propose to the Court, as an alternative, a line which crosses a valley and surface watercourses means, no more and no less, requesting it not only to amend but also to scorn its own Award, which is based on the interpretation of the concept of water-parting and the term "local water-parting" used in the 1902 Award in their normal meaning of lines which may never cross drainage flows. Faithful to its function and its duty, the Court will not draw lines crossing surface watercourses.

153. With regard to Chile's warnings or insinuations, the Court will cite the following statements by Chile in its submission of 31 January 1995:

> . . . the authorities of both Parties have declared, both before and after the 1994 Arbitral Award, that whatever the arbitral decision it should be respected. After the pronouncement of the Award it was further stated that this did not constitute an obstacle to the legitimate exercise of the means of recourse provided by the 1984 Treaty of Peace and Friendship. In annex No. 2 of this submission will be found copies of some of these statements. . . finally, it is against this background that Chile has stated, faithful to its tradition of respect for commitments, treaties and arbitral awards, that it will comply with the 1994 Award, without prejudice to its legitimate and unrenounceable right to use all the means of recourse provided by the 1984 Treaty of Peace and Friendship (para. 36).

XII

154. The Court has carefully examined Chile's submissions in this matter. It has ignored the views stated by Chile's agents concerning its members' knowledge of law and logic and the allegations of the "absurdity" of the Award or the serious violations of the law of nations which it has committed. But what Chile's agents cannot truthfully assert is that "the 1994 Award, rather than interpreting and applying what was done or decided in the 1902 Award and thus dispensing justice, seems to have been concerned principally with disqualifying the Chilean claim" (para. 11 of the document of 31 January 1995). All the members of the Court are certain that they have reached their decision by applying international law with strict impartiality. They do not seek praise

and they are not intimidated by defamation. They have all acted in accordance with their professional knowledge and their conscience, knowing that one day they will have to account for their actions to an inexorable Judge. Therefore, every one of the judges may quote to anyone analysing the Award the thought of Pascal:

> ... sachez qu'il est fait par un homme qui s'est mis à genoux auparavant et après, pour prier cet Etre infini et sans parties, auquel il soumet tout le sien (*Pensées*, Brunswick edition, p. 233).

XIII

155. For the reasons stated,

THE COURT

resolves:

I. By four votes to one:

To reject the request for revision submitted by the Republic of Chile with respect to the Award of 21 October 1994.

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

II. Unanimously:

To reject the request for a subsidiary interpretation submitted by the Republic of Chile with respect to the Award of 21 October 1994.

Done and signed in Rio de Janiero, today 13 October 1995, in Spanish in three identical copies, 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 appends his individual opinion.
Mr. Benadava appends his dissenting opinion.

INDIVIDUAL OPINION OF JUDGE REYNALDO GALINDO POHL

I. *General comments*

At the start of this consideration of the request for revision submitted by Chile with respect to the Award of 21 October 1994, it is first necessary to refer to my opinion dissenting from this Award. The present request is of fairly limited scope and does not therefore allow examination of the whole of the instrument in question. The request does not constitute an appeal, expressly prohibited by agreement between the Parties (article XVII of the *Compromis* of 31 October 1991) but it seeks an assessment of the extent to which the

Award is affected, wholly or partly, by an error of fact resulting from the hearings or documentation in the case (art. 40 of the Treaty of Peace and Friendship of 29 November 1984).

In these explanations I am refering to an objective and very specific situation constituted by the 1994 Award and the questioning of its content as to possible errors of fact, within the limits previously agreed by the Parties.

I agree with some parts of the Decision on revision and interpretation, without prejudice to the reservations and even the outright disagreement prompted by other parts. The points of greatest divergence include the passages on the consideration of the facts subsequent to the 1902 Award and in particular the analysis of the maps submitted during the arbitral proceedings. I also make a reservation with respect to the opinions stated with regard to water-parting, continental water-parting and local water-parting, and the use of these concepts.

On each of the points submitted to the Court for consideration I offer my own opinions, which to some extent distance me implicitly from some of the explanations and grounds included in the Decision on the applications for revision and for a subsidiary interpretation.

The application for revision on the ground of error of fact allows the examination of only two specific points, to be assessed in terms of their effect on the operative part of the Award. The application is not an appeal, which is expressly prohibited by agreement between the Parties.

II. *The admissibility of the application*

The Decision does not pronounce expressly on the admissibility of the application for revision of the 1994 Award.

From the procedural standpoint it would have been preferable, before entering into the substance, to admit or reject the application, preferably by means of a separate resolution. The resolution which the Court adopted on 22 February 1995 states: "Without implying a ruling by the Court on the admissibility of the Chilean document, to instruct the Secretary to transmit to the agents of the Argentine Republic . . .". This language does not rule out the need for a decision on admissibility: it is kept in mind and implicitly deferred until after the Parties have submitted their arguments. Thus, the question of admissibility was left for subsequent resolution.

It is not sufficient merely to give the reader to understand that the application has been admitted by virtue of the fact that the Decision pronounces on the substance. Sometimes the form supports the substance and invests it with its whole meaning.

III. *Dismissal of the errors of law*

There is no need to examine in detail the errors of law which the first Chilean submission attributes to the 1994 Award, for they are excluded *ipso jure* from the present revision, the frame of reference of which is fairly re-

stricted. It would thus be pointless to examine, for the purposes of revision, each of the errors which the applicant Party recognizes to be errors of law (Chilean "Presentation", para. 11).

IV. *The local water-parting*

1. *Chile's plea with respect to the local water-parting*

In its first document Chile submitted a list of errors of fact, including an error of fact relating to the local water-parting. It mentioned "a supposed local water-parting which is in reality a combination of three water-partings of different kinds: 12 km. of Pacific local water-parting, 50 kilometres of continental water-parting and 17 km. of Atlantic local water-parting". ("Presentation", para. 12, p. 11)

"By not applying correctly the concept of local water-parting in accordance with the 1902 Award, [the Court] was forced to decide with respect to one stretch that the line defined by the 1902 Arbitrator as following a local water-parting should follow the continental water-parting instead, which the 1902 Arbitrator clearly disregarded until after the boundary reached Mount Fitzroy". ("Presentation", para. 20, p. 21)

Chile continued: "The Court committed an error of fact by not taking the position that in all the cases in which the 1902 Award defined its line by using the concept of local water-parting . . . such line is a water-parting which separates waters running to one single ocean: the Pacific" ("Presentation", para. 21, p. 22)

In its second document Chile does not attribute an error of fact to the use of the concepts denoting water-partings. This document states: "The first condition contained in article 40 is that there should be an error of fact. The Court has decided *in law* that the frontier between boundary post 62 and Mount Fitzroy should follow the water-parting as the said Court interprets this notion. This decision *in law* is not questioned by the application for revision submitted by Chile". ("Replication", para. 65, p. 29)

Immediately following this submission it adds: "The Court has decided *in law* that the water-parting, as the Court conceives it, is a fact of nature . . .". "This is the identification which the Court requested its expert to make and which the Court endorsed in paragraphs 5 and 7. This decision *in law* is not questioned by the Chilean application either" ("Replication", para. 66, pp. 29-30)

"What Chile is questioning in its application for revision is, amongst other things, the *factual* accuracy of the identification made by the expert and endorsed by the Court." "The statement *of fact* implied by this "identification" is factually inaccurate in the section between the Gorra Blanca glacier and Marconi Pass . . .". "It is *factually* false: therefore, this passage of the Award contains a flagrant, evident and manifest error *of fact* ("Replication", para. 67, p. 30).

"It is deduced from the documents and hearings in the case that, between Gorra Blanca and Marconi Pass, the water-parting (in the same sense in which the Court interprets this notion *in law*) is not found *in fact* at the place where the Court, following its expert, places it, and thus it cannot be regarded as the same as the one which existed in 1902. What Chile is requesting is correction of this error, i.e., this discrepancy between what the Court asserts to exist and what exists in the actual geographical situation" ("Replication", para. 67, pp. 30-31).

These statements show that Chile is not objecting, on the basis of the concept of local water-parting, to the line drawn by the Court between boundary post 62 and Mount Fitzroy. On this point the Chilean statement begins by stating that "the first condition contained in article 40 is that there should be an error of fact". It immediately mentions "the water-parting, as the Court interprets this notion" and adds that "this decision *in law* is not questioned by the application for revision submitted by Chile" ("Replication", para. 65, p. 29).

Thus, in the same paragraph this submission points out that the revision concerns only the error of fact and it goes on to state that the frontier should follow the water-parting "as the Court interprets this notion". Attention is drawn to the distinction between the error of fact which is a ground for revision and the "decision in law" and the "interpretation in law" adopted in the domain of law and therefore beyond the scope of article 40.

Furthermore, the Chilean submission states that "the Court has decided *in law* that the water-parting, as the Court conceives it, is a fact of nature". And it adds: "This decision *in law* is not questioned by the Chilean application either" (para. 66, p. 29).

The submission then rounds off the Chilean position: "What Chile is questioning in its application for revision is, amongst other things, the *factual* accuracy of the identification made by the expert and endorsed by the Court" (para. 67, p. 30). Thus, it is clearly stated that Chile is not impugning the application of the concept of water-parting as an error of fact, because it states that the line adopted was the result of a "decision in law". It is impugning the accuracy, in terms of the facts, of the identification of the line made by the expert and adopted by the Court.

Chile requests correction of this error, i.e., of the apparent discrepancy between what the Court states and what actually exists in the geographical situation. It is thus objecting to the lack of consistency between the expert's line and the geographical reality.

Chile states that the boundary line in the disputed sector has been adopted in law, within the domain of law. The questions of the local water-parting and the line adopted by the Award thus pass from the domain of facts, where they were located according to the first submission, to the domain of law. The case is reduced to the circumstance that the line decided upon between Cerro Gorra Blanca and Marconi Pass is not in fact to be found where the Court places it ("Replication", para. 67, pp. 30-31).

In corroboration of this understanding, in the section entitled "Chile's pleas" ("Replication", pp. 103-105) nothing is said either about the local water-parting or about the line decided upon by the Court on the basis of that concept. Nor is this topic referred to again in other parts of the second submission. Accordingly, the error of fact relating to the concept of local water-parting which Chile cited in its first submission has been left out of consideration. The Parties in a case are masters of their pleas and may therefore modify or discard them.

V. *Identification of the 1902 line with the present line*

1. *The point at issue*

"The Court maintains that its line and the line of the 1902 Arbitrator are the same." "The land remains unchanged, and therefore 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" (see para. 71).

2. *Chile's reasons*

". . . in reality, the land does not remain unchanged because. . .the glaciers of Cerro Gorra Blanca and Marconi Pass are—and always have been—in constant motion ("Replication", para. 107, p. 49).

"Given these circumstances the Court has made an *error of fact*, because it is obvious that between Cerro Gorra Blanca and Marconi Pass the present water-parting—attaching to this notion the same interpretation which, in law, the Court attaches to it—is not *in fact* that same 1902 water-parting". Then Chile states that the use of the map of the Mixed Boundary Commission contributes to this error ("Replication", paras. 108-113, pp. 50-53).

Chile applies the error to the whole of the Award line, although it emphasizes the glacier zones. "The Court based its decision on its understanding that the 1902 local water-parting and the water-parting now identified by the expert are the same. The Court stated: "[It] is the same as the one which can be traced [today] . . .". So much so that the Court concludes that "the line described in paragraph 151 is consistent with what is prescribed in the three instruments which make up the 1902 Award" and that the Award "does not revise but rather faithfully carries out the provisions of the 1902 Award" ("Replication", para. 123, p.55).

Hence the following conclusion: "Given the circumstances the Award is the result of the error of fact of accepting that the local water-parting between boundary post 62 and Mount Fitzroy is currently the same as the 1902 water-parting, which, in the light of the examination of the facts, is incorrect" ("Replication", para. 134, p. 55).

3. *The map of the Mixed Boundary Commission*

In this and in other respects the map of the Mixed Boundary Commission plays a leading role. "At the end of 1992 the Court expressed the wish for both Parties to produce and submit to it a 1:50,000 map depicting the lines claimed in the case". "On 14 January 1993 Chile submitted the map of the Mixed Boundary Commission . . ." ("Replication", paras. 111 and 112, pp. 50-51)

Chile then points out that in its memorial (p. 191) it describes the map of the Mixed Boundary Commission as a work of indisputable technical quality which is available to the Court "*as the basis for the studies* which it may see fit to carry out". "It does not state that the map is sufficient for other more complicated purposes such as determination of water-partings on glaciers" ("Replication", para. 113, 5, p. 52).

The form in which this map was presented—"as the basis for the studies which it may see fit to carry out"—prompted the Court to use it for the studies which it thought appropriate and of course, in the absence of any objection or reservation, for the depiction of the line representing its decision.

Furthermore, Chile used the Mixed Commission's map on several occasions and even drew attention to it in the oral hearings as the authentic expression of the cartography of the zone in dispute. Thus, it would be wrong to make changes to this map on the basis of earlier or subsequent maps. The Court needed a reliable map which was accepted by the Parties. Only the Mixed Commission's map met and meets these requirements.

4. *The movement of the glaciers*

Another argument concerns the movement of the glaciers. "As can be seen, it is demonstrated that the surface of the glaciers in the zone is undergoing constant and considerable change. With all the more reason it should be concluded that the alteration of the glacier relief between 1902 and the present has been very considerable, rendering the physical identification of the expert's line with the line of the 1902 British Arbitrator impossible" ("Replication", para. 84, p. 38).

The movement of the glaciers is a fact. It is not known exactly what the glaciers were like over 90 years ago, nor can any conclusion be reached about the exact degree of their alteration, but since it has been verified that they are moving, it must be assumed that they have changed since 1902.

Since in 1902 the geography of the zone was not known with any accuracy, there is no way of establishing that the 1994 line is the same as the 1902 line. There can be no certainty that the assertion that the current well-known line is the same as the 1902 line is correct to some undefined extent, so that this assertion is now a matter for an interpretation by the present Court. If two things are to be declared identical, they must both be known in all their details.

Given this margin of uncertainty, such an assertion could be regarded as an unverifiable assumption. If it was treated as an error of fact, its vital role in the operative part of the Award would not attract attention. It could be understood as an item of supporting evidence which would not play a decisive role in the delineation of the frontier because it does not have a direct effect on the decision.

5. *The present frontier considered to be the same as the 1902 frontier*

On this subject too the statement in the Award (para. 158) that "the boundary line decided upon is the same as the one which has always existed between the two States Parties to the present arbitration" has also been described as an error ("Presentation", paras. 7 and 8, pp. 18 and 20).

The Court states that "its decision is declaratory of the content and meaning of the 1902 Award which, in turn, was also declaratory of the 1881 Boundary Treaty and the 1893 Protocol. Accordingly, the Award of this Court, by its very nature, has *ex tunc* effects and the frontier line decided upon is the one which has always existed between the two States Parties to the present arbitration" (Award, para. 158).

We are dealing here with a legal principle which provides that the interpretation is held to be incorporated in the principal rule. In this case the interpretative decision contained in the Award is understood to be incorporated in the 1902 arbitral rule, and hence it may be said that the precise identification of the frontier which is now made has been a subject of agreement between the two States since 1902. A general principle of law is thus applied to the temporal effects of the interpretation.

VI. *Identification of the Award line with the current geographical situation*

1. *Description of the case*

"The Court made a second error of fact by concluding that the line identified by its expert and described in paragraph 151 of the 1994 Award is consistent with the current geographical situation. That is not the case, at least for the section in which the line runs on and across glaciers" ("Replication", para. 127, p. 57).

The Court's expert identified the water-parting in the sector in question as a water-parting which from Cerro Gorra Blanca ". . . 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" ("Replication", para. 128, p. 57).

The reason for this statement is that "instead of making a direct geographical identification susceptible of being compared with the actual situation, a description is given of the local water-parting in the sector, stating that it is the one "determined by the contour lines of the 1:50,000 map of the Argentina-Chile Mixed Boundary Commission" ("Replication", para. 132, pp. 58-59).

Another reason is that "the failure in paragraph 151 of the 1994 Award to specify the hydrographic basins which this line separates is a strong indication of the problems of delineating the frontier by following a water-parting in the glacier-covered zone" ("Replication", para. 133, p. 59).

The argument next states that the available cartographic materials "show the variations which have occurred over a short time in the contour lines in the area of the Cerro Gorra Blanca and Marconi Pass glaciers" and that in these circumstances "the application of the 1902 Award which the Court envisages effecting in accordance with the *real and current geography of the sector*, is rendered an impossibility by this error of fact" ("Replication", paras. 136 and 137, p. 60).

The Chilean document concludes that "of course, the water-parting identified with the frontier must be consistent with *the geographical reality* on the ground and not with the situation as represented on an obsolete map: a situation which existed in 1966 but exists no more" ("Replication", para. 140, p. 61).

2. *Comment*

The line identified by the Court's expert on the basis of the map of the Mixed Boundary Commission is consistent with the geographical situation described by the Parties during the arbitration proceedings. The expert went into the field to establish the Award line on the ground and he submitted his report to the Court.

Of course, variations could have occurred owing to natural changes in the period between production of that map and execution of the Award. The Court has not ordered any corrective measures and, moreover, the restricted framework within which the present application is being heard precludes the use of documents other than the documents in the case.

If such variations were found, we would not be dealing, properly speaking, with an error of fact in the indication of the line but with problems of execution.

VI. *The Court's line as a single, continuous and uninterrupted water-parting*

1. *Framing of the question*

"The Court made a third error of fact by considering that the water-parting identified by its expert and which corresponds to the line of the frontier decided upon by the Award, is a single, continuous and uninterrupted water-parting between two *termini* and, as such, *divides waters at all its points*. According to the true geographical situation that is not the case, at least in the part between Cerro Gorra Blanca and Cerro Marconi Norte" ("Replication", para. 156, p. 68).

The reason for submitting this ground is stated as follows: "The reality of the facts indicates: "first, that the topographic line cannot link Cerro Gorra Blanca to Marconi Pass and Cerro Marconi Norte since it follows a path, determined by the contour lines of the map of the Chile-Argentina Mixed Boundary Commission, which crosses temporary or interrupted watercourses, so that it does not have the character of water-parting"; and "second, this line also crosses glacier flows, with the same result" ("Replication", para. 157, pp. 68-69).

"These circumstances stem from the incompleteness of the information on the 1:50,000 map of the Mixed Boundary Commission used by the Court's expert to identify the frontier line in the part between Cerro Gorra Blanca and Marconi Pass" ("Replication", para. 138, p. 69).

The line "does not have the property attributed to it by the Court of separating waters at all its points" because it is interrupted and because it crosses glacier flows ("Replication", paras. 161 and 169, pp. 70 and 73).

2. *The 1966 photograms and the 1995 aero-photogrammetric survey*

In order to demonstrate this point Chile refers to the "1966 photograms used on the 1989 map of the Mixed Commission" and to an aero-photogrammetric survey carried out in January 1995. The photograms were used for the Mixed Commission's map. The 1995 survey is subsequent to the Award and is not a document in the case. The fact is that the adopted line, which is identified by a small number of reference points, could be delineated by following a genuine water-parting, in the opinion of the expert.

A *divortium glaciarum* has its own peculiar features, and of course it is not easy to delineate a water-parting on ice-covered ground. The technical opinion thinks it possible to do so, provided that the water-parting follows the slopes of the ground at any given moment. It must be pointed out that the task is to identify the water-parting on glaciers and that this line may differ from the line of the *divortium glaciarum*.

3. *The stability of frontiers*

Once a frontier line has been identified in accordance with the situation on the ground at the time of the actual demarcation, it must remain even if the ice moves. A line adopted by treaty or by award is by definition stable, unless it is expressly agreed or decided otherwise.

All natural features can change, but this possibility does not render them unsuitable as boundaries. All geographical features serving as frontiers, including rivers and mountains, are subject to change caused by natural forces. When such changes occur, unless an exception to the rule has been made, the frontier remains in its original position.

The frontier is marked at a given moment, without prejudice to any prior or subsequent natural changes, and from that moment it remains, regardless of any changes in the geographical features in question. Otherwise the result would

be moveable frontiers—a source of new disputes. When nature alters the geographical features adopted as a boundary, the principle of the stability of frontiers, adapted to the circumstances of each case, protects the earlier agreements or awards.

VIII. *The Court's line according to the line of the Arbitrator's map*

1. *Framing of the question*

"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. . .and also satisfies the requirement stated in the Tribunal's report." "Furthermore, this line is consistent with the Award map." (1994 Award, para. 160, pp. 107-108)

Chile comments on this argument: "A comparison of the line of the 1994 Award with the line on the map of the 1902 Award shows that, except for the short section in which there was no disagreement between the Parties, the two lines differed substantially". ("Replication", para. 209, p. 90)

Chile points out that the Award recognizes that the 1902 line indicates a direction. The Award says that "the line indicates only a 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" (para. 160). Chile continues: "In fact, the "direction" not only indicates the terminal point of the line but also its course or path, with respect to which, quite clearly, the frontier decided upon in the 1994 Award is not in conformity with the Award map" ("Replication", para. 213, p. 90).

2. *Considerations concerning this point*

The pecked line on the Award map, in addition to identifying the terminal points, indicates the more or less direct path between these points. Mere observation shows that this path is very far from the Court's line. In fact, while the pecked line on the Arbitrator's map runs in a slight curve towards Cerro Gorra Blanca, following a south-west direction, the Court's line runs west, then north, west again, and finally south, until it reaches Cerro Gorra Blanca.

The language of the 1994 Award gives the idea of a degree of identification when it states that the line decided upon "coincides" with the line of the 1902 Award. "Coincides" means that one thing agrees or is consistent with another. According to the descriptions given above, these lines are not consistent with each other.

The Award also indicates that there is "agreement" between the two lines. This term is very broad and can refer both to coincidence and to a conceptual agreement or even an agreement on justification. The agreement between the two lines is very debatable, from whatever standpoint it is considered.

In fact, the underlying justifications of the two lines are different, for while the Award takes the position that the "direction" of the line on the Arbitrator's map indicates only two terminal points, it is possible to take the position that the 1902 Award indicated on its map both the terminal points and the path along which the compromise line was to be drawn. The Arbitrator indicated the terminal points and also marked on his map the approximate position which the adopted line should occupy, i.e., the space through which it should run.

The 1966 Award, the relevant passage of which is reproduced in the 1994 Award (para. 134), says that a pecked line is the normal indication for a feature which is known to exist, but whose position has not been accurately located. Thus, it speaks of position. Position is location or situation. The English word "position" used in the 1966 Award is more expressive or explanatory that the corresponding Spanish word, for it means "the way in which something is placed in relation with its surroundings". The 1966 Award ruled on the interpretation of the same Award which has today been the subject of another interpretation.

Furthermore, if the 1902 Arbitrator adopted only the local water-parting, he thereby set aside the continental water-parting, which according to the geographical knowledge of the time ran much further to the east, over a relatively low mountain chain. The line on the Arbitrator's map did not run over glaciers but along local water-partings clearly differentiated from the continental divide. This is in conformity with the geography known at the time, the only geography which the 1902 Arbitrator knew and the only geography which should serve as the basis for reconstructing and clarifying the intention of his Award.

There is no coincidence or agreement between the line on the Arbitrator's map, based exclusively on the local water-parting and clearly separate from the continental divide, and the line of the 1994 Award, which occupies a very different position and follows a very different path along a line combining local and continental water-partings.

Since it is alleged that the coincidence or agreement attributed to the two lines in question involve errors of fact, it is necessary to determine whether the operative part of the Award could be altered in the light of these circumstances, but not whether any error of fact provides grounds for such alteration. The error must be one which has a direct impact on the decision and without which the arbitration might reasonably have produced a different decision.

In this case the error of fact does not satisfy the practical requirements necessary for revision. The decisive ground for the arbitral decision lies in the concept of local water-parting identified with the concepts of continental water-parting and water-parting. The quality of a "decision in law" which Chile accorded to this line is not affected by the debatable coincidence or agreement of the line of the 1994 Award with the line on the Arbitrator's map. The essence of the present arbitration has been the interpretation of the rule of the 1902 Award which directs that the frontier line should follow the local water-parting between the south shore of Lake San Martín and Mount Fitzroy. The statement commented on above supports the decision but is not its effective cause. Hence, this error of fact must be rejected as a ground for revision.

IX. *Passage of the line through the Portezuelo de la Divisoria*

In its first submission Chile indicates as an error of fact the passage of the boundary line through the Portezuelo de la Divisoria. In this connection it points out that in the season of rains or thaw, owing to the poor run-off of the water, there is an increase in marshy areas in this zone. "For this reason, the mud of the marshes tends to form a very flat topography on which the water-parting shifts its course easily and suddenly." "In a very changeable area a boundary has been established which does not constitute, in any way, a stable line easy to recognize on the ground." ("Presentation", para. 23, pp. 24-25)

"Furthermore, it is absolutely certain that in 1902 the local water-parting, in an area of such unstable morphology, must have followed a path substantially different from its present path. The 1994 Court was ignorant of this fact and, according to the doctrine, such ignorance is included in the error." ("Presentation", para. 23, pp. 24-25)

The fact that the path of the adopted line is difficult to identify in the Portezuelo de la Divisoria does not mean that it cannot be identified. It was discovered by means of aero-photogrammetric studies that the continental water-parting passes through this area. There still exists a mound marking the place of the continental water-parting. During the demarcation it would be possible to erect a boundary marker visible from a distance and standing out above the marsh in the exact place in the Portezuelo.

The Portezuelo de la Divisoria does not seem to introduce an insuperable element of doubt about the adopted line. The problem of the Portezuelo de la Divisoria is that it is part of the continental water-parting and is not located on an authentic local water-parting.

X. *Application concerning interpretation and manner of execution*

With regard to this application, subsidiary to the application for revision, Chile states that "the doubt stems from the fact that in [para. 151 of the Award] the Court's expert identifies the local water-parting between boundary post 62 and Mount Fitzroy as he [the expert] understands it, and from the fact that the Award itself states that "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" and that "the line of the frontier decided upon is the one which has always existed between the two States Parties to the present arbitration" ("Presentation", para. 30, p. 30).

Chile perceives a contradiction between the paragraphs of the Award referred to above, because they do not specify clearly which of the lines the Demarcator should follow in order to comply with operative paragraph II. In other words, "it is not made clear whether the Demarcator should confine himself to depicting on the map which he is to prepare the identification which he has already made or whether he must identify on the ground itself the real path of the water-parting. Nor does the Award indicate what the Demarcator must do in the event of discrepancy between what is stated in its paragraph 151 and the actual situation." "Presentation", para. 30, p. 30).

"Chile requests the Court to interpret its Award in such a way that the geographical reality on the ground prevails over the identification made by the expert . . . and, in the cases where this is not possible, [to] draw a straight line linking the point to which the water-parting extends from the north to the next point located to the south." ("Presentation", para. 31, p. 31).

The question immediately arises of the factual assumptions of the rule which provides for the possibility of submitting a request concerning interpretation and manner of execution: "Unless the Parties have agreed otherwise, the disagreements which may arise between the Parties about the interpretation or the manner of execution of the arbitral decision may be brought by any Party before the Tribunal which rendered the decision" (chapter II, article 39, annex No. 1 of the Treaty of Peace and Friendship of 29 November 1984).

This rule makes an application concerning interpretation and manner of execution dependent on "the disagreements which may arise between the Parties". No information has been received about disagreements between the Parties with respect to these two types of problem—interpretation and manner of execution. It is more a question of possible problems stemming from the interpretation of the Award itself.

The points raised do not fall within the scope of the provisions of this rule and they would therefore have to be resolved, if they came up in the course of the demarcation, on the basis of the provisions of the Award, including the rule which prescribes that the expert shall work "with the support of the Mixed Boundary Commission" (1994 Award, X, II). It could of course be the case that there was some discrepancy between the line drawn on paper and the situation on the ground. Cases of this kind have already arisen and have been resolved by the Mixed Boundary Commission by giving precedence to the ground. This well-established practice could be continued by common accord.

XI. *Conclusions*

The views stated in this individual opinion relate to the Award considered objectively, as an instrument resulting from the exercise of judicial power.

In accordance with the limitations agreed by the Parties with respect to applications for revision, none of the points raised affects directly the operative part of the Award pronounced on 21 October 1994 and therefore, although they may be considered errors of fact, they do not qualify as grounds for revision.

Other points raised and discussed do not constitute errors of fact, for example the use of the map of the Mixed Boundary Commission, the delineation of the water-parting over ice, and the retroactive effect attributed to the interpretation.

Therefore, since it would be wrong to modify the operative part of the Award of 21 October 1994 by reason of errors of fact, there is no possibility of a new line, either the one proposed by Chile ("Replication", para. 234) or any other line which might be regarded as more appropriate than the line already decided upon.

On this basis I voted for the dismissal of all the points raised as errors of fact, for my own reasons and grounds, some similar to, some different to a greater or lesser extent from the ones stated in the Decision.

Rio de Janeiro, 13 October 1995

Reynaldo GALINDO POHL

DISSENTING OPINION OF JUDGE SANTIAGO BENADAVA

I

Before recording my dissenting opinion I wish to make a few general comments on some of the terms used by the Argentine Republic in its documents concerning the applications for revision and subsidiary interpretation submitted by Chile.

These documents contain coarse and offensive terms improper to arbitral proceedings between friendly countries. I find particularly inappropriate the statements which cast doubt on the good faith of the applicant and describe Chile's submission of the applications as irrelevant and improper.

When an international instrument provides certain procedural means of recourse with respect to an arbitral award it accords the parties an opportunity to decide, in each case, whether to use them or not. Each party makes this decision in its sovereign right, without being subject to the will or opinion of the other party. The reasons for its action must always be respected.

Of course, the other party may attack the legal grounds invoked in support of the applications. That is its right. But what this party may not do is to impugn the good faith of the applicant and the propriety of his conduct. A party exercising a legal recourse offends nobody and it should not, in turn, be insulted by the other party. It will be for the court concerned, when it rules on the application, to say the last word on its admissibility in the case. And on this point, even within the court, opinions may differ.

The hearings and the decision on such applications may delay somewhat the final settlement of the dispute. But that is preferable to a situation in which a country affected by an award which it regards as mistaken should be left feeling aggrieved that, out of inexcusable negligence, it let slip the procedural opportunity of requesting amendment of the award. This seems to me to be particularly true of territorial disputes, which usually arouse understandable patriotic feelings and impose on Governments the need to account for their actions not only to their peoples but also to history.

II

The ground for revision invoked by Chile is specified in chapter II, article 40, of the Chile-Argentina Treaty of Peace and Friendship of 1984. According to this provision,

> "Any party may request the revision of the decision before the Tribunal which rendered it provided that the request is made before the time-limit for its execution has expired, and in the following cases:
>
> 1. If the decision has been rendered on the basis of a false or adulterated document;
>
> 2. If the decision is wholly or partly the result of an error of fact resulting from the hearings or documentation in the case.
>
> . . .

The recourse of revision envisaged in the provision reproduced above is admissible only on the very strict terms stated therein. It is, in fact, an extraordinary recourse.

It is essential to bear in mind that, according to article 40, paragraph 2, the only provision invoked by Chile, the ground for revision of the decision must be an *error of fact*, i.e., a false judgement concerning an objective reality or situation. On the other hand, an *error or law*, for example faulty reasoning, a mistaken interpretation, or an erroneous assessment of an item of evidence, does not justify revision according to the terms of article 40.

A request for revision is therefore different from an appeal. An appeal allows a decision to be questioned before a higher court both on an error of fact and on an error of law, and this higher court can modify or even revoke the decision. Neither the Arbitral *Compromis* or the Treaty of Peace and Friendship authorizes appeal. On the contrary, they expressly exclude it.

Furthermore, article 40 requires for the admissibility of revision that the error of fact results "from the hearings or documentation in the case" and that the decision is wholly or partly "the result" of the error.

A decision may suffer from various flaws or errors, of fact or of law, but it will not be subject to revision, according to article 40, unless all the requirements of this provision are met.

The fact that an application for revision must be decided upon by the same court which pronounced the decision under attack and the exceptional nature of this recourse render its admissibility even more difficult.

III

I voted against the Court's Decision rejecting the request for revision submitted by Chile. I regret dissenting from this Decision and also from some of the reasoning and arguments on which it is based. I will not attempt to rebut every point raised or term used in the Decision which seems to me to warrant challenge. I will confine myself to discussing one of the errors of fact cited by Chile which I think is decisive in justifying the requested revision.

Chile argues that the Court made an error of fact by asserting that the line identified by its expert in paragraph 151 of the Award and endorsed by the Court corresponds to the true situation. According to Chile this is not the case, at least in the sector in which the line runs over and across glaciers, in particular the sector between Cerro Gorra Blanca and Marconi Pass. The line in this sector was identified in paragraph 151 of the Award as follows:

> "From Cerro Gorra Blanca the water-parting continues southwards along a snow-covered ridge, descends 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."

This text has given rise to a problem of interpretation. Chile argued that the contour lines shown on the map of the Mixed Boundary Commission determine the path of the frontier from Cerro Gorra Blanca to Marconi Pass and that these contour lines do not reflect the current geographical situation on the ground. It adds that they are based on photograms taken in 1966, partially supplemented in 1980, of a glacier-covered zone whose relief, shape, movement and flows are constantly changing. Since 1966 the topography of the ground, according to Chile, has changed significantly. Since the expert described the path of the water-parting by reference to the contour lines of the map of the Mixed Commission instead by identifying it according to the situation on the ground, and since the Court endorsed this description, the Court made a crucial error of fact which would justify revision of the Award. However, the Court has resolved that the geographical fact whose identification is determined "by the contour lines" of the map of the Mixed Boundary Commission is not, as Chile claims, the stretch of the water-parting between the summit of Cerro Gorra Blanca and Marconi Pass but the "direction" (*rumbo*) of the water-parting between a point on the glacier's surface and Marconi Pass.

Interpretation of paragraph 151 and its literal meaning lead me to the conclusion that what was determined by the contour lines on the map of the Mixed Boundary Commission in the sector in question was the actual path of the water-parting and not merely the direction taken by this path.

In fact, paragraph 151 describes the course of the frontier between boundary post 62 and Mount Fitzroy as a continuous *line* between these two points. In some sectors of this course paragraph 151 indicates the "direction" of the line which it is describing, but always in general terms ("west-south-west direction", "first in a west-south-west direction and then north-west", "mainly south-south-west direction", etc.), without ever indicating the factors (contour lines or others) on the basis of which the course has to be determined.

The situation is no different in the Gorra Blanca (Sur)-Marconi Pass sector. It is not the "south-south-west direction" which is determined by the contour lines of the Mixed Commission's map but the stretch of the water-parting which has to be consistent with this direction. The south-south-west direction did not need any greater specification, as was also the case with respect to the path of the line in other stretches of the frontier described. What required greater precision was the path of the water-parting. And, in the absence of fuller information on this point, the Court decided it on the basis of the contour lines.

The Court considered that, since the path of the water-parting between the point on the surface of the Gorra Blanca (Sur) glacier and Marconi Pass had not been specifically identified in paragraph 151, it would be the task of the expert, in execution of the Award, to identify this path on the ground and depict it on a map to be submitted to the Court for its approval.

I do not interpret the task of the expert in this way. Once the Award had been pronounced, it was not his task to identify a stretch of the water-parting which the Award had left unspecified but to *demarcate the frontier decided upon by the Court* and depict it on a map. And this frontier, according to the Award, had been determined, in the sector to which I am referring, on the basis of the contour lines on the map of the Mixed Boundary Commission.

IV

It is a fact that the surface of glaciers is subject to constant movement. The changes in a glacier's relief then produce changes in the configuration of the water-partings. This sole fact ought to have prompted the Court to assume correctly that the contour lines on the Mixed Commissions Map, based on 1966 photograms, were no longer a suitable means of describing the frontier in the glacier zone between Cerro Gorra Blanca and Marconi Pass.

At the time of the Award the Court had several items of information which would have allowed it to conclude that changes of relief had taken place in the glacier zone and that the contour lines on the Mixed Commission's map did not take due account of them. This information includes the references in the Chilean counter-memorial to the geographical, geodesic and physical measurements made by the Department of Frontiers and Boundaries in the glacier zone, for these measurements indicated considerable topographical changes in the glaciers since 1966 (annex No. 4, para. 4.21), and the details of the ice cover revealed by the USAF aerial photographs. Mark Hurd Aerial Survey 1974-1975 (annex No. 4).

This information, added to Chile's repeated warnings about the problems of delineation of boundaries in ice-covered areas and the constant and considerable changes in the relief of such areas ought to have induced the Court, before reaching a decision, to inform itself by all available means about the real configuration of the relief on the ground and of the precise course of the water-parting in the zone in question. To this end it could have ordered expert reports, requested from the Parties additional geographical data and clarifications, arranged for the map of the Mixed Boundary Commission to be enlarged, etc. This would have enabled the Court to describe in its Award, perhaps by means of geographical coordinates, the exact path of the water-parting between Cerro Gorra Blanca and Marconi Pass with an accuracy which the contour lines of the Mixed Commission's map could not supply. However, the Court took no action in this regard.

Chile cannot be charged with negligence for not having requested the Court to order new studies or expert reports or to gather new information about the topographic configuration of the glacier zone. During the proceedings Chile directed its efforts to advocating its own line and, naturally, it was not for Chile to assume that the Court would accept the Argentine line in its entirety and decide that it should cross glaciers—a line whose practicality had been disputed during the proceedings.

I regret that I do not agree with the Court's assertion that during the proceedings Chile used the map of the Mixed Boundary Commission without entering any reservations about its accuracy and that Chile is therefore now precluded from arguing that the map contains errors which were never referred to during the arbitration proceedings.

This map was provided to the Court by the Parties at the Court's request and it constituted a useful tool both for the Parties and for the Court. Chile's occasional use of the Commission's Map cannot be regarded as acceptance by Chile of everything contained on the map. Each use should be examined in its context, bearing in mind its purpose and the comments or reservations made on each occasion.

By this yardstick I believe that Chile's references to the Mixed Commission's map do not amount, taken as a whole, to the acceptance which the Court attributes to them. For example, when Chile refers to the map in the formal requests which it made in its memorial (paras. 16.5, 16.8 and 16.9) it is describing the frontier line which it claims between boundary post 62 and Mount Fitzroy. This line did not cross glacier zones in which changes of relief might have occurred; therefore, Chile did not need to enter any reservation when it referred to the map.

Another example: the "block-diagram" representation of Cerro Gorra Blanca and Marconi Pass in the annex to the Chilean counter-memorial (figure 3) depicts a "Continental water-parting obtained from the contour lines of the same map" of the Mixed Boundary Commission. Figures 1 and 2 also take this as the basis for cartographic work. However, No. 47 of this annex 4 contains the following RESERVATION (*sic*, in block capitals): "the concept of continental water-parting used in this work is subject to the formal reservation entered by Chile as to the possibility and the appropriateness of identifying such a water-parting on glaciers or under glaciers: as well as on other unstable surfaces, owing to certain features of this concept which will be taken up later".

The Mixed Commission's map was used in these and in other cases for merely illustrative purposes and not as constituting acceptance, for any purpose, of the contour lines which it shows.

Chile's memorial describes the Mixed Commission's map as "a work of indisputable technical quality, which is available to the Court as the basis for the studies which it may see fit to carry out". This sentence says what it says and nothing more. It only indicates that the map may constitute a support, a starting point, for the studies which the Court may make, but Chile does not regard it as sacrosanct or say that it is suitable and accurate for all purposes.

Furthermore, Chile referred repeatedly during this arbitration to the changes of relief which constantly occur in ice-covered zones and, in particular to the changes which had occurred between 1966 and 1990 in the relief of the glaciers in the Cerro Gorra Blanca-Marconi Pass area. This position is totally incompatible with acceptance of contour lines based on photograms made in 1966.

I therefore believe that the Court made an error of fact in defining the path of the water-parting between Cerro Gorra Blanca and Marconi Pass on the basis of the contour lines on the map of the Mixed Boundary Commission.

This error results from the hearings or documentation in the case, particularly the map in question, the contour lines on which were out of date at the time of the Award, and the Award is partly the result of the error.

I therefore believe that the Court should admit this ground for revision invoked by Chile and amend its Award accordingly.

V

The 1995 Decision rendered on the application for revision refers in several passages to the report and the map submitted by the expert and approved by the Court on today's date.

I regret, however, having to enter reservations about these documents, although I recognize the great competence and integrity of the expert and the quality of the work which he did on the ground, sometimes in difficult geographical circumstances and very bad weather.

Firstly, the field work described in the expert's report was carried out without the cooperation of the Chilean Boundary Commission. It did not take part in the expert's demarcation work between 23 January and 2 February 1995, obviously because Chile was preparing to submit an application for revision of the 1994 Award. It is thus understandable that its Commission should refrain from taking part in the work of implementing a decision which Chile was about to challenge by means of a request for revision and which might undergo modification as a result. Thus, it was not capriciousness or lack of interest in collaborating with the Court and the expert which motivated Chile's non-participation.

I think that it would have been essential for the Court, before pronouncing on the expert's report and map, to give Chile another opportunity to join the expert, together with Argentina, in other field work, or at least it should have heard what Chile had to say on the documents in question. However, the report and map submitted by the expert seemed to the Court sufficient, and it has approved them on today's date.

Secondly, I think that the work done by the expert on the ground was not as complete as might have been desirable. In particular, owing to the deteriorating weather conditions in the area the expert was unable to make a topographic survey of the section between point 6, referred to in annex 6 of his report, and the point at which the water-parting reached the surface of the

Gorra Blanca (Sur) glacier. In my opinion, further work would have meant a better identification and depiction of the frontier decided upon by the 1994 Award.

These reservations have induced me to vote against approval of the expert's report and map.

Santiago BENADAVA

INTERNATIONAL COURT OF ARBITRATION BETWEEN THE ARGENTINE REPUBLIC AND THE REPUBLIC OF CHILE TO DETERMINE THE COURSE OF THE FRONTIER LINE BETWEEN BOUNDARY POST 62 AND MOUNT FITZROY

Resolution

WHEREAS:

I. The Court has received from the geographical expert the report on his work carried out in the sector subject to this arbitration between 23 January and 2 February 1995, entitled "Report of the Court's geographical expert on the surveying and topographic demarcation work preceding the erection of the boundary posts on the water-parting between boundary post 62 and Mount Fitzroy identified in paragraph 151 of the Award" of 21 October 1994 and "Map showing the course of the frontier line identified in paragraph 151" thereof.

II. According to the report, the field work completed the topographic demarcation of the line decided upon by the Court in its Award of 21 October 1994 and the places where the boundary posts are to be erected have been indicated, leaving pending the physical erection of these posts and the formal declaration of Cerro Gorra Blanca and Mount Fitzroy as natural boundary marks.

III. On 22 February 1995 the Court deferred its decision on the said report and map and its resolution on the execution of the Award until it had pronounced on the Chilean document of 31 January 1995.

IV. The Court has pronounced on today's date on the request for revision and subsidiary interpretation of the Award of 21 October 1994 submitted by Chile.

CONSIDERING:

I. That the Court has analyzed in detail the report and map submitted by the geographical expert.

II. That the report and map so submitted are in conformity with the provisions of the Award of 21 October 1994.

III. That it is appropriate for the practical work of erecting the boundary posts, which is the responsibility of the Mixed Boundary Commission, to be carried out under the direction and control of the Court's geographical expert.

IV. That it is likewise appropriate for the Court's geographical expert to prepare the records of the erection of the boundary posts and of the formal declaration of Cerro Gorra Blanca and Mount Fitzroy as natural boundary marks.

Accordingly, the Court, by three votes to two

For: Mr. Nieto Navia, Mr. Barberis and Mr. Nikken,

Against: Mr. Galindo Pohl and Mr. Benadava,

RESOLVES:

I. To approve the report of the geographical expert entitled "Report of the Court's geographical expert on the surveying and topographic demarcation work preceding the erection of the boundary posts on the water-parting between boundary post 62 and Mount Fitzroy identified in paragraph 151 of the Award" of 21 October 1994, the map entitled "Map showing the course of the frontier line identified in paragraph 151" thereof, and the demarcation work which has been carried out.

II. That the boundary posts are to be erected at the points marked on the ground by the expert, in accordance with the following coordinates:

(*a*) Summit at 1,767 metres:

X = 1.441.974,736 Y = 4.576.143,265

(*b*) Pass between Lakes Redonda and Larga or Portezuelo de la Divisoria:

X = 1.440.497,242 Y = 4.577.042,867

(*c*) Portezuelo del Tambo:

X = 1.427.793,111 Y = 4.573.361,894

III. That in the sections listed below, the path of the frontier line decided upon by the Award of 21 October 1994 passes through points having the following coordinates, determined topographically on the ground:

(*a*) Section of the water-parting which descends from the point on the west slope of the summit at 1,767 metres to the pass between Lakes Redonda and Larga or Portezuelo de la Divisoria (annex 4, *Report*, p. 32):

—Point 4	X = 1.440.589,567	Y = 4.577.020,077
—Point 5	X = 1.440.952,164	Y = 4.576.934,798
—Point 6	X = 1.441.090,181	Y = 4.576.879,505

(*b*) Section of the water-parting which ascends from the pass between Lakes Redonda and Larga or Portezuelo de la Divisoria to an unnamed summit at 1,629 metres (annex 5, *Report*, p. 36):

—Point 1	X = 1.437.875,227	Y = 4.576.578,507
—Point 2	X = 1.438.005,302	Y = 4.576.452,714
—Point 3	X = 1.438.717,165	Y = 4.576.367,233

(*c*) Section of the water-parting which runs across Marconi Pass and the lower part of the Gorra Blanca (Sur) glacier (annex 6, *Report*, p. 39):

—Point 1	X = 1.416.821,414	Y = 4.551.602,494
—Point 2	X = 1.416.935,343	Y = 4.551.991,654
—Point 3	X = 1.416.993,963	Y = 4.552.173,551
—Point 4	X = 1.416.995,938	Y = 4.552.314,144
—Point 5	X = 1.417.098,762	Y = 4.552.476,857
—Point 6	X = 1.418.262,787	Y = 4.553.390,422

II. To deliver to the Parties copies of the said report and map.

III. To instruct the Court's geographical expert that, with the assistance of the Mixed Boundary Commission and of the representatives participating in it, he shall direct the work of erecting the boundary posts referred to in this Resolution, deal with any technical problems which may arise in this work, and proceed to prepare and sign the corresponding records of the erection of the boundary posts and of the formal declaration of Cerro Gorra Blanca and Mount Fitzroy as natural boundary marks. This work shall be completed before 31 January 1996.

Done in Rio de Janeiro, 13 October 1995.

Rafael NIETO NAVIA
President

Rubem AMARAL JR.
Secretary

True Copy Of The Original
Rubem AMARAL JR.