

REPORTS OF INTERNATIONAL  
ARBITRAL AWARDS



RECUEIL DES SENTENCES ARBITRALES

VOLUME XXII

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RECUEIL DES SENTENCES  
ARBITRALES

VOLUME XXII



UNITED NATIONS — NATIONS UNIES



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## FOREWORD

The present volume is made up of three arbitration cases, namely, the case concerning a boundary dispute between Argentina and Chile concerning the delimitation of the frontier line between boundary post 62 and Mount Fitzroy; the award of the Tribunal in the first stage of the proceedings between Eritrea and Yemen (Territorial Sovereignty and Scope of the Dispute), and the award of the Tribunal in the second stage of the proceedings between Eritrea and Yemen (Maritime Delimitation).

The present volume also includes the decision of the Tribunal with respect to the application for revision and subsidiary interpretation of the Award of 21 October 1994 between Argentina and Chile, submitted by Chile.

In accordance with the practice followed in this series, awards in English or French are published in the original language. Those in both languages are published in one of the original languages. Awards in other languages are published in English. A footnote indicates when the text reproduced is a translation made by the Secretariat of the United Nations.

This volume, like volumes IV to XXI, was prepared by the Codification Division of the Office Legal Affairs.



## AVANT-PROPOS

Le présent volume réunit trois affaires soumises à l'arbitrage : l'affaire concernant un litige frontalier entre la République argentine et la République du Chili relatif à la ligne de démarcation entre le poste frontière 62 et le mont Fitzroy, la sentence du Tribunal arbitral rendue au terme de la première étape de la procédure entre l'Erythrée et la République du Yémen (souveraineté territoriale et portée du différend), et la sentence du Tribunal arbitral rendue au terme de la seconde étape de la procédure entre l'Erythrée et la République du Yémen (délimitation maritime).

Le présent volume reproduit également la décision du Tribunal concernant la demande de révision et d'interprétation subsidiaire de la sentence du 21 octobre 1994 présentée par la République du Chili.

Conformément à la pratique, le présent Recueil reproduit les sentences rendues en anglais ou en français dans la langue originale et celles qui ont été rendues en anglais et en français dans une des deux langues originales. Il fournit une version anglaise des sentences rendues dans d'autres langues en spécifiant, le cas échéant, dans une note de bas de page si la traduction émane du Secrétariat de l'Organisation des Nations Unies.

Le présent volume, comme les volumes IV à XXI, a été établi par la Division de la Codification du Bureau des affaires juridiques de l'Organisation des Nations Unies.



**PART I**

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**Case concerning a boundary dispute between  
Argentina and Chile concerning the delimitation of  
the frontier line between boundary post  
62 and Mount Fitzroy**

**Decision of 21 October 1994**

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**Affaire concernant un litige frontalier entre  
la République Argentine et la République du Chili  
portant sur la délimitation de la frontière entre  
le poste frontière 62 et le mont Fitzroy**

**Decision du 21 octobre 1994**





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

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

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

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

Mr. Rafael Nieto Navia, *President*;

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

Mr. Rubem Amaral Jr., *Secretary*;

Mr. Rafael Mata Olmo, *geographical expert*.

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

The Argentine Republic, represented by

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

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

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

*As Agents:*

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

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

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

As Counsel:

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

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

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

*As experts:*

Captain Federico Río, Deputy Director of the Arbitration Office.

Counsellor Bibiana Lucila Jones, Arbitration Office.

Counsellor Eduardo Mallea, Arbitration Office.

Counsellor Gustavo C. Bobrik, Arbitration Office.

Counsellor Alan C. Béraud, Arbitration Office.

Embassy Secretary Pablo A. Chelía, Arbitration Office.

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

Embassy Secretary Holger F. Martinsen, Arbitration Office.

Mrs. Luisa Lemos, Argentine Embassy in Berne.

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

Mrs. Ursula María Zitnik Yaniselli, Arbitration Office.

Mr. Gustavo R. Coppa, Arbitration Office.

Mrs. Nora G. Veira, Arbitration Office.

Mrs. Andrea S. Fatone, Arbitration Office.

Mrs. María Elena Urriste, Arbitration Office.

*As Advisers and Assistants:*

*and*

The Republic of Chile, represented by

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

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

*As Agents:*

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

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

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

*As Counsel:*

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

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

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

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

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

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

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

Miss Marta Mateluna R., cartographer, Arbitration Agency.

Miss Cecilia Zamorano V., cartographer, Arbitration Agency.

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

Mrs. María Teresa Escobar, interpreter, Arbitration Agency.

Mr. Raúl Boero, interpreter, Arbitration Agency.

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

Miss Viviana Morales A., secretary, Arbitration Agency.

Miss Marcela Leal G., secretary, Arbitration Agency.

*As Advisers and Assistants:*

the Court, composed as above, pronounces the following Award:<sup>1</sup>

I

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

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

---

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

*Article I*

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

*Article II*

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

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

*Article III*

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

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

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

*Article IV*

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

*Article V*

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

*Article VI*

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

*Article VII*

1. The working language shall be Spanish.

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

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

*Article VIII*

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

Each Party shall submit a memorial before 1 September 1992.

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

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

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

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

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

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

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

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

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

#### *Article IX*

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

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

#### *Article X*

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

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

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

#### *Article XI*

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

#### *Article XII*

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

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

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

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

*Article XIII*

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

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

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

*Article XIV*

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

*Article XV*

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

*Article XVI*

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

*Article XVII*

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

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

*Article XVIII*

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

*Article XIX*

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

*Article XX*

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

*Article XXI*

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

Signed in Santiago on 31 October 1999.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

#### 15. In its counter-memorial Argentina stated:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

18. In its counter-memorial Chile stated:

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

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

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

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

## II

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

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

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

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

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

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

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

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

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

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

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

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

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

The Argentine expert stated that

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

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

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

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

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

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

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

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

He also stated that:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

### III

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

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

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

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

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

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

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

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

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

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

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

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

The Court's report gives the following description:

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

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

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

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

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

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

<sup>2</sup> NOTE BY THE SECRETARIAT:

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

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

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

#### IV

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

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

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

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

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

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

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

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

## V

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

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

Article II.1 of the *Compromis* states:

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

Article XI adds:

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

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

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

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

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

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

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

Article V of the 1902 Award states on this point:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## VI

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

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

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

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



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

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

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

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

The counter-memorial states:

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

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

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

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

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

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

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

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

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

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

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

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

Chile’s counter-memorial states:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

\*93. In 1898 the Chilean expert stated:

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

In its arguments before the Arbitrator, Chile stated:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Chile then gives the following description:

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

## VII

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

The Award itself states:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

## VIII

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Chile added:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

## IX

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

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

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

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

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

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

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

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

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

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

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

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

## X

171. For the reasons stated above,

THE COURT

by three votes to two decides that:

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

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

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

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

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

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

Rafael Nieto NAVIA  
President

RUBEM AMARAL JR.  
Secretary

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

#### DISSENTING OPINION OF MR. REYNALDO GALINDO POHL

##### I. CIRCUMSTANCES OF AND REASONS FOR THE DISSENTING OPINION

###### 1. *The origin of the dissenting opinion*

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

2. The Parties submitted abundant documentation on the origins and development of the frontier dispute concerning the sector between boundary post 62 and Mount Fitzroy; and their written and oral submissions brimmed with erudite arguments of excellent technical quality, which were moreover presented with intelligence and skill. Faced with such a large volume of information and such interesting arrays of arguments I could not help wavering during the proceedings between the conflicting petitions, especially when the inevitable moment came to take a position on the facts, arguments and legal principles invoked.

3. My dissent stems, in particular, from the conflicting positions in the Court of Arbitration on two points: (1) Chile's territorial claims in 1898-1902 and in the present dispute; and (2) the meaning of continental water-parting and local water-parting. The Court chose the question of the territorial claims as the first item in the list of topics for study and debate owing to its significance for the final decision.

4. Discord is far from being an ideal situation in collegial courts, although they have often in practice divided into majorities and minorities. This circumstance constitutes one of the realities of the existence and functioning of collegial courts, both national and international.

5. It is not the purpose of this dissenting opinion to quibble with the decision taken but to expound a line of reasoning and a particular view of the facts and the law pertaining to the 1898-1902 arbitration. Hence the absence of judgements on details and of references to the majority position. My purpose is to present a conceptual approach based on study of the documents received and on the opinions of the Parties.

6. This dissenting opinion is designed solely to expound a line of thinking and assess what happened in 1892-1902 and subsequent years with respect to this dispute. Accordingly, it takes an entirely positive line. As the dispute relates to the assessment of the facts and the interpretation and application of the law, a dissenting opinion may help to clarify the problems studied. This is the positive meaning of dissent.

7. I cannot avoid saying something which invests this dissenting opinion with a radical quality: I agree with the decision taken with respect to the sections concerning the history of what happened in the years of that arbitration and the history of the present arbitration. On the other sections I have reservations, because although I can accept some of the arguments in isolation, when they are combined in an opposing line of thought, their general meaning and their purposes do not fit with this dissenting opinion.

8. Although in the Court's consideration of the fundamental points two paths emerged which led to opposing courses of action and conclusions, in the situation in which I find myself there is only one path—to state the grounds and purposes of my dissent. With every respect for the Award and the Judges who make up the majority, I will now state my views on this case.

## 2. *General outline of problems arising in this arbitration*

1. The 1991 *Compromis* specifies the objectives of the arbitration and the competence of the Court. It is a question of determining “the line of the frontier in the sector between boundary post 62 and Mount Fitzroy”; and this determination must be made by “interpreting and applying the 1902 Award in accordance with international law” (articles I and II of the *Compromis* of 31 October 1991). Additional rules are to be found in the Treaty of Peace and Friendship of 29 November 1964 (annex I, ch. II, arts. 28 and 29).

2. The two rules cited from the *Compromis* constitute a semantic unity, and although each of them can be analyzed separately in methodological terms, each delivers its meaning as a function of the other. The first rule states the issue to be determined—the line of the frontier between boundary post 62 and Mount Fitzroy; and the second stipulates how this issue is to be addressed—by interpreting and applying the 1902 Award in accordance with international law.

3. International law governs the interpretation and application of the 1902 Award; and the Award and international law rest on the decision guided and supported by the interpretation and application of the 1902 Award under the auspices of international law. The Parties conferred on the Court a limited authority. As a result, its decision on the line of the frontier must be based not on arbitrary attitudes, personal opinion, prerogative or discretion but on law, i.e., the law constituted by the combined application of the particular rules of the Award and the general rules of international law.

4. The Parties are not questioning the Award, for they acknowledge that it is a firm decision. What is more, they reiterate with manifest emphasis that the Award is valid and, moreover, constitutes the indissoluble cement of the present arbitration. The problem is to determine the circumstances of fact and of law which gave birth to the arbitration and the true meaning of the arbitral decisions.

5. It follows from the intention of the Parties that the Court’s interpretation of the 1902 Award should leave the *res judicata* untouched. Given the circumstances of the present case, it does not seem wise to follow in the tracks of recent case law in the matter of interpretation of international awards, because this case law deals with matters whose characteristics differ considerably from the ones which shape the present dispute and invest it with its singularity. Furthermore, some of these interpretations deal with awards concerning areas of ocean; and the essential features of the interpreted awards, determined mainly by considerations of equity, might have been the reason, although without any express acknowledgement to this effect, for the fairly lax treatment, at times bordering on revision, of the questions subject to interpretation.

6. Out of concern for the legal safety vital to the protection of the *res judicata*, it seems to me more appropriate, with respect to the interpretation and application of earlier decisions, to pursue in principle the conceptual ap-

proach which has shaped the extensive and consistent traditional case law, because in this approach care has been taken to avoid entering that uncertain and slippery domain where one may be led, unawares, in the direction of revision of the award which is being interpreted.

7. Given the way the dispute has arisen, two problems are most relevant: Chile's territorial claim in 1898-1902 in relation to its present claim, and the concepts of local water-parting and continental water-parting. The solution of these two problems definitively and irrevocably determines the final decision.

8. The Court is required to interpret and apply the 1902 Award in accordance with international law. There are a number of prominent principles of international law which have a significant impact on this case: the principles of contemporaneity, stability of frontiers, integral interpretation of the relevant instruments, and preservation of the *res judicata*. These principles bear on the treatment of matters of fact and of law, both positively in terms of what can and should be done and negatively in terms of what cannot and should not be used.

9. The principles of contemporaneity and stability of frontiers are particularly relevant to the determination of the line of the frontier between boundary post 62 and Mount Fitzroy. The principle of contemporaneity is not limited and cannot be limited to the interpretation of the terms in the meaning which they had at the time when they were used. It is not merely a principle relating to terms but a general principle of law. For example, the Arbitrator of 1898-1902 cannot be held to have had geographical knowledge which he did not have and could not have had for the simple reason that nobody had it, nor can subsequent knowledge be used to interpret the meaning of past facts. Everything in its time and in its place.

10. It is moreover an essential requirement to analyze the case by placing oneself in the situation of the time and trying to reproduce the situation which shaped the vision and opinions of the Arbitrator and the opinions and purposes of the Parties. The proposed end dictates the means; and since the end is to determine the meaning of the 1902 Award the case and its consequences must be examined in the light of the considerations of fact and of law available to the Arbitrator for the purposes of his decision.

11. Accordingly, one must go back to the time of the decision and try to understand and, of course, respect the situation in which the Arbitrator worked, as a *sine qua non* of understanding the meaning of his decisions. When considered outside of their temporal context, as if the Award was being pronounced today, the decisions of the past lose their original meaning. Particularly in frontier disputes awards must be interpreted on the basis of the geographical knowledge, information and arguments submitted to the judge at the time and in the context of the time. Otherwise, there is a risk of disrupting the *res judicata* and the stability of the frontiers.

12. The often attractive effects of subsequent facts and knowledge, for example new and more accurate geographical surveys using very sophisticated techniques, have to be disregarded in the interpretation of events and

statements of a distant time, in this case 92 years ago. By means of interpretation one penetrates into the past, and application in the light of what is known today returns one to the present.

13. This case does not contain any circumstances justifying the application of evolving concepts or the inclusion of unresolved matters to which knowledge subsequent to the Arbitral Award is applied. The motives and purpose of territorial disputes are concerned with stability. There is no place here for the interpretative processes which have been used in branches of law undergoing development and reorganisation, as has happened in some areas of the law of the sea. Without rejecting the reasons for this kind of adaptation which modifies the past by means of the present, it is wrong to take this updating approach with regard to matters governed by the desire for stability, such as matters of State frontiers.

14. Stability is so firmly established where State frontiers are concerned that even a fundamental change of circumstances cannot be asserted as a reason for terminating a treaty or withdrawing consent to it in such matters (Vienna Convention on the Law of Treaties, art. 62, para. 2 (a)).

15. The most respected and respectable legal precedents support the view that judicial and arbitral decisions must be interpreted solely on the basis of the facts examined in the case in question, to the exclusion of facts subsequent to such decisions. (P.C.I.J., *Collection of Judgements*, Series A, No. 13, p. 21; United Nations, *R.I.A.A.*, vol. XVIII, p. 336). And interpretation has definite limits in the decision of the court concerned, a decision which in turn is determined by the claims of the parties (I.C.J. *Reports 1950*, p. 403).

16. The Parties agreed that the Arbitrator should make his Award on the basis of the geographical knowledge of the time and even in the awareness that there were unexplored areas. In this latter connection the sector between boundary post 62 and Mount Fitzroy was no exception. There are 16 blank zones on the Arbitrator's map, i.e., 16 unexplored zones. By accepting this geographical circumstance and even urging the Arbitrator to pronounce his Award quickly, under pressure of a complex political situation, the Parties implicitly agreed in advance to accept the risks and consequences.

17. Examination of the language of the documents available has played a role, at times a decisive one, in the formulation of this dissenting opinion. I mean analysis of the terms and the structures in which they are used, in particular the language of the arbitration documents. Of equal importance is the study of the organisation of the propositions and the context in which they are presented.

18. For example, a distinction must be made between what is exercise of the *ars litigandi*, by means of which the parties try to win over the judge, and what constitutes a real claim or recognition of the rights of others. With regard to the recognition of the rights of others, it is necessary to consider whether the language is categorical, even if conditionality occasionally seeps in by means of conditional or future tenses of verbs. The art of litigation is an aspect of the art of reasoning, and both are rich in propositions loaded with probability and therefore separate or separable from proof governed by the principle of identity-contradiction.

19. The 1991 *Compromis* says that the Court has to determine the line of the frontier between boundary post 62 and Mount Fitzroy. The Court must therefore determine the course of a frontier line, the one most consistent with the terms of the 1902 Award. Thus, the dispute is more about lines than about areas, zones or space. These spatial matters have already been adjudicated in the 1902 Award. Of course, two different lines competing for recognition create space without losing the character of lines; and lines of interpretation entail spaces when they establish the external limits of a claim or award.

20. In principle, this Court could adopt one of the following lines: (1) the Argentine line; (2) the Chilean line; (3) the Demarcator's line; (4) the line on the Arbitrator's map; or (5) a line of its own, different from the others, which conforms with the terms of the Award. A solution of mere equity is dismissed by the intention of the Parties; and a solution of equity within the norm appears *prima facie* unnecessary.

21. Argentina maintains that Chile cannot claim today more than it claimed in 1898-1902 and that, moreover, Chile recognized as Argentine territory what Chile is claiming today. The Argentine argument has to be answered with a yes or no, without any intermediate positions, qualifications or dilution. An affirmative answer leads necessarily to certain consequences, and a negative one to different consequences. The Court had to rule on this question: the affirmative answer shaped its decision, and the negative answer was the starting point of this dissenting opinion.

22. Clarification of the content and extent of Chile's territorial claim in the 1898-1902 arbitration is a key point in determining one's position on four fundamental issues: (1) the competence of the 1898-1902 Arbitrator and of course of the present Court, for the Court cannot exceed the competence of the Arbitrator; (2) the practical effects of the *res judicata*; (3) the decision-making capacity of this Court in accordance with the principle that it cannot award more than what has been requested; and (4) application of the principle of estoppel.

23. These four points have a common origin in Chile's territorial claim in the arbitration of 1898-1902. If accepted, the Argentine argument would entail certain practical effects, such as: (1) the entire basin of the River de las Vueltas, as it is known today, would have been excluded from the competence of the Arbitrator in 1898-1902; (2) the entire basin of the River de las Vueltas would be excluded from the competence of this Court, as a direct effect of the former exclusion; (3) any interpretation of the 1902 Award based on a line which entered the upper part of the las Vueltas basin, for example the area marked on the Arbitrator's map with a pecked line, would constitute a decision vitiated by *ultra vires*; (4) the whole line in Chile's interpretation of the 1902 Award would be rejected *ipso facto*; and (5) the whole line in the present Argentine interpretation of the 1902 Award, by the fact of coinciding with Chile's extreme territorial claim at that time, would be legitimated and validated.



24. The Arbitrator made his Award within the space of his territorial competence; and within this space lay the line of the Arbitrator's map, Robertson's two lines, Holdich's line, the Demarcator's line, and the lines which the Parties drew between boundary post 62 and Mount Fitzroy on the many maps which they published over some 50 years.

25. The other main point of divergence concerned the concepts of local water-parting and continental water-parting. Set against the doctrine that the two concepts form a unity when they perform the same function—the function of separating waters which flow in different directions—and that the qualifiers “local” and “continental” do not express any specificity or differentiation, the argument that this is not the case augmented the volume of dissent.

26. Now that the two main topics have been clarified, it is necessary to consider the lines submitted by the Parties, both affected by the problem that, while the arbitral report stipulates following the local water-parting, the lines combine local and continental water-partings. It will then be necessary to consider the Demarcator's line, to which Chile assigns sufficient merit for it to represent the interpretation of the intention of the Arbitrator in 1898-1902.

27. This process of successive exclusion—exclusion because these lines entail difficulties which, to a greater or lesser extent, render them in themselves incapable of satisfying the arbitral texts of 1892-1902—leaves as a final option a line consistent with the three instruments making up the 1902 Award: the decision itself, the Arbitrator's report, and his map. These documents, the primary source material for adjudicating the case, form a single semantic unit and complement and clarify each other.

28. The principle purpose of this exercise is and will remain the search for consistency among the many and complex factors affecting the problems under discussion. What is needed is, on the one hand, successive elimination of possible solutions and, on the other, coordination and connection of all the factors present, even the apparently most disparate ones, within a unity of meaning.

29. The chosen method presupposes a model governed by the principle of consistency and shaped by the purpose which steers the exercise, in the knowledge of course that this model cannot materialize owing to insuperable obstacles of various kinds but nevertheless constitutes a source of inspiration and a guideline which acts as a goal and a point of reference for proof, amendment and adjustment, as well as a guideline for elaboration of the final conclusion.

30. Within this structural consistency each and every one of the elements of fact and of law has its meaning and its value and, taken together, they achieve harmony and justification by means of generally recognized principles and, moreover, they support the final conclusion. This dissenting opinion closes with some thoughts about a solution which might be consistent with the 1902 Award.

## II. THE TERRITORIAL CLAIMS OF CHILE IN 1898-1902 AND IN 1992-1994

### II.1 THE TERRITORIAL CLAIM OF CHILE IN 1898-1902

#### 1. *Framing of the question*

The determination of Chile's two claims, one in 1898-1902 and the other in 1992-1994, is fundamental to the question of whether Chile is today claiming territory which it did not claim in 1898-1902 and to a decision, if the answer is affirmative, that its present claim is inadmissible in its entirety and that, as a counterpart, the present Argentine claim is admissible in its entirety.

These consequences will also find support in Chile's acknowledgement that all the Atlantic basins belong to Argentina. In this case the claim and the acknowledgement have the same consequences; and they are moreover joined at the root, because Chile would have accorded recognition to land which it did not claim. A determination of what Chile's claim was at that time will also determine, implicitly, which areas Chile recognized as being under Argentine sovereignty.

It is further necessary to determine Chile's present territorial claim, compare it with the claim of 1898-1902 and decide whether it subtracts anything from what was recognized as belonging to Argentina at the time of the arbitration, and therefore whether Chile is today asking for more than it sought at that time, with the consequent collapse of its entire present claim.

In concrete terms, would the upper las Vueltas basin, situated to the north and west of what at the time of the arbitration was regarded as the continental water-divide and today is known for certain, as a result of surveys carried out since then, to belong to the Atlantic slope, have fallen outside the competence of the Arbitrator in 1898-1902 because it was not in dispute? If the answer is in the affirmative, the upper las Vueltas basin would lie outside the competence of the present Court as well.

There is nothing better than the language of the Parties for siting this question within the context of the causes and the circumstances of the present dispute. First, the problem will be stated by means of quotations culled from the many written and oral submissions of the Parties. Then an attempt will be made to render things clearer and more precise by reference to primary and secondary sources and the relevant developments at the time and to assess their influence on the interpretation and application of the 1902 Award.

#### 2. *Argentina's position on the Chilean claim of 1898-1902*

A large part of the problem of this dispute turns on what Chile claimed or did not claim in 1898-1902. Argentina maintains that Chile "cannot claim today, in an exercise of interpretation and application of the 1902 Award, territory which it did not claim at the time of that arbitration and which it repeatedly, persistently and systematically recognized as belonging to the Argentine Republic. In short, Chile cannot now claim territory which it acknowledged to

be Argentine in 1898 and in its submissions to the 1902 Arbitrator” (*Argentine memorial*, pp. 332-333, para. 1, p. 336, para. 6, p. 337, para. 7, and pp. 338-339). (This memorial will be referred to hereinafter by the abbreviation MA and the page or pages by the abbreviations p. or pp., and the paragraph numbers will follow the page numbers.)

It was not a question of tacit recognition, which may always give rise to difficult problems of interpretation concerning the conduct of a State. Using the language frequently cited in the legal literature, it is a question of “the adoption of a positive acknowledgement on the part of the State”. . . . in 1902 Chile’s attitude was not one of silence or mere acquiescence but a positive one, for it recognized that the Atlantic hydrographic basins belonged to Argentina (MA, p. 337, 8).

Furthermore, “subsequent developments, from 1902 up to the present dispute, show that Chile’s conduct has been invariable in this respect; it has never claimed basins of rivers or lakes which discharge into the Atlantic, throughout the lengthy process of demarcation which has taken place since that time”. “If in its interpretation of the 1881 Treaty submitted to the British Arbitrator Chile recognized the Atlantic basins as belonging to Argentina, it may not now discuss such sovereignty.” (MA, p. 341, 12, and p. 343, 14)

Argentina reiterated the same argument in its counter-memorial. The following is one example of many relevant passages: “The line which Chile is requesting in these arbitration proceedings, based on a supposed “interpretation” of the 1902 Award”, disregards Chile’s extreme claim for the sector in 1898-1902. By this sole fact, not to mention others, this line cannot correspond to the boundary decided upon by the 1902 Award. At no point did Chile seek from the British Arbitrator a line which would award to Chile basins or parts of basins on the Atlantic slope, and it did not do so, therefore, with regard to the basin of the River de las Vueltas. What Chile requested was all of the basins which discharge into the Pacific Ocean and only those basins.” (Argentine counter-memorial, p. 27, para. 22). (Hereinafter this counter-memorial will be referred to by the abbreviation CA and the paragraph numbers will follow the page numbers.)

The importance of Chile’s extreme claim in 1898-1902 for the purposes of an interpretation of the 1902 Award lies in the fact that the las Vueltas basin was not claimed by Chile (CA, p. 27, 21).

In the oral submissions Argentina presented this point as the most important of its arguments to prove that the entire las Vueltas basin, as it is known today, was excluded from the competence of the Arbitrator in 1898-1902. It stated two grounds: Chile did not claim the basin and recognized that it belonged entirely to Argentina.

If a State recognizes that a territory belongs to another State, such recognition precludes the first State from subsequently claiming what it had previously recognized as belonging to the other State (record No. 12 of 28 April 1994, p. 55). . . . the said continental *divortium aquarum* was also to the south of Lake San Martín, as in the other areas, and was the “true” one on the ground, i.e., the *natural and effective* water-parting of the South American continent (record No. 10 of 26 April 1994, p. 33).

Accordingly, despite Chile’s claims in the present arbitration the 1902 Award could not have assigned to Chile, in the sector between boundary post 62 and Mount Fitzroy, either Lake del Desierto or the valley of the River Diablo or any other part of the Atlantic basin of

the River de las Vueltas, which is, in turn, part of the lacustrine basin of Lake Viedma. Both Atlantic basins had been excluded from the territorial competence assigned by the Parties to the British Arbitrator (record No. 10 of 26 April 1994, p. 24).

In 1958 Chile, in contradiction with its earlier acts contemporaneous with and subsequent to the 1898-1902 arbitration, began to claim a part of the Atlantic basin of Lake Viedma, which included *inter alia* the valley of the River Diablo and Lake del Desierto (record No. 19 of 16 May 1994, pp. 39-40).

Many more such passages can be cited:

In Argentina's opinion, Chile contradicts its earlier position because in 1992-1994 it is claiming territory which it recognized as Argentine before and during the 1898-1902 arbitration. Chile recognized as Argentine the territory to the east of the natural and effective continental water-divide (record No. 12 of 28 April 1994, pp. 48 and 54).

Chile's argument must be dismissed in the light of its own position and the competence *ratione loci* of the Tribunal in the 1898-1902 arbitration . . . Chile's claim is located beyond and outside its extreme claim during the 1902 arbitration (record No. 14 of 2 May 1994, p. 9).

The effects of Chile's territorial claim and the recognition that went with it have four consequences for the present dispute: (1) application of the principle of estoppel; (2) determination of the territorial competence of the 1902 Arbitrator so as to exclude from the competence of the present Court the entire de las Vueltas basin as it is known today; (3) application of the principle that it is impossible to award more than what has been requested in the case; and (4) the *res judicata* (record No. 19 of 16 May 1994, pp. 86-87).

### 3. *Chile's position on its 1898-1902 claim*

Chile confirms that the expert Barros Arana stated in the arbitral proceedings that "the topographical location of a proposed line is entirely independent of the maps and that, accordingly, this line is no other than the actual and effective water-parting of the South American continent". It then adds that this statement "may not be used in support of the argument that whatever proved to be the continental water-parting at a later stage should become the definitive expression of Chile's claim in 1902. Thus, it is impossible to interpret Barras Arana's statement as an assertion that the continental water-parting, whose true course was not known at the time of the Award, could be incorporated in the Award many years later and despite having been rejected by the Arbitrator as an appropriate criterion for determining the boundary. Moreover, with regard to the expression of Chile's interpretation of the determination of the boundary, what really matters is the line drawn on the map" (Chilean counter-memorial, pp. 45-46, paras. 4.2 and 4.3). (Hereinafter this counter-memorial will be referred to by the abbreviation CCH, and the paragraph numbers will follow the page numbers.)

Chile has also stated on this question: "For the moment it is sufficient to stress that the claims of the Parties were both submitted to the Tribunal in the form of lines drawn on maps and that, without adhering to those lines, the Tribunal made its decision, also shown as a line drawn on a map" (CCH, p. 46, 4.4).

Chile is obliged to reject the conclusion drawn by Argentina that "both Governments . . . recognized that the whole hydrographic basin of Lake Viedma belonged to Argentina". The

arbitration proceedings in relation to this area were conducted on the basis of lines drawn on maps. Any speculation about the position which Chile might have taken if the true geographical facts had been known cannot affect the scope of the claim actually made by Chile or the interpretation of the words actually used or the identification of the claimed result by the Tribunal on the basis of the terms used (CCH, pp. 47-48, 4.5 (iii)).

Chile transcribes the following passage from the Argentine memorial: "Consistent with its position, Argentina requested the Arbitrator in its petition to accept as the boundary the points proposed by its expert and indicated by the numbers 1, 2, 267-274, 282-302 and 306, and to reject the points proposed by the Chilean expert and indicated by the numbers 1-9, 257-262, 271-330 and 333-348".

Chile comments: "From Chile's standpoint the form in which the Argentine memorial records Argentina's position offers the most effective support of Chile's assertion that, ultimately, what mattered in the 1902 arbitration was not the general and doctrinal principles stated by the two Parties as their respective interpretations of the 1881 Boundary Treaty but the graphic expression of these interpretations, represented as lines which actually passed through definite points specifically identified and numbered by the Parties" (CCH, p. 51, 4.11 and 4.12).

Nor does Chile deny having said that the application of the principle of the continental divide would not require at that time maps providing an accurate picture of the area, for the subsequent application of this principle would be sufficient to identify the boundary. But this does not mean that Chile had accepted, as a consequence, that the identification of the boundary on the ground could be postponed for an indefinite period after the Award or that, whatever proved to be the boundary which the Parties had regarded as such in the meantime, this boundary could be altered by the subsequent discovery of the true geographical facts (CCH, p. 52, 4.14).

Chile drew on a map the line which it claimed. The Tribunal, like Argentina, regarded that line as representing the Chilean claim, and the Award was made on the basis of its depiction on the Arbitrator's map (CCH, p. 54, 4.17).

Chile mentions map X submitted to the Arbitrator by Argentina, which contains the legend "showing. . . the frontier line proposed by Chile for the whole length of the continental water-parting". On the same map we read: "The continental water-parting, where the Chilean expert places his line, as shown on maps ii, iv, v, vii, x and xi, is not mentioned in the Treaties or in the documents on the boundaries question up to 1898. . ." Chile comments: "This map and its accompanying legend make it clear that Argentina accepted that the line claimed by Chile was depicted on the map and was not a line to which a verbal or geographical definition could not be attached". "This applies equally to the following map, No. XII in the Argentine memorial" (Chilean memorial (hereinafter MCH), p. 55, 4.18 (1) and (2), and footnote 29; MA, *maps*, p. 11).

Similar comments may be made about the two other maps in the Argentine collection, i.e., maps XIII and XIX. The main map described by Argentina in this section is map XVIII. This map confirms everything stated above about the acceptance and reproduction by Argentina of the two lines claimed by the Parties, which are shown on the map as representing the extent of their claims (CCH, p. 56, 4.19 (4), and p. 58, 4.23).

#### 4. *The origins of the territorial dispute of 1898-1902*

Argentina and Chile decided to compare the reports of their respective experts to determine the points of convergence and divergence for the whole length of their common frontier. An extensive section of this frontier allowed the application of the agreed principle for determining the frontier, i.e., the high peaks of the Andes which divide the waters between the Atlantic and Pacific Oceans.

Between latitudes 41°S and 51°S the geography changed: the high peaks, running north-south, were now cut by valleys and rivers running east-west, and the continental water-divide lay a considerable distance away and sometimes deep within the Pampas on extremely low ground. The high mountain peaks no longer separated the waters, so that they no longer obeyed the general rule on boundaries, and the approach taken in the northern and central parts of the common frontier was no longer possible. The principle of the high peaks *which* separate the waters could no longer be applied.

Four regions of disagreement were identified: the First Region, known as San Francisco Pass, which began at the point where a boundary mark had been erected by agreement between the Parties; the Second, called Lake Lacar; the Third, known as Pérez Rosales Pass-Lake Viedma; and the Fourth, identified as Ensenada de la Ultima Esperanza [Last Hope Inlet]. The present dispute concerns territory in the southern part of the Third Region.

The geography which separated the high peaks and the continental water-parting was the cause of the difficulty of applying the delimitation principle which associated peaks with water-parting. In these four regions, where the high peaks and the continental divide were separated by large distances, it was impossible to apply the delimitation principle on the agreed terms. The original principle was thus undermined by the geography.

The principle which associated high peaks with continental divide produced two further principles, that of the high Andean peaks advocated by Argentina and that of the continental water-parting advocated by Chile, head-to-head and in determined competition to secure the assent of the other Party throughout the work of the commissions established for implementation of the boundary treaties and, later, to obtain the backing of the Arbitrator. Each Party, on the basis of the treaties whose application had been thrown awry by the unforeseen geography of the Andes, chose the principle which best fitted with its territorial claims.

Thus, Argentina made the high Andean peaks the centre of its claim, and Chile opted for the continental water-parting. The British Arbitrator, called upon to apply the treaties, could not satisfy these competing principles, given his agreed terms of reference, and he devised and implemented a compromise solution, which was previously accepted by the Parties; he thus decided upon an intermediate line, in the tracing of which he took into consideration, in addition to the geography, the value of the land, including its development potential, and its population and the strategic interests (MA, *Annex of Documents*, vol. I, document No. 35, Holdich, "Considerations Other than Geographical Which Must Affect the Decision of the Tribunal", pp. 385-392).

5. *Concerning whether the Chilean claim was a principle or a line drawn on maps*

Argentina maintains that Chile sought recognition of a concept or principle, the natural and effective water-parting of the South American continent, and that the maps were of secondary importance, while Argentina itself claimed the line of the highest Andean peaks shown on the maps. According to this interpretation, the natural and effective continental water-parting was the principle and constituted the position which Chile wished to see triumph in the 1898-1902 arbitration as an interpretation of the 1881 Treaty and more particularly of the 1893 Protocol.

Argentina says that Chile began with a position of principle, which it advocated with tenacity and did not alter throughout the arbitration, and that to assert the contrary is to deny the obvious. It then adds that all the quotations show very clearly that Chile maintained that a natural and effective continental water-parting was the general boundary criterion which should be followed for the whole length of its frontier with Argentina, in accordance with the provisions of the boundary treaties of 1881 and 1893. Finally, Chile recognized as Argentine the territory to the east of the natural and effective water-parting. Completing its presentation, Argentina argues that Chile's statement of its claim was not, however, structured in terms of lines on a map (MA, pp. 75-76, 21 and 22, pp. 99-104, 39, and pp. 119-121, 50; CA, pp. 26-27, 20, pp. 29-30, 28, and pp. 31-33, 28-30).

Argentina states that "a simple comparison of these three maps shows clearly that the depiction of Chile's position in 1898-1902 was not a line fixed on a map, as Chile claims today, but rather a dynamic representation which was adapted as geographical knowledge evolved (record No. 9 of 25 April 1994, p. 7). "In short, Chile claimed that the Arbitrator had ruled on the applicable principle of delimitation and that he had accepted that this principle was the continental water-parting" (MA, p. 115, 47).

Other quotations from the oral submissions support the Argentine thesis. "The eastern limit of the area falling within the competence of the British Arbitrator was. . . a natural limit, the natural and effective water-parting of the South American continent, and not the cartographic representations of this natural limit on any map or plan, whatever its origin" (record No. 20 of 17 May 1994, p. 7). "It is important to bear in mind that the Tribunal realised that the "extreme claims" of the two Parties were not the lines as drawn on the maps" (record No. 12 of 28 April 1994, p. 74).

Chile's claim "was not a line fixed on a map, as Chile asserts today, but rather a dynamic representation which was adapted as geographic knowledge evolved, for it represented the course on the ground of the natural and effective continental water-parting" (record No. 9 of 25 April 1994, p. 7).

The succession of geographical descriptions and cartographical representations of the continental divide submitted during the British arbitration had for Chile no more than a merely tentative and illustrative value, always subject to revision depending on the true line of the natural continental water-parting on the ground. During the British arbitration the geographical descriptions and cartographical representations of the "continental divide" in the area to the south of Lake San Martín were evolving in step with improvements in the knowl-

edge of the geography and topography. However, at no point did Chile adopt any of these successive cartographical representations as the “specific” line of its extreme claim, which remained throughout the arbitral proceedings the “natural and effective water-parting” wherever it was located on the ground (CA, pp. 29-30, 25).

Against the background of this interpretation, Argentina comments that it is not for nothing that paragraph 10 of the report of the Arbitral Tribunal “does not mention the claims as being depicted on maps”, and Argentina goes on to say that “for the Tribunal Chile’s line was the natural and effective continental water-parting, regardless of the maps, and could not be anything else when Chile itself kept telling the Tribunal that any deficiency of geographical information on the Chilean maps was of no importance” (record No. 12 of 28 April 1994, pp. 75-76).

Chile, in contrast, argues that “the claims of the Parties were established as specific lines described with some precision and represented visually on maps”, and that “for each Party the demarcation of its claim in the form of a line on its map running from one numbered point to another brought the dispute between the Parties to a head in 1898” (CCH, p. 134, 8.4). Accordingly, in opposition to the Argentine thesis that Chile claimed solely a concept or principle, Chile argues that it claimed a concrete line marked on maps.

In order to determine one’s position on this issue it is necessary to examine directly the documents which constituted the 1898 Arbitral *Compromis*, i.e., the records of the experts and the agreement of the representatives of Argentina and Chile to submit the points of dissent to the British Arbitrator.

#### 6. *The claims of the Parties in the records of the experts*

The points of agreement and disagreement were indicated in the records of their deliberations produced by the experts. These records were submitted to the Arbitrator in order to make clear to him the areas concerning which the Parties were seeking a decision.

These are records of the meetings which the experts held on 29 August and 1 and 2 September 1898 and of the meeting in Santiago between Chile’s Minister for Foreign Affairs and Argentina’s Minister Plenipotentiary on 22 September of that year with the experts in attendance. At these meetings the points of agreement and disagreement were established, and the two countries, having exhausted the possibilities of reaching a direct understanding, finally decided to submit the points of disagreement to the British Arbitrator for adjudication.

##### 6.1 *The maps in the records of 29 August and 1 September 1898*

The record of 29 August 1898 (MA, *Annex of Documents*, vol. I, document No. 14, pp. 109-136) says that the two experts made the following statements: “The Chilean expert, that he has established a general line of the Andean frontier between Chile and Argentina specified in the 1881 Treaty, which he presents to his colleague on a map and as a numerical list of points included below” (para. 2).



“The Argentine expert, that it would be four days before he could submit a general map, similar to the one submitted by the Chilean expert, of the part of the Cordillera de los Andes lying between parallels 38° and 52° . . . but that he would be happy to make available to his colleague, at the office of the Argentine Commission, the partial sheets of a 1:200,000 map, in the expectation that he would in turn be able to examine, at the Chilean office, the partial sheets which had been used in the preparation of the full map”. (para. 82)

At the same meeting the Argentine expert stated:

“ 8. He regards it as essential and so proposes to the Chilean expert that the experts should exchange photographic reproductions, or reproductions of any other kind, of the partial maps used in determining the general line proposed by each of them, and that these reproductions should contain indications of the points and sections of such lines” (para. 88).

“ 9. They should also exchange reproductions of the same maps showing clearly the points or sections of the general frontier line” (para. 89).

The same record contains other references to maps. The Argentine expert added:

“ 10. Having made the comparison referred to in proposal 4, they should enter on reproductions of the same maps the changes made in the course of the general line by the two experts on their respective maps” (para. 91).

“ 11. Once proposal 5 has been carried out, they should enter [in the record] reproductions of the same maps” (para. 92).

“ 12. . . . including the proposed lines, the lines rejected and accepted for the whole or part of the extent [of the frontier], accompanied by reproductions of the same maps containing specific depictions of the various lines” (para. 93).

There are further references to maps in the record of 29 August. The Argentine expert again:

“ 13. They should at the same time exchange reproductions of the maps on which they had drawn the dividing lines proposed for adoption, in the event of the case provided for in the said protocol and agreement” (para. 94).

“ 14. . . . and of the various reproductions of the maps which they have taken into account in the formulation of decisions . . .” (para. 95).

“ 16. The reproductions of all the maps referred to in this general record shall show the area of the demarcation, on a scale of not less than 1:400,000, and they shall be signed by the two experts” (para. 96).

“ 17. When all this has been done, the two Parties will have completed the representation of the general frontier line between the Argentine Republic and the Republic of Chile” (para. 97).

“ 18. . . . the experts shall deliver to their assistants copies of the maps on which the approved points or sections of the dividing line have been entered” (para. 98).

It seems that at the meeting of the experts on 1 September 1898 (MA, *Annex of Documents*, vol. I, Document No. 15, pp. 137-138) the Chilean expert “proposed that the part concerning the exchange of copies of maps should

be amended as follows: both experts shall in future deliver to his colleague at his office all the individual maps or sets of maps available from the ones which have been used in formulating the proposal of his general line, so that each expert may consult, copy or reproduce them as he sees fit. They shall also undertake to certify with their signatures all duly verified copies or reproductions" (para. 3). The Argentine expert replied that "he would have no difficulty in accepting the amendment proposed by the Chilean expert concerning the exchange of maps" (para. 5).

These quotations demonstrate the importance of the maps in the determination of the points of agreement and disagreement on the frontier line between Argentina and Chile. The experts made their partial maps available to each other and resolved to certify the reproductions with their signatures and exchange maps without restriction; and they mentioned the exchange of partial maps representing clearly the points or sections of the general frontier line.

In addition, the experts agreed to enter on the maps any changes in the course of the general line and to depict the differing dividing lines which they sought to have adopted. Lastly, there is the reference to "the maps which have been taken into account in the formulation of decisions". These abundant references to maps, evidence of their widespread use, mean that the Parties used maps to determine their points of agreement and disagreement concerning the common frontier.

It is worth mentioning the statement of the Chilean expert on 29 August 1898 that "he has established a general line of the Andean frontier between Chile and Argentina", which "he submits to his colleague on a map and as a numerical list of points included below" (para. 2). "The description of the dividing line proposed by the Chilean expert" (para. 18) does in fact appear later in the same record. It is followed by a description of the proposed line by means of toponyms and numbered points (paras. 19-75). Here it is stated that Chile presented "the general line of the Argentina-Chile frontier . . . on a map and as a numerical list of points and sections".

## 6.2 *The frontier lines in the records of 29 August and 22 September 1898*

These records contain abundant references to the lines of the Parties. The purpose of the meeting on 29 August was "to decide on the general line of the frontier" (record of 29 August, para. 1). There now follows a sample of quotations concerning the frontier lines:

Here are the words of the Chilean expert:

- (1) "that he has established a general line of the frontier . . ." (para. 2);
- (2) "the delineation of this line has been based solely and exclusively on the demarcation principle established in the first clause of the 1881 Treaty . . ." (para. 3);
- (3) "that accordingly the frontier line which he proposes passes . . ." (para. 4);
- (4) "that the same line leaves . . ." (para. 5);

(5) “. . . to conclude . . . the deliberations of the experts concerning the general line” (para. 7);

(6) “the description of the dividing line proposed by the Chilean expert which, at his request, is to be inserted in the record is as follows: . . .” (para. 18);

(7) “. . . would have no problem in stating that the course of the general line which he has proposed is in conformity with the provisions of the articles of the Treaties and Agreements cited by the Argentine expert” (para. 80).

The record repeats, then, that the Chilean line was depicted on maps. A depiction is a drawing or other portrayal of a person or thing. What is depicted by a line can be, for example, “the course or direction of a road, canal, railway line, highway, etc.”. In the language of the records what is depicted as a line is the course of the frontier.

Elsewhere the Chilean expert says “that although in its most extensive and important parts the ground across which the dividing line runs is sufficiently well-known and even extensively surveyed, . . . it must nevertheless be pointed out that the topographical location of the proposed line is entirely independent of the accuracy of the maps and that, for this reason, he states that this line is none other than the natural and effective water-parting of the South American continent” (para. 6).

The Chilean expert adds “that the Argentine expert has submitted his general line with a numerical list of points and sections accompanied by fairly concrete and precise indications for identifying them on the ground by any natural feature” (para. 8).

The record of 22 December (MA, *Annex of Documents*, vol. I, document No. 17) contains the following statements: “the said officials have entered the line which each of them believes should separate the Argentine Republic from the Republic of Chile”; “the line of the Chilean expert begins . . .”; “the lines of the two experts coincide . . .”; “the line of the Chilean expert diverges from the line of the Argentine expert at the points and sections . . .” (paras. 1, 2, 3 and 4).

The record of 22 September repeats that the proposed lines are the ones which the experts consider to separate Argentine and Chilean territory; and it is stated that the lines coincide or diverge at this or that point. The points of coincidence and divergence were established by reference to lines; and the records tell us that the lines were described by means of toponyms and points and sections numbered and depicted on maps.

These quotations show that in formulating their proposals both Parties translated the underlying principles into concrete points and that these points were marked on maps. The references to lines are continual—unlike the references to principles, except Chile’s statement that its line is in conformity with the principle established in the 1881 Treaty and the reiteration of Chile’s interpretation of that Treaty to the effect that it accorded preference to the continental water-parting. From this material we can infer the interrelationship between the chosen principle and its descriptive and graphic representations.

7. *Determination of points of agreement and disagreement in the records of 29 August and 22 September 1898*

When the discussions had been completed, the Chilean expert proposed to his Argentine colleague a procedure for deciding on the general frontier line. To this end he suggested that in the course of two or three meetings the experts should resolve matters relating to the general line and that at one of these meetings they should submit to each other in writing “a list of the points and sections on which each is in agreement with the other and a list of the points or sections concerning which this is not the case”.

The Chilean expert then added: “4. Once the two lists have been compared, each of the experts will have an opportunity to offer any clarifications or comments or any amendments which he wishes to make to his original proposal in the light of the geographical data contained on the maps submitted by his colleague, which shall be entered in the record” (record of 29 August, paras. 86-88).

Thus, the points of agreement and disagreement were determined by comparing the experts’ lists. List means an enumeration of items. In this case the relevant items were the toponyms and points and sections in the experts’ proposals. A comparison of the lists of toponyms and points and sections produced the concrete versions of the respective territorial claims.

The experts also envisaged the possibility of making changes in their respective lines in the light of the maps submitted to each other: “in the light of the geographical data contained in the maps submitted by his colleague”.

According to the record of 22 September 1898, on that date Chile’s Minister for Foreign Affairs and Argentina’s Minister Plenipotentiary agreed to submit to the British Arbitrator the points of disagreement identified in the experts’ records. Accordingly, they sent to the British Arbitrator a copy of the record of 22 September and “[copies] of the records of the experts and of the international treaties and agreements in force in order that, in accordance with the second clause of the *Compromis* of 17 April 1896, he may resolve the differences noted above” (para. 7). (MA, *Annex of Documents*, vol. I, document No. 17, pp. 149-152)

The fact that the record of 22 September did not mention any plans or maps among the documents sent to the Arbitrator has been interpreted as confirming that the concrete expression of the claims of the Parties did not take the form of plans or maps.

This fact does not vitiate or devalue the use of maps at the meetings of the experts or their use to identify the points of agreement and disagreement. Argentina submitted its first map on 17 January 1899, and Chile its in February of that year. From that date the filing of maps and their description in written submissions was a keynote of the arbitral proceedings.

8. *Points and sections in the experts’ records*

The record of 22 September states: “2. That the lines of the two experts coincide . . . at the points and sections designated by the numbers 10-256 in the Chilean expert’s list, and 3-266 in the Argentine expert’s list; and at the points

and sections designated by the numbers 263-270 of the Chilean expert, and 275-281 of the Argentine expert; and finally at those numbered 331 and 332 by the Chilean expert, and 304 and 305 by the Argentine expert” (para. 3).

The points and sections of disagreement were specified as follows: “That the line of the Chilean expert diverges from the line of the Argentine expert at the points and sections designated . . . by the numbers . . . 271-330 by the Chilean expert and 282-303 by the Argentine expert . . .” The current dispute concerns points of divergence 330 (Chile) and 303 (Argentina), to the north, and points of coincidence 331 (Chile) and 304 (Argentina), to the south. Points of coincidence 331 (Chile) and 304 (Argentina) mark Mount Fitzroy.

The points coincided with respect to Mount Fitzroy because, owing to their lack of geographical knowledge, the Parties believed during the deliberations of the experts in 1898 that Mount Fitzroy was a high Andean peak situated on the continental water-divide. This meant that it satisfied the requirements of the 1881 Treaty and the 1893 Protocol for designation as a point of the frontier. Later, in the course of the arbitration, although it was known that this mountain was not situated on the continental water-divide, the Parties left their agreement untouched.

The record of 1 October 1898 (MA, *Annex of Documents*, vol. I, document No. 18, pp. 153-155) clearly repeated the points of agreement with a view to entrusting their demarcation to four mixed commissions. This record reads as follows: “1. That, as a result of the comparison of the general frontier lines submitted by the Argentine expert as contained in the record of 3 September last and by the Chilean expert as contained in the record of 29 August, the points and sections of the Argentine expert numbered 3-266, 275-281 and 304-305 coincide with the points and sections of the Chilean expert numbered 10-256, 263-270 and 331-332, they resolve to accept them as forming part of the dividing line in the Cordillera de los Andes between the Argentine Republic and the Republic of Chile” (para. 2).

This record refers to “points and sections”, so that, the description beginning from the north, the numbers refer first to the points and then to the sections, i.e., to the lines running southwards. The numbers correspond both to the points and to the sections. This is stated in the records: “The points and sections designated by the numbers. . .” (record of 22 September, para. 3)

The sequence is established between points and sections, not between sections and points. When the number of a point is given, the section identified by the same number is the line running southwards as far as the next point; and each section is identified by the same number as the point at which it begins.

When there is a discrepancy between points on the two lines it is understood that this discrepancy also exists with respect to the sections running southwards. Accordingly, the discrepancy between points 303 (Argentina) and 330 (Chile) continues southwards until the line reaches the next point, which in this case is Mount Fitzroy, numbered 304 (Argentina) and 331 (Chile).

It will be noted that with respect to the points and sections relevant to the present dispute the coincidence of point 331/304 continues throughout the section running southwards as far as the next point, 332/305. The discrepancy

between points 330 and 303 continues with respect to the section running southwards and coinciding on Mount Fitzroy (point 331/304). The points coincided from Mount Fitzroy onwards. The Arbitrator had no doubt that the points and sections of disagreement numbered 303 and 330 fell within his competence. The preparatory work and the outcome of the Award confirm this.

8.1 *Concerning whether the section between Chilean points 330 and 331 was not in dispute.*

In the oral submissions Argentina submitted some comments demonstrating or at least suggesting that Chilean section 331 had been agreed between the Parties. Although that assertion is unobjectionable, the identification of section 331 can be questioned. In fact, section 331 is not located between points 330 and 331 but between points 331 (Mount Fitzroy) and 332. On the other hand, section 330, located between points 330 and 331, was the subject of dispute.

An examination of these materials can be boiled down to the determination of the number corresponding to the section between points 330 and 331, because if it turns out that this is not section 331 but 330, the stated consequences can be disregarded, because once the cause has been eliminated, the effect disappears.

The record of 22 September lists the points and sections of agreement. It states that the lines of the two experts coincide “at the points and sections designated by the numbers. . . ; and finally at those numbered 331 and 332 by the Chilean expert and 304 and 305 by the Argentine expert” (para. 3).

The records make specific mention of the points and sections of agreement and disagreement. They indicate the number and whether there is agreement or disagreement and they refer both to the point and to the section running southwards from it. Agreement was not reached on Chilean point 330 but there was agreement on Chilean point 331. The failure to agree on point 330 extended to the section also bearing the number 330 and running southwards as far as the point and section numbered 331.

Since the lines ran parallel to each other, there was agreement and disagreement as to whether some of the points and sections of both Parties corresponded in the descriptions and depictions of the lines on maps. Even if the sections ran from south to north, which was not the case according to the description of the general frontier line contained in the records of the experts, the same attitude would have to be taken to section 331 as to section 304. Section 330 could not have been disputed, even if it was assigned number 331, without the dispute also covering section 303, to which had been assigned number 304; and if there had been agreement on section 330 there would also have been agreement on section 303. The sections between Lake San Martín and Mount Fitzroy were within the competence of the 1898-1902 Arbitrator, regardless of their numbers, and the Arbitrator ruled on them. Here the *ex post facto* argument seems solid.

## 9. *Reasons for questioning the evidentiary value of plans and maps*

### 9.1 *Water-parting principle versus concrete line*

First of all it is adduced that the dispute arose between a concept or principle (the continental water-divide) and a concrete line, the principle advocated by Chile and the line by Argentina. In this connection Argentina refers to the Chilean statements contained in the record of 29 August 1898: (a) “the delineation of this line has been based solely and exclusively on the demarcation principle established in the first clause of the 1881 Treaty, a principle which should also be the invariable rule of the proceedings of the experts, according to the 1893 Protocol” (para. 3); and (b) “this line is none other than the natural and effective water-parting of the South American continent between parallels 26°52’45" and 52° and can be demarcated on the ground without carrying out any more topographical operations than are necessary for determining what the course of the waters would be in places where they do not physically run” (para. 6). It has been understood, on the basis of these and other similar statements, that the Chilean claim consisted of a concept or a principle, the natural and effective continental water-divide, wherever it might be located, and not of a line specified on a map.

The statement of the Chilean expert that his line followed solely and exclusively the continental water-parting of the South American continent is preceded by another statement: the Chilean expert “has established a general line of the Andean frontier between Chile and Argentina specified in the 1881 Treaty, which he submits to his colleague on a map and as a numerical list of points included below”. This general statement precedes and provides the context for the series of subsequent statements and indicates that this is a line based on the 1881 Treaty and represented on a map and by a numerical list of points.

A key element of the proposal appears at this point: the numerical list of points transposed onto a map. Further on in the same record of 29 August are found details of the points and sections and a description of the line with its toponyms. The importance of the maps is thus confirmed, not as secondary materials but as materials essential to the claims of the Parties.

It must be pointed out that the claims of the Parties would have been unintelligible if they had not been expressed as lines drawn on maps. If even the most learned person were given the records of the experts without the maps, he would be hard put to understand the point of the dispute. And if he sought guidance from the toponyms, he would have to use maps to see where each river or peak was located. And it must be noted that the descriptions did not include the identification of geographical features in terms of degrees, minutes and seconds.

In a submission to the Arbitrator Chile associated its line with its map, which it called official: “That the information in the Chilean proposal about a frontier line contained in the records, in 1898, is sufficient for the identification and demarcation of the line throughout its total extent and that the depic-

tion of this line on Chile's official map submitted with the records agrees with the description and is substantially correct" (*Chilean Statement*, ch. XXVIII; MA, *ibid.*, document No. 6, p. 273).

Still on the use of maps, the Chilean statement added: "The examination of the ground covered by the Treaties will be undertaken with the aid of the maps annexed to the present statement of evidence" (*ibid.*, p. 274).

An examination of the lines and maps mentioned in the records of the experts shows that the Parties were arguing about two principles, in the sense that each of them endeavoured to secure victory for the principle which suited it best: Argentina the high Andean peaks, and Chile the continental water-parting.

Each of these principles was manifested in terms of toponyms and numbered points and sections. The common source of the two positions was the 1881 Treaty and the 1893 Protocol. The respective principles were the guideline, foundation and legal justification of the toponyms, points, sections and lines of the competing claims.

The experts compared materials of the same kind to determine the general line of the frontier and identify the points and sections of agreement and disagreement. Reduced to a confrontation between a principle and a concrete line, the dispute would have introduced an internal imbalance both in the petitions and in the proceedings. Furthermore, the results could not be permanent for one of the Parties and variable and dependent on subsequent geographical discoveries for the other.

## 9.2 *The pecked section of the continental water-parting*

In order to promote the thesis of a principle, particular importance is attached to the fact that the boundary proposed by Chile was marked as a pecked line in a sector of the continental water-parting. This pecked line should have meant that the course of the divide was tentative and subject to correction in the light of advances in geographical knowledge.

During the arbitration Chile moved the pecked line shown on plate IX further to the north from the position which it had occupied on its 1899 map. The parties to an international dispute can alter their claims during the judicial or arbitral proceedings, and the final submission determines the plea in question. The Argentine line was also altered between points 302 and 303: from its south-south-east direction in the records of the experts, on the basis of which the Parties agreed to submit the dispute to the British Arbitrator, it was shifted through a right-angle to a south-west direction in the statement and maps submitted to the Arbitrator (MA, *Annex of Documents*, document No. 27, "Chilean Statement", ch. XL, p. 284).

Although Chile's pecked line now occupied a different position on plate IX, this last depiction constituted its final location. The Arbitrator ruled on the basis of this final representation of the continental water-parting. Following his decision the situation was consolidated by the *res judicata* and consequently the variability referred to above ceased.



### 9.3 *The Chilean claim independent of maps*

The record of 29 August contains the following statement by the Chilean expert: "That although in its most extensive and important parts the ground across which the dividing line runs is sufficiently well-known, and even extensively surveyed, and although the hydrographic origins of the rivers and streams which flow away to both sides is generally well-established, it must nevertheless be pointed out that the topographical location of the proposed line is entirely independent of the accuracy of the maps and that, for this reason, this line is none other than the natural and effective water-parting of the South American continent between parallels 26°52'45" and 52°" (para. 6).

Both at the meetings of the experts and in its submissions to the Arbitrator Chile reiterated the advantage of the adoption of the continental water-parting—that it could generally be identified by surveying the ground. According to this argument, if anyone is told to trace a line by following this water-parting, all he has to do is to go to the spot and observe the flow of the waters.

Chile's second submission to the Arbitrator clarifies the role of the maps with respect to the continental water-parting. Chile said that "it had never proposed subordinating the demarcation to the maps since they were not necessary, either for establishing that there existed a true and single line separating the waters between Chilean and Argentine territory or for finding and identifying that line on the ground". One can agree with the statement that maps are not necessary for establishing that a continental divide exists on the South American continent or for identifying that divide on the ground, for it can be found by means of exploration.

Part of the grey area enveloping this problem can be clarified by distinguishing between the guiding principles—the high Andean peaks and the continental water-parting—and the lines which represent them. This distinction is implicit throughout the arbitral proceedings. The claims could not be reduced to principles nor could they lack parallelism and balance, because they necessarily had to be claims of the same kind, i.e., claims represented as lines on maps.

Thus, the principles came on the scene as the basis, foundation and legal justification of concrete lines which were manifested in terms of points and sections designated by numbers and described by toponyms, as can be seen from the records of the experts.

The Parties were not in dispute merely about principles, nor was one arguing about a principle and the other about a concrete line. Both were arguing about lines based on principles. And there can be no other possibility in the light of the records of the experts and the circumstances of the proceedings themselves. The Parties argued in reference to a continental water-parting in full knowledge of the uncertainty attaching to some of its sectors.

In this context, the point is not that the maps were unofficial but that their accuracy was not an essential condition without which the Arbitrator could not have adopted a line based on the continental divide. Generally speaking, the maps of the time were by no means renowned for their accuracy and technical quality, according to Holdich (MA, *Annex of Documents*, vol. I, document No. 32, "Narrative Report of the Chile-Argentine Boundary Commission", pp. 300-334).

The Chilean expert's statements were not enough to convince the Arbitrator, who opted for an intermediate line between the extreme claims of the Parties, i.e., between the high Andean peaks and the continental water-parting as known at the time. The documents of the preparatory work of the Award contain abundant references to a compromise line and they specify how and when the Parties gave their consent thereto.

Inaccuracy is not the same thing as non-existence. Inaccuracy means a lack of precision and finish and, accordingly, the possibility of subsequent changes and additions. Something regarded as inaccurate does exist but it exists subject to possible correction. Chile changed the line of the continental water-parting during the arbitration, including the line in this sector, by means of two documents which have a unity of meaning: the *Chilean Statement*, the relevant chapter of which is No. XL, and the map known as plate IX.

The possibility of changing the line was closed by the final Chilean presentation and then sealed by the Award, which crystallised the claims of the Parties in their final expression and determined definitively the territorial competence of the Arbitrator. That moment marked the end of the possibility of changing, for better or for worse, the lines claimed by the two Parties, for that was now precluded by the *res judicata*.

#### 9.4 *Significance and importance of the maps*

In order to elucidate the nature and extent of Chile's territorial claim in 1898-1902, which has been one of the most complicated topics of the present arbitral proceedings, it is necessary to take account of the significance of the maps, i.e., the legal purpose of maps in territorial disputes. Maps constitute a graphic language and as such they must be read and interpreted in conjunction with the written and oral language of the submissions of the Parties.

Maps are not isolated documents but integral parts of submissions, either of claims or of arguments. For example, plate IX cannot be considered in isolation from the corresponding *Chilean Statement*; on the contrary, the two documents are bound together by a unity of exposition and meaning. All the maps submitted to the Arbitrator by the Parties contained a graphic representation of the Argentine and Chilean claims, and the Argentine maps made a graphic distinction between explored and unexplored zones. One cannot really see the reason for discounting the message contained in the plans and maps.

### 10. *The maps in the 1898-1902 arbitration*

Beginning with references to Argentine sources, attention may be drawn to the following statements:

- (1) The representatives of the two countries which decided to submit the territorial dispute to adjudication by the British Arbitrator (record of 22 September 1898) mentioned the submission to the British Arbitrator of the records and international treaties and agreements in force, but there was no mention of the maps.
- (2) Argentina states that paragraph 2 of the arbitration report indicates that an examination was made of copies of the treaties, agreements, protocols and documents provided by the Parties, but it makes no mention in this context of maps or of lines drawn on maps.

(3) The Tribunal was aware that the “extreme claims” of the two Parties were not the lines drawn on the maps; and in paragraph 10 of the arbitration report there is no mention at all of the claims as depicted the maps.

Some comments may be offered on these points. The record of 22 September did not mention the submission of maps. The reason for this silence was not explained, but, since the abnormal has to be explained, it would have been strange if the maps had been deliberately removed without any statement of the reason. If the Parties had thought the maps of little value, they would have said so, for such an attitude would have been unusual in a territorial dispute. In principle there is no need to explain a normal action because it goes without saying that it is part of a regular procedure.

A review of the circumstances of the request submitted to the British Arbitrator prompts the conclusion that the maps did not accompany the notes requesting intervention in the dispute which the Parties sent to the Foreign Office on 23 November 1898. Argentina stated in its note that it was not forwarding the minutes of the meetings of the experts because the Government had not finished preparing them. The Chilean note referred to the annex consisting of the minutes concerning the points of disagreement. Neither of the notes referred to maps (MA, *ibid.*, documents Nos. 19 and 20, pp. 157-162).

Both Argentina and Chile submitted their maps to the Foreign Office. Argentina appended a map to its note of 17 January 1899, and Chile delivered a map in February of that year (MA, *maps*, maps Nos. 1 and 2; MCH, *Atlas*, maps Nos. 1 and 2). Both these maps showed the continental water-parting as a line corresponding to the numbered points and sections and to the toponyms mentioned in the records of the experts. The Argentine map depicted the continental water-parting as known at the time with no difference indicated between explored and unexplored zones. The Chilean map depicted the continental divide as a pecked line in the unexplored sector.

The arbitration report mentioned documents but not maps. A restrictive interpretation of the term “documents” is not consistent with other passages of the same arbitration report or with the preparatory work of the 1902 Award. Later in the arbitration report paragraph 4 states that the Tribunal “invited the representatives of the two Governments to provide it with the fullest possible information about their respective positions, accompanied by maps and topographical details of the disputed territory, and it acknowledged that the Parties had provided it with lengthy and exhaustive statements and arguments in several printed volumes illustrated with maps and drawings and with a large number of photographs which provided a graphic and topographic picture of the characteristics of the terrain”. The Tribunal states clearly that it requested maps from the Parties and that the maps illustrated the corresponding statements and arguments.

With regard to the preparatory work, the report of Sir Thomas Holdich (*ibid.*, document No. 32, T.H. Holdich, “Narrative Report of the Chile-Argentine Boundary Commission”, p. 332) noted that the inspection of the area should be carried out sufficiently quickly to ensure that it was concluded before the harsh Patagonian winter, and it added that this was only rendered possible because the Technical Commission had maps of the country and that, provided

that these maps were complete and accurate and that the rival experts on either side were satisfied of their accuracy and could raise no argument on this point subsequently, the field would at once be open for the Tribunal *to discuss or decide on the map basis*. If they proved insufficient or inaccurate, the investigation would certainly be prolonged.

In the same report Holdich went on to say that he was confident "that we may take the Argentina maps as they stand and depend on them (so far as they are officially complete) *as the basis of any decision the Tribunal may advance*" (*ibid.*, p. 333).

Holdich's report shows that the Technical Commission could quickly explore the region and would not require a second visit in the following southern summer because it had maps provided by the Parties; that unless the experts of the two countries disagreed, the Tribunal could begin discussing or deciding *on the map basis*; and that the Argentine maps were reliable enough to constitute the basis for such a discussion and subsequent decision. The Argentine maps showed, without exception, the lines of the territorial claims both of Argentina and of Chile. And there was no mention of any disagreement concerning the maps, for in that case the Technical Commission would have undertaken other exploration work, and the Arbitrator would have delayed his final decision.

Furthermore, the Arbitrator's map is one of the three instruments constituting the 1902 Award and its immediate antecedent is Argentina's map No. XVIII. Attention must be drawn to the role which the Award itself accorded to the maps: a more detailed definition of the frontier line was to be found in the arbitration report and on the maps received from the Republics of Argentina and Chile, on the basis of which the Arbitrator approved the frontier proposed to him by the Arbitral Tribunal (art. V, para. 1).

### 11. *Chile's submissions to the Arbitrator*

Several of Chile's submissions to the Arbitrator have been quoted in order to demonstrate that the upper part of the basin of the River de las Vueltas lay outside the Arbitrator's competence because Chile had not included it in its claim and that, as an Atlantic basin, it was covered by Chile's acknowledgement that all the Atlantic basins belonged to Argentina.

Here are some passages on this point: (1) "Accordingly, all the land irrigated in that region by waters which flow to the Atlantic were Argentine, and land irrigated by waters flowing to the Pacific were Chilean" (first Chilean submission); (2) "All the orographic, topographic and hydrographic features which may occur on either side of the line belong in perpetuity and *will remain* under the absolute rule of the respective country" (second Chilean submission).

It immediately strikes one that the Spanish verb tenses in the quoted passages are not categorical. Those in the first passage are in the imperfect indicative and imperfect subjunctive; the ones in the second passage are in the future indicative.

Reading the submissions as a whole, these seem to be arguments in favour of the adoption of the continental water-parting, for the term is not used in association with the line of the high Andean peaks, as stated in the boundary treaties, but in an exclusive manner. Chile stated that “in short, Chile’s positions on the Andean frontiers can be condensed into two introductory paragraphs: 1. That the sole principle of demarcation which the Treaties order to be followed is the water-parting; and 2. That the Chilean expert has followed this principle in drawing his line” (MA, *Annex of Documents*, document No. 26, “Chilean Statement”, ch. XVIII, pp. 279-280).

There is no need to refer to the submissions to the Arbitrator to verify that Chile recognized that the territory located in Atlantic basins was Argentine. The matter had been settled by the 1881 Treaty and more particularly so by the 1893 Protocol: “the frontier line shall run along the most lofty peaks of the said Cordillera that may divide the waters”; and “consequently all lands and all waters . . . situated to the east of the line of the most elevated crests of the Cordillera of the Andes that may divide the waters, shall be held in perpetuity to be the property and under the absolute dominion of the Argentine Republic; . . . and all land and all waters . . . situated to the west of the line of the most elevated crests of the Cordillera of the Andes to be the property and under the absolute dominion of Chile” (MA, *Annex of Documents*, document No. 6, “Additional and Explanatory Protocol to the Boundary Treaty of 1881, signed on 10 May 1893”, para. 2).

The real issue relates not to Chile’s acknowledgement that the Atlantic basins belonged to Argentina but rather to the territory which first the Parties and then the Arbitrator understood and recognized, in the case of the River de las Vueltas, as constituting and confining the Atlantic basins at the time. It is a question of knowing whether the geographical knowledge of the time is to be upheld or disregarded and what effect was given to such knowledge in the 1898-1902 arbitration.

### 11.1 *Chile’s statement on the basin of the River de las Vueltas*

The frequently cited chapter XL, entitled “The proposed frontier lines between Lake San Martín and Mount Stokes” was the object of particular attention and debate during the present arbitral proceedings. Describing the course of the continental water-parting in the southern part of the section currently in dispute, Chile said that its First Subcommission measured altitudes of 727, 558, 1,029, 1,850 and 2,095 metres along the *divortium aquarum*, indicating a gradual elevation of the ground from east to west as far as a series of snowy peaks from which several tributaries of Lake San Martín flow towards the Pacific and the streams or sources of the Rivers Chalia and Hurtado, tributaries of Lake Viedma, flow towards the Atlantic.

The description of the continental water-parting continued as follows: “On the summit of 2,095 metres the *divortium aquarum* turns to the N.N.W. to enter a region still very little-known, bordering on the north the basin of the River Gatica (Río de la Vuelta of the Argentine maps), which in the lower part

of its course attains 80 metres in breadth, and the sources of which, judging by the great volume of their waters, are probably situated far above the point to which it has been explored" (*Annex of Documents*, document No. 27, "Chilean Statement", p. 292).

This description corresponds to what at the time was known as the continental water-parting which, running north-south at a considerable distance from the high Andean peaks, turned westwards and followed an east-west course for the whole length of the peaks whose altitudes are given above, and then from the peak at altitude 2,095 metres turned north-north-west and ran along the edge of the basin of the River de las Vueltas before turning south-south-west to reach point 331 (Mount Fitzroy). This description corresponds fully with the map labelled plate IX, the pecked line on which has been the subject of much controversy.

The description follows explored land for the whole extent of the measured elevations, which run east-west not north-south, and then, now in little-known or unknown terrain, it passes along the edge of the las Vueltas basin, following a curve which ascends northwards, i.e., borders what at the time was known as the las Vueltas basin. The references are to the periphery of the las Vueltas basin as it was thought to be at the time, i.e., the maximum extent attributed to it.

An important point in this scenario is the significance of the pecked line on plate IX. From the peak at altitude 2,095 metres and all along the periphery of the las Vueltas basin as it was known at the time the line is not solid but pecked to indicate unexplored terrain. This pecked line has blank spaces to take account of the possible prolongation of the las Vueltas basin that might be established by exploration work during the arbitration proceedings.

Exploration work in the 1920s, which led to the discovery of Lake del Desierto, proved that the basin extended much further to the north than had been assumed at the time of the arbitration. No use has been made of this pecked line, which is tantamount to declaring it non-existent for practical purposes, with the consequence that the true course of the line would have depended on geographical discoveries, regardless of when they occurred.

The pecked section of the continental water-parting indicates little-known or unknown terrain but was based on two known facts: the continental divide which ran east-west to the peak at altitude 2,095 metres, of which the geographers of the time were certain; and the mapped part of the las Vueltas basin, which showed that the basin began further to the north of the mainly horizontal line which carried the continental divide east-west to the peak at 2,095 metres. The pecked line had been drawn, then, not as a mere hypothesis but as an inference from known facts: the explored part of the continental divide and the mapped part of the las Vueltas basin. It can thus be seen why at the time there was no other line to compete with the pecked section of the continental divide.

The final graphic representation of the continental divide described above appeared on plate IX. The two documents, *Chilean Statement* (ch. XL) and the map, correspond in all respects. Neither the description of the periphery of the las Vueltas basin nor plate IX showed the whole extent of the Rivers Cañadón

de los Toros, Milodón, Diablo and Eléctrico, Lake del Desierto and Lake Larga, i.e., they did not include the upper las Vueltas basin as it is known today, because it was situated to the north and west of the continental divide, i.e., in a disputed area which was regarded as a Pacific basin and fell within the competence of the 1898-1902 Arbitrator.

The River de las Vueltas, in view of the volume of its waters in its lower part—it is 80 metres wide—was shown extended on plate IX with a dotted line, and the continental water-parting was moved a little to the north, beyond a blank space indicating an unexplored area between the mapped zone and the continental water-parting.

Furthermore, plate IX and its pecked line cannot and should not be considered in isolation but in conjunction with the statement describing the periphery of the las Vueltas basin, i.e., the area which at the time was regarded as the entire basin of this river. The description and the map refer to the las Vueltas basin in similar terms; and since they have the same purpose and complement each other they cannot be interpreted separately. On the contrary, they form a unity of exposition and meaning.

The essence of the problem is to clarify what the Chilean statement was referring to—whether to the las Vueltas basin and the continental water-parting as they were known at the time or whether, in view of the pecked section of the continental water-parting, the space was left open to later correction, including correction subsequent to the 1902 decision.

The final written and graphic expression of the continental water-parting as it was known at the time was crystallized in the claim submitted to the Arbitrator and in the consensus of the Parties, indicated both by their silence and failure to protest and by their reproduction of this final line, without any reservations, on Argentina's map No. XVIII, sheet 8, which the Arbitrator used when he drew his own line. The continental water-parting shown on this sheet 8 was more advantageous to Chile than the plate-IX map. But the Arbitrator's line respected the plate-IX continental water-parting in its entirety. With these acts the arbitration proceedings were brought to a close, the territorial competence of the Arbitrator was established, and the 1902 Award was pronounced.

It is necessary to decide whether the variability of the Chilean claim could be prolonged in time or would be rendered fixed by the effect of the final form of the claim and then by the effect of the Award. It can be argued that the *res judicata* consolidated the territorial claims in their final expression and fixed the space concerning which the Arbitrator made his Award. From that moment the claimed line could move no more.

#### 12. *The maps produced prior to the Award*

Argentina depicted the line of the continental water-parting on all the maps which it submitted to the Arbitrator, without entering any reservations as to the significance of this line in unexplored areas. On the Argentine maps the continental water-parting occupied the same position as on the two Chilean maps, a

fact which supports the interpretation that the two countries were in agreement on the continental water-parting at the time and that therefore it could determine the Arbitrator's territorial competence.

On 19 January 1899 Argentina delivered to the Foreign Office a three-sheet map prepared by the expert Francisco P. Moreno, on which its claim was marked with a solid line and Chile's with a pecked line throughout their extent. Both lines are continuous and do not distinguish between unexplored and explored areas.

Coming from east to west, the continental parting ascended northwards to run along the periphery of what was known as the las Vueltas basin. This basin was situated to the south of the area formed by the continental water-parting. The River de las Vueltas was shown as extending northwards by a pecked line, with two sources at its headwaters separated from the continental water-parting by a blank space. This map was submitted a few days before the Chilean map.

On 16 January 1901 Argentina delivered map X to the Arbitral Tribunal. This map showed the numbered points and sections which the experts had described in the records and delineated on their maps. It has the following title, a very interesting one to be sure: "map of the Region between 47° 0' & 49° 30' Lat. Showing the Proposed Argentine Boundary Lines (Landmarks Nos. 301-305) and the Proposed Chilean Boundary Lines (Landmarks Nos. 322-331). Argentine Evidence—map X. Scale 1:500,000" (MA, *maps*, p. 11).

The copy of map X furnished to the present Court, a reduced and partial reproduction of the one submitted to the British Arbitrator, covers the entire area of the present dispute. The Chilean line contains the points numbered 329, 330 and 331 (Mount Fitzroy). The las Vueltas basin is shown, as was customary at the time, by a pecked line in its still unexplored sector, with its sources shown as two rivers which do not touch the continental water-parting. The prolongation as a pecked line is the same as on the earlier map, and the las Vueltas basin lies to the south and within the continental water-parting of the time, as on the Chilean map of 1899.

Map X depicts the line of Argentina's claim with crosses and dashes throughout its length and the line of Chile's claim with dots and dashes throughout its length. Both lines are continuous and do not distinguish between unexplored and explored areas.

In April 1901 Argentina delivered to the Tribunal maps XII, XIII and XIV, which include the area between the south shore of Lake San Martín and Mount Fitzroy. map XII marks the Argentine line with crosses and dashes and the Chilean line with dots and dashes, both continuous and with no distinction between unexplored and explored areas. Maps XIII and XIV reproduce the graphic representations described above (MA, *maps*, pp. 12, 13 and 14).

On 22 September 1902 Argentina submitted to the Tribunal its "Short Reply to the Chilean Statement", to which were appended several maps, including No. XVIII, sheet 8 of which describes the area between Lake San Martín and Mount Fitzroy. As already stated, this map was used by the Arbitrator when he drew his boundary line between the two countries. Sheet 8 showed the las Vueltas basin as it was known at the time and included Cerro Gorra Blanca, in



accordance with Von Platen's map. As had become customary, the Argentine line was marked with crosses and dashes and the Chilean line with dots and dashes, both continuous and without distinction between unexplored and explored areas.

### 13. *The maps of the 1898-1902 Arbitration*

#### 13.1 *The maps in the preparatory work*

The preparatory work of the 1902 Award took account of the continental water-parting of the time, as described and depicted in the statements and maps of the Parties. This conclusion is based on the works of Robertson and Holdich.

In his report on the southern section of the frontier of Chile and Argentina Captain Robertson wrote: "Section B—from Mount Fitzroy, the northernmost agreed point on the frontier in the vicinity of Lakes Argentino and Viedma (if this point were not in the las Vueltas basin) the line will run direct to the nearest point in this basin. It will then follow an easterly direction round the watershed till it reaches a point in the neighbourhood of longitude 73°00'WG" (Chilean Skeleton map, scale 1:200,000, Season 1900, map 3).

With regard to this proposal, known as the alternative proposal, Robertson commented: "This line has the advantage over the line described earlier which, while assigning the larger part of the fertile land to Argentina, divides the disputed zone in this part of the territory in such a way that the larger portion remains Chilean. However, it has the disadvantage that it does not constitute a good barrier between the two countries, unlike the earlier proposal. I have been unable to visit the southern part of this line, from Mount Fitzroy to the point mentioned on meridian 72°33'WG, but I have seen from a distance that it consists at this time of the year (mid-April) of valleys and high snow-covered and mud-streaked hills" (MCH, *Annexes*, vol. I, annex No. 14).

This description and the accompanying map, the 1900 map of Riso Patrón, on which Robertson drew the alternative line, demonstrate that the alternative proposal ran along the continental water-divide of the time, as it appeared on the maps furnished to the Arbitrator.

Robertson states expressly that this line should pass direct to the nearest point of the watershed of that river, the River de las Vueltas, and then continue round the watershed, or periphery of the las Vueltas basin, to the neighbourhood of longitude 73°00', or more accurately to longitude 72°32'.

This "watershed" of the River de las Vueltas was the continental water-parting of the time. From Mount Fitzroy the continental watershed runs east, not north or north-east. It is sufficient to identify the place which longitude 73° runs through to realise that this was the continental water-parting as depicted on the maps. If the alternative proposal had been accepted by the Arbitrator, it would have assigned to Chile the entire area which is the subject of the present dispute and therefore the upper part of the las Vueltas basin.

Confirming his description of his two proposals, Robertson added the course of his two lines on Riso Patrón's map. Nobody objected to Robertson's second proposal for allegedly entering an area which had been excluded from the territorial competence of the 1898-1902 Arbitrator.

The language used by Holdich to refer to his own boundary proposal confirms that the Tribunal believed that the continental watershed came from the north, far to the east of the las Vueltas basin: "The real continental water-divide followed a line of comparatively low level to the east of the main or more elevated peaks of the Andes".

Holdich was referring, then, to the watershed as a fairly low-level chain in comparison with the lofty peaks of the main chain of the Andes. Its location some distance to the east made it an unsuitable candidate for the compromise boundary which he was seeking. The reference to its following a line of comparatively low level corresponds to the continental divide as described and depicted on maps of the time.

Holdich was categorical in stating that the maps were key elements in the preparatory work of the 1902 Award. For example, the following passages from his "Narrative Report" (MA, *Annex of Documents*, document No. 32, pp. 330, 331 and 333):

1. "In the first place I considered it essential that the examination should be conducted with sufficient rapidity to ensure its completion before the rigorous Patagonian winter put an end to further work in the field."
2. "The field would at once be open for the Tribunal to discuss or decide upon a boundary of compromise on the map basis."
3. "It is necessary to say a few words as to the nature of the respective maps and surveys"; and Holdich went into details about the methods of preparing the Argentine and Chilean maps and their relationship with the topography and triangulation."
4. "There was a most satisfactory general agreement between the values of most of the important points fixed when the two sets of maps were critically examined."
5. "We may take the Argentine maps as they stand. . . as the basis for any decision the Tribunal may advance."

Holdich referred to two series of maps, of Argentina and of Chile, and saw fit to use the Argentine maps as they stood as the basis for the Tribunal's decision. He also explained that the Tribunal would "decide. . . on the map basis".

Argentina showed on its maps the continental water-parting of the time, and the Arbitrator carried out his preparatory work and pronounced his decision on the basis of the continental water-parting of the time, i.e., the northern part bordered by the pecked line on the Chilean maps. The Arbitrator's map, regardless of the merit or demerit attached to his pecked line, is decisive for the reconstruction of the Arbitrator's territorial competence because he drew his pecked line in the area which later became known to be the upper part of the las Vueltas basin. The Arbitrator's map, considered in the light of current geographical knowledge, shows that the Arbitrator made his Award with respect to the upper part of the las Vueltas basin as it is known today on the understanding that it was a Pacific basin.

14. *The maps in the 1902 Award*

The Award stated: "A more detailed definition of the line of frontier would be found in the report of the Tribunal and on the maps furnished by the experts of the Republics of Argentina and Chile, on which the boundary which the members of the Tribunal had decided upon had been delineated and approved by them" (MA, *ibid.*, "Award Pronounced by His Majesty King Edward VII", document No. 40-A, art. V, first paragraph, p. 447).

This statement by the Arbitrator makes the Award map an essential element for determining the details of the frontier. This map depicts an unbroken line from the southern shore of Lake San Martín to the termination of the Cordón Martínez de Rozas, continuing with a pecked line as far as Mount Fitzroy, touching Cerro Gorra Blanca on the way.

The Arbitrator's map superimposes this line on Argentine map No. XVIII, sheet 8 of which covers the area of the present dispute. This map was better than the Chilean maps, in Holdich's view. However, sheet 8 was not as good as Chile's plate IX, but the Arbitrator could not insert plate IX on the Argentine map because that would have destroyed the topographical unity of the presentation. He was thus compelled to use map XVIII in its entirety.

It is not a question, at this time, of considering this line as a possible frontier decided upon by the Arbitrator but of assessing it in relation to the space which determined the territorial competence of the 1898-1902 Arbitrator.

To this end it must be pointed out that the Arbitrator took care not to place his line to the south of the continental water-parting shown on plate IX, except at one point at which, by agreement of the Parties, the line had to reach Mount Fitzroy. Accordingly, the Arbitrator's line respected the continental water-parting marked on plate IX although he worked on Argentine sheet 8. The continental divide shown on sheet 8 runs further to the south than the water-parting on plate IX, but the Arbitrator traced his line *as if he had worked* on the basis of the continental water-parting on this latter map.

Thus, the line on the Arbitrator's map lies within the space which, according to the geographical knowledge of the time, lay between Lake San Martín to the north and the continental water-parting to the south, i.e., in the upper part of the las Vueltas basin as it is known today.

The pecked section of the line on the Arbitrator's map, even if it is regarded as tentative for the purposes of determining the frontier, shows that the Arbitrator believed that, tentative or definitive, his line was drawn within the area of his territorial competence. An arbitrator cannot and should not trace a line, even a tentative one, in an area outside his competence. And he may not do so, because what is tentative has the capacity of becoming definitive. Thus, the Arbitrator knew that his line on his map was within his competence, or otherwise he would not have marked it where he did, not even with a pecked line. The Parties did not enter any objection or reservation during the next several decades.

### 15. *The Demarcator's map*

It is not our purpose, at this time, to discuss the possible value of this map or to decide whether the Demarcator was authorized to establish his own line or whether this map really had the status of "final map", as Holdich stated in a letter to the Ministry of Foreign Affairs and Worship of Argentina. Our purpose is to consider the significance of this map for an understanding of the territorial competence of the 1898-1902 Arbitrator.

The Demarcator of this region, Captain Crosthwait, depicted his frontier line on map XVIII, sheet 8, the same one as was used by the Arbitrator. In the British archives there are two maps signed by Crosthwait, on 7 and 8 June 1903. Both these maps show an almost straight line between boundary post 62 and the vicinity of Mount Fitzroy. The lines on these maps do not touch Mount Fitzroy nor do they make an inflection to Cerro Gorra Blanca.

The line of the map signed on 7 June is superimposed on the continental water-parting of the time from the point at which the water-parting turns south. The line on the map of 8 June lies much closer to and parallel to the full length of the continental divide in this same sector and it touches the divide at only one point. Both lines are pecked in the unexplored part. Both maps show the continental divide of the time as a continuous line (MA, pp. 188-190, plates XXIII and XXIV).

The two lines on Crosthwait's maps lie entirely within the zone which, according to the geographical knowledge of the time, lay to the north and west of the continental divide and was regarded as a Pacific basin, i.e., outside the basin of the River de las Vueltas as it was known in those years.

Neither of the Parties expressed any disagreement, objection or doubt about Crosthwait's work. Many years later there was some discussion as to whether he had been authorized to establish his own line, but it was never argued that he had located his line outside the area of competence of the 1898-1902 Arbitrator. Chile on its first two maps and Argentina on many maps depicted frontier lines which, more or less, followed the Demarcator's line or lay close to it.

### 16. *The maps produced after the 1902 Award*

Following the pronouncement of the Award the Parties produced maps whose lines, although they did not coincide with each other, included sections running through the area known today to be the upper part of the las Vueltas basin and considered at the time to be a Pacific basin. There has been much discussion as to whether this or that map reproduced the Arbitrator's line or the Demarcator's line. For the purposes of clarifying the territorial competence of the 1898-1902 Arbitrator this topic is irrelevant, because both lines and *all the lines* depicted on *all the maps* published by the Parties, *without exception*, ran through the area which today is said to have been outside the competence of the Arbitrator in 1898-1902.

The common characteristics of the maps published by the Parties over more than 50 years is that they delineated the frontier without stating any reservation about matters of territorial competence, i.e., they sited their lines to

the north and west of what was regarded as the continental water-divide at the time of the arbitration. In order to confirm the Arbitrator's territorial competence there is no need to engage in a detailed examination of the maps, whose common characteristics have been pointed out above. The consistent behaviour of the Parties endorses the position that the dispute arose and was settled on the basis of the geographical knowledge of the time.

For the purposes of determining the understanding which the Parties had of the Arbitrator's competence it does not matter that at some times they adopted the Arbitrator's line and at others the Demarcator's line, that they made one or two mistakes, or that the map reproductions, for lack of reliable technical equipment, varied slightly from one case to another. The Demarcator's line, similar to the line on the Argentine maps, sometimes touched and sometimes did not touch Mount Fitzroy. Now, for our present purposes, it does not matter that the line on the two Argentine maps, as was actually the case, sometimes touched and sometimes did not touch Mount Fitzroy.

The common characteristic of all the maps, Argentine and Chilean, is that they depicted boundary lines within the area now in dispute and that they therefore considered this area to be within the competence of the 1898-1902 Arbitrator.

### 17. *The 1902 Argentine map*

Immediately after the pronouncement of the Award on 20 November 1902 Argentina produced a map, a reduced and partial reproduction of which was included in a volume annexed to the Argentine memorial (MA, *maps*, map No. 19). This map showed the line on the Arbitrator's map and the lines claimed by Argentina and Chile. The sheet containing map No. 19 reproduces on its right-hand side the map of the 1902 Arbitrator, on which are added the lines claimed by the Parties, and on its left-hand side a copy of the corresponding explanatory legend.

This legend begins with the title of the map: "General map of the Southern Region of the Argentine Republic and Chile showing the Argentine and Chilean Projects [i.e., proposals] and the Boundary Line settled by the Arbitrator".

The contents of the map are then given: (1) "The Boundary Line Settled by the Arbitrator", marked with continuous red crosses; (2) "International Boundary Line Agreed upon—Record of October 1st 1898", depicted with black crosses—the frontier agreed without recourse to arbitration; (3) "Proposed Argentine Line Along the Cordillera de los Andes—Records of 1st and 3rd September 1898", marked with continuous dots and dashes; and (4) "Proposed Chilean Line Along the Continental Divide—Record of 29th August 1898", marked with continuous dashes.

A box contains the statement: "Partial reproduction of legend on the same scale as the original deposited with the Ministry Foreign Relations and Worship of the Argentine Republic".

The explanatory note “Proposed Chilean Line Along the Continental Divide—Record of 29th August 1898” helps to elucidate this matter. According to this text, the Chilean proposal consisted of a line which followed the continental water-parting in accordance with the record of 29 August 1898. The Chilean line marked on this map does not distinguish between explored and unexplored areas. What is more, there is no indication at all that this factor, so important at the time, had been taken into account in the drafting of the explanatory notes.

This map was filed with the present Court without any reservation or additional explanation and it shows that, according to the understanding of events at the time, the line proposed by Chile (its claim) had been marked along the whole length of the continental water-parting and in accordance with the record of 29 August 1898. If this water-parting is compared with the one shown on the maps submitted during the arbitration proceedings, the full concordance of the two are immediately obvious. The area circumscribed by the two lines of the claims, each based on the country’s respective principles and expressed concretely on maps, as the 1902 Argentine map confirms, determined the territorial competence of the 1898-1902 Arbitrator.

#### 18. *Mount Fitzroy and the continental water-parting*

The Parties agreed that Mount Fitzroy was an obligatory point on the frontier. This was because at the time of the arbitration it was considered that Mount Fitzroy satisfied the requirements of the two competing principles, i.e., that it was a high Andean peak and was situated on the continental water-parting.

The Argentine expert stated that Mount Fitzroy bore the number 304 on his general frontier line: “It will pass along this crest (the snow-covered chain which overlooks Lake San Martín from the west and cuts across this lake’s outlet), passing across Mount Fitzroy (304) and the lofty snowy peaks of the Cordillera . . .” (MA, *Annex of Documents*, vol. I, record of 3 September 1898, p. 147).

The Chilean expert indicated the Cordillera del Chaltén as point 331 on his general frontier line: “No. 331, Cordillera del Chaltén, which divides the hydrographic basin of Lake Viedma or Quicharre, which flows to the Atlantic via the River Santa Cruz, from the Chilean sources which discharge in the Pacific inlets” (*ibid.*, record of 29 August 1898, p. 124).

The Chilean description says that point 331, Cordillera del Chaltén, of which Mount Fitzroy is one of the highest peaks, separates the waters flowing to the Atlantic from the waters flowing to the Pacific. The two experts identified Mount Fitzroy as the point of conjunction of the Argentine and Chilean lines and stated this in the record of 22 September, which recognized that Argentine point 304 and Chilean point 331 were the same: “2. That the lines of the two experts coincide . . . at the points numbered 331 and 332 by the Chilean expert and 304 and 305 by the Argentine expert” (*ibid.*, pp. 149-150).

Through its expert Barros Arana Chile had reiterated that the points which it was proposing were all on the continental water-parting. Now, by accepting that Mount Fitzroy was an agreed point on the boundary the Parties also accepted implicitly that it was an Andean peak situated on the continental water-parting.

The record of 22 September stated that, since Argentine point 304 and Chilean point 331 coincided, they were considered to be situated on the common frontier. This agreement could not have been reached unless Mount Fitzroy had been considered to be located on the continental divide, because if it had been known to be a peak in an Atlantic basin it would have been in Argentine territory according to the provisions of the 1881 Treaty and the 1893 Protocol. Accordingly, the Parties reached agreement on Mount Fitzroy as a point on the common frontier on the basis of the continental water-parting of the time, the very water-parting which was carried as far as Mount Fitzroy (No. 331) on the Chilean map by a pecked line.

Later, when it was discovered during the arbitration proceedings that Mount Fitzroy was not situated on the continental divide but to the east thereof and in fact entirely within an Atlantic basin, the agreement between the Parties was left untouched. The continental water-divide discovered in 1945 passes by Mount Fitzroy at a distance of no less than 17 kilometres. The continental water-divide of the time was used for determining that Mount Fitzroy was a point on the frontier and then as a point of reference for deciding that this mountain was located a little further to the east than had originally been supposed. The accord on Mount Fitzroy was made possible by a lack of geographical knowledge, and years later it was maintained even in the light of improved geographical knowledge.

#### 19. *The subsequent conduct of the Parties*

The subsequent conduct of the Parties indicates how they interpreted the Award and it is therefore a useful element in confirming the interpretation of the Award based on the study of its components. To a greater or lesser extent both Argentina and Chile have recognized the role played by their subsequent conduct in the interpretation of the meaning of the arbitral rules.

Argentina pointed out the differing weight attached to the subsequent conduct of the parties depending on whether such conduct relates to the interpretation of a treaty, in which case it has enormous force, or of an award and, more concretely, when it relates to the conduct of local authorities or individual nationals or foreigners (record No. 9 of 25 April 1994, p. 31).

Chile has repeatedly stressed the importance of the subsequent conduct of the Parties in this case and has assigned multiple effects to it; Argentina has attached less relevance to it and, although it has referred at times to subsequent conduct in some of its statements, it has done so with frequent reservations.

Chile has argued that "the conduct of the Parties is a very important factor for demonstrating the way in which they interpreted the content and intention of the text" (MCH, p. 154, 14.14). In one of its submissions Argentina frames the problem thus: "Such subsequent conduct shows how the Parties have interpreted the 1902 Award in practice" (CA, p. 215, 9).

It is in fact a question of determining how the Parties interpreted the Award in practice, i.e., in implementing it. This exercise is of particular importance for the question of the 1898-1902 Arbitrator's territorial competence, for it

helps to determine how the Parties understood that competence and provides evidence supporting conclusions reached by other means and on the basis of other sources.

The Parties have furnished the present Court with ample documentation and painstaking analysis on this point. The relevant materials can be divided into four categories: maps, activities of settlers, administrative acts in general, including the prosecution of criminals, and administrative acts relating to land grants. The subsequent conduct of the Parties manifests itself in a pertinent manner in their production of maps, but since this topic has been extensively studied, it is better to concentrate on other aspects.

The activities of settlers are not conclusive because contradictory accounts are provided by the authorities of each country. They reflect instead the common attitude of settlers in frontier regions, especially in regions remote from the centres of political power, i.e., the propensity of settlers to move about according to their immediate needs.

Chile performed acts of administration in the area which illustrate its interpretation of what the Arbitrator accorded to each country in his Award. Such administrative acts include the report and map prepared by Engineer Fernández Correa, who visited the area of the present dispute in 1933 and marked out the plots of Percival Knight, Ismael Sepúlveda and Evangelista Gómez in Chilean territory. Chile granted titles of ownership in the area to Ismael Sepúlveda (1937) and Evangelista Gómez (1934).

Something more precise emerges from the land grants made by Chile and Argentina after the arbitration. In 1904 Chile made the so-called Freudenburg Concession. Although this concession failed, since it did not become established in the area, the grant and the accompanying plan illustrate the fact that one of the Parties believed that the land in question had been covered by the arbitral decision. This grant, the eastern boundary of which extended up to the line on the Arbitrator's map, received widespread publicity.

The titles of ownership which Chile granted in 1935 to Evangelista Gómez and Ismael Sepúlveda related to the area today in dispute. For the present purposes there is no need to verify the exact boundaries of the plots. Furthermore, there was overlapping between Chilean and Argentine grants, but this does not vitiate the conclusion that the area had been covered by the 1902 Award.

Argentina's land grants generally stopped first at the Demarcator's line and later at the Arbitrator's line, without that preventing them from overlapping in some cases with Chilean grants or the same recipient from seeking to obtain titles or protection from both countries.

The abundant documentation submitted to this Court shows that the Parties tried to respect the arbitral decision in the area, despite difficulties stemming partly from its remoteness, ruggedness and harsh climate but mainly from the lack of boundary posts on a line on which two undisputed fixed points might be located about 50 kilometres apart.

In the years following the arbitration several Argentine maps offered land in the area today in dispute, but none of these offers infringed on the Demarcator's line. The series of maps showing land offered on leases began in



1911 and continued in 1916 and 1919 with maps produced by private individuals which marked the boundary line within the area today in dispute. There is a map of the Land Department of the Ministry of Agriculture which offers land bounded in the west by the Demarcator's line, depicted by a series of crosses. Another 1918 map produced by the same Department depicts the frontier line in the same way.

The plans and maps, which were given widespread publicity with a view to the award of land grants or leases, indicate the areas which the Parties considered to be within the Arbitrator's competence and concerning which he had made his Award. The land grants and offers of leases illustrate the projects for the development of available areas and the territory in which each country believed that it could exercise this kind of act of sovereignty with the knowledge and acquiescence of the other Party.

20. *The status quo unaffected for many years  
by new geographical discoveries*

The discovery in about 1923 of Lake del Desierto, the main source of the River de las Vueltas, did not prompt any claim. A map produced in 1923 by the cartographer of the Office of the Governor of the Territory of Santa Cruz, Mr. Roberto Daublebsky von Sterneck, and annexed to a book in the following year, showed Lake del Desierto for the first time on the maps of the Parties (MCH, pp. 107-108, 9.42).

Everything continued just as before, despite the discovery of the main source of the River de las Vueltas and of the fact that its basin extended beyond the continental water-divide as known at the time of the arbitration. In the case of Chile this silence continued until 1953 when it adopted, indicating that it was "a preliminary map" and "a boundary under study", the continental water-parting discovered by means of the aero-photogrammetric surveys carried out by United States technical personnel in 1945. On a 1969 map Argentina reproduced the continental water-parting discovered in 1945, labelling the map "provisional".

The acquiescent silence on the two sides following the simultaneous publication of maps based on the 1898-1902 arbitration lasted for some 31 and 45 years from the discovery that the las Vueltas basin extended beyond the continental divide known at the time of the arbitration, and for some eight and 21 years after the discovery, in 1945, of the true continental water-parting.

Thus, for a very long time consensus prevailed concerning the continental water-parting of the time of the arbitration and indeed concerning the fact that the work and the decision of the British Arbitrator had applied to an area within his competence. For some time, indeed, even after the consensus on this continental water-parting had been disrupted by the discovery of the main source of the River de las Vueltas in Lake del Desierto and the subsequent discovery of the natural and effective continental water-parting on the ground, the Arbitrator's decision, as depicted on his map, was preserved out of respect for the *res judicata*.

21. *The lack of geographical knowledge at the time of the arbitration*

This attempt to identify the origins of some of the problems underlying the present dispute brings one to the question of the lack of geographical knowledge. The positions of the Parties in 1898-1902 were necessarily conceived and formulated on the basis of what was known of the region at the time. The Arbitrator reached his decision on the same basis.

It was in this context that the Arbitrator's competence was established, the Arbitrator pronounced his Award, and the Parties demonstrated by their acts their interpretation of the Award. The preparatory work of the Award (Robertson and Holdich), the Award with its three components, and the subsequent demarcation work (Crosthwait) applied to an area which was regarded as a Pacific basin situated to the north of the continental divide known and acknowledged at the time. Years later, as a result of new exploration work, it became known that this area was in fact an Atlantic basin.

The fact that the continental divide lay further to the north than had been realised at the time of the arbitration became known for certain with the discovery of Lake del Desierto in about 1923. Even this did not make it possible to identify the true continental divide. The continental divide was hidden from human eyes, following a line which starts from the Cordón Martínez de Rozas, from the summit at altitude 1,767 metres, runs north-west and continues northwards, then westwards and finally southwards, without touching Mount Fitzroy. This complicated course—unexpectedly complicated—diverges considerably from the assumed or known course of the continental divide at the time of the arbitration.

The key point, which Argentina has called Portezuelo de la Divisoria, was discovered by means of aero-photogrammetric surveys in 1945. In 1966 the Mixed Boundary Commission identified it on the ground and for ease of reference constructed a mound 10 metres in diameter and three metres thick (MA, pp. 257-258, 53; CCH, pp. 39-40, 3.24, 3.25 and 3.26; MCH, *volume of Annexes*, annex No. 7).

This mound stands in a marsh where the direction taken by the water or, more accurately, whether the water flows in any direction, cannot be established by examination of the ground, where one's feet sink in the mud and standing water, or by climbing the neighbouring heights. If it had not been for the technical work and the mound, it would not be known or even suspected that the continental water-parting is situated here.

The geographical features of the place explain the delay in identifying this section of the continental water-parting. Here the idea that this water-parting can be determined by visual examination of the ground was once again overturned. This place is one of the series of instances, and it even outdoes the others, which Holdich noted on his tour of inspection, in which it is very difficult to locate the continental water-parting.

The members of the present Court were able to verify with their own eyes during their tour of the area in February 1994 the physical impossibility of identifying the continental divide without the help of sophisticated techniques.

## 22. *Summary of the analysis of the Chilean position in 1898-1902*

Following the 1902 Award and the 1903 demarcation the Parties expressed themselves in the graphic language of maps. They did not submit new lines but repeated the line of the Arbitrator's map or the Demarcator's line. Chile in 1953 and Argentina in 1969 depicted on maps the new possibilities which had apparently been opened up, with respect to the frontier line, by the discovery of the continental divide in 1945. Thus, the Parties continued to use maps, just as they had done during the arbitral proceedings.

The interpretation developed here with respect to the significance of the facts, documents and arguments is supported by the records of the experts, the vital role of maps during the arbitral proceedings, the preparatory work of the Award, the Award with its three components, and the subsequent conduct of the Parties, including their presentation of their positions by means of maps. All these facts form a unity of meaning, the consistency of which is confirmed by analysis of Chile's territorial claim of 1898-1902.

The facts of action, inaction, silence and acquiescence show that for a long time a consensus about the territorial competence of the Arbitrator prevailed, that this consensus survived the discovery of the main source of the River de las Vueltas, and that it began to waver following the discovery of the true continental divide in 1945. The only significant incident in the area of the current dispute occurred in 1965, 62 years after the pronouncement of the Award. The time factor is not to be underestimated in cases in which an initial situation continues undisturbed.

The strands of the interpretation of the available factual and legal materials merge at the point where these materials are united by the principle of consistency: Chile's territorial claim of 1898-1902 had its basis, foundation and legal justification in the principle of the continental water-parting and was manifested in a line consisting of numbered points and sections and of toponyms which are interwoven with the graphic language of the plans and maps. This line was the continental water-parting as known and acknowledged, without reservation, dissent or counter-proposal at the time of the arbitration, fixed by the final presentations to the Arbitrator and protected by the Award as *res judicata*.

Once the competence of the 1898-1902 Arbitrator has been determined and verified in this way, it cannot be asserted that the zone lying to the north and west of the continental divide of the time, along which the line on the Arbitrator's map ran throughout its extent, fell outside the Arbitrator's competence and therefore outside the competence of the present Court. Nor can it be asserted that a decision concerning this area would mean that the 1898-1902 Arbitrator had exceeded his authority or that such a decision would itself suffer the defect of *ultra vires*. The principle *non ultra petita partium* is not subject to any reservations in its application, nor is the principle of estoppel. The Arbitrator himself marked out his area of competence on his map, and this was corroborated by the preparatory work, the demarcation and the maps produced by the Parties themselves over several decades. Argentina indeed stated: "The official maps are of special relevance to an assessment of the conduct of the Parties subsequent to the 1902 Award, for they show how the delineation rule of the Award has been interpreted and applied by the Parties" (CA, p. 133, 1).

## II.2 THE CHILEAN CLAIM IN 1992-1994

### 1. *Nature and possible effects of the present Chilean claim*

The Chilean claim in the 1898-1902 arbitration has implications for the present Chilean claim. "Chile cannot claim today more than it claimed in 1902." The assertion that Chile cannot claim today more than it claimed in 1898-1902 is absolutely correct. It is based on the principle which circumscribes the competence of international courts charged with interpreting earlier decisions by reference to the competence of the first court and on another principle which penalizes, provided that certain conditions are satisfied, some kinds of contradiction by precluding any claim, in the same case, of more than what was claimed earlier.

The issue turns on what Chile claimed or did not claim in the 1898-1902 arbitration and on what it is claiming and not claiming today. The first issue has already been clarified. It is now necessary to consider the current Chilean petition. A comparison of the two claims helps to clarify and close the circle on some of the topics which have been examined. It can be argued that, within the conceptual approach which has been taken, the earlier Chilean claim could vitiate partially, if not wholly, its current claim.

This current claim has to be examined in relation to the nature of the dispute submitted to this Court. According to the 1991 *Compromis*, this Court has to decide on the course of the frontier line between boundary post 62 and Mount Fitzroy by interpreting and applying the 1902 Award in accordance with international law. Thus, the Award is left untouched, and its content cannot be reopened. The language of the *Compromis* framed the dispute as a dispute about a line—the course of the frontier line. In the end, the claims of the Parties, given the acknowledged validity of the 1902 Award, can only have the significance of interpretations thereof.

Chile has stated that this is a dispute about a zone or area, whereas Argentina has emphasized that it is about a line and not an area and that "the delimitation of the sector was decided by the Award and confirmed by the 1991 *Compromis*, which govern these arbitral proceedings". Argentina maintains that "Chile's current claim is a new territorial claim" (CA, p. 171, 1, p. 3, 7, and p. 113; MA, pp. 358-359, 23, and p. 336, 7), and it adds: "There is no more territory to be adjudicated to the south of Lake San Martín" and that there is no "area in dispute" in this region.

Going back to the time and bearing in mind the events and geographical knowledge of that time, it can be asserted that Chile's interpretation of the line, by the fact that it enters spaces which were clearly outside the competence of the Arbitrator and the Chilean claim of 1898-1902, is defective in its southern part. This problem is not eliminated by the fact that, in some way and at some point, the line had to cut across the continental water-parting of the time in order to arrive at Mount Fitzroy, the point in the Atlantic basin declared obligatory by the Parties. This mandatory point would have to be reached

by cutting across the smallest possible area of Atlantic basin, as the Arbitrator did on his map, in contrast with the sizeable cut entailed by the Chilean line. The need to cut across the old continental divide ought not to lead to a deep incursion into land which was not disputed.

It is not a question here of applying the principle of estoppel, which presupposes contradiction, qualified by several conditions, between claims of the same specific nature and relating to the same object, but of the essential characteristics which defined the dispute at that time, in particular with regard to the territorial competence of the 1898-1902 Arbitrator.

It could be argued that, since the dispute is not over an area but over a line, Chile's current petition could not be understood to relate to a zone or area. There would then not be a zone comparable to the zone claimed in 1898-1902, and it would be said that it would be impossible to compare the current Chilean claim, concerning its interpretation of the line, with the 1898-1902 claim unless the latter claim had related to a line and not a zone.

As a counter-argument reference may be made to the fact that, in this case, there is no clear separation of line and zone, because two competing lines create space and even a single line representing a claim includes a space which it circumscribes and limits, so that it implicitly entails a claim to the space marked by the line. The delimitation was of course settled in 1902, and now the problem is to identify the course of the boundary line on the basis of that delimitation.

In any event, the decisive factors are the continental water-parting of which the Arbitrator took account in pronouncing his Award and the area which the Parties disputed in 1898-1902. From these bases it can be concluded that only the southern part of Chile's current interpretation of the line is affected by its 1898-1902 claim.

## *2. Effects of a possible contradiction between the Chilean claims*

Chile's claim of 1898-1902 was the main topic of the debate between Argentina and Chile during the oral submissions and the principle point of disagreement in the present Court. The main thrust of Argentina's arguments is that Chile is today claiming space which it had not claimed in 1898-1902 and that therefore its entire present claim had to be rejected.

The big question has been and remains the determination of the actual area covered by the Chilean claim in 1898-1902. Depending on the framing and resolution of this question, the arbitration will follow different paths and lines of reasoning and will reach opposite conclusions. Given such a radical disagreement no type of conciliation seems possible.

Acceptance of the Argentine thesis would produce the following consequences:

1. In accordance with the principle of estoppel Chile cannot claim today what it did not claim in 1898-1902;

2. The entire basin of the River de las Vueltas as known today would lie outside the competence of the present Court because it had been outside the competence of the 1898-1902 Arbitrator;

3. The present Court would be precluded from according to Chile, pursuant to the interpretation which it might adopt, the least part of the las Vueltas basin as known today, for that would be to decide *ultra vires*, except of course with respect to the part of the Atlantic basin bordering Mount Fitzroy;

4. Chile's version of the line would be rejected *ipso facto* by application of the principle of estoppel, by Chile's admission that the whole of the las Vueltas basin as known today is Argentine, and by the territorial competence of the 1898-1902 Arbitrator, which had placed this entire basin outside the dispute;

5. Argentina's version of the line, consisting partly of continental and partly of local water-parting, would automatically be validated, for it would follow the whole length of the line of Chile's extreme territorial claim at the time of the arbitration, which in turn was the limit of the territorial competence of the 1898-1902 Tribunal and indeed of the present Court.

As a direct effect of the Chilean claims of 1898-1902 Argentina has argued that the territorial competence of that Tribunal, and therefore of this Court, was circumscribed in its eastern part by the continental water-parting as known today, dissociating the entire las Vueltas basin from any dispute about or interpretation of the course of the frontier line. The only line which would be consistent with the competence of the present Court would be the one situated on the periphery of the Viedma-Vueltas basin as known today, i.e., Argentina's line. If the decision of this Court were to affect any other part of this basin, it would inevitably incur the defects of *ultra petita* and *ultra vires*.

Given such results there would be no need to examine the Argentine and Chilean lines on their merits and demerits, for the Chilean line would be dismissed and the Argentine line validated. A detailed study of these lines would not be essential but merely confirmatory, offering some subsidiary grounds for adoption of one line and rejection of the other. Given these results the discussion of the decision of the present Court would follow a necessary path leading to equally necessary conclusions.

But an examination of the documents produced by the Parties in that arbitration in the form of pleadings, commentaries and maps and of the three components of the Award—the Award itself, the report of the Arbitral Tribunal and the Arbitrator's map—shows that the 1898-1902 dispute was resolved not on the basis of the entire basin of the River de las Vueltas as it is known today but as it was known at the time of that arbitration.

### 3. *Invocation of the principle of estoppel*

“Chile cannot claim today, in an exercise of interpretation and application of the 1902 Award, territory which it did not claim at the time of that arbitration and which it repeatedly, persistently and systematically recognized as belonging to the Argentine Republic. In short, Chile cannot now claim territory which it acknowledged to be Argentine in 1898 and in its submissions to the 1902 Arbitrator” (MA, pp. 332-333, I, 1; CA, pp. 7-8, 13).

Argentina calls for the application of the principle of estoppel on the basis of the scope of the territorial competence of the 1898-1902 Arbitrator, Chile's extreme claim during that arbitration, and Chile's acknowledgement that the basin of the River de las Vueltas is Argentine in its entirety, with the exception of the small section bordering Mount Fitzroy, an obligatory point on the frontier (CA, p. 18, 13, p. 22, 11, and p. 39, 37). Application of this principle presupposes that Chile is claiming in the present arbitration more territory than it claimed in that arbitration and is contradicting or denying its earlier recognition that the entire las Vueltas basin belongs to Argentina.

Argentina repeatedly requested application of the principle of estoppel to the present dispute, both in its memorial and counter-memorial and in its oral submissions. During these submissions considerable importance has been attached to Chile's admission that the Atlantic basins belong to Argentina, so that they lay outside the competence of the 1898-1902 Arbitrator.

Both these arguments, of estoppel and territorial competence, have the same origin in Chile's territorial claim during that arbitration and they lead to the same conclusion, i.e., divorce of the entire las Vueltas basin from any decision which the present Court may take on the course of the frontier line.

Chile argued that the principle of estoppel was irrelevant to the present dispute and that "the Award makes law and must be interpreted as it is, on the basis of its own content". Chile also stated that its claim of 1898-1902 was not relevant now because neither Argentina nor the Arbitrator had accepted it, and therefore it had, legally speaking, disappeared (record No. 3 of 13 April 1994, p. 34).

"Estoppel or preclusion cannot apply when the conduct cited is immediate, forceful and completely rejected by the other Party." "Argentina did not rely on the Chilean argument in such a way as would cause Argentina to suffer harm or detriment as a result of relying on that argument" (record No. 3 of 13 April 1994, pp. 84-85). Argentina replied that the territorial claim in question was a unilateral act and therefore the exclusive responsibility of its author, requiring no counterpart participation (record No. 12 of 28 April 1994, p. 59).

"Argentina attaches fundamental importance to this question, that is to say, with respect to the Atlantic basins recognized by Chile as Argentine in the 1898-1902 arbitration. As Argentina has stated already in its memorial, this is a basic issue which the Court must necessarily resolve as a first and preliminary step" (CA, pp. 385-386, 1).

But Argentina did not raise this issue as a special plea in bar; instead it emerged as the first matter on the Court's agenda. The Court accepted this opinion in view of the internal logic of the procedure of deliberation and decision.

Argentina referred to the authority of Judge Ricardo J. Alfaro with respect to estoppel. According to his definition, this principle establishes that "a State which is a party to an international dispute is bound by its previous acts when these contradict its claims in the dispute". Dr. Alfaro explains that this principle, based on good faith, penalizes any contradiction between the current position of the State and its previous acts, opinions and conduct which may cause harm to another State. (*Cuaderno de la Facultad de Derecho y Ciencias Politicas*, No. 4, University of Panama, Panama, 1966).

Application of the principle of estoppel, also known as preclusion, still gives rise to much controversy and the principle is far from having achieved a consistent formulation and general acceptance. Dr. Alfaro's definition has been cited many times during the oral and written submissions. But it must be said, with all respect for the academic and legal authority of this eminent jurist, that his conception of this principle is very broad in scope, for it omits conditions and nuances well-established in Anglo-Saxon law, the principle's immediate source.

If these original conditions and nuances are eliminated, the principle becomes simple and easy to apply, but it will then address many different kinds of conduct, and if estoppel is applied to them it would limit the freedom of action of States. If the original conditions are eliminated, the scope of the principle is expanded, for it loses in decisive specificity and gains in scope as much as it loses in content (the fundamental conditions for its application in Anglo-Saxon law).

It is then so broad that it could be applied even to opinions. Since the law accords individuals freedom of opinion, which includes both the statement and the correction and amendment of opinions, international law cannot punish the exercise by States of their freedom of opinion.

Although the essence of estoppel is the contradiction of earlier positions to the detriment of the other State, care must be taken not to reduce it to mere contradiction, for mere contradiction could not be objected to and even less punished: the law must not act as a master in the classroom. Mere contradiction could be a matter of policy but not of law. The contradiction has to be accompanied by detriment and, moreover, the fact of having relied on the first position of the other State and having used it in support of the assertion of one's own right.

As we advance along this rock-strewn path we can see that when the Statute of the International Court of Justice (art. 38, 1.c) authorizes the application of the general principles of law recognized by civilised nations, it is referring to principles of law in general, including principles of internal law. It may be hoped that such principles of internal law are fully consistent with the principle of legal certainty and indeed adhere fully to its original terms.

If it eliminates the original conditions a court is creating a new rule. Generally speaking, courts apply pre-established rules and they create new rules, or partly new ones, only by way of exception to resolve a specific case by clarifying pre-existing rules, in the light of very particular and even totally new circumstances when the solution is to be based on equity alone.

In any event, in the present case the conditions for application of the principle of estoppel do not obtain, either in the restrictive sense just described or in the very broad sense of Dr. Alfaro. The 1898-1902 dispute was framed, developed and decided on the basis of the geography of the time. The present geography cannot prevail over the *res judicata*.

Nor do the conditions obtain which would allow the argument that the area located to the north and west of the continental divide of the time lay outside the competence of the Tribunal and therefore is not within the compe-



tence of the present Court. Accordingly, no decision which the Court may take on the area where the 1898-1902 Arbitrator drew his line would imply the assertion that he had acted *ultra vires*.

### III. ARGENTINA'S VERSION OF THE LINE

#### 1. *Description of Argentina's line*

Argentina's 60-kilometre line follows the continental water-parting between boundary post 62 and Mount Fitzroy, combining continental and local water-partings. It passes through four points regarded as obligatory, the first two indicated in the Award (boundary post 62 and Mount Fitzroy), the third indicated on the Arbitrator's map (Cerro Gorra Blanca), and the fourth, called Portezuelo de la Divisoria, identified by the Mixed Boundary Commission, as stated in record No. 74 of 4 March 1966.

Starting from the south shore of Lake San Martín, at boundary post 62, the line runs along the Cordón Martínez de Rozas for about 12 kilometres of local water-parting to reach the summit at altitude 1,767 metres, at which point, now following the continental water-parting, it turns north-west and descends to Portezuelo de la Divisoria.

There is no disagreement between the Parties concerning the 12 kilometres of local water-parting, since both regard this sector as the undisputed boundary between the two countries. The disagreement begins at the 1,767-metre summit, with the Argentine line turning north-west along the continental divide and the Chilean line continuing southwards, also along the continental divide.

From Portezuelo de la Divisoria the Argentine line changes direction several times (west-south-west, north-west, west, south-south-west, west-south-west, and south) and passes across Cerro Sin Nombre, Cerro Trueno, Cerro Demetrio, Portezuelo El Tambo, Cerro Gorra Blanca, Marconi Pass, Cerro Marconi Norte and Cerro Rincón to reach Mount Fitzroy. The line abandons the continental divide when the divide turns westwards. From this point it follows the local water-parting which leads to Mount Fitzroy (MA, pp. 589-599).

From this summary description it is clear that the Argentine line combines local water-parting, continental water-parting and again local water-parting. The question arises as to whether the language of the arbitration report, according to which the frontier shall be delineated along the local water-parting from the point at longitude 72°45'30", is compatible with a line which combines continental and local water-partings.

The report states ". . . whence the boundary shall be drawn to the foot of this spur and ascend the local water-parting to (usually translated "*hasta*") Mount Fitzroy and thence to the continental water-parting to the northwest of Largo Viedma". "Here the boundary is already determined between the two Republics" (MA, *Annex of Documents*, vol I, document No. 40-B, p. 460, section 22, last paragraph).

Argentina made lengthy written and oral submissions to demonstrate that, since the continental and local water-partings function in the same way, in that they separate waters running in opposite directions, there is no difference between them. Therefore, the key point is to determine whether Argentina's line is in conformity with the report and for this purpose to assess the meaning of the terms continental water-parting and local water-parting as used in the instruments which constitute the 1902 Award.

## 2. *The Argentine thesis concerning water-partings*

"When he termed the local water-parting linking boundary post 62 with Mount Fitzroy "local parting" the Arbitrator was doing no more than using this term in the current meaning of such terms at the time of the Award: "local" in the sense of relating to space situated between two obligatory predetermined points which he had himself chosen. As the Argentine memorial argued, any water-parting between two points on a topographic surface can be described as "local" (MA, p. 525, 11) without precluding its possible coincidence in part of its course with a section of the continental water-parting as it passes through the place in question. "This meaning is consistent with the normal meaning accorded to "local" by any dictionary, either contemporary or of the time when the Award was pronounced" (CA, p. 124, 21).

"The important thing is not the epithet, for the nature of a "water-parting" and its *modus operandi* in a delimitation are the same. The important thing is *the extreme points which define the water-parting* in question. These extreme points will determine whether the "course" of a "water-parting" is local or continental and whether it coincides wholly or partly with a section of the "continental water-parting", but the characteristics and *modus operandi* of the "water-parting" do not change. They are always the same" (CA, pp. 124-125, 22).

". . . the qualifier which in exceptional cases is attached to the established delimitation criterion has no practical or legal consequences for the drawing of the boundary" (MA, p. 553, 37, and pp. 561-562, 44). "The essential thing is the condition of being a water-parting, and its qualification is incidental. The incidental cannot be compared with the essential. The incidental cannot alter the essential" (MA, p. 530, 17). "The important thing is the fact that in the Award all the "water-partings", regardless of how they are qualified, have the same inherent characteristics and the same effects" (CA, p. 124, 22).

". . . nothing in the 1902 Award precludes the possibility that a local water-parting between two specified points may also be a continental water-parting for part of its course . . ." ". . . for the drafters of the Award the qualifiers sometimes attached to the term "water-parting" are secondary and merely descriptive; for them the main thing is the affirmation of the criterion of water-parting and its actual use in a delimitation." "There is only one local water-parting between boundary post 62 and Mount Fitzroy, and this is the line advocated by Argentina in this arbitration" (CA, pp. 126-127, 28).

Argentina adduces several reasons in support of its argument that continental and local water-partings, since they function in the same way, are the same thing: (1) the meaning of the adjective "local"; (2) the discounting of the

adjectives “continental” and “local”; (3) the fact that all water-partings function in a similar way; (4) the failure of the Award to define a term to which special significance had been attached in the case of “local water-parting”; and (5) the language of the 1902 Award.

### 3. *A point supposed to be both continental and local*

It is argued that, since the Arbitrator knew that the continental water-parting bordered Mount Fitzroy in the north and west, he also knew that the local water-parting which the arbitration report ordered to be followed from the south shore of Lake San Martin had necessarily to cut across the continental water-parting, and that it did in fact cross it at the point at which the pecked line on the Arbitrator’s map crossed the continental divide to reach Mount Fitzroy.

This argument maintains that such a crossing, at a specific point, made this point part of the continental divide and part of the local water-parting. It thus undermines the separation of the two water-partings. And if that happens at one point, it would not be surprising for it also to happen in the case of a line combining continental and local water-partings. If a point can be both local and continental, the line can also be local and continental.

On the assumption that the crossing point combines the local and continental water-partings, it must be pointed out that, although it is the same point, it is a point which performs two different functions, one as part of the local and the other as part of the continental water-parting. It is not a question of whether it is both continental and local in one given situation, but whether in each different situation it is continental or local.

Furthermore, what applies to a point may not necessarily apply to a line, just as what applies to a line may not necessarily apply to a point. Even if it is conceded that a point may be at the same time both continental and local, this would not be a sufficient reason for attributing equal versatility to the corresponding line.

In any event, this is moreover a phenomenon which does not and cannot occur on the ground but only in depictions on maps. A map may show the continental divide cut at some point by another line which may have the character of local water-parting, but this is a question of a continental divide being crossed not by a local water-parting but by a frontier line drawn at the behest of the parties or court. It is a situation similar to the one which occurs when the intention of the court or arbitration body links two local water-partings by drawing a line across a river, for in this case too the same intention results in a line drawn on a map without the crossing of the river actually being effected by the local water-parting as such and as defined.

A local water-parting may run close to the continental water-parting on a slope, but it cannot cross it. On the slope on the other a local water-parting (a different one) may begin very close to the continental divide. These two water-partings, even when they run in the same linear direction and extremely close together, cannot cross the continental divide. This is precluded by the very nature of the continental divide, the continuity of which cannot be interrupted by any other geographical feature.

#### 4. *Reasons for questioning the equivalence of continental and local water-partings*

Such reasons may be found in the theory of meaning and in the preparatory work of the 1902 Award and its language, both in the relevant texts and in the context which supports and clarifies them. It is a question of establishing the meaning of three terms: *continental water-parting*, *local water-parting*, and *water-parting*.

##### 4.1 *Reasons based on the theory of meaning*

According to the theory of meaning, at least in its most simple and customary form, words represent perceptible forms of ideas, and the ideas represent the immediate meaning of the words themselves. It would be odd if certain words, particularly in legal texts, lacked any meaning or message and were superfluous, or if nouns qualified by different adjectives were able to function interchangeably without restriction by discounting the adjectives. It is usual to define the meaning of all the terms used in a legal instrument. Thus, the first step in this exercise is to assign differentiating connotations to the adjectives continental and local.

Theoretically adjectives distinguish between objects of the same kind. They are never redundant either in ordinary or in technical language. Adjectives perform a function, indeed a very valuable function, in rendering communication intelligible and precise. To discount different adjectives qualifying the same noun, in this case the adjectives continental and local qualifying the noun water-parting, is tantamount to waiving in advance the precision which the adjectives bring to the communication of the ideas in question.

An adjective indicates an attribute of a person, an object, an idea or an action; and the attribute distinguishes person from person, object from object, idea from idea and action from action. Persons differentiated by attributes are still persons and ideas differentiated by attributes are still ideas, just as water-partings differentiated by the qualifiers continental and local are still water-partings.

The theory of meaning and communication cannot dispense with adjectives. They are normally used for a purpose and every effort must be made to discover the meaning of the communication in the light of this purpose. That a word is redundant, is used erroneously or constitutes a mere repetition would be a conclusion reached only in the light of exceptional and somewhat extraordinary circumstances.

When the same adjectives are repeated in a legal document the assumption, for the purposes of determining its meaning, is necessarily that they have a significance which must be identified. Therefore, in the circumstances of the present case the assumption is that the adjectives have a useful meaning. That they should have a meaning is normal and usual; that they should not have a meaning is abnormal and unusual.

One of the most delicate aspects of the formulation of legal rules is the separation and exploration of distinctions between ideas and between their corresponding expressions in language. Generally speaking, when there is a

possibility of confusion or at least a degree of obscurity or uncertainty, this legal technique recommends the use of different nouns or distinguishing qualifiers of the same nouns. In the present case the qualifiers continental and local bring clarity and precision to the text of the report.

Qualifiers usually make distinctions between ideas and they consequently help to regulate and fix the use of the ideas. Since this is the normal situation, one must start from the assumption that such qualifiers perform a useful function, i.e., have a purpose and a meaning which convey a message.

In exceptional cases, when they clearly cause confusion and lack a logical application or usefulness, adjectives can be discounted. Such cases would be atypical and therefore would have to be carefully justified. The atypical, since it is not part of the usual processes of formulation and interpretation of legal rules, cannot be the premise but only the result of a proof. Furthermore, the mere reiterated use of the terms in question, in the case of the 1902 Tribunal, excludes any possibility of a blunder, error or slip attributable to the copyist or author.

#### 4.2 *The specific nature of continental water-partings and local water-partings*

The first conclusion to be drawn from the repeated use of these two adjectives in the instruments which make up the 1902 Award is that they render the nouns to which they are attached more specific without impairing their common characteristics. The two types of water-parting do in fact have common characteristics: they are the sole partings between specified points and divide waters flowing to different basins. Side by side with these common characteristics exist distinctions based on the specific nature of the concepts themselves.

Here a distinction must be made between the general function common to all water-partings and the specific functions proper to each member of the class. A continental water-parting, as its name suggests, divides waters of continents; a local water-parting is one which, not being a continental water-parting, can be identified by means of its function of dividing waters and which, owing to its special location, also performs a special function within the framework of the continental water-parting. It differs from a continental water-parting by virtue of its specific function and not of its general function and it can be designated in several ways, for example secondary or subsidiary, but in the 1902 arbitration report it is frequently referred to as local. A continental water-parting, also called real or principle, has a familiar and generally accepted function. A local water-parting, defined in relation to the continental, is any water-parting which does not function specifically as a continental one.

Use is also made of the term “water-parting”, without qualification, to denote the concept of what all water-partings have in common, regardless of their specific functions and therefore of their qualifiers. As to the specific nature of the functions of continental and local water-partings, the continental serves as a point of reference and differentiation, since its function is unambiguous and in this case has been accepted by the Parties—separation of the waters of a continent.

It is a characteristic common to all water-partings that they separate waters flowing in different directions. The qualifiers refer to specific functions which are added to the general function. In some geographical situations water-partings separate the waters of the continental land mass and in others they separate waters which flow to different basins, without involving separation of the waters of the continent. When a text wishes to refer to both types of divide without distinguishing between their specific functions it simply says "water-parting", a term applicable without distinction both to continental and to local partings, as well to partings qualified in any other way.

The qualifier "local" is understood, in its usual meaning, to be something relating to an area, region or country. It is also used to indicate municipal or provincial as opposed to general or national. This second usage means that the local is distinct from the general. The problem here cannot be solved by reference to the usual use of one of the terms which form part of the problem. The question of the terminology of water-divides is not one of ordinary language but of technical language. The authors of the Award, well-versed in geography, must have used the terms of their speciality in their technical sense; and it is the technical sense of these terms which must be clarified. A continental water-parting is the big, principle or general divide, sometimes called real, which separates the waters of the continent. A local water-parting lacks this distinguishing characteristic and therefore relates to an area, region or country lying within the areas separated by the continental divide.

In other words, all water-partings have the common and equal function of dividing waters which run in different directions. This general function is expressed by the term water-parting. Then there are the specific functions, which qualify the general function, without of course destroying it, and which consist sometimes of the separation of the waters of continents and sometimes of the separation of waters which are not of continents taken as a whole but of smaller, partial and dependent or secondary areas.

The Arbitral Tribunal did not define the meaning of the term local water-parting. It did not need to do so, unless it wanted to attach to it a special meaning different from the one which might be attached to it in accordance with the text and context of the report. The definition of terms is not indispensable in a legal text, and the use of definitions to make ideas clearer is left to the discretion of whoever drafts the text.

The mere absence of definition does not imply any particular message. When the author of a legal text decides not to define the terms used in it—and the Award contains no definition of the terms used—their meaning must be determined in the light of their common or their technical interpretation and in conformity with the text and context of the relevant provisions, as well as with their practical effect, all of this within the linguistic structure which ensures the communication of the ideas.

To conclude, according to the theory of meaning, including its implications for legal instruments and in this case arbitral awards, "local water-parting" is different from "continental water-parting", and both terms are encompassed by "water-parting".

#### 4.3 *Water-partings in the scientific literature of the time*

One author whom the Parties have cited as an authority in this matter is Dr. Alfred Phillipson, who had written a scientific study widely esteemed at the time of the arbitration entitled *Studien über Wasserscheiden* (1886). This study offers criteria which help to elucidate the problems which have arisen in the present arbitration with respect to water-partings.

“The innumerable water-partings in a specific region are not absolutely equivalent and they can be ranked in their significance, which is determined by the destination of the separated waters flowing together in the watercourses of the valleys on both sides of the water-parting.” “In other words, the more independent and divergent the separated drainage flows or systems are, and the greater their extent, the more significant is the water-parting.” “In every large land mass are found principal divides, as opposed to the water-partings between the drainage systems of the same regions, which have only a *local* significance.”

The following conclusions may be drawn from the quoted passages and they may help to settle the problem under discussion: (1) the water-partings in a specific region are not absolutely equivalent; (2) water-partings can be ranked in their significance, and when so ranked they display differences; (3) the ranking of water-partings depends on the destination of the waters; and (4) in each big land mass are found principle water-partings “as opposed to” water-partings of only local significance.

#### 4.4 *Water-partings in the preparatory work of the 1902 Award*

Terms for water-parting occur with great frequency in the reports of Holdich, head of the Technical Commission which visited the disputed area and prepared the compromise proposal which the Tribunal adopted with some modifications for the sector between boundary post 62 and Mount Fitzroy. For example, in the report of the Technical Commission Holdich mentioned “continental divide” (pp. 328, 341 and 344), “continental water-divide” (p. 332), and “divide” (pp. 338 and 341). Nor did he fail to use “local watershed” (p. 344). He also stated that he had formed a good picture of the nature of the frontier divide which Chile claimed (p. 344) (MA, *Annex of Documents*, document No. 32, pp. 328, 332, 338, 341 and 344).

In another preparatory work Holdich continued to reveal how he used terms relating to water-partings: “continental water-divide” (pp. 350, 366 and 381), “continental divide” (pp. 370, 372 and 376), “main water-divide” (p. 363), “a lofty sierra which carries the continental divide” (p. 365), “watershed” (p. 372), “mountain watershed” (p. 372), “very low divide” (p. 379), “a well defined East West sierra carries the continental divide” (p. 380), “division of the waters”, “*divortium aquarum*” (p. 361), and “local divide” (p. 358) (MA, *ibid.*, document No. 33, “Geographical Conditions of Patagonia”).

Holdich states: “From the point at which it touches the north shore of the lake [San Martín] the frontier line will continue along the local water-parting to its conjunction with the continental water-parting to the north-west of Lake Viedma. Here the frontier has already been determined between the two Republics” (MA, *ibid.*, document No. 37, p. 403).

He says here that the local and continental water-partings enter into conjunction to the north-west of Lake Viedma. Conjunction means the union or joining of things having separate identities. Here conjunction refers to two lines, one local and the other continental. A single line cannot conjoin with itself but only continue or be extended.

A memorandum by Holdich which the Tribunal received during the oral submissions contains a distinction between continental and local water-partings ("Hearing Book", document No. D-I). Here, referring to a specific situation, Holdich writes: "The water-divide in such a case would be "local" and not "continental", but it would all the same furnish the most effective natural boundary that could be found" (Sir T. Holdich, "Notes on the Boundary", April 1899). Here the same passage contains three terms relating to this geographical feature: water-parting, continental water-parting, and local water-parting.

In these notes Holdich asks why the qualifier "continental" or "between the Atlantic and Pacific", which is "so obviously necessary" had been omitted from the boundary treaties, for its inclusion would have defined beyond the reach of further argument the nature of the water-divide; and he adds that reference to the local water-parting has also been omitted. "The terms of the treaty are not therefore contradictory but defective; whilst the terms of the protocol leave no doubt on my mind that whether we accept the "divortium aquarum" as being continental (which is not stated) or as being local (which is not provided for) we are to look for the boundary within the Andine system, and not beyond it." (Sir. T. Holdich, *ibid.*, April 1899).

Holdich says that qualification of the water-parting was obviously necessary in the boundary treaties. And he adds that this would have defined the nature of the water-parting. This means that the qualifier denotes the specific nature of the water-parting. And the qualifier was "obviously necessary" in this case, because it would have indicated the specific nature of the water-parting and placed the water-parting so qualified beyond the reach of further argument. This result could have been obtained by using the qualifiers "continental" or "local", which were not used in the treaty in question. "As regards the Chile contention that by the terms of the treaty the boundary should follow the continental water-divide between the Atlantic and Pacific, it is difficult to understand, if this were really the intention and meaning of the Chile Government, why so obviously necessary a qualification as the word "continental" or "between the Atlantic and Pacific", or some similar qualification which would define beyond the reach of further argument the nature of the water-divide which the boundary should follow, has been omitted from the treaty." (*ibid.*)

Holdich also refers to the failure to qualify the water-parting in another of his preparatory works, saying that if the words "continuous" or "continental" had been used in the treaties Chile's position on the continental water-parting would have been unassailable (MCH, *Annexes*, vol. I, annex No. 22, "Holdich Introduction", para. 1).



#### 4.5 *Repeated mention of continental water-parting and local water-parting in the arbitration report*

The Award itself refers to “principal water-parting of the South American continent” (art. III), which is obviously equivalent to continental water-parting. There are three mentions of the continental water-parting in the arbitration report and all of them indicate clearly that it is characterised by its specific function, which is to separate waters of the continental land mass. The first two references occur in the zone Pérez Rosales Pass-Lake Viedma, the second with reference to Mount Fitzroy, and the third in the region of Last Hope Inlet.

The arbitration report uses the term water-parting 17 times and local water-parting seven times. It also uses equivalent expressions. For example, it says that the frontier line follows a high mountain water-parting and local water-parting before reaching the continental water-parting. The passages in question make it clear that these are different things. The distinction is clear, and the continental water-parting emerges as an entity with its own essential character, distinct from other water-partings (MA, *ibid.*, document No. 40-B, pp. 458, 460 and 461).

The arbitration report frequently uses the term water-parting (without qualifiers) and adds a description of the basins which it separates, and in some cases it uses qualifiers which do not modify in any way the generic nature of this term, qualifiers such as snow-covered, high-mountain, elevated or lofty. Exceptionally, in three instances referring to two short sections separated by the crossing of the waters of Lake Pueyrredón there is no mention of the basins separated by the water-parting (MA, *ibid.*, pp. 455-459).

The term water-parting, unqualified, can refer both to continental and to local water-partings, as well as to terms equivalent to these two terms, such as principle water-divide and secondary or subsidiary divide. In the report the term is used to denote both types of parting; and then the subsequent determination of its principle or secondary function has to be made on the basis of the topography of the ground.

Without any inconsistency with the arguments set out above, when a water-parting (unqualified) is mentioned and its terminal points are indicated, reference can be made to a section of the continental divide which runs along a section of the local divide and vice-versa, linking the terminal points. This occurs in the passage of the arbitration report which establishes the frontier line as the water-parting between Pérez Rosales Pass and Mount Tronador, which on the ground begins as a continental divide and continues as a local divide (document No. 40-B, p. 456).

#### 4.6 *Water-partings in the last paragraph of section 22 of the arbitration report*

This final paragraph of section 22 of the arbitration report contains the nub of the question of distinguishing between continental and local water-partings. This paragraph must be transcribed because of its vital importance for the elucidation of this problem: “From this point it [the boundary] shall

follow the median line of the Lake [San Martín] southwards as far as a point opposite the spur which terminates on the southern shore of the Lake at longitude 72°47'W., whence the boundary shall be drawn to the foot of this spur and ascend the local water-parting to Mount Fitzroy and thence to the continental water-parting to the north-west of Lago Viedma”.

Examining this delimitation rule for the section between the southern shore of Lake San Martín (today boundary post 62) and Mount Fitzroy one is struck by the use of the terms local water-parting and continental water-parting in the same passage, separated by eight words of the same semantic unit. The boundary shall ascend the local water-parting to Mount Fitzroy, i.e., towards Mount Fitzroy, and thence to the continental water-parting. The two terms are quite clearly distinguished: between Lake San Martín and Fitzroy there is a local water-parting, and from Fitzroy the continental water-parting. It is impossible to see how these two terms could be interchangeable in this passage or how the qualifiers could be omitted.

If the Tribunal had wanted the frontier in this section to follow a water-parting without any qualification whatsoever, i.e., that it did not care whether it was a continental or local water-parting or a combination of the two, it could simply have said “water-parting”. But that is not what it did, and the Arbitrator distinguished clearly, in the same prescriptive clause, between the use of local and continental water-parting.

The arbitration report consistently adheres to the standard usage with respect to water-partings. This text is of decisive importance to the solution of the problem of interpretation. It could even be asserted, if necessary, that this terminological distinction in the principal legal text could not be altered by the context, since the situation is so clearly established in the prescriptive clause of the arbitration report. Furthermore, the context, as we have seen, consistently takes the same approach.

Moreover, the Arbitrator could not have proceeded in any other way with regard to this sector, for he knew for certain, from the consensus of the Parties about the position of the continental divide of the time, that this divide lay much further to the east of the zone through which he wished to draw his compromise line, a line situated between the high peaks which Argentina advocated and the continental divide advocated by Chile. There was no continental divide available for a compromise solution. It may be noted that, given the geographical conditions as they were known during the arbitration, a single local water-parting could not run from Lake San Martín to Mount Fitzroy because the continental water-divide of the time stood in the way, as is made clear by the graphic language of the Arbitrator’s map.

Given the many references to continental and local water-partings and bearing in mind the use of these two terms in the same prescriptive clause of the arbitration report concerning the zone between Lake San Martín and Mount Fitzroy, it cannot be assumed that these terms were used in such a way as to lack determinative effect. On the contrary, everything points to the fact that they served to identify particular geographic situations and helped to distinguish between different segments of the boundary line.

### 5. *The problems of Argentina's version of the line*

The biggest obstacle to acceptance of the Argentine line is that it combines continental divide with local divide, and this circumstance is not consistent with the language of the arbitration report, which directs that the local water-parting should be followed. In the light of the analysis given above, it is not consistent with the preparatory work or with the language of the arbitral instruments. In particular, attention must be drawn to the use of the terms local water-parting and continental water-parting in the provision of the arbitration report concerning the line of the frontier from Lake San Martín, which makes a distinction between these terms.

In addition, it may be noted that the Argentine line does not conform to the line of the Arbitrator's map. This latter line, even though in the disputed sector it is shown as pecked, cannot be disregarded in all its possible effects. The Arbitrator's map has the authority invested in it by the Award itself when it indicated this line as the source of details of the delimitation of the frontier (Award, art. V), and the direction of the line is of course an important point.

Leaving for later an examination of the significance of the pecked line on the Arbitrator's map, the minimum value which can and should be assigned to it is that it indicates the direction of the line which interprets the meaning of the arbitral decision correctly. The Argentine line deviates completely from the direction followed by the line on the Arbitrator's map. In fact, this Argentine line moves in directions inconsistent with the general direction indicated on the Arbitrator's map as the continuation of the frontier line, which generally runs north-south. Therefore, it is inconsistent with another requirement, that of interpreting the three arbitral instruments as a single semantic unit in accordance with the principle of integration.

## IV. CHILE'S VERSION OF THE LINE

### 1. *Description of the Chilean line*

From Boundary post 62 Chile's version of the line of the 1902 Award ascends the Cordón Martínez de Rozas and runs southwards to the summit at altitude 1,767 metres. Thence it continues by the summits of the Cordón Innominado and Cordón del Bosque. In other words, from boundary post 62 the line runs along three ranges which, as a whole, Chile calls the Cordón Oriental. Leaving the Cordón del Bosque from the terminal point—Mount Fitzroy—the line descends to the valley and crosses the River de las Vueltas in a straight line 360 metres long and the River Eléctrico in a straight line 250 metres long. It then ascends the north-east spur of Mount Fitzroy and follows the local water-parting to its summit at 3,406 metres (MCH, pp. 163-164, 16.1-16.7).

## 2. *The justification of the Chilean line*

The arbitration report says that the boundary line shall ascend to Mount Fitzroy along the local water-parting from Lake San Martín. Since there is no continuous local water-parting between boundary post 62 and Mount Fitzroy, Chile refers to the Award itself, as the 1966 Court did, and bases its position on one of its clauses, the one to the effect that Mounts San Lorenzo and Fitzroy are located in the dividing ranges. Then, identifying the range which effects the division, Chile uses the arbitration report to identify the spur near the south shore of Lake San Martín.

Chile emphasizes the dominant position of the three ranges which it designates as a whole the Cordón Oriental. In the case of the Cordón Oriental the water-parting has the additional function of making the definition of the line running along its crest more precise. "The identification of the dividing range is the main element in the determination of Chile's line. The addition of the local water-parting is both a reference to the hydrographic function of the range and another way of designating the range, as well as a means of determining the precise line for the whole extent of the summit-line of the range along which the boundary should run" (CCH, pp. 62-63, 4.30).

The backbone of Chile's argument is the text of the Award itself, which states: "The further continuation of the boundary is determined by lines which We have fixed across Lake Buenos Aires, Lake Pueyrredón (or Cochrane), and Lake San Martín, the effect of which is to assign the western portions of the basins of these lakes to Chile, and the eastern portions to Argentina, the dividing ranges carrying the lofty peaks known as Mounts San Lorenzo and Fitzroy". "From Mount Fitzroy to Mount Stokes the line of frontier has been already determined" (*Award*, art. III, 3rd and 4th paras.).

Chile states its understanding of this provision of the Award: "It describes the line which assigns the eastern part to Argentina as being "the dividing ranges" in which Mounts San Lorenzo and Fitzroy are located". Chile then acknowledges that this provision is insufficient in itself for determining the exact course of the boundary in the disputed region (MCH, p. 135, 12.11-12.12). Chile finds the beginning of the correct course of the line in the arbitration report in the reference to "spur".

From this provision of the Award itself Chile infers that it was not prescribed, at least for this section of the line, that the boundary should necessarily follow a local water-parting and that "the truth is that the Award speaks of dividing ranges and not of water-partings" (MCH, p. 136, 12.14). Chile considers that, by referring to the spur from which the boundary runs in the direction of Mount Fitzroy the arbitration report identified the range which the line should follow, interpreting spur to mean a very long feature and even the mountain range itself. Thus, the course of the line is based on the Award, supplemented by the report, for the whole length of the three successive ranges.

At the point at which the Cordón del Bosque moves away from Mount Fitzroy the Chilean line abandons this range and descends to the valley along a local water-parting, crosses the River de las Vueltas and the River Eléctrico and ascends to Mount Fitzroy along another local water-parting. On the Cordón

Oriental the Chilean line coincides first with the local water-parting for 12 kilometres from the initial spur, then runs for 27 kilometres along the continental water-parting, before moving to the local water-parting along the flanks of the Cordón del Bosque and crossing the Rivers de las Vueltas and Eléctrico.

With regard to the crossing of these two rivers, Chile relies on what the 1966 Court called “the general practice of the 1902 Award” which was “to follow the boundary, either along the continental divide or along local surface water-partings, crossing tributary rivers when necessary” (MCH, p. 147, 13.18, and pp. A/266-A/267).

A particular topic of debate in the arbitral proceedings was whether Chile maintained that a local water-parting, as such, can cross rivers. Argentina argued that the language used by Chile had that meaning; it constantly criticized this position and declared that it was a serious defect in the Chilean line that it crossed rivers as a prolongation of local water-partings.

That Chile took this position can be seen from some passages in its written submissions. “Argentina is therefore wrong when it asserts that the Arbitrator recognized a concept of “water-parting” consisting of “a continuous and single line which, between its extreme points and throughout its extent or course, separates two opposite directions of water-flow, which cannot be interrupted or crossed by any water-course . . .”. Referring to the course of the line between Cerro Tres Hermanos and the north shore of Lake San Martín, Chile argued that “the Tribunal indicated that a water-parting should be used. This meant crossing two rivers” (CCH, p. 60, 4.27). Attention is drawn here to the sequence of the references to water-parting and the crossing of two rivers.

In its counter-memorial Chile made statements in which the crossing of rivers was not attributed to an intrinsic quality of local water-partings but to the intention of the Arbitrator, who wanted to link two local water-partings.

Whether its justification is derived from the nature of a water-parting as such, which in fact is impossible, or from the Arbitrator’s decision to link two water-partings, the Chilean line crosses two rivers and connects the local water-parting descending from the summit of the Cordón del Bosque to the local water-parting ascending from the valley by the slopes of Mount Fitzroy.

### 3. *The problems of Chile’s version of the line*

Five issues connected with the Chilean line merit attention: (1) the dividing ranges as the legal basis for determining the boundary; (2) the identification of the beginning of the line as the spur of Cerro Martínez de Rozas; (3) the combination of continental and local water-partings; (4) the crossing of the Rivers de las Vueltas and Eléctrico; and (5) the line’s penetration into territory which was not disputed in 1898-1902.

#### 3.1 *The provision of the Award concerning dividing ranges*

The relevant provision of the Award, which has two parts, must be read carefully. The first part states that the further continuation of the boundary is determined by lines fixed across Lakes Buenos Aires, Pueyrredón and San

Martín, the effect of which is to assign the western portions of the basins of these lakes to Chile and the eastern portions to Argentina. This statement is obviously prescriptive, i.e., it contains a rule concerning the determination of the boundary across these three lakes.

The second part continues “the dividing ranges carrying the lofty peaks known as Mounts San Lorenzo and Fitzroy”. In this text the second part stands in apposition to the first, but it is more of an independent than a subordinate clause. Sir John Ardagh, a member of the Tribunal, added this clause after the first part had been written.

When the two parts are read together, the first is prescriptive and the second descriptive or explanatory. Being explanatory, the second part lacks any prescriptive or mandatory meaning and simply states that Mounts San Lorenzo and Fitzroy are located in the dividing ranges. It does not say that the dividing ranges extend between the two peaks or that the line should follow ranges between these peaks.

Neither the prescriptive clause, concerning the division of the three lakes between the Parties, nor the explanatory clause, stating that Mounts San Lorenzo and Fitzroy are located in the dividing ranges, says that the ranges function as the dividing line between the summits of San Lorenzo and Fitzroy. The prescriptive clause contains the Arbitrator’s decision that the line divides the three lakes and assigns the western portions of their basins to Chile and the eastern to Argentina. The descriptive or explanatory clause simply states that Mounts San Lorenzo and Fitzroy are located in the dividing ranges.

The second clause determines the position of Mounts San Lorenzo and Fitzroy, stating that they are located in dividing ranges. It says nothing more about dividing ranges. The verb “located” is not prescriptive but merely indicative of situation. Nor is the verb “carry” prescriptive and the most appropriate Spanish translation in the present case is “*encontrarse*”.

In the English text the subject of the sentence is “the dividing ranges”, the verb is “carrying”, which here, as is common usage in English to indicate a stable situation, is in the gerundive form; and the complement is “the lofty peaks known as Mounts San Lorenzo and Fitzroy”.

The Award could have said more but it did not. The arbitration report established the rule for determining the line in this sector: the local water-parting which ascends to Mount Fitzroy. This is a prescription or a mandate and not an explanation.

The late addition of “the dividing ranges” to the arbitration text could not be more eloquent, for the line was being determined in the extensive zone lying between Mount San Lorenzo and Mount Fitzroy, some 190 kilometres long, in which the Arbitrator had decided to cross the River Mayer and Lake San Martín, delimiting large zones without reference to dividing ranges, either because they did not seem appropriate or because they did not exist, as in the area of the three lakes and the surrounding terrain.

### 3.2 *Start of dividing range in the boundary post 62–Mount Fitzroy sector*

Having cited the Award itself in support of its argument that the line runs along dividing ranges, Chile refers to the arbitration report to specify what these ranges are. “The report first identifies the “dividing range” referred to in the Award (the Cordón Oriental) when it mentions the spur whose foot is to be found at the specified point on the southern shore of Lake San Martín and to which the line is then to ascend in the direction of Mount Fitzroy.” Further: “Cordón Oriental, also known as Cordón Martínez de Rozas and Cordón del Bosque in its southern part, is the spur referred to in the 1902 arbitration report . . .” (MCH, p. 136, 12.16, and p. 13, 3.12).

Chile considers that this provision of the report is consistent with the more general rule contained in article III of the Award, for the rule uses a dividing range to carry the boundary. The report adds a reference to the local water-parting as the tool which defines with greatest detail or precision the course of the boundary along the chosen dividing range. In several statements Chile argues that “spur” is equivalent to “dividing range”, for example in the reference to “the foot of this spur” (record No. 1 of 11 April 1994, p. 44).

Here is another example of this identification of spur with range: “An examination of the 1902 arbitration report shows that its use of “spur” corresponds in all cases to “dividing range”, i.e., to one of the ranges chosen by the Arbitrator as the geographical feature constituting the international boundary”. “This is precisely the case of the Cordón Oriental, i.e., it constitutes one of the dividing ranges.” Chile then explains that immediately after the arbitration Chile’s official documents translated “spur” as “*contrafuerte*”, but that today it prefers “*estribación*” as being a noun which, while meaning the same, is now in wider use (record No. 7 of 19 April 1994, pp. 47-53).

The meaning of “spur” provoked much debate during these arbitral proceedings. Argentina argued against the thesis that “spur” identifies the dividing range, the basis for Chile’s position that spur and range are equivalent terms. This approach corresponds to the Chilean position according to the passages quoted above.

The dictionaries of the time cited by the Parties and today’s dictionaries agree that “spur” is a salient issuing from a mountain mass, but it is not the mass itself; in other words, a spur issues from a range or mountain but it is not the range or mountain itself. The term does not include the range, peak or mountain from which the spur issues. Thus, the report indicates only the start of the line from the crossing of Lake San Martín and says nothing to the effect that it runs along dividing ranges. Having indicated its starting point, the reports states that the line is determined by the local water-parting. The Parties agree on the first 12 kilometres of the local water-parting on the Cordón Martínez de Rozas.

The report stipulates the local water-parting as mandatory. A local water-parting may run along ranges or along such a low relief that its identification of the ground is difficult. If the report had made the dividing ranges the delimitation rule, it would not have mattered whether the continental or local water-parting ran along them. But since this is not the case, the only applicable criterion, from the point identified as "spur", is the local water-parting.

### 3.3 *The combination of continental and local water-partings*

Chile argues that the boundary should follow the Cordón Oriental until this range moves a considerable distance away from Mount Fitzroy. The first section of the Chilean line runs along the local water-parting, this being a more precise indication of the position of the line along the ranges. According to Chile's thesis, the principal and decisive element is the dividing range, and the secondary or complementary element is the local water-parting. After the first 12 kilometres the line joins the continental water-parting and then moves on to a local one. This combination is not consistent with the Chilean argument that the two kinds of water-parting are distinct and that if one of them is continental it cannot also be local, and vice-versa. Chile states that "logically, a water-parting cannot be continental and local at the same time, because the waters which it separates cannot flow simultaneously to two oceans and to only one of them (MCH, p. 18, 2.42).

Chile would have fallen into contradiction with its thesis of the clear distinction between continental and local water-partings if it had relied of the arbitration report, which makes the local water parting mandatory, because the Chilean line combines local and continental partings. Since Chile relied on the dividing ranges, the continental or local character of the water-parting became a secondary consideration. However, as it has been determined that dividing ranges do not play the role assigned to them in this sector, local and continental water-partings remain set in contradiction with each other, and the combination of local and continental partings is not without relevance to the resolution of this contradiction.

Since Chile accords precedence to the dividing ranges, it would be possible to avoid the problem of this distinction if such precedence was a prescription of the Award, for the successive ranges could carry the line to the point from which it descends to the valley along which flow the Rivers de las Vueltas and Eléctrico. If the local water-parting played a subsidiary role, and moreover there was no continuous and single water-parting between the supposed terminal points, it would not matter whether the dividing ranges carried along their summit-line a continental or a local parting. These hypotheses, however, do not fit with the terms of the Award and the arbitration report.

Based as it is on the distinction between continental and local water-partings and on the fact that the applicable rule for determining the boundary in this section is the local water-parting alone, the Chilean interpretation of the boundary line, like the Argentine version, suffers the defect of combining continental and local water-partings. The report speaks of a local water-parting



not of a water-parting without qualification. If the report had referred to a water-parting without qualification, it would have been admissible to combine continental and local partings.

### 3.4 *The crossing of the River de las Vueltas and the River Eléctrico*

The Chilean line descends from the Cordón del Bosque along a low-lying local water-parting to the River de las Vueltas, crosses it and continues towards the River Eléctrico, which it also crosses before ascending along a local water-parting to Mount Fitzroy. Chile finds the justification for crossing these rivers in the practice of the 1902 Award, which the 1966 Court described as follows: "The general practice of the 1902 Award was for the boundary line to follow either the Continental Divide or local surface water-partings, crossing river tributaries as necessary". (*Award of the British Government and Report of the Court of Arbitration*, Santiago, MCMLXX, bilingual edition, p. 169).

The waters of a river flow in only one direction, while a water-parting separates waters which flow in different directions. Thus, a water-parting as such cannot cross a river, because in that section it would not part the waters. Accordingly, it is not a question of the local water-parting crossing rivers, which would contradict its definition, but of the intention of the Arbitrator to the effect that at the end of one local water-parting the line should cross a river to reach another water-parting or some other geographical feature.

The 1902 Award was able to accept the crossing of rivers as the Arbitrator's intention, not as a prolongation of the local water-parting. The language of the arbitration report indicates that the crossing of rivers is a result of the decision of the Tribunal and not of the prolongation of local water-partings.

The statement of the 1966 Court quoted above indicates that the general practice of the 1902 Award associates the crossing of tributary rivers with the line of the frontier but not with the local water-parting. This general practice to which the 1966 Court refers means that the frontier line, not the local water-parting, can cross rivers when necessary; and the frontier line represents the arbitral decision.

The crossing of rivers in the present case of interpretation and application of the 1902 Award could be effected by decision of the Court, if that was absolutely indispensable for giving effect to the intention of the 1898-1902 Arbitrator and in view of the incomplete geographical knowledge of the region at the time of the arbitration. But since objections have been raised against the earlier sections of Chile's version of the line, it would be wrong to consider the possibility of having it cross rivers at the behest of the Arbitrator.

### 3.5 *Penetration of the Chilean line into areas which were not disputed in 1898-1902*

After crossing the River Eléctrico the Chilean line ascends along a local water-parting to Mount Fitzroy. This sector of the line is located in a zone which at the time of the 1898-1902 arbitration was considered to belong to the Atlantic basin, which Chile recognized as Argentine, and to lie outside the competence of the Arbitrator.

This incursion into a zone which was not disputed is grounded on a reason similar to the one by which the Arbitrator justified entering the Atlantic basin of Lake Viedma, i.e., that Mount Fitzroy, an obligatory point of the boundary, was located in the geography of the time on the Atlantic slope and was bordered to the north and west by the continental divide. Any line coming from Lake San Martín had necessarily to cross the continental divide of the time in order to reach Mount Fitzroy, but the Arbitrator opted for the minimum incursion into this basin, as his map demonstrates, while the Chilean line makes a relatively large incursion into territory which was not disputed in 1898-1902.

The 1898-1902 Tribunal would not have been able to carry its intention of seeking an intermediate line between the extreme claims of the Parties as far as dividing land which was clearly not in dispute. The Tribunal could not direct that the boundary should penetrate far into land which was not disputed and therefore lay outside its competence. By sticking to their agreement on Mount Fitzroy as a point on the frontier the Parties accepted that the line should enter the Atlantic basin as known at the time, but the Arbitrator understood that, although the incursion into the Atlantic basin was meant to meet a need, it must be kept to a minimum, precisely because it was an exception. The Arbitrator's map proves this.

## V. THE 1903 DEMARCATION LINE

### 1. *Background*

On 26 December 1901 Sir John Ardagh submitted the first proposal for a British commission to undertake the execution of the delimitation. He sent a cable to the Foreign Office on 30 April 1902 saying that a mixed commission would certainly be needed to erect the boundary marks, with British officers as arbitrators. The significance of assigning the role of arbitrators to British officers was clarified in a note which the Secretary of the Tribunal sent to the Foreign Office on 3 May 1902, stating that the Tribunal was thinking of proposing that the demarcation of the boundary should be undertaken by a mixed commission of the two Republics, with British officers as arbitrators, and that consequently the decision of these officers would be accepted by both Parties as absolutely final and binding (see MCH, *Annexes*, vol. I, annex 13, p. 1, and annex 15, pp. 1 and 2).

On 26 May 1902 the Governments of Argentina and Chile signed an agreement on demarcation of the boundary line between Chile and Argentina, in which they requested the British Government to appoint a commission to fix on the ground the boundaries which it had ordered in its Award (MCH, *Annexes*, vol. I, annex 17). On 29 December 1902 Sir Thomas Holdich informed Argentina's Minister for Foreign Affairs, Mr. Luis Drago, that he had reached an agreement with the experts of the two countries on the terms under which the mixed commission would operate, with British officers acting as arbitrators (MCH, *Annexes*, vol. I, annex 29).

The note mentioned above contains the terms of reference of the demarcation commissioners, to the effect that the British officer in charge will have absolute command of the group and will be the final judge in the event of disagreement. He was also responsible for the accuracy of the final records of the frontier, which should include: (1) the final map; (2) a summary or list of boundary marks indicating the coordinates of their location on this map in latitude and longitude correct to 10 seconds and their relation to adjacent boundary posts and surrounding points fixed by triangulation (CCH, *Annexes*, vol. I, annex 29). This is the most important part of the agreement reached by Holdich and the experts, because it refers to the powers conferred on the members of the Demarcation Commission, and of course on the British officers as arbitrators.

## 2. *The powers and work of the Demarcator Captain Crosthwait*

Argentina submitted two maps prepared by Captain Crosthwait, dated 7 and 8 June 1903, and it pointed out a number of differences between them. For our present purposes the differences between these maps are irrelevant. None of them showed a line extending to Mount Fitzroy. Chile stated that it had not received the map until 8 June.

Given the absolute authority conferred on the British officers to resolve definitively any problems connected with the boundary marks, it may be concluded that they were the real demarcators of the delimitation ordered by the Arbitrator. The determination of the powers invested in the Demarcator for the zone in question, Captain I.H. Crosthwait, is a matter of great importance for the assessment of the value of his map. The main point to be settled is the meaning of the words “final map”.

Crosthwait made some changes in the line which he drew on his map: (1) he changed the direction of the line on the Arbitrator’s map, depicting it as an almost straight line running north-south between boundary post 62 and the continental water-parting of the time in the neighbourhood of Mount Fitzroy, and deleting the westward inflection of the line on the Arbitrator’s map; (2) his line did not touch Cerro Gorra Blanca, and this represented a substantial change from the Arbitrator’s map; and (3) nor did it touch Mount Fitzroy, an obligatory point on the boundary, again diverging from the Arbitrator’s map.

Captain Crosthwait did not explain these changes, so that it is impossible to indicate, except as hypotheses, his reasons for acting in this way. One possible reason for the omission of Cerro Gorra Blanca might be that, although the Arbitrator’s map touched this peak with its boundary line, the arbitration report did not mention it. The fact that the line did not pass over Mount Fitzroy, when the Arbitrator’s map touched it by crossing the continental divide of the time and then left it by crossing the same continental divide again, does not seem to point to a reason but rather to an act of will.

Captain Crosthwait erected boundary post 62 on a prominent rock about 50 metres above the level of the lake in line with the spur which descends from the peak described in the Award (marked “D” on the map), about 750 metres to

the west of a river which flows into the lake (MCH, *Annexes*, vol. I, annex No. 31, "Tabular Statement of Boundary Pillars Erected on the Chile-Argentina Boundary by the British Delimitation Commission", pp. 7-8).

### 3. *Controversy concerning the work of Captain Crosthwait*

Argentina considers that the Demarcator was only authorized to erect boundary marks. "The 1903 demarcation was not a second disguised arbitration. Its purpose was not to "adjust the line" of the frontier of the 1902 Award . . . what was done in 1903 was to fix points on the line of the frontier of the 1902 Award by erecting boundary marks at some of these pre-selected points. This was, then, a "demarcation" in the most elementary sense of the term, i.e., the actual implementation of the "delimitation decided upon in the Award" (CA, p. 187, 23).

Chile, in contrast, assigns to the Demarcator's map a dominant role in the determination of the line of the frontier in accordance with the 1902 Award. "This is the line, which, in its general characteristics and principally by reason of its almost direct path to Mount Fitzroy, represents in Chile's view the clearest indication of the intention of the 1902 Award and report." "Both for Chile and for Argentina the demarcation settles definitively any omissions or uncertainties in the frontier defined by the Award." (MCH, p. 139, 12.31)

"It was clear to the Tribunal that the acts and decisions of the Demarcator were to resolve any points remaining in doubt." Chile also refers to the practice of implementing the Demarcator's line by correcting the Arbitrator's map, which occurred on many occasions involving hundreds of kilometres of frontier (CCH, p. 23, 3.1, p. 139, 12.31, and p. 71, 7.47 and 7.48). These corrections were made possible by an agreement between the Parties.

Chile accords precedence to the acts of the Demarcator, for it says that "the 1903 demarcation must be regarded as an integral part of the 1902 Award and report, and it was accepted as such by the Palena Court". In this connection it believes that "the demarcation settles definitively any omissions or uncertainties in the frontier defined by the Award". "The authority and mandatory nature of the demarcation cannot now be called into question." (MCH, p. 139, 12.31)

It must be pointed out that the 1902 Award consists of three instruments: the Award itself, the arbitration report and the Award map. The binding authority of the Demarcator's map and report stems from the agreement concluded by the Parties on 28 May 1902. Here the question under discussion is not so much the binding nature of the demarcation as the authority of the Demarcator to produce a map different from the one produced by the Arbitrator.

#### 3.1 *Delimitation and demarcation*

Where frontiers are concerned it is common practice to distinguish between delimitation and demarcation. The Tribunal distinguished between the two concepts, for it said that it undertook to give opinions and recommendations on the delimitation and that the actual demarcation should be carried out in the presence of British officers (*Arbitration Report*, para. 17).

It must be noted that the delimitation had already been concluded in 1903 and that Crosthwait was not appointed to amend the delimitation but to carry out the demarcation in accordance therewith. His powers, defined by their purpose, were limited to demarcation, and therefore he had no authority to diverge from the Arbitrator's delimitation.

The demarcation agreement signed by the two countries spelled out the terms of reference of the Mixed Commission as follows: "It shall fix on the ground the boundaries prescribed in [the Arbitrator's] Award". The distinction between demarcation and delimitation means that demarcation is a technical activity concerned only and exclusively with the implementation of the delimitation. To accept that the Demarcator could make changes to the Arbitrator's map would also mean accepting instability and uncertainty in the delimitation decision.

### 3.2 *The question of the final map entrusted to the Demarcator*

One question which has given rise to error is the Demarcator's responsibility for the production of the "final map". It has been inferred from this that the map had been superimposed on the Arbitrator's map with some adjustments for accuracy. This would mean that the Arbitrator's map would be the penultimate in the delimitation process. It is not easy to see how the Demarcator could make adjustments for accuracy on the Arbitrator's map by omitting Mount Fitzroy as a point on the frontier line, or how the deletion of the passage of the line across Cerro Gorra Blanca could properly be called adjustment for accuracy. But the main point concerns the Demarcator's powers.

The agreement between Holdich and the experts states the task entrusted to the Demarcator: to erect boundary marks in the appropriate places and to do so in accordance with specific instructions. In order to facilitate this task the Demarcator was authorized to use certain discretionary powers. Within this context the final map for which he was responsible was to consist of a graphic description of the places where the boundary marks were erected. In any event, the use of the words "final map" provoked debate during the present arbitration proceedings.

Sir Thomas used different language, this time unambiguous, in the instructions which he gave to his four demarcation officers. He directed them to supervise the alignment of the boundary posts or frontier markers in the places indicated by the Tribunal and to decide, in the event of any doubt, where they should be erected. He then stated the criteria for erection of the primary and secondary boundary marks and the information about each post which should be included in the mission report.

These instructions no longer refer to a "final map" but to a "fair map". "A short narrative report will be required of each Officer's work together with a fair map of the boundary in his section." The qualifier "final" was used in the report: "A final statement, or synopsis, of the boundary pillars will be drawn up . . ." (CCH, *Annexes*, vol. I, annex 30, "General Directions Given by Sir Thomas Holdich to Officers in Charge of Demarcation 1902", paras. 9 and 10).

#### 4. *The subsequent use of the Demarcator's map*

On the question of how to assess the maps it is worth recalling the following comment by Argentina: "In an assessment of conduct subsequent to the 1902 Award the official maps are of special relevance, for they show how the delimitation rule of the Award has been interpreted and applied by the Parties" (CA, p. 333,1).

Even though the Demarcator's map, examined in the light of the powers conferred on its author, could not be interpreted as binding on the Parties, except with respect to the erection of boundary post 62, it was used by Argentina, beginning with the 1907 map published by the Office of International Boundaries. For several decades Argentina consistently, except on two maps which reproduced the line of the Arbitrator's map, depicted a line similar to the one on the Demarcator's map. On some of these maps the line touched Mount Fitzroy and on others it did not. The first Argentine map showing a line similar to its version of the line in the present arbitration appeared in 1962.

An examination of this long series of maps shows that the Argentine line on them was drawn in the same direction, in the same area and through the same points as the line of the Demarcator's map, no matter whether it did not touch Mount Fitzroy, following in this respect the Demarcator's map, or did touch it, thus adding to the Demarcator's map. This assertion is not based on deduction but on direct and objective visual examination.

Two maps produced by Chilean experts, Riso Patrón (1905) and Donoso Grillé (1906), also adopted the Demarcator's line. This was repeated on maps up to 1953. Chile's 1953 map, labelled "preliminary map" and "boundary under study", used the line advocated today by Argentina, i.e., the continental divide discovered in 1945. In 1955 Chile published a map showing its current version of the line of the 1902 Award.

Although the maps of Riso Patrón and Donoso Grillé were published on their authors' responsibility in their private capacity, Chile did not dissociate itself from these maps but referred to them as its own. It states in this connection: "(1) in 1905 and 1906 two Chilean maps used the line indicated on the Demarcator's 1903 map, i.e., the line running directly between boundary post 62 and Mount Fitzroy. Cerro Gorra Blanca was thus in Chilean territory" (MCH, p. 101, 9.3). On this basis it can be asserted that Chile first adopted the Demarcator's line and that from 1906 and for many years it preferred the line of the Arbitrator's map.

The maps produced by the Parties subsequent to the 1902 Award confirm that the area on which the lines of the Arbitrator's map and the Demarcator's map were shown fell within the competence of the 1898-1902 Arbitrator. The maps of the Parties up to 1953 reproduced those two lines, and reproduced them without any reservation concerning the area which later would be known as the upper part of the basin of the River de las Vueltas. The lines on the maps of the Parties coincided, notwithstanding their differences in other respects, in the path which they took in the upper las Vueltas basin. The Parties were stating in graphic language that the two original lines had been drawn in an area concerning which the Arbitrator had been given authority to rule.

It emerges from the foregoing arguments that the Parties' assessments of the value of the Demarcator's map and line did not agree. Notwithstanding its original defect, if the Parties had agreed to invest the Demarcator's line with the status of dividing line throughout several decades, the question would have arisen of determining the implications of that agreement.

The official maps took different approaches to identification of the boundary line. Argentina inclined towards the Demarcator's line and Chile towards the Arbitrator's. In consequence there remained an intermediate space concerning which, for several decades, neither Party made any attribution or claim by means of the graphic language of their maps. Actual activities, private and official, were carried out in this intermediate area. But no agreement could be reached on the Demarcator's line, nor could its original defects be corrected by the subsequent conduct of the Parties.

In conclusion, the Demarcator's map could not take the place of the Arbitrator's map owing to the Demarcator's lack of authority, and the subsequent and divergent conduct of the Parties could not correct its original defects. The line on his map does not meet the necessary requirements for being considered as the authentic interpretation of the 1902 Award, even though it did confirm that the area through which this line ran between boundary post 62 and Mount Fitzroy had been within the competence of the 1898-1902 Arbitrator.

#### VI. THOUGHTS ON A LINE WHICH MAY REPRESENT THE DECISION OF THE 1898-1902 ARBITRATOR

##### 1. *The common problem of Argentina's and Chile's versions of the line*

The most pertinent point in the debate between Argentina and Chile on the capacity of their respective lines to represent the authentic interpretation of the 1902 Award turns on their interpretation of continental water-parting and local water-parting: similar and interchangeable terms (Argentina) or different and non-interchangeable (Chile).

Argentina says that the two divides function in the same way and denominate the same geographical situation and that therefore the qualifiers do not alter their essential shared character. Chile maintains that the terms mean two different things and that a water-parting is either continental or local but not both at once.

In its interpretation of the arbitration report's rule which stipulates following the local water-parting, Argentina presents a divide combining continental and local features, interpreting local in accordance with the approach taken by the Award. Chile relies on the dividing ranges for part of the course of its line and then takes up the local water-parting. The elucidation of what is understood by continental and local water-parting becomes a decisive factor in the assessment of the two lines and establishing the correct interpretation of the 1902 Award.

Argentina argues that, in the boundary post 62–Mount Fitzroy sector, there is no incompatibility between the Award itself and the arbitration report, in contrast to what happened in the 1966 arbitration when the Court set aside the

report by reason of its faulty geography and applied the Award itself. Thus, Argentina considers that in the present case there is total consistency between Award and report and that they can be applied on the ground.

Argentina maintains that, when these two instruments are read in the context of the geographical situation as it is known today, the frontier line should be drawn on the ground for the whole length of the water-parting running without interruption between boundary post 62 and Mount Fitzroy, notwithstanding the fact that this water-parting is a continental one in part of its course. In Argentina's opinion, this is the water-parting which the 1898-1902 Tribunal called local water-parting.

Argentina considers that the local water-parting can be used between boundary post 62 and Mount Fitzroy on the understanding that there is no difference between continental and local divides since both function in the same way, i.e., they separate waters flowing in different directions.

The task of the present Court, Argentina concludes, is to identify the line corresponding to the local water-parting in accordance with the 1902 Award and report and to determine its course, for which purpose it does not matter that part of this course corresponds to a continental divide, since the adjectives local and continental add nothing to and subtract nothing from the nature of the divide.

This line of argument would confirm the conclusions drawn from application of the principle of estoppel and from the territorial competence of the 1898-1902 Arbitrator. Thus, estoppel, territorial competence of the Arbitrator and thesis of water-parting concur in validating the Argentine line.

Chile considers that there is a clear distinction between continental and local water-parting, since the one separates waters flowing to the Atlantic and Pacific Oceans and the other waters flowing to one same ocean. Chile says that a divide is either continental or local but not both at once; and it hopes to overcome the obstacle inherent in this distinction for its version of the line by recourse to dividing ranges and the interpretation that in the stretch where the dividing range prevails it is immaterial whether the water-parting is continental or local.

Chile maintains that there is a geographical error in the present case and that, just as in the 1966 arbitration it was determined that the River Encuentro does not have its sources on Cerro de la Virgen, the local water-parting does not run without interruption between boundary post 62 and Mount Fitzroy and that, therefore, the arbitration report's rule cannot be applied.

Chile refers to the authority of the 1966 Award in support of two points: (1) reliance on the Award itself with respect to the dividing ranges mentioned in its article III, since the report had made a geographical error; and (2) the possibility that the local water-parting may cross rivers, in accordance with what the 1966 Court called "the general practice of the 1902 Award".

On the assumption that the arbitration report's rule cannot be applied because there is no single water-parting which is actually local throughout its length between boundary post 62 and Mount Fitzroy, Chile relies, as did the 1966 Court, on the Award itself in order to draw a line which runs along the ranges Martínez de Rozas, Innominado and del Bosque, descends to the valley



along a local water-parting, crosses the River de las Vueltas and the River Eléctrico, and then ascends along a local water-parting to Mount Fitzroy. Along these ranges the Chilean line is in some parts a continental divide.

If a distinction is made between continental and local water-partings, on the basis of their respective qualifiers and moreover on the understanding that they are technical terms, it can be said that the Argentine line combines continental and local water-partings and that the Chilean line does likewise. The question, with respect to both lines, is to decide whether this combination is consistent with the rule of the arbitration report's instruction that the local water-parting should be followed in this sector.

Reasons have been adduced, some theoretical and others taken from the texts of the 1898-1902 arbitration and its preparatory work, to prove that continental water-parting and local water-parting were specific terms at the time and that they cannot be used interchangeably in the language of the Award. Reference to the preparatory work is necessary in this case because the texts in question prefigure the language of the Award and state clearly that the authors make a distinction between continental and local water-parting. Thus, the solution to this dispute must be sought elsewhere than in the understandings or claims of the Parties with respect to their lines.

## 2. *The 1994 Arbitral Award*

The 1994 Award and this dissenting opinion invoke the same legal principles but they differ in their application of these principles. I cannot find any significant points of agreement between the Award and my dissenting opinion.

My dissent from the Award begins in the chapter containing an examination of the competence of the present Court, moves on to the territorial competence of the 1898-1902 Arbitrator, including its consequences, citing the history and application of the principle *non ultra petita partium*, and concludes with the meaning of the terms for water-parting.

Thus, I do not endorse the grounds, conclusions or decision of this Award with respect to the interpretation and application of the 1902 Award. This dissenting opinion, taken as a whole and in each of its elements, explains the reasons why I voted against the Award.

Therefore, having thus exhausted the material used for the successive exclusion of possible answers to the question put in the 1991 *Compromis*, I will now offer some thoughts with which I bring to an end and close the circle on this dissenting line of reasoning.

## 3. *The sources for determination of the line in accordance with the 1902 Award*

The exposition given above has successively eliminated possible ways of interpreting the 1902 Award with regard to the sector covered by the present dispute, on the ground that for one reason or another they are not duly consistent with the terms of that Award. It makes reference to the Award, with its three elements consisting of the decision itself, the arbitration report and the Arbitrator's

map, i.e., the primary source from which are derived the interpretations to which objections have been raised and which, pursuant to the 1991 *Compromis*, is to be interpreted and applied in accordance with international law.

The three components of the 1902 Award must be considered as a whole, because in isolation none of them resolves the problem. The decision itself, the report and the map constitute a semantic unity and complement each other. It must be remembered that the 1902 Award contains language of two kinds, the written language of the decision itself and the arbitration report and the graphic language of the map. If the principle of integration is to be applied to its interpretation, this technique based on a legal principle and backed by logic must be applied to the whole interpretation and to all the problems which arise.

The Award itself contains two fundamental clauses concerning the sector currently in dispute. The first states: "The further continuation of the boundary is determined by lines which we have fixed across Lake Buenos Aires, Lake Pueyrredón (or Cochrane), and Lake San Martín, the effect of which is to assign the western portions of these lakes to Chile and the eastern portions to Argentina" (*Award*, art. III, para. 3).

The second fundamental clause states: "A more detailed definition of the line of frontier will be found in the Report submitted to Us by Our Tribunal, and upon the maps furnished by the experts of the Republics of Argentina and Chile, upon which the boundary which We have decided upon has been delineated by the members of Our Tribunal, and approved by Us" (*Award*, art. V, para. 1). Thus, the frontier approved by the Arbitrator is delineated on the maps.

The arbitration report contains the following prescription: ". . . [the frontier line] shall follow the median line of the Lake (San Martín) southwards as far as a point opposite the spur which terminates on the southern shore of the Lake in longitude 72°47'W., whence the boundary shall be drawn to the foot of this spur and ascend the local water-parting to Mount Fitzroy and thence to the continental water-parting to the northwest of Lake Viedma" (*Arbitration Report*, section 22, last paragraph).

The Arbitrator's map contains details of the arbitral decision, in accordance with the provision of the Award itself (art. V, para. 1). The Award does not allude to any order of priority between the report and the map but uses both of them to set out the details of its decision.

In other words, the Award itself formulates the general rule concerning the line, which, coming down from the north crosses Lake San Martín and then continues to Mount Fitzroy, the effect of which is to assign the eastern portions of the lacustrine basins to Argentina and the western portions to Chile, thus implementing the compromise solution which the Arbitrator regarded as appropriate in the light of positions which were incompatible with the provisions of the boundary treaties interpreted in their strict sense.

As this was a very general formulation, the Arbitrator supplemented it with the report and the map, adding the details which were lacking in the general rule. As a result, not only for reasons of interpretative logic but also at the express direction of the Arbitrator, the report and the map represent and clarify the

Arbitrator's intention. The structure of these instruments is such that neither of them, in itself and in isolation, can solve the problem of the identification of the course of the frontier line between boundary post 62 and Mount Fitzroy.

The arbitration report read in conjunction with the Arbitrator's map provides the details of the line prescribed in very general terms in the decision itself. The way in which this general rule is to be applied in the sector of the present dispute is specified in the arbitration report and on the Arbitrator's map. Thus, the key to a solution is to be found in the examination and interpretation of the report and the map considered as a single semantic unit consisting of written and graphic language.

And at the end of the day, if all the paths of interpretation encounter insuperable obstacles, there will remain, as a first hypothesis, an abominable silence, a symbol of the bewilderment of the logicians. But since silence is not a solution and is inadmissible in legal matters, even though legal history does record some cases, the Court would have the power to adopt its own decision, not one devised totally by the Court but one consistent with the factual and legal background and the context in which the Arbitrator conducted the proceedings and adopted his decision, as well as with the written and graphic language of the components of the Award, in particular the report and the map.

#### 4. *Concerning whether the Parties confirmed an interpretation of the Award by their concordant conduct*

Before continuing with this consideration of solutions a few words must be said about the possibility that the Parties had confirmed a given interpretation of the Award by their concordant conduct. The conduct of the Parties following the Award manifested itself mainly in the form of maps. These maps do not seem to have consolidated a common interpretation which might have constituted a binding factor for the present dispute.

For the details of the content and significance of the maps which the Parties produced subsequent to the 1902 Award reference must be made to the sections of this exposition dealing with the question of the territorial competence of the 1898-1902 Arbitrator. Here I will limit myself to a summary of the reasons why it can be asserted that such concordance did not materialise.

The first Argentine map, produced in 1902 immediately after the pronouncement of the Award, was apparently an internal document which was not made public and was not discussed during the arbitral proceedings. This map depicted the line of the Arbitrator's map, recognizing that this was the boundary adopted by the Arbitrator. This map came to the attention of the present Court because a copy of it was included in the volume of annexes in the Argentine memorial.

The first two Chilean maps, produced by Riso Patrón and Donoso Grillé, depicted the Demarcator's line, and then for many years the official Chilean maps showed the line of the Arbitrator's map. Chile continued to use this line consistently until in 1953, eight years after the discovery of the true continental divide, it published a map showing a line similar to the one which would

subsequently become the current Argentine line. This map was labelled “boundary under study” and “preliminary map”, so that it cannot be regarded as acknowledging Argentina’s present version of the line, for acknowledgement must be categorical and unambiguous. In 1955 this map was replaced by one showing the current version of Chile’s line.

Argentina’s official maps tended to follow the Demarcator’s line, with a few exceptions. Since Chile chose the line of the Arbitrator’s map and Argentina the Demarcator’s line, there was no concordance between the two countries on the interpretation of the Award.

What is more, for many years there remained between these two lines a space not encompassed by either of them. With the passage of time concrete activities were carried out in this space. These activities, although they show that the Parties never intentionally went beyond the line of the Arbitrator’s map, allowed some uncertainty as to boundaries, and the present task is to identify and define a line which does not give rise to any uncertainty.

##### 5. *The dispute about the value of the Arbitrator’s map*

The two Parties agree that there are a number of difficulties connected with application of the Arbitrator’s map, difficulties due mainly to the pecked line in the sector currently in dispute. Even so, they recognize that this map is a component of the Award. What is more, they have made statements recognising the legal force of the graphic language of the map. For example, Argentina has stated: “Thus when a “map” is part of the international instrument subject to interpretation, as in the present case, its value as evidence of the meaning and scope of the instrument in question is legally and logically obvious” (CA, p. 65, 21). It would be difficult or even impossible to disagree with this statement.

Argentina comments on the joint interpretation of the components of the Award, including the Arbitrator’s map. For example: “And the Award maps constitute the graphic representation of the criteria established and defined in the other two documents. Consequently, the two documents referred to in article V are in fact complementary to and explanatory of the Award itself” (MA, pp. 441-444, 5).

On the basis of the validity which it accords to the Arbitrator’s map, Argentina believes that there are three obligatory points on the line between boundary post 62 and Mount Fitzroy: the two extreme points—post 62 and Mount Fitzroy—indicated in the arbitration report, and a third intermediate point indicated on the Arbitrator’s map. The arbitration report does not mention Cerro Gorra Blanca but the Arbitrator’s map shows it as a point on the pecked line which sets out from the Cordón Martínez de Rozas and reaches Cerro Gorra Blanca by means of a westward inflection.

“. . . Cerro Gorra Blanca is a point which must necessarily be taken into account by the present Court in determining the boundary . . .” “Even if the Award and the report do not mention it expressly, the Award map shows Cerro Gorra Blanca without any ambiguity, highlighting it and even mentioning its

altitude of 2,770 metres.” “It must be added that the official Chilean maps from 1903 up to 1958 always showed the international boundary as passing across Cerro Gorra Blanca.” (MA, pp. 589-591, 36, pp. 305-306, 19, and p. 308, 21).

Chile takes a different position. “The Arbitrator’s map introduces, for the first time in the case, a reference to Cerro Gorra Blanca, which is not mentioned in the report or the Award. There is nothing in the topography depicted on the map itself to suggest that Cerro Gorra Blanca was situated on “the local water-parting” (to which the arbitration report alludes) between the place where boundary post 62 would be erected and Mount Fitzroy.”

Chile comments on the fact that Captain Crosthwait did not have his line pass over Cerro Gorra Blanca: “He (Crosthwait) was also authorized to take the view that Cerro Gorra Blanca was not situated on the spur ascending to Mount Fitzroy from boundary post 62 and, therefore, he could eliminate this peak from the boundary line”. “Cerro Gorra Blanca had not been named in the Award or in the report and was not, therefore, an obligatory point on the frontier” (MCH, p. 59, 6.11, and p. 69, 7.29).

Furthermore, Argentina acknowledges that the line on the Arbitrator’s map is drawn within the space falling within his territorial competence. “The Award map provides a perfect illustration of how the Arbitrator understood that [the line] should reach the obligatory point of Mount Fitzroy in accordance with his terms of reference, i.e., without exceeding the limits of his territorial competence over the basins.” “. . . by indicating on the Award map that the boundary line passed over Cerro Gorra Blanca the Arbitrator complied fully with the terms of reference given him by the Parties . . .” “Argentina refers further . . . to the text of the 1902 Award as a whole, and to the text of the rule contained therein applicable to the boundary post 62-Mount Fitzroy sector, and to the Award map both as a whole and in the part concerning this sector . . .” (record No. 10, pp. 27-28 and 39-39).

These statements acknowledge that the Arbitrator made his Award within his competence and, this being the case, he acted within his competence when he drew the pecked line in areas which subsequently were revealed to be in the Atlantic basin. Moreover, the map is acknowledged as a whole, without distinction or reservation of any kind, probably because, constituting a unity, it does not admit of partial acceptance.

#### 6. *The significance of the pecked line*

The reply to this question appeared in the 1966 Award, which the Parties have mentioned and accepted without suggesting any reservation or contradiction. “A pecked line is the normal indication for a feature which is known to exist but whose position has not been accurately located.” The map “shows the boundary decided upon in the Award with a solid red line where the country has been adequately surveyed and with a pecked red line across unsurveyed areas” (*Award of the British Government and Report of the 1996 Court of Arbitration*, pp. 101 and 103).

The Arbitrator used the pecked line 17 times and he used it whenever his line crossed blank areas, i.e., unsurveyed areas, or separated explored and unexplored areas. He used it so many times that it would have been essential for him to have stated, if such had been his intention, that the pecked line had a special value somewhat different from the value of the solid line.

As an example of the use made of the pecked line on the ground we may refer to the details of the complicated section between Cerro de la Virgen and Lake General Paz. When the Mixed Boundary Commission traced the pecked line of the Arbitrator's map on the ground, the demarcated frontier followed a much more twisting course than Arbitrator's line. By following the local water-parting on the ground the demarcation line deviated from the line on the map but did respect its direction. Respect for the direction of the line on the map, solid or pecked, is an important factor in a proper reconstruction of the Arbitrator's intention.

On the Arbitrator's map Cerro Gorra Blanca is touched by the pecked line; and before inferring from the depiction of this peak on the map that it is an obligatory point of the frontier line, it must be remembered the map cannot be used piecemeal, for it constitutes an indivisible whole. It is either accepted *in toto* or rejected *in toto*, but it cannot be accepted with regard to the obligatory status of Cerro Gorra Blanca, touched by the pecked line, when it is rejected with regard to the rest of the pecked section.

It may be agreed that Cerro Gorra Blanca is an obligatory point on the frontier, but at the same time it must be acknowledged that this is the case by virtue of the pecked line on the Arbitrator's map and that this line arrives at Gorra Blanca by following a specific direction. Since the unity of the documentary evidence cannot be disturbed, if Cerro Gorra Blanca is obligatory by virtue of the pecked line, so will be the other elements of this line, such as the direction and route which produce the sole appearance of this peak in the Award.

#### 7. *The local water-parting according to the Arbitrator's map*

It must be pointed out that between two well-defined terminal points there can be only one local water-parting. It has generally been thought that the Award assumes a single local water-parting between the southern shore of Lake San Martín and Mount Fitzroy. As the report's prescription has been interpreted, there is no single local water-parting between these two points. This interpretation stems from the Spanish translation of the relevant part of the report, where "to" is rendered as "*hasta*".

It can be seen from an examination of the Arbitrator's map that the pecked line crosses the continental divide of the time, as depicted on the map. This crossing means that the local water-parting coming from Lake San Martín and the one which proceeds to Fitzroy after the crossing are not the same. The watershed in the first section flows to the Pacific Ocean, and the one in the second to the Atlantic Ocean. According to this map, Mount Fitzroy cannot be the other terminal point of a local water-parting running from Lake San Martín.

In fact, just as it is the case that a local water-parting cannot itself cross a watercourse, but that the frontier line running along the water-parting can cross rivers at the behest of the Arbitrator, so is it impossible for a local water-parting as such to cross the continental divide, and if it does so on the map it is because the Arbitrator has decided that the line should continue from the continental divide along another water-parting on the slope on the other side of the divide.

According to the Award map, Mount Fitzroy was not and could not be the other terminal point of the local water-parting running from the southern shore of Lake San Martín, but it could be the terminal point of another local water-parting originating from a summit on the continental divide of the time. This assertion is in conformity with the geography as it was then known, as can be seen from the Arbitrator's map. Thus, a distinction must be made between Mount Fitzroy as an obligatory point on the frontier line and Mount Fitzroy as the supposed terminal point of a single local water-parting running between two extreme points, boundary post 62 and Mount Fitzroy.

If the Arbitrator's map is interpreted in this way, it would be possible for at least two local water-partings to run between Lake San Martín and Mount Fitzroy.

8. *Examination of the arbitral report in conjunction with the Arbitrator's map*

Taken separately, neither the report nor the map settles this issue. The report speaks only of the local water-parting and it does not say where this parting is located. The only indication is that it heads towards Mount Fitzroy. The map states what is missing from the report, for it indicates the direction and path of the local water-partings which the Arbitrator adopted as the compromise line.

The direction and path of the line, solid or pecked, were determined by the compromise decision which the Arbitrator took after obtaining the consent of the Parties, and they must therefore be preserved. In fact, the compromise which determined the Arbitrator's line is one of the several grounds which concur in supporting the interpretation that the line marked on the Arbitrator's map must be followed in as close conformity as possible with the provisions of the instruments which make up the Award; in other words, unnecessary liberties or distortions of the Award's message must be avoided.

The geography of the time allows the assertion that people knew about the geographical feature which could be found in the zone and about the feature which was not sought and could not be found there. The pecked line indicates that there is here a geographical feature whose existence is known but whose details are not known, and the report says that this feature is the local water-parting.

The report states what must be looked for and identified in order to demarcate the line decided upon by the Arbitrator, thus transforming the pecked line into a precise line. Furthermore, the Arbitrator's map says that this search must not be carried out just anywhere but in the direction and along the path

marked by the pecked line. The significance of the pecked line must be that it represents, on the basis of the geographical knowledge of the time, the local water-parting, the only one mentioned in the report, and not the continental water-parting, which was situated some considerable distance away.

#### 9. *Complementarity of the arbitration report and map*

The Award states that a detailed description of the line decided upon will be found in the arbitration report and in the lines drawn on the maps provided by the experts of Argentina and Chile. Thus, the Award refers at the same time and in the same provision to the arbitration report and map in connection with the details of the line which it prescribes in general terms (art. III).

The report and map have the same authority and neither takes precedence over the other. This consideration dispels any doubt which may have arisen with regard to the value of the Arbitrator's map. The line drawn on the map represents the Arbitrator's intention and, in conjunction with the report, it helps to identify the frontier line between boundary post 62 and Mount Fitzroy. Greater accuracy than was provided by these two instruments lay beyond the Arbitrator's grasp because he lacked adequate maps of the area. It is this additional accuracy which the present Court has to supply.

The arbitration report states that the frontier line, from the spur at longitude  $72^{\circ}47'W$ , shall "ascend the local water-parting to Mount Fitzroy". The Spanish translation of the phrase "shall ascend to Mount Fitzroy" is "*ascenderá hasta el Monte Fitz Roy*" [shall ascend as far as Mount Fitzroy], so that Mount Fitzroy is indicated as the terminus of the ascent and there is even a suggestion of the idea of continuous ascent as far as this terminus by means of the same single local water-parting.

This translation is not consistent with the geography known at the time and reproduced on the Arbitrator's map. In fact, this map showed Mount Fitzroy as located on the far side of the continental divide, so that it was physically impossible for a single local water-parting to run without interruption from the southern shore of Lake San Martín as far as Mount Fitzroy. A local water-parting with these characteristics cannot be found today, nor could it be found at the time, as the Arbitrator's map shows.

The English preposition "to" has several meanings in Spanish; for example: "*hasta*", as it was translated in this case, as well as "*hacia*", "*a*" and "*en dirección a*". Since Mount Fitzroy cannot be the terminus of a local water-parting which would be consistent with the translation of "to" by "*hasta*", the English preposition should be translated by "*hacia*", "*a*" or "*en dirección a*". If the Arbitrator had wished to indicate a local water-parting which ran from Lake San Martín all the way to Mount Fitzroy, he could have said "as far as", which is beyond doubt equivalent to "*hasta*", but that would not have been consistent with the known geography of this sector as it is shown on the Arbitrator's map. In order to render report and map compatible, "to" must be translated by "*en dirección a*" ["towards" or "in the direction of"]. It will immediately be noted that this translation is compatible with the possibility of several successive local water-partings all running in the direction of Mount Fitzroy.



If boundary post 62 and Mount Fitzroy are regarded as the terminal points of the local water-parting, then there is no local water-parting running between them as a single and unbroken line, i.e., in accordance with the definition of water-parting. There is certainly a water-parting consisting of continental and local stretches, but this circumstance is not consistent with the language of the arbitration report, which uses the term "local water-parting".

These stretches of continental water-parting did not become known until 1945. On the basis of the geography of the time the Arbitrator neither expected nor could expect that some section of the continental divide would be found in this zone, because this continental divide was depicted as situated far from that zone, and there cannot be, in a single area, two lines having the status of continental divide.

The pecked line indicates a geographical feature which is known to exist but has not yet been identified. The Arbitrator could not know that a continental divide existed here, because the geography of the time, represented on many maps produced and consistently accepted by the Parties, placed this divide to the east and south of the main block of the area subject to the present arbitration. The only features which the Arbitrator knew to exist in this area, a conclusion arrived at by a process of elimination, were local water-partings.

It does not seem appropriate to diverge from the language of the arbitration report to opt for a line which is not the local water-parting but to some extent local and to a great extent continental, both because that would amount to disregarding the clear language of the report and because one would be choosing a geographical feature which, although unknown in that location at the time of the report, was known to be found some distance away. If the line has to follow a single local water-parting running between two supposedly extreme points, boundary post 62 and Mount Fitzroy, the report's rule could not be applied on the ground, simply because such a line does not exist as such, nor, according to the Arbitrator's map, could it exist.

To conclude, the translation of "to" by "*hasta*", which suggests a single and unbroken local water-parting between the two extreme points, is not consistent with the language of the report supplemented and illustrated by the Arbitrator's map. In contrast, the translation of "to" by "*en dirección a*" is consistent with the message of these documents read in conjunction. Thus, such a reading points the interpretation in a different direction.

#### 10. *A way of identifying the true course of the pecked line*

The arbitration report's rule, which directs that the local water-parting shall ascend to Mount Fitzroy, is the key to improving the accuracy of the Arbitrator's map, accuracy which it could not originally possess in sufficient degree owing to the incomplete geographical knowledge of the region in question.

The arbitral decision does not distinguish between the value of the pecked line and the value of the solid line. The Award itself refers only to the line drawn on the maps provided by the Argentine and Chilean experts. One of the criteria of interpretation states that when the author of a decision does not

offer an interpretation of a point, it should not be interpreted. Of course, this criterion cannot be absolute or apply invariably in all interpretation exercises, but the distinctions produced by the interpretation must be well-founded and carefully developed, for the interpretation is subject to the limiting factor of the mandatory content of the interpreted rule.

If a judge makes distinctions in a rule when its author has not done so, he is using a technical device to adapt the rule to the special features of the actual case and thus to comply with the true *intention* underlying the rule. The result is a specific rule better adapted to the object and purpose of the adjudication. But one should not be led astray by this device, because basically, although it is regarded as a use of implicit or discretionary powers, it is a rule which the judge has created in order to dispense better and fuller justice.

This practice, by its nature, and especially in the case of interpretation of a decision which has the status of *res judicata*, as in the present case, must be based on a careful evaluation of the circumstances and implications in order to ensure that it is truly consistent with the interpreted text. In the present case there is no apparent need to make any fundamental distinction between the pecked and solid lines, mainly because that would distort the Arbitrator's intention. The report and the map, in conjunction, identify the pecked line accurately and preserve the Arbitrator's intention.

Nothing has been said, either by the cartographers or by the 1966 Court of Arbitration, about a possible discounting of the value of the pecked line. This line is a technical means of describing a particular situation—the total or partial lack of topographic surveys. The pecked line must therefore be followed but also adjusted in the light of improved geographical knowledge. The interpretation must be consistent with the known geography of the time at which the Award was pronounced, and the interpretation must be put into effect in conformity with the known geography of the time when it is made.

Such adjustments are necessary with respect both to the pecked line and to the solid line, as is confirmed by the experience of the Argentina–Chile Mixed Boundary Commission. This experience teaches that compliance with the direction of a line shown on a map, either pecked or solid, is an essential criterion in the adjustment of the line.

#### 11. *The details shown on the Arbitrator's map*

There has been much talk of the details which, according to the Arbitral Award, are to be found on the Arbitrator's map. There are indeed several such details, in addition to the general direction in which the Arbitrator wished the compromise frontier line to be drawn. There are, for instance, these two details: deviating from the straight line which it should have been possible to draw in order to reach Mount Fitzroy, the line makes a westward inflection to touch Cerro Gorra Blanca; and it arrives at Fitzroy by way of the shortest possible stretch of the continental divide of the time.

Any adjustment of the map's pecked line must respect these details. Accordingly, it should touch Cerro Gorra Blanca and reach Mount Fitzroy by way of the minimum possible incursion into the area lying to the east and south of what was the line of the continental divide at the time.

12. *A course for the line which might satisfy the 1902 Award*

The question of local water-partings in the area has been discussed with the Court's expert, Dr. Rafael Mata Olmo. In his judgement, the criterion of following several local water-partings allows a large number of lines, even, in theory, an infinite number. In any event, there is no local water-parting issuing from the terminal point at the southern end of the Cordón Martínez de Rozas. "It is important to point out that, whatever the line, it would always include a small section of continental water-parting."

Thus, all the possibilities include a stretch of continental water-parting. This circumstance might prompt thoughts of an entirely arbitrary line which would divide the zone as if in implementation of a second *Compromis* or on the basis of a solution of equity. However, such an extreme recourse is unnecessary and unjustified, for the interpretation of the Award can in fact be applied on the ground.

The inclusion of a section of the continental divide would not be a result of the interpretation of the 1902 Award but a necessity of the application of the appropriate interpretation. There is no other way of acting on the combined instructions of the report and the Arbitrator's map. The interpretation is made in conformity with the geography of the time; it has to be applied in conformity with the geography of today. With regard to such application, as has been pointed out during the Arbitral proceedings, "the ground gives the orders".

But there is another reason, and a very important one, for including a certain section of the continental divide: the section which is required to ensure that these lines correspond exactly with the pecked line on the Arbitrator's map.

From the many possibilities available the expert has found that three lines are consistent with the features described in the decision. They start from the summit at altitude 1,767 metres, to the south of the Cordón Martínez de Rozas, and touch Cerro Vespigniani. The first line consists of seven small local water-partings and crosses Lake del Desierto, two small glacial lakes and five rivers.

The second line lies fairly close to the pecked line of the Arbitrator's map and therefore is more consistent than the first line with the combined instructions of the map and the report. It consists of two local water-partings and touches Cerro Milanesio before arriving at Cerro Gorra Blanca. The line of the Arbitrator's map headed towards Cerro Gorra Blanca not towards Cerro Milanesio, and therefore this second line is not fully consistent with the line which has to be identified.

The third line, which fits best and closest with the line on the Arbitrator's map, touches Cerro Vespigniani, crosses the Rivers Cañadón de los Toros and Milodón, passes across Cerro Cagliero to Cerro Gorra Blanca and terminates on Mount Fitzroy, having followed a water-parting which is partly local and partly continental. This line, which reaches Cerro Gorra Blanca by way of four successive local water-partings, complies fairly well with the combined instructions of the graphic language of the Arbitrator's map and the provision in the report concerning the local water-parting.

Since there is no single local water-parting in this area and since the Arbitrator could not have believed one to exist, as his map shows with its crossing of the continental divide of the time, the adoption of successive local water-

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

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

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

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

Reynaldo Galindo POHL

#### DISSENTING OPINION OF MR. SANTIAGO BENADAVA

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

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

##### *The Court's task*

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

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

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

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

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

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

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

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

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

I shall take these two points up one by one:

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

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

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

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

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

#### *Chile's extreme claim in the 1898-1902 arbitration*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*The frontier line on the Arbitrator's map*

Article V of the Award states:

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

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

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

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

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

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

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

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

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



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

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

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

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

#### *The line drawn on the Demarcator's map*

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

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

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

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

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

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

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

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

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

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

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

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

These maps were:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Several precedents from the case law confirm this view.

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

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

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

[Interpretation] poses the question, what was it that the Court decided with binding force in its decision, not the question what ought the Court now to decide in the light of fresh facts or fresh arguments (United Nations, *R.I.A.A.*, vol. XVIII, p. 296).

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

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

### *The effect of res judicata*

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

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

\* \* \*

I have tried to demonstrate above that:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### *The subsequent conduct of the Parties*

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

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

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



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

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

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

*The claims of the Parties in the present arbitration*

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

A. *The Argentine line*

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

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

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

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

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

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

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

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

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

### B. *The Chilean line*

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

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

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

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

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

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

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

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

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

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

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

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

\* \* \*

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

Santiago BENADAVA



**Part II**

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**Decision of the Tribunal with respect to the application  
for revision and subsidiary interpretation  
of the award of 21 October 1994,  
submitted by Chile**

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**Decision of 13 October 1995**

**Décision du Tribunal concernant la demande de révision et  
d'interprétation subsidiaire de la sentence 21 octobre 1994,  
présentée par la République du Chili**

**Decision du 13 Octobre 1995**



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 REVI-  
SION 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 glacialium*) — 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 contemporanéité — Principe de la stabilité de frontières — Principe d'équité — Le recours à un expert ne constitue pas une délégation de compétence 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 glacialium*) — 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:<sup>1</sup>

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<sup>1</sup> 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.

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.

III. The Court may, if it sees fit, request the Parties to give additional explanations to clarify any aspect of the matters discussed.

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.

... 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.

... 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.

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.

...

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.

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 Neufelize 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).<sup>2</sup>

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<sup>2</sup>... 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 absolutely 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 impracticability 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 relation 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 relation logique qui existe entre les normes soit celle d'un corollaire. La simple affirmation qu'entre deux propositions il y a une certaine relation logique n'est pas suffisante (*Revue Générale de Droit International Public*, 1990, pp. 234-235).<sup>3</sup>

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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<sup>3</sup> 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 glacialium* 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 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 Janeiro, 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 referring 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 glaciarium* 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 glaciarium*.

## 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 than 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 of 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.



**PART III**

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**Award of the Arbitral Tribunal in the first stage  
of the proceedings between Eritrea and Yemen  
(Territorial Sovereignty and Scope of the Dispute)**

**Decision of 9 October 1998**

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**Sentence du Tribunal arbitral rendue au terme de la première étape  
de la procédure entre l'Erythrée et la République du Yémen  
(Souveraineté territoriale et portée du différend)**

**Décision du 9 octobre 1998**





AWARD OF THE ARBITRAL TRIBUNAL IN THE FIRST STAGE OF  
THE PROCEEDINGS BETWEEN ERITREA AND YEMEN  
(TERRITORIAL SOVEREIGNTY AND SCOPE OF THE DISPUTE),  
9 OCTOBER 1998

SENTENCE DU TRIBUNAL ARBITRAL RENDUE AU TERME DE LA  
PREMIERE ETAPE DE LA PROCEDURE ENTRE L'ERYTHREE ET  
LA REPUBLIQUE DU YEMEN (SOVERAINETE TERRITORIALE  
ET PORTEE DU DIFFEREND), 9 OCTOBRE 1998

First phase of a two-stage award concerning a territorial sovereignty dispute and the delimitation of maritime boundaries between Eritrea and Yemen — Determination of the scope of the dispute; concept of critical date.

Concept of historic title — Claim, possession, use, continuity and confirmation of an ancient title — Territorial acquisition; succession to title, effective occupation, acquisitive prescription, *res nullius* — Doctrine of reversion; lack of continuity.

Treaties: *res inter alios acta*; *erga omnes* effect.

Manifestations of sovereignty: notion of governmental activity, acts of administration and control. Display of state and governmental authority over the territory: exercise of jurisdiction and state function on a continuous and peaceful basis are necessary for the acquisition or attribution of territory — Standard of requirement — Pertinence of “effectivités”.

Probative value of maps — Principle of natural and geographical unity — Presumption of proximity, “appurtenance factor”, portico doctrine.

Première étape d’une sentence en deux parties concernant un différend portant sur la souveraineté territoriale et la délimitation des frontières maritimes entre l’Érythrée et la République du Yémen — Détermination de la portée du différend; notion de date critique.

Notion de titre historique — Revendication, possession, usage, continuité et confirmation d’un titre ancien — Acquisition territoriale: succession au titre, occupation effective, prescription acquisitive, *res nullius* — Doctrine de réversion: défaut de continuité.

Traites: *res inter alios acta*; effet *erga omnes*.

Manifestations de la souveraineté: notion d’activité gouvernementale, d’actes administratifs et de contrôle. Exercice de l’autorité étatique et gouvernementale sur le territoire: l’exercice de la juridiction et de fonctions étatiques de manière continue et dans des conditions pacifiques sont indispensables à l’acquisition et à l’attribution du territoire — Norme applicable — Pertinence des “effectivités”.

Valeur probante des cartes — Principe de l’unité naturelle et géographique — Présomption de proximité, “facteur d’appartenance”, “portico doctrine”.

*The Arbitral Tribunal:*

Professor Sir Robert Y. Jennings, President

Judge Stephen M. Schwebel

Dr. Ahmed Sadek El-Koshery

Mr. Keith Highet

Judge Rosalyn Higgins

*Representatives of the Government of the State of Eritrea:*

His Excellency Mr. Haile Weldensae, Agent

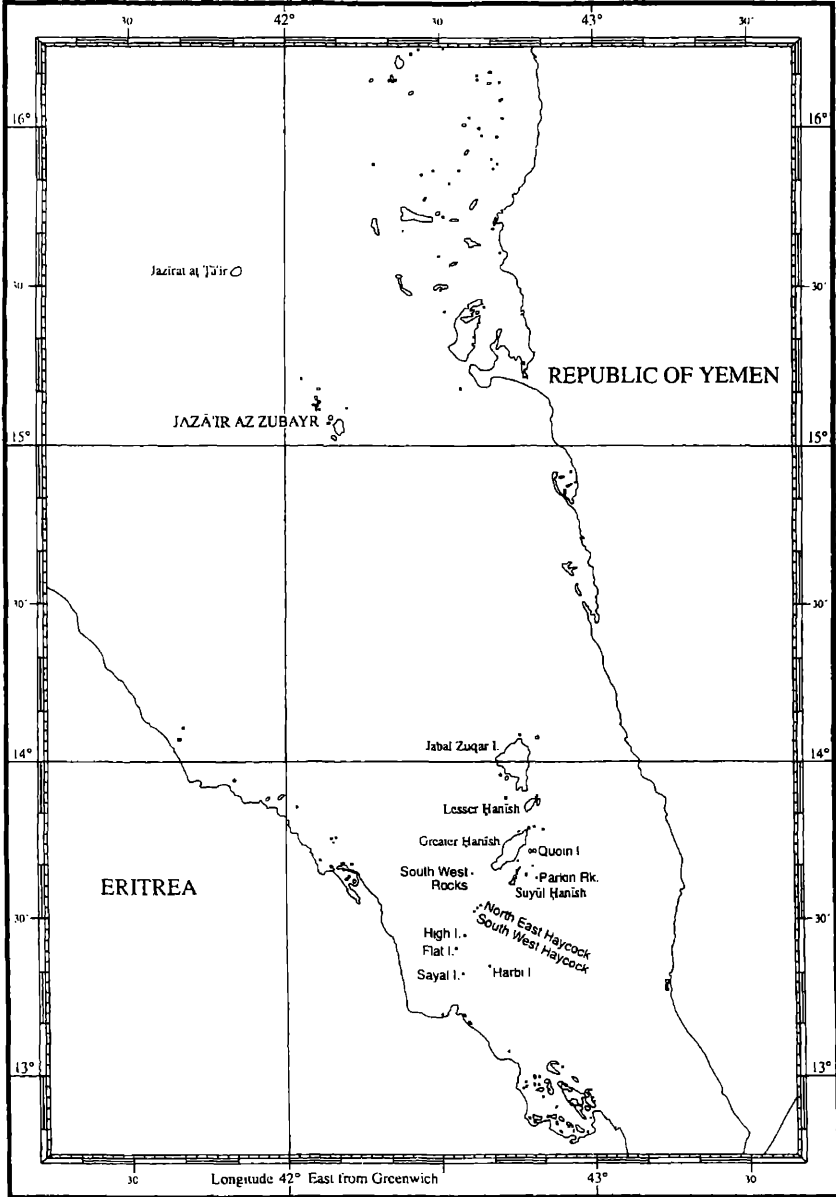
Professor Lea Brilmayer and Mr. Gary B. Born, Co-Agents

*Representative of the Government of the Republic of Yemen:*

His Excellency Dr. Abdulkarim Al-Eryani, Agent

His Excellency Mr. Abdullah Ahmad Ghanim, Mr. Hussein Al-Hubaishi,

Mr. Abdulwahid Al-Zandani and Mr Rodman R. Bundy, Co-Agents





THE GOVERNMENT OF THE STATE OF ERITREA  
AND  
THE GOVERNMENT OF THE REPUBLIC OF YEMEN

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AWARD OF THE ARBITRAL TRIBUNAL IN THE FIRST STAGE OF THE PROCEEDINGS  
(TERRITORIAL SOVEREIGNTY AND SCOPE OF THE DISPUTE)

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Chapter I. *The setting up of the Arbitration  
and the Arguments of the Parties*

*Introduction*

1. This Award is rendered pursuant to an Arbitration Agreement dated 3 October 1996 (the “Arbitration Agreement”), between the Government of the State of Eritrea (“Eritrea”) and the Government of the Republic of Yemen (“Yemen”) (hereinafter “the Parties”).

2. The Arbitration Agreement was preceded by an “Agreement on Principles” done at Paris on 21 May 1996, which was signed by Eritrea and Yemen and witnessed by the Governments of the French Republic, the Federal Democratic Republic of Ethiopia, and the Arab Republic of Egypt. The Parties renounced recourse to force against each other, and undertook to “settle their dispute on questions of territorial sovereignty and of delimitation of maritime boundaries peacefully”. They agreed, to that end, to establish an agreement instituting an arbitral tribunal. The Agreement on Principles further provided that

... concerning questions of territorial sovereignty, the Tribunal shall decide in accordance with the principles, rules and practices of international law applicable to the matter, and on the basis, in particular, of historic titles.

3. Concurrently with the Agreement on Principles, the Parties issued a brief a Joint Statement, emphasizing their desire to settle the dispute, and “to allow the re-establishment and development of a trustful and lasting cooperation between the two countries”, contributing to the stability and peace of the region.

4. In conformity with article 1.1 of the Arbitration Agreement, Eritrea appointed as arbitrators Judge Stephen M. Schwebel and Judge Rosalyn Higgins, and Yemen appointed Dr. Ahmed Sadek El-Kosheri and Mr. Keith Highet. By an exchange of letters dated 30 and 31 December 1996, the Parties agreed to recommend the appointment of Professor Sir Robert Y. Jennings as President of the Arbitral Tribunal (hereinafter the “Tribunal”). The four arbitrators met in London on 14 January 1997, and appointed Sir Robert Y. Jennings President of the Tribunal.

5. Having been duly constituted, the Tribunal held its first meetings on 14 January 1997, at Essex Court Chambers, 24 Lincoln's Inn Fields, London WCI, UK. The Tribunal took note of the meeting of the four arbitrators, and ratified and approved the actions authorized and undertaken thereat. Pursuant to article 7.2 of the Arbitration Agreement, the Tribunal appointed as Registrar Mr. P.J.H. Jonkman, Secretary-General of the Permanent Court of Arbitration (the "PCA") at The Hague and, as Secretary to the Tribunal, Ms. Bette E. Shifman, First Secretary of the PCA, and fixed the location of the Tribunal's registry at the International Bureau of the PCA.

6. The Tribunal then held a meeting with Mr. Gary Born, Co-Agent of Eritrea, and Mr. Rodman Bundy, Co-Agent of Yemen, at which it notified them of the formation of the Tribunal and discussed with them certain practical matters relating to the arbitration proceedings.

7. Article 2 of the Arbitration Agreement provides that:

1. The Tribunal is requested to provide rulings in accordance with international law, in two-stages.

2. The first stage shall result in an award on territorial sovereignty and on the definition of the scope of the dispute between Eritrea and Yemen. The Tribunal shall decide territorial sovereignty in accordance with the principles, rules and practices of international law applicable to the matter, and on the basis, in particular, of historic titles. The Tribunal shall decide on the definition of the scope of the dispute on the basis of the respective positions of the two Parties.

3. The second stage shall result in an award delimiting maritime boundaries. The Tribunal shall decide taking into account the opinion that it will have formed on questions of territorial sovereignty, the United Nations Convention on the Law of the Sea, and any other pertinent factor.

8. Pursuant to the time table set forth in the Arbitration Agreement for the various stages of the arbitration, the Parties submitted their written Memorials concerning territorial sovereignty and the scope of the dispute simultaneously on 1 September 1997 and their Counter-Memorials on 1 December 1997. In accordance with the requirement of article 7.1 of the Arbitration Agreement that "the Tribunal shall sit in London", the oral proceedings in the first stage of the arbitration were held in London, in the Durbar Conference Room of the Foreign and Commonwealth Office, from 26 January through 6 February 1998, within the time limits for oral proceedings set forth in the Arbitration Agreement. The order of the Parties' presentations was determined by drawing lots, with Eritrea beginning the oral proceedings.

9. At the end of its session of 6 February 1998, the Tribunal, in accordance with article 8.3 of the Arbitration Agreement, closed the oral phase of the first stage of the arbitration proceedings between Eritrea and Yemen. The closing of the oral proceedings was subject to the undertaking of both Parties to answer in writing, by 23 February 1998, certain questions put to them by the Tribunal at the end of the hearings, including a question concerning the existence of agreements for petroleum exploration and exploitation. It was also subject to the proviso in article 8.3 of the Arbitration Agreement authorizing the Tribunal to request the Parties' written views on the elucidation of any aspect of the matters before the Tribunal.

10. In its Communication and Order No. 3 of 10 May 1998, the Tribunal invoked this provision, requesting the Parties to provide, by 8 June 1998, written observations on the legal considerations raised by their responses to the Tribunal's earlier questions concerning concessions for petroleum exploration and exploitation and, in particular, on how the petroleum agreements and activities authorized by them might be relevant to the award on territorial sovereignty. The Tribunal further invited the Parties to agree to hold a short oral hearing for the elucidation of these issues.

11. Following the exchange of the Parties' written observations, the Tribunal held oral hearings on this matter at the Foreign and Commonwealth Office in London on 6, 7 and 8 July 1998. By agreement of the Parties, Yemen presented its arguments first. In the course of these hearings, the Tribunal posed a series of questions interpretation of concession evidence, and the Parties were requested to respond thereto in writing within seven days of the end of the oral hearings. On 17 July 1998, both Parties submitted their written responses to the Tribunal's questions. Eritrea indicated at that time that it anticipated a brief delay in submission of documentary appendix accompanying its submission; this documentary appendix was received by the International Bureau of the PCA on 22 July 1998. On 30 July 1998, the International Bureau received from Yemen a submission entitled "Yemen's Comments on the Documents Introduced by Eritrea after the Final Oral Agreement". Eritrea objected to this late filing by Yemen.

12. In the course of the supplementary hearings in July 1998, the Tribunal informed the Parties of its intention to contact the Secretary-General of the Arab League, in order to ascertain the existence, and obtain copies, of any official Arab League reports of visits to any of the islands in dispute, particularly in the 1970s. A letter on behalf of the Tribunal was sent by fax to the Secretary-General of the Arab League on 20 July. His response, dated 28 July, was transmitted by the registry to the Co-Agents and the Members of the Tribunal.

\* \* \*

#### *Arguments of the Parties on territorial sovereignty*

13. Eritrea bases its claim to territorial sovereignty over these "Red Sea Islands" (hereinafter the "Islands")<sup>1</sup> on a chain of title extending over more than 100 years, an don international law principles of "effective occupation". Eritrea asserts that it inherited title to the Islands in 1993, when the State of

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<sup>1</sup> The identification of the specific island or island groups in dispute between the Parties has been entrusted to the Tribunal by article 2 of the Arbitration Agreement (see para. 7) and is dealt with in the part of this Award dealing with the scope of the dispute. References to "the Islands" in this Award are to those Islands that the Tribunal finds are subject to conflicting claims by the Parties. The geographic area in which these islands are found is indicated on the map opposite page 1.

Eritrea became legally independent from the State of Ethiopia. Ethiopia had in turn inherited its title from Italy, despite a period of British military occupation of Eritrea as a whole during the Second World War. The Italian title is claimed then to have vested in the State of Ethiopia in 1952-53, as a consequence of Eritrea's federation with, and subsequent annexation by, Ethiopia.

14. Eritrea traces this chain of title through the relevant historical periods, beginning with the Italian colonization of the Eritrean mainland in the latter part of the 19<sup>th</sup> Century. The parties do not dispute that, prior to Italian colonization, the Ottoman empire was the unchallenged sovereign over both coasts of the Red Sea and over the Islands. Bypassing the Ottomans and dealing directly with local rulers, Italy established outposts in furtherance of its maritime, colonial and commercial interests. Despite Ottoman objections, it proclaimed the Italian colony of Eritrea in 1890. Eritrea contends that in 1892 Great Britain recognized Italian title to the Mohabbakah islands, a group of islands proximate to the Eritrean coast.

15. Eritrea asserts that, without challenging Ottoman sovereignty, Italy also maintained an active presence in other southern Red Sea islands at that time. Italian naval vessels patrolled the surrounding waters in search of pirates, slave traders and arms smugglers, and the colonial administration allegedly issued concessions for commercial exploitation on the Islands. According to Eritrea, there was no Yemeni claim to or presence on or around the Islands during this time. The Imam Yahya, who ultimately founded modern Yemen, occupied a highland region known as the *Gebel*, and, according to Eritrea, openly acknowledged his lack of sovereignty over the coastal lowlands known as the *Tihama*. This acknowledged his lack of sovereignty over the coastal lowlands known as the *Tihama*. This territorial arrangement was confirmed by the 1911 "Treaty of Da'an", an understanding between the Imam and the Ottoman Empire.

16. Eritrea asserts that the weakening of the Ottoman Empire in the years immediately preceding the First World War fueled Italian plans to occupy an island group known as the "Zuqar-Hanish Islands". These plans were preempted by a brief period of British military occupation in 1915, which was short-lived and, according to Eritrea, without legal consequences. At the end of the War, Italy purportedly renewed and expanded its commercial and regulatory activities with respect to what Eritrea refers to as the "Zuqar-Hanish and lighthouse islands". These activities are cited by Eritrea as evidence of Italy's intent to acquire sovereignty over the Islands.

17. The question of sovereignty over the Islands formed part of the post-First World War peace process that culminated in the signature of the Treaty of Lausanne in 1923. While certain former territory of the defeated Ottoman empire was divided among local rulers who had supported the victorious Allies, Eritrea contends that none of the Arabian Peninsula leaders who had supported the Allies was in sufficient geographical proximity to the Islands to be considered a plausible recipient. The Imam of Sanaa was not a plausible recipient of the Islands, both because of his alliance with the Ottoman Turks, and because his sovereignty did not extend to the Red Sea coast. Eritrea cites Great Britain's



rejection of claims made by the Imam in 1917-1918 to parts of the Tihama, and relies on the Imam's characterization of these territories as having been "under the sway of his predecessors" as acknowledging that the Imam indeed lacked possession and control at that time.

18. Eritrea traces Great Britain's failure to persuade the remaining Allies to transfer the Islands to Arab rulers selected by Great Britain, or to Great Britain itself, through the unratified 1920 Treaty of Sevres and the negotiations leading up to the conclusion of the Treaty of Lausanne in 1923. Eritrea relies on articles 6 and 16 of the Treaty of Lausanne as having left the islands open for Italian occupation. Article 6 established the general rule that, in terms of the Treaty, "islands and islets lying within three miles of the coast are included within the frontier of the coastal State". Eritrea interprets this provision, and subsequent state practice under the treaty of Lausanne, as withholding the islands in question from *any* Arabian peninsula leader, because none of the Islands are within three miles of the Arabian coast. Eritrea further argues that the Imam could not have been given the disputed islands pursuant to article 6, because his realm was neither a "state" nor "coastal" at the time the Treaty of Lausanne was signed.

19. Article 16 of the Treaty of Lausanne contained an express Turkish renunciation of all rights and title to former Ottoman territories and islands, and provided that their future was to be "settled by the parties concerned." Eritrea argues that because article 16 did not transfer the Islands to any particular state, and did not specify any particular procedure for conveying ownership of the Islands, their ultimate disposition was left to general international law standards for territorial acquisition—conquest effective occupation, and location within the territorial sea. Eritrea claims to find further support for this in subsequent state practice interpreting article 16.

20. Eritrea asserts that by the end of the 1920s, Italy had acquired sovereignty over the disputed islands by effective occupation, and that neither the 1927 conversations between Great Britain and Italy, which came to be known as the "Rome Conversation", nor the aborted 1929 Lighthouse Convention were contra-indications. This effective occupation consisted, *inter alia*, of the construction in 1929 of a lighthouse on South West Haycock Island, which Eritrea claims led Great Britain to repeat acknowledgments of Italian sovereignty over the Mohabbakhs, previously made in 1892 and 1917. Eritrea finds further support for effective Italian occupation during this period in the dispatch of an expedition to the Zuqar–Hanish Islands and their subsequent occupation by Italian troops. Eritrea asserts that in the period 1930-1940 Italy exercised sovereign rights over the islands through the colonial government in Eritrea. Eritrea cites, *inter alia*, the granting of fishing licenses with the respect to the surrounding waters, the granting of a license for the construction of a fish processing plant on Greater Hanish, and the reconstruction and maintenance of an abandoned British lighthouse on Centre Peak Island. These satisfy, in Eritrea's view, the *corpus occupandi* requirement of effective occupation and, accompanied as they were by the requisite sovereign intent (*animus occupandi*) constitute the acquisition of sovereignty by effective occupation.

21. Eritrea further asserts that Yemen did not protest or question Italy's activities on the Islands during this time. Great Britain, however, sought assurances that Italian activities did not constitute a claim of sovereignty. Eritrea characterizes Italy's responses that the question of sovereignty was "in abeyance" or "in reserve" as a refusal to give such assurances. According to Eritrea, this formula was understood by both Italy and Great Britain as preserving Italy's legal rights while allowing Great Britain to withhold diplomatic recognition of those rites. Tensions between the two states on this and other matters led to conclusion of the 1938 Anglo-Italian Agreement, which Eritrea claims is probative of Italian and British views at that time. It is said to reflect, among other things, the parties' understanding that the Islands were not appurtenant to the Arabian Peninsula, and that Italy and Great Britain were the only two powers with a cognizable interest in them.

22. The 1938 Anglo-Italian Agreement also contained an express undertaking on the part of both Italy and Great Britain with respect to the former Ottoman Red Sea islands, that neither would "establish its sovereignty" or "erect fortifications or defences". This constituted, in Eritrea's view, not a relinquishment of existing rights, but simply a covenant regarding future conduct. Eritrea argues that, at the time of the Anglo-Italian Agreement, Italy's sovereignty over the Islands had already been established as a matter of law, and it remained unaffected by the agreement. Eritrea further asserts that in December of 1938, Italy formally confirmed its existing territorial sovereignty over the Islands by promulgating decree number 1446 of 1938, specifically that the Islands had been, and continued to be, part of the territory of the Eritrean *Commissariato* of Dankalia.

23. Eritrea characterizes the eleven-year British occupation of Eritrea that commenced in 1941 in the wake of the Second World War as congruent with the law of belligerent occupation. Eritrea's territorial boundaries remained unchanged, and the territory of "all Italian colonies and dependencies" surrendered to the Allies in the 1943 Armistice "indisputably included", in Eritrea's view, the Islands. The 1947 Treaty of Peace provided for disposition of Italy's African territories by the Allied Powers, which was accomplished in 1952 by the transfer to Ethiopia, with which Eritrea was then federated, of "all former Italian territorial possessions in Eritrea". This marked, in Eritrea's view, the passing to Ethiopia of sovereign title to the Islands.

24. Eritrea claims that drafting history of the 1952 Eritrean Constitution confirms the inclusion of the disputed islands within the definition of Eritrean territory. This is, according to Eritrea, the only plausible interpretation of the phrase, "Eritrea, including the islands" in the definition of the territory of Eritrea, and it is said to be supported by advice given to Ethiopia at the time by its legal adviser, John Spencer. Eritrea claims that this was further reinforced by similar language in subsequent constitutional and legislative provisions, in particular, the 1952 Imperial Decree federating Eritrea into the Ethiopian Empire, and the 1955 Ethiopian Constitution.

25. Another basis for Ethiopian sovereignty put forward by Eritrea is the inclusion of the Islands within Ethiopia's territorial sea. Eritrea relies on the rule of the international customary and conventional law that every island is

entitle to its own territorial sea, measured in accordance with the same principles as those applicable to the mainland. In Eritrea's view, a chain of islands linked to the mainland with gaps no wider than twelve miles falls entirely within the coastal state's territorial sea and therefore under its territorial sovereignty. Thus, measuring from the Mohabbakah islands, which Eritrea asserts were indisputably Ethiopian, Ethiopia's 1953 declaration of a 12-mile territorial sea encompassed the Zuqar–Hanish Islands.

26. The 35-year period between 1953 and Eritrean independence in 1991 is characterized by Eritrea as one of extensive exercise of Ethiopian sovereignty over the Islands. This allegedly included continuous, unchallenged naval patrols, which became increasingly systematic as the Eritrean Liberation Movement gathered strength. In addition, following transfer of the administration of the lighthouses to Asmara by the British Board of Trade in 1967, Ethiopia is said to have further consolidated its sovereignty by requiring foreign workers on the lighthouse islands to carry passports and similar documents, overseeing and regulating the dispatch of all provisions to the lighthouse islands, being involved in all employment decisions affecting lighthouse workers, approving all inspection and repair visits to the lighthouse islands, and tightly controlling radio transmissions to and from the lighthouse islands. Other alleged acts of Ethiopian sovereignty put forward by Eritrea include the exercise of criminal jurisdiction over acts committed on the Islands, regulation of oil exploration activities on and around the Islands, and an inspection by then President Mengistu and a group of high-ranking Ethiopian military and naval personnel during the late 1980s, for which Eritrea has submitted videotape evidence.

27. Eritrea claims that throughout the 1970s the two Yemeni states and their regional allies acknowledged Ethiopian control over the Islands by their statements and actions. It alleges that, until the early 1970s, neither North Yemen nor South Yemen had displayed any interest in the Islands. Regional interest in the Islands is said to have been sparked by false reports of an Israeli presence there in 1973. According to Eritrea, the presumption on the part of Yemen, its neighbouring states and the Arab media that Ethiopia had leased the Islands to Israel constituted an acknowledgment of Ethiopian sovereignty. In support, Eritrea claims that the Arab states not only condemned Ethiopia for having made Ethiopian islands available to Israel, but also looked ultimately to Ethiopia for permission to visit the Islands in order to investigate the allegations of Israeli military activity.

28. Eritrea contends that the final years before Eritrean independence were marked by aerial surveillance and continuous naval patrols by Ethiopian forces.

29. Eritrea claims that, after winning its independence in 1991, it acquired sovereign title to the Islands and exercised sovereign authority over them. Eritrea asserts that, as they have been throughout recent history, Eritrean fishermen are dependent upon the Islands for their livelihood. Eritrea administrative regulations are said strictly to control fishing around the Islands, prescribing licensing and other requirements for fishing in the surrounding waters. Eritrea further contends that its vessels that fail to comply. It asserts that Yemen did not maintain any official presence in the Islands, and that it was only in 1995 that Eritrean naval patrols discovered a small Yemeni military and civilian

contingent purportedly engaged in work on a tourist resort on Greater Hanish Island. This led, in December 1995, to hostilities that ended with Eritrean forces occupying Greater Hanish Island, and Yemeni forces occupying Zuqar.

30. With respect to territorial sovereignty, Eritrea seeks from the Tribunal an award declaring “that Eritrea possesses territorial sovereignty over each of the “islands, rocks and low-tide elevations” specified by Eritrea in its written pleadings, “as to which Yemen claims sovereignty”.

\* \* \*

31. Yemen, in turn, bases its claim to the Islands on “original, historic, or traditional Yemeni title.” Yemen puts particular emphasis on the stipulation in article 2.2 of the Arbitration Agreement, that “(t)he Tribunal shall decide territorial sovereignty in accordance with the principles, rules and practices of international law applicable to the matter, and on the basis, in particular, of historic titles.” This title can, according to Yemen, be traced to the *Bilad el-Yemen*, or realm of Yemen, which is said to have existed as early as the 6<sup>th</sup> Century AD. Yemen advances, in support of its claim, map evidence,<sup>2</sup> declarations by the Imam of Yemen, and what it refers to as “the attitude of third States over a long period.”

32. Yemen contends that its incorporation into the Ottoman Empire, from 1538 to *circa* 1635, and again from 1872 to the Ottoman defeat in 1918, did not deprive it of historic title to its territory. Yemen asserts that the creation of the Ottoman *vilayet* of Yemen as a separate territorial and administrative unit constituted Ottoman recognition of Yemen’s separate identity. It relies on the work of 17<sup>th</sup>, 18<sup>th</sup> and 19<sup>th</sup> Century cartographers who allegedly depicted Yemen as a separated, identifiable territorial entity. Further map evidence is adduced in support of Yemen’s contention that the Islands form part of that territory.

33. In further support of its assertions that Yemen maintained historic title to the Islands, Yemen retraces the drafting history of its 1934 Treaty with Great Britain, citing several exchanges of correspondence in which the Imam insisted, in one form or another, on his rights to the “Islands of the Yemen”. Yemen cites Great Britain’s rejection of the Imam’s proposal to attach to the treaty a secret appendix concerning the Islands, on the grounds that the Islands, as former Ottoman possessions, were to be dealt with pursuant to article 16 of the Treaty of Lausanne.

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<sup>2</sup> Although Eritrea has also submitted cartographic evidence showing the Islands to be Ethiopian, Eritrea, or, in any event, not Yemeni, it places relatively little weight on this type of evidence. Eritrea takes the position that maps do not constitute direct evidence of sovereignty or of a chain of title, thereby relegating them to a limited role in resolving these types of disputes.

34. Yemen argues that this did not constitute a denial of traditional Yemeni title, and puts forward documents that it claims support the characterization of British official opinion in the period of 1933 to 1937 as being reluctant to challenge Yemeni title. Yemen further contends that the Treaty of Lausanne had no effect on Yemeni title, because Yemen was not a party to the Treaty, and because Turkey's renunciation of rights could not prejudice the interests of third parties. Yemen takes the view that the effect of article 16 was not to make the Islands *terra nullius*, but rather, territory "the title to which was undetermined." Yemen argues in addition that article 16 has, in any event, ceased to have effect between "the parties concerned", because of their own conduct, and that of third states, in recognizing, or failing to make reservations concerning, Yemen's sovereignty in respect of the Islands.

35. Another ground put forward in support of Yemen's claim that its original title extends to the Islands is "the principle of natural or geographical unity". Yemen argues that this doctrine is a corollary of the concept of traditional title, and that it operates in conjunction with evidence of the exercise of acts of jurisdiction or manifestations of state sovereignty. Yemen cites case law of the International Court of Justice and arbitral decisions in support of the premise that once the sovereignty of an entity or natural unity as a whole has been shown to exist, it may be deemed, in the absence of any evidence to the contrary, to extend to all parts of that entity or unity. According to Yemen, there is a "concordance of expert opinion evidence on the character of the islands as an entity or natural unity", including British admiralty charts, the *Red Sea and Gulf of Aden Pilot*, produced by the United Kingdom Hydrographic Office, and the *Encyclopedia Britannica*.

36. Yemen relies on various categories of evidence of sovereignty, which it asserts may serve to confirm and supplement the evidence of traditional or historic title, as well as constituting independent sources of title. These include economic and social links between the Islands and the Yemeni mainland, the exercise of sovereignty in the form of acts of jurisdiction, recognition of Yemen's title by third states, and confirmation of Yemeni title by expert opinion evidence.

37. Yemen cites case law and commentary in support of its contention that, within the appropriate geographical context, the private activities of individual persons constitute relevant evidence of historic title to territory. Yemen's analysis of these facts and activities begins with the names "Hanish" and "Zuqar", which, it asserts, have Arabic roots. Yemen also notes the presence on the Yemeni coast of inhabitants with names derived from the word "Hanish", and a family history, as fishermen, intertwined with that of the Islands. Yemen points out that, during the disturbances of 1995, two members of such a family were taken prisoner by Eritrean forces while fishing near Greater Hanish Island. Yemen also alleges the existence of anchorages and settlements on the Islands bearing distinctly Yemeni Arabic names. Yemen claims that, for generations, Yemeni fishermen have enjoyed virtually exclusive use of the Islands, even establishing, in contrast to Eritrean fishermen, permanent and semi-permanent residence there.

38. Yemen further asserts that the Islands are home to a number of Yemeni holy sites and shrines, including the tombs of several venerated holy men. It points to a shrine used primarily by fishermen, who have developed a tradition of leaving unused provisions in the tomb to sustain their fellow fishermen.

39. In addition, Yemen points out that the Islands fall within the jurisdiction of a traditional system of resolving disputes between fishermen, in which a kind of arbitrator may “ride the circuit” along the coast and among the Islands, in order to insure access to justice for those fishermen who are unable to travel.

40. Yemen emphasizes the economic links between Islands and the Yemeni fishermen who rely for their livelihood on them and their surrounding waters, and who sell their catch almost exclusively on the Yemeni mainland. Yemen contrasts this with the situation of the Eritrean fishermen, pointing out that, because of the difficulty of hygienic transport of fish to the interior of Eritrea (including the capital of Asmara), Eritrea lacks a fish-eating tradition. According to Yemen, most Eritrean fishermen find a better market for their wares on the Yemeni coast. Yemen asserts that for centuries, the long-standing, intensive and virtually exclusive use of the Islands by Yemeni fishermen did not meet with interference from other states.

41. Yemen provides an historical review of alleged Yemeni acts of administration and control, which are said to supplement and confirm Yemen’s historic title to the Islands, as well as forming independent, mutually reinforcing sources of that title. The earliest of these acts, a mission sent to Jabal Zuqar by the King of Yemen in 1429 to investigate smuggling, predates Ottoman rule. In the Ottoman period, Yemen asserts that the Islands were considered part of the *vilayet* of Yemen, and that the Ottoman administration handled, *inter alia*, tax, security, and maritime matters relating to the Islands. Yemen cites as 1881 lighthouse concession by the Ottoman authorities to a private French company, for the construction of lighthouses throughout the empire, which included some of the islands in the *vilayet* of Yemen. Yemen also cites nineteenth Century Ottoman maps and annual reports, which place the Islands within the *vilayet* of Yemen.

42. Yemen emphasizes that the post-Ottoman British presence on the Islands was intermittent, and that Great Britain never claimed sovereignty over them. Following establishment of the Yemen Arab Republic in 1962, its Government allegedly asserted legislative jurisdiction over the Islands on at least two occasions. Yemen claims that its navy conducted exercises on and around the Islands, and that its armed forces played a key role in confirming the absence of Israeli troops on the Islands in 1973. In Yemen’s rendition of the events surrounding the 1973 incident, the Islands are consistently characterized as Yemeni, rather than Ethiopian.

43. Yemen cites a number of examples of the issuance of licenses to foreign entities wishing to engage in scientific, tourist and commercial activities in and around the Islands, and of the granting of permits for anchorage. Yemen presents evidence concerning the authorization given to a German company by the Yemeni Ministry of Culture and Tourism and the Yemen General In-

vestment Authority in 1995 for the construction of a luxury hotel and diving centre on Greater Hanish Island. Yemen further asserts that it exercised jurisdiction over the Islands in respect of fishing, environmental protection, the installation and maintenance of geodetic stations, and the construction and administration of lighthouses, including the publication of relevant Notices to Mariners. Yemen has placed in evidence elaborate chronological surveys, covering a variety of time periods, of alleged Yemeni activities “in and around the Hanish Group”.

44. Yemen contends that from 1887 to 1989, at least six states confirmed, by their conduct or otherwise, Yemen’s title to the Islands. Yemen points out that upon conclusion of the Anglo-Italian Agreement of 1938, which Eritrea characterizes as being limited to future conduct, the Italian Government informed the Imam of Yemen that, pursuant to the agreement, Italy had undertaken not to extend its sovereignty on or to fortify the “Hanish Island group”, and that it had, in the negotiations, “kept in mind...above all Yemen’s interests.” Yemen claims to find further acknowledgment of Yemeni rights in British practice and “internal thinking”, as reflected in Foreign Office and Colonial Office documents of the 1930s and 1940s. French recognition of Yemeni title is said to include a request for permission to conduct military manoeuvres in the Southern Red Sea in 1975, and for a French oceanographic vessel to conduct activities near the Islands in 1976.

45. Yemen attributes similar evidentiary value to German conduct and publications, and to official maps published by the United States Army and Central Intelligence Agency, as recently as 1993. Yemen offers evidence of what it terms “revealing changes in Ethiopian cartography” in support of its contention that Ethiopia did not claim title to the Islands. It relies particularly on Ethiopian maps from 1978, 1982, 1984 and 1985, on which all or some of the Islands appear, by their colouring, to be allocated to Yemen.

46. Yemen also puts forward cartographic evidence on which it relies as official and unofficial expert evidence of Yemeni title to the Islands. Such evidence serves, according to Yemen, as proof of geographical facts and state of geographical knowledge at a particular period. Yemen supplements this cartographic evidence with the published works of historians and other professionals.

47. Yemen gives an historical review of this evidence, beginning with seventeenth and eighteenth century maps depicting the independent *Bilad el-Yemen*. Yemen asserts that while some eighteenth century maps fail to depict the Islands accurately, the more accurate of these attribute them to Yemen. Yemen places great emphasis on writings and maps reflecting the firsthand impressions of Carsten Niebuhr, a Danish scientist and explorer who visited the Red Sea coast from 1761-1764. Niebuhr’s works suggest political affiliation and other links between the Islands and the Yemeni mainland.

48. Yemen further submits in evidence a large number of nineteenth and twentieth century maps, of varied origin, the colouring of which appears to attribute all or some of the Islands to Yemen. At the same time, it did not deny that certain Yemeni maps attribute the Islands to Ethiopia or Eritrea; or at least not to Yemen.

49. In addition to proffering cartographic and other evidence in support of its assertions of historic title to the Islands, Yemen argues that until the events of December 1995, Ethiopian and Eritrean conduct was consistent with Yemeni sovereignty. Yemen alleges that as recently as November 1995, Eritrea acknowledged in an official communique to the President of Yemen that the Islands had "... been ignored and abandoned for many years since colonial times, including the eras of Haile Selassie and Mengistu, and during the long war of liberation."

50. Yemen insists that, during the Ottoman period, the Islands were consistently administered as part of the *vilayet* of Yemen, and that title never passed to Italy during the period of Italian colonization of the Eritrean mainland. Yemen cites several occasions on which, in its view, Italy had declined to claim sovereignty. These include exchanges between the British and Italian Governments in the late 1920s and 1930s and culminated in the 1938 Anglo-Italian Agreement which amounts, in Yemen's view, to a definitive agreement by both parties not to establish sovereignty over islands with respect to which Turkey had renounced sovereignty by article 16 of the Treaty of Lausanne. Yemen interprets Italian decree number 1446 of December 20, 1938 not as a confirmation of existing territorial sovereignty but rather as a mere "internal decree providing for the administration of the islands to be undertaken from the Assab department of Eritrea."

51. Yemen argues further that the phrase "the territory of Eritrea including the islands" in the 1952 United Nations-drafted Eritrean Constitution does not refer to the disputed islands, because the official *Report of the United Nations Commission for Eritrea*, prepared in 1950, indicates Yemeni title to the Islands, by depicting them in the same as the Yemeni mainland on United Nations maps accompanying the Report. Yemen contests all Eritrean allegations of Ethiopian acts of sovereignty or administration, and asserts that Ethiopian conduct, particularly its publication of official maps on which the Islands were the same colour as the Yemeni mainland, constituted recognition of Yemeni sovereignty over the Islands.

52. According to Yemen, while Yemeni fishermen historically fished around the Islands and used them for temporary residence, Yemen exercised a wide array of state activities on and around them. These activities are alleged to have included, during the 1970s, the consideration of requests by foreign nationals to carry out marine and scientific research on the islands, periodic visits of Yemeni military officials to Greater Hanish and Jabal Zuqar, and related patrols on and around these islands. Yemen also claims to have protested the conduct of low-level military flights by France over the Hanish Islands, as well as Ethiopia's arrest of Yemeni fishermen in the vicinity of the Islands, and further asserts that it investigated a number of lost or damaged foreign vessels around Greater Hanish and Jabal Zuqar.

53. With respect to the 1980s and 1990s, Yemen alleges that various Yemeni air force and naval reconnaissance missions were conducted over and around the Islands. Yemen also asserts that it granted licenses allowing nationals of third states to visit the certain islands for scientific purposes and tourism, and that some of these visitors were accompanied by Yemeni officials. In



1998, Yemen is said to have embarked on a project to upgrade and build a series of lighthouses, accompanied, by Notices to Mariners, on Centre Peak Island, Jabal al-Tayr, Lesser Hanish Islands, Abu Ali, Jabal Zuqar and Greater Hanish Island. Yemen also claims to have erected geodetic stations on Greater Hanish, which was used frequently in the early 1990s. Yemen also contends that, during this period, it continued its patrols of the islands, arresting foreign fishermen and confiscating vessels found operating in waters around the islands without a Yemeni license.

54. With respect to territorial sovereignty, Yemen seeks from the Tribunal an award declaring “that the Republic of Yemen possesses territorial sovereignty over all of the islands comprising the Hanish Group of islands...as defined in chapters 2 and 5 of Yemen’s Memorial.”

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*Arguments of the Parties on the relevance of petroleum agreements and activities*

55. In response to specific questions from the Tribunal, which were dealt with in supplemental written pleadings, at resumed oral hearings in July 1998, and in post-hearing written submissions, both Parties have presented evidence of offshore concession activity in the Red Sea. Yemen contends that its record of granting offshore concessions over the last fifty years reinforces and complements a consistent pattern of evidence indicating Yemeni title to the islands. As the granting of oil concessions serves to confirm and maintain an existing Yemeni title, rather than furnishing evidence of effective occupation, it need not, in Yemen’s view, be supported by evidence of express claims. This is said to be congruent with Yemen’s assertions of historic title.

56. In evidence of what it terms “longstanding and peaceful administration of its petroleum resources” on and around the Islands, Yemen has submitted agreements and maps concerning concession blocks granted or offered since 1974. One of these concession blocks (Tomen) encompasses some of the Islands, in this case, the “Hanish Group”, while another (Adair) is bounded by a line that cuts through Greater Hanish. Yemen further relies on a 1991 hydrocarbon study of the Red Sea and Gulf of Eden regions carried out by the United Nations Development Program (UNDP) and the World Bank. As this study enjoyed the participation of the governments concerned, particularly Ethiopia and successive Yemeni governments, Yemen relies on it as a useful overview of petroleum activities undertaken by the two states from the early 1950s.

57. Yemen relies on both case law (in particular the *Eastern Greenland* case<sup>3</sup>) an scholarly writing in support of its assertion that the granting of exploration permits and concessions constitutes evidence of title, addressing such evidentiary categories as: the attitude of the grantor state, its grant and regula-

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<sup>3</sup> Legal Status of Eastern Greenland (Den. V.Nor.), 1933 P.C. I. J. (Ser. A/B) No. 53.

tion of the operation of the concession, ancillary government-approved operations, and the attitude of the concessionaire and of international agencies. In addition, Yemen derives from the absence of protests evidence of Ethiopian and Eritrean acquiescence.

58. Yemen invokes the presumption that a state granting an oil concession does so in respect of areas over which it has title or sovereign rights. The activity of offering and granting concessions with respect to blocks that encompass or approach the Islands constitutes, in Yemen's view, a clear manifestation of Yemeni sovereignty over the Islands. Yemen cites, in addition, express reservations, in the relevant agreements, of Yemeni title to the concession areas. In addition to demonstrating Yemen's attitude regarding title, the granting of these economic concessions to private companies is said to constitute evidence of the exercise of sovereignty in respect of the territory concerned. Yemen finds additional evidence of the exercise of sovereignty in Yemen's monitoring and regulation of the operations undertaken by the various concessionaires and the granting of permits for ancillary operations such as seismic reconnaissance.

59. Yemen further argues that a company will not enter into a concession with a state for the development of petroleum resources unless it is persuaded that the area covered by the concession, and the underlying resources, in fact belong to that state. Furthermore, the reservations of Yemeni title in the concession agreements submitted by Yemen are said to constitute express recognition by the concessionaires of Yemeni title to the blocks concerned. The UNDP/World Bank study constitutes, in Yemen's view, recognition of Yemeni title by these international agencies, as well as expert evidence to the same effect.

60. Yemen also proffers the UNDP/World Bank study as evidence of Ethiopian acquiescence. Because the study was prepared in collaboration with, and ultimately distributed to, all concerned governments, Ethiopia can, in Yemen's view, be held to have had notice of the existence and scope of Yemeni concessions implicating the Islands, without issuing any protests. Yemen relies further on other maps and reports published in the professional petroleum literature, of it asserts Ethiopia and Eritrea should have been aware.

61. Finally, Yemen asserts that Ethiopian and Eritrean petroleum activities did not encompass or touch upon the Islands, and therefore provide no support for a claim of sovereignty. Despite this, Yemen alleges that is consistently made timely protests with respect to those Ethiopian concessions, that in Yemen's view, encroached in any manner upon its territorial sea, continental shelf and exclusive economic zone.

62. Eritrea, in turn, proffers evidence of offshore petroleum activities, conducted primarily by Ethiopia, at a time at which, it alleges, "Ethiopia's title was already established". Eritrea cites oil-exploration related activities "on the islands" as confirming Ethiopia's pre-existing claim to sovereignty, which could not, in its view, be divested by Yemen's unilateral grants of offshore mineral concessions. Eritrea also argues that, in the absence of any physical manifestation of control either on islands or in their territorial waters, the mere

granting of concessions by Yemen would not suffice to establish title through effective occupation, “even if the islands had been previously unowned.”

63. According to Eritrea, the concession evidence put forward by Yemen is irrelevant, because it represents unilateral attempts by Yemen to establish permanent rights to the seabed, in violation of customary international law and the United Nations Convention on the Law of the Sea (the “Law of the Sea Convention”). Yemen’s concession agreements are further said to be irrelevant because they were entered into only after the present dispute arose, were not accompanied by Yemeni government activities, and did not pertain to the territory in dispute. Eritrea also question the factual accuracy of Yemen’s allegations concerning concession agreements, pointing to Yemen’s failure to submit in evidence copies of certain of these agreements.

64. Eritrea argues that under both the Law of the Sea Convention and customary international law, mineral rights to the seabed can neither be acquired nor lost through the unilateral appropriation of one competing claimant. Pending agreement with the opposite coastal state, Yemen was, in Eritrea’s view, entitled only to issue concessions on a provisional basis. If the alleged concessions could not effectively confer the very mineral rights with which they purported to deal, they could not indirectly settle the question of sovereignty over the Islands. According to Eritrea, petroleum concessions are relevant only where they demonstrate the existence of a mutually recognized de facto boundary line. There had, in this case, been no attempt by Yemen to reach mutual agreement with Ethiopia or Eritrea.

65. Eritrea contends that the provisional character of any concessions issued by Yemen is derived not only from article 87 (3) of the Law of the Sea Convention, which permits the provisional granting of concessions, provided this does not prejudice a final delimitation, but also from Yemen’s own continental shelf legislation, adopted in 1977, which provides that “pending agreement on the demarcation of the marine boundaries, the limits of territorial sea, the contiguous zone, the exclusive economic zone ... shall not be extended to more than the median or equidistant line.”

66. Eritrea further asserts that Yemen’s offshore concessions were issued after 1973, with full knowledge of Ethiopia’s sovereignty claims to the Islands. This is claimed not only to have implications for the delimitation of the surrounding seabed, but to limit as well the evidentiary value of Yemen’s concession evidence in resolving the question of sovereignty.

67. Thus Eritrea argues that the post-1973 grant of concessions by Yemen reflects attempts to manufacture contacts with the disputed islands. This is further supported, in Eritrea’s view, by the lack of any related Yemeni state activity pertaining specifically to the territory in dispute. According to Eritrea, concessions can be brought to bear on the question of territorial acquisition in two ways. The first is exemplified by the deep sea fishing concession granted by Italy to the *Cannata* company in the 1930s, which led inter alia to construction of a commercial fishing station on Greater Hanish Island. According to Eritrea, the *Cannata* concession was accompanied by the direct involvement of state officials, including Italian troops stationed on the island.

68. Another way in which concessions may be relevant to territorial acquisition is that reflected in the *Eastern Greenland* case. *Eastern Greenland* does not, in Eritrea's reading, necessarily require the physical presence of a particular state official, but rather activities by individuals who, while not themselves employees of the state, act under colour of state law. Eritrea cites doctrine in support of its position that the concession activity of private individuals is relevant only when it involves some kind of real assertion of authority, since "the exercise or display must be genuine and not a mere paper claim dressed up as an act of sovereignty." Eritrea argues that the scope of Yemeni and private activity with respect to petroleum concessions "does not approach the quality and significance of Ethiopia's long-standing pattern of governmental activities on and around the disputed islands." Eritrea further asserts that the few concession agreements actually placed in evidence by Yemen ultimately bear little or no relationship to the islands in dispute.

69. In addition, Eritrea characterizes much of Yemen's petroleum activity as pertaining to "marine scientific research", rather than economic exploitation. Article 241 of the Law of the Sea Convention expressly precludes marine scientific research activities from constituting the legal basis for any claim to any part of the marine environment or its resources.

70. Eritrea argues that its failure to protest Yemeni concessions does not amount to acquiescence, particularly in light of military and political upheaval in Ethiopia during the relevant period. Eritrea has submitted evidence aimed at demonstrating that the 1991 UNDP/World Bank report relied on by Yemen as evidence of notice to Ethiopia may never have been received by Ethiopia, embroiled as it then was in the fall of the Mengistu regime and the end of the civil war. And even if it had been ultimately received, Eritrea posits that in 1991, knowing it would soon lose its entire coastline to the soon-to-be independent Eritrea, Ethiopia would have had no reason to protest Yemeni concessions.

71. Even if it had had actual notice of some or all of Yemen's concessions, Eritrea contends that it was entitled to rely on their being provisional under article 87 (3) of the Law of the Sea Convention and under Yemen's own 1977 continental shelf legislation.

72. Finally, at the oral hearings in London in July 1998, Eritrea produced evidence of a 1989 Ethiopian concession agreement which, in its view, included at least some of the Islands, notably Greater Hanish, on which Eritrea relies as evidence of related activities which are said to have taken place on Greater Hanish Island, including the placement of beacons. Moreover, it has introduced evidence of publication in 1985 of a series of maps, one of which is entitled, "Petroleum Potential of Ethiopia" and purports to encompass a block of the Red Sea that includes the Hanish Islands.

Chapter II. *The scope of the dispute*

73. The Arbitration Agreement seeks from the Tribunal an award “on the definition of the scope of the dispute between Eritrea and Yemen.” It further instructs the Tribunal to decide on the definition of the scope of the dispute “on the basis of the respective positions of the Two Parties.”

74. The Parties agree that this provision was included in the Arbitration Agreement as a result of the Parties’ inability to reach agreement on the definition of the scope of the dispute. According to Eritrea, at the time of the military confrontation in late 1995, which resulted in an Eritrean military occupation of Greater Hanish and some of the small surrounding islands and the Republic of Yemen’s military occupation of Zuqar Island, Eritrea wished to seek a determination of all respective Eritrean and Yemeni claims, either by international arbitration or adjudication. Yemen would not agree to such a submission, insisting instead, as Eritrea relates it, on limiting the scope of the dispute to Eritrea’s alleged illegal occupation of Hanish Island. Because neither Party wanted this disagreement on scope to prevent the conclusion of the Agreement on Principles and subsequent Arbitration Agreement, they agreed to leave the determination of scope to the Tribunal.

75. In Eritrea’s interpretation of the phrase “the respective positions of the Parties”, both Parties are free to put forth and elaborate on their positions concerning the scope of the dispute at any point in the proceedings. Eritrea purports to have done so by including in its Memorial, submitted on 1 September 1997, a non-exhaustive list of “islands”, rocks, and low-tide elevations” with respect to which it asserts territorial sovereignty, and requesting the Tribunal to rule that the scope of the dispute includes each of these specified “islands, rocks and low-tide elevations”. Eritrea insists that as its position with regard to scope has not altered over time, the time at which it was determined is irrelevant. While indicating that it had not expected Yemen to claim the Mohabbakah islands, Eritrea has expressed willingness to defend its claim to the Mohabbakahs; i.e., to consider them encompassed by the scope of the dispute. Eritrea further asserts that Yemen was, in fact, aware of Eritrean claims to Jabal Al-Tayr and the Zubayr group.

76. Yemen, however, puts forward the view that “the respective positions of the Parties” are to be determined at the date of the Agreement on Principles (21 May 1996). Yemen submits that “the task of the Tribunal is to determine the extent to which there was a dispute between the Parties over certain islands in the Red Sea and their maritime limitation of that date.” According to Yemen, the respective positions of the Parties at that date reflected their mutual understanding that Jabal Al-Tayr and the Zubayr group of islands were not considered to fall within the scope of the dispute. Yemen characterizes the scope of the dispute as involving “the Hanish Group of Islands”, comprising—in its view—Abu Ali island, Jabal Zuqar, Greater and Lesser Hanish, Suyul Hanish, the various small islets and rocks that surround them, the South West Rocks, the Haycocks and the Mohabbakahs. It asserts that the “Northern Islands” of

Jabal Al-Tayr and the Zubayr group were never in dispute between the Parties, and were not reflected in Eritrea's "position" until 1 September 1997, the date of filing the Parties' Memorials, and thus fell outside the scope of the dispute.

77. The Parties' divergent positions on the substance of the dispute are reflected in a document dated 29 February 1996, entitled "French Memorandum for Yemen and Eritrea". In the aftermath of the December 1995 hostilities, Eritrea and Yemen had, on advice from the United Nations Secretary-General, invited the French Government to "contribute to the seeking of a peaceful settlement of the dispute between them in the Red Sea." This memorandum was the result of three diplomatic missions to the region, consisting of in-depth talks with the representatives of the two Governments, and it led to the subsequent conclusion between the Parties of the Agreement on Principles, in May 1996, and the Arbitration Agreement, in October 1997.

78. As described in the French memorandum, "(t)he problem raised is as follows. According to Eritrea the dispute concerns at present not only the island of Great Hanish which underwent the events we know about in autumn 1995, but also all of the Hanish-Zucur archipelagoes, particularly the island of Djebel Zucur, since Yemen has stationed troops there whereas these archipelagoes come under Eritrean sovereignty." With respect to the Yemeni position, the French memorandum continues: "According to Yemen this dispute concerns the island of Greater Hanish, where Eritrea has sent troops, but cannot concern the Hanish-Zucur archipelagoes in their totality, particularly the island of Djebel Zucur, since they come under Yemeni sovereignty."

79. The French mediator therefore proposed that the arbitral tribunal be asked "to provide rulings on the questions of territorial sovereignty, as well as delimitation of maritime boundaries, in a zone defined for example by geographical coordinates." This definition would, according to a French Draft Agreement on Principles dated 29 February 1996, take into account "the undisputed sovereignty of either Party on islands and rocks, such as, for example, the Dahlak Islands for Eritrea, or the Zubair Islands for Yemen." This proposal was rejected by the Parties, in favour of leaving the determination of the scope of the dispute to the arbitral tribunal.

80. Article 1 of the Agreement on Principles of 21 May 1996 provides:

[...]

1.2 They shall request the Tribunal to provide rulings in accordance with international law in two stages:

(a) in the first stage, on the definition of the scope of the dispute between Eritrea and Yemen, on the basis of the respective positions of the two parties:

(b) in the second stage, and after having decided on the point mentioned in letter a) above, on:

- (i) questions of territorial sovereignty,
- (ii) questions of delimitation of maritime boundaries.

2. They shall commit themselves to abide by the decision of the Tribunal.

81. Article 2 of the Arbitration Agreement, however, provides as follows:

1. The Tribunal is requested to provide rulings in accordance with international law, in two stages.

2. The first stage shall result in an award on territorial sovereignty and on the definition of the scope of the dispute between Eritrea and Yemen. The Tribunal shall decide territorial sovereignty in accordance with the principles, rules and practices of international

law applicable to the matter, and on the basis, in particular, of historic titles. The Tribunal shall decide on the definition of the scope of the dispute on the basis of the respective positions of the two Parties.

3. The second stage shall result in an award delimiting maritime boundaries. The Tribunal shall decide taking into account the opinion that it will have formed on questions of territorial sovereignty, the United Nations Convention on the Law of the Sea, and any other pertinent factor.

82. Article 15 of the same Arbitration Agreement also provides:

1. Nothing in this Arbitration Agreement can be interpreted as being detrimental to the legal positions or to the rights of each Party with respect to the questions submitted to the Tribunal, nor can affect or prejudice the decision of the Arbitral Tribunal or the considerations and grounds on which those decisions are based.

2. In the event of any inconsistency between the Agreement on Principles and this Arbitration Agreement implementing the procedural aspects of that Agreement on Principles, this Arbitration Agreement shall control. Except with respect to such inconsistency, the Agreement on Principles shall continue in force.

83. Since there is indeed in this respect an inconsistency between the Agreement on Principles and the Arbitration Agreement, under article 15 (2) of the Arbitration Agreement the provisions of the latter prevail to the extent of the inconsistency. The Tribunal must therefore decide the question of scope, as well as the resulting questions of sovereignty, in the present first stage of the proceedings.

84. This decision on scope has to be made “on the basis of the respective positions of the two Parties”, and on this point the provisions of the two agreements are identical. It is apparent, however, from the submissions of the Parties in their written pleadings and in their oral presentations for the first stage that the positions of the two Parties differ with respect to the scope of the arbitration. Eritrea’s position is that the scope includes all the islands of the Zuqar–Hanish chain, the Haycocks and the Mohabbakahs, and also the northern islands of Jabal al-Tayr and the Zubayr group. Yemen, however, though claiming all the islands of the Zuqar–Hanish chain, including, in their view, the Haycocks and the Mohabbakahs, does not concede that the northern islands are in dispute in this arbitration.

85. The contention of Yemen, as mentioned above, is that the respective positions of the two Parties at the time of the Agreement on Principles (21 May 1996) were different from what they became at the time of the subsequent Arbitration Agreement (3 October 1996). According to Yemen, at the time of the Agreement on Principles, Eritrea was apparently not seeking to claim the northern islands or to bring them within the scope of the arbitration, although it may be noted that there was already an existing dispute over the northern islands.<sup>4</sup> It seems clear, moreover, that Yemen, at the time of the Agreement on Principles, was not claiming the Mohabbakahs.

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<sup>4</sup> In a letter dated 4 January 1996, Yemen formally protested an Eritrean oil concession to the Andarko Company which, according to Yemen, constituted “a blatant violation of Yemeni sovereignty over its territorial waters in so far as it extends to the exclusive territorial waters of the Yemeni Jabal al-Tayr and al-Zubayr islands, in addition to the violation of the rights of the Republic of Yemen in the Exclusive Economic Zone.”

86. But, according to Yemen, the date of the Agreement on Principles is “the critical date” for the determination by the Tribunal of the “respective positions of the two Parties” on which the scope of the Arbitration is to be decided, because it was the date of the definitive agreement of the Parties to submit the matter to this Arbitration. From this proposition Yemen concludes that the northern islands do not come within the scope of the present arbitration.

87. This somewhat technical “critical date” argument, fails, in the opinion of the Tribunal, to take sufficient account of the crucial change brought about in the Arbitration Agreement in the specifications of the first stage of the Arbitration as being that in which this question of scope was to be determined by the Tribunal. Whereas, in the Agreement on Principles, the decision on scope was to be the whole matter of the first stage, the later Arbitration Agreement joined within that stage both the award on sovereignty and the decision on scope. This now meant that the Tribunal was to decide the issue of scope “on the basis of the respective positions of the two Parties” only after having heard the entire substantive contentions of both Parties on the question of sovereignty. This later provision must throw doubt upon the proposition that the Parties nevertheless intended the earlier date of the Agreement on Principles still to be the critical date for the determination of scope.

88. In addition, the later Arbitration Agreement did not, in its article 2(2), qualify in any way its use of the phrase “on the basis of the respective positions of the two Parties.” If not qualified, the ordinary meaning of that phrase in its context, and in the light of the object and purpose of the Arbitration Agreement, would seem to be that it is “the respective position of the two Parties” as at the date of the Arbitration Agreement, and not at some unspecified date, that should form the basis for the determination by the Tribunal of the scope of the dispute under the Arbitration Agreement.

89. Moreover, and by implication consistent with this analysis, Yemen, although taking some care in various ways to reserve its position on scope, has in fact provided a full argument in support of its claim to sovereignty over Jabal al-Tayr and the Zubayr group, and in the July 1998 supplementary hearings on petroleum agreements, considerably elaborated on that argument.

90. The Tribunal therefore, on the question of the scope of the dispute, prefers the view of Eritrea and accordingly makes an Award on sovereignty in respect of all the islands and islets with respect to which the Parties have put forward conflicting claims, which include Jabal al-Tayr and the Zubayr group, as well as the Hancocks and the Mohabbakahs.



### Chapter III. *Some particular features of this case*

#### *In general*

91. It is convenient at the outset to call attention to some features of this case. There is one striking difference between the Parties themselves. Yemen traces its existence back to medieval times and even before the establishment of the Ottoman Empire; Eritrea on the other hand became a fully independent state, separate from Ethiopia, in the early 1990s. Nevertheless, Eritrea traces what it regards as its own title to the disputed islands through an historical succession from the Italian colonial period as well as through the post –Second World War period of its federation as part of the ancient country of Ethiopia. Accordingly the Tribunal has been presented by both Parties with great quantities of material put forward as evidence of the establishment of a legal title through the accumulated examples of claims, possession or use or, in the case of Yemen, through consolidation, continuity and confirmation of an “ancient title”. All these materials of quite varying character and weight have had to be sifted, analysed and assessed by the Tribunal.

92. Since much of these materials relates to the actions and reactions or conduct of the Parties or of their predecessors, it is well to have in mind that both have experienced periods in which they were preoccupied by civil wars on either side of the Red Sea: Yemen from 1962-70, and Ethiopia with the severe and bloody conflict with Eritrean rebels which resulted in the independence of Eritrea in 1993.

93. The disputed islands and islets range from small to tiny, are uniformly unattractive, waterless, and habitable only with great difficulty. And yet it is also the fact that they straddle what has been, since the opening of the Suez Canal in 1869, one of the most important and busiest seaways in the world. These contradictory aspects of the disputed islands are reflected in the materials presented to the Tribunal. During the earlier periods the islands seem often hardly to have been noticed by coastal countries other than by local traditional fishermen who used them for shelter and their waters for anchorage; but did receive considerable attention, amounting even to temporary occupation, from rival colonial powers, notably Great Britain and Italy. This was no doubt because, after the opening of the Canal, this sea, narrowing in its southern part where the islands are situated, was the principal route from Europe to India, the East Indies and the Far East.

94. The former interest in these islands of Great Britain, Italy and to a lesser extent of France and the Netherlands, is an important element of the historical materials presented to the Court by the Parties, not least because they have had access to the archives of the time, and especially to early papers of the British Government of the time. Much of this material is interesting and helpful. One general caveat needs, however, to be made. Some of this material is in the form of internal memoranda, from within the archives of the British

Foreign Office, as it then was, and also sometimes of the Italian Foreign Office. The Tribunal has been mindful that these internal memoranda do not necessarily represent the view or policy of any government, and may be no more than the personal view that one civil servant felt moved to express to another particular civil servant at that moment: it is not always easy to disentangle the personality elements from what were, after all, internal, private and confidential memoranda at the time they were made.

### *Critical date*

95. Faced with such a mass of legal and political history, the Tribunal has felt it right to consider whether the notion of the “critical date” or “critical period” might assist in the organization or the interpretation of this voluminous material. It has noted, however, that the Parties themselves have spoken of a critical date only in relation to the question discussed above: whether, in deciding on the scope of the Arbitration, the critical date is that of the Agreement on Principles or the Agreement on Arbitration. Neither of them has sought to employ a critical date argument in relation to any of the questions involving the substance of the dispute. In this situation the Tribunal has thought it best to follow the example of the 1996 award in the arbitration between Argentina and Chile presided over by Lord McNair, and has accordingly “examined all the evidence submitted to it, irrespective of the date of the acts to which such evidence relates.”<sup>5</sup>

### *Uti Possidetis*

96. Yemen in its Counter Memorial introduced the doctrine of *uti possidetis* to explain what it holds to have been the legal position of these islands after the dissolution of the Ottoman Empire following the end of the First World War. The position is said to have been, in the words used by Yemen, that “[o]n the dismemberment of an empire like the Ottoman Empire, there is a presumption, both legal and political in character, that the boundaries of the independent states which replace the Empire will correspond to the boundaries of the administrative units of which the dismembered Empire was constituted.” The principle of *uti possidetis* presumably provides the legal aspect of this presumption on which Yemen relies. Eritrea strongly contests this.

97. There is, however, a prior problem regarding the facts on which a legal presumption of *uti possidetis* would purport to be based. For such a legal presumption to operate it is necessary to know what were indeed “the boundaries of the administrative units of which the dismembered Empire was constituted.” It is known that by *firmans* issued in 1841, 1866 and 1873, the Sublime Porte granted to the Khedive of Egypt the right to exercise jurisdiction over

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<sup>5</sup> Argentina v. Chile (9 Dec. 1996), 19 R.I.A.A. 111, 115; 38 I.L.R. 16, 20 (1969).

the African coast of the Red Sea. Presumably this right of jurisdiction over the African coast might naturally have extended to the islands which were in the neighborhood of the coast and geographically at least seemed to belong to that coast. But how far this jurisdiction extended over the archipelago which is the principal element in the present dispute is to some extent a matter for conjecture. It seems that, unsurprisingly, the *firman* did not mention the archipelago. The sources provided by the Parties in relation to this question are primarily British Foreign Office internal papers and memoranda. And the answers there given were, it is made quite clear, based upon informed speculation. It is known that there were from time to time small Ottoman garrisons upon Zucar and upon Hanish, and there are suggestions that they came from the Arabian side, and probably had their supplies from that coast.

98. There is particularly the September 1880 memorandum of Sir Edward Hertslet (author of the celebrated and influential *Map of Africa by Treaty*, and Librarian of the Foreign Office) compiled in the Foreign Office for the use of the Board of Trade, which was responsible for lighthouses in the Red Sea and which sought Foreign Office help with the question of jurisdiction over lighthouse islands. In this memorandum Hertslet carefully distinguished between sovereignty, which the Ottoman Empire possessed over all these possessions, and a right of jurisdiction over the African side, which had been conferred on the Khedive. He drew up three long lists of the islands in the Red Sea. The first list was of the islands which in his opinion could be said to be "in close proximity" to the African coast, and the second list was of those in close proximity to the Arabian coast. The first list includes the Mohabbakahs and the Haycocks; the second list contains the islands in the "Jabel Zucar Group", those in the "Little Harnish Group", and those in the "Great Harnish Group". This memorandum appears to have been accepted as a working paper by both the Foreign Office and the Board of Trade, notwithstanding the fact that the perception of the second group as being "in close proximity" to the Arabian coast might be regarded as questionable in terms of physical geography. The third list was a relatively short one of islands near "the Center of the Red Sea" including Jabal Al-Tayr and the Zubayr group, the jurisdiction over which was thought by Hertslet to be "doubtful", although the sovereignty remained Ottoman.

99. It is doubtful how far it would be right to base a legal presumption of the *uti possidetis* kind upon these speculations of a concerned but not disinterested third-government department; and this quite apart from the legal difficulties of creating a presumption which would be plainly at odds with the specific provision made for at least some of these islands by article 16 of the Treaty of Lausanne of 1923.<sup>6</sup> Yemen of course pleads that this was *res inter alios acta*. But Turkey having been in a position to refuse to accept the Treaty of Sevres, the sovereignty over these islands must have remained with Turkey until the Treaty of Lausanne was signed, and presumably until 1926 when it

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<sup>6</sup> Throughout this award, the date used for the Treaty of Lausanne is its date of signature, in 1923, rather than that of its entry into force 1926.

was ratified. Added to these difficulties is the question of the intertemporal law and the question whether this doctrine of *uti possidetis*, at that time thought of as being essentially one applicable to Latin America, could properly be applied to interpret a juridical question arising in the Middle East shortly after the close of the First World War.

100. Nevertheless, all this material about the position of the Islands during and shortly after the period of the Ottoman Empire remains an instructive element of the legal history of the dispute. It is especially interesting that even when the whole region was under Ottoman rule it was assumed that the powers of jurisdiction and administration over the islands should be divided between the two opposite coasts.

*Article 15, paragraph 1, of the Arbitration Agreement*

101. This paragraph provides as follows:

Nothing in this Arbitration Agreement can be interpreted as being detrimental to the legal positions or to the rights of each Party with respect to the questions submitted to the Tribunal, nor can affect or prejudice the decision of the Arbitral Tribunal or the considerations and grounds on which those decisions are based.

The Tribunal finds this provision less than perspicuous. A question to the Parties about it evoked different answers; both were to the general effect that this clause was meant as a “without prejudice” clause concerning the arguments and points of view they might wish to present to the Tribunal. As both Parties have fully argued their cases without either of them having occasion to invoke this provision, it seems to the Tribunal best to leave the matter there.

*The task of the Tribunal in the first stage*

102. The Agreement for Arbitration provides in the second paragraph of its article 2:

2. The first stage shall result in an award on territorial sovereignty and on the definition of the scope of the dispute between Eritrea and Yemen. The Tribunal shall decide territorial sovereignty in accordance with the principles, rules and practices of international law applicable to the matter, and on the basis, in particular, of historic titles. The Tribunal shall decide on the definition of the scope of the dispute on the basis of the respective positions of the two Parties.

Several of the clauses of this paragraph call for consideration. First there is the requirement that this stage shall “result in an award on territorial sovereignty.” Thus, the Agreement does not require the Tribunal, as is often the case in agreements for arbitration, to make an allocation of territorial sovereignty to the one Party or the other. The result furthermore is to be an award “on” territorial sovereignty not an award “of” territorial sovereignty. The Tribunal would therefore be within its competence to find a common or a dividend sovereignty. This follows from the language of the clause freely chosen by the Parties. It seems right that to call attention to the broader possibilities admitted by this unusual arbitration clause. The Tribunal has indeed considered all possibilities.

103. Further consideration must be given to the clause that requires the Tribunal to “decide territorial sovereignty in accordance with the principles, rules and practices of international law applicable in the matter, and on the basis, in particular, of historic titles”.

104. As already mentioned, both Parties rely on various elements of evidence of possession and use as creative of title, and this is itself an appeal to what is a familiar kind of historic claim. As Judge Huber said in the *Palmas* case, “[i]t is quite natural that the establishment of sovereignty may be the outcome of a slow evolution, of a progressive intensification of State control.”<sup>7</sup>

105. But Yemen also relies primarily upon what it calls specifically an “historic title”. This calls for reflection upon the meaning of “title”. It refers not to a developing claim but to a clearly established right, or to quote Pollock, “the absolutely or relatively best right to a thing which may be in dispute.”<sup>8</sup>

106. The notion of an historic title is well-known in international law, not least in respect of “historic bays”, which are governed by rules exceptional to the normal rules about bays. Historic bays again rely upon a kind of “ancient title”: a title that has so long been established by common repute that this common knowledge is itself a sufficient. But an historic title has also another and different meaning in international law as a title that has been created, or consolidated, by a process of prescription, or acquiescence, or by possession so long continued as to have become accepted by the law as a title. These titles too are historic in the sense that continuity and the lapse of a period of time is of the essence. Eritrea pleads various forms of this kind of title, and so also does Yemen, which relies upon this latter kind of title as “confirmation” of its “ancient title”.

107. The injunction to have regard to historic title “in particular” can hardly be intended to mean that historic title is to be given some priority it might not otherwise possess; for if there is indeed an established title—the best right to possession—then it is by definition a prior right. So perhaps the phrase “in particular” is put in out of abundant caution, lest the Tribunal, faced with a welter of other interests and uses, were to forget that there can be a separate category of title that does not depend upon use and possession, but is itself a right to possession whether or not possession is enjoyed in fact. At any rate, as will appear below, the Tribunal has not failed to examine historic titles of all kinds in its consideration of this case

108. There have been different points of view between the Parties about the effects of this twofold division of a first stage award on territorial sovereignty and a second stage award on maritime boundaries. It was in the course of the supplementary proceedings on the Parties’ petroleum agreements that Yemen became strenuously exercised over the possibility that the Tribunal might be tempted to “prefigure” (a nicely chosen expression) an eventual stage

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<sup>7</sup> *Island of Palmas (Neth. V. U.S.) 2 R. I. A.A. 829 at 867 (Apr. 4, 1928)*, Professor Max Huber, at the time President of the Permanent Court of International Justice, acted as sole arbitrator in proceedings conducted under the auspices of the Permanent Court of Arbitration, pursuant to the 1907 Convention for the Pacific Settlement of International Disputes.

<sup>8</sup> Frederick Pollack, *A First Book Of Jurisprudence* 177 (6<sup>th</sup> ed, 1929).

two maritime solution as an element of its thinking about stage one. Thus paragraph 20 of Yemen's written pleadings in the supplementary petroleum agreements phase states as follows:

This last element [prefigured] is of particular concern to the Government of Yemen. It is always attractive to seek to discover a basis for dividing a group of islands, not least in an arbitration. The attraction must be the greater when the task of the Tribunal extends to the process of maritime delimitation, and no doubt caution will be needed to avoid a prefiguring of equitable principles and concepts, which are in law only relevant in the second place of these proceedings.

This paragraph was repeated for word in Yemen's oral argument in the July 1998 supplementary hearings.

109. A novel feature of Yemen's arguments, introduced at a late stage of the proceedings but clearly and strongly felt, concerned an apparently unacceptable supposition that an equitable solution was being contemplated for the first stage. This was curious, if only because it seems to have been the first and only reference to equity or equitable principles by either Party in course of the pleadings. Furthermore, no member of the Tribunal had mentioned equity or equitable principles.

110. This matter arose again in a somewhat different form in Yemen's answers to four questions put to both parties at the close of Yemen's oral argument in the supplementary proceedings, and which questions both Parties answered later in writing. The purpose of these questions was simply to ask both Parties how it was that some of their petroleum agreements, particularly those of Yemen, appeared to be drawn to extend to some sort of coastal median line. In response, Yemen felt obliged to "express the strongest possible reservation against the 'prefiguring of a median line'".

111. Eritrea replied, in the Tribunal's view rightly, that article 2.2 of the Arbitration Agreement requires the Tribunal to "decide territorial sovereignty in accordance with the principles, rules and practices of international law applicable to the matter, on the basis, in particular, or historic titles." That formula must include any principles, rules or practices of international law that are found to be applicable to these matters of sovereignty, even if those principles, rules or practices are part of maritime law. Certainly the Tribunal is not in this first stage to delimit any maritime boundaries or to prefigure any such delimitation. But that is an entirely different matter from applying all international law that may be relevant for the purpose of determining sovereignty, which is the province of this first stage.

112. In general, the Tribunal is unable to accept the proposition that the international law governing land territory and the international law governing maritime boundaries are not only different but also discrete, and bear no juridical relevance to each other. Such a theory is indeed disproved by Yemen's own request to the British Government to be allowed to attend the 1989 Light-houses Conference on the ground that the northern islands were within Yemen's Exclusive Economic Zone.

113. It is well to have the considered view of the Tribunal on these questions stated at the outset of this Award. At the same time, it may be said that the Tribunal has no difficulty in agreeing with Yemen, and indeed also with Eritrea,

that there can be no question of even “prefiguring”, much less drawing, any maritime boundary line, whether median or indeed a line based on equitable principles, in this first stage of the arbitration.

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#### Chapter IV. *Historic title and other historical considerations*

114. Article 2 of the Agreement for Arbitration enjoins the Tribunal to decide territorial sovereignty in accordance with applicable international law “and on the basis, in particular, of historic title.” The Tribunal has thus paid particular attention both to the arguments relating to ancient titles and reversion thereof proposed by Yemen and arguments relating to longstanding attribution of the Mohabbakahs to the colony of Eritrea and to early establishment of titles by Italy pronounced by Eritrea. An important element of Yemen’s case is that of an asserted “historic title” to the Islands, and this is indeed reflected in the very language of both the Agreement on Principles and the Arbitration Agreement. Thus the Tribunal fully recognizes that the intention of article 2 is that, among all the relevant international law, particular attention should be accorded to such elements. Notwithstanding its analysis of how the principles, rules and practices of international law generally bear on its decisions on territorial sovereignty, the Tribunal has had the most careful regard to historic titles as they bear on this case.

115. For its part, Eritrea makes no argument for sovereignty based on ancient title, in spite of the undeniable antiquity of Ethiopia. Rather, Eritrea in part asserts an historic consolidation of title on the part of Italy during the inter-war period that resulted in a title to the Islands that became effectively transferred to Ethiopia as a result of the territorial dispositions after the defeat of Italy in the Second World War. This argument will naturally fall to be dealt with in the chapters below dealing with the inter-war periods and the armistice and related proceedings at the end of the Second World War.

116. Yemen has asserted an historic or “ancient title” running back in time to the middle ages, under which the islands are asserted to have formed part of the *Bilad el-Yemen*. This ancient title predated the several occupations by the Ottoman Empire, asserts Yemen, and reverted to modern Yemen after the collapse of the Ottoman Empire at the end of the First World War.

117. It is thus only Yemen that has raised substantial questions of an “historic” or “ancient” title that existed before the second Ottoman occupation of the nineteenth century; it is therefore to an appreciation of the historical background necessary for an understanding of that claim to an early title that the Tribunal now turns. This chapter will consider the ways in which the overall history of the Arabian peninsula must be understood in then contemporary legal terms, as a preface to the Tribunal’s ultimate conclusion on the legal questions concerning “historic titles”. In addition, this chapter will address Yemen’s theory of “reversion”, which is critical to any decision as to the legal effect of an “historic title”.

118. Yemen's arguments on historic and ancient title touch upon several important historical considerations. One relates to the identity of historic Yemen and whether it comprised the islands in dispute. A second questions the existence of a doctrine of reversion recognized in international law, and a third relates to the place of continuity within a concept of reversion of ancient title. Those claims advanced by Eritrea that are based on both history and international law are addressed elsewhere. This chapter further addresses such important historical matters as the tradition of joint use of the Islands' waters by fishermen from both sides of the Red Sea, and the Ottoman allocation of administrative jurisdiction between the two coasts.

119. Yemen's claim is based essentially on an "ancient" or "historical" title pursuant to which the Imam's inherent and inalienable sovereignty extended over the entirety of what historically has been known as *Bilad el-Yemen*, which existed for several centuries and is alleged by Yemen to have included the southern Red Sea islands. This sovereignty is further characterized by Yemen as having remained unaffected by and having survived the Ottoman annexation of Yemen, in spite of the Sublime Porte's having declared Yemen to be one of the *vilayets* falling under Ottoman rule.

120. The arguments advanced by Yemen in this respect must be evaluated within the historical and legal context that prevailed during the relevant period, extending from the end of the nineteenth century until the dissolution of the Ottoman Empire.

121. The particularity of the relationship between the Ottoman Empire and Yemen should be taken into account as an important historical factor. In spite of the Treaty of Da'an, concluded in 1911, which granted the Imam of Yemen a greater decree of internal autonomy, he remained a suzerain acting within Ottoman sovereignty until the total disintegration of the Ottoman Empire and the loss of all its Arabian possessions, including the *vilayet* of Yemen<sup>9</sup>. It was only in 1923, by virtue of article 16 of the Treaty of Lausanne, that the Ottoman Empire not only recognized the renunciation of all its sovereignty rights over Yemen, but explicitly renounced its sovereign title over the islands that had previously fallen under the jurisdiction of the Ottoman *wali* in Hodeidah.

122. The territorial extent of Imamic Yemen as an autonomous entity must be distinguished from that of the Ottoman *vilayet* of Yemen. During the entire period from the second half of the nineteenth century until 1925, the Imam of Yemen had neither sovereignty nor jurisdiction over the Tihama and the Red Sea coasts. Under his agreements with the Ottoman sultan, the Imam administered an exclusively land-locked territory, limited to the high mountains. The Ottoman *wali* exercised exclusive jurisdiction over the coasts until

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<sup>9</sup> See, in particular, John Baldry, *One Hundred Years of Yemeni History: 1849-1948*, in *L'Arabie Du Sud* vol. II at 85 (J. Chelhodetal., Eds. 1984); Roger Joint Daguene, *Histoire De La Mer Rouge: De Lesseps A Nos Jours*, 113-116, 186-190, 240-241 (1997).



1917. Thereafter, the coasts came under the control of the Idrisi, a local tribal ruler supported first by the Italians, and later by the British Government. The coast came under the Imam's rule only in 1926. As will be seen later, this fact has negative legal implications for the "reversion" argument advanced by Yemen, as well as for the application of certain other rules of international law, including the concept of ancient "historic title" in its full classical sense.

123. There can be no doubt that the concept of historic title has special resonance in situations that may exist even in the contemporary world, such as determining the sovereignty over nomadic lands occupied during time immemorial by given tribes who owed their allegiance to the ruler who extended his socio-political power over that geographic area. A different situation exists with regard to uninhabited islands which are not claimed to be falling within the limits of historic waters.

124. In the present case, neither party has formulated any claim to the effect that the disputed islands are located within historic waters. Moreover, none of the Islands is inhabited on other than a seasonal or temporary basis, or even has the natural and physical conditions that would permit sustaining continual human presence. Whatever may have been the links between the coastal lands and the islands in question, the relinquishment by the Ottoman Empire of its sovereignty over the islands by virtue of article 16 of the 1923 Treaty of Lausanne (discussed in greater detail in chapter V) logically and legally adversely affects an pre-existing title.

125. It was recognized in the course of the oral hearings that, by the law in force at the time, Ottoman sovereignty over the regions in question was lawful. The fact that Yemen was not a party to the Treaty of Lausanne, and that it perceived both the British and the Italians as having been usurpers in the Red Sea, does not negate that legal consequence. It has not been established in these proceedings to the satisfaction of the Tribunal that the doctrine of reversion is part of international law. In any event, the Tribunal concludes that on the facts of this case it has no application. No "reversion" could possibly operate, since the chain of titles was necessarily interrupted and whatever previous merits may have existed to sustain such claim could hardly be invoked. During several decades, the predominant role was exercised by the western naval powers in the Red Sea after its opening to international maritime traffic through the Suez Canal, as well as through the colonization of the southern part of the Red Sea on both coasts. An important result of that hegemony was the maintenance of the status quo imposed after the First World War, in particular that the sovereignty over the islands covered by article 16 of the Lausanne Treaty of 1923 remained indeterminate at least as long as the interested western powers were still in the region. As long as that colonial situation prevailed, neither Ethiopian nor Yemen was in a position to demonstrate any kind of historic title that could serve as a sufficient basis to confirm sovereignty over any of the disputed islands. Only after the departure of the colonial powers did the possibility of a change in the status quo arise. A change in the status quo does not, however, necessarily imply a reversion.

126. This should not, however, be construed as depriving historical considerations of all legal significance. In the first place, the conditions that prevailed during many centuries with regard to the traditional openness of southern Red Sea marine resources for fishing, its role as means for unrestricted traffic from one side to the other, together with the common use of the islands by the populations of both coasts, are all important elements capable of creating certain "historic rights" which accrued in favour of both parties through a process of historical consolidation as a sort of "*servitude internationale*" falling short of territorial sovereignty."<sup>10</sup> Such historic rights provide a sufficient legal basis for maintaining certain aspects of a *res communis* that has existed for centuries for the benefit of the populations on both sides of the Red Sea. In the second place, the distinction in terms of jurisdiction which existed under the Ottoman Empire between those islands administered from the African coast and the other islands administered from the Arabian coast constitutes a historic fact to be taken into consideration.

127. According to the most reliable historical and geographical sources, both ancient and modern, the reported data clearly indicate that the population living around the southern part of the Red Sea on the two opposite coasts have always been inter-linked culturally and engaged in the same type of socioeconomic activities. Since times immemorial, they were not only conducting exchanges of a human and commercial nature, but they were freely fishing and navigating throughout the maritime space using the existing islands as way stations (*des iles relais*) and occasionally as refuge from the strong northern winds. These activities were carried out for centuries without any need to obtain any authorizations from the rulers on either the Asian or the African side of the Red sea and in the absence of restrictions or regulations exercised by public authorities.

128. This traditionally prevailing situation reflected deeply rooted culturally patterns leading to the existence of what could be characterized from a juridical point of view as *res communis* permitting the African as well as the Yemeni fishermen to operate with no limitation throughout the entire area and to sell their catch at the local markets on either coasts to the other used to take temporary refuge from the strong winds on any of the uninhabited islands scattered in that maritime zone without encountering difficulties of a political or administrative nature.<sup>11</sup>

129. These historical facts are witnessed through a variety of sources submitted in evidence during the arbitral proceedings. A comprehensive evaluation of the evidence submitted by both Parties reveals the presence of deeply-rooted common patterns of behavior as well as the continuation, even in recent

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<sup>10</sup> See in this respect, Yehuda Z. Blum, *Historic Rights*, in 7 *Encyclopedia Of Public International Law* 120 *et seq.*; and *Historic Titles In International Law* 126-129 (1965)

<sup>11</sup> See in particular, Charles Forster, *The Historical Geography of Arabia*, vol. 1 at 113, vol. 11 at 337 (1984) (first published in 1844); Joseph Chelod et al., *L'Arabie du Sud - Histoire et Civilisation*, vol 1 at 63, 67-69, 252-255 (1984); Roger Joint Daguene, *Histoire de la Mer Rouge: De Moise a Bonaparte* 20-24, 86-87 (1995); and Yves Thoraval et al., *Le Yemen et la Mer Rouge* 14-16, 17-20, 35-37, 43-47, 51-54 (1995).

years, of cross-relationships which are marked by eventual recourse to professional fishermen's arbitrators (*aq'il*) in charge of settling disputes in accordance with the local customary law. Such understanding finds support in the statements attributed to fishermen from both coasts of the Red Sea, taken as a whole, which have been submitted by both Parties.

130. The socio-economic and cultural patterns described above were perfectly in harmony with classical Islamic law concepts, which practically ignored the principle of "territorial sovereignty" as it developed among the European powers and became a basic feature of nineteenth century western international law.<sup>12</sup>

131. However, it must be noted that the Ottoman Empire, which directly or through its sultans governed the quasi-totality of the countries around the Red Sea during the first half of the nineteenth century including *Bilad El-Yemen* and what became known thereafter as Eritrea, started after the end of the Crimean War in 1856 to abandon the communal aspects of the Islamic system of international law and to adopt the modern rules prevailing among the European concert of nations to which the Sublime Porte became a fully-integrated party during the Berlin Congress of 1875. According to this new modern international law, the legal concept of "territorial sovereignty" became a cornerstone for most of the state powers, and the situation in the Red Sea could no longer escape the juridical consequences of that new reality.

132. Hence, it is understandable that both Parties are in agreement that the islands in dispute initially all fell under the territorial sovereignty of the Ottoman Empire. Within the exercise of the Ottoman's sovereignty over these islands, it has to be noted that the Sublime Porte granted to the Khedive of Egypt the right to administer the Ottoman possessions (*vilayet*) on the African Coast which at present form "the State of Eritrea", and this delegation of power included jurisdiction over islands off the African Coast, including the Dahlaks and eventually the Mohabbakahs.

133. The sovereignty of the Ottoman Empire over both coasts of the Red Sea is undisputed up to 1880 and this remained the case with regard to the eastern, or Arabian, coast until the First World War. Among the various documents introduced in support of this historical fact, Eritrea has submitted the French-language version of a memorandum dated 6 December 1881, issued by the Egyptian Khedival Ministry of Foreign Affairs, which indicates that in May 1871, Italy recognized that the Ottoman flag had been flying since 1862 over the African Coast at a point going beyond the south of Assab. The Egyptian memorandum added that until 1880 the Egyptian Government believed the affirmation of the Italian Government that the Italian presence had been essentially of private and commercial character. Consequently, the entire African coast and the islands off that coast remained until then under the Khedive's

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<sup>12</sup> See in particular, A Sanhoury, *Le Califat*, 22, 37, 119, 163, 273, 320-321 (1926); Majid Kadouri, *Islamic Law*, 6 *Encyclopedia Of Public International Law*, 227 *et seq.*; and Ahmed S. El Koshery, *History of Islamic Law*, 7 *Encyclopedia Of Public International Law*, 222 *et seq.*

jurisdiction. At the same time, all other islands were, and continued to be, under the jurisdiction of the Ottoman *wali* stationed in Hodeidah and appointed by the Sublime Porte.

134. Hence, a clear distinction has to be made between the Red Sea islands which were under jurisdiction of the Khedive of Egypt acting on behalf of the Ottoman Empire until 1882 and the other Red Sea islands which remained under the Ottoman *vilayet* of Yemen until the dissolution of the Empire after the First World War.

135. A British Foreign Office Memorandum dated 10 June 1930, relying expressly on the Hertslet memorandum of 1880, indicates that the Khedive of Egypt exercised jurisdiction off the African coast over the "Mohabakah Islands, Harbi, and Sayal". With regard to the other category, the British Memorandum describes "the Great Hanish group as being off the Arabic Coast and consequently under the sovereignty and within the exclusive jurisdiction of the Sultan."

Paragraph 16 of the same Memorandum emphasized that:

Great Hanish, Suyal Hanish, Little Hanish, Jebal Zukar, Abu Ali, being nearer to the Arabian Coast, appear before the war to have been considered as under both the jurisdiction and sovereignty of Turkey.

136. Furthermore, Eritrea has submitted Italian Colonial Ministry documents, including a note dated October 11, 1916, entitled "The Red Sea Islands", reflecting the findings of an inquiry conducted on the islands themselves. After devoting Part I to "Farsan" and Part II to "Kameran", Part III of the note deals with "the other islands", which included what is referred to as "Gebel Zucur". This heading included not only the "group of 12 sizable rocks", but also "the two great and small Hanish Islands". With regard to these islands, it was noted that "[t]he Ottoman authorities kept a small garrison of 40 there under the command of a Mulazim to monitor the movement of important vessels to the Yemen Coast from Gibut", and further that, "faced with the difficulties of supplying water and victuals on account of a shortage of resources, the Ottoman authorities withdrew the garrison." After the bombardment of Midi by Italian warships, the Ottoman authorities are said to have "restored the garrison in 1909 and increased the number of askaris to 100."

137. These Italian colonial documents, which confirm Ottoman sovereignty over the Hanish Zuqar islands and assert that they continued in 1916 to be administered by the *vilayet* of Yemen, are consistent with the views expressed in a telegram addressed by the Governor of the Eritrean Colony to the Italian Minister of the Colonies and transmitted on October 18, 1916 to the Italian Minister of Foreign Affairs. A Foreign Ministry note entitled: "The Red Sea Islands", dating back to July 31, 1901, is attached thereto as "appendix II". The 1901 Note bases the division of the islands into three groups:

The most northerly islands, which are of little or almost not relation to the Colony of Eritrea on account of the distance, those facing Massaua and the most southerly islands which are opposite the Eritrean Coasts of Beilul and Assab. Almost all are found on the eastern coast of the Red Sea, except the Dahalac islands, which are under our rule, and a few others of much less importance.

With regard to the second group, the Italian note indicates:

Leaving aside the archipelago of the Dahalac islands—which is under the sovereignty of Italy and which include the biggest islands in the Red Sea—Cotuma, Diebel Tair and Camaran are notable in this second group of the archipelago; all of which under Turkish rule.

The note explicitly characterizes as “Turkish”: “Cotuma”, “Djebel...called Gebel Sebaïr” and “Camaran”.

Turning to the third group, the 1901 Italian note refers to a:

... group of islands known as Hanish or Harnish (Turkish). It comprises the islands of Gebel Zucar, large and small Hanish Islands and the other minor islands of Abu-ail, Syul-Hanish, Haycoc and Mohabbach, and a few islets amounting to large rocks.

138. Contemporary British documents also reflect the view that the islands in question, with the exception of Mohabbakahs, formed part of the *vilayet* of Yemen, and appear to link their future disposition to this historical attachment to the Arabian Coast.

139. A Foreign Office Memorandum dated 15 January 1917 and entitled “Italy and the Partition of the Turkish Empire” provides in paragraph 38:

Lastly, everyone seems to be agreed that the islands in the Red Sea which were previously under Turkish sovereignty pass naturally to the Arab State, though some special regime will be necessary in Kamaran Island in view of the pilgrim traffic.

140. Lord Balfour, in a 13 March 1919 letter to Lord Curzon, indicated that the solution envisaged for “Abu Ail, Zabayir and Jebel Teir” as well as “Kamaran, Zukur and the Hanish Islands (Great Hanish, Little Hanish and Suyul Hanish group)” was either “to annex them” to the British Empire or “to claim that they should be handed over to some independent Arab rulers on the mainland other than the Imam of Sanaa or the Idrisi.”

141. Lord Curzon’s letter addressed to Lord Balfour on 27 May 1919 linked the subject of any handover to Arab rules with the essentially political question of the area’s future, “the whole question of the future of the Red Sea Islands” was to be considered “ultimately bound with that of the future status of Arabia.” Therefore, Lord Curzon indicated that:

[t]he policy of his Majesty’s Government should in the first place be directed towards the recognition by the High Contracting Parties of the fact that the islands form a part of the mainland and will accordingly become the property of the Arabian rulers concerned; and that these rulers are to be in special relation with His Majesty’s Government.

142. As will be expanded upon later, the allocation of administrative powers over the Red Sea islands, whether by the Ottoman Empire acting as sovereign power on both coasts or only as exercising jurisdiction from the Arabian Coast alone, represents an historic fact that should be taken into consideration and given a certain legal weight.

143. Before leaving this study of the historical considerations, it is necessary to recall the question of ancient or historic Yemeni title, to which Yemen gave such crucial importance in the presentation of its case. It has been explained in this chapter that there are certain historical problems about this argument. First, there is the historical fact that medieval Yemen was mainly a mountain entity with little sway over the coastal areas, which were essentially dedicated to serving the flow of maritime trade between, on the one hand,

India and the East Indies, and on the other, Egypt and the other Mediterranean ports. Second, the concept of territorial sovereignty was entirely strange to an entity such as medieval Yemen. Indeed, the concept of territorial sovereignty in the terms of modern international law came late (not until the nineteenth century) to the Ottoman Empire, which claimed, and was recognized as having, territorial sovereignty over the entire region.

144. But there are other problems with the Yemeni claim to an ancient title, in particular the effect of article 16 of the Treaty of Lausanne and the necessity of establishing some doctrine of continuity of ancient title and of reversion at the end of the Ottoman Empire. This subject is explored in detail in the following chapter, and the final view of the Tribunal on this question of ancient title is expressed in chapter X.

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Chapter V. *The legal history and principal treaties and other legal instruments involved; questions of State succession*

145. The series of major instruments engaging, in various combinations, the maritime users of the Red Sea form an important backdrop to the legal claims of the parties in this arbitration. Their binding nature or otherwise, their status as directly legally significant or as *res inter alios acta*, and the meaning of their terms, have all engaged the attention of the Parties.

146. The so-called Treaty of Da'an of 1911 was in fact an internal instrument by which the Imam of Yemen obtained for himself greater internal powers of autonomy within the Ottoman Empire. However, sovereignty over all the Ottoman possessions, including the islands in dispute, remained vested in the Empire itself until it was legally divested of its Arabian possessions after the First World War.

147. The Principal Allied Powers (the British Empire, France, Italy and Japan) agreed at Mudros an armistice with Turkey on 30 October 1918. The 1918 Armistice of Mudros was a vehicle for ending hostilities and indeed for permitting belligerent occupation. It was not an instrument for the transfer of territory. It is not disputed that immediately before the signing in these proceedings that Ottoman title had been secured by military occupation, which was lawful by reference to the international law of the day. An essential component of sovereign title is the right to alienate. Just as the Ottoman Empire would have been free to cede title to the islands to a third state at any time during the period 1872 to 1918, so it still had the legal right itself to determine where title should go after 1918. Its freedom in this regard was curtailed not by the operation of a doctrine of reversion which would spring into operation upon any divesting of title by Turkey, but by the realities of power at the end of the War.

148. It cannot be the case therefore that title passed in 1918 to the Imam. Accordingly the Tribunal is not able to accept that sovereignty over the islands in dispute reverted to Yemen.

149. It was intended that a treaty of peace, containing the future settlement of Turkish territory in Europe and elsewhere, should follow the 1918 Armistice of Mudros. To that end, the Principal Allied Powers (forming together with Armenia, Belgium, Greece, the Hedjaz, Poland, Portugal, Roumania, the Serb-Croat Slovene State and Czechoslovakia the "Allied Powers") on the one hand, and Turkey on the other, signed a Treaty of Peace at Sevres on 10 August, 1920. The long and detailed provisions contained but a single clause that might have had application to the islands in the Red Sea in dispute in the present case. Article 132 provided:

Outside her frontiers as fixed by the present Treaty Turkey hereby renounces in favour of the Principal Allied Powers all rights and title which she could claim on any ground over or concerning any territories outside Europe which are not otherwise disposed of by the present Treaty.

Turkey undertakes to recognize and conform to the measures which may be taken now or in the future by the Principal Allied Power in agreement where necessary with third Powers, in order to carry above stipulation into effect.

150. In the event, the Treaty of Sevres was not ratified by Turkey and did not enter into effect. Accordingly, title to the Red Sea islands in dispute must thus have remained with Turkey—even though it knew that it would in due course be required to divest itself of such title. Indeed, Great Britain had been occupying certain islands since 1915 to forestall Italian activity, and had been displaying the flag but without claiming title.

151. The initial position of Great Britain at the peace talks at Sevres was that the islands lying east of the South West Rocks off Greater Hanish island should be placed under the sovereignty of the independent chiefs of the Arabian mainland. The British appreciated that reasons of history and geography would make the Arab mainland rulers strong claimants when Turkey finally relinquished title and future sovereignty had to be determined, and indeed that their desire to exclude any European Power from establishing themselves on the east coast would make the passing of title to a "friendly Arab ruler" a desirable outcome.<sup>13</sup> But that is a different matter from title passing automatically by reversion from Turkey to Yemen. In the event, a different proposal was agreed in article 132 of the Treaty of Sevres.

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<sup>13</sup> Compare the policy objective that was explored by the Foreign Office for the islands of Sheikh Saal, Kamaran, and Farsan, and for Hodeidah, namely occupation. In the event, a 1915 telegram from the Viceroy of India indicates that the British flag had been hoisted on Jabal Zuqar and the Hanish Islands. These events were characterized, in a message to the Foreign Office from the British Resident in Aden as a "temporary annexation". By 1926 Britain did not regard itself as holding sovereign title.

152. Much has been made by Yemen of the fact that throughout the years that ensued, the Imam protested to Great Britain that “the islands” had not been returned. These “islands” were not specified. While this may indeed support allegations of the existence of a Yemeni claim, there is no evidence that it was either intended, or interpreted, to include the islands in dispute in the present case. Furthermore, a state’s protests about the refusal of others to allow it to exercise effective control over what it maintains in its own territory have little legal significance if the protesting state does not, in fact, have title. More relevant is the fact that Turkey undoubtedly had title in 1918 and failed to divest itself in 1920. The instrument by which it did finally divest itself was the Treaty of Lausanne in 1923.

153. The Imam was not a party to the Treaty of Lausanne and in that technical sense the Treaty was *res inter alios acta* as to Yemen. If title had lain with Yemen at that time, the parties of the Treaty of Lausanne could not have transferred title elsewhere without the consent of Yemen. But, as indicated above, title still remained with Turkey. Boundary and territorial treaties made between two parties are *res inter alios acta vis-à-vis* third parties. But this special category of treaties also represents a legal reality which necessarily impinges upon third states, because they have effect *erga omnes*. If State A has title to territory and passes it to State B, then it is legally without purpose for State C to invoke the principle of *res inter alios acta*, unless its title is better than that of A (rather than of B). In the absence of such better title, a claim of *res inter alios acta* is without legal import.

154. These are the legal realities with which an analysis of the Treaty of Lausanne must be approached. Two further realities are, as stated just above, that the Imam had asserted claims during this period though without specify as to which particular islands his claims attached, and that Italy, by its conduct, had also revealed its aspirations for the islands. The formulation of the Treaty of Lausanne was undoubtedly agreed upon in full knowledge both of the position of the Imam and the ambitions of Italy.

155. Great Britain (which had briefly in 1915 sent troops to Jabal Zuqar and the Hanish Islands) had been interested at one stage in an amendment to article 132 of the Treaty of Sevres which would have added to the rather general Turkish renunciation of all “rights and title” a specific clause which referred to “any islands in the Red Sea”. As the first paragraph of this proposal referred to rights and title in the Arabian peninsula, it may be assumed that Great Britain thought the islands were not encompassed in that reference, but that some particular provision was needed if they too were to pass out of Turkish title. The Treaty of Lausanne, signed in 1923, did make reference to islands as well as to territories though by now the earlier proposal that underlay the abortive Treaty of Sevres (that Turkish title should pass to the Allied Powers,<sup>14</sup> whether as a condominium or otherwise) was dropped.

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<sup>14</sup> The Treaty of Lausanne, entered into five years after the end of hostilities, in fact uses the term “High Contracting Parties” rather than Allied Powers. Those High Contracting Parties were the British Empire, France, Italy, Japan, Greece, Roumania and the Serb-Croat Sloven State on the one hand, and Turkey on the other.



156. Article 6 provided that, in the absence of provisions to the contrary, islands and islets lying within three miles of the coast are included within the frontier of the coastal state. While some of the Dahlaks and some of the Assab islands would have been fallen outside the three-mile limit, they were generally regarded as appurtenant to the African littoral and thus belonging to Italy. The Mohabbakahs (the nearest being almost six miles away) and the Haycocks did not fall within the provisions, though, as will be shown below, Italian *jurisdiction* over them had been acknowledged. Whether or not the Mohabbakahs are islets rather than islands, and notwithstanding that article 6 refers to islets, whereas article 16 did not, the Mohabbakahs were not islets transferred to Italian title by virtue of article 6.

157. Article 15 provided for the renunciation, in favour of Italy, of certain specified and named islands in the Aegean. article 16 provided as follows:

Turkey hereby renounces all rights and title whatsoever over or respecting the territories situated outside the frontiers laid down in the present Treaty and the islands other than those over which her sovereignty is recognized by the said Treaty, the future of those territories and islands being settled or to be settled by the parties concerned...

158. Although “territories” and “islands” are separately mentioned, their treatment under article 16 is identical. These phrases presumably covered also those islets not transferred by operation of article 6. What was intended by the “parties concerned” is not wholly clear, but given further that the phrase used elsewhere in the Treaty is “The High Contracting Parties”, it is not unreasonable to conclude that what was envisaged was a settlement of the matter in the future by all those having legal claims or high political interest in the islands, whether Treaty of Lausanne High Contracting Parties or not. A 1923 British Foreign Office document acknowledges, for example, the likelihood of France, Italy and Yemen being “interested parties”. This interpretation accords with the assurances that Italy gave the Imam, at the time of the signature of the 1938 Anglo-Italian Agreement, that Yemen’s “interests” had been “kept in mind”, and with the working assumptions of the British Board of Trade with respect to the 1923 Treaty of Lausanne, that the “local Arab rulers on the mainland might put in their claim to be ‘interested’ parties”.

159. It is not certain whether in 1923 either Great Britain or Italy would have regarded the reference to islands in the Red Sea over which Turkey had title as including the Haycocks. This was because Italian jurisdiction in those islands had already been acknowledged. Until the very end of the nineteenth century the Ottomans treated those living in Eritrea as being of Turkish nationality and subject to the Ottoman jurisdiction. But certain accommodations were being reached. Italy had in 1883, 1887, and 1888 entered into a series of agreements with local Eritrean leaders. The Treaty of 1888 with the King of Shoa provided that “Italy will protect on the sea coast the safety of the Danakil littoral.” (art. VIII) and that “Italy will watch over the security of the sea and the Colony” (art. IX). By article V, the Sultan Mohammed Hanfari ceded to Italy “the use of the territory of Ablis”. In 1887 a further treaty, which seems to have no special relevance for the matters at issue, was signed. In 1888 a Treaty of Friendship and Commerce between Italy and the Head of the Danakils provided that Italy would guarantee the security of the Danakil coast. Further

“The Sultan Mohamed Anfari recognizes the whole of the Danakil coast from Afila to Ras Dumeira as an Italian possession” (article III). As a British Foreign Office Memorandum in 1930 was later to put it “...the Italian rights of surveillance drifted into what was tantamount to territorial rights to the littoral” and Great Britain, having made no protest, “could not now fall back upon the terms of the Agreement of May 1887.”

160. Exploring the possibility of a new shipping route on the African side of the Red Sea, and the need to light it, the British government wrote to the Italian government in 1892 referring to the proposed site: North East Quoin (or alternatively Rahamet, on the coast), South West Rocks, “one of the Haycocks” and Harbi—and suggested that under article 111 of the 1888 Treaty they appeared to be within the jurisdiction of Italy (though doubt was expressed internally about South West Rocks). It seems likely that this reading of article III of the 1888 Treaty—which is not on its face self-evident—was influenced by the Hertslet memorandum of 1880 and its attached list. That Memorandum spoke of the western coast of the Red Sea as being under the jurisdiction of the Khedive of Egypt and the east coast as under the jurisdiction of the Sultan. Hertslet suggested that “the various islands and reef in close proximity to the coast, and which are enumerated in List 1, would appear to be under” the Khedives jurisdiction. List 1 includes “Harbi”, White Quion Hill, and “Mah-hab-bakah”. The “Jibbel Zukur”, “Little Harnish”, and “Great Harnish” groups are attributed to the Eastern coast. “Haycock” appears twice within the list of islands appurtenant and in proximity to the east coast. As to the islands “near the centre” (listed by Hertslet as “Jibbel Teer” and the “Zebayar Group”), including a further Haycock, Hertslet in 1880 thought that “jurisdiction over the islands ... would appear to be doubtful; but the sovereignty over them no doubt belongs to the Sultan.”

161. It must also be noted that others within the British diplomatic service placed less weight on proximity.<sup>15</sup> Italy was asked whether it did indeed claim jurisdiction. Italy confirmed that “the places mentioned” were subject to its own jurisdiction. British recognition of Italian jurisdiction over the Haycocks (and presumably *a fortiori* of the Mohabbakahs) occurred in 1892. In 1930, internal British memoranda speak of Italian sovereignty over South West Haycock (or sometimes, simply “the Haycocks”) as having occurred in June 1892. But it was added “[e]xcept *as against ourselves*, the Italian claim to sovereignty over these islands does not appear to be very strong” (emphasis added).

162. Later evidence indicates that Great Britain regarded the issue of sovereignty as unsettled, even in Italian jurisdiction was acknowledged. Both the Mohabbakahs and the Haycocks would thus in 1923 be regarded by the Lausanne Treaty parties as Turkish territory falling, as to sovereignty, within the reach of article 16, notwithstanding intermittent acceptance that they were under the jurisdiction of Italy.

163. The situation is clear as regards Abu Ali, Jabal al-Tayr and the Zubayr group. They were envisaged at the time as having belonged to the Ottomans (but as never having previously been claimed by the Imam). These three islands fell under the terms of article 16 of the Treaty of Lausanne.

<sup>15</sup> See Reilly, *Aden And Yemen*, Colonial Office 1960, 69-70

164. There are three key points at issue in respect of article 16. The first is the legal implications of it being *res inter alios acta* in respect of Yemen. The second is what islands in fact fell under this provision, i.e., were still under Ottoman sovereignty up to the date of the Treaty. The Tribunal has addressed these points above (see para. 153-159). And the third is whether article 16 either permitted acquisitive prescription by a single state of some or all of these islands and if not, whether such acquisitive prescription could and did nonetheless occur (even if in violation of a treaty obligation).

165. The correct analysis of article 16 is, in the Tribunals' view, the following: in 1923 Turkey renounced title to those islands over which it had sovereignty until then. They did not become *res nullius*—that is to say, open to acquisitive prescription—by any state, including any of the High Contracting Parties (including Italy). Nor did they automatically revert (insofar as they had ever belonged) to the Imam. Sovereign title over them remained indeterminate *pro tempore*. Great Britain certainly regarded it as likely that some undefined islands which “pertained to Yemen” were covered by article 16. Indeterminacy could be resolved by “the parties concerned” at some stage in the future—which must mean by present (or future) claimants *inter se*. That phrase is incompatible with the possibility that a single party could unilaterally resolve the matter by means of acquisitive prescription.

166. Given the Great Power politics in the region, the application of these legal principles was inevitably sometimes less than clear. Great Britain in fact secured jurisdiction over Kamaran island in this fashion; the records show that British civil servants and ministers over the years continued to entertain notions of appropriation of particular islands; but Great Britain was at pains to ensure the continued efficacy of article 16 so far as Italian acts were concerned, through frequent enquiries to the Italian Government.

167. The islands to which the article 16 proviso applied at the outset were therefore the Mohabbakahs, the Haycocks, South West Rocks, and certainly the Zuqar–Hanish group. Abu Ali, Jabal al-Tayr and the Zubayr group.

168. Far from the Treaty of Lausanne, “paving the way” for Italian sovereignty, as has been suggested by Eritrea, it presented a formidable obstacle. It is arguable that acquisitive prescription might nonetheless have been effected by Italy in the face of its obligations should the other parties to the Treaty of Lausanne have so allowed. Italy would have tried to secure the most favourable position, both on the ground and in diplomacy, for that day in the future when title would be determined. In terms of political aspiration, *animus occupandi* undoubtedly existed. But whether claims to sovereignty were made and acknowledged, so that certain islands would be effectively *au dehors* the reach of article 16 of the Treaty of Lausanne, must be doubtful. Still less plausible is the contention that the High Contracting Parties (and Great Britain in particular) would have allowed, or acquiesced, in an incremental assumption of sovereignty by Italy.

*The 1927 Rome conversations*

169. This conclusion is confirmed by the history following the Treaty of Lausanne. In 1927, conversations took place in Rome between the Italian Government and the British Government relating to British and Italian interests in Southern Arabia and the Red Sea (“the Rome Conversations”). In the signed record they agreed to cooperate in seeking to secure the pacification of Ibn Saud, the Imam Yahya and the Idrisi of Asir; and noted that Great Britain regarded it as “a vital imperial interest that no European Power should establish itself on the Arabian shore of the Red Sea, and more particularly on Kamaran or the Farsan islands, and that neither ... shall fall into the hands of an unfriendly Arab Ruler.” This proviso was repeated, *pari passu*, in respect of the west coast and Kamaran and the Farsan islands.

170. No such specific reference was made to the other islands now in dispute. Whereas articles 4 and 6 apply to Karman and Farsan, article 5 must, in the view of the Tribunal, be taken to apply to the other islands in dispute. Article 5 provided:

that there should be economic and commercial freedom on the Arabian coast and the islands of the Red Sea for citizens and subjects of the two countries and that the protection which such citizens and subjects may legitimately expect from their respective governments should not assume a political character or complexion.

171. This article can only be understood to mean that acts which might otherwise be construed as providing an incremental acquisition or sovereignty were by the agreement of the parties not to be so construed. To seek to identify acts “having a sovereign character” thus became without legal purpose.

172. Eritrea has argued that no legal weight is to be given to these provisions, in the first place because this record was not registered under article 18 of the Covenant of the League of Nations and in the second place because it cannot be invoked by Yemen, either for that reason or because it was *res inter alios acta*. That this was not registered was undoubtedly because it was not regarded as a treaty between states. But it was nonetheless an accurate account of what both parties had agreed and was signed by them as such. It is simply evidence of the thinking of the time—this time by both parties – in much the same way as the Tribunal has been presented with a myriad of other evidence in non-treaty form. Insofar as Yemen wishes to draw it to the attention of the Tribunal, it is not relying on a treaty that is *res inter alios acta*, nor indeed resting its own claim on it. It is diplomatic evidence, like any other, but of an undoubted interest because it reflects what was recorded by both parties as that which they had agreed to.

173. The provisions of article 5 of the Rome Conversations were, of course, fully consistent with article 16 of the Treaty of Lausanne, and indeed reinforced it. The former did not replace the latter but rather provided a further mechanism for assuring that fishing, commercial and navigation-related activities could continue without the indeterminate status of the islands being jeopardized.

174. Italy and Great Britain each now sought to ensure that sovereignty was indeed reserved. When Great Britain proposed to France certain arrangements concerning the management of the old Ottoman lighthouses at Abu Ali,

Jabal al-Tayr, Centre Peak and Mocha, Italy asked for acknowledgment that the last belonged to Yemen and that sovereignty was reserved as to the first three islands. Great Britain was able to provide this. And when it was learned in London that Italy was preparing to build a lighthouse on South West Haycock (which it thought of as part of the Mohabbakahs) Great Britain sought assurance that the Haycocks as well as the Hanish Islands were indeed viewed by Italy as falling under article 5 of the Rome Conversations. Italy in 1930 informed Great Britain that it had sovereignty over South West Haycock, regarding which it made a specific reservation, that it lay in the Mohabbakahs, that it was prepared for South-West Haycocks and the rest of the Hanish Islands to be treated in accordance with article 5 of the Rome Conversations. The British reaction was not to take up the offer of talks from Italy, lest Italy should seek to have its sovereignty over South West Haycock "settled" within article 16 of the Treaty of Lausanne, but rather tacit acceptance that everything should be treated under the framework of article 5 of the Rome Conversations.

175. In 1931, further assurances were received from Italy over its establishment of armed posts on Greater Hanish, and Jabal Zuqar. Italy assured Great Britain that these posts were for the protection of concessionaires and that sovereignty over the Hanish Islands remained in abeyance. The judicial status of these islands was said to be the same as that of Farsan and Kamaran in the Rome Conversations of 1927. Further, Italy recalled that it had in 1926, during the negotiation of the abortive Lighthouse Convention of 1930, confirmed that sovereignty over Abu Ali, Zubayr and Jabal al-Tayr was equally to remain in abeyance, falling also under article 5 of the Rome Conversations.

176. These assurances were also to be sufficient for the British authorities in the face of a 1933 incident in which HMS Penzance visited Jabal Zuqar and Hanish, noting, *inter alia*, the presence of Italian soldiers and the flying of the Italian flag. Great Britain, in the meantime, was providing comparable assurances regarding Kamaran.

177. The Italian Royal Legislative Decree No. 1019 of 1 June 1936 made arrangements for the administration of Italian East Africa. It provided, *inter alia*, in its article 4, that the territory of Dankalia was constituted by reference to a line from the lowlands to the east of Lake Ascianghi at the southern limit of Aussa and was part of Eritrea. Although no islands were named in terms, the specifying of the lines which constituted these administrative boundaries brought the Hanish-Zuqar group within the commissaryship of Dankalia. None of the line-drawing provided for by Decree 1019 covered Abu Ali, Zubayr or Jabal al-Tayr.

178. This was affirmed in terms by General Government Decree No. 446 of 20 December 1938: "the Hanisc-Sucur Islands are deemed to be included within the bounds of the Commissaryship of the Government of Dancalia and Aussa (Assab)." In the view of the Tribunal these administrative arrangements cannot, in the light of the Rome Conversations and subsequent assurances, be regarded as international claims to sovereignty, rather than as to jurisdiction. Nor would they have been regarded as such by Great Britain. And only eight months beforehand Italy had assured the Imam that it had undertaken with Great Britain not to extend its sovereignty to the Hanish Islands (and that it had been able to secure the dispatch of an Italian doctor to Kamaran on that basis).

179. At the same time, Italy unsuccessfully asked Great Britain to revoke its own Decree regarding Karmaran, which Italy regarded as upsetting the status quo agreement reached in 1927. At the same time, Great Britain did continue to regard the sovereignty over Kamaran as reserved.

180. Italy, which had been recognized independent Yemen in 1926, entered into a treaty of Amity and Economic Relations with that country in September 1937. While Italy confirmed unconditionally its "recognition of the full and absolute independence, without restrictions" of the King of Yemen and his Kingdom, the Tribunal cannot view this as illuminating the current problems.

181. Developments in Yemen and Saudi Arabia, including their relations with each other, made Italy and the United Kingdom believe that matters should be clarified further. After several months of negotiation there was signed on 16 April 1938 an Agreement and Protocols which entered into effect on 16 November 1938. Annex 3 of the Agreement included detailed dispositions of relevance to the Red sea islands:

*Article 1*

Neither Party will conclude any agreement or take any action which might in any way impair the independence or integrity of Saudi Arabia or of the Yemen.

*Article 2*

Neither Party will obtain or seek to obtain a privileged position of a political character in any territory which at present belongs to Saudi Arabia or to the Yemen or in any territory which either of those States may hereafter acquire.

*Article 3*

The two Parties recognize that, in addition to the obligations incumbent on each of them in virtue of articles 1 and 2 hereof, it is in the common interest of both of them that no other Power should acquire to seek to acquire sovereignty or any privileged position of a political character in any territory which at present belongs to Saudi Arabia or to the Yemen or which either of those States may hereafter acquire, including any islands in the Red Sea belonging to either of those States, or in any other islands in the Red Sea to which Turkey renounced her rights by article 16 of the Treaty of Peace signed at Lausanne on 24 July 1923. In particular they regard it as an essential interest of each of them that no other Power should acquire sovereignty or any privileged position on any part of the coast of the Red Sea which at present belongs to Saudi Arabia or to the Yemen or in any of the aforesaid islands.

*Article 4*

(1) As regards those islands in the Red Sea to which Turkey renounced her rights by article 16 of the Treaty of Peace signed at Lausanne on 24 July 1923, and which are not comprised in the territory of Saudi Arabia or of the Yemen, neither Party will, in or in regard to any such island:

- a. Establish its sovereignty, or
- b. Erect fortifications or defences.

(2) It is agreed that neither Party will object to:

- a. The presence of British officials at Kamaran for the purpose of securing the sanitary service of the pilgrimage to Mecca in accordance with the provisions of the Agreement concluded at Paris on 19 June 1926, between the Government of Great Britain and Northern Ireland and of India, on the one part, and the Government of the Netherlands, on the

other part; it is also understood that the Italian Government may appoint an Italian Medical Officer to be stationed there on the same conditions as the Netherlands Medical Officer under the said Agreement;

b. The presence of Italian officials, at Great Hanish, Little Hanish and Jebel Zukur for the purpose of protecting the fishermen who resort to those islands;

c. The presence at Abu Ail, Centre Peak and Jebel Teir of such persons as are required for the maintenance of the lights on those islands.

182. The Ministry of Foreign Affairs of Italy had, in an internal Note of 31 March, made clear that the formula being negotiated would confirm that the Red Sea islands formerly under Turkish sovereignty “belong neither to Great Britain, Italy or the two Arab States, but remain of reserved sovereignty”. An accompanying list of islands “of reserved sovereignty” indicated that Kamaran, Abu Ali and Jabal al-Tayr were at the time under British occupation, and described as occupied by Italy: Greater Hanish, Jabal Zuqar, Centre Peak, and Lesser Hanish. South-West Haycock is not listed in the Italian Foreign Ministry Note as coming within this arrangement, notwithstanding the assurances on this point given to Great Britain in 1930 regarding understanding reached during the 1927 Rome Conversations. In the Treaty of 1938 itself, however, the islands agreed to fall within its provisions are not specified. Nor is there any reflection of an internal British proposal that the termination of the 1927 Rome Conversations be made clear.

183. It would seem that the 1938 Treaty is to be seen not as replacing but as supplementing and expanding the 1927 undertakings (always less than a formal treaty), the “political character and complex formula of the latter having been found unsatisfactory.” The Rome Treaty was never registered with the League of Nations and by virtue of article 18 of the Covenant could not be invoked by either party against the other. More relevant to Yemen is the fact that it is a third party to the treaty. There is no evidence, however, that either Italy or the United Kingdom failed to proceed with registration for any reason other than the approaching war clouds. The text of the treaty still has significance, which the Tribunal may properly take account of, as to the understanding of the parties in the autumn of 1938 regarding the current position of the islands and their intention at that moment as to how they should continue to be treated. No change is to be discerned from the essential thrust of what had gone before: claims were to remain inactive. The islands were not *res nullius* to be acquired by Italy or Great Britain.

184. The wording of article 3 is not without its ambiguities. What it does show is that, on the one hand, there *were* some islands in the Red Sea regarded in 1938 as belonging to Saudi Arabia and to Yemen. It also shows, on the other hand, that there were other Red Sea islands regarded as belonging to neither, and whose title was still indeterminate.

185. As article 4 clearly and specifically refers to Kamaran, Greater Hanish, Little Hanish, Jabal Zuqar, Abu Ali, Centre Peak and Jabal al-Tayr as not being under the sovereignty of Saudi Arabia or Yemen, it is uncertain what islands were regarded as “at present belong[ing] to Yemen”. In any event, Italy and the United Kingdom did not in 1938 regard title to any of the named islands as belonging to Yemen or as having been settled within the terms of article 16 of the Treaty of Lausanne; and they each undertook not to establish

sovereignty thereon. There is nothing in the record to show that the term “establish” in article 4 was intended to mean other than “acquire” or “seek to acquire” sovereignty, as used in article 3, through the various acts referred to in the Treaty, especially fortifications. It may be concluded that the 1938 Treaty evidences no recognition by Italy or Great Britain of any Yemeni title to the disputed islands. But at the same time the Treaty expressly excluded any Italian claims of sovereignty thereto.

186. The consequence of this series of international instruments and engagements was that from 1923 to 1938 Italy could make no claim that it already had a title that must be recognized. The only clear claim to sovereign title was to South West Haycock—but even that claim to an existing title was to be treated, at Italy’s own suggestion, as “in abeyance” until title to the islands generally should later be settled by the parties concerned under article 16 of the Treaty of Lausanne.

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187. As for Yemen, it in turn made sporadic claims to Red Sea islands during this period, in general and unspecified terms. While Great Britain had assured Yemen that Italy’s lighthouse activities did not prejudice Yemen’s positions, neither it nor Italy regarded the islands as being within Yemen’s ownership up to 1938. As the Treaty of Lausanne provisions had been the mechanism by which the Ottoman Empire divested itself of ownership of these islands, that fact is not wholly without significance for Yemen, which, even putting the argument in its own terms, has to show not only a right of reversion but also that such a right overrode the decision that the previous sovereign had been obliged to make as to the future of the islands.

188. In 1933 Great Britain was in fact negotiating a Treaty with the Imam. The view was expressed within the Foreign Office that Yemen had legally been part of the Ottoman Empire and “any islands pertaining to it” were “fully covered by article 16 of the Treaty of Lausanne and the disposal was therefore a matter for international agreement.” Contrary to the submissions of Yemen, this does not clearly assume Yemeni title—it assumes that what had been sovereign had now become indeterminate, until title was attributed by the “interested Parties”.

189. The islands claimed by the Imam during the negotiation with the United Kingdom for the Treaty of Friendship and Mutual Cooperation of Sanaa of 1934 were without specific identification, but they were clearly later understood by the British to have meant Kamaran and the various unoccupied islands, the largest of which are Zuqar and Greater Hanish. The assertion of that claim was acknowledged although it was not reflected in the text of the Treaty and the refusal of the British Government to do more was made clear to the Imam.

190. As neither Italy nor Yemen held sovereign title at the outbreak of the Second World War, all the islands (save perhaps South West Haycock and the Mohabbakahs) may be assumed to have fallen within the relinquishment



provisions that Italy was obliged to accept. This conclusion is also supported by an examination of the documents relating to the years 1941-50.

191. The 1941 Proclamation of British Military Jurisdiction brought under the command of Lieutenant-General Plan “[a]ll territories in Eritrea and Ethiopia”. This wording seems to the Tribunal neither “broad” nor indeed “narrow”, but merely general and uninformative geographically and legally. The Armistice did speak of the “[i]mmEDIATE surrender of Corsica and of all the Italian territory, both islands and mainland, to the Allies ...” (para. 6). But what islands are there referred to is wholly uncertain; the explanation in article 41 of the “Additional Conditions of Armistice” with Italy that “the term ‘Italian territory’ includes all Italian colonies and dependencies ... (but without prejudice to the question of sovereignty) ...” carries things no further. The phrase remains question-begging and in addition carries a specific caveat. Armistice agreements are instruments directed to stopping or containing hostilities and not to acknowledging or denying sovereign title.

192. In 1944 the British Colonial Office conducted an internal assessment on the status of Kamaran, the Great Hanish group, the Little Hanish group, the Jabal Zuqar group (including Abu Ali), the Zubayr group (including Centre Peak), and Jabal al-Tayr. In correspondence the history was briefly recounted, and it was recalled that under article 16 of the Treaty of Lausanne “their future was to be settled by the ‘parties concerned’. It never has been. They are in fact international waifs.” The letter continued: “Once upon a time the Italians were interested in all these islands.” It was thought that the Dutch now had some interest.<sup>16</sup> “Apart from the British, however, the most serious claimant seems to be the Yemen, off whose coast all the islands lie.” The claims of the Imam in 1934 were recalled.

193. The author of the letter (a civil servant within the Colonial Office) suggested that matters could be left as they were; or tidied up “in the same way”; or the UK could annex the islands.

194. Leaving aside the assessment of all the islands as “off Yemen’s coast” or the assumption, without legal analysis, that they were free for annexation, the letter evidences what seemed to be a widely-held view within the British Government that sovereignty over these islands remained unsettled within the terms of article 16 of the Treaty of Lausanne.

195. By 1947 the question of title had, of course, to be faced in the Treaty of Peace with Italy. Under article 23 Italy renounced “all right and title to the Italian territorial possessions in Africa, i.e., Libya, Eritrea and Italian Somaliland.” The third paragraph of that provision then provided:

The final disposition of these possessions shall be determined jointly by the Governments of the Soviet Union, of the United Kingdom, of the United States of America, and of France within one year from the coming into force of the present Treaty ...

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<sup>16</sup> The Dutch had not been signatories to the 1923 Treaty of Lausanne and had in fact remained neutral in the First World War.

That this did not refer to the islands here in issue is made fully clear by article 43, which provides:

Italy hereby renounces any rights and interests she may possess by virtue of article 16 of the Treaty of Lausanne signed on July 24, 1923.

Both the placement of this article (at a point distant from article 2) and the very need for such a provision made it clear that the disputed Red Sea islands did not fall to be disposed of under article 23 (3). This provision was not meant to operate as a revision or renunciation, by parties other than Italy, of article 16 of the Treaty of Lausanne.

196. Instead, article 16 of the Treaty of Lausanne remained intact. Italy was now obliged to renounce “any rights and interests” under it. This refers not merely, as has been submitted by Yemen, to Italy’s right to protest at a purported acquisition by another to be party eventually to a settlement of title. It refers also to a renunciation of any claims Italy might have made and any legal interests she might have asserted regarding the islands.

197. A United Nations working paper drawn up in December 1949 in connection with the preparation of the draft Eritrean Constitution supports the view that the Hanish, Zuqar and more northerly islands were not among those to be settled (and eventually affirmed as passing to independent Eritrea). The section on the Geography and History of Eritrea says that the Italian colony “includes the Dahlak archipelago off Massawa, and the islands further south off the coast of the Danakil country.” This would seem to refer to those Mohabbakahs in proximity to Assab. The section that recalls the “attempts to colonize the highlands of Eritrea” makes no reference to any colonization of the islands.

198. The Ministry of Foreign Affairs of Ethiopia did protest when it commented on the draft constitution. It pointed out that the language used in article 2 of the draft Constitution “would impliedly exclude all archipelagos and islands off the coast. Surely, this exclusion was not intended.” The constitution in its finally accepted form stated that “the territory of Eritrea, including the islands, is that of the former colony of Eritrea.”\* That formulation does not indicate whether the islands referred to were other than those of the Dahlak archipelago and the Mohabbakas.

199. The Italian Government had also been invited to express its opinions on the future of Eritrea to the United Nations Commission on Eritrea. Italy urged independence for Eritrea, emphasising that its renunciation of all title did not make Eritrea a *res nullis*. It spoke of the regions that had been occupied by Italy to establish Eritrea. In that context, reference was made to the Dahlak islands. In urging the continued unity of Eritrea no mention was made of any other islands. None of the rapidly ensuing instruments – the British Military Authority (BMA) Termination of Powers Proclamation of 1952, or the revised Constitution of Eritrea of 1955, changed matters.

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\* These two sentences replace the last sentence in the original award pursuant to a correction by the Tribunal. See the letter from Sir Robert Y. Jennings, President of the Tribunal, dated 9 November 1998, addressed to His Excellency Hailo Weldense, Foreign Minister of Eritrea. The letter is filed in the Permanent Court of Arbitration, Peace Palace.

Chapter VI. *Red Sea lighthouses*

200. The Red Sea lights bear on this arbitration in three main ways. First, each of the parties has at various moments suggested that its establishment or maintenance of lighthouses on the various islands constitute of acts of sovereignty. Second, the diplomatic correspondence relating to the lighthouses might throw some light on the underlying claims to the islands where they are located, not least because the lighthouse islands were necessarily named. So much of the other material relates to islands without specifications. Third, the relationship between the several lighthouse conventions and the provisions of article 16 of the Treaty of Lausanne might have some legal significance.

201. From the late nineteenth century the Red Sea lights have had an historical importance in this region, although this is now somewhat reduced with the advent of radar. But radar may not be available to many of those fishing in the Zuqar–Hanish Islands. The Ottoman authorities, and later the various coastal states, along with the major shipping users, have all played a role in the story of the Red Sea lights. In 1930, a proposed treaty regime for the lights was drawn up, but never came into force. From 1962 until 1989, a treaty regime did indeed govern the lights.

202. In 1881, the Ottoman Empire granted a forty-year concession, to the *Société des Phares de l'Empire Ottoman*, owned by Messieurs Michel and Collas, to build a series of lighthouses in the Red sea and the Persian Gulf. Almost endless disputes were to arise regarding the concession for the Red Sea lighthouses.

203. The British Government had proposed to the Sublime Porte that four lights should be erected at Jabal al-Tayr, Abu Ail, Jabal Zubayr and at Mocha, to assist navigation. Anxious at the difficulties encountered with the concessionaires, it began in 1891 to revive an earlier idea to explore the possibility of a western navigation route through the Red Sea. As the envisaged route was to be “abreast of the Italian possessions at Assab”, Italy was asked to facilitate the technical mission and to allow supplies to be taken on at Assab—a request to which Italy readily agreed.

204. Once a western route was recommended by the Board of Trade, the British Government had to concern itself with questions of title. The so-called “Western Hanish” route would have entailed lights on North East Quoin (or at Rakmat), South West Rocks, one of the Haycock islets and Harbi islet. In 1891 the Board of Trade, relying on the Hertslet Memorandum of 1880, suggested that North East Quoin and Harbi were within Egyptian jurisdiction and South West Rocks and the Haycocks within Ottoman jurisdiction—with the Sublime Porte claiming sovereignty to all four islands. The Marquis of Salisbury, in writing to the British Ambassador to Rome in January 1892, stated “The islands rocks recommended by the Board of Trade ..., with the exception of South-west Rocks, seems [*sic*] to be in effect within the jurisdiction of Italy. That over the South-west Rocks would appear to be doubtful.” From 1881 to 1892 there was an extended international correspondence on this subject.

205. A Note of 3 February 1892 was addressed to the Italian government to seek clarification. The Note included the statement that “according to article 3 of the Treaty between Italy and Sultan Ahfari of Aussa of 9 December 1888”, the jurisdiction over the new sites, “with the exception perhaps of South-West Rocks, appears to belong to Italy.” Italy was asked whether it claimed jurisdiction over these sites, and if so whether it would itself be prepared to erect lights there, or alternatively if it would be willing for Great Britain to do so.

206. The Italian Government replied in June of that year that “the King’s Government consider these points as a maritime appendage of the territory over which they exercise their sovereignty” but urged the British Government to erect and maintain the lighthouses and to fix the method of reimbursement.

207. In the event, the western route was not proceeded with and the Ottomans arranged for the building of four lighthouses at Mocha on the Arabian coast, and on Jabal al-Tayr, on Abu Ali and in the Zubayr group (on Centre Peak). This was maintained by the French concessionaires for the Ottomans until 1915. Great Britain occupied the three lighthouse islands in 1915.

208. When the Ottoman Empire was required to renounce its possessions, sovereignty over the lighthouse islands fell, under article 16 of the Treaty of Lausanne, “to be settled by the parties concerned.” The light at Mocha was recognized by Great Britain as being within the territory succeeded to by the Imam. Great Britain had on occasion contemplated trying to acquire sovereignty over the islands it occupied but on balance thought they did not have enough strategic value. It is significant that Great Britain did not regard itself as precluded from attempting to acquire sovereignty by the terms of article 16 of the Treaty of Lausanne. It was not until 1927 that Great Britain formally stated (to France) that it had definitely renounced this idea. And in certain quarters the idea of annexing Hanish and Zuqar, as well as Jabal al-Tayr and Abu Ali, was not totally dead even in 1944.

209. It is also striking that, throughout the series of enquiries that Great Britain was to make after 1923 to Italy about the status of certain other islands, it never once put to Italy that a claim would be contrary to the terms of article 16 of the Treaty of Lausanne. Rather, Great Britain was content to satisfy itself that Italy’s position was consistent with the bilateral understandings of the Rome Conversations of 1927.

210. Notwithstanding this, the Tribunal has already indicated that in its view the history, text and purpose of article 16 argues against the unilateral acquisition of title over the islands whose status was left undetermined in 1923. Nor is it necessary to consider whether Italy was seeking to establish title contrary to the agreement in hand and entered into in the Treaty of Lausanne, because Italy’s posture was in fact much more cautious.

211. In 1927 Great Britain negotiated an agreement with France for the maintenance of all four lighthouses by the French company and approached the main users of the route—Germany, the Netherlands, Japan and Italy—to regulate the matter by a convention. Italy, expressing the wish that it had been consulted earlier, made two points. First, Mocha was claimed by the Imam and he should be a party. Second, Italy wished to know whether sovereignty of the islands was to be attributed to the neighborhood coast or whether the point would be re-

served. No Italian claim to any of the islands was presented. The British Government conceded that Mocha was under the rule of the Imam and affirmed that the status of the islands was to be reserved. These reassurances led to the conclusion of the Convention concerning the Maintenance of Certain Lights of 1930.

212. Although this Convention did not enter into force, and thus cannot be said to bind the parties as a treaty, it is useful evidence of their thinking at that date. The preamble and the annex refer to the renunciation by Turkey of both the islands and of Mocha, the occupation of the islands by Great Britain, and the provision in article 16 of the Treaty of Lausanne that “the future of these islands, and of that territory [is] a matter for settlement by the Parties concerned.” The annex continued: “(e)... no agreement on this subject has been come to among the parties concerned and it is desirable in the interests of shipping to ensure that the lighthouses on the said islands shall be maintained.” It then proceeded to determine that a lighthouse on the said islands shall be maintained.” It then proceeded to determine that a lighthouse company should take possession of and manage the lighthouses on Abu Ali, Zubayr and Jabal al-Tayr. Italy was prepared to put its signature to this and to article 13, which clearly affirmed the continued operation of article 16 of the Treaty of Lausanne:

Art. 13. In the event of the arrangement contemplated in article 16 of the Treaty of Lausanne being concluded between the parties concerned, the High Contracting Parties will meet in conference in order to decide whether it is desirable to terminate the present Convention, or to modify its terms with a view to making it conform to the aforesaid arrangement.

213. Although the 1930 Convention was ratified by Italy and the Netherlands, it did not come into force, because the French Government was locked in disagreement with the British Government as to whether the lighthouse company, Michel et Collas, should be paid on the basis of gold. France refused to ratify.

214. In the meantime, in the very same year, Italy was preparing to erect a lighthouse on South West Haycock. The Haycocks had not been specifically mentioned in the 1927 Rome Conversations and the British were anxious to establish the article 5 thereof should nonetheless apply, the more so a “the erection of a lighthouse ... may be regarded as implying some definite claim to sovereignty.” Great Britain was concerned as to whether indeed South West Haycock did fall within the Rome Conversations—there were internal divisions on the question of title—and it noted that the islet was only 20 miles from the “Italian” coast. It was decided to seek assurances. These were sought in an aide-memoire of 18 February 1930, in which Italy was reminded of the earlier exchanges in 1927. In that document Great Britain referred to South West Haycock as being “in the Hanish group of Islands.”

215. In its Pro-Memoria of 11 April 1930, Italy observed that the lighthouse was being built for navigational reasons. It asserted that South West Haycock was not part of the Hanish Islands, but rather belonged to the Mohabbakah archipelago over which it alleged that the Ottomans had never claimed sovereignty.<sup>17</sup> Italy therefore made “a special reserve regarding Ital-

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<sup>17</sup> The Tribunal notes, however, that prior to Italian occupation, the islands off the African coast were administered by the Khedive of Egypt on behalf of the Ottoman Empire.

ian sovereignty over this island” and then consented to “the question being considered on the same lines as that of the sovereignty of all the islands of the Hanish group, in accordance with the spirit of the conversations of Rome of 1927.”

216. The Pro-Memoria can only be read as a claim to sovereignty over South West Haycock by Italy (while at the same time agreeing that the erection of the lighthouse was to be treated as a commercial rather than a sovereign act) and a failure to advance a comparable claim to title over the Hanish group. The internal evidence shows that this was an assessment that Great Britain was at the time inclined to accept, and with which it was satisfied; although in other documents Great Britain treats South West Haycock as part of the Hanish group, and as having been Ottoman. In the event, all fell to be treated as provided by article 16 of the Treaty of Lausanne, which was reinforced by the understanding reached in the Rome Conversations.

217. The South West Haycock lighthouse was extinguished in 1940. It was abandoned after 1945. When the 1930 Convention failed to come into effect the British authorities were left with the sole financial burden of the existing lights. It decided to abandon the Centre Peak light (in the Zubayr group) from September 1923 and Italy (which had been notified, along with France) reactivated the Centre Peak light in 1933. The decision was taken in Italy to inform the “interested powers” that this was being done for reasons of navigational necessity, and that the Imam “who lays claim to right over the islands” should be “informed of the provisional nature of the occupation and the usefulness to himself in having the lighthouse reactivated.” It was apparently originally intended to ask for contributions, but in the event this was not done.

218. The British authorities were notified by Note Verbale on October 4, 1933 of the anxieties of the Captain of the Port at Massawa as to safety on the Massawa-Hodeidah route, in the absence of the Centre Peak light, and of Italy’s decision to take over the lighthouse. The Note Verbale expressly stated:

... the Royal Ministry for Foreign Affairs need hardly add that the presence of an Italian staff on the Island of Zebair (Centre Peak), which will ensure the operation of the light, implies no modification of the international judicial status of the island itself, which, together with the islands of Abu Ail and Begel Taiz [*sic*], was considered by the Italian and British governments in 1928 during the negotiations for the Red Sea Lights Convention, when the conclusion was reached that the questions of sovereignty of those islands should remain in suspense.

219. Thus in the northern islands, too, Italy had established a navigational interest but affirmed that it had not implications for sovereignty. The British decided this was a sufficient comfort not to have to pursue this matter further with the Italians.

220. The situation remained essentially unchanged by the 1938 agreement. Article 4(2) of Annex 3 again affirmed that neither Great Britain nor Italy would establish sovereignty over the renounced islands, following article 16 of the Treaty of Lausanne, and that no objections would be raised to lighthouse personnel.

221. By the outbreak of the Second World War it may be said that the maintenance of the lights is seen as a non-sovereign act and there is agreement that the underlying title to the islands concerned was left in abeyance—though Italy had asserted title (even if choosing not to press it) to South West Haycock. But this turned upon a perception of South West Haycock as being part of the Mohabbakahs, rather than upon any suggestion that the erection of a lighthouse thereon itself had a role in establishing sovereignty. In the course of the Second World War, the South West Haycock and the Centre Peak lights were extinguished.

222. In June 1948 the British Military Authority (BMA) in Eritrea sought legal advice as to whether it was liable under any international conventions for the re-establishment of various lights previously operated by the Government of Italy. These included those at South West Haycock and at Centre Peak. The advice (which eventually came from the Ministry of Transport) was that there was no obligation under any convention.

223. The decision by the BMA that it had no responsibility for the lights at South West Haycock and Centre Peak was not because it was thought those islands were not Italian. No particular attention seems to have been given to that aspect. Rather, it was decided that as long as the Abu Ali light was maintained there was no real danger to shipping. Further, the Admiralty advised that a state was under no obligation to light its coasts. Thus even if South West Haycock and Centre Peak had been Italian (and neither was addressed in the 1948 correspondence nor is there any evidence that Zubayr was ever regarded by the British as Italian), no obligation was passed to the BMA as the occupying power.

224. After the Second World War, the British did continue to take responsibility for the lighthouses at Abu Ali and Jabal al-Tayr, and from 1945 received financial contribution from the Netherlands. These arrangements were in 1962 brought within an agreement made between Denmark, Federal Republic of Germany, Italy, the Netherlands, Norway, Sweden, the United Kingdom and the United States, and formally accepted also by Pakistan, the Soviet Union and the United Arab Republic. Yemen was not a party. Nor was Ethiopia. The criterion for invitation was clearly that of navigational importance and not of title to the coast or islands. The opening recitals to the 1962 agreement rehearse the history of the Abu Ail and Jabal al-Tayr lights, recall the abortive 1930 Convention, refer to article 16 of the Treaty of Lausanne, and add: "No agreement on the subject of the future of the above-mentioned islands has been come to among the Parties concerned."

225. Further, article 8 was to make crystal clear that nothing in the text following was to be regarded either as a settlement of the future of the islands referred to in article 16 of the Treaty of Lausanne, "or as prejudicing the conclusion of any such settlement." This article reproduces the provisions of article 15A of the 1930 Lighthouses Convention. The United Kingdom was affirmed as the "Managing Government" for these two lights and was entitled to appoint an agent for this purpose (article 2). article 6 provided for discontinuance of this role upon notice to the other parties, and indicated the procedures to be followed in that eventuality.

226. As in 1930, the managerial role of the United Kingdom had nothing to do with the issue of title to the islands; nor did management even place the United Kingdom in a favourable position for when the title issue came to be resolved. This clearly followed the pattern of the Rome Understandings (as they bear on the management of lights) and of abortive 1930 Convention—even though the 1962 Convention concerned two lights only.

227. The United Kingdom managed the lighthouses at Jabal al-Tayr and Abu Ali from Aden, but realized that arrangements would have to be made when the British would leave Aden upon the independence of the People's Democratic Republic of Yemen in 1967. The Savon and Ries Company was accordingly appointed agent under article 2 of the 1962 agreement, for management duties. It so happened that Savon and Ries were operating out of Massawa, and the staff engaged in lighthouse functions at the Board's request came increasingly from Ethiopia, but in the view of the Tribunal this was simply a matter of practical convenience. The various Ethiopian authorizations for inspection and repair visits to the islands and the control exercised over radio transmissions were immaterial as to sovereignty. Everything maintained as it had been so far as title to the islands was concerned—that is to say, article 8 of the 1962 Convention continued to govern.

228. In 1971 the British Government decided to replace the lights by automatic lights, dispensing with the services of lighthouse-keepers. The United Kingdom notified Yemen of this intention, assured that Government that “the action of the Board of Trade in accordance with (the 1962 convention) does not infringe upon rights of sovereignty” and asked whether Yemen had any objection. The fact that the communication was addressed to Yemen, a non-signatory of the 1962 Convention, would seem to indicate that, while the islands remained unattributed in accordance with the terms of the 1962 Treaty, Yemen was regarded by the United Kingdom as a “party concerned” within the terms of article 16 of the Treaty of Lausanne and as having claims to Abu Ali and Jabal al-Tayr that should not be prejudiced. It may also be noted that by this time Italy had lost its possessions on the Red sea coast and was not, therefore, any longer a “party concerned” within the meaning of article 16 of the Treaty of Lausanne.<sup>18</sup>

229. Although at an earlier era the legal advice within the British Government was that Abu Ali and Jabal al-Tayr (as well as Centre Peak) were islands that were *res nullius* and various candidates had been suggested at different moments of time as “parties concerned”, it would seem that by the early 1970s Yemen was regarded as the leading “party concerned” for purposes of article 16 of the Treaty of Lausanne, at least so far as Abu Ali and Jabal al-Tayr were concerned.

230. In 1975 the management of these two lights was transferred from Savon and Ries' offices in Ethiopia to its offices in Djibouti. Five years later, the agency for management was passed by the British authorities to a new company it had formed, the Red Sea Lights Company.

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<sup>18</sup> Nor has Italy, for that matter, any state asserted that it considers itself to be “a party concerned” for this purpose. The Tribunal therefore concludes that, with respect to the islands in dispute, the only present-day “parties concerned” are the Parties to this arbitration.



231. In 1987 Yemen relit the lighthouse on Centre Peak, issued pertinent Notices to Mariners and, in 1988, upgraded it. This appears to have occasioned no protests by Ethiopia, which could not have assumed that such acts were rendered without significance by virtue of article 16 of the Treaty of Lausanne (to which Yemen was not a party), or by the various bilateral Italian—UK agreements, or by the 1962 Lighthouse Convention—none of which were opposable to Yemen.

232. On June 20, 1989, Yemen contacted the United Kingdom regarding “the matter of the Lighthouses installed on Abu Ali (Ail) and Jabal al Tair Islands which is to be discussed on Tuesday 20 June 1989.” Yemen formally stated that:

1. The two Islands mentioned above lie within the exclusive economic zone of the Yemen Arab Republic.

2. In the light of this fact the Yemen Arab Republic is willing to take the responsibility of managing and operating the said two lighthouses for the benefit of National and International Navigation. As you may be aware, the Ports and Marine Affairs Corporation in the Yemen Arab Republic is already running and operating several lighthouses some of which lie within the area of these two Islands.

233. Unless positive action was taken to extend the 1962 Convention, it would expire in March 1990. In 1988 and 1989 it became clear that many parties had denounced the 1962 Treaty or indicated their intention to do so. The United Kingdom, the managing authority of the lights, was among these. Egypt offered to take over that role, but it was clear that there were not sufficient votes for extending the Convention beyond 1990.

234. A meeting of the parties was held in London in June 1989. Having established its credentials and interest, Yemen was invited as an observer to the 1989 Conference on the future of the two northern lights, notwithstanding the fact that (like Ethiopian) it had not been a party to the 1962 agreement. The Report to the Government of Yemen of the Yemeni technicians attending the 1989 meeting refers to the fact that the British had confirmed the installation and operation by Yemen of new lighthouses on Jabal Zubayr and Jabal Zuqar. Manifested interest and professional competence appear to be the motivating factors for Yemen’s presence. Ethiopia was not invited to attend and had not requested this.

235. Yemen supported the Egyptian proposal that Yemen would manage the lighthouses on Jabal al-Tayr and Abu Ali and did so without reserve as to title. The minutes show that they also indicated their willingness to operate lights on the two islands at their own expense with almost immediate effect should be agreement lapse. The minutes contain no reference by Yemen to the islands being in its Exclusive Economic Zone—though that point had been included in the pre-meeting exchanges with the United Kingdom.

236. The reference to Yemen’s Exclusive Economic Zone rather than to title to the islands themselves does not appear to have been casual. It is mentioned twice again in the internal report sent after the 1989 conference from the Yemeni Director-General of the Ports and Maritime Affairs to the Government of Yemen. Yemen’s offer—which was accepted—was in language other than claim of a right of sovereign title. Yemen did not say that it had title to Abu Ali or Jabal al-Tayr, nor to the nearby islands, and thus it would be for it alone to provide any lights. The 1961 agreement had no chance of survival and Egypt’s offer to become managing authority could not provide the answer. The international treaty regime for the Red Sea lights was coming to an end.

237. The erection and maintenance of lights, outside of any treaty arrangements and for the indefinite future, had certain implications. The acceptance of Yemen's offer did not constitute recognition of Yemen sovereignty over islands. But it did accept the reality that Yemen was best placed, and was willing to take on the role of providing and managing lights in that part of the Red Sea; and that when the time came finally to determine the status of those islands Yemen would certainly be a "party concerned". (Yemen, of course, was not bound by article 8 of the 1962 Convention and indeed appears not to have known at the time of the arrangements made under it.)

238. Eritrea has contended that there was no need for Ethiopia to have protested the relighting by Yemen of lights on Abu Ali and Jabal al-Tayr, as its "activities were merely a continuation of the historic activities of Great Britain on Jabal A'Tair and Abu Ali." But Yemen was not in the same legal relationship with Ethiopia over the matter of lights as had been Great Britain and, if such was the reasoning for a failure to reserve claimed Ethiopian sovereignty, it was misplaced.

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## Chapter VII. *Evidences of the display of function of State and Governmental authority*

### *Analysis of the evidence*

239. The factual evidence of "*effectivités*" present to the Tribunal by both parties is voluminous in quantity but is sparse in useful content. This is doubtless owing to the inhospitability of the Islands themselves and the relative meagerness of their human history. The modern international law of the acquisition (or attribution) of territory generally requires that there be: an intentional display of power and authority over the territory, by the exercise of jurisdiction and state functions, on a continuous and peaceful basis. The latter two criteria are tempered to suit the nature of the territory and the size of its population, if any. The facts alleged by Eritrea and Yemen in the present case must be measured against these tests, with the following qualification. Not only were these islands for long uninhabited and ungoverned or, if at all, governed in the most attenuated sense, but the facts on which Eritrea relies were acts by its predecessor, Ethiopia, which were not "peaceful", unless that term may here be understood to include acts in prosecution of a civil war. Nevertheless, the Tribunal cannot discount these facts, given the singular circumstances of this case.

240. The Tribunal has found it useful to classify the wide variety of factual evidence advanced by the Parties in relation to this subject, and will now examine these categories of evidence in turn.

*Assertion of intention to claim the Islands*

241. Evidence of intention to claim the Islands *à titre de souverain* is an essential element of the process of consolidation of title. That intention can be evidenced by showing a public claim of right or assertion of sovereignty to the Islands as well as legislative acts openly seeking to regulate activity on the Islands. The Tribunal notes that the evidence submitted by both Parties is replete with assertions of sovereignty and jurisdiction that fail to mention any islands whatsoever, and with general references to “the islands” with no further specificity.

*Public claims to sovereignty over the Islands*

242. Eritrea’s claim that these islands were included as part of “the former Italian colony of Eritrea” by the Italian Military Armistice of 1943, the 1947 Treaty of Peace, and the 1952 Constitution is barely supported by evidence. It is true that Italy wished to claim the islands and indeed established a presence on some of them; but these facts were always subject to repeated assurances that the islands’ legal position was indeterminate in accordance with article 16 of the Treaty of Lausanne and with the Rome Conversations (see chapter V). The 1952 Eritrean Constitution defined the extent of Eritrean territory as “including the islands,” but failed to specify which islands were intended. The same uncertainty existed in the language of article 2 of the United Nations Resolution approving the 1952 Constitution, and the 1955 Ethiopian Constitution, the 1987 revision of the Ethiopian Constitution, and the 1997 Constitution of the newly-independent State of Eritrea.

243. The scant evidence of Ethiopian legislation before the Tribunal suffers from the same uncertainty as do the constitutional provisions. The 1953 Ethiopian Federal Crimes Proclamation and a 1953 Maritime Order put in evidence by Eritrea were not explicit about the Islands. The former was content merely to specify “any island which may be considered as appertaining to Ethiopia,” and the latter simply republished the phrase “including the islands”. A Maritime Proclamation of 1953 referred merely to “the coasts of the Ethiopian islands.”

244. Seventeen years later, in 1970, Ethiopia promulgated an order for a state of emergency. This Order did not specify the Islands; nor did the implementing regulations promulgated by the Minister of National Defence. Three 1971 operations orders are cited by Eritrea to demonstrate that “the islands in dispute here fell within the ambit of Ethiopia’s concern.” They identify Greater Hanish and Jabal Zuqar as being “areas” to be visited or as reference points for patrol routes. In 1987, the Ethiopian Ministry of National Defence was given responsibility “for the defence of the country’s territorial waters and islands” but, again, those “islands” remained unidentified.

245. In 1973, the Ministry of Foreign Affairs of the Yemen Arab Republic informed the Imperial Ethiopian Embassy in Sanaa of the YAR’s plans to conduct a full aerial survey of its territory that would cover certain “Yemeni is-

lands". These were identified as: "Great Hanish", "Little Hanish", "Jabal Zuqur", "Jabal al Zair", and "Humar". The reason given for the notification was that the photographs, which were to be taken from a height of 30,000 feet, might show "parts of the Ethiopian coasts". Ethiopia responded that "some of the islands listed in the afore-mentioned note could not be identified under the nomenclature used, while others are Ethiopian islands." This exchange of correspondence is cited in a January 1977 "Top Secret" memorandum of the Ministry of Foreign Affairs of The Provisional Military Government of Socialist Ethiopia, which details the measures Ethiopia considered taking to protect its interests. The memorandum refers to islands in the southern part of the Red Sea that "have had no recognized owner", with respect to which Ethiopia "claims jurisdiction"<sup>19</sup> and "both North and South Yemen have started to make claims." It names the Hanish Islands, Jabal Zuqar, Jabal al-Tayr and Jabal Zubayr, and points out that the 1973 response to the YAR and deliberately been left vague, because there was insufficient time to collect evidence in support of Ethiopia's "claim over the islands" and for fear of provoking a military response from Yemen and its Arab allies, particularly in the wake of false reports, in 1973, of an Israeli presence on certain Red Sea islands. The memorandum urges that "Ethiopia ... take a clear stand in this respect in order to protect its ownership."

246. Yemen relies on a claim of historic title, asserted to stem from time immemorial. It was allegedly most early evidenced in 1429, when King al-Zahir of Yemen sent a mission to Jabal Zuqar to investigate two vessels engaged in smuggling that had run aground on the island. The relevance of this happening is vigorously contested by Eritrea on various grounds which were not responded to in substance by Yemen. It appears to be unique, and isolated. The Tribunal does not consider it important in relations to the determination of title to Zuqar. Its only significance (which has been substantially weakened by Eritrea's rebuttal of its relevance, not replied to by Yemen) might be that it could support an interpretation of the Imama's aspirations so as to include at least Jabal Zuqar, but that in turn fails since there is no evidence that when he advanced his claim of historic rights in 1918, the Imam knew of the 1429 expedition. Moreover, the source for that information was only published in 1976, long after the claim of historic rights had allegedly been advanced by the Imam.

247. In his reply to a British proposal for a treaty of friendship, the Imam is recorded as having requested *inter alia*, "(2) Establishment of his rule and independence over all the Yemen, i.e., over that part which was once under the sway of his predecessors ...". This claim could not have been more general. Indeed, the word "that part", being expressed in the singular, would not seem naturally applicable to islands. This generalized claim was apparently manifested on several occasions in bilateral diplomatic conversations during the inter-War period, but no constitutional or legislative act of Yemen or of the Imam claimed any of the Islands specifically or described them specifically as Yemeni territory.

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<sup>19</sup> Eritrea has submitted two translations of this document, one of which refers to "jurisdiction" and the other to "sovereignty".

248. Yemen asserted in the oral hearings that in 1933 "... certain British representatives expressed puzzlement as to why the Imam was so adamant about his claim to the islands of Al-Yemen, including the islands of the Hanish Group." The Yemeni Foreign Minister allegedly "made the Imam's claim to the Hanish Islands well known to German officials in 1930, France in 1936 and, of course, England, in connection with the 1934 treaty and on many other occasions." Yemen added that "the Imam stated and restated his historic claims to the British, to the French and to the Italians whenever this was practically possible," and this appears to be borne out by contemporaneous evidence from 1930 to 1936.

249. Other evidence of communications between the Imam and British diplomats, including the records of the Clayton mission of 1926, and Colonel Reilly's communications to the Foreign Office are too vague to serve as evidence of a specific claim by the Imam to the Islands at that time.

250. Although Yemen asserted in the oral hearings that Yemen's response to the granting of an oil concession by the United Kingdom in the area of Kamaran Islands in 1956 "restated the claim to the Red Sea Islands", the language actually used in the official statement merely stated that "[t]he Yemeni Government considers Kamaran island and the other Yemeni islands to be a inseparable part of Yemen." It also added that "[t]he Yemeni Government continues to insists upon its rights to the Yemeni islands and their liberation." A likely inference to be drawn from this is that the "islands" referred to could not have been the islands now in question since those were not islands that required "liberation"

251. In 1973 there were press reports that Israel had occupied Jabal Zuqar with the permission of Ethiopia. Substantial effort was devoted by both sides in the proceedings to seeking to demonstrate that the respective reactions to the matter were relevant to sovereignty over the Islands. A 1973 press statement issued by the Embassy of the Yemen Arab Republic in Mogadishu reported that Yemeni investigations had found "Lesser Hanash, Greater Hanash, Zukar, Alzubair, Alswabe and several other islands at the Yemeni coast", to be free of foreign infiltration, and further stated that:

[...]

The Y.A.R. always controls and maintains its sovereignty over its islands at the Red Sea, with the exception of the islands of Gabal Abu Ali and Gabal Attair which were given to Ethiopia by Britain when the latter left Aden and surrendered power in our Southern Yemen.

This supports an inference that the phrase "its islands in the Red Sea" included the disputed Islands; moreover, the press statement emphasized that the Yemen Arab Republic maintained its claim of sovereignty over those islands "given by Britain to Ethiopia", and urged Ethiopia to surrender those islands.

252. Yemen's "historic claim" was initially expressed in vague and general terms following the end of World War I, and reiterated in bilateral diplomatic contexts in the inter-War period. After World War II it was reasserted in 1956, even though largely in doubtful and indirect terms. In 1973, however, it was expressly revived in a public statement (which, although it said that Jabal

al-Tayr and the Zubayr group had been “given to Ethiopia”, also reasserted Yemen’s “rights and possession” to them and was specific about the other, “mentioned”, islands). The statement therefore left little room for doubt that Yemen had sustained or renewed its claim over all of the larger Islands, including the northern islands—or, at any rate, as of 1973. There is no evidence that Yemen subsequently abandoned or relinquished this claim. The evidence does, however, also suggest that Yemen had no presence on and little knowledge about Jabal al-Tayr and the Zubayr group at that time, and supposed that they were in the possession of Ethiopia. The fact was that, for many years, the northern lighthouses were administered from Ethiopia by employees for the lighthouse company.

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*Legislative acts seeking to regulate activity on the Islands*

253. There is no evidence of post-war Ethiopian legislation seeking expressly to regulate activity on the Islands. As discussed above, no Ethiopian legislation between 1953 and 1992 specifically purported to exercise jurisdiction and state functions over the Islands. From 1992 to the inception of the dispute in 1995, no Eritrean legislation explicitly treated the Islands as being subject to the jurisdiction and control of Eritrea.

254. The Ethiopian Federal Crimes Proclamation and the 1953 Maritime Order put in evidence by Eritrea were not explicit. They applied to “any island which may be considered as appertaining to Ethiopia” and “the islands”. A related Maritime Proclamation of 1953 referred merely to “the coasts of the Ethiopian islands.” These instruments would of course have applied to the Dahlak group and to the islands in the Bay of Assab; but those islands are not disputed.

255. As to Yemen, the evidence of administrative and legislative decrees advanced to support a claim of the exercise of state functions follows substantially the same pattern as the evidence introduced by Ethiopia: there is silence as to whether the Islands are intended to be included in the ambit of the decrees. There is no evidence of Yemeni legislation openly seeking to regulate activity on the Islands. From 1923 to the inception of the dispute in 1995, no Yemeni legislation specifically treated the Islands as being subject to the jurisdiction and control of Yemen.

256. In 1967, two decrees were issued by the President of the Yemen Arab Republic concerning territorial waters and continental shelf. However these did not mention the Islands by name. Yemen contends that the subsequent Yemeni licensing in 1987 of a research program in waters off the Islands by the German research vessel, the *F.S. Meteor*, demonstrated their applicability to the Islands. While that is unclear, it is arguable that this incident can be viewed as crystallizing Yemeni intent as to the scope of the 1967 legislation.

257. In conclusion, the evidence on behalf of both Parties shows legislative and constitutional acts without any specific reference to the Islands by name. It should be borne in mind that during most of these years both Ethiopia and Yemen were distracted by civil war on strife, and serious internal instability. Yemen did not resile from the broad and loose claims made before World War II—which might or might not have embraced the islands in dispute—but did not pursue or articulate them until 1973.

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### *Activities Relating to the Water*

#### *Licensing of activities in the waters off the Islands*

258. There is much evidence that Ethiopian naval units had for many years conducted surveillance in the Red Sea and in particular around the Zuqar/Hanish archipelago. As pointed out below, it is not clear whether those actions were evidence of fisheries control and administration or whether they primarily related to security measures, or both, particularly in light of the fierce struggle by the Eritrean freedom fights in the two decades prior to Eritrean independence. In any event, there is little evidence that the Ethiopian activity was based on fisheries regulations or laws as such.

259. As to Eritrea, the evidence only dates from early 1992. In January of that year the Eritrean provisional government issued a notice prohibiting in general terms unlicensed fishing activity in “Eritrean territorial waters.” Eritrea has asserted that its Ministry of Marine Resources “has regulated fishing in Eritrean waters since shortly after Eritrean independence.” On 1 April 1995, the Ministry of Marine Resources issued a “Manual and Guidelines for the Administration of Foreing [*sic*] Vessel Licensing and Operations.”

260. In September 1995, Trawler Regulation I was issued by the Ministry of Marine Resources. The statement is made by Eritrea that the handout appended to Trawler Regulation I “includes the Zuqar–Hanish Islands within Areas No. 11 and 12 (Beilul and Bera isole).<sup>20</sup> The areas are separated laterally by dotted lines. These lines do not however extend to, or surround, the Zuqar/Hanish archipelago. (Comparison with maps 1 and 2 shows, in the case of map 2’s depiction of the Dahlak (“Dehalak”) archipelago, a carefully-drawn lateral boundary around the Dahlaks.)

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<sup>20</sup> Map 3 (dated November 1993) shows Area 10 (“Bera isole”) and Area 11 (“Beilul”), but Area 12 is actually “Assab-Dumeira”.

261. As far as Yemen is concerned, there is no evidence of any regulation or order as such regulating fisheries as such in Yemeni waters. The evidentiary record is devoid of any assertion of a formal legal basis for fisheries jurisdiction assumed by the Yemeni Government over the waters surrounding the Zuqar/Hanish archipelago. A witness statement cited in support of the proposition that Yemeni Government “launches are vigilant in controlling illegal fishing” merely details that the witness (a Navy Captain) “was assigned by [his] ... command to arrest foreign fishermen pirates...who were looting our maritime wealth in a random an illegal manner,” but indicates no further detail.<sup>21</sup>

262. Yet Yemen has asserted that it has “tightly regulated fishing activities on and around the Hanish Islands” and that “the Government has actively controlled illegal fishing”. There is a substantial record of fishing vessel arrests by Yemeni authorities between 1987 and 1990. It should be noted however that they are recent in time, and appear to have been primarily directed in recent years against large Egyptian industrial fishing vessels.

263. In conclusion, the Tribunal is of the view that the activities of the Parties in relation to the regulation of fishing allows no clear legal conclusion to be drawn. The record of these activities under Ethiopian administration is, as will be seen below, open to conjecture. Since Eritrean independence, the record is less than clear. Since 1987, Yemen appears to have been engaged in some regulation of fishing, primarily directed towards larger vessels. The balance of this evidence does not appear to tilt in one direction or another.

#### *Fishing vessel arrests*

264. Although there is evidence before the Tribunal that a substantial number of arrests of fishing vessels for violation of the respective fishing regulations and orders have occurred, the period of time comprised in that evidence is brief. It is difficult therefore to characterize those actions as the “continuous and peaceful display of state authority.”

265. The evidence before the Tribunal concerning Ethiopian regulation of fishing or fishing violation arrests is almost wholly derived from former Ethiopian naval officers. There are many detailed witness statements that recount service in the Ethiopian patrolling forces during the Eritrean was of independence. In most instances the whereabouts of particular incidents are rendered in general terms, albeit with frequent reference in particular to islands of the Zuqar/Hanish archipelago. Although there are few dates given for the various vessel arrests referred to in the witness statements, the majority of activities reported appear to have taken place during the two decades preceding Eritrean independence in 1991.

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<sup>21</sup> The samples of fishing and boat licenses supplied by Yemen are not helpful; when they specify fishing areas, they only state “Red Sea”.



266. A fair reading of the witness statements shows that by far the principal concern of the Ethiopian military during this period was to combat the EPLF activities on and around the Islands and to deny the use of the Islands to rebel forces either as a staging area for strikes on to the Eritrean coast of Ethiopia or as supply depots and strategic bases. The Ethiopian naval officers concerned did also exercise police powers when they would stop and check fishing boats.

267. The primary purpose of such an exercise was suppression of the insurgency. In most of these cases the witnesses stated that part of their duties was to stop all fishing boats and check their papers and cargo. Thus, “[t]he Dankali fishermen were suspected of cooperating with the rebels in smuggling arms, ammunition and other supplies across the Red Sea.” However the duties of these naval patrols also extended to keeping foreign fishermen out of what Ethiopia considered to be her territorial waters. Vessels that were not licensed to fish in the waters or that were of non-Ethiopian registration were arrested or requested to leave.

268. The Eritrean pleadings state that the evidence shows “the inspection of fishing and/or commercial vessels as a primary function of their routine patrols around the islands.” Having regard to the fierce fighting that was going on over the years in question in and around the area in question, it is not clear that enforcing fishing regulations was the primary purpose of these Ethiopian naval patrols.

269. At the same time, the Tribunal is not disposed to discount the evidence introduced by Eritrea on the grounds that the acts were not “peaceful”. Military action taken in a civil war is in any event not normally regarded as a belligerent act that would have no legal relevance for the question of title. Accordingly, even though the Tribunal does not accept Eritrea’s contention that most activity was directed at fishing regulation, the Tribunal finds nonetheless that they are not without legal significance.

270. In 1976, an Ethiopian naval patrol boat arrested three Yemeni fishermen on Greater Hanish Island. Yemen protested to the United Nations Security Council this “flagrant act of aggression and ... distinct violation of the sovereignty of the Yemen Arab Republic.” Ethiopia responded, in a formal letter from its UN Permanent Representative to the President of the Security Council, that “[t]he Ethiopian patrol boats were carrying out their responsibilities within Ethiopian jurisdiction.”

271. Following independence, the record shows that much attention became devoted to control of Eritrean fisheries affairs entailing inter alia a number of vessel arrests, some of which involved Yemeni fishermen. Although a substantial number of witness statements speak of supervisory authority and activity by Ministry of Marine Resources authorities in conjunction with the Eritrean Navy, the evidence dates from the time of Eritrean independence and in almost all instances relates to matters occurring after 1995. Without precise fixing of coordinates and distances, it is unfortunately difficult to see whether the activities and vessel arrests in question actually occurred with respect to the waters around the Zuqar/Hanish archipelago or Jabal al-Tayr and the Zubayr group. Many witness statements and reports are not clear as to how close to the contested islands the incidents were.

272. As to Yemen, a number of incidents between 1987 and 1995 are also in evidence. There is documentary evidence of an arrest in 1989 of an Egyptian trawler “next to Zuqar island ... in the territorial waters of Yemen.” There is also testimony from a Navy Captain that in May 1995 he was assigned “to arrest foreign fishermen pirates” and that he arrested “several launches” of “Gulf ownership” with Egyptian crews after a gun battle “in Yemeni territorial waters,” “in an area between al-Jah and Zuqar.” Although Yemen asserted that in 1990 four Egyptian fishing vessels were arrested “in the area of the Hanish Group”, and the owners required to pay an indemnity to Yemen and undertake not to repeat their actions, the supporting document does not specify the location of the arrests.

273. However, a 1990 report addressed to the Yemeni Defence Ministry describes twenty separate incidents between 1987 and 1990 in which a total of more than sixty vessels are reported to have been arrested, accosted, “escorted to” a naval base, or “warned to leave”—a good number of these incidents appear to have related to Egyptian commercial fishing vessels. While some of these are described as having been in the vicinity of the Zuqar/Hanish archipelago or Jabal al-Tayr, Zubayr and Abu Ali, the report refers to the “area of” a named island or islands; one exception is a report of unlicensed fishing by two Egyptian trawlers “at Zuqar”. In most instances, when vessels were ordered to leave, the report states that the warnings specified that they should depart “from territorial waters”, or “from Yemeni waters”.

#### *Other licensing activity*

274. Apart from fishing, there have been no attempts on the part of Eritrea to demonstrate any licensing activities in respect of the waters off the Islands. For its part, Yemen asserts the official approval in 1993 of plans for a tourist boat operation between al-Khawkhah and Greater Hanish. There was also a license granted by Yemen to a German company for the building of a diving centre on the north end of Greater Hanish in 1995. As will be discussed below, between 1972 and 1993 the Yemeni Government recorded eight instances of requests for approval for activities relating to the use of the waters around the Islands, and in several cases approval was given for research and diving expeditions and the like.

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#### *Granting of permission to cruise around or to land on the Islands*

275. As discussed, there is an abundance of evidence before the Tribunal relating to the manifold activities of the Ethiopian Navy in the 20-year period before Eritrean independence. The evidence largely indicates that the Ethiopian naval patrols operated intensive patrolling in and around the Islands

during the Ethiopian war against the Eritrean insurgents. In that role, the naval vessels stopped ships, boats and dhows in those waters, requested identification and inspected equipment and cargo. Tourist vessels anchored near the Zuqar–Hanish Islands were arrested and brought into Ethiopian ports for investigation and the film from their cameras was destroyed.

276. There is evidence that informal requests from third parties for permission to cruise around, anchor at or land on the Islands were sometimes made to naval patrols. For example, one witness statement indicates that radio requests made to Ethiopia patrol craft to anchor “at the north western cove off Hanish”, received from “large foreign commercial vessels” (including ones of Greek, Japanese, Yugoslavian and Italian nationality), were granted for reasons such as “repairs, shelter or rest.”

277. As to Yemen, there is evidence that in 1978 three Kuwaiti fishing trawlers requested and received shelter from a storm at Jabal Zuqar, and that on two occasions in 1991 foreign flag vessels sought and received permission to anchor at Zuqar and Hanish for repairs.

278. In addition, between 1972 and 1995 Yemen received at least eight formal requests from third parties, including one from a foreign Government, for permission to cruise around, anchor at, or land on the Islands: A request from an Italian organization to conduct research on Jabal Zuqar was declined by the Government of the Yemen Arab Republic in 1972; the French Government in 1975 requested permission to conduct naval exercises in the vicinity of the Hanish Islands; in 1983 a request from a French organization to film submarine life was approved; in 1987, a German request for scientific research studies to be conducted by the *F. S. Meteor* around the Hanish Islands was approved by an official governmental decree and the project was completed without incident; for indeed *The Meteor* seemingly carefully avoided the territorial waters of both Ethiopian and Yemen. In 1992 approval was given for a diving trip by a British yacht, the *Lady Jenny V*, around the Islands; in 1993 the Yemen Government approved a research expedition to the Zuqar/Hanish archipelago to be conducted with the Royal Geographical Society; in 1993, the Government approved the French research expedition of the Ardoukoba Society to Greater Hanish, and also approved a German diving expedition on the yacht *Cormoran*. There is also an unsupported statement that a Polish request for diving in the area was rejected in late 1995.

279. It should be noted however that there is no specification of the islands in the application or report of the cruise of the *Meteor* though the Report mentions the Hanish Islands and states that “maximum values were noted at the Hanish Islands ...” Moreover, the terms of the license specified that the “research operation must be conducted in waters at a depth of 100 metres or more,” thus excluding research in any close proximity to the Islands.

280. What can be concluded is that there was somewhat greater Yemeni activity than Ethiopian/Eritrean activity in the granting of permission relating to the Islands in the periods stated.

*Publication of notices to mariners or pilotage instructions relating to the waters of the Islands*

281. Other than Eritrea's fishing regulations, Eritrea has produced no evidence of publication, by Ethiopia or Eritrea, of general information concerning pilotage or maritime safety.

282. In the five years between 1987 and 1991 Yemen published six Notices to Mariners in connection with its installation of new lighthouses in the Islands. These were: Centre Peak (1987 and 1988); and Jabal Zuqar (1989). Following the 1989 London Conference on Red Sea Lights, Yemen issued a Notice to Mariners concerning a new solar lighthouse on Jabal al-Tayr, and one concerning a new system on Abu Ali. In 1991 the Yemen Ports Authority constructed a new lighthouse on Low Island, and an official telex notification was sent to the Hydrographer of the Royal Navy in Taunton (referring to it as "Hanish as Saghir" Island). In 1992 a similar telex was sent indicating a "beaconpipe" at "Jabal-at-Tair", a lighthouse at "Sawabey" (al-Zubayr), a lighthouse at Abu Ali, a beacon at Zuqar, and beacons at Hanish Sashir and Hanish Kabir.

283. The Tribunal notes that such notices form a natural adjunct to the operation and maintenance of lighthouses, but that latter function, in the particular circumstances of the Red Sea, does not generally have legal significance. The issuance of such notices, while not dispositive of the title, nevertheless supposes a presence and knowledge of location. Moreover, it is to be noted that in relation to these indications, accuracy in identifying the navigational aid and its location is of the prime importance, rather than the provenance of the information.

*Search and rescue operations*

284. Eritrea has produced evidence maintaining that in 1974, the M. V. *Star of Shaddia* was stranded off Zubayr. There is no evidence as to her nationality. *HMS Ethiopia* attempted a rescue, but was unable to approach the ship because of severe weather and mechanical difficulties, and departed without being able to assist.

285. In 1990, the Yemeni Ports Authority rescued an Iraqi vessel, the *Basra Sun*, from the rocky coast of Jabal Zuqar after it had requested assistance.

286. Since there is under the law of the sea a generalized duty incumbent on any person or vessel in a position to render assistance to vessels in distress, no legal conclusions can be drawn from these events.

*The maintenance of naval and coast guard patrols in the waters around the Islands*

287. Eritrea has produced a large amount of evidence relating to naval patrolling activity in and around the Islands. The activities alleged are for the most part not referred to in documentary evidence, but rather in affidavits prepared in connection with these proceedings. However, the Tribunal takes note of statements by Eritrea that a large amount of Ethiopian naval records were destroyed in the course of hostilities.

288. **1953-1973:** For the first twenty-year period (1953-1973), Eritrea has introduced two types of evidence: naval logbooks from 1959-1967 and naval operations reports primarily from the 1970s.

289. **Naval logbooks:** The Eritrean Memorial states that “there are numerous records that the Islands were ‘visited and/or observed’” (Eritrean Memorial, p. 427), implying that most of the logs indicate this. It also states that they “demonstrate in painstaking detail the continuous Ethiopian presence in the disputed islands” and characterizes them as “record[ing] visits” to the Islands.

290. However, the logs themselves—in contrast with the operations reports—relating to the years 1959, 1961, 1962, 1963, and 1967, do not use the word “visit”. Moreover, it is not clear to the Tribunal what that term entailed. The “observations” are largely contained in Column (13) of the standard printed logbook form, labeled “Soundings Fixes Bearings Observations”, and a study of the entries in that column show that they are almost uniformly position “fixes” of azimuth bearings on land points and islands, sometimes from as far as fifteen miles offshore.<sup>22</sup> The Tribunal cannot therefore draw many useful conclusions about Ethiopian exercise of governmental functions with respect to the Islands on the basis of these logs alone.

291. **Operations reports and orders:** Eritrea has placed in evidence three operations reports—two cruises in April 1970 and one in July 1971. However, the language in which the missions are recorded in the operations reports is too vague to be relied upon as establishing state functions with respect to the Islands in this case, e.g., patrolling the “area south” of Greater Hanish and the Haycocks, sailing “top the Grand Hanish and back”, and investigating vessels “south of Zuqar” and “vicinity Jebel Attair.” The only relevant precision accorded by this evidence is in the operation report of HMS Ethiopia for July 20/21 an d25/26, where she “[a]nchored Zuqar” overnight in order to remedy mechanical difficulties. Episodes of that nature can hardly give rise to a legal claim of occupation and control.

292. Furthermore, although the Eritrean Memorial captions its description of the reports with a statement that they demonstrate the “continuous Ethiopian naval presence around the disputed islands”, for the twenty years in question they cover only two cruises in April 1970 and one cruise in July 1971. In consequence, these documents hardly support the assertion that the Ethiopian Navy maintained a “continuous presence” around the Islands for the entire period of 1953-1973.

293. There are also in evidence four operations orders of the Ethiopian Navy, from January, July, September and October of 1971. They instructed the preparations of “a Schedule” for visiting the different areas,” including “Kebir Hanish” and “Zukar”, and patrols “around Hanish I[slands]”, “within the route: Dumeira is – Fatmah Lt. – Rs Darma – Kabir Hanish – Zuqar – Edd and Ras Darma”, and another with a similar routing. They cover less than one year out of twenty, though this may be explained by the asserted destruction of Ethiopian naval records during the civil war. In warfare continuing over several decades, it does not seem likely that Ethiopian activity in controlling insurgency would be limited to a single year.

<sup>22</sup> In one example, it appears that the officer of the watch has helpfully added estimated radar ranges of distance, e.g.: “Ø Jabal al Tair Isl. 045° 6.0 by radar, “ and “Ø Haycock Isl. 106° 15 by radar, “ showing that the vessel (H.I.M.S. PC-12) was far offshore on both occasions.

294. **1974-1980:** Eritrea has also put forward documentary evidence of a similar nature relating to activities from 1974 up until the end of 1980, but this is just as sparse as that for the preceding twenty years. Again, it takes the form of log-books and orders which, being contemporaneous, have a special interest, as well as correspondence. The log-book entries, for 1974, 1977 and 1980 reveal the same kind of imprecision as the earlier log-book records, one of which for example, while purporting to "record ... [a] visit ... to Hanish (on 16 August) [1977]", merely shows "Hanish" in the Column (13) of the Log under "Soundings Fixes Bearings Observations" as having been sighted by P-203 at 0400 on 16 August, at a bearing of 325° and at a *distance of 20 n.m.* This is not evidence of a "visit", nor of passage through the territorial sea of that islands.

295. Additional evidence has been presented describing the Ethiopian/Eritrean sea battle off the island of Zuqar after the capture of the merchant ship *Salvatore* by the ELF on the way to Assab in June 1979, but it is not clear what evidentiary relevance can be ascribed to this incident. Finally, P-203's Log-Book in May 1980 records warning shots at a Canadian and a West Germany boat; the precise location is not indicated in the log but the incident is noted in an entry which begins "slipped out for patrolling Hanish to Zuqar". The 1980 capture of five wooden boats referred to in the pleadings is not particularized further than occurring "near the islands of Lesser Hanish." In April 1980 some Yemeni fishermen were captured "near Zuqar Island", and others were also captured "in the vicinity of the Zuqar/Hanish Islands." This incident was in fact protested by North Yemen.

296. Eritrea states that the "most critical Ethiopian naval event of 1980" was "Operations Julia"; and that it "resulted in twenty four hour surveillance and a blockade of the entire area for the entire three month period of the operation." When the map submitted in evidence is consulted, it shows what appear to be four areas of patrolling off the Ethiopian/Eritrean coast: two close on shore, one half-way to Greater Hanish from the coast, and one lying approximately 3-4 n.m. west of Near Island and Shark Island on the west side of Jabal Zuqar, and running south across Tongue Island to just north of Marescaux Rock. The context of Operation Julia shows quite clearly that this was a series of grave incidents at forces patrolled their own coastlines, and the sea mainly west of the Islands facing the Eritrean coasts; a main purpose of the operation having been to stop rebels "infiltrating into Assab District".

297. **1973-1993:** For the second twenty-year period, Eritrea has also placed substantial evidence before the Tribunal, largely in the form of seven witness statements specifically obtained from seven former Ethiopian navy officers and two witness statements obtained from two former EPLF naval fighters. With one exception, the testimony relates only to activities from 1968 on. The testimony, summarized in the written pleadings, largely concerns activities at sea extending over substantial periods between 1964 and 1991.

298. It is however possible only to rely on this testimony for the most general of indications. In ten out of the thirty incidents described by Eritrea the identity of the Ethiopian or Eritrean vessel is not given. The dates of the incidents are given in only nine cases. Their locations are specified in only three, but

in those three instances the time frame extends over indeterminate periods of eight months, five years, and one month respectively. There is therefore no evidence of an arrest or stopping by Ethiopian or Eritrean naval forces with *both* a precise location *and* a precise date, for the entire period from 1970-1995.

299. In a close reading of the witness statements provided by Eritrea, three other interesting points emerge with clarity which should assist in evaluating the context and scope of this evidence. These points have not been controverted in the proceedings.

300. The first point is that out of the seven witness statements of former Ethiopian naval officers, three record no landings on the Islands. The remaining four are imprecise with respect to either date or location. There are two witness statements that mention more than isolated landings during the entire period from 1973-1993.

301. The second point relates to the nature of the patrols which, as well as being fast, appear to have taken place at night, and sometimes in conditions of darken ship. These factors bear upon the absence of protest by Yemen.

302. Third, although some of the evidence does recite that the "purpose of these patrols was primarily to apprehend vessels carrying contraband and to keep foreign fishermen, who were generally from Yemen, out of our territorial waters," it is not clear that a major twenty-year military operation increasing in intensity can be viewed as primarily related to fishing. There is certainly some validity to the argument that checking fishing boats on a regular basis was an essential part of checking for insurgents and contraband weapons. Just as checking ELF dhows for small arms and ammunition was essential to defeating the rebels ("[t]he dhows could carry hundreds of sheep and goats, so they would hide the supplies underneath the livestock where it was impossible or us to search") so was checking fishermen ("... we would often see Dankali fishermen further east, in the area of the islands ... We would check the identification papers for the boat, captain and crew and look for contraband and armaments.") However, normal fisheries surveillance does not require checking for "contraband and armaments".

303. There also appears to be, in this evidence, a discrepancy in Eritrean witness statements as to the presence of Yemeni fishermen. While some witnesses state that "Yemeni fisherman were almost never reported to be in the area of Zuqar and Hanish at the time" (the late 1980's) and "I never encountered a Yemeni fishermen [*sic*] in the waters around Zuqar and Hanish", others state: "[w]e patrolled east of the Dahlaks as well as the Hanish Islands" and "[s]ometimes, our patrols would find Yemeni fishermen fishing in Ethiopian waters, including around Zuqar/Hanish."

304. **1983-1991:** These witness statements were also intended to supplement the documentary evidence put in by Eritrea as to activities from 1983 through 1991 but this evidence is imprecise. Speaking almost consistently in terms as such as "around Hanish and Zuqar," "the environs of Hanish," "in the vicinity of Jabal A 'Tair," these operations and reports and sailing orders are sparse chronologically: May 1983, October 1984, September 1984, May 1986, July 1984, and August 1987. Even if this evidence were precise as to location

and relevance to the Islands, it could still hardly provide a demonstration of a "continuous Ethiopian naval presence around the disputed islands" as it covers only six months out of ninety-six and leaves out four years entirely of that continuous naval presence.

305. Nevertheless, the extent of this evidence and its homogeneity do suggest the conclusion that the Ethiopian Navy, during the period in question, did in fact conduct widespread surveillance and military reconnaissance activities in the waters around the islands. It is uncontroverted and these patrols were frequent and, in the course of the Ethiopian war against the ELF and the EPLF, of steadily increasing intensity. Elements of the Ethiopian Navy anchored frequently off the Islands, sent details ashore for reconnaissance missions, and even bombarded suspected rebel facilities on the Islands.

306. With exception of the 1976 incident discussed above (which was protested to the Security Council of the United Nations), North Yemen (and, later, the Republic of Yemen) did not protest any of these Ethiopian naval activities. Although such a lack of protest would normally appear to suggest a degree of acquiescence, four elements need to be weighed by the Tribunal in considering the evidence: the location of the Islands, the fact that they were not settled, and the fact that there was no normal line of communication from persons on or near the Islands to the mainland; the fact that many of the Ethiopian patrols appear to have been conducted at night under conditions of darken ship; the fact that many of those patrols were conducted at high speed; and the fact that civil hostilities were in progress.

307. At the same time, the failure of Yemen to protest the considerable presence of Ethiopian naval forces around and sporadically on the Islands over a period of years is capable of other interpretations. If Yemen did not know of that presence, that belies Yemeni claims that there were Yemeni settlements of fishermen on the Islands and that Yemen patrolled the waters of the Islands and indeed maintained garrisons on them. If Yemen did know of this Ethiopian presence, and if, as the record shows, did not protest it, that could be interpreted as an indication that Yemen did not regard itself as having sovereignty over the Islands, or, at any rate, as an acknowledgment by Yemen that it lacked effective control over them.

308. Yemen could take the view that belligerent acts by Ethiopia against insurgents using the Islands were not elements of continuous and peaceful occupation by Ethiopia, or that Ethiopian regulation of Yemeni fishing vessels found within the waters of the Islands was incidental to Ethiopian belligerency. But such acts, belligerent or otherwise, could not normally be reconciled with Yemeni sovereignty over the Islands. Thus, if Ethiopia's naval presence in the Islands over the years does not establish Ethiopia's (and hence Eritrea's) title, it may nonetheless be seen as throwing into question the title of Yemen.

309. The Tribunal has found it necessary to address at some length the Eritrean evidence relating to naval patrolling over a substantial period of time. At the same time it must be noted that Yemen has not suggested to the Tribunal that it conducted more than a very few activities during this entire period of naval operations by Ethiopia. Yemen has not explained its lack of protest.



310. Essentially Yemen relies on two witness statements. In one statement, Yemen asserts that patrols of the Islands were “carried out on a regular basis”—weekly in the summer and “once every month or two” in the winter but the dates are unspecified. A specific date, but a very recent one, is given by this statement for an assignment “to arrest foreign fishermen pirates” (May 1995). This statement also tells of intercepting foreign warships (American, French and Russian) “in these islands” and requesting them to leave, but no dates are supplied except for an incident with a Russian merchant vessel “on the western side of Zuqar off Shaykh Ghuthayyan about 1977-78.” Interception of an ELF dhow between Zuqar and al-Jah was recorded “about 1974-75.”

311. In the other statement, evidence is given that “during the years of 1965 to 1977” the Yemeni naval forces carried out regular patrols around the Islands, saying that “[t]hey always anchored at the anchorages of these islands and patrolled around them” (specifying the anchorages by name), and that “[o]ur soldiers and officers would land onto their shores.” The statement adds, without specifying dates, that “[m]any times our officers and naval enlisted personnel would land on the shores of those islands (Zuqar, Greater Hanish, Lesser Hanish, and al-Zubayr) on dismounted reconnaissance missions (on foot), as well as to swim and relax.” The period is not specified other than generally from 1965 to 1977.

#### *Environmental protection*

312. Yemen reports having investigated an oil spill reported by a Russian freighter about 10 miles from Lesser Hanish in 1990.

#### *Fishing activities by private persons*

313. There was substantial debate between the Parties as to whose fishing community was more important, and as to how important a part fishing and fish played in the economic life of each state. The Tribunal does not find these arguments pertinent, since in any event it may be expected that population, and economic realities, will change inevitably over time. What may be very important today in terms of fishing may be unimportant tomorrow, and the reverse is also true.

314. For Eritrea, the evidence before the Tribunal includes the statement that “[t]here are more than 2,500 Eritrean fishermen, many of whom are artisanal fishermen engaged in small-scale fishing using traditional methods and equipment” and that “[t]he waters around the Zuqar-Hanish Islands supply a significant portion of Eritrea’s annual catch.” For Yemen, the statement has been made that: “[f]ishing communities along the Yemeni Red Sea coast have historically depended on the neighbouring islands of the Hanish Group for their economic livelihood.”

315. Numerous witness statements were submitted by both sides as to the longevity and importance of their respective fishing practices and the significance of fishing in the lives of their people. Yet, although substantial evidence of individual fishing practices in the record may be taken as a different

form of “*effectivité*”—i.e., one expressive of the generally effective attitude and practice of individual citizens of Eritrea or of Yemen—it is not indicative as such of state activity supporting a claim for administration and control of the Islands. This varied and interesting evidence, on both sides, speaks eloquently concerning the apparent long attachment of the populations of each coast to the fisheries in and around the Islands, and in particular that around the Zuqar–Hanish Islands. However it does not constitute evidence of *effectivités* for the simple reason that none of these functions are acts *à titre de souverain*. For state activity capable of establishing a claim for sovereignty, the Tribunal must look to the state licensing and enforcement activities concerning fishing described above.

316. Yemen has put into evidence a substantial number of arrests of commercial fishing vessels in the past few years in the waters around the Islands. These arrests have been accompanied by legal proceedings, expulsion of the vessels from the waters, and substantial fines. The arrested vessels appear to have borne foreign registries other than Ethiopian or Eritrean and in most cases seem to have been Egyptian. No protests of these activities have been recorded from Ethiopia or Eritrea. Eritrea also produced a witness who related that “between 1992 and 1993” while a commercial captain in the Zuqar–Hanish waters he reported about 20 Egyptian trawlers. “Some of these trawlers were confiscated . . .” He further stated that in his job at the Department of Marine Transport it is his current responsibility “to determine what should be done with them.”

*Other jurisdiction acts concerning incidents at sea*

317. A lost dhow was searched for off the Islands, and an investigation conducted by Yemeni authorities in 1976; a drowning at sea at Greater Hanish was investigated by Yemeni authorities in 1992.

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*Activities on the Islands*

318. In order to examine the performance of jurisdictional acts on the Islands, the Tribunal must consider evidence of activities on the land territory of the Islands as well as acts in the water surrounding the Islands. This evidence includes: landing parties on the Islands; the establishment of military posts on the Islands; the construction and maintenance of facilities on the Islands; the licensing of activities on the land of the Islands; the exercise of criminal or civil jurisdiction in respect of happenings on the Islands; the construction or maintenance of lighthouses; the granting of oil concessions; and limited life and settlement on the Islands.

*Landing parties on the Islands*

319. The direct evidence presented shows little or no landing activities on the Islands by either side.

320. Eritrea's evidence shows that during the twenty years of the emergency there was substantial activity onshore and off the Islands by elements of the Ethiopian navy engaged in suppressing the secessionist movements. The record indicates clearly that the Islands were used heavily by rebel forces in connection with their war of independence. As discussed above, in the context of naval operations around the Islands, two substantial patrols and a number of unspecified landing parties by Ethiopian military forces are in evidence for the period between 1970 and 1988.

321. On the part of Yemen, there was an official visit to Jabal Zuqar and the Abu Ali Islands in 1973 following the publicity about possible Israeli presence on those islands. In response to the Tribunal's request for specific information, the Secretary General wrote to the President of the Tribunal on 28 July 1998, informing him that there had never been "any visit to any of the islands in the red sea by any official delegation of the League of Arab States headed by the secretary general." The letter reported a 1973 meeting between the Secretary General of the Arab League and the Ethiopian foreign minister, to discuss Arab concern about reports of Israeli use of the Dahlak islands and other islands in the bay of Assab. The Ethiopians invited an Arab League delegation to visit the islands in order to confirm that there was no Israeli presence, "but no such visit was ever made." Finally, the Arab League letter states that "in 1971 and 1973", members of the League of Arab States' military committee, including Yemeni officers, visited the islands of the Hanish group including Zuqar as well as the Zubair Islands with the sole cooperation and assistance of the Governments of the People's Republic of Yemen and the Yemen Arab Republic." According to the Secretary General, no report of these visits had been found in the League's archives.

322. Other Yemeni assertions of military presence on the Islands rely heavily on one witness statement describing unspecified landings over a period of time with unspecified dates, other than generally from 1965 to 1977.

323. Yemen has also placed into evidence information concerning field trips by faculty and students of the Staff and Command College in 1987 and 1990. It does not appear that the trips were for more than a very brief period of time, or left any lasting effects.

*Establishment of military posts on the Islands*

324. The evidence presented shows no permanent military posts on the Islands before 1995. Although Eritrea's statements include the mention of landing parties, it was explained that no garrison had been established and the relevance of such garrisons was denied. Rather, Eritrea emphasized that what was legally relevant were sovereign acts tailored to the character of the territory in question, namely military surveillance and fishing regulation.

325. As to Yemen, although the written pleadings state that “a temporary military garrison” was “established ... on Jabal Zuqar at the time of’ the 1973 visit, and that “[d]uring the 1970s, the Government placed guard posts on other islands in the Group, including on Greater Hanish”, no evidence was submitted to substantiate that statement. Photographs introduced into the record of groups of military personnel standing on the Island do not give the impression of permanence. It is also to be noted that no structure or building is shown in the photographs; one would have expected that, had there been any structure or building available, it would have been captured on film.

326. The Tribunal concludes that it cannot accept that a permanent garrison or military post was established on the Islands until following the outbreak of the dispute in 1995.

*Construction and maintenance of facilities on the Islands*

327. There is no evidence of the construction or maintenance of any type of facilities on the Islands by Eritrea. Eritrea nevertheless claims, as an indication of Ethiopia’s “consolidation of sovereign control over the disputed islands, “ that following the hand-over of Aden in 1967 the lighthouses on Abu Ali and Jabal al-Tayr were managed by a private company then based on Asmara, and that Ethiopian regulations applied to transactions by that company in connection with its management and maintenance of those lighthouses. The Tribunal does not consider this to be persuasive.

328. Yemen has however constructed some lighthouses and has maintained others. The operation or maintenance of lighthouses and navigational aids is normally connected to the preservation of safe navigation, and not normally taken as a test of sovereignty. Maintenance on these islands of lighthouses by British and Italian companies and authorities gave rise to no sovereign claims or conclusions. The relevance of these activities and of Yemen’s presence at the 1989 Red Sea Lights Conference are examined in chapter VI.

329. Yemen also points to the siting and installation of two geodetic stations by French companies in 1992 on behalf of the Yemeni Government on Jabal Zuqar and Greater Hanish as examples of state action. Eritrea’s response is that these markers were placed secretly and are in any event modest. The Tribunal cannot give too much weight to such small monuments of this nature, and yet must also not that in fact the markers were installed before the exchange of correspondence between the two heads of state in 1995; that they do exist, and that they are reflected on a map of geodetic stations in the Yemen.

330. The maintenance of shrines and holy places that was also presented in Yemen’s materials appears to be of a private nature; no governmental activity is suggested. There is unsubstantiated testimony before the Tribunal that “[o]ur government built an airfield between al-Shura and al-Habal [on Greater Hanish] for helicopters.” The airstrip constructed by Total on Greater Hanish with Yemen’s authorization in relation to the 1985 Total concession and subsequently dedicated to rest and recreational visits by Total employees is discussed in chapter IX.

331. Although evidence concerning the intentions in May 1995 of the Yemeni General Investment Authority is recent, and although such indications are only of state action without specific object, it nevertheless demonstrates that on a high governmental level the Yemeni authorities were seriously considering that investment should be encouraged for tourism on Greater Hanish, Less Hanish, Abu Ali, Jabal al-Tayr and al-Zubayr; thus official government policy implicitly relied on Yemeni sovereignty over these Islands at that time.

*Licensing of activities on the land of the Islands*

332. Eritrea has suggested that the fact that authorization was required for the private firm Savon & Ries to ship radio transmitters to Abu Ali and Jabal al-Tayr, the islands on which that firm maintained lighthouses, was indicative of the exercise of state control. However the regulation of electronic equipment used by a private firm whose personnel were operating in a zone in which military activities were conducted cannot be viewed as an exercise of sovereign authority with respect to the land territory of the islands concerned.

333. Eritrea has produced evidence of the grant of a license for the operation of a radio transmitting station on Greater Hanish in connection with petroleum activities to be conducted in the vicinity.

334. As to Yemen, discussion follows concerning its construction and maintenance of lighthouses on the Islands. To the extent that most of the useful economic activity and interest in the Islands is generated by their position in the Red Sea and by their relationship to their surrounding waters (whether for purposes of smuggling, fishing, or tourism), most of the licensing activities that have taken place have all been water-related. One brief but not insignificant use of the land resources on the Islands that was also water-related was the recent amphibious scientific research expedition of the Ardoukoba Society to Greater Hanish, authorized by Yemen.

*Exercise of criminal or civil jurisdiction in respect of happenings on the Islands*

335. In 1976, a military court of the Ethiopian Government conducted a trial of employees of Savon & Ries, the lighthouse maintenance company servicing the lights on Abu Ali and Jabal al-Tayr, on accusations of leading and training a subversive group on those islands. The resulting execution of the finance officer and expulsion or imprisonment of a head lighthouse keeper and others caused the company to move its offices from Asmara to Djibouti.

336. The examples of contemporary exercises of criminal jurisdiction over matters occurring in the Islands by Yemeni authorities include a 1976 investigation of a missing dhow and, in 1992, the investigation of the loss at sea of a fisherman off Greater Hanish.

337. In addition, Yemen asserts that for many years the local fishermen have used their own customary law system of arbitration of local disputes under the authority of an *aq'il*—"a person known for wisdom and intelligence."

There is a senior “*Aq’il of the Sea*” the most noted of whom is said to have “resided part of the year on the Yemeni mainland and part of the year at his settlement (‘Izbat al-Sayyid ‘Ali) on Greater Hanish.” The final authority above village *aq’ils* or the *Aq’il of the Sea* is the “*Aq’il of the Fishermen*,” who is a dignitary officially recognized by the Government of Yemen.

338. The *aq’ils* apply what is asserted by Yemen to be a “well-established Yemeni body of customary law, known as the *urf*”, to resolve the fishermen’s disputes. There is evidence before the Tribunal that the judgments or decisions of *aq’ils* are binding.<sup>23</sup> Indeed, in the man overboard case just referred to, the evidence before the Tribunal is that “[t]he owner and crew members both informed the local official, who is known as the *Aq’il Sheikh of the Fishermen*, and the Department was notified by the *Aq’il*.”

339. The existence of this customary law system of arbitration of small disputes does not appear to be contested by Eritrea. There is evidence that the *urf* and the *aq’il* system appear to be applicable to Yemenis and non-Yemenis within Yemeni territory, and to be regularly applied to problems occurring on the Islands.

340. In the Tribunal’s understanding, the rules applied in the *aq’il* system do not find their origin in Yemeni law, but are elements of private justice derived from and applicable to the conduct of the trade of fishing. They are a *lex pascatoria* maintained on a regional basis by those participating in fishing. This reflects the reality also that the principal market for fish is in Hodeiah, on the Yemeni side, and that the fishing activities in the area of the Islands have long been conducted indiscriminately by the fishermen on each side of the Red Sea on a regional basis. The fact that this system is recognized or supported by Yemen does not alter its essentially private character.

#### *Construction or maintenance of lighthouses*

341. The question of lighthouses has already been discussed above in chapter VI. The present section examines this material only for the purposes of the present chapter on *effectivités*. The lighthouses as Abu Ali and Jabal al-Tayr were administered by the lighthouse management company, Savon & Ries. This company maintained its operation in Asmara until 1976, when it moved its office to Somalia because of prosecution of its staff by the Ethiopian Government for allegedly subversive operations (see para. 335). There is however no legal basis for concluding that the location within a state of the office of a private firm, operating under a management agreement for the maintenance of lighthouse facilities on islands, constitutes an international display of power and authority by that state.

342. As to Yemen, starting in 1987 a programme of installation of new lighthouses in the Islands was undertaken, beginning with Centre Peak in 1987 and 1988, and Jabal Zuqar in 1989.

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<sup>23</sup> According to a witness statement submitted by Yemen “... any disputant who seeks to avoid an unfavourable decision of the Council may find himself subject to action by the State, including, under certain circumstances, prison.”

343. Following the 1989 London Conference on Red Sea Lights, Yemen installed new solar lighthouses on Jabal al-Tayr and Quoin (Abu Ali islands). In 1991, a new lighthouse was constructed on Low Island. Finally, a lighthouse was erected on Greater Hanish in 1991.

344. Yemeni Governmental authorities communicated the construction and identification of each of these lighthouses to the public by means of public notices or Notices to Mariners, as described more fully in paragraph 282.

345. The legal effect to be given to the construction and maintenance of lighthouses in this particular case has been dealt with in chapter VI.

#### *Granting of oil concession*

346. Because of the significant attention devoted to the legal implications of petroleum agreements and activities in supplemental written and oral pleadings, this topic is treated separately in chapter IX.

#### *Limited life on the Islands*

347. There is also evidence that some of the Yemeni fishermen have maintained “dwellings” on Greater Hanish, Lesser Hanish and Zuqar, and have traditionally maintained those structures for a long time; or have “settled” on Greater Hanish for the summer, or on Addar Ali Islets or Lesser Hanish for the summer.

348. Eritrea has advanced some evidence that Eritrean fishermen would stay for brief periods on the Islands during the fishing season, but the assertions of “settlements” do not appear to be as prominent in the evidentiary record as those made on behalf of Yemen. There is evidence by one fishermen however that “the longest that I know of anyone staying on the islands is 7 to 8 months.”

349. In the pleadings Yemen states that “some Yemeni fishing families have for generations maintained a permanent presence in the Hanish Group”, and refers to “fishing families resident in the Hanish Group” in the same context as its discussion of “temporary dwellings” and other temporary residence by fishermen. No specific evidence has been produced about families living on the Islands.

350. One Yemeni witness statement records that naval landing parties “would meet many Yemeni fishermen ... who were settled on some of these islands, salting and drying fish, and staying there for several months.”

351. During the fishing seasons the fishermen from each side could expect to spend days and nights on the end fishing in and around the Islands, since returning to port—whether in Ethiopia/Eritrea or in Yemen—would cost a full day’s sailing even if the winds were right. Eritrean evidence is that the Yemeni fishermen “would stay around the islands for only three or four days and then go home.” Another old Eritrean fishermen recounts that “[w]e would go to the island twice a year for three months at a time. Some of us preferred to sleep on the islands, and other would sleep on the boats. Since the islands were not inhabited, no one told us we could not sleep there.”

352. A Yemeni witness declared in his statement that “[a]t Greater Hanish I would settle at the al-Shura anchorage . . . There were trees there under which we would seek the shade. We would not have to make dwellings.” The statement continues to describe the anchorages on Greater Hanish, saying that “[n]ear the Jafir anchorage is dwelling of Capt. Ibrahim Salim and his crew . . . At the other end of the island many others have settled, such as the anchorage where I am at al-Shura, then the al-Habal dwelling, and beyond is the Ibn ‘Alwan anchorage. In the summer many people settle at the Ibn ‘Alwan anchorage. From al-Qataba alone there are over 40 *huris* [small boats].”

353. The first conclusion must be that settled life on the Islands does not exist, but that episodic or seasonal habitation occurs, and that it appears to have taken place for many years. Eritrea asserts that its fishermen have been predominant, and Yemen asserts the reverse. There is no evident manner in which the Tribunal can, on the basis of the sparse and conflicting evidence before it, decide the matter one way or another. The likelihood is not that one nationally prevailed and the other was absent, but that both were present on the Islands in varying numbers and at various times—and that any precise calculation of relative use would, over time, reveal what may be perceived as a genuinely common use of the waters and their resources.

354. The second conclusion appears to be that the manner of living on the Islands is equally indiscriminate: some fishermen stay on their boats; others sleep on the beach; some construct small shelters; other use larger shelters; some consider their structures “settlements.” The one thing that is clear is from the record is that there is no significant and permanent dwelling structure, or in fact any significant and permanent structure of any other kind, that has been built and that has been used to live in.

355. The third conclusion is that it is not clear from the evidence, in spite of occasional references to “families” staying on the Islands, whether any family life is in fact present on the Islands. Inasmuch as the use of the islands is necessarily seasonal, this would seem to be a priori inconsistent with family life in the sense of family units migrating to a location where normal community activities continue, as for example with nomadic herdsmen.

356. The final conclusion must be that life on the Islands, such as it is, is limited to the seasonal and temporary shelter for fishermen. The evidence shows that many of them, of both Eritrean and Yemen nationality, appear to stay on the islands during the fishing season and in order to dry and salt their catch, but that residence, although seasonal and regular, is also temporary and impermanent.

357. For the time being however it would appear that there is little question but that this type of activity on the part of nationals of both Yemen and of Eritrea (and Ethiopia) is activity which, in the words of the Court in the *Anglo-Norwegian Fisheries* case of 1951, represents a “consideration not to be overlooked, the scope of which extends beyond purely geographical factors: that of certain economic interests peculiar to a region, the reality and importance of which are clearly evidenced by a long usage.”<sup>24</sup>

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<sup>24</sup> Fisheries Case (U.K. v. Nor.) 1951 I.C. J. 116 (Dec. 18) at 133.



*General activities*

358. Finally, evidence of more general activities has been presented to the Tribunal by the Parties. This evidence includes assertions of conduct relating to overflight and miscellaneous activities.

*Overflight*

359. The act of overflying a substantially deserted group of islands is not one that would appear to constitute with any cogency an intentional display of power and authority over them. However it may be noted that in its Attachment 2 to the response given by Yemen to Question 18 (“Chronology of Selected Yemeni Acts Manifesting Sovereignty ...”) a number of overflights are recorded, commencing in April 1982 and proceeding through 1988. Doubtless they were important incidents of watching the unfolding of the Eritrean liberation struggle during that decade, but in any event the Tribunal can accord no substantial weight to these activities.

*Miscellaneous activities*

360. Yemen has listed a broad variety of actions and acts in a sixteen-page attachment to response to the Tribunal’s Question 18. A variety of actions of many different categories have been advanced as supporting the respective contentions for consolidation of title over the Islands. The Tribunal has noted the most legally significant acts and positions in its earlier analysis.

361. Considerable emphasis, however, has been placed by Eritrea on an inspection tour conducted by President Mengistu and his staff in 1988. A video-cassette of this tour around the Islands was also provided to the Tribunal. The Tribunal is unable to draw any conclusions from this episode, however, as the presidential party passed the Islands at speed and at some distance offshore, and did not stop or go ashore. No question of an intentional display of power and authority over a territory would seem to be raised by such a passage.

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### Chapter VIII. *Maps*

362. Finally, maps must be considered. It appears to the Tribunal that maps are used by the Parties at different times for different purposes, and that they have relevance to the dispute in several different ways.

*Use of maps by the parties*

363. Older maps, from the eighteenth and early nineteenth centuries, are adduced by Yemen in support of its thesis that the Islands once belonged to Yemen and that Yemen therefore possess an ancient title which should cause sovereignty in the Islands to revert to it following termination of the article 16

suspension under the Treaty of Lausanne. Similarly, maps subsequent to 1872 and earlier than 1918 are adduced by Yemen to show that the Islands fell under Ottoman sovereignty during the period in question and fell within the *vilayet* of Yemen. Eritrea then asserts that maps from the early twentieth century through the late 1930s show that Italy claimed to be, or was received as being, the sovereign over the Islands.

364. Both Eritrea and Yemen have introduced maps produced by third parties in order to demonstrate that informed opinion recognized the Islands as respectively forming part of Ethiopia, or of Yemen, during the period from the early 1950s to the early 1990s.

365. Yemen has introduced maps from the period of the early 1950s to demonstrate that the United Nations considered the Islands not to be part of the Province of Eritrea (within Ethiopia). Both Parties have introduced maps from the period of the 1960s onwards, from a variety of sources, respectively indicating that Yemen treated the Islands as non-Yemeni and that Ethiopia treated them as non-Ethiopian—and that third parties and authoritative sources considered them respectively to be one or the other.

366. Finally, Yemen has introduced evidence showing that Ethiopian, the Eritrean liberation movement before independence, and the Eritrean Government after independence have not considered the Islands to be Ethiopian or Eritrea—but rather Yemeni. Eritrea has introduced evidence to show that Yemen has attributed the Islands to Ethiopia or to Eritrea. Each side has also accused the other of waging a deliberate “maps” campaign—from the early 1970s on the part of Yemen to the early 1990s on the part of Eritrea—to alter the designations, labels, and colours on maps so as to “claim” the Islands as a part of the other’s territory.

367. In general however the positions of the Parties emerged as quite different overall in the usefulness they attributed to maps. Even whilst seeking to make the points just enumerated, Eritrea’s essential position was that map evidence in general (and the evidence in this case in particular) was contradictory and unreliable and could not be used to establish serious legal positions.

368. Yemen’s position was diametrically different; it sought to justify its use of maps in the case for at least four reasons: as “important evidence of general opinion or repute” (in the words of Sir Gerald Fitzmaurice, cited in the oral hearings); as evidence of the attitudes of governments; to reveal the intention of the Parties in respect of state actions; and as evidence of acquiescence or admissions against interest.

*The purposes claimed to be served by maps in the case*

Pre-1872

369. Older maps, from the eighteenth and early nineteenth centuries, are adduced by Yemen in support of its thesis of an ancient or historic title. Most of the maps clearly show the Zuqar-Hanish group and the northern islands as identifiable with the Arabian rather than with the Africa side of the

Red Sea. The Tribunal is not able to judge the extent of the precise territory of the Kingdom of Yemen (*Bilad el-Yemen*). Moreover, in these older maps there is no attribution of the territory of the Islands to Yemen, as such.

370. It appears not unreasonable to infer from the map evidence that rulers (including in particular the Imam of Yemen) of Southern Arabia before the 1872 Ottoman conquest probably did not perceive that the Islands fell within their territorial claim as part of Yemen or of the Arabian coast. However this impression must be qualified by the fact that it is not possible to evaluate the *colour* of maps produced during periods when hand-colouring had to be applied to maps at a second stage. These factors are therefore not determinative with regard to the issue of reversionary historic title. Moreover, there is no evidence that Southern Arabian rulers themselves ever saw or authorized these maps. Conclusions based on this material would be tenuous at best.

#### 1872-1918 period

371. Similarly, maps subsequent to 1872 and earlier than 1918 are adduced by Yemen to show that the Islands fell under Ottoman sovereignty during the period in question and fell within the *vilayet* of Yemen and were administered as part of that *vilayet*. The map evidence appear to confirm the fact that the Ottoman Empire was sovereign over the Islands, upon which fact the Parties are in agreement.

#### Period between 1924 and 1939

372. Yemen has introduced a number of maps that appear to prove that Italy in the inter-war period did not officially consider itself as sovereign over the Islands. These maps were produced by the Ministry of Colonies in 1933, 1935, and 1937 and by the Ministry of Italian Africa in 1939, and they show that the Italian colonial attributes did not consider at the time that the Islands formed part of the Italian Colony of Eritrea. Yemen has also submitted other official Italian maps from the Ministry of Colonies (c. 1925 and 1933) and the Ministry of Italian Africa (1939) of which the first two attribute the Islands clearly to *Yemen* as opposed to the Province of Eritrea, and the third merely omits them from territory of Italian East Africa.

373. Eritrea has introduced an official Italian map of the 1920s to a contrary purpose. It is however hard to discern and appears to be done by hand. Weighed against the evidence submitted by Yemen in terms of official Italian maps of the period, it is not as clear as the Ministry of Colonies' 1933 and 1935 Maps. Nor is its date specified.

374. To the extent that these may be viewed as admissions against interest from official Italian sources, which are not controverted by Eritrean evidence, they have relevance to the Eritrean claim that Italy considered herself sovereign over the Islands at the outbreak of the Second World War. The best interpretation of this evidence appears to be that official Italian cartography did not wish formally to portray the Islands as being under Italian sovereignty in the inter-war period—and even went so far as to assign the Islands to Yemen. On balance, the evidence seems to establish that Italy, in the interbellum pe-

riod, did not consider the Islands to be under Italian sovereignty or at least does not establish that Italy in that period did consider the Islands to be under Italian sovereignty.

375. However, since the Tribunal has arrived at its legal conclusions about the status of the Islands on the basis of the diplomatic record and agreements entered into between 1923 and 1939, the map evidence—whilst supportive of and consistent with the conclusions reached—is not itself determinative. Were there no other evidence in the record concerning the attitude or intentions of Italy, this evidence would be of greater importance.

#### *United Nations treatment in 1950*

376. Yemen has introduced maps from the period of the early 1950s to demonstrate that the United Nations considered the Islands not to be part of the Province of Eritrea (within Ethiopia). The key evidence here is a United Nations map of 1950. Eritrea has vigorously contested the accuracy of this map, its provenance, authenticity and effect, saying that “[n]o official map was adopted by the United Nations”.

377. It is well accepted that, in the United Nations practice, its publication of a map does not constitute a recognition of sovereign title to territory by the United Nations.

378. Whether the map was attached to the report of the United Nations Commission for Eritrea as an official commission map, or as a compromise – or even as a merely illustrative map—seems to be beside the point. What it bears witness to is that it was used and circulated—and received no objection. No protest was recorded in 1950 or at any later time, and Ethiopia itself voted in favour of the report with full knowledge of the map.

379. The map however cannot affirmatively prove that the Islands were Yemeni, even if they bear the same colour as Yemen. In this instance, the United Nations was not concerned with Yemen. The map did not in fact concern Yemen as such. What it shows is that the United Nations when it acted on the future of Ethiopia and Eritrea did *not* consider the Islands to be Ethiopian or Eritrea. As already mentioned in connection with the Italian map evidence of the 1920s and 1930s, since the Tribunal has reached the conclusion that Italy had not acquired sovereignty over the Islands by 1940, it could not then reach the conclusion that Ethiopia (and thus Eritrea by derivation) could have acquired title ten years later by inheritance from Italy.

#### *Informed opinion*

380. Both Eritrea and Yemen have introduced a number of maps produced by third parties (such as independent or commercial cartographic sources, or the intelligence, mapping and navigational authorities of third states) in order to demonstrate that informed opinion recognized the Islands as respectively forming part of Ethiopia, or of Yemen, during the period from the early 1950s to the early 1990s.

381. Although the Tribunal must be wary of this evidence in the sense that it cannot be used as indicative of legal title, it is nonetheless “important evidence of general opinion or repute” in the sense advanced by Yemen. But while a considerable number of the maps submitted appear in general to confirm an impression that the Islands, from and after 1952 to the present day, are mainly attributed to Yemen, and not to Ethiopia or Eritrea, there are noteworthy experiences.

382. Although Eritrea, on its part, has introduced some respectable independent cartographic evidence, this evidence appears to be somewhat outweighed by the contrary evidence from the other side. In some instances the Tribunal cannot agree with the characterization of the maps sought by the Party introducing it. Moreover, the Tribunal is unwilling, without specific direction from the map itself, to attribute meaning to dotted lines rather than to colouration or to labeling. The conclusions on this basis urged by Eritrea in relation to a number of its maps are not accepted.

383. There are also Central Intelligence Agency maps introduced by Yemen and the corroborative labeling in the United States Defence Department Mapping Agency charts of 1994.

#### *Admissions against interest*

384. In 1967, the United States Department of State distributed a press package on the occasion of a state visit by Emperor Haile Selassie to Washington together with “Background Notes” that included a map that very clearly showed the Islands as not being Ethiopian. They are clearly shown in black, just as are Kamaran and the Farasan islands; the Dahlaks are also clearly shown in white, as part of Ethiopia.

385. Yemen has introduced evidence showing that Ethiopia, the Eritrean liberation movement before independence, and the Eritrean Government after independence have not considered the Islands to be Ethiopian or Eritrean—but rather Yemeni. Eritrea has also introduced evidence to show that Yemen has itself attributed the Islands to Ethiopia or to Eritrea. The Tribunal is of the view that most of this evidence tends to cancel itself out, except possibly for the Eritrean maps published after 1992.

386. Yemen further contended that a particular map, asserted by Eritrea to have been produced for the Eritrean Ministry of Tourism by a private firm and to contain a number of inaccuracies, had in fact been distributed to foreign missions, including those of Yemen and the United States, and that it also “hung in Eritrean Government offices in Asmara.” This statement was not controverted. The Tribunal notes that an early map produced by Eritrea after it became independent did not attribute to Eritrea all of the islands that it now claims.

387. On its part, Eritrea asserts as well that Yemen has authorized the production of maps that can be interpreted against its interest, including a map published in 1975 which clearly appears to ascribe the Islands to Ethiopia.

*Conclusion as to maps*

388. On balance, the Tribunal has reached the following conclusions:

*As to the period prior to 1872*

Although Yemen has shown in general that most ancient and nineteenth-century maps attributed the Islands to the Arabian sphere of influence rather than to the African coast, the precise attribution of the Islands to “Yemen” has not been demonstrated.

*For the period from 1872-1918*

The maps produced by each side demonstrate without difficulty that the Islands were under Ottoman domination during the last years of the Empire’s existence. There is no evidence in the record, nor was there any discussion in the case, about the effect of this widespread recognition on the validity *vel non* of the asserted Yemeni claim to a reversionary interest.

*For the period between the Wars*

The map evidence is to some extent contradictory, but by and large the official Italian maps of the time demonstrate that even if Italy harboured a desire to annex the Islands after the Treaty of Lausanne, it certainly did not accompany this desire with any outward manifestation of state authority in its official cartography.

*For the post-war period*

It is not possible to conclude from the history of the 1950 United Nations maps that Ethiopia acquired the Islands after the Second World War, from Italy or otherwise.

*For the period between 1950 and 1992*

The evidence for this period is beset with contradictions and uncertainties. Each Party has demonstrated inconsistency in its official maps. The general trend is, however, that Yemeni map evidence is superior in scope and volume to that of Eritrea. However, such weight as can be attached to map evidence in favour of one Party is balanced by the fact that each Party has published maps that appear to run counter to its assertions in these proceedings.

*For the period from 1992 to 1995*

Finally, evidence is in the record showing broadly-publicized official and semi-official Eritrean cartography shortly after independence which shows the Islands as non-Eritrean if not Yemeni. The evidence is, as in all cases of maps, to be handled with great delicacy.

Chapter IX. *Petroleum Agreements and Activities*

389. It is a singular fact of the proceedings that neither party on its own motion pleaded, described, or relied upon oil contracts and concessions relating to the Red Sea and the disputed Islands. The pleadings of the parties in respect of oil contracts and concessions came in response to questions posed by a Member of the Tribunal at the close of its hearings in February 1998; in the absence of those questions, it appears that those pleadings would not have been made in this phase of the proceedings.

390. Nevertheless, in response to questions put to them, both parties submitted considerable data and argument. In the view of the Tribunal, that data and argument left some questions unanswered. It accordingly called for renewed hearings to be devoted solely to Red Sea petroleum contracts and concessions. Those hearings took place in London from 6-8 July, with the benefit of substantial further written pleadings as well as oral argument, in the course of which, and after which, still further material data was introduced. In those hearings, Eritrea largely maintained that these contracts and concessions were probative of little that was relevant to the issues before the Tribunal, whereas Yemen maintained that they were of major significance in support of its position. Yemen contended that the pattern of Yemen's offshore concessions, unprotected by Ethiopia and Eritrea, taken together with the pattern of Ethiopian concessions, confirmed Yemen's sovereign claims to the disputed Islands, acceptance of and investment on the basis of that sovereignty by oil companies, and acquiescence by Ethiopia and Eritrea. Yemen stated that lack of time had been the reason for its not having pleaded the contracts and concessions on its own initiative.

*The provisions of the pertinent contracts and concessions*

391. Both Yemen and Eritrea have concluded contracts and concession agreements for oil exploration, development, production, and sale of commercial quantities of petroleum that might be found under the Red Sea. While in the event no such quantities have so far been found, those contracts and concessions merit the Tribunal's consideration for what they show and do not show. Of particular significance for the issues before the Tribunal may be an *effectivités* arising out of or associated with those contracts and concessions.

*Contracts and concessions entered into by Yemen*

392. Yemen has submitted information on Red Sea contracts and concession agreements as follows.

*Shell seismic survey, 1972*

393. Yemen states that, in 1972, its predecessor, the Yemen Arab Republic, entered into a contract with Shell International Petroleum Company for "a major geophysical scouting survey in the Red Sea." It maintains that the survey, carried out on Shell's behalf by Western Geophysical Company of America in March 1972, involved the shooting of seismic reconnaissance lines

in the area of the Red Sea that encompassed the islands of the Zuqar–Hanish group, the Zubayr group and Jabal al-Tayr, and from that fact argues that the survey is supportive of Yemeni sovereignty over those Islands. It states that, as a result of the survey, Shell decided that the southern third of the area surveyed, a substantial zone that encompassed the Zuqar–Hanish group, was not promising, but that it would take up a concession contract for a more northerly block which included Zubayr Island.

394. Yemen has not been in a position to provide a text of the survey contract, whose existence Eritrea questions. It does provide a report of Shell International Petroleum Maatschappij N.V. of January 1977, which refers to an offshore scouting survey whose results were used to select the area of the agreement discussed below. It introduced as well in the course of the hearings on 7 July 1998 the *Final Operations Report, Marine Seismic Survey, Offshore Yemen (Red Sea)* by Western Geophysical Company of March 1972. That report states that the objective of the survey was to provide a preliminary seismic coverage of “the concession area” (though at that stage there was no concession), and notes that the field office and base of operations for the seismic survey were in Massawa, Ethiopia. The report attaches a map of the “approximate area covered by seismic program” (plate I), which extends right up to the Ethiopian coast.

395. That map indicates that the survey area is irrelevant to questions of title; Yemen hardly is claiming jurisdiction over the territorial waters of Eritrea, and could not have meant to do so by the authorization or performance of the seismic survey in question. The fact that the survey area embraced Islands in dispute accordingly is not probative.

#### *Shell Petroleum Agreement, 1974*

396. The Yemen Arab Republic and Deutsche Shell Aktiengesellschaft concluded a Petroleum Agreement on 16 January 1974. The contract area was defined as meaning the specified area and its subsoil and seabed “under the jurisdiction of the Yemen Arab Republic”. It comprised a Red Sea block north of the Zuqar and Hanish Islands, which islands it names but does not encompass. It does not encompass Jabal al-Tayr, which is to the west of the contract area, nor does it name it. It names none of the islands it does encompass. It includes the Zubayr group among the unnamed islands within the contract area.

397. A reconnaissance survey was contracted for by Shell that entailed seismic, gravity and magnetic data acquisition in the contract area; the survey report does not state that the survey was carried out within the territorial waters of the Zubayr group. A well was drilled by Shell at a point far from the islands in dispute; oil was not found in commercial quantities; and the agreement was terminated.

398. In a *Final Report on the Exploration Venture of Yemen Shell Exploration GMBH Yemen Arab Republic* of May 1981, it is stated that: “The concession area granted to Deutsche Shell ... under the terms of the Petroleum Agreement of 16 January 1974 extended from ... the Yemen mainland in the east to approximately the median line of the Red Sea in the west.”



399. In view of that statement and the fact that the concession contract speaks not of an area and its subsoil and seabed under the sovereignty but under the jurisdiction of Yemen, the Tribunal concludes that the 1974 Shell concession was granted and implemented in exercise not of Yemen's claims to sovereignty over the islands and their waters within the contract area but in exercise of its rights to the continental shelf as they then were. It further is of view, in the light of the foregoing factors, that, since the contract does not name the Zubayr group or within their territorial waters, the 1974 Shell Petroleum Agreement was entered into without particular regard to the Zubayr group. Those islands appear to have been included within the contract area because the Zubayr group fell on the Yemeni side of the median line, on a continental shelf over which Yemen could exercise jurisdiction.

400. At the same time, the Petroleum Agreement between Yemen and Shell was known to the industry, was published, and its existence and, with sufficient diligence, its terms, could have been known to Ethiopia had it followed the pertinent publications (such as Barrow's *Basic Oil Laws and Concession Contract*). Ethiopia may be argued to have had notice, at any rate, constructive notice, of its existence and provisions. It made no protest about the agreement, despite its contract area including the Zubayr group to which Eritrea now lays claim. Eritrea maintains that Ethiopia in fact was unaware of the terms of the agreement; that, as a poor country locked in civil war, Ethiopia cannot be charged with gaining knowledge of it, and that, in any event, since conclusion and publication of a concession contract is not a title-generating act, there was nothing to protest in the absence of concrete and visible activities of Shell or the Yemeni Government on the Zubayr group. Yemen, for its part, attaches significance to the failure of Ethiopia to protest. Such absence of protest by Ethiopia, and later Eritrea, characterizes all the concessions granted by Yemen in the Red Sea, and will be evaluated.

401. The area of the 1974 Petroleum Agreement between Yemen and Shell is further reproduced in a map dated December 1976. That map was prepared by Shell, and is found in a Shell report of January 1977 marked "Confidential". It is not contended that it has been published or could or should have been known to Ethiopia. It shows the area of the agreement and the areas of detailed survey within it (which are not near the Zubayr group). To the west of the area of the agreement, there runs a line which is described as the "Approximate tentative international boundary". That boundary runs west of the Zubayr group and west of Zuqar and the Hanish Islands as well. No evidence was offered about the considerations that in the view of the drawer of the line gave rise to it, nor did Eritrea specifically comment upon it. In *Yemen's Comments on the Documents introduced by Eritrea after the Final Oral Argument, 29 July 1998*, maps 5 and 6 prepared by Yemen are described as reproducing the line.

402. It appears to the Tribunal that the author of the Shell map was of the view that the "approximate tentative international boundary" was to be drawn on the basis of Yemeni sovereignty over most of the disputed islands and all of the larger ones. That impression is supported not only by the fact that the "approximate tentative international boundary" runs west of those islands.

It is strengthened by the author's having accorded the major disputed islands, including Zuqar and the Hanish Islands, an influence on the course of the boundary as drawn.

*Tomen–Santa Fe Seismic Permit, 1974*

403. A Seismic Permit Agreement was concluded between the Yemen Arab Republic and Toyo Menka Kaisha Ltd. ("Tomen") in 1974, which was extended to include Santa Fe International Corp. The agreement was initially characterized by Yemen in these proceedings as a "concession", which was contested by Eritrea; when its text was later introduced, it was found to be entitled, "Seismic Permit", and to provide for Tomen's conducting a marine seismic survey in the contract area. The contract area is specified by the contract to be outlined in "Exhibit A"; however, Yemen has not placed "Exhibit A" in evidence and has not offered an explanation for its absence from the text of a contract otherwise provided in full. The contract itself gives the coordinates of the contract area and Yemen has placed in evidence maps which it states were prepared for these proceedings on the basis of those coordinates.

404. Yemen affirms on the basis of those coordinates and maps that the contract area embraced the whole of Zuqar and the Hanish Islands. However, in an "Exploration History Map" prepared by the United Nations Development Programme (UNDP) and the World Bank undated but apparently prepared late in 1991, on whose probative force Yemen repeatedly has relied, the western line differs. The western line appears to run through, rather than to the west of, the southern extremity of Greater Hanish Island (the explanatory block on the map reads, "Tomen & Santa Fe, started 1974, ended 1975, seismic, 2150 km.") It may be that the line on the UNDP map runs through Greater Hanish along a median line, as two other concessions, one concluded by Yemen and another by Eritrea, appear to do.

405. The Tomen-Santa Fe Seismic Permit Agreement recites that Yemen has "exclusive authority to mine for Petroleum in and throughout" the contract area, and that the contract area "means the offshore area within the statutory mining territory of Yemen" described in the permit. The term of the contract is six months (and appears to have been extended to a year). The contract specifies that, "The execution of the work program shall not conflict with obligations imposed on the Government of Yemen by International Law". It provides that the contractor shall have the right of ingress to and egress from the contract area and adjacent areas. It further provides that Tomen shall, within the contract term, have the right to apply for a Petroleum License for all or part of the contract area for the exploration, development and production of petroleum, the terms of which are to be agreed upon guided by the terms of similar licenses in OPEC countries.

406. The Seismic Permit Agreement, which not a concession agreement, accordingly is a petroleum-related contract that looks towards the conclusion of such an agreement in certain circumstances. Its assertion of an exclusive authority of Yemen to mine for petroleum within the contract area, and its reference to the statutory mining territory of Yemen, is consistent with conclu-

sion of a contract for exercise of Yemen's rights on its continental shelf. Decree No. 16 concerning the Continental Shelf of the Yemen Arab Republic of 30 April 1967, in proclaiming Yemeni sovereign rights over the seabed and subsoil of its continental shelf and the continental shelf of its islands, asserts the exclusive right to prospect for natural mineral resources of the shelf. The contractual reference to obligations imposed upon Yemen by international law is also of interest, and may be a reference to limited continental shelf rights. In the view of the Tribunal, the Seismic Permit Agreement of itself does not constitute a claim by Yemen to sovereignty over the islands within its contract area, nor does Eritrea's failure to protest the agreement indicate acquiescence in any such claim. However to some extent it presupposes some measure of title to any islands contained within the contract area. The contract area included the land territory and territorial waters of the islands within its extent; this would have included the land territory and also the territorial waters of some or all of Greater Hanish and all of Zuqar and Lesser Hanish.

407. Eritrea argues that in any event seismic surveys are not indicative of sovereign claims. It relies on the Law of the Sea Convention, Part XIII on "Marine Scientific Research". Article 241 provides: "Marine scientific research shall not constitute the legal basis for any claim to any part of the marine environment and its resources". Article 246 provides any claim to any part of the marine environment and its resources" article 246 provides for the regulation by coastal states of marine scientific research in the exclusive economic zone and on the continental shelf; research which shall be conducted with the consent of the coastal state. States shall in normal circumstances grant their consent for marine scientific research projects by other states or competent international organizations "in order to increase scientific knowledge of the marine environment for the benefit of mankind." In the view of the Tribunal, these provisions carried out by licenses of the Parties in the circumstances of these proceedings.

408. Accordingly, activities undertaken in pursuance of the Tomen-Santa Fe Seismic Permit and other like authorizations by licensees of the Parties have a certain importance, and must be weighed by the Tribunal. In the period between 23 July 1974, when the vessel *Western Geophysical I* departed from Hodeidah, and the completion of its voyage on 9 September 1974, a period of some six weeks, "Of the originally scheduled 1500 miles of program, only 1336 miles were recorded due to ... dangerous shoaling in the offshore islands area." That suggests that there were difficulties in working close to the islands; there are a number of references in the report to the Zuqar and Hanish Islands, but no indication is given that suggests any activity on the islands. It is not easy to deduce from the text and maps provided whether seismic work was performed within the territorial waters of the islands. One, for example, speaks of an aerial survey 2 square miles in extent "East of Little Hanish Island - is not shown, nor was the question precisely pursued by counsel for Yemen, who confined himself to stating that operations were conducted "very close" to the islands. Figure 1 of the Santa Fe Report, "Location map & geophysical map", indicates that the areas of detailed survey avoided the immediate waters of the islands, but the map of itself does not show at what proximity to the islands seismic work was con-

ducted. However, if, for example, the geographic position stated “West side Zuqar Island; southwest intersection Lines 50 and 8” is matched against the survey grid found in Figure 1—each of bigger blocks being 10 square kilometers—it appears that seismic activities did extend well into Zuqar’s territorial waters. As far as can be determined from a review of the report, it is uncertain whether the same can be said for the waters of the Hanish Islands.

409. The Santa Fe Report continues: “During the seismic survey, the Zuqar and Hanish Islands were observed from aboard ship by the writer, appearing to be made entirely of volcanic rocks ... Later, Mr. Hazem Baker, a geologist with Yemeni government, went ashore on Zuqar Island and collected samples...all basaltic”. It seems reasonable to presume that he believed that he was landing on an island at least under Yemeni jurisdiction.

*Hunt Oil Company Offshore Production Sharing Agreement, 1984*

410. Yemen and Offshore Yemen Hunt Oil Company on March 10, 1984 concluded an Off-Shore Area Production Sharing Agreement. It recites, “Whereas, all Petroleum in its natural habitat in strata lying within the boundaries of YEMEN is the property of the STATE; and Whereas the STATE wishes to promote the development of potential oil resources in the Area and the CONTRACTOR wishes to join and assist the State in the exploration, development and production of the potential Petroleum resources in the Area ...” Hunt is appointed Contractor “exclusively to conduct Petroleum Operations in the Area described ... the STATE shall in its name retain title to the area covered ...” The agreement provides that Yemeni laws shall apply to the Contractor provided that they are consistent with the agreement, and that the rights and obligations of the parties shall be governed by the agreement and can be altered only with their mutual agreement. The agreement was approved by Government Decree. The coordinates of the area covered by the agreements are set out in annex A, to which is attached a map at annex B showing those coordinates but not naming or showing any of the disputed islands. Yemen has prepared and submitted a map to the Tribunal which shows the Hunt concession as running in the west very close to the edge of, but not including, Jabal al-Tayr, and, at the southern end of the contract boundary, just including the Zubayr group.

411. In fulfillment of its exploration obligations under the agreement, Hunt contracted with Western Geophysical to conduct a seismic survey of the concession area. It did so in 1985, “infilling” Shell data collected a decade earlier. That operation included the area of the Zubayr islands and, it is claimed, Jabal al-Tayr even though the latter did not fall within the concession area. Seismic soundings were taken “around the Zubayr islands and Jabal al-Tayr” but it is not claimed or shown that seismic activities were conducted within their territorial waters. No activities on the Islands are alleged or shown. Aero-magnetic surveys in the contract area were conducted by an aircraft flying from Yemen, and consequently permission to fly through Yemeni airspace was sought and accorded; that fact neither supports nor detracts from Yemen’s claims about the status of the contract area. Equally neutral is the fact that, in connection with well drilling, permission was sought “to enter YAR territorial waters

and conduct offshore drilling operations”, which were nowhere near the Islands. Two wells were drilled far from the Islands; neither produced oil in commercial quantities, and the concession was relinquished.

412. The Production Sharing Agreement does not in terms state a claim of sovereignty of Yemen over the concession area, and, as noted, it takes no notice of the Islands within it, verbally or in the annexed map. It could be interrupted as a concession issued within the area demarcated by a median line in implementation of Yemen’s rights on its continental shelf, a concession which includes the Zubayr group but stops just short of including Jabal al-Tayr. It may be said that if it was the intention of Yemen in issuing the concession to assert sovereignty over the disputed islands, the concession would have included Jabal al-Tayr. What seems likelier is that this concession, as others, was issued with commercial considerations in mind and without particular regard to the existence of the Islands. The fact that title to the contract area is stated to remain in the State of Yemen is not determinative; Yemen holds title to resources on and under its continental shelf; but since the agreement specifies that Yemen retains title “to the area covered” that may be read as a reservation of sovereign title. The reference to the “boundaries of Yemen” is also suggestive of a claim of sovereignty, though “boundaries” does not exclude continental shelf boundaries. The Hunt Production Sharing Agreement was reported in the petroleum literature and gave rise to no protest on the part of Eritrea.

*BP Production Sharing Agreement, 1990*

413. Yemen and British Petroleum concluded a Production Sharing Agreement on 20 October, 1990, whose terms are very similar and in pertinent respects identical to the foregoing Hunt Agreement. It covers the same Antufash Block offshore Yemen that Hunt operated in earlier, and thus embraces the Zubayr islands but not Jabal al-Tayr. However, and this may reflect the policy of Yemen in respect of potential petroleum blocks offered by it in the 1990s, the BP Agreement’s description of the block is more specific than that found in the Hunt Agreement, providing: “Whereas, the State wishes to promote the development of potential Petroleum Resources in the Agreement Area block 8,k As-Sakir, Shabwa Province, ROY...” The text of the agreement was published in *Barrow’s*. It elicited no protest from Eritrea.

414. BP conducted extensive aeromagnetic surveys of the agreement area. Low-level flights, conducted with the permission of the Government of Yemen, covered the Area, including the Zubayr islands, and Jabal al-Tayr though it was outside the Area. A Yemeni military officer accompanied the aircraft during its survey. Survey results were unpromising and BP relinquished its rights in the Area in 1993.

415. The Tribunal does not attach much importance to overflights by either of the parties of the islands in dispute. In the circumstances of the case, it is not clear that overflights of these uninhabited islands are tantamount to a claim of jurisdiction, still less sovereignty, over the Islands. However the agreement’s characterization of the Antufash block as comprising or being within a province of the Republic of Yemen is a factor of significance in favour of Yemen; it indi-

cates a sovereign rather than a jurisdictional claim. At the same time, the fact that the agreement was entered into in 1990 and published about that time is noteworthy. Ethiopia was then locked in its final struggle with the Eritrean liberation movement, the Mengistu regime was close to collapse, and to suggest that Eritrea today should be taxed with Ethiopia's failure during that period to find and protest the terms of the agreement may be unreasonable.

*Total Production Sharing Agreement, 1985*

416. Yemen and Total-Compagnie Francaise des Petroles concluded a Production Sharing Agreement in 1985, to which Texaco later became party. Its terms appear close to those of the Hunt Agreement concluded the year before, summarized in pertinent passages above. It however recites, "Whereas, all Petroleum in its natural habitat in strata lying within the boundaries of Yemen and in the seabed subject to its jurisdiction is the property of the State ..." Since the area of the agreement is onshore as well as offshore, this could be read as an indication of an offshore claim only to jurisdiction and not sovereignty, and could be taken as an indication of an offshore claim only to jurisdiction and not sovereignty, and could be taken as an indication of such a Yemeni assumption in other petroleum agreements. The Area is stated to be described in annex A and shown on the map labelled annex B, but neither annex is attached to the text submitted by Yemen to the Tribunal. However, it is common ground between the parties that the Total Agreement's western line runs to the east of Zuqar and the Hanish Islands. There is no ground for concluding that this fact suggests a lack of entitlement of Yemen to enter into agreements embracing the disputed islands. It rather again suggests that the petroleum agreements entered into by Yemen were concluded without regard to the Islands.

417. Since the agreement area does not include any of the islands in dispute, it is of limited interest for these proceedings, except in the following respects. Total commissioned seismic studies, which were concentrated between the agreement's western line (which fell short of the Hanish Islands) and the coastline of Yemen. The single well drilled—which prove unproductive and led to the agreement's termination in 1989—was distant from the Hanish Islands and towards the coast. However, less detailed seismic surveys were conducted to the west of the Hanish Islands, outside the contract Area, which entered territorial waters of those islands. Yemen acted as if it were entitled to authorize, and Total's agent acted as if it were entitled to conduct, those surveys in Hanish territorial waters.

418. Having come to know the Hanish Islands through its offshore concession, Total in 1993 decided to become a sponsor of the French Ardoukoba scientific mission to the islands to study marine life in the reefs. Total requested and received Yemeni Government permission to establish a landing strip on Greater Hanish so that a Total aeroplane could transport equipment to it. It is also claimed that Total sought and received permission to establish a radio station on Greater Hanish and to permit visiting scientists to use its frequency; evidence in support of this claim has not been provided. Evidence has been provided show-

ing that access to the Hanish Islands, described by Total as uninhabited, was subject to authorization delivered by the “Central Operation of the Army”. After the conclusion of the Ardoukoba mission, Total produced a report that referred to “les îles Hanish en république du Yémen.” Thereafter it sought and received governmental authorization to improve the landing strip and fly Total personnel to Greater Hanish for rest and recreation. For a time, a Total aircraft flew frequently to Greater Hanish, carrying passengers for these purposes.

419. Incidental as it may have been to Total’s Petroleum Agreement, the building and use of an airstrip on Greater Hanish is in the view of the Tribunal a material *effectivité*. It demonstrates the exercise by Yemen of jurisdiction over Greater Hanish, a recognition of that jurisdiction by Total, and the conduct of visible indicia of that jurisdiction—an airstrip in active use—over a period of time. Eritrea appears to have been unaware of it and in any event made no protest. However, Eritrea has introduced evidence showing that a report of activities of a French company in the waters around Greater Hanish was received in May 1986, the period when Total was operating in that area; that an Ethiopian patrol vessel was dispatched to the area to investigate, and that nothing was found. This evidence suggests that, in the perspective of Eritrea, sovereignty over Greater Hanish lay with it.

#### *Adair International Production Sharing Agreement, 1993*

420. Yemen and Adair International entered into a Production Sharing Agreement in 1993. The text of the agreement has not been offered in evidence and accordingly the Tribunal is not in a position to analyse it. The agreement was not ratified by Yemen and did not come into force. Yemen has, however, provided maps of the agreement area which show it as falling within Block 24 or the Al Kathib block in which the Tomen-Santa Fe area fell. It maintains that Yemen had on offer an offshore block that included the whole of the Hanish Islands, and that Adair chose to take a contract area slightly less than the total block on offer. The maps of the Adair area provided by Yemen show the western line to cut through the southern portion of Greater Hanish Island, leaving the larger part, but not all, of Greater Hanish within the area of the agreement. It explains that Adair drew that western line for commercial reasons. As far as the Tribunal can judge, the Adair Agreement’s western line roughly runs along a median line between the coasts of Yemen and Eritrea, drawn without regard to the islands in dispute.

#### *Blocks offered by Yemen*

421. Beginning in 1990, Yemen no longer responded to proposals by prospective concessionaires for rights in areas drawn by them, but began offering concession blocks, dividing most of Yemen and its offshore into blocks. It states that the blocks include the Zubayr island and the Hanish Islands—it offers no explanation for not including Jabal al-Tayr—and maintains that this is further evidence of Yemen holding itself out as the sovereign of disputed islands.

422. Such weight as the Tribunal might be disposed to give to that contention may be qualified by the evidence about the western lines of the offshore blocks provided by Yemen. Yemen has submitted not only its depiction of the blocks. It has also submitted and relied upon, as “expert opinion evidence confirming Yemen’s exercise of State authority over the Hanish Islands and other islands,” a number of maps prepared by Petroconsultants S.A. of Geneva, illustrations of Petroconsultants’ series, “Foreign Scouting Service, Current Status.” The maps are dated from 1989 until November 1997. Three of these maps show a western line of Yemen’s relevant block running not to the west of Greater Hanish Island but through it, as the Adair Area line does. The map for 1994 is linked to the Adair Agreement but the maps for 1996 and 1997 are not.

*Petroleum Agreement and Activities of Ethiopia and Eritrea*

423. Ethiopia in the 1970s entered into a number of offshore concession agreements, which stop short of the deep trough that runs through the middle of the Red Sea. At that time, oil technology was unable to support drilling in so deep a trough. While Yemen maintains that these agreements—which it rather than Eritrea introduced in these proceedings—showed a recognition by Ethiopia and the companies concerned that Ethiopia was not entitled to issue concessions embracing the disputed islands, in the view of the Tribunal these agreements simply reflect technological and commercial realities and carry no implication for the rights of the parties at issue in these proceedings. It is reinforced in this conclusion by the fact that Ethiopian concessions typically contain a formula such as the following (as, *mutatis mutandis*, do maps attached to Yemeni concessions): “The description of the eastern boundary of the contract area does NOT necessarily conform to the international boundaries of Ethiopia and accordingly nothing said herein above is to be deemed to affect or prejudice in any way whatsoever the rights of the Government in respect of its sovereign rights over any of the islands or the seabed and subsoil of the submarine area beneath the high seas contiguous to its territorial waters or areas within its economic zone.” The Tribunal also finds unenlightening two Red Sea offshore petroleum contracts concluded by Eritrea as late as 1995 and 1996, which were promptly protested by Yemen as overlapping its waters. But Ethiopia’s contract with International Petroleum/Amoco is important.

*International Petroleum/Amoco Production Sharing Agreement, 1988*

424. Ethiopia concluded a Production Sharing Agreement with International Petroleum Ltd. of Bermuda on 28 May, 1988. The concession covered, “the onshore-offshore area known as the Danakil Concession in the PDRE” (People’s Democratic Republic of Ethiopia). It recites that, “WHEREAS, the title to all Petroleum existing in its natural condition on, or under the Territory of Ethiopia is vested in the State and people of Ethiopia ... and the Government wishes to promote the exploration, development and production on, in or under the Contract Area ...”, the Government grants to the Contractor “the sole right to explore, develop and produce Petroleum in the Contract Area ...” On 1 November, 1989, 60% of the contract was assigned to Amoco Ethiopia Petroleum Company. Amoco assumed operative responsibility under the assignment.



425. The map attached to the 1988 Production Sharing Agreement shows "Ethiopia-Red Sea Acreage", onshore and offshore, the latter's eastern line running through the southwest extremity of Greater Hanish Island. The description of the Contract Area runs "To the Offshore point 13 at the intersection of LAT 14 DEG 30 with the international median line between North Yemen and Ethiopia, then along the Offshore median line". The agreement contained a *force majeure* clause, including wars, insurrections, rebellions, and terrorist acts, during which the life of the contract would be prolonged. Apparently in view of the fighting between Ethiopian and Eritrean unites, *force majeure* was declared on 9 February 1990 and as of June 1992 was stated to be still in effect.

426. However there is ambiguity about the extent of the Contract Area, at any rate in depictions of it on maps. Amoco Ethiopian Petroleum Company filed four Annual Reports with the People's Democratic Republic of Ethiopia which are in point.

427. The Annual Report for 1989 recounts that geologic activities were undertaken in 1989, that Delft Geophysical Company was awarded a contract to acquire marine seismic, gravity and magnetic data, and that a scout trip by Delft was completed in December. Preliminary seismic interpretation and mapping was initiated. The map attached to the 1989 Report shows virtually all of Greater and Lesser Hanish within the area of the contract, i.e., considerably more than does the map attached to the Production Sharing Agreement.

428. The Annual Report for 1990 observes that activities were suspended with the advent of *force majeure* on 9 February, 1990; as of the end of 1990, the security situation within the Danakil area was considered to remain unsafe for normal seismic operations. It reports on considerable geologic and geophysical activity before that time, and lists some \$2,000,000 in expenditures under the agreement. While the description of the Contract Area matches that in the 1989 report, two maps are attached to the 1990 Annual Report. The first map of the Danakil Contract Area shows the eastern line as running not through but rather west of the Hanish Islands. The second map of that Contract Area shows virtually all of Greater and Lesser Hanish within the Contract Area, duplicating the map attached to the 1989 Annual Report.

429. The 1991 Annual Report notes that *force majeure* has effectively extended the initial period of the contract. While normal seismic operations were unsafe in 1991, substantial technical evaluation of existing data continued. The map of the Contract Area in the 1991 Annual Report shows virtually all of the Hanish Islands within the Contract Area, duplicating the maps to that effect in the 1989 and 1990 Reports.

430. The 1992 Annual Reports limited reprocessing work. It states that Amoco and International Petroleum representatives met with officials of newly independent Eritrea in Asmara on June 24, 1993, when assurances were received that the Danakil Production Sharing Agreement would be recognized by Eritrea. It attaches a contract summary entitled, "Eritrea Danakil Block" and gives an expiration date of February 9, 1997, "to be delayed because of *force majeure*". The governing law is now described as Eritrean. The Danakil

Block map attached to the 1993 Annual Report shows virtually all of the Hanish Islands within the Contract Area, as does a “composite magnetic map of the Danakil concession.”

431. A map prepared by Petroconsultants, on whose maps Yemen has repeatedly relied, also shows the Amoco Contract Area as embracing the greater part of Greater Hanish.

432. Yemen, while not denying that it never protested the terms or geographical extent of the International Petroleum-Amoco Production Sharing Agreement, argues that it could not be charged with doing so. It observes that an article in the *Petroleum Economist* of October 1991 presents a map which shows an Amoco concession that does not include the Hanish Islands. (The UNDP map, which is an “Exploration History Map”, does not name the Amoco concession.) Yemen also maintains that the Amoco contract lasted only some three months and that, by the time it might have come to its attention, *force majeure* prevailed, which might have induced Yemen to take no action.

433. The Tribunal does not find Yemen’s position entirely persuasive. As the Annual Reports summarized above demonstrates, the IPC/Amoco contract was extended well beyond three months and into the days of Eritrean independence, its life compares with that of the contracts of 1995 and 1996, it would have seen that Ethiopian claimed the right to contract for the exploration, development and production of oil in an area claimed as its territory that included some or virtually all of Greater Hanish Islands. Amoco is a major player on the international petroleum scene, and in the immediate area; indeed, one of the maps introduced into evidence by Yemen, shows Amoco together with BP in the Antufash block and shows the Danakil Amoco concession angling into the Adair area in the Al Kathib block.

434. Yemen in its argument has made a great deal about what it alleges is the failure of the Ethiopian or Eritrean to grant any concession contract that included disputed islands, and their failure to protest grants of Yemen that did include those islands. But it has been demonstrated that, in the lately pleaded International Petroleum-Amoco Productions Sharing Agreement, Ethiopia did grant a concession including much or virtually all of the Hanish Islands, and that Yemen failed to protest that agreement. It is of further interest that the map attached to the Production Sharing Agreement speaks of drawing the boundary along the international median line between Yemen and Ethiopia.

435. Eritrea also claims pertinent *effectivités*. It has submitted a copy of an Ethiopian radio transmitting license granted circa 1988-89 (the earlier date on the contract is apparently of the Ethiopian calendar) to Delft Geophysical Co. for the establishment of a station on Greater Hanish Island, presumably in connection with the seismic work which Amoco had contracted with Delft to perform. It has provided the text of a detailed order to the most senior military commanders to provide protection to a petroleum exploration expedition of the Ethiopian Ministry of Mines and Energy to be deployed to areas “including Greater Hanish Island.” It has provided an Ethiopian memorandum on oil exploration in the Red Sea carrying the Ethiopian date of 13 April, 1982 (which is circa 1989 AD.), stating that Amoco-Ethiopia Petroleum

Company “has installed navigation beacons to enable it to conduct seismic study ... including on Greater Hanish Island”. The memorandum continues: “An Amoco professional team of contractors will be available starting third week of December to select areas for the installation as follows:

For two weeks installation of navigation beacons on the 8 selected locations: At the end of the two-week period, conduct 6 week-long seismic tests ...”

and it calls for ensuring the protection of the contractors and their equipment during beacon installation and for the protection of the installed beacons. It further requests protection for the Delft Geophysical ship while it is conducting seismic tests. Another memorandum states that an Amoco contracting team will conduct helicopter patrols to select locations for the installation of navigation beacons, including locations “on Greater Hanish”. It is not entirely clear whether these activities were in fact completed, although the Amoco Annual Report for 1989 does corroborate that Delft Geophysical did conduct a scout trip in December 1989 (see para. 427, above).

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436. In the light of this complex concession history, the Tribunal has reached the following conclusions:

437. The offshore petroleum contracts entered into by Yemen, and by Ethiopia and Eritrea, fail to establish or significantly strengthen the claims of either party to sovereignty over the disputed islands.

438. Those contracts however lend a measure of support to a median line between the opposite coasts of Eritrea and Yemen, drawn without regard to the islands, dividing the respective jurisdiction of the parties.

439. In the course of the implementation of the petroleum contracts, significant acts occurred under state authority which require further weighing and evaluation by the Tribunal.

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## Chapter X. *Conclusions*

440. Having examined and analysed in great detail the extensive materials and evidence presented by the Parties<sup>25</sup>, the Tribunal may now draw the appropriate conclusions.

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<sup>25</sup> The Tribunal wishes to note the sheer volume of written pleadings and evidence received from the Parties in this first phase of the arbitral proceedings. Each Party submitted over twenty volumes of documentary annexes, as well as extensive map atlases. In addition, the Tribunal has carefully reviewed the verbatim transcripts of the oral hearings, which together far exceed 1,000 pages. The Tribunal further notes that the majority of documents were submitted in their original language, and the Tribunal has relied on translations provided by the Parties.

*Ancient title*

441. First there is the question of an “ancient title” to which Yemen attaches great importance; moreover the Agreement for Arbitration requires the Tribunal to decide the question of sovereignty “on the basis in particular of historic titles”. Yemen contends that it enjoys an ancient title to “the islands”, which title existed before the hegemony of the Ottoman Empire and indeed emanates from medieval Yemen. It contends, moreover, that this title still subsisted in international law at the time when the Turks were defeated at the end of the First World War, and that therefore, when the Ottoman Empire renounced their generally acknowledged sway over the islands by the Treaty of Lausanne in 1923, the right to enjoy that title in possession “reverted” to Yemen.

442. This is an interesting argument and one that raises a number of questions concerning the international law governing territorial sovereignty. No one doubts that during the period of the Ottoman Empire—certainly in the second Ottoman period 1872-1918—the Ottomans enjoyed possession of, and full sovereignty over, all the islands now in dispute, and thus not only factual possession but also a sovereign title to possession. When this regime ceased in 1923, was there a “reversion” to an even older title to fill a resulting vacuum?

443. It is doubted by Eritrea whether there is such a doctrine of reversion in international law. This doubt seems justified in view of the fact that very little support for such a doctrine was cited by Yemen, nor is the Tribunal aware of any basis for maintaining that reversion is an accepted principle or rule of general international law. Moreover, even if the doctrine were valid, it could not apply in this case. That is because there is a lack of continuity. It has been argued by Yemen that in the case of historic title no continuity need be shown, but the Tribunal finds no support for this argument.

444. Yemen’s argument is difficult to reconcile with centuries of Ottoman rule over the entire area, ending only with the Treaty of Lausanne (see chapter V). This is the more so because, under the principle of intertemporal law, the Ottoman sovereignty was lawful and carried with it the entitlement to dispose of the territory. Accepting Yemen’s argument that an ancient title could have remained in effect over an extended period of another sovereignty would be tantamount to a rejection of the legality of Ottoman title to full sovereignty.

445. The Treaty of Lausanne did not expressly provide, as the Treaty of Sèvres would have done, that Turkey renounced her territorial titles in favour of the Allied Powers; which provision would certainly have excluded any possibility of the operation of a doctrine of reversion. Yemen was not a party to the Treaty of Lausanne, which was therefore *res inter alios acta*. Nevertheless, none of the authorities doubts that the formerly Turkish islands were in 1923 at the disposal of the parties to the Lausanne Treaty, just as they had formerly been wholly at the disposal of the Ottoman Empire, which was indeed party to the treaty and in it renounced its sovereignty over them. Article 16 of the Treaty created for the islands an objective legal status of indeterminacy pending a further decision of the interested parties; and this legal position was generally recognized, as the considerable documentation presented by the Parties to the Tribunal amply demonstrates. So, it is difficult so see what could have been left of

such a title after the interventions of the Ottoman sovereignty which was generally regarded as unqualified; and its replacement by the article 16 regime which put the islands completely at the disposal of the "interested parties".

446. There is a further difficulty. Yemen certainly existed before the region came to be under the domination of the Ottomans. But there must be some question whether the Imam, who at that period dwelt in and governed a mountain fortress, had had sway over "the islands". Further, there is a problem of the sheer anachronism of attempting to attribute to such a tribal, mountain and Muslim medieval society the modern Western concept of a sovereignty title, the particularly with respect to uninhabited and barren islands used only occasionally by local, traditional fishermen.

447. In keeping with the dictates of the Arbitration Agreement, both Parties, and Yemen especially, have placed "particular" emphasis on historic titles as a source of territorial sovereignty. They have, however, failed to persuade the Tribunal of the actual existence of such titles, particularly in regard to these islands.

448. Eritrea's claims too, insofar as they are said to be derived by succession from Italy through Ethiopia, if hardly based upon an "ancient" title, are clearly based upon the assertion of an historic title. There is no doubt, as has been shown in chapters V, VI and VII, that Italy in the inter-war period did entertain serious territorial ambitions in respect of the Red Sea islands; and did seek to further these ambitions by actual possession of some of them at various periods. Major difficulties for the Eritrean claims through succession are, as has been shown above in some detail, first the effect of article 16 of the Treaty of Lausanne of 1923, and later the effects of the provisions of the Italian Peace Treaty of 1947. But there is also the fact that the Italian Government, in the interwar period, constantly and consistently gave specific assurances to the British Government that Italy fully accepted and recognized the indeterminate legal position of these islands as established by treaty in 1923. No doubt Italy was hoping that the effect of her active expansionist policies might eventually be that "the parties concerned" would be persuaded to acquiesce in a *fait accompli*. But that never happened.

449. So there are considerable problems for both Parties with these versions of historic title. But the Tribunal has made great efforts to investigate both claims to historic titles. The difficulties, however, arise largely from the facts revealed in that history. In the end neither Party has been able to persuade the Tribunal that the history of the matter reveals the juridical existence of an historic title, or of historic titles, of such long-established, continuous and definitive lineage to these particular islands, islets and rocks as would be a sufficient basis for the Tribunal's decision. And it must be said that, given the waterless and uninhabitable nature of these islands, and islets and rocks, and the intermittent and kaleidoscopically changing political situations and interests, this conclusion is hardly surprising.

450. Both Parties, however, also rely upon what is a form of historic claims but of a rather different kind; namely, upon the demonstration of use, presence, display of governmental authority, and other ways of showing a pos-

session which may gradually consolidate into a title; a process well illustrated in the *Eastern Greenland* case, the *Palmas* case, and very many other well-known cases. Besides historic titles strictly so-called the Tribunal is required by the Agreement for Arbitration to apply the “principles, rules and practices of international law”; which rubric clearly covers this kind of argument very familiar in territorial disputes. The Parties clearly anticipated the possible need to resort to this kind of basis of decision—though it should be said that Yemen expressly introduces this kind of claim in confirmation of its ancient title, and Eritrea introduces this kind of claim in confirmation of an existing title acquired by succession—and the great quantity of materials and evidences of use and of possession provided by both Parties have been set out and analysed in chapter VII, together with chapter VIII on maps and chapter IX on the history of the Petroleum agreements. It may be said at once that one result of the analysis of the constantly changing situation of all these different aspects of governmental activities is that, as indeed was so in the *Minquiers and Ecrehos*<sup>26</sup> case where there had also been much argument about claims to very ancient titles, it is the relatively recent history of use and possession that ultimately proved to be a main basis of the Tribunal decisions. And to the consideration of these materials and arguments this Award now turns.

*Evidences of the display of functions of State and Governmental authority*

451. These materials have been put before the Tribunal by the Parties with the intention of showing the establishment of territorial sovereignty over the islands, in Judge Huber’s words in the *Palmas* case<sup>27</sup> “by the continuous and peaceful display of the functions of state within a given region.” But the kind of actions that may be deployed for this purpose has inevitably expanded in the endeavour to show that Charles de Visscher named a gradual “consolidation” of title. Accordingly, the Tribunal is faced in this case with an assortment of factors and events from many different periods, intended to show not only physical activity and conduct, but also repute, and the opinions and attitudes of other governments (the different classes of materials are set out in chapter VII).

452. It is well known that the standard of the requirements of such activity may have to be modified when one is dealing, as in the present case, with difficult or inhospitable territory. As the Permanent Court of International Justice said in the *Legal Status of Eastern Greenland* case, “[I]t is impossible to read the records of the decisions in cases as to territorial sovereignty without observing that in many cases the tribunal has been satisfied with very little in the way of the actual exercise of sovereign rights, provided that the other state could not make a superior claim.”<sup>28</sup>

<sup>26</sup> *Minquiers and Ecrehos* (U.K. v. Fr.), 1953 *I.C.J.* 47.

<sup>27</sup> *Island of Palmas* (U.S. v. Neth.), 2 *R.I.A.A.* 829 (1929).

<sup>28</sup> *Legal Status of Eastern Greenland* (Den. v. Nor.), 1933 *P.C.I.J.* (Ser.A/B) No. 53.

453. This raises, however, a further important question of principle. The problem involved is the establishment of territorial sovereignty, and this is no light matter. One might suppose that for so important a question there must be some absolute minimum requirement for the acquisition of such a right, and that in principle it ought not normally to be merely a relative question.

454. It may be recalled that this question of principle did arise in the *Palmas* case, but there Huber was able to meet it by appealing to the particular terms of the *compromis*, which, said Huber, “presupposes for the present case that the Island of Palmas (or Miangas) can belong only to the United States or to the Netherlands and must form in its entirety part of the territory either of the one or of the other of these two Powers, parties to the dispute,” and “[t]he possibility for the arbitrator to found his decision on the relative strength of the titles invoked on either side must have been envisaged by the parties to the Special Agreement.”

455. The Arbitration Agreement in the present case, however, is in different and even unusual terms. The Tribunal is required only to make “an award on territorial sovereignty” and “to decide the sovereignty”. The *Compromissory* provision which led Huber to the possibility of deciding only on the basis of a marginal difference in weight of evidence cannot be said to apply in the present case.

456. There is certainly no lack of materials, evidence, or of arguments in the present case. The materials, on the contrary, are voluminous and the result of skilled research by the teams of both Parties, and of the excellent presentations by their counsel. But what these materials have in fact revealed is a chequered and frequently changing situation in which the fortunes and interests of the Parties constantly ebb and flow with the passages of the years. Moreover, it has to be remembered that neither Ethiopia nor Yemen had much opportunity of actively and openly demonstrating ambitions to sovereignty over the islands, or of displaying governmental activities upon them, until after 1967, when the British left the region. For, as shown, the British were constantly vigilant to maintain the position effected by the Treaty of Lausanne that the legal position of “the islands” were indeterminate.

457. In these circumstances where for all the reasons just described the activities relied upon by the parties, though many, sometimes speak with an uncertain voice, it is surely right for the Tribunal to consider whether there are in the instant case other factors which might help to resolve some of these uncertainties. There is no virtue in relying upon “very little” when looking at other possible factors might strengthen the basis of decision.

458. An obvious such factor in the present case is the geographical situation that the majority of the islands and islets and rocks in issue form an archipelago extending across a relatively narrow sea between the two opposite coasts of the sea. So there is some presumption that any islands off one of the coasts may be thought to belong by appurtenance to that coast unless the state on the opposite coast has been able to demonstrate a clearly better title. This possible further factor looks even more attractive when it is realised that its influence can be seen very much at work in the legal history of these islands; beginning indeed with the days of Ottoman rule when even under the common

sovereignty of the whole region it was found convenient to divide the jurisdiction between the two coastal local authorities (see paras. 132-136). Moreover, in the present case, the examination of the activities material itself shows very clearly that there was no common legal history for the whole of this Zuqar–Hanish archipelago; some of the evidence not surprisingly refers to particular islands or to subgroups of islands.

459. Thus the Tribunal has found it necessary, in order to decide the question of sovereignty, to consider the several subgroups of the islands separately, if only for the reason that the different subgroups have, at least to an important extent, separate legal histories; which is only to be expected in islands that span the area between two opposite coasts. This may seem only a natural or even manifest truth, but Yemen in particular has emphasized the importance it attaches to what it calls a principle of natural unity of the islands, and some comment on this theory is therefore required.

*Natural and physical unity*

460. Yemen's pleadings insist strongly on what it calls "the principle of natural or geophysical unity" in relation to the Hanish group of islands; Yemen uses the name of the "Hanish Group" both in its texts and in its illustrative maps to encompass the entire island chain, including the Haycocks and the Mohabbakahs (the present comments do not refer of course to the northern islands of Jabal al-Tayr and the Zubayr group, which will be considered separately later on).

461. This "principle" is described in chapter 5 of the Yemen Memorial, where impressive authority is cited in support of it, including Fitzmaurice, Waldock and Charles de Visscher. That there is indeed some such concept cannot be doubted. But it is not an absolute principle. All these authorities speak of it in terms of raising a presumption. And Fitzmaurice is, in the passage cited, clearly dealing with the presumption that may be raised by proximity where a state is exercising or displaying sovereignty over a parcel of territory and there is some question whether this is presumed to extend also to outlying territory over which there is little or no factual impact of its authority. The Tribunal has no difficulty in accepting these statements of high authority; but what they are saying is in fact rather more than a simple principle of unity. It will be useful to cite Fitzmaurice again:

*The question of 'entity' or 'natural unity'*

This question can have far-reaching consequences. Not only may it have powerfully affect the play of probabilities presumptions, but also, if it can be shown that the disputed areas (whether by reason of actual contiguity or of proximity) are part of an entity or unity over which as a whole the claimant State has sovereignty, this may (under certain conditions and within certain limits) render it unnecessary—or modify the extent to which it will be necessary—to adduce specific evidence of State activity in relation to the disputed areas as such—provided that such activity, amounting to effective occupation and possession, can be shown in the principle established by the Island of Palmas case that 'sovereignty cannot be exercised in fact at every moment on every point of a territory'.<sup>29</sup>

<sup>29</sup> 32 B.Y.I.L. (1955-56) 73-74.



462. Thus, the authorities speak of “entity” or “natural unity” in terms of a presumption or of probability and moreover couple it with proximity, contiguity, continuity, and such notions, well known in international law as not in themselves creative of title, but rather of a possibility or presumption for extending to the area in question an existing title already established in another, but proximate or contiguous, part of the same ‘unity’.

463. These ideas, however, have a twofold possible application in the present case. They may indeed, as Yemen would have it, be applied to cause governmental display on one island of a group to extend in its juridical effect to another island or islands in the same group. But by the same rationale a complementary question also arises of how far the saw established on one of the mainland coasts should be considered to continue to some islands or islets off that coast which are naturally “proximate” to the coast or “appurtenant” to it. This idea was so well established during the last century that it was given the name of the “portico doctrine” and recognized “as a means of attributing sovereignty over off-shore features which fell within the attraction of the mainland”.<sup>30</sup> The relevance of these notions of international law to the legal history of the present case is not far to seek.

464. Thus the principle of natural and physical unity is a two-edged sword, for if it is indeed to be applied then the question arises whether the unity is to be seen as originating from the one coast or the other. Moreover, as the cases and authorities cited by Yemen clearly show, these notions of unity and the like are never in themselves roots of title, but rather may in certain circumstances raise a presumption about the extent and scope of a title otherwise established.

465. In spite of unity theories, the fact is that both Parties have tacitly conceded that, for the purposes at any rate of the exposition of their pleadings, it may be accepted that there can be sub-groups: the Mohabbakahs; the Haycocks; and what it will be convenient at least for the moment to call the Zuqar–Hanish group and its many satellite islands, islets, and rocks. These names will all be found in the *British Pilot and Sailing Directions for the Southern Red Sea* (Yemen has cited this publication as authority for regarding all these islands as one group, but of course if one is concerned with them as sailing hazards or landmarks when traversing the Red Sea there is really no other way to do it). There are also the two northern islands: Jabal al-Tayr, and the group of which the biggest island is Jabal Zubayr. The Tribunal will now consider its conclusions in respect of each of the three subgroups and then, finally, the northern islands.

466. Thus, in order to make decisions on territorial sovereignty, the Tribunal has hardly surprisingly found no alternative but to depart from the terms in which both Parties have pleaded their cases, namely by each of them presenting a claim to every one of the islands involved in the case. The legal

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<sup>30</sup> D.O’connell, *The International Law of the Sea* 185 (1982).

history simply does not support either such claim.<sup>31</sup> For, as has been explained above, much of the material is found on examination to apply either to a particular island or to a sub-group of islands. The Tribunal has accordingly had to reach a conclusion which neither Party was willing to contemplate, namely that the islands might have to be divided; not indeed by the Tribunal but by the weight of the evidence and argument presented by the Parties, which does not fall evenly over the whole of the islands but leads to different results for certain sub-groups, and for certain islands.

### *The Mohabbakahs*

467. The Mohabbakah Islands are four rocky islets which amount to little more than navigational hazards. They are Sayal Islet, which is no more than 6 nautical miles from the nearest point on the Eritrean mainland coast, Harbi Islet and Flat Islet; all three of these are within twelve nautical miles of the mainland coast. Finally, there is High Islet, which is less than one nautical mile outside the twelve-mile limit from the mainland coast, and about five nautical miles from the nearest Haycock islands, namely South West Haycock.

468. Eritrea has sought to show that Italy obtained title to the Mohabbakahs along with the various local agreements Italy made with local rulers (see para. 159), which led to its securing title over the Danakil coast; this was not protested by Turkey and came to be recognized by Great Britain. The diplomatic history has some interest for this case, especially in highlighting the question of whether South West Haycock is a Mohabbakah island, or part of a separate group of Haycocks, or part of a larger "Zuqar-Hanish group" (see para. 215, for the 1930 Italian claim to sovereignty over South West Haycock).

469. Eritrea thus contends that the Mohabbakahs were comprised within what was passed to Ethiopia and so to Eritrea after the Second World War and that this is affirmed by the reference in article 2 of the 1947 Peace Treaty to the islands "off the coast" and by the constitutional arrangements.

470. Yemen claims that the only islands Ethiopia secured jurisdiction over through local rulers were the islands in Assab Bay; and that, because formerly both coasts of the Red Sea fell under Ottoman rule; and because after the end of the First World War Yemen reverted to its "historic title"; and also because the Mohabbakahs are properly to be perceived as a unity with the Haycocks and the Zuqar-Hanish group, title to all these islands lies with Yemen. The Tribunal rejects this argument.

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<sup>31</sup> In this connection it is interesting to see the statements made in the 1977 "Top Secret" memorandum of the Ministry of Foreign Affairs of the Provisional Military Government of Socialist Ethiopia, discussed in para. 245. This memorandum refers to islands in the southern part of the Red Sea that "have had no recognized owner", with respect to which Ethiopia "claims jurisdiction" and "both North and South Yemen have started to make claims." South Yemen's position is that the islands were illegally handed over to Ethiopia by the British when Britain was giving up its rights in the protectorate of Aden." It adds "the North Yemen government has now raised the question of jurisdiction over the islands. It goes on to recommend bilateral negotiations which seem in fact to have been entered into before the time of this memorandum for it goes on to say that "[b]oth states ... have informally mentioned the possibility of dividing the islands between the two of them. The proposal is to use the median line, which divides the Red Sea equally from both countries' coastal borders, as the dividing line... Ethiopia rejected this proposal as disadvantages."

471. The Tribunal has already noted that there is no evidence that the Mohabbakah islands were part of an original historic title held by Yemen, even were such a title to have existed and to have reverted to Yemen after the First World war. And, even if it were the case that only the Assab Bay islands passed to Eritrea by Italy in 1947, no serious claims to the Mohabbakahs have been advanced by Yemen since that time, until the events leading up to the present arbitration.

472. The Tribunal needs not, however, decide whether Italian title to the Mohabbakahs survived the Treaty of Lausanne, and passed thereafter to Ethiopia and then to Eritrea. It is sufficient for the Tribunal to note that all the Mohabbakahs, other than High Islet, lie within twelve miles of the Eritrean coast. Whatever the history, in the absence of any clear title to them being shown by Yemen, the Mohabbakahs must for that reason today be regarded as Eritrean.<sup>32</sup> No such convincing alternative title has been shown by Yemen. It will be remembered indeed that article 6 of the 1923 Treaty of Lausanne already enshrined this principle of the territorial sea by providing expressly that islands within the territorial sea of a state were to belong to that state. In those days the territorial sea was generally limited by international law and custom to three nautical miles, but it has now long been twelve, and the Ethiopian territorial sea was extended to twelve miles in a 1953 decree.

473. At this point it will be convenient to look at the ingenious theory enunciated by Eritrea, based on the undoubted rule that the territorial sea extends to twelve miles not just from the coast but may also extend from a baseline drawn to include any territorial islands within a twelve-mile belt of territorial sea. Thus the baseline can lawfully be extended to include an entire chain, or group of islands, where there is no gap between the islands of more than twelve miles; the so-called leapfrogging method of determining the baseline of the territorial sea. As already mentioned, the entire chain or group of these islands consists of islands, islets, or rocks proud of the sea and therefore technically islands, with no gap between them of more than twelve miles. The only such gap is the one between the easternmost island (the Abu Ali islands) and the Yemen mainland coast.

474. The difficulty with leapfrogging in the instant case is that it begs the very question of issue before this Tribunal: to which coastal state do these islands belong? There is a strong presumption that islands within the twelve-mile coastal belt will belong to the coastal state, unless there is a fully-established case to the contrary (as for example, in the case of the Channel Islands). But there is no like presumption outside the coastal belt, where the ownership of the islands is plainly at issue. The ownership over adjacent islands undoubtedly generates a right to a corresponding territorial sea, but merely extending

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<sup>32</sup> See D. Bowett, *The Legal Regime of Islands in International Law* 48 (1978); where he says of islands lying within the territorial sea of a state, "Here the presumption is that the island is under the same sovereignty as the mainland nearby"; and he also interestingly quotes Lindley, *The Acquisition and Government of Backward Territory in International Law* 7 (1926), writing, it may be noted, in the mid 1920s that "An uninhabited island within territorial waters is under the dominion of the Sovereign of the adjoining mainland."

the territorial sea beyond the permitted coastal bet, cannot of itself generate sovereignty over islands so encompassed. And even if there were a presumption of coastal-state sovereignty over islands falling within the twelve-mile territorial sea of a coastal-belt island, it would be no more than a presumption, capable of being rebutted by evidence of a superior title.

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475. Therefore, after examination of all relevant historical, factual and legal considerations, the Tribunal unanimously finds in the present case that the islands, islet, rocks, and low-tide elevations forming the Mohabbakah islands, including but not limited to Sayal Islet, Harbi Islet, Flat Islet and High Islet are subject to the territorial sovereignty of Eritrea. It is true that High Islet is a small but prominent rocky islet barely more than twelve miles (12.72 n.m.) from the territorial sea baseline. But here the unity theory might find a modest and suitable place, for the Mohabbakahs have always been considered as one group, sharing the same legal destiny. High Islet is certainly also appurtenant to the African coast.

#### *The Haycocks*

476. The Haycocks are three small islands situated along a roughly south-west-to-northeast line. They are, from south to north, South West Haycock, Middle Haycock, and Northeast Haycock. South West Haycock is some 6 nautical miles from the nearest point of Suyul Hanish, though there is the very small Three Foot Rock about midway between them.

477. As already mentioned above, the Haycocks do have a peculiar legal history and it is for this reason mainly that they need to be discussed separately here. That legal history is very much bound up with the story of the Red Sea lighthouses. but one might begin the salient points of this legal history by recalling the 1841, 1866 and 1873 *firmans* of the Ottoman Sultan (see para. 97), by which the African coast of the Red Sea and the islands off it were placed under the jurisdiction and administration of Egypt, though of course the whole of this part of the world was then under the sovereignty of the Ottoman Empire. There seems little doubt that this African coast administration would have extended to the Mohabbakahs and the Haycocks. At this time the territorial sea was limited to three miles, and there were still grave doubts about the nature and extent of the territorial waters regime. Nevertheless, there was a feeling, based upon considerations of security as well as of convenience, that islands off a particular coast would, failing a clearly established title to contrary, be under the jurisdiction of the nearest coastal authority. As mentioned, this was sometimes called the "portico doctrine".

478. Another stage in this legal history is at the end of the nineteenth century, when the British Government was interested in the possibility of establishing an alternative western shipping channel through the Red Sea, which needed lighting if it was to be used at night. Various islands were considered as sites for a light (see para. 203, 204), including South West Haycock, which is in the end proved to be the successful candidate. This involved inquiries about the “jurisdiction” under which the island would come, and the British Board of Trade satisfied itself that South West Haycock was subject to Italian jurisdiction and at any rate probably not Ottoman.

479. In 1930, when the Italians were constructing a lighthouse on South West Haycock, there was an instructive correspondence between the Italian and British Governments. An internal Foreign Office memorandum reveals the opinion that “the establishment of the Italian colony of Eritrea makes it difficult, therefore, to resist the claim that the islands off the coast of Eritrea are to be considered as an appendage of that colony.”<sup>33</sup> This was the official reaction to a letter from the Royal Italian Government of 11 April, claiming South West Haycock, *inter alia* for reasons of its “immediate vicinity” to the Eritrean Red Sea coast.

480. Eritrea employs these arguments to support its claim to the Haycocks, but puts it in the form of a succession derived from the Italian colony of Eritrea, and by the way of the subsequent federation of Ethiopia and Eritrea, through to Eritrean independence in 1993. There are difficult juridical problems with this theory of succession, not least the terms of the Italian armistice of 1943 and the peace treaty of 1947, whereby Italy surrendered her colonial territories for disposition by the Allies and in default of agreement amongst them, to disposition by the United Nations, which of course is what actually happened to Eritrea. However this may be, the geographical arguments of proximity to the Eritrean coast remain persuasive and accord with the general opinion that islands off a coast will belong to the coastal state, unless another, superior title can be established. Yemen has failed, in this case, to establish any such superior claim.

481. The Eritrean claim to the Haycocks also finds some support in the material provided by both Parties for the supplementary hearing on the implications of petroleum agreements. None of the Yemen agreements extends as far to the southwest as the Haycocks; the 1974 Tomen–Santa Fe agreement appears to encompass the Hanish group, but stops short of the Haycocks. On the other hand, the fully documented agreements of the Eritrean Government and Shell, Amoco and BP do cover the areas of the Haycocks, and of course the Mohabbakahs. There was no protest from Yemen, though Yemen did protest when an agreement with Shell appeared to it to trespass upon its claim to the northern islands.

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<sup>33</sup> Foreign Office Memorandum dated 10 June 1930, prepared by Mr. Orchard.

482. Therefore, after examination of all relevant historical, factual and legal considerations, the Tribunal unanimously finds in the present case that the islands, islet, rocks, and low-tide elevations forming the Haycock Islands, including, but not limited to, North East Haycock, Middle Haycock, and South West Haycock, are subject to the territorial sovereignty of Eritrea. It follows that the like decision will, apart from other good reasons noted, apply to High Islet, the one island of the Mohabbakah sub-group that is outside the Eritrean territorial sea.

483. There remains a question whether the South West Rocks should for these purposes be regarded as going along with the Haycocks. No doubt South West Rocks are so called because they lie southwest of Greater Hanish and there is no other feature between them and that island. There is some evidence that South West Rocks were, at various times, considered to form the easternmost limit of African-coast jurisdiction. While the British Foreign Office documentation relied on by both Parties reflects divergent views (referring in at least one case to Italian jurisdiction over South West Rocks as “doubtful”), the Parties agree that in the early 1890s, Italy responded to direct British inquiries concerning potential lighthouses sites with assertions of jurisdiction over all of the proposed sites, including South West Rocks. Furthermore, Italy did not object to the subsequent British suggestion that the Sublime Porte be informed of the Italian position. This thinking surfaced again in 1914, in Great Britain’s initial proposal for a post-war distribution of relinquished Ottoman territory, which would have placed everything east of South West Rocks under the sovereignty of “the independent chiefs of the Arabian mainland”.

484. In light of this, it seems reasonable that South West rocks should be treated in the same manner as the other islands administered from the African coast: the Mohabbakahs and the Haycocks. South West Rocks are therefore unanimously determined by the Tribunal to be subject to the territorial sovereignty of Eritrea.

#### *The Zuqar–Hanish group*

485. There remains to be determined the sovereignty over Zuqar and over the Hanish Islands, and their respective satellite islets and rocks, including the island of Abu Ali, to the east of the northern end of Zuqar, which was for long a principal site for a lighthouse.

486. This has not been an easy group of island to decide on, one reason for this being that positioned as they are in the central part of the Red Sea, the appurtenance factor is bound to be relatively less helpful. A coastal median line would in fact divide the island of Greater Hanish, the slightly greater part of the island being on the Eritrean side of the line. Zuqar would be well on the Yemen side of a coastal median line.

487. The Parties have put before the Tribunal many aspects of the local legal history which are said to point the decision one way or the other. These have all been examined in detail in the chapters above. It is however already apparent from that examination that any expectation of a clear and definite

answer from that earlier legal history is bound to be disappointed. The Yemeni idea of a reversionary ancient title has been discussed earlier in this chapter and found unhelpful in regard to these islands. More helpful perhaps is the material which suggests that, when the Ottomans decided in the later nineteenth century to grant to Egypt the jurisdiction over the African coast, this possibly included islands appurtenant to that coast, and according to some respectable authorities this did not include this central group of islands, both Zuqar and Hanish being regarded as still within the jurisdiction of the *vilayet* of Yemen. If this was so, though that position can hardly have been carried over to the present time in spite of article 16 of the Treaty of Lausanne, it would constitute an impressive historical precedent. Hertslet's opinion about the proper distribution of jurisdiction over the islands of the Red Sea clearly impressed the British Foreign Office, but it seems to be Hertslet's view of what should be done about all the islands in the Red Sea rather than evidence of existing titles.

488. There are some echoes of the idea of Yemeni title to be found in the earlier part of the present century in for example the record of negotiations between the Imam and a British envoy, Colonel Reilly, in which talk the Imam is said to have referred to the need to return to him certain Yemeni islands. But there is no doubt that the main grievance the Imam had in mind was the island of Kamaran and its surrounding islets, which was then occupied by the British. There was also a claim which an internal Foreign Office memorandum referred to as the Imam's claim to "unspecified islands". The British civil servants were quite prepared themselves to speculate that these islands might have included Zuqar and Hanish, which had been temporarily occupied by the British in 1915. But it is in the end difficult to attach decisive importance to a claim which could not be specified with any certainty.

489. Eritrea seeks to derive an historical title by succession, through Ethiopia, from Italy. There is no doubt that Italy had serious ambitions in respect of these central islands in the nineteen thirties and did establish a presence there. But as has been seen above that position was constantly neutralized by assurances to the British Government that Italy fully accepted that the legal status of the islands was still governed by article 16 of the Treaty of Lausanne. And then there is also difficulty of deriving a title from Italy in view of the provisions of the Italian Peace Treaty of 1947.

490. Then of course there are the maps. These islands are large enough to find a place quite often—though by no means always—on even relatively small-scale maps of the region. It is fair to assert that, thanks to the efforts of counsel and especially those of Yemen, the Tribunal will have seen more maps of every conceivable period and provenance than probably have ever been seen before, and certainly a very much larger collection than will have been seen at any time by any of the principal actors in the Red Sea scene. In fact, the difficulty is not so much the interpretation of a plethora of maps of every kind and provenance, as it is the absence of any kind of evidence that these actors took very much notice of, or attached very much importance to, any of them. The Tribunal is of the opinion that in quite general terms Yemen has a margin-

ally better case in terms of favourable maps discovered, and looked at in their totality the maps do suggest a certain widespread repute that these islands appertain to Yemen.

491. As to the other aspects of the legal history of this central group, it does inevitably reflect the ebb and flow of the interest, or the neglect, as the case may be, of both sides, varying from time to time, and qualified always by the unattractive nature of these islands, relieved from time to time by occasional usefulness, as for siting navigational lights, or by their sometimes perceived or imagined strategic importance; for they have never been considered "remote" in the sense of Greenland or the Island of Palmas. Accordingly, in the Tribunal's opinion, although some of this older historical material is important and generally helpful and indeed essential to an understanding of the claims of both Parties, neither of them has been able on the basis of the historical materials alone to make out a case that actually compels a decision one way or the other. Accordingly the Tribunal has looked at events in the last decade or so before the Agreement of Arbitration for additional materials and factors which might complete the pictures of both Parties' cases and enable the Tribunal to make a firm decision about these two islands and their satellite rocks and islets. The Tribunal is confirmed in this approach by the fact that both Parties have anticipated the need for such material by providing supplementary data in connection with the hearings held in July 1998. It should be added, however, that the more recent legal history of these islands shows in some respects differences between Zuqar and Hanish. Because this is so, the islands should be, and will be, considered separately. It would be wrong to assume that they must together go to one Party or the other. In this extent the Tribunal rejects the Yemen theory that all the islands in the group must in principle share a common destiny of sovereignty.

492. Of the recent events perhaps the first heading to look at is that of the Red Sea lighthouses which have featured in the arguments of both Parties. It is evident from the lighthouse history, again dealt with in detail in chapter VI, that the undertaking by a government of the maintenance of one of these lights has generally been regarded as neutral for the purpose of the acquisition of territorial sovereignty, although it should also be remembered that, when Great Britain wished in 1892 to secure the building of a light for the proposed western shipping channel, the British Government was anxious to know which government had "jurisdiction" over the chosen site on South West Haycock, and Italy not only made a claim but had its claim to jurisdiction recognized by the British Government. Four lights have been constructed by and appear to be maintained by Yemen in the area now being dealt with (though it should be added that such lights are of course no longer manned). These are sited as follows: on the island of Abu Ali, which is some 3 nautical miles west of the northern tip of Zuqar, on the south-eastern tip of Zuqar itself; on Low Island which is off the north-eastern tip of Lesser Hanish; and on the northeastern tip of Greater Hanish. The latter was constructed in July 1991 by Yemen and there is in evidence a picture of it with an inscription giving the name of the Republic of Yemen. It can hardly be denied that these lights, clearly intended to be permanent installations, are cogent evidence of some form of Yemen presence in all these islands.



493. Of relatively recent events, Eritrea attacks much importance to the history of Ethiopian naval patrols and the log books which evidence their occurrence, and which involved in particular the islands of Zuqar and Hanish; and this is indeed a possible factor where the islands must be taken as a group; or these were patrols in these waters generally rather than voyages to particular islands. There is no doubt that these patrols occurred on a large scale, and they are fully examined in chapter VII and it is well known that these islands were used by the rebels, probably mainly as staging posts and relatively safe anchorages for vessels attempting to convey supplies to the rebel armies fighting on the mainland of Ethiopia, some of them possibly from Yemen, which is known to have sympathised with the rebel cause.

494. A strange aspect of these naval patrols possibly over a matter of several years—though the actual evidence Eritrea has been able to provide leaves a number of blank periods—is the lack of protest from Yemen. If Ethiopia had been patrolling the islands on the assumption that it was merely patrolling its own territory, then the lack of Yemen protest is all the more remarkable and calls for some explanation which Yemen has not altogether provided. Yemen was of course preoccupied with its own civil war between 1962 and 1970; and a good deal of this naval patrolling must have been on the high seas rather than in the territorial seas of the islands. Eritrea claims that the Ethiopian naval patrols were also enforcing fishing regulations. This seems credible for it would have provided cover for inspecting the papers of vessels even on the high seas and the rebels would hardly have confined their supply operations to ships flying the Ethiopian flag.

495. And yet these logbooks of naval patrols give relatively little evidence of activity on or even near to the islands. It is interesting to consider in this context the press statement issued by the Yemen Embassy in Mogadishu on 3 July 1973 stating “the Y.A.R. always maintains its sovereignty over its islands in the Red Sea, with the exception of the islands of Gabal Abu Ali and Gabal Attair which were given to Ethiopia by Britain when the latter left Aden and surrendered power in our Southern Yemen”. This surmise was of course mistaken. But it does amount to a statement that Yemen at this time had no presence in either of these two mentioned island and had little idea what was happening there. This, however, was the time of the Arab press rumours of Ethiopia having allowed Israel the use of certain Red Sea islands. This same press release stated that Yemen had, accompanied by journalists and press correspondents, investigated the position on “Lesser Hanish, Greater Hanish, Zuqar, Alzubair’ Alswabe’, and several other islands at the Yemeni coast”. These were found to be “free from any foreign infiltration whatsoever”. Presumably this was also the inspection by the military committee of the Arab League (see para. 321). This statement has the ring of truth. It most probably was the position that these islands, including Zuqar and both Hanish Islands, were then normally empty of people or activity other than that of small coastal fishermen plying their traditional way of life and calling at the islands when their work took them there. But it is significant that Yemen could apparently take the above inspection party without any repercussions from Ethiopia.

496. There is much that is ambiguous and unexplained on both sides in this evidence of naval patrols. On balance the episode appears to the Tribunal to lend some weight to the Eritrean case. But again it is a matter of relative weight. There is no compelling case here for either Party. And again it is very difficult on the basis of this material to give it great weight in claims to land territory.

497. The petroleum agreements made by Yemen and by Ethiopia (and then by Eritrea) from 1972 onwards do surprisingly little to resolve the problem, for these agreements, in so far as they extended to offshore areas, were not really concerned with the islands at all, but with either the outer boundary formed by the extent of the then exploitable depths of seabed, or by the coastal median line, which was the temporary boundary actually contemplated for such agreements by the 1977 Yemeni continental shelf legislation. As was reflected by the questions put to the Parties in the closing moments of the July 1998 hearings, the agreements seemed almost to ignore the islands; not surprisingly, considering that the volcanic geological nature of the islands meant that they were totally uninteresting to the oil companies.

498. As already stated above, the Tribunal attaches little importance to the agreements by both Parties with Shell for geological investigations. The area covered by the contract activities likely traversed these islands. But the Tribunal has little doubt that Shell was operating with the permission of both Parties, and was getting information primarily for its own use, in order to decide about which areas of the continental shelf it might be worth making production agreements.

499. When it comes to actual agreements for exploitation, whether in the form of full petroleum production-sharing agreements, or less than that, two of the agreements made by Yemen encompassed the Zuqar–Hanish Islands totally (one with Adair, which was very short-lived and never went into effect, and one with Tomen–Santa Fe), while the agreements made by Ethiopia (Ethiopia/Shell) avoided extending to these islands or, in the instance of the Ethiopia–IPC/Amoco agreements of 1989, cuts across Greater Hanish, the division apparently depending on precisely how one plots the coastal median line.

500. After the careful examination of the contract areas of the oil agreements of both Parties, the conclusions to be drawn from this material seem to be reasonably clear. Eritrea can and does point to the IPC/Amoco agreement with Ethiopia which cuts the Island of Hanish. There are various versions. In some versions of the attempts to draw the contract area on a map, only the tip of Hanish is within the Eritrean side of the line; in others the line appears to portray most of the island as Eritrean, leaving only a relatively small portion of it to Yemen. It is surely apparent that the contract area was defined simply in terms appropriate for the essentially maritime interests of the contracting party, and that this, in conformity with normal practice where there is no agreed and settled maritime boundary, was made the coastal median line, ignoring the possible effect of islands. It seems in effect to have been agreed on drawn on the illustrative map of the contract simply ignoring the islands. If Ethiopia had had it in mind to use the agreement for the purpose of illustrating a claim to the island of Hanish, Ethiopia would surely not have given itself only two-thirds

of the island; it would have had the line make an excursion round and embrace the whole island. As it is, it seems to the Tribunal that the Ethiopian and Eritrean agreements are in effect neutral as far as the present task of the Tribunal is concerned; as indeed Eritrea argued. This does not mean that the Eritrean claim to these islands is unfounded; but it does mean that the oil agreements do little to assist that claim, except in so far as the IPC/Amoco Agreement tends to neutralize the Yemeni argument that petroleum agreements as such provide confirmation of sovereignty.

501. Yemen, besides the unconvincing suggestion that the Shell Company's seismic investigation of a large area right across the southern Red Sea somehow confirms the Yemeni claims to the Zuqar and Hanish Islands, has in the Tomen–Santa Fe seismic agreement of 1974–75 referred to an agreement in which the contract does apparently embrace both Zuqar and Hanish, or most of Greater Hanish Island. This also resulted in certain activities by the company, including a collection of samples from Zuqar (see para. 409). This again does not establish that Yemen has validated its claim to both these islands. But as concluded above, the agreements produced by both parties fail to establish evidence of sovereignty. Perhaps it helps to see these petroleum agreements of the seventies in perspective to remember that in 1973 there was a Yemeni inspection of the islands, with journalists and representatives of the Arab League military committee, that found all these islands empty.

502. It was later that there was more activity; notably that construction in 1993 by the Total Oil Company of an air landing strip on Hanish, for the recreational visits of their employees, and as a by-product of their concession agreement with Yemen. That agreement did not encompass either Zuqar or Hanish. Nevertheless, the fact that there were regular excursion flights constitutes evidence of governmental authority and the exercise of it. Nor did it apparently attract any kind of protest from Eritrea; though of course by this time the civil war was over and Eritrea was established as an independent state.

503. As neither Party has in the opinion of the Tribunal made a convincing case to these islands on the basis of an ancient title in the case of Yemen, or, of a succession title in the case of Eritrea, the Tribunal's decision on sovereignty must be based to an important extent upon what seems to have been the position in Zuqar and Hanish and their adjoining islets and rocks in the last decade or so leading up to the present arbitration. Anything approaching what might be called a settlement, or the continuous display of governmental authority and presence, of this kind found in some of the classical cases even for inhospitable territory, is hardly to be expected. For very few people would wish to visit these waterless, volcanic islands except for a special reason and probably a temporary one. Nevertheless, it is clear from the documents mentioned earlier in this Award that both Yemen and Ethiopia had formulated claims to both islands at least by the late eighties and had indeed it would seem held secret negotiations on the claims; which negotiations, at least according to the Eritrean "Top Secret" internal report, had at first promised a compromise solution on the basis of the median line which would presumably have given Zuqar and Little Hanish to Yemen and Greater Hanish to Ethiopia. But this came to nothing. So now one must look at the *effectivités* for the solution.

504. Yemen has been able to present the Tribunal with a list of some forty-eight alleged Yemeni happenings or incidents in respect of “the islands”, which occurred in the period between early 1989 and mid-1991. This list is not confined to the central group, for there is included for example the decisions of the 1989 London Conference on the lighthouses, and the building of a lighthouse on al Tayr in July 1989. It is evident though that Zuqar features very prominently in the list. It is also evident that Eritrea has relatively very little to show respect of Zuqar. The Tribunal has no doubt that the island of Zuqar is under the sovereignty of Yemen.

505. In respect of Hanish the matter is not so clear cut. The Eritrean claim is well established as a claim and is clearly of great importance to that very newly-independent country. The refusal to agree to a Yemeni aerial survey of the Islands and Ethiopia’s responsive claim of title to some of them is significant. So also is its arrest of Yemeni fishermen on Greater Hanish and its assertion, in response to Yemen’s protest to the Security Council, that the area was within Ethiopian jurisdiction.

506. There was some emphasis by Eritrea on a scheme to put beacons on Hanish to assist Amoco’s seismic testing; there is no clear evidence that they were actually installed. Any such installations of beacons covered several locations, of which Greater Hanish Island was only one, and would have been short-lived: the evidence provided by Eritrean mentions two weeks, and provides for removal of the beacons on completion of the seismic work. Moreover, the beacons were placed by the oil company, Amoco, with only a limited role for the Ethiopian government in protecting the oil company personnel and the temporary beacons from the attentions of “random individuals”. Finally, there is evidence of the issuance, in 1980, of an Ethiopian radio transmitting licence to Delft Geophysical Company, which provided for a station to be located at “Greater Hanish Island, Port of Assab vicinity”.

507. Yemen has more to show by way of presence and display of authority. Putting aside the lighthouse in the north of the island, there was the Ardoukoba expedition and campsite which was made under the aegis of the Yemeni Government. There is the air landing site, as well as the production of what appears to be evidence of frequent scheduled flights, no doubt mainly for the off-days of Total employees; and there is the May 1995 license to a Yemeni company (seemingly with certain German nationals associated in a joint venture scheme) to develop a tourist project (recreational diving is apparently the possible attraction to tourism) on Greater Hanish.

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508. Therefore, after examination of all relevant historical, factual and legal considerations, the Tribunal finds in the present case that, on balance, and with the greatest respect for the sincerity and foundations of the claims of both Parties, the weight of the evidence supports Yemen’s assertions of the exercise of the functions of state authority with respect to the Zuqar–Hanish group. The Tribunal is further fortified in finding in favour of Yemen by the

evidence that these islands fell under the jurisdiction of the Arabian coast during the Ottoman Empire; and that there was later a persistent expectation reflected in the British Foreign Office papers submitted in evidence by the Parties that these islands would ultimately return to Arab rule. The Tribunal therefore unanimously finds that the islands, islets, rocks, and low-tide elevations of the Zuqar–Hanish group, including, but not limited to, Three Foot Rock, Parkin Rock, Rocky Islets, Pin Rock, Suyul Hanish, Mid Islet, Double Peak Island, Round Island, North Round Island, Quoin Island (13°43'N, 42°48'E), Chor Rock, Greater Hanish, Peaky Islet, Mushajirah, Addar Ail Islets, Haycock Island (13°47'N, 42°47'E; not to be confused with the Haycock Islands to the southwest of Greater Hanish), Low Island (13°52'N, 42°49'E) including the unnamed islets and rocks close north, east and south, Lesser Hanish including the unnamed islets and rocks close north east, Tongue Island and the unnamed islet close south, Near Island and the unnamed islet close south east, Shark Island, Jabal Zuqar Island, High Island, and the Abu Ali Islands (including Quoin Island (14°05'N, 42°49'E) and Pile Island) are subject to the territorial sovereignty of Yemen.

*Jabal al-Tayr and the Zubayr group of Islands*

509. Both the lone island of Jabal al-Tayr, and the Zubayr group of islands and islets, call for separate treatment, as they are a considerable distance from the other islands as well as from each other. They are not only relatively isolated, but also are both well out to sea, and so not proximate to either coast, though they are slightly nearer to the Yemeni coastal islands than they are to the coast and coastal islands of Eritrea. Both are well eastward of a coastal median line. Here again, the Tribunal has had to weigh the relative merits of the Parties' evidence, which has been sparse on both sides, of the exercise of function of state and governmental authority.

510. The traditional importance of both groups has been that they have been lighthouse islands (the Zubayr light was on Centre Peak, the southernmost islet of the group). It will be clear from the history of the Red Sea lighthouses (see Chapter VI) that, although, or perhaps even because, lighthouses were so important for nineteenth and early twentieth century navigation, a government could be asked to take responsibility or even volunteer to be responsible for them, without necessarily either seeming to claim sovereignty over the site or acquiring it. The practical question was not one of ownership, but rather of which government was willing, or might be persuaded, to take on the responsibility, and sometimes the cost, if not permanently then at least for a season.

511. It will be recollected that Centre Peak in the Zubayr group was an island in which Italy, in its 1930s period of colonial expansion, had taken a great interest; the Centre Peak light was abandoned by the British in 1932, but reactivated by Italy the following year. The British sought and obtained the usual assurances about the Treaty of Lausanne status of the island (see paras. 216-218). So for a time at least this group fell under the jurisdiction of the authority on the African coast.

512. Yet during the Second World War and the subsequent British occupation of Eritrea, it was decided that Great Britain was under no obligation to maintain the Centre Point light or indeed the Haycock light.

513. An important turning point in the history of the northern islands of Jabal al-Tayr and the Zubayr group was the 1989 London conference about lighthouses. This was rather different from previous conferences. This conference was to be the last of its kind, because its main purpose was to liquidate the former international arrangements for administration of the lights and the sharing of costs. The final arrangements made for the lights (which were then still of the great importance for navigation) were therefor intended to be permanent. No further conference was envisaged.

514. It will be remembered that Yemen was invited to the conference as an observer on the plea to the British Government that the two lighthouse islands of Abu Ali and Jabal al-Tayr, "lie within the exclusive economic zone of the Yemen Arab Republic," and that because of this Yemen was willing to take on the responsibility of managing and operating the lights. It was also the fact that Yemen had already installed new lights on both of these sites. The offer from Yemen was gratefully accepted by the conference. There had been hopes that Egypt might take on the work but Egypt was not willing to do so.

515. The matter of sovereignty was not on the agenda of the conference, nor was it discussed. Yemen's own request to be invited to the conference had wisely avoided raising the matter. Moreover, there were at the conference the usual references to the Treaty of Lausanne formula concerning indeterminate sovereignty.

516. Nevertheless, the decision of the conference to accept the Yemeni offer over the lights does reflect a confidence and expectation of the member governments of the conference of a continued Yemeni presence on these lighthouse islands for, at any rate, the foreseeable future. Repute is also an important ingredient for the consolidation of title.

517. There is also another matter where Yemen is able to show what amounts to important support for its case over these northern islands, and that is the substantially new information on petroleum agreements that was made available to the Tribunal at the supplementary hearings held for this purpose in July 1998. There are two such agreements which appear to be relevant for the islands presently under discussion.

518. First, there is the agreement made by the Yemeni Government with the Shell company on 20 November 1973. The western boundary of the contract area in this agreement is drawn so as to include within it the Zubayr group. It does not include Jabal al-Tayr, but passes at a distance which might encompass the territorial sea of that island, depending on the breadth of the territorial sea allowed to it for the purposes of a maritime delimitation.

519. The second is the Hunt Oil production sharing agreement ratified on 10 March 1985. The western contract area boundary of this agreement again includes the Zubayr group, but also appears from the illustrative map to brush the island of Jabal al-Tayr, and of course plainly includes a part of its territorial sea.

520. These agreements were not protested by Ethiopia (though it should be remembered that the Hunt agreement was made at a time when the Ethiopian civil war was still raging).

521. Neither Ethiopia nor Eritrea has made any petroleum agreements encompassing these islands. Eritrea did, however, make agreements in 1995 and 1997 with the Anadarko Oil Company, which extended in the direction of these islands and towards what appears to be an approximate median line between coasts. Yemen protested this line on 4 January 1997 as a "blatant" violation of the territorial waters of both groups and of her economic rights "in the region". This was, of course, some time after the signature of the Agreement on Principles and indeed the Arbitration Agreement initiating these proceedings.

522. The legal history of these northern and isolated islands has been mixed and varied. It has been seen that even as late as 1989 it was assumed that their sovereign status was still indeterminate in accordance with the status impressed upon them, until it should be changed in a lawful way, by the Treaty of Lausanne. Nevertheless, by 1995 it was doubtful whether any dispute over Yemen's claim to them would be agreed to be submitted to this Tribunal. Even Eritrea at one point made a proposal for an agreement in which these islands were not mentioned.

523. The Tribunal has not found this particular question an easy one. There is little evidence on either side of actual or persistent activities on and around these islands. But in view of their isolated location and inhospitable character, probably little evidence will suffice.

524. Therefore, after examination of all relevant historical, factual and legal considerations, the Tribunal unanimously finds in the present case that, on the basis of the foregoing, the weight of the evidence supports the conclusion that the island of Jabal al-Tayr, and the limited to, Quoin Island (15°12'N, 42°03'E), Haycock Island (15°10'N, 42° 07'E; not to be confused with the Haycock Islands to the southwest of Greater Hanish), Rugged Island, Table Peak Island, Saddle Island and the unnamed islet close north west, Low Island (15°06'N, 42°06'E) and the unnamed rock close east, Middle Reef, Saba Island, Connected Island, East Rocks, Shoe Rock, Jabal Zubayr Island, and Centre Peak Island are subject to the territorial sovereignty of Yemen.

#### *The traditional fishing regime*

525. In making this award on sovereignty, the Tribunal has been aware that Western ideas of territorial sovereignty are strange to peoples brought up in the Islamic tradition and familiar with notions of territory very different from those recognized in contemporary international law. Moreover, appreciation of regional legal traditions is necessary to render an Award which, in the words of the Joint Statement signed by the Parties on 21 May 1996, will "allow the re-establishment and the development of a trustful and lasting cooperation between the two countries."

526. In finding that the Parties each have sovereignty over various of the Islands the Tribunal stresses to them that such sovereignty is not inimical to, but rather entails, the perpetuation of the traditional fishing regime in the

region. This existing regime has operated, as the evidence presented to the Tribunal amply testifies, around the Hanish and Zuqar islands and the islands of Jabal al-Tayr and the Zubayr group. In the exercise of its sovereignty over these islands, Yemen shall ensure that the traditional fishing regime of free access and enjoyment for the fishermen of both Eritrea and Yemen shall be preserved for the benefit of the lives and the livelihoods of this poor and industrious order of men.

\* \* \*

#### Chapter XI. *Dispositif*

527. Accordingly, **THE TRIBUNAL**

taking into account the foregoing considerations and reasons,

**UNANIMOUSLY FINDS IN THE PRESENT CASE THAT**

- i. the islands, islet, rocks, and low-tide elevations forming the Mohabbakah islands, including but not limited to Sayal Islet, Harbi Islet, Flat Islet and High Islet are subject to the territorial sovereignty of Eritrea;
- ii. the islands, islet, rocks and low-tide elevations forming the Haycock Islands, including but not limited to, North East Haycock, Middle Haycock, and South West Haycock, are subject to the territorial sovereignty of Eritrea;
- iii. the South West Rocks are subject to the territorial sovereignty of Eritrea.
- iv. the islands, islet, rocks and low-tide elevations of the Zuqar–Hanish group, including, but not limited to, Three Foot Rock, Parkin Rock, Rocky Islets, Pin Rock, Suyul Hanish, Mid Islet, Double Peak Island, Round Island, North Round Island, Quoin Island (13°43'N, 42°48'E), Chor Rock, Greater Hanish, Peaky Islet, Mushajirah, Addar Ail Islets, Haycock Island (13°47'N, 42°47'E; not to be confused with the Haycock Islands to the southwest of Greater Hanish), Low Island (13°52'N, 42°49'E) including the unnamed islets and rocks close north, east and south, Lesser Hanish including the unnamed islet close south, Near Island and the unnamed islet close south east, Shark Island, Jabal Zuqar Island, High Island, and the Abu Ali Islands (including Quoin Island (14°05'N, 42°49'E) and Pile Island) are subject to the territorial sovereignty of Yemen;
- v. the island of Jabal al-Tayr, and the islands, islets, rocks and low-tide elevations forming the Zubayr group, including, but not limited to, Quoin Island (15°12'N, 42°03'E), Haycock Island (15°10'N, 42°07'E; not to be confused with the Haycock Islands to the south-



west of Greater Hanish), Rugged Island, Table Peak Island, Saddle Island, and the unnamed islet close north west, Low Island (15°06'N, 42°06'E) and the unnamed rock close east, Middle Reef, Saba Island, Connected Island, East Rocks, Shoe Rock, Jabal Zubayr Island, and Centre Peak Island are subject to the territorial sovereignty of Yemen; and

- vi. the sovereignty found to lie with Yemen entails the perpetuation of the traditional fishing regime in the region, including free access and enjoyment for the fishermen of both Eritrea and Yemen.

528. Further, whereas article 12.1 (b) of the Arbitration Agreement provides that the Awards shall include the time period for their execution, the Tribunal directs that this Award should be executed within ninety days from the date hereunder.

\* \* \*

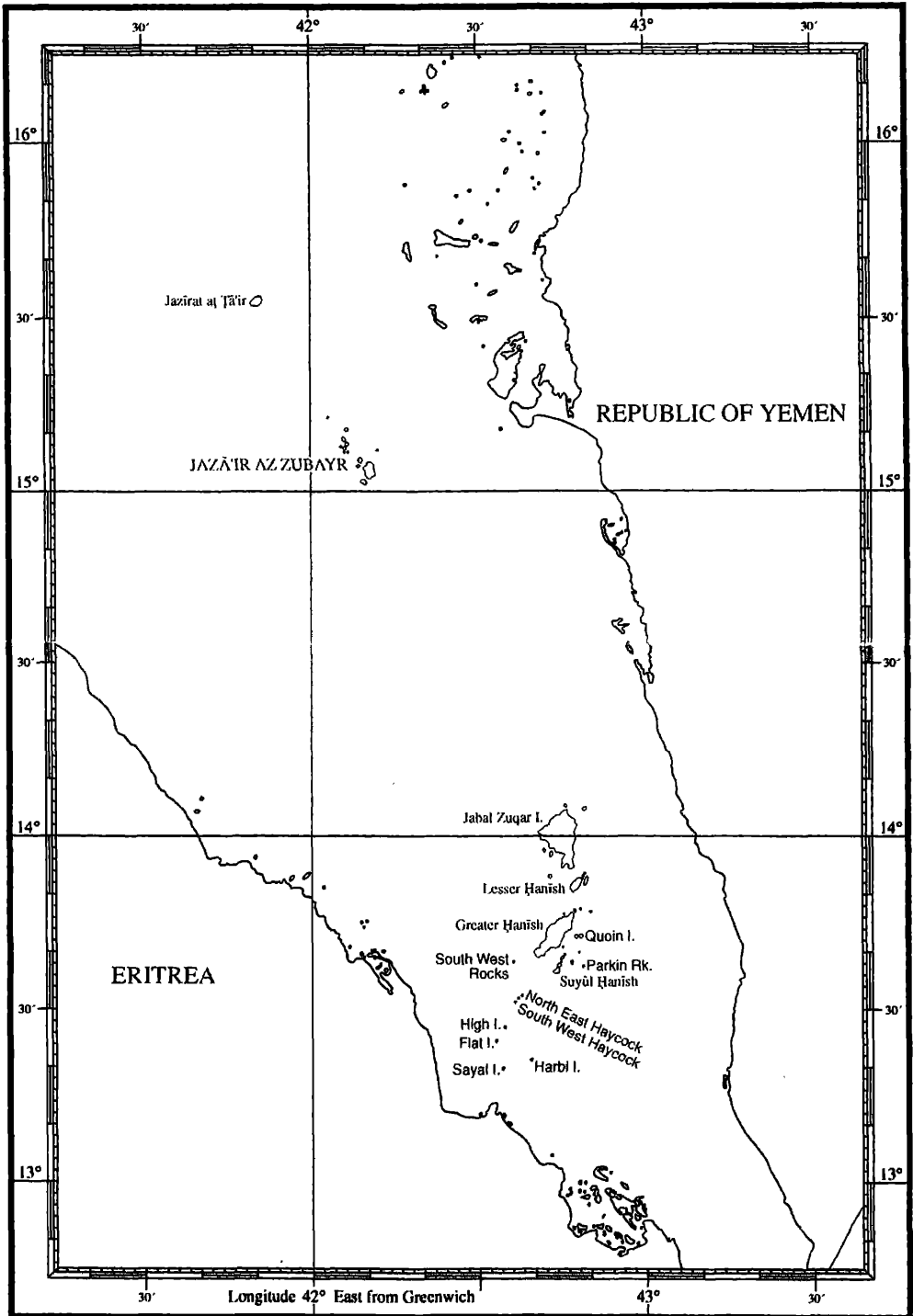
Done at London this 9th day of October, 1998

**The President of the Tribunal**

/s/ Professor Sir Robert Y. JENNINGS

**The Registrar**

/s/ P.J.H. JONKMAN



**Part IV**

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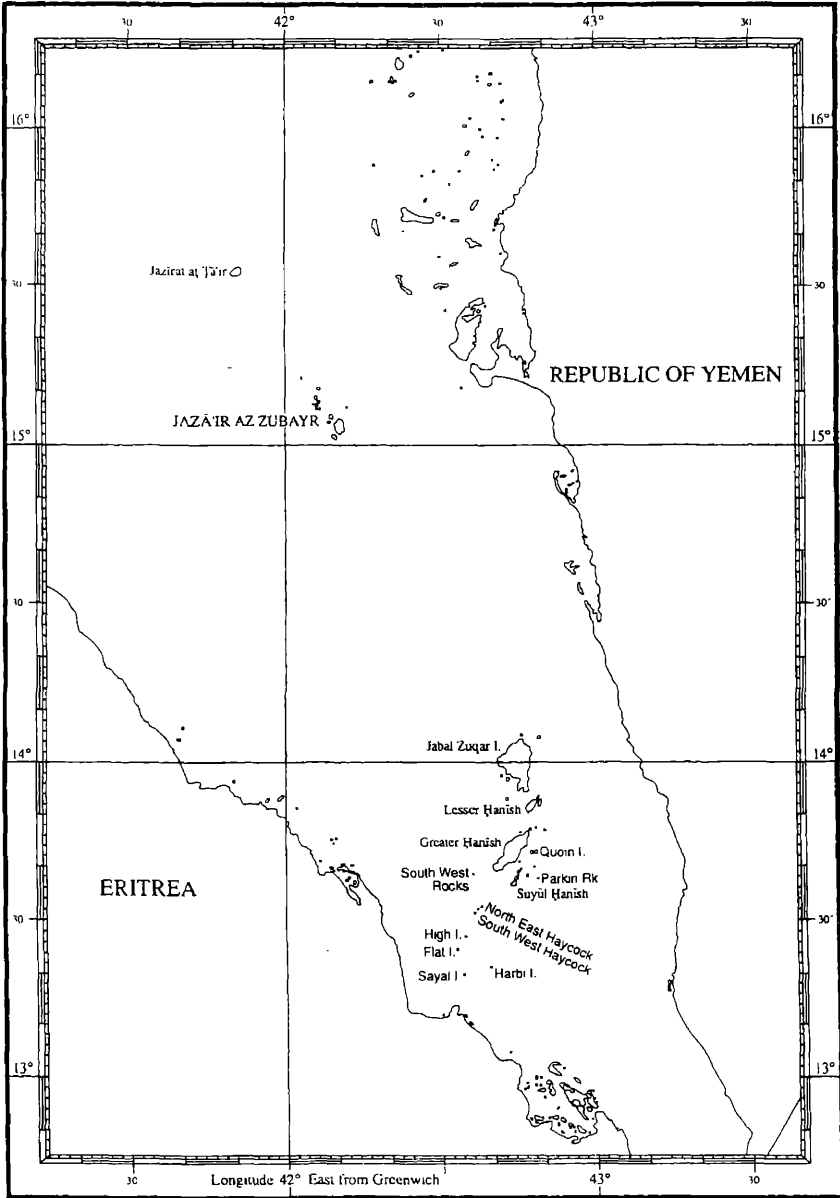
**Award of the Arbitral Tribunal in the second stage  
of the proceedings between Eritrea and Yemen  
(Maritime Delimitation)**

**Decision of 17 December 1999**

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**Sentence du Tribunal arbitral rendue au terme de  
la seconde étape de la procédure entre l'Érythrée et  
la République du Yémen  
(Délimitation maritime)**

**Décision du 17 décembre 1999**



AWARD OF THE ARBITRAL TRIBUNAL IN THE SECOND STAGE OF  
THE PROCEEDINGS BETWEEN ERITREA AND YEMEN (MARI-  
TIME DELIMITATION), 17 DECEMBER 1999

SENTENCE DU TRIBUNAL ARBITRAL RENDUE AU TERME DE LA  
SECONDE ÉTAPE DE LA PROCÉDURE ENTRE L'ÉRYTHRÉE ET  
LA RÉPUBLIQUE DU YÉMEN (DÉLIMITATION MARITIME), 17  
DÉCEMBRE 1999

Median line and historic median line — Methods of measurement — Principle of equidistance — Baselines: high water-line, low water-line, median line — “normal baseline”, “straight baseline” — Geodesic line. — Presence of mid sea islands — Principle of proportionality as a test of equitableness and not a method of delimitation — Requirement of an equitable solution.

Non-geographical relevant circumstances: fishing, security, principle of non-encroachment — Relevance of fishing in acceptance or rejecting the argument as to the line of delimitation: location of fishing areas, economic dependency on fishing, effect of fishing practices on the lines of delimitation — “catastrophic” and “long usage” tests — “artisanal fishing”, “industrial fishing”, and associated rights.

The drawing of the initial boundary line does not depend on the existence and the protection of the traditional fishing regime. Relevance of petroleum contracts and concessions as to the line of the delimitation — Joint exploitation of resources, in particular in the case of overlapping of continental shelves, and implications on the nature of sovereignty.

Incompetence of the Tribunal to decide on any of the boundaries between either of the parties and neighboring states — *res communis condominiumia* — Force of the *res judicata* of the first award on the delimitation of the maritime boundary by the Tribunal during the second stage of the proceedings.

Ligne médiane et ligne médiane historique — Méthodes de mesure — Principe de l'équidistance — Lignes de base: laisse de haute mer, laisse de basse mer, ligne médiane — “ligne de base normale”, “lignes de base droite” — Ligne géodésique — Présence d'îles au large des côtes — Le principe de proportionnalité en tant que critère d'équité et non en tant que méthode de délimitation — Exigence d'une solution équitable.

Circonstances pertinentes non géographiques: pêches, sécurité, principe de non-empiétement — Pertinence de la pêche comme motif d'acceptation ou de rejet des arguments concernant la ligne de démarcation: emplacement des zones de pêche, dépendance économique à l'égard de la pêche, effect des méthodes de pêche eu égard aux lignes de démarcation — Critères de la survenue d'accidents et du long usage — “pêche artisanale”, “pêche industrielle” et droits associés.

L'existence et la protection d'un régime de pêche traditionnel ne dépendent pas d'un trait tiré ni d'une ligne frontalière internationale — Pertinence des contrats et concessions pétroliers eu égard à la ligne de démarcation — Exploitation conjointe de ressources, en particulier dans le cas où les plateaux continentaux se chevauchent, et ses implications quant à la nature de la souveraineté.

Incompétence du Tribunal pour trancher les questions concernant toutes frontières entre l'une ou l'autre partie et les États voisins — *res communis condominiumia* — Autorité de la chose jugée concernant la première sentence rendue par le Tribunal relativement à la délimitation de la frontière maritime lors de la seconde étape de la procédure.

*The Arbitral Tribunal:*

Professor Sir Robert Y. Jennings, President  
Judge Stephen M. Schwebel  
Dr. Ahmed Sadek El-Kosheri  
Mr. Keith Highet  
Judge Rosalyn Higgins

*Representatives of the Government of the State of Eritrea:*

His Excellency, Haile Weldensae, Agent  
His Excellency, Haile Saleh Meki  
Professor Lea Brilmayer and Mr. Jan Paulsson, Co-Agents

*Representatives of the Government of the Republic of Yemen:*

His Excellency, Dr. Abdulkarim Al-Eryani, Agent  
His Excellency, Mr. Abdullah Ahmad Ghanim  
Mr. Hussein Al-Hubaishi, Mr. Abdulwahid Al-Zandani and Mr. Rodman R. Bundy, Co-Agents

*INTRODUCTION*

## Proceedings in the delimitation stage of the arbitration

1. This Award in the Second Stage of the Arbitration is rendered pursuant to an Arbitration Agreement dated 3 October 1996 (the "Arbitration Agreement"), between the Government of the State of Eritrea ("Eritrea") and the Government of the Republic of Yemen ("Yemen") (hereinafter "the Parties").

2. The Arbitration Agreement, which appears as annex 1 on page 51, was preceded by an "Agreement on Principles" done at Paris on 21 May 1996, which was signed by Eritrea and Yemen and witnessed by the Governments of the French Republic, the Federal Democratic Republic of Ethiopia and the Arab Republic of Egypt. The Agreement on Principles provided that the Tribunal should decide questions of territorial sovereignty and to that end the Tribunal rendered an Award in the First Stage finding the sovereignty of the disputed islands in the Red Sea to belong either to Eritrea or to Yemen. (See Award in the First Stage, chapter XI—*Dispositif*, paragraphs 527-528.)

3. In a correspondence concerning the Written Pleadings for the Second Stage, and including requests for an extension of the time allowed, a question was raised by Eritrea relating to the Traditional Fishing Regime and how it might be pleaded and argued in the Second Stage of the Arbitration. The President's reply was: "the Tribunal is of the view that it is for Eritrea itself to determine the contents of its written pleadings for that stage." This is referred to in chapter IV.

4. Pursuant to the time table set forth in the Arbitration Agreement, the Parties filed written Memorials in the Second Stage on 9 March 1999 and Counter-Memorials on 9 June 1999. On 25 May 1999, Mr. Tjaco van den Hout, Secretary-General of the Permanent Court of Arbitration, succeeded as Registrar Mr. Hans Jonkman, who had retired. Pursuant to article 7 (2) of the Arbitration Agreement, Ms. Phyllis Pieper Hamilton, First Secretary of the Permanent Court of Arbitration, served as Secretary to the Tribunal.

5. Prior to the Hearings in the Second Stage of the Arbitration, after consultation with the Parties, the Tribunal as contemplated by article 7 (4) of the Arbitration Agreement sought assistance with the calculations of the maritime boundaries and the technical preparations of the corresponding chart. On 8 July 1999, pursuant to article 7 (4) the Tribunal communicated an Order to the Parties designating Ms. Ieltje Anna Elema, geodetic engineer, Head of the Geodesy and Tides Department of the Hydrographic Service of the Royal Netherlands Navy, as its expert in geodesy.

6. article 2 of the Arbitration Agreement provides that:

1. The Tribunal is requested to provide rulings in accordance with international law, in two stages.

2. The first stage shall result in an award on territorial sovereignty and on the definition of the scope of the dispute between Eritrea and Yemen ...

3. The second stage shall result in an award delimiting maritime boundaries. The Tribunal shall decide taking into account the opinion that it will have formed on questions of territorial sovereignty, the United Nations Convention on the Law of the Sea, and any other pertinent factor.

7. Pursuant to the time table set forth in the Arbitration Agreement for the various stages of the Arbitration, and with the consent of the Parties regarding the venue, the Oral Proceedings in the second stage of the Arbitration were held 5-16 July 1999 in the Great Hall of Justice in the Peace Palace in The Hague. By agreement between the Parties, Yemen began the Oral Proceedings.

8. The Tribunal's task was greatly facilitated by the excellence of the oral presentations on both sides.

9. During the Oral Arguments, pursuant to article 8 (3) of the Arbitration Agreement authorizing the Tribunal to request the Parties' written views on the elucidation of any aspect of the matters before the Tribunal, counsel were asked to respond to various questions. On 13 August 1999 the Parties were submitted written responses to questions put to them by the Tribunal on 13 and 16 July. The Tribunal's questions and the answers provided by the Parties are set out in annex 2.

## Chapter I. *The arguments of the Parties*

### *Introduction*

10. The purpose of the present chapter is to summarise what the Tribunal understands to have been the main arguments of the Parties. For the Tribunal's reasons for acceptance or rejection or modification of those argu-

ments, it may be necessary to turn to later chapters. In this Chapter describing the arguments of the Parties, it will be convenient in general to follow the order agreed by them for the Oral Presentations and so put first the arguments of Yemen followed by the arguments of Eritrea.

11. It may be said at once that both Parties claimed a form of median international boundary line, although their respective claimed median lines follow very different courses and do not coincide. They do, however, follow similar courses in the narrow waters of the southernmost portion of the line. Eritrea's median line is equidistant between the mainland coasts, but its historic median line takes into account Eritrea's islands (but not the Yemen mid-sea islands); the Yemen line is equidistant between the Eritrean coast (including certain selected points on the Dahlak islands) and the coasts of all the Yemen islands. The Yemen line was plotted with WGS84 coordinates of the turning points; the Eritrean line was not, although, in answer to a question from the Tribunal, the coordinates of the base points were provided. The rival claimed lines are reproduced on the Charts (Eritrea's maps 3 and 7 and Yemen's map 12. 1) to be found in the map section at the back of the book.

#### *Yemen's proposed boundary line*

12. The Yemen claimed line was described in three sectors divided by lines of latitude: 16°N; 14°25'N; and 13°20'N. So there was (i) a northern sector between the Yemen islands of Jabal al-Tayr and the Jabal al-Zubayr group on the one hand, and the Eritrean Dahlak islands on the other; (ii) a central sector between the Zuqar–Hanish group of Yemen and the opposite mainland coast of Eritrea together with the Mohabbakahs, the Haycocks and South West Rocks; and (iii) a southern sector between the respective mainland coasts of Yemen and Eritrea south of the Zuqar–Hanish group. These sectors were fixed by the latitude of the controlling base points of the Yemen line. Thus for instance, 14°25'N was the point on the line where the controlling base points changed from the points on the islet Centre Peak in the Zubayr group to the base points on the coast of Zuqar.

13. Yemen began its argument with the general understanding, as endorsed by the International Court of Justice in the *North Sea Continental Shelf* cases<sup>1</sup>, that a median line normally produces an equitable result when applied between opposite coasts. Therefore, argued Yemen, a major preliminary task for the Tribunal was to decide which were the coasts to be used as baselines.

14. In the northern sector, the proposed Yemen line assumed that the Dahlak islands, a closely knit group of some 350 islands and islets, the largest of them having a considerable population, should be recognized as being part of the Eritrean mainland coast and the waters within them as internal waters. It followed that the easternmost islets of that group might be used as base points of the median line. Yemen used the high water line as baseline on these islands.

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<sup>1</sup> *I.C.J. Reports* 1969, p. 36, para. 57.



15. Yemen proposed that the eastern base points of the line should be found on the low-water line of the western coast of the lone mid-sea island of Jabal al-Tayr and on the western coasts of the mid-sea group of Jabal al-Zubayr. Yemen argued that these islands should be used as base points because they were as important, or even more important, than the very small uninhabited outer islets of the Dahlak group. In this way, said Yemen, there would be a “balance” in the treatment of island base points on the west and the east coasts, arguing that in this northern area “each Party possesses islands of a comparable size, producing similar coastal facades lying at similar distances from their respective mainlands.”

16. In the central sector the Yemen claimed line proceeded through the narrow waters between the Hanish group of islands and the Eritrean mainland coast. (This part of the boundary line area was called the “central” one by Yemen but sometimes called the “southern” one by Eritrea.) The Yemen line was a line of equidistance between the high-water line on the Eritrean mainland coast and the low-water line on the westernmost coasts of the Yemen’s Hanish Island group.

17. Yemen suggested that the “small Eritrean islets in between” the Eritrean mainland coast and the larger Yemen islands were inappropriate for a delimitation role. Thus, the computing and the drawing of Yemen’s boundary line ignored both the South West Rocks and the three Haycocks (which had been found in the Award on Sovereignty to belong to Eritrea) as being no more than small rocks whose only importance was that they were navigational hazards. The Eritrean sovereignty over these islets was, however, recognized by placing them in limited enclaves.

18. In Yemen’s “southern sector”, the line entered a narrow sea with had few islets and was relatively free from complicating mid-sea islands or islets, and the line became a simple median between the opposite mainland coasts. By using the islands of Fatuma, Derchos and Ras Mukwar as base points it did, however, recognize that the Bay of Assab was an area of Eritrean internal waters. Yemen added the comment that:

This method of delimitation has been selected in order to accord the islands in the Southern Sector the same treatment as the islands in the Northern Islands Sector.

19. Summing up three sectors, Yemen observed that, in accordance with the applicable legal principles, the appropriate delimitation would be achieved by a median line between the relevant coasts. There was no justification for any adjustment of this line on the basis of equitable principles. This median line delimitation between the relevant coasts was the only equitable solution with the purposes of this arbitration.

20. Yemen also addressed other relevant factors. There was the factor of proportionality and this, together with Eritrea’s argument under the same heading, is dealt with below. There was also discussion of certain “non-geographical relevant circumstances”, the first one being “dependency of the fishing communities in Yemen upon Red Sea fishing”. This is a matter upon which both Parties held strong and differing view, which are described and considered in chapter II.

21. The other of these relevant circumstances maintained by Yemen was “the element of security of the coastal State”. This, according to Yemen, “connotes nothing more exciting than non-encroachment”. It was chiefly in the narrow waters between the Hanish group of islands and the Eritrean coast that the question of security or non-encroachment arose. According to Yemen, this concern is automatically addressed by the application of the principle of equidistance which was intended to effect equality of treatment.

*Eritrea's proposed boundary line*

22. Eritrea asserted that there was a legal flaw in the Yemen argument for its claimed line. This criticism illuminated some of the basic ideas underlying Eritrea's own claimed line.

23. Eritrea pointed with some insistence to what it regarded as a fundamental contradiction in the Yemen argument. In the northern part of the line, where the question of the influence upon it of the northern mid-sea islands arose, the maritime boundary was between the respective continental shelves and exclusive economic zones (hereinafter EEZ). These two boundaries, of continental shelf and of EEZ, are governed by articles 74 and 83 of the United Nations Convention on the Law of the Sea. In neither of these two articles is there even a mention of equidistance; there is, however, a clear requirement that a delimitation of these areas should “achieve an equitable solution”. Nevertheless, for these very areas, Yemen insisted upon an equidistance line having included as base points for it the coasts of its small northern mid-sea islets.

24. In contrast, Eritrea contended in oral argument that, in the narrow seas between the Hanish group of islands and the Eritrean mainland coast, there was an area involving distances less than 24 miles<sup>2</sup> and which was therefore all territorial sea to which article 15 of the Convention “is going to be most directly applicable in the more southern reaches of the delimitation area in question, the area round the Zuqar and Hanish Islands. The reason for that, of course, is that the distances there are smaller. What that means is that in the area round the Zuqar and Hanish Islands there is a basic rule of equidistance.”

25. This would favour a median line that takes full account of South West Rocks and the Haycocks, which in the Award on Sovereignty were found to belong to Eritrea. Applying article 15, moreover, there could be no question of enclaves of these islands.

26. Eritrea also objected that Yemen's proposed enclaves would in practice mean that there was no access in corridor for Eritrea through the surrounding Yemen territorial sea. Thus, both the Eritrean South West Rocks and the Haycocks would be “completely isolated”. Eritrea objected to the enclave solution because Eritrea claimed this would have put the western main shipping channel, “between the Haycock Island and South West Rocks”, into Yemen territorial waters while the eastern main channel, which goes east of Zuqar, was

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<sup>2</sup> Throughout this Award the use of “miles” refers to nautical miles.

already in undisputed Yemen territorial waters. Thus, Yemen's proposal would result in "inclusion of both of the main shipping channels within what would be Yemen's territorial waters if Yemen's proposed delimitation were accepted."

27. Eritrea's own proposed solution of the delimitation problem was in two parts. There was the proposed international boundary, and there was the proposal for certain delimited "boxes" of the mid-sea islands, the purpose of which was to delimit the areas which Eritrea claimed to be "joint resource areas." This delimitation of "the shared maritime zones around the islands" was distinguished from recognition of "the exclusive waters of Yemen, to the east, and the exclusive waters of Eritrea, to the west." These ideas represented Eritrea's understanding of what in its view was meant by the reservation in the Award on Sovereignty of the traditional fishing regime, and what was needed to ensure the fulfillment of that regime. Of this Eritrea said, "if this regime is to be perpetuated, the Parties must know what it is and where it holds sway in a technically precise manner."

28. It is to be noted that the "exclusive" Eritrean waters on the west included not merely the territorial sea but also the waters west of the mid-sea islands and west of the historic median line. These two Eritrean proposals—the two versions of the median line and the joint resource area boxes—belong together because they were both essential parts of the Eritrean proposal as a whole. Thus, Eritrea's "historic median line" was—although with some variations to be noted later—one drawn as a median between the mainland coasts and ignoring the existence of the mid-sea islands of Yemen, but taking into account the islands of Eritrea. (There are precedents for this kind of boundary line in the petroleum agreements discussed in chapter III.) Eritrea's "resource box system" provided the essential elements of a complex solution for the problem of these islands. The boxes were offered in a variety of shapes and sizes (see Eritrea's maps 4 and 7). These "joint resource boxes" seem to have been advanced by Eritrea as a flexible set of suggestions. Its main concern was the reasonable one that it wanted to be able to tell its fishermen precisely where they might fish.

29. The coupling in the Eritrean pleadings of the two questions—the nature of the traditional fishing regime and the delimitation of the international boundary—is in contradistinction to Yemen's arguments. Yemen had expressed this view that "the traditional fishing regime should not have any impact on the delimitation of the maritime boundaries between the two Parties in the Second Stage." Yemen, in answer to a question from the Tribunal, also expressed the view that "article 13, paragraph 3, of the Arbitration Agreement (see annex 1) and the framework created by the 1994 and 1998 Agreements obviated any need further to take into account the traditional fishing regime in the delimitation of the maritime boundary." (The two Agreements of 1994 and 1998 are reproduced in annex 3 to this Award.)

30. Eritrea replied to this letter from Yemen 24 August saying that: Yemen's submission conveys the impression that the two States have conducted discussions since October 1998 which have resulted in arrangements for the implementation of Eritrea's traditional rights. No such discussions have taken place on this subject and no arrangements have been made to protect or preserve Eritrea's traditional rights in the waters around the mid-sea islands.

*Arguments about historic rights and sovereignty*

31. Sovereignty over the disputed islands was the subject of the First Stage of this Arbitration. The Arbitration Agreement enjoins the Tribunal in this Second Stage to take into account “the opinion it will have formed on questions of territorial sovereignty”. It is not surprising, therefore, that both Parties raised some interesting questions in this Second Stage about the nature of sovereignty and its relation to the question of delimitation and, not least, to the question of the traditional regime.

32. Eritrea was moved to return to the history of the formerly disputed islands and especially to the period of Italian influence and presence. From these and some other considerations was precipitated the view urged upon the Tribunal that Yemen’s ‘recently acquired’ sovereignty over islands made them of less importance as factors to be taken into consideration for the purposes of the delimitation. This approach was expressed in these words:

Eritrea also considers that the [mid-sea] islands come within the category of small uninhabited islands of recently acquired sovereignty and near the median line that should be recognized by the Tribunal to possess diminished maritime zones.

33. The Eritrean Prayer for Relief took this idea even further when it said in article 4 that:

The outer borders of the maritime zones of the islands in which these shared rights exist shall be defined as extending:

A. on the western side of the Red Sea, to the median line drawn between the two coasts, which shall include the islands historically owned by either State prior to the decade preceding commencement of this arbitration in accordance with article 121 of the United Nations Convention on the Law of the Sea; and

B. on the eastern side of the Red Sea, as far as the twelve mile limit of Yemen’s territorial sea.

34. Continuing the same theme article 5 of the Prayer for Relief provided:

5. The waters beyond the shared area of the mid-sea islands shall be divided in accordance with a median line drawn between the two coasts, which shall include the islands historically owned by either State prior to the decade preceding commencement of this Arbitration in accordance with article 121 of the United Nations Convention on the Law of the Sea.

35. Eritrea felt, therefore, able to urge that “Eritrea possess historic title to all waters to the west of the historic median line, drawn by reference to the historically owned islands.” This idea, it will be noted, yielded a rather different historic median line from the one drawn between the mainland coasts.

36. Yemen’s reply was that Yemen’s title to the formerly disputed islands was not created by the adjudication in the Award on Sovereignty, but that the adjudication was rather a confirmation of an already existing title; and, that “in arbitration the issue of title is determined both prospectively and retroactively”. These considerations led to some discussion of the effect of a critical date.

37. Yemen was also concerned that Eritrea’s proposed joint resource zones were founded upon a supposition that the sovereignty awarded to Yemen in the First Stage was a sovereignty “only limited or conditional”. This seems

to be partly a war of worlds. All sovereignty is "limited" by international law. Eritrea can hardly be suggesting that Yemen's sovereignty over the islands is "conditional" in the legal sense according to which failure to observe the condition might act as a cesser of the sovereignty.

38. Eritrea, however, responded by pointing to paragraph 126 of the Award on Sovereignty which speaks of the traditional fishing regime as having, by historical consolidation, established rights for both Parties "as a sort of '*servitude internationale*' falling short of territorial sovereignty". Other aspects of these arguments are discussed in chapter IV.

### *Proportionality*

39. This factor was argued strenuously and ingeniously by both Parties. Both relied upon the statement in the *North Sea* cases that a delimitation should take into account "a reasonable degree of proportionality, which a delimitation carried out in accordance with equitable principles ought to bring about between the extent of the continental shelf areas appertaining to the coastal State and the length of its coast measured in the general direction of the coastline".<sup>3</sup> Both were in agreement with the warning in the *Anglo French Arbitration* case<sup>4</sup> that this is a test of equitableness and not a method of delimitation, and that what had to be avoided was a manifest disproportionality resulting from the line selected. So there was little between the Parties as to principle but there was strong disagreement about the measurement of the length of their respective coasts and the significance of that measurement when it was made. The measurement is a matter on which several views are possible when Eritrea's coast extends also to be opposite to Yemen's neighbouring State, the Kingdom of Saudi Arabia; with which the maritime boundary remains undelimited.

40. The Yemen position was that proportionality is a factor to be taken into account in testing the equitableness of a delimitation already effected by other means. In relation in particular to the line to be drawn in the central sector, Yemen suggested that the relative lengths of the coast overall were not significant because (i) in the restricted seas between the Yemen islands and the Eritrean coast any modifications of the median line would involve the principle of non-encroachment; (ii) further, in the central sector, given the general configuration of the coasts, equal division alone guarantees an equitable result; (iii) equal division is reinforced by the principle of non-encroachment; (iv) the relevant coasts for this delimitation are the Eritrean coast and the Yemen islands; (v) State practice supported the median line; and (vi) proportionality cannot be applied in the context of overlapping territorial sea.

41. The Eritrean reply to this was to question whether the Yemen claimed line in the central sector really was the median line envisaged in article 15 of the Convention; and Eritrea suggested that it was not so, because it ignored the low-water line base points of the Eritrean islands of South West Rocks and the Haycocks.

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<sup>3</sup> *I.C.J. Reports* 1969, p. 57, para.101

<sup>4</sup> 18 *ILM* 60; 54 *ILR* 6.

42. It is not possible here to describe the many variations to be found in the pleadings on the theme of the method of measurements to be employed, or the discussions of the ambiguities of “oppositeness”, although the Tribunal has examined them all. Suffice it to say that whereas Yemen calculated that its own claimed line neatly divided the sea areas into almost equal areas, which according to Yemen’s measurements of the length of the coast was the correct proportion, Eritrea found, in a final choice of one of its several different methods of calculation, that its own historic median line between the mainland coasts would produce respective areas favouring Eritrea by a proportion of 3 to 2, which again was said to reflect accurately the proportion of the lengths of coast according to Eritrea’s method of measuring them.

43. It should be mentioned that Eritrea was particularly concerned that, in calculating the areas resulting from the delimitation, account should not be taken of the internal waters within the Dahlaks or the bays along its coast, including the Bay of Assab.

*The northern and southern extremities of the boundary line*

44. There also arose a question about where to stop the boundary at its northern and southern ends, considering that in these areas it might prejudice other boundary disputes with neighbouring countries. The Kingdom of Saudi Arabia indeed had written to the Registrar of the Tribunal on 31 August 1997 pointing out that its boundaries with Yemen were disputed, reserving its position, and suggesting that the Tribunal should restrict its decision to areas “that do not extend north of the latitude of the most northern point on Jabal al-Tayr island”. Yemen for its part wished the determination to extend to the latitude of 16°N, which is the limit of its so-called northern sector. Eritrea on the other hand stated that it had “no objection” to the Saudi Arabia proposal.

45. At the southern end, the third States concerned have not made representations to the Tribunal, but the matter will nevertheless have to be determined. Eritrea was not concerned here about the arrow with which Yemen terminated its claimed line, as this arrow, according to Eritrea, pointed in such a direction as to “slash” the main shipping channel and cause it to be in Yemen territorial waters. Yemen had also used an arrow to terminate the northern end of its line and there was some discussion and debate from both sides about the propriety or otherwise of these arrows.

46. At the southern end of the line, as it approaches the Bab-al-Mandab, there is the complication of the possible effect upon the course of the boundary line of the Island of Perim. This question might clearly involve the views of Djibouti. It follows that the Tribunal’s line should stop short of the place where any influence upon it of Perim Island would begin to take effect. The Tribunal has taken into consideration these positions variously expressed and has reached its own conclusions, as more fully detailed in chapter V.

The submissions of Yemen and the Prayer for Relief of Eritrea appear.

*Submissions of Yemen*

On the basis of the facts and legal considerations presented in Yemen's pleadings; and

Rejecting all contrary submissions presented in Eritrea's "Prayer for Relief", and

In view of the provisions of article 2 (3) of the Arbitration Agreement;

The Republic of Yemen, respectfully requests the Tribunal to adjudge and declare:

1. That the maritime boundary between the Parties is a median line, every point of which is equidistant from the relevant base points on the coasts of the Parties as identified in chapters 8 through 10 of Yemen's Memorial, appropriate account being taken to the islets and rocks comprising South West Rocks, the Haycocks and the Mohabbakahs;
2. That the course of the delimitation, including the coordinates of the turning points on the boundary line established on the basis of the World Geodetic System 1984 (WGS 84), are those that appear in chapter 12 to Yemen's Memorial.

*Eritrea's Prayer for Relief*

(Paragraph 274, Memorial of the State of Eritrea)

Article 2, paragraph 3, of the Arbitration Agreement requires the Tribunal to issue an award delimiting the maritime boundaries between the Parties in a technically precise manner. In order that such precision shall be achieved, the State of Eritrea respectfully requests the Tribunal to render an award providing as follows:

1. The Eritrean people's historic use of resources in the mid-sea islands includes fishing, trading, shell and pearl diving, guano and mineral extraction, and all associated on land including drying fish, drawing water, religious and burial practices, and building and occupying shelters for sleep and refuge.
2. The right to such usage, to be shared with the Republic of Yemen, extends to all of the land areas and maritime zones of the mid-sea islands;
3. The right to such usage shall be preserved intact in perpetuity; as it has existed in the past, without interference through the imposition of new regulations, burdens, curtailments or any other infringements or limitations of any kind whatsoever, except those agreed upon by Eritrea and Yemen as expressed in a written agreement between them;
4. The outer borders of the maritime zones of the islands in which these shared rights exist shall be defined as extending:
  - A. on the western side of the Red Sea, to the median line drawn between the two coasts, which shall include the islands historically owned by either State prior to the decade preceding commencement of this arbitration in accordance with article 121 of the United Nations Convention on the Law of the Sea; and
  - B. on the eastern side of the Red Sea, as far as the twelve mile limit of Yemen's territorial sea.
5. The waters beyond the shared area of the mid-sea islands shall be divided in accordance with a median line drawn between two coasts, which shall include the islands historically owned by either State prior to the decade preceding commencement of this Arbitration in accordance with article 121 of the United Nations Convention on the Law of the Sea;

6. The two Parties are directed to negotiate the modalities for shared usage of the mid-sea islands and their waters in accordance with the following terms:

- A. Immediately following Tribunal's rendering of an award in the second Phase, the Parties shall commence negotiations, in good faith, with a view toward concluding an agreement describing the ways in which nationals of both Parties may use the resources of the mid-sea islands and their maritime zones, as those zones are described in the Award of the Tribunal, and dealing a mechanism of binding dispute resolution to settle any and all disputes arising out of the interpretation or application of the agreement;
- B. The Parties shall submit this agreement to the Tribunal for its review and approval no later than six months after the date the Tribunal renders its award in the second Phase;
- C. The Tribunal shall determine whether the agreement is in accord with its award in the second Phase, and in particular whether it faithfully preserves the traditional rights of the two Parties to usage of the resources of the mid-sea islands;
- D. If the Tribunal determines that the agreement is not satisfactory according to the criteria described in the preceding paragraph, or if the Parties fail to submit an agreement, the Tribunal shall issue an award that either describes such modalities or else appoints the water between the two Parties equally. The Tribunal may request submissions from the Parties on this point.
- E. If the Tribunal finds that the agreement (or a revised agreement) is satisfactory, according to the criteria set forth above, it shall communicate its approval to the Parties, endorse the agreement as its own award and further direct the Parties to execute the agreement in the form of a binding treaty to be deposited with the Secretary-General of the United Nations;

7. The Tribunal shall remain seized of the dispute between the Parties until such time as the agreement regarding shared usage of the mid-sea islands has been received for deposit by the Secretary-General of the United Nations.

## Chapter II. *The General Question of Fishing in the Red Sea*

47. This chapter will first deal with the evidence and arguments advanced by the Parties concerning the general question of fishing in the Red Sea. It will then set forth the Tribunal's conclusions on these arguments and evidence.

### *The evidence and arguments of the Parties*

48. Each Party made much of fishing, including both the past history and the present situation, and as related not only to its own nationals but also the practices of the nationals of the other Party. The evidence advanced by the Parties and the arguments made by them can essentially be broken down into five subjects. These are: (1) fishing in general; (2) the location of fishing areas; (3) the economic dependency of the Parties on fishing; (4) consumption of fish by the populations of the Parties; and (5) the effect of fishing practices on the lines of delimitation proposed by the Parties.

49. The arguments of each Party were advanced essentially in order to demonstrate that the delimitation line proposed by that Party would not alter the existing situation and historical practices, that it would not have a cata-



strophic effect on local fishermen or on the local or national economy of the other Party or a negative effect on the regional diet of the population of the other Party, and conversely, that the delimitation line proposed by the other Party would indeed alter the existing situation and historical practice, would have a catastrophic or at least a severely adverse effect on the local fishermen or on the first Party's regional economy, and would also have a negative effect on the diet of the population of the first Party.

50. These elements were introduced directly and indirectly by each side against the general background of the "catastrophic" and "long usage" test originated in the *Anglo-Norwegian Fisheries Case* of 1951—and as brought forward in the provisions *inter alia* of article 7, paragraph 5 of the 1982 United Nations Convention on the Law of the Sea.

51. They also found an echo in the "equitable solution" called for by paragraph 1 of articles 74 and 83 of the Convention, it being assumed that no "solution" could be equitable which would be inconsistent with long usage, which would present a clear and present danger of a catastrophic result on the local economy of one of the Parties, or which would fail to take into account the need to minimize detrimental effects on fishing communities, and the economic dislocation, of States whose nationals have habitually fished in the relevant area.

#### *Fishing in general*

52. The position taken by Eritrea was as follows. The historical record demonstrated that the Eritrean fishing industry was substantial before the civil war in Ethiopia and had been, second only to Egypt, the most important regional fishing economy. Since the end of the civil war and independence, serious efforts were underway to reestablish the Eritrean fishing economy. It was, therefore, a mistake to consider that the Eritrean fisheries were—as Yemen argued—to a large extent dependent on Eritrean freshwater fisheries; in fact these have had no importance. On the other hand, the Yemen fishing industry was substantially based on its Indian Ocean fisheries and did not rely significantly on the Red Sea. Although Yemen's fishing industry in the Red Sea is much less significant than Yemen has claimed, it is nonetheless well established and in no even dependent for protection on the particular delimitation line proposed by Yemen.

53. Yemen argued that Yemeni nationals have long dominated fishing activities in the Red Sea; the Yemen traditional fishing activities—conducted in small boats, whether *sambouks* or *houris*—had been of much greater significance in the past than those of Eritrea, whose fishing activities had largely been concentrated on fishing close inshore along the Eritrean coastline and in and among the Dahlaks. Moreover, Hodeidah in Yemen was the most active market for fisheries production from Eritrean and Yemeni fishermen alike.

*Economic dependency on fishing*

54. The position of Eritrea was that considerable efforts had been made since the close of the war to reorganise and build up the Eritrean fishing industry—including efforts sponsored by the UNDP and FAO—and that the prospects for significant future development of the Eritrean fisheries were both promising and important. Although Eritrea did not claim present economic dependency on fishing, it did make the point that the existing fisheries practices of its nationals should not be restricted or curtailed by the delimitation to be decided by the Tribunal. As to Yemen, Eritrea asserted not only that the Yemen's Red Sea fisheries presence was far less important than Yemen had claimed, but also that the most fish landed in Hodeidah were brought there by Eritrean fishermen.

55. On the other hand, Yemen argued that its fishermen have always depended on the Red Sea fisheries as their fishing grounds and that this fishing activity had long constituted an important part of Yemen's overall national economy and been a dominant part of the regional economy of the Tihama region along the Red Sea coast. Yemen claimed that Eritrea had no basis for arguing that it possessed any substantial dependency on fishing, fisheries, fish, or fish consumption, and that most of Eritrea's concerns as manifested by documentary evidence submitted to the Tribunal in both Stages of the Arbitration had concerned proposals and projects for the development of future fishing activity and fisheries resources of Eritrea that did not now exist or were not now utilised.

*Location of fishing areas*

56. The arguments of Eritrea were to the following effect: at present, fishing in the Red Sea was by and large dominated by Eritrean artisanal fishermen who caught their fish around the Dahlaks, along the Eritrean coast, around the Mohabbakahs, the Haycocks, and South West Rocks, and in the waters around the Zuqar–Hanish group of “mid-sea islands”. (As noted, Eritrea denied that any part of its fish catch depended on inland Eritrean fisheries such as in lakes and reservoirs.) As to Yemen, Eritrea claimed that Yemeni fishermen had hardly, if at all, relied on the deep-water fishing grounds to the west of the mid-sea islands and around the Mohabbakahs, the Haycocks, and South West Rocks; there was little evidence of any Yemeni national's activity west of the Zuqar–Hanish group; and Yemen had failed to prove that a single gram of fish consumed in Yemen was taken from those waters.

57. For its part, Yemen argued that its artisanal and traditional fishermen had long fished in the waters around Jabal al-Tayr and the Zubayr group, in the waters around the Zuqar–Hanish group, and in the deep waters west of Greater Hanish and around the Mohabbakahs, the Haycocks, and South West Rocks. Supporting these assertions was evidence produced in the form of witness statements in the First Stage of the Arbitration in which individual Yemeni fishermen indicated that they had fished in the waters in question for a long time. As to the other Party, Yemen again asserted that Eritrea's fishing activi-

ties were confined to waters of the Dahlak archipelago and the inshore waters surrounding the islands at issue in the First Stage of the Arbitration—including the deep waters west of Greater Hanish and around the Mohabbakahs, the Haycocks, and South West Rocks.

*Consumption of fish by the population*

58. Eritrea argued that the Eritrean coastal population consumed far more fish than Yemen claimed and that, in addition, efforts were taking place to increase the popularity and availability of fresh fish for human consumption by its general population. It further asserted that the Yemeni population's dependence on fresh fish from the Red Sea as a food source had been greatly exaggerated by Yemen's pleadings, and that the Yemeni population of the Tihama—and *a fortiori* the population of Yemen as a whole—did not rely to any significant extent on fresh fish as a food. For its part, Yemen maintained that its population, particularly in the coastal areas such as the Tihama, consumed substantial quantities of fish and that—by contrast—Eritrean fish consumption was negligible.

*Effect on lines of delimitation proposed by the Parties*

59. The Eritrean position was that the Tribunal's indication of a line of delimitation such as the "historic median line" suggested by Eritrea's would respect the historic practice of the Parties, would not displace or adversely affect Yemen's fishing activity, and would be an equitable result for both Parties. In Eritrea's view, however, the Yemen proposed "median line" would deprive Eritrean fishermen of valuable fishery areas east of the mid-sea islands, and would award to Yemen areas to the west of the mid-sea islands and around the Mohabbakahs, the Haycocks, and South West Rocks—where Eritrean fishermen had long been plying their trade and where Yemeni nationals had never engaged in substantial fisheries activity. To that extent Eritrea argued that the proposed Yemen delimitation line would be inequitable and would deprive Eritrean fishermen of an important resource.

60. On the other side, Yemen maintained that the median line proposed by it would correctly reflect historical practices, would not give Yemen anything it did not have before, would respect existing rights, would not "penalise" existing or past Eritrean fishing activity, and would constitute an equitable result. As far as the Eritrean proposed "historic median line" was concerned, it would encroach on Yemen's traditional fishing grounds without justification, would deprive Yemeni fishermen of deep water fishing grounds without justification, would deprive Yemeni fishermen of deep water fisheries west of the mid-sea islands, and would give a corresponding windfall to Eritrea.

*The Tribunal's Conclusions on the Evidence*

61. The purposes of the arguments and evidence of the Parties were several, but were essentially directed to establishing that the delimitation advanced by each Party would respect existing historical practices, would not have a catastrophic effect on local fishermen or population, would not have a generally negative effect on the economy (or future plans) of the other Party, and would not have a deleterious effect on the diet and health of the population of the other Party. By the same token, each Party asserted or implied that the line of delimitation advanced by the other would have precisely the converse effect. The evidence advanced by the Parties has to a very large extent been contradictory and confusing.

On the basis of the arguments and evidence advanced before it the Tribunal reaches the following conclusions.

*As to fishing in general*

62. Fishing in general is an important activity for both sides of the Red Sea coast. This was recognized in the Award on Sovereignty of the Tribunal. It is not necessary and probably misleading to seek to determine the precise extent of its importance at any particular time, but the plain fact appears to be that – as the Tribunal stated in paragraph 526 of its Award on Sovereignty—“the traditional fishing regime in the region . . . has operated, as the evidence presented to the Tribunal amply testifies, around the Hanish and Zuqar Islands and the island of Jabal al-Tayr and the Zubayr group”.

63. Moreover, the whole point of the Tribunal's holding in paragraph vi of *Dispositif* in the Award on Sovereignty—that this traditional fishing regime shall be perpetuated so as to include “free access and enjoyment for the fishermen of both Eritrea and Yemen”—is that such traditional fishing activity has already been adjudged by the Tribunal to be important to each Party and to their nationals on both sides of the Red Sea. It thus suffices to say that fishing, fishermen, and fisheries are, and remain, of importance to each Party in the present case. Precisely because of this significance of paragraph 526 of the Award on Sovereignty and paragraph vi of its *Dispositif*, the fishing practices of the Parties from time to time are not germane to the task of arriving at a line of delimitation.

*As to economic dependency on fishing*

64. It is not possible or necessary for the Tribunal to reach a conclusion that either Eritrea or Yemen is economically dependent on fishing to such an extent as to suggest any particular line of delimitation. The evidence before the Tribunal suggests that fishing activity and income appear to form an important part of Yemen's economic activity—particularly of the Tihama region—and that revitalisation and development of the Eritrean fishing industry is a priority objective of the Government of Eritrea and has received significant attention since Eritrean independence.

*As to location of fishing areas*

65. The evidence advanced in both Stages of the Arbitration included evidence that many fishermen from Eritrea tended largely to fish in and around the Dahlak archipelago and on inshore waters along the Eritrean coastline, but it also appears that some Eritrean fishermen used the waters in and around the Hanish and Zuqar Islands as well as the deep waters to the west of the mid-sea islands and around the Mohabbakahs, the Haycocks, and South West Rocks. This conclusion was adumbrated by the Tribunal's concern for maintenance of the traditional fishing regime "in the region" as a whole, "including free access and enjoyment for the fishermen of both Eritrea and Yemen" (Award on Sovereignty, *Dispositif*, paragraph 527, subparagraph vi).

66. There is abundant historical data indicating that fishermen from both the eastern and western coasts of the Red Sea freely undertook activities, including fishing and selling their catch on the local markets, regardless of their national political affiliation or their place of habitual domicile.<sup>5</sup>

67. This information concerning the social and economic conditions affecting the lives of the people on both sides of the Red Sea also reflects deeply-rooted and common social and legal traditions that had prevailed for centuries among these populations, each of which was under the direct or indirect rule of the Ottoman Empire until the latter part of the nineteenth century.

68. The evidence before the Tribunal further appears to establish that over the years Yemeni fishermen have operated as far north as the Dahlak archipelago and Jabal al-Tayr and the Zubayr group, and as far west as the Mohabbakahs, the Haycocks, and South West Rocks. Again, this conclusion is implicit in the Tribunal's concern for maintenance of the traditional fishing regime "in the region" as a whole.

69. On a subject not unrelated to fishing areas, it should be noted that the evidence is quite clear that Eritrean fishermen as well as Yemeni also appear to have enjoyed free and open access to the major fish market at Hodeidah on the Yemen side of the Red Sea without impediment by reason of their nationality. (This element was again taken into account by the Tribunal in its Award on Sovereignty, *Dispositif*, paragraph 527, subparagraph vi.)

*As to consumption of fish by the population*

70. The evidence concerning fish consumption advanced by each Party was presumably aimed at establishing that the Tribunal's adoption of the line of delimitation proposed by the other Party would constitute a serious dietary or health threat to the population of the first Party. However, the evidence on this matter is conflicting and uncertain. It is difficult if not impossible to draw any generalized conclusions from the welter of alleged facts advanced by the Parties in this connection.

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<sup>5</sup> See footnotes 9 and 11 to paragraphs 121 and 128 respectively of the Award on Sovereignty.

71. The Tribunal can readily conclude, without having to weigh intangible and elusive points of proof or without having to indulge in nice calculations of nutritional theory, that fish as a present and future potential resource is important for the general and local populations of each Party on each side of the Red Sea. The Tribunal can also conclude, as a matter of common sense and judicial notice, that interest in and development of fish as a food source is an important and meritorious objective. Based on these two conclusions, however, the Tribunal can find no significant reason on these grounds for accepting—or rejecting—the arguments of either Party as to the *line of delimitation* proposed by itself or by the other Party.

*Concerning the effect on lines of delimitation proposed by the Parties*

72. Based on the foregoing, the Tribunal finds no significant reason on any other grounds concerning fishing – whether related to the historical practice of fishing in general, to matters of asserted economic dependency on fishing, to the location of fishing grounds, or to the patterns of fish consumption by the populations – for accepting, or rejecting, the arguments of either Party on the line of delimitation proposed by itself or by the other Party. Neither Party has succeeded in demonstrating that the line of delimitation proposed by the other would produce a catastrophic or inequitable effect on the fishing activity of its nationals or detrimental effects on fishing communities and economic dislocation of its nationals.<sup>6</sup>

73. For these reasons, it is not possible for the Tribunal to accept or reject the line of delimitation proposed by either Party on fisheries grounds. Nor can the Tribunal find any relevant effect on the legal reason supporting its own selection of a delimitation line arising from its consideration of the general past fishing practices of either Party or the potential deprivation of fishing areas or access to fishing resources, or arising from nutritional or other grounds.

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74. For the above reasons, the evidence and arguments by the Parties in the matter of fishing and fisheries could have no significant effect on the Tribunal's determination of the delimitation that would be appropriate under international law in order to produce an equitable solution between the Parties.

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<sup>6</sup> Cf. article 70, paragraph 5, of the United Nations Convention on the Law of the Sea: "Developed geographically disadvantaged States shall, under the provision of this article, be entitled to participate in the exploitation of living resources only in the exclusive economic zones of developed coastal States of the same sub-region or region having regard to the extent to which the coastal State, in giving access to other States to the living resources of its exclusive economic zone, has taken into account the need to minimize detrimental effects on fishing communities and economic dislocation in States whose nationals have habitually fished in the zone."

Chapter III. *Petroleum Agreements and median lines*

75. In the matter of the pertinence and probative force for this Stage of the proceedings of petroleum contracts and concessions entered into by Yemen and by Ethiopia or Eritrea, the Parties exhibited a reversal of roles.

76. In the First Stage, Yemen laid great weight on oil contracts and concessions concluded by it. It introduced into evidence a number of such oil agreements and maps illustrating them, many of which were prepared by Petroconsultants S.A. of Geneva. Since some of these arrangements embodied western boundaries to the east of which lay some of the islands in dispute, Yemen argued that these arrangements demonstrated that both Yemen and the contracting oil companies were of the view that Yemen enjoyed sovereignty over those disputed islands. It contended that, where a State enters into a concession covering a specified area, it holds itself out as having sovereignty over that area; and that, where a foreign oil company enters into that concession, and expends resources in pursuance of it, it does so because it accepts and acts in reliance upon the sovereignty of that State. Yemen emphasized that not only were some of its petroleum contracts of a geographical extent that encompassed the disputed islands; it was also significant, it claimed, that none of the oil contracts and concessions concluded by Ethiopia or Eritrea did so. As the Award on Sovereignty summarised: "Yemen contended that the pattern of Yemen's offshore concessions, unopposed by Ethiopia and Eritrea, taken together with the pattern of Ethiopian concessions, confirmed Yemen's sovereign claims to the disputed Islands, acceptance of and investment on the basis of that sovereignty by oil companies, and acquiescence by Ethiopia and Eritrea." (paragraph 390)

77. In the First Stage, Eritrea in contrast argued that conclusion by a State of an oil contract or concession with a foreign oil company was not evidence of title but, at most, a mere claim. Such arrangements lacked probative force unless activities in pursuance of them took place. Nevertheless Eritrea countered Yemen's argument by introducing evidence of a concession concluded by Ethiopia which covered part or all of Greater and Lesser Hanish Islands. Neither Eritrean nor Yemen attached importance to the fact that a number of the petroleum arrangements concluded by Yemen and Ethiopia or Eritrea extended to a median line between their respective coastlines.

78. In its Award on Sovereignty, the Tribunal concluded:

437. The offshore petroleum contracts entered into by Yemen, and by Ethiopia and Eritrea, fail to establish or significantly strengthen the claims of either party to sovereignty over the disputed islands.

438. Those contracts however lend a measure of support to a median line between the opposite coasts of Eritrea and Yemen, drawn without regard to the islands, dividing the respective jurisdiction of the Parties.

79. In the Second Stage of these Proceedings, Eritrea placed great emphasis upon paragraph 438, and other passages of the Award, that found that various petroleum arrangements indicate limits drawn along a median line, and contended that the Tribunal's Award provided support for the "historic median line" which it now advanced as the maritime boundary line between

Eritrea and Yemen. Eritrea stressed that, in several petroleum contracts concluded by Yemen, the contractual area extended from the mainland coast of Yemen in the east to the median line of the Red Sea, drawn without regard to base points on the disputed islands. It observed that a contract concluded by it, and another concluded by Yemen, ran through Greater Hanish along a median line. It pointed out that one of Yemen's concession contracts contains a median line, marked "Ethiopia" to the west and "Yemen" to the east. It maintained that maps prepared by Petroconsultants, introduced and relied upon by Yemen in the First Stage, and showing concession boundaries running along a median line between the coasts of Yemen and Eritrea, cannot now be discounted by Yemen because it introduced them for another purpose. Eritrea acknowledged that the contracts and conduct of Yemen and of Ethiopia and Eritrea are not tantamount to mutual acceptance of a median maritime boundary or even of a *modus vivendi* line. But it contended that they nevertheless provide a persuasive basis for taking an "historic median line" to divide the waters of the Red Sea, to be drawn without according the "mid-sea" disputed islands influence on the course of that line.

80. Yemen for its part contended that, while it introduced the Petroconsultants maps as evidence of Yemen's sovereignty over the disputed islands, it did so not to show maritime boundaries; that the Petroconsultants maps contain "mistakes"; and that these and other maps introduced in the First Stage contain disclaimers about lines affecting or prejudicing the contracting government's sovereign rights. Yemen emphasized the Tribunal's holding that the concessions were "issued with commercial considerations in mind and without particular regard to the existence of the Islands." (Award on Sovereignty, paragraph 412.)

81. It should be noted that, in the course of making its holdings on sovereignty over the disputed islands, the Tribunal held that the petroleum contracts do "lend a measure of support to a median line between the opposite coasts of Eritrea and Yemen, drawn without regard to the islands, dividing the respective jurisdiction of the Parties."

82. At this juncture, however, the Tribunal acts in the lights of the dispositive provisions of paragraph 527 of its Award. Which islands are subject to the territorial sovereignty of Eritrea, and which are subject to the territorial sovereignty of Yemen, has been determined. In delimiting the maritime boundaries of the Parties, the Tribunal is required in this Second Stage of the proceedings to take into account, *inter alia*, the opinion that it formed on the question of territorial sovereignty.

83. As is set out in other passages of this Award, the Tribunal has taken as its starting point, as its fundamental point of departure, that, as between opposite coasts, a median line obtains. The Award on Sovereignty's examination of petroleum arrangements does show, as just indicated, repeated reference to a median line between the coasts of Yemen and Eritrea. To that extent, Eritrea's position in this Stage of the proceedings is sustained by those references. But that is not the same as saying that the maritime boundary now to be



drawn should be drawn throughout its length entirely without regard to the islands whose sovereignty has been determined; nor is it to say that the boundary should track Eritrea's claimed "historic median line". The concession lines were drawn without regard to uninhabited, volcanic islands when their sovereignty was indeterminate. Those lines can hardly be taken as governing once that sovereignty has been determined. While initial weight is to be given to the mainland coasts and their island fringes, some weight is to be or may be accorded to the islands, certainly in respect of their territorial waters. What weight, and why and how, are questions addressed.

84. In respect of petroleum arrangements and a maritime boundary between the Parties in the Red Sea, the Tribunal recalls the conclusion of the International Court of Justice in its Judgment in the *North Sea Continental Shelf* cases<sup>7</sup>, that delimitation of States' areas of continental shelf may lead to "an overlapping of the areas appertaining to them. The Court considers that such a situation must be accepted as a given fact and resolved either by an agreed, or failing that by an equal division of the overlapping areas, or by agreements for joint exploitation, the latter solution appearing particularly appropriate when it is a question of preserving the unity of a deposit." Judge Jessup in his separate opinion in that case referred to a seminal article by William T. Onorato<sup>8</sup> and cited examples of such cooperation; and in the last thirty years there has grown up a significant body of cooperative State practice in the exploitation of resources that straddle maritime boundaries. The papers in a volume published by The British Institute of International and Comparative Law summarise and analyse this practice<sup>9</sup>, as does a more recent study by Masahiro Miyoshi, *The Joint Development of Offshore Oil and Gas in Relation to the Maritime Boundary Delimitations*, International Boundaries Research Unit, 1999.<sup>10</sup>

85. That practice has particular pertinence in the current case. The Red Sea is not to be compared to the great oceans. Yemen and Eritrea face one another across a relatively narrow compass. Their peoples have had a long and largely beneficent history of intermingling, a history not limited to the free movement of fishermen but embracing a wider trade, and a common rule as well as a common religion. These relations long antedate the relatively modern, European-derived, concepts of exclusionary sovereignty. While oil and gas in commercial quantities have not to date been found beneath the waters of the Red Sea that lie between the Eritrea and Yemen, it is possible that either or both may be.

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<sup>7</sup> I.C.J. Reports 1969, p. 52.

<sup>8</sup> *Apportionment of an International Petroleum Deposit*, 17 ICLQ 85 (1958).

<sup>9</sup> Edited by Hazel Fox, *Joint Development of Offshore Oil and Gas* (1990) by R. R. Churchill, Kamal Hossein, Isa Huneidi, Masahiro Miyoshi, Ian Townsend-Gault, Anastasia Strati, H. Burmester, Clive R. Symmons, Thomas H. Walde, Brenda Barrett, P. Birnie and A. D. Read.

<sup>10</sup> See also, I.F.P. Shihata and W.T. Onorato, *Joint Development of International Petroleum Resources in Undefined and Disputed Areas*, International Conference of the LAWASIA Energy Centre, Kuala Lumpur, 1992.

86. In paragraph 1 of its Prayer for Relief, Eritrea requests the Tribunal to determine that “The Eritrean people’s historic use of resources in the mid-sea islands includes . . . mineral extraction.” For reasons explained in paragraph 104 of this Award, the Tribunal is not in a position to accede to this request. However, it is of the view that, having regard to the maritime boundary established by this Award, the Parties are bound to inform one another and to consult one another on any oil and gas and other mineral resources that may be discovered that straddle the single maritime boundary between them or that lie in its immediate vicinity. Moreover, the historical connection between the peoples concerned, and the friendly relations of the Parties that have been restored since the Tribunal’s rendering of its Award on Sovereignty, together with the body of State practice in the exploitation of resources that straddle maritime boundaries, import that Eritrea and Yemen should give every consideration to the shared or joint or unitised exploitation of any such resources.

#### Chapter IV. *The traditional fishing regime*

87. In paragraph 526 of its Award on Territorial Sovereignty and Scope of the Dispute the Tribunal found:

In finding that the Parties each have sovereignty over various of the Islands the Tribunal stresses to them that such sovereignty is not inimical to, but rather entails, the perpetuation of the traditional fishing regime in the region. This existing regime has operated, as the evidence presented to the Tribunal amply testifies, around the Hanish and Zuqar Islands and the islands of Jabal al-Tayr and the Zubayr group. In the exercise of its sovereignty over these islands, Yemen shall ensure that the traditional fishing regime of free access and enjoyment for the fishermen of both Eritrea and Yemen shall be preserved for the benefit of the lives and livelihoods of this poor and industrious order of men.

88. Immediately after, in paragraph vi of its *Dispositif*, The Tribunal determined that:

the sovereignty found to lie within Yemen entails the perpetuation of the traditional fishing regime in the region, including free access and enjoyment for the fishermen of both Eritrea and Yemen.

89. Eritrea has taken the view that these findings entail the establishment of joint resource zones, which the Tribunal should delimit in its Award in the Second Stage. Eritrea, in its Prayer for Relief, also urged the Tribunal to direct the Parties to negotiate so as to achieve certain results it regards as required by paragraph 527 (vi) of the *Dispositif* in the Award on Sovereignty, and to take certain other powers in relation thereto. To fail to do so, contended Eritrea, would be *infra petita*. Eritrea further contended that the final paragraph of the letter of 9 November 1998 from the President of the Tribunal to the counsel and co-agent for Eritrea left Eritrea full liberty so to submit during this Stage of the Arbitration. Some of the elements contained in Eritrea’s Prayer for Relief were not pursued in oral argument; there the main plea was that the Court specify with precision what was entailed by its findings as to the traditional fishing regime and where that regime lay within the Red Sea. However, the Prayer for Relief, unamended, was said by Eritrea to represent its final submissions.

90. Yemen took the view that it was clear from paragraph 526 of the Award on the Sovereignty that it was for it, Yemen, in the exercise of its sovereignty, to ensure the preservation of the traditional fishing regime: that, while the 1994

and 1998 Agreements might prove to be useful vehicles for that exercise in sovereignty, there was no question of Yemen's sovereignty having been made conditional and thus no agreement with Eritrea was necessary for the administrative measures that might relate to this regime; that the Tribunal had not made any finding that there should be joint or common resource zones; that the Tribunal's finding that Yemen's sovereignty entailed the perpetuation of the traditional fishing regime was a finding in favour of the fishermen of Eritrea and Yemen, not of the State of Eritrea; that article 3 (1) of the Agreement on Principles and article 2 (3) of the Arbitration Agreement meant that it would be *ultra vires* for the Tribunal to respond favourably to Eritrea's Prayer for Relief; and that the President's letter of 9 November 1998 indeed showed that the Prayer for Relief was irregular. Further, Yemen contended that there had traditionally been no significant Eritrean fishing in the vicinity of the islands.

91. The details of the positions taken by Eritrea and Yemen is recalled above at paragraphs 48-60.

92. The Tribunal recalls that it based this aspect of its Award on Sovereignty on a respect for regional legal traditions. The abundant literature on the historical realities which characterised the lives of the populations on both the eastern and western coasts was noted in the award of the Arbitral Tribunal in the First Stage of the Proceedings, paragraph 121, footnote 9 and paragraph 128, footnote 11. This well-established factual solution reflected deeply rooted common legal traditions which prevailed during several centuries among the populations of both coasts of the Red Sea, which were until the latter part of the nineteenth century under the direct or indirect rule of the Ottoman Empire. The basic Islamic concept by virtue of which all humans are "stewards of God" on earth, with an inherent right to sustain their nutritional needs through fishing from coast to coast with free access to fish on either side and to trade the surplus, remained vivid in the collective mind of Dankhalis and Yemenites alike.

93. Although the immediate beneficiaries of this legal concept were and are the fishermen themselves, it applies equally to States in their mutual relations. As a leading scholar has observed: "Islam is not merely a religion but also a political community (*umma*) endowed with a system of law designed both to protect the collective interest of its subjects and to regulate their relations with the outside world."<sup>11</sup>

94. The sovereignty that the Tribunal has awarded to Yemen over Jabal al-Tayr, the Zubayr group and the Zuqar-Hanish group is not of course a "conditional" sovereignty, but a sovereignty nevertheless that respects and embraces and is subject to the Islamic legal concepts of the region. As it has been aptly put, "in today's world, it remains true that the fundamental moralistic general principles of the *Quran* and the *Sunna* may validly be invoked for the consolidation and support of positive international law rules in their progressive development towards the goal of achieving justice and promoting the human dignity of all mankind."<sup>12</sup>

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<sup>11</sup> Khadduri, *Encyclopedia of Public International Law*, volume 6, page 27.

<sup>12</sup> *Encyclopedia of Public International Law*, volume 7, page 229.

95. The Tribunal's Award on Sovereignty was not based on any assessment of volume, absolute or relative, of Yemeni or Eritrean fishing in the region of the islands. What was relevant was that fishermen from both of these nations had, from time immemorial, used these islands for fishing and activities related thereto. Further, the finding on the traditional fishing regime was made in the context of the Award on Sovereignty precisely because classical western territorial sovereignty would have been understood as allowing the power in the sovereign state to exclude fishermen of a different nationality from its waters. Title over Jabal al-Tayr and the Zubayr group and over the Zuqar–Hanish group was found by the Tribunal to be indeterminate until recently. Moreover, these islands lay at some distance from the mainland coasts of the Parties. Their location meant that they were put to a special use by the fishermen as way stations and as places of shelter, and not just, or perhaps even mainly, as fishing grounds. These special factors constituted a local tradition entitled to the respect and protection of the law.

96. It is clear that the Arbitration Agreement does not authorize the Tribunal to respond affirmatively to paragraphs 6 and 7 of Eritrea's Prayer for Relief. Nor, indeed, would it have been able so to do even if the arbitration had been conducted within the framework of a single stage or phase, as originally envisaged by article 3 (1) of the Agreement on Principles.

97. However, Eritrea is entitled to submit to the Tribunal that its finding as to the traditional fishing regime has implications for the delimiting of maritime boundaries in the Second Stage; and the Tribunal is at liberty to respond to such submissions.

98. Indeed, it is bound to do so, because it is otherwise in a position to respond to the submissions made by Yemen as well as by Eritrea in this Second Stage. It cannot be the case that the division of the Arbitration into two stages meant that the Parties may continue to debate whether the substantive content of the Tribunal's findings on the traditional fishing regime has any relevance to the task of delimitation, but that the Tribunal must remain silent. Such formalism was never the objective of the agreement of both Parties to divide the Arbitration into two Stages.

99. Of course, in making its Award on Sovereignty the Tribunal did not "prefigure" or anticipate, the maritime delimitation that it is now called upon to make in the Second Stage, after full pleadings by the Parties. Beyond that the Tribunal is not to be artificially constrained in what it may respond to by the procedural structures agreed for the Arbitration. The two-stage mechanism is not to be read either as forbidding Parties to make the arguments they wish, when they wish; nor as limiting their entitlement to seek to protect what they perceive as their substantive rights.

100. Article 15 of the Arbitration Agreement (the meaning of which is otherwise not readily intelligible) lends support to this view. Paragraph 2 seeks of the Arbitration Agreement as "implementing the procedural aspects" of the Agreement on Principles. And paragraph 1 provides that:

Nothing in this Arbitration Agreement can be interpreted as being detrimental to the legal positions or to the rights of each Party with respect to the questions submitted to the Tribu-

nal, nor can affect or prejudice the decision of the Arbitral Tribunal or the consideration and grounds, on which those decision are based.

101. As the Tribunal has indicated in its Award on Sovereignty, the traditional fishing regime around the Hanish and Zuqar Islands and the islands of Jabal al-Tayr and the Zubayr group is one of free access and enjoyment for the fishermen of both Eritrea and Yemen. It is to be preserved for their benefit. This does not mean, however, that Eritrea may not act on behalf of its nationals, whether through diplomatic contacts with Yemen or through submissions to this Tribunal. There is no reason to import into the Red Sea the western legal fiction—which is in any event losing its importance—whereby all legal rights, even those in reality held by individuals, were deemed to be those of the State. That legal fiction served the purpose of allowing diplomatic representation (where the representing State so chose) in a world in which individual had no opportunities to advance their own rights. It was never meant to be the case however that, were a right to be held by an individual, neither the individual nor his State should have access to international redress.

102. The Tribunal accordingly now responds to the diverse submissions advanced in this Stage by the Parties, both as to the substantive content of the traditional fishing regime referred to in paragraphs 526 and 527 (vi) of its Award on Sovereignty and as to any implications for its task in this stage of the Arbitration. The correct answer is indeed to be gleaned from the pages of that Award itself. Attention may in particular be drawn to paragraphs 102, 126-128, 340, 353-357 and 526.

103. The traditional fishing regime is not an entitlement in common to resources nor is it a shared right in them. Rather, it entitles both Eritrean and Yemeni fishermen to engage in artisanal fishing around the islands which, in its Award on Sovereignty, the Tribunal attributed to Yemen. This is to be understood as including diving, carried out by artisanal means, for shells and pearls. Equally, these fishermen remain entitled freely to use these islands for those purposes traditionally associated with such artisanal fishing—the use of the islands for drying fish, for way stations, for the provision of temporary shelter, and for the effecting of repairs.

104. In paragraph 1 of the Prayer for Relief, Eritrea asks the Tribunal to determine that “The Eritrean people’s historic use of resources in the mid-sea islands includes guano and mineral extraction . . .” In the pleadings before the Tribunal Eritrea referred specifically in this context to guano extraction which had been license by Italy. Guano extraction is not to be assimilated to mineral extraction more generally. Further, as the Award on Sovereignty made clear, Eritrea’s rights today are not derived from a claimed continuity from rights once held by Italy. The traditional fishing regime covers those entitlements that all the fishermen have exercised continuously through the ages. The Tribunal has received no evidence that the extraction of guano, or mineral extraction more generally, forms part of the traditional fishing regime that has existed and continues to exist today.

105. The FAO Fisheries Infrastructure Development Project Report of 1995 was a report on fishing in Eritrean waters. However, its findings on artisanal fishing would be of general application in this region. The 1995 Re-

port makes clear that both the artisanal vessels and their gear are simple. The vessels are usually canoes fitted with small outboard engines, slightly larger vessels (9-12m) fitted with 40-75 hp engines, or fishing *sambuks* with inboard engines. Dugout canoes and small rafts (*ramas*) are also in use.<sup>13</sup> Hand lines, gill nets and long lines are used. In its Report on Fishing in Eritrean waters, the FAO study states that this artisanal fishing gear, which varies according to the boat and the fish, is “simple and efficient”.<sup>14</sup>

106. However, the term “artisanal” is not to be understood as applying in the future only to a certain type of fishing exactly as it is practised today. “Artisanal fishing” is used in contrast to “industrial fishing”. It does not exclude improvements in powering the small boats, in the techniques of navigation, communication or in the techniques of fishing; but the traditional regime of fishing does not extend to large-scale commercial or industrial fishing nor to fishing by nationals of third States in the Red Sea, whether small-scale or industrial.

107. In order that the entitlements be real and not merely theoretical, the traditional regime has also recognized certain associated rights. There must be free access to and from the islands concerned—including unimpeded passage through waters in which, by virtue of its sovereignty over the islands, Yemen is entitled to exclude all third Parties or subject their presence to license just as it may do in respect of Eritrean industrial fishing. This free passage for artisanal fishermen has traditionally existed not only between Eritrea and the islands, but also between the islands and the Yemen coast. The entitlement to enter the relevant ports, and to sell and market the fish there, is an integral element of the traditional regime. The 1994 Memorandum of Understanding between the State of Eritrea and the Republic of Yemen for Cooperation in the Areas of Maritime Fishing, Trade, Investment, and Transportation usefully identifies the centres of fish marketing on each coast. Eritrean artisanal fishermen fishing around the islands awarded to Yemen have had free access to Maydi, Khoba, Hodeidah, Khokha and Mocha on the Yemen coast, just as Yemeni artisanal fishermen fishing around the islands have had an entitlement to unimpeded transit to and access to Assab, Tio, Dahlak and Massawa on the Eritrean coast. Nationals of the one country have an entitlement to sell on equal terms and without any discrimination in the ports of the other. Within the fishing markets themselves, the traditional non-discriminatory treatment—so far as cleaning, storing and marketing is concerned—is to be continued. The traditional recourse by artisanal fisherman to the *acquil* system to resolve their disputes *inter se* is to be also maintained and preserved.

108. Yemen and Eritrea are, of course, free to make mutually agreed regulations for the protection of this traditional fishing regime. Insofar as environmental considerations may in the future require regulation, any administrative measure impacting upon these traditional rights shall be taken by Yemen only with the agreement of Eritrea and, so far as access through Eritrean waters to Eritrean ports is concerned, vice versa.

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<sup>13</sup> FAO 24/95 ADB-ERI.4, 27 February 1995, at paragraphs 2.19 and 3.44.

<sup>14</sup> *Ibid*, paragraph 2.20.

109. The traditional fishing regime is not limited to the territorial waters of specified islands; nor are its limits to be drawn by reference to claimed past patterns of fishing. It is, as Yemen itself observes in its Answers to the Tribunal's Questions, annex 2, page 64, a "regime that has existed for the benefit of the fishermen of both countries throughout the region." By its very nature it is not qualified by the maritime zones specified under the United Nations Convention on the Law of the Sea, the law chosen by the Parties to be applicable to this task in this Second Stage of the Arbitration. The traditional fishing regime operates throughout those waters beyond the territorial waters of each of the Parties, and also in their territorial waters and ports, to the extent and in the manner specified in paragraph 107.

110. Accordingly, it does not depend, either for its existence or for its protection, upon the drawing of an international boundary by this Tribunal. This much was indeed acknowledged by Yemen in its Answers to the Tribunal's Questions, when it observed that "the holdings of the Tribunal in the first Award with respect to the traditional fishing regime constitute *res judicata* without prejudice to the maritime boundary that the Tribunal decides on in the second stage of the proceedings" (annex 2) Yemen informed the Tribunal that it was "fully committed to apply and implement the Award in all its aspects, including with respect to the perpetuation of the traditional fishing regime for the fishermen of both Eritrea and Yemen." Nor is the drawing of the maritime boundary conditioned by the findings, in the Award on Sovereignty, of such a regime.

111. As the Tribunal has explained above, no further joint agreement is legally necessary for the perpetuation of a regime based on mutual freedoms and an absence of unilaterally imposed conditions. However, should Eritrea and Yemen decide that the intended cooperation exemplified by the 1994 Memorandum of Understanding and the 1998 Agreement can usefully underpin the traditional regime, they may choose to use some of the possibilities within these instruments. The subject matter of the 1994 instrument has a particular pertinence. (Moreover, it is the understanding of the Tribunal that the Parties did not jointly intend to deprive fishermen of their rights under this traditional regime if they failed to submit a fishing licence to the other Party within three months from the date of the signing of the Memorandum of Understanding.)

112. The Tribunal has responded to the pleadings that both Parties have made, as they were entitled to do, in this phase of the proceedings. Its answer indicates how its Award on Sovereignty is to be understood in relation to the matters that the Parties have now raised before it.

## Chapter V. *The Delimitation of the International Boundary*

### *The Tribunal's comments on the arguments of the Parties*

113. Since, as it will appear below, the international maritime boundary line decided upon by the Tribunal differs in some respects from both the one claimed by Yemen and the one, or the ones, claimed by Eritrea, it is right first

to explain briefly where and why the boundaries claimed by the Parties have not been endorsed in this Award. This will now be done taking generally first the Yemen claim and then the Eritrean claim, as this was the order in which the Parties agreed to argue in the Oral Proceedings of this Second Stage of this Arbitration.

114. Yemen claimed one single international boundary line for all purposes. The single line it claimed was described as a “median line”, because Yemen treated the westward-facing coasts of all of its islands as relevant coasts for purposes of the delimitation. For the Eritrean coast, Yemen used base points on the mainland coast of Eritrea and thus ignored the Eritrean mid-sea islands for the purpose of delimitation of the boundary. Yemen also claimed that its line can properly be described as a coastal median line. For Yemen the relevant coasts included not only the islands over which it has been awarded sovereignty, but also of certain among the Dahlak islands; thus Yemen, like Eritrea, was prepared to treat the Dahlaks as being part of the Eritrean coast, and so used base points on the islets called “the coastal median line”, it meant the median line between what in the Eritrean view represented the *mainland* coasts of both Parties. At the same time Eritrea claimed a historic median line using only its own islands as base points, and thus ignoring those of Yemen. These variations produced different claimed median lines. See Eritrea’s maps 3 and 7, and Yemen’s maps 12.1. See also charts 1 and 2 showing the base points as provided by Eritrea.

115. It is in what Yemen called the northern sector of the boundary line where this difference caused the greatest divergence, actually of several nautical miles, between the lines claimed by the Parties because of the question of how much “effect” on the line should be given to the Yemen northern islands, namely the small sole mid-sea island of Jabal al-Tayr and the mid-sea groups of islands and islets called Zubayr. Yemen allowed them full effect on the line; Eritrea’s line allowed them none.

116. In considering this marked divergence of view it is well to recollect that the boundary line in its northern stretch—including indeed both the opposing claimed lines—are boundaries between the Yemen and the Eritrean continental shelves and EEZ; and are therefore governed by articles 74 and 83 of the 1982 Convention. In any event there has to be room for differences of opinion about the interpretation of articles which, in a last minute endeavour at the Third United Nations Conference on the Law of the Sea to get agreement on a very controversial matter, were consciously designed to decide as little as possible. It is clear, however, that both articles envisage an equitable result.

117. This requirement of an equitable result directly raises the question of the effect to be allowed to mid-sea islands which, by virtue of their mid-sea position, and if allowed full effect, can be obviously produce a disproportionate effect—or indeed a reasonable and proportionate effect—all depending on their size, importance and like consideration in the general geographical context.

118. Yemen understood this problem very clearly. Its argument was that, although these mid-sea islands and islets are small and uninhabitable (these questions figured prominently in the First Stage of this Arbitration), those con-



siderations were nicely matched, or “balanced”, by the complementary smallness and lack of importance of the outer islets of the Dahlak group which were the base points on the Eritrean side of the boundary. However, the situation of these Dahlak islets is very different from that of the mid-sea islands. The Dahlak outer islets are part of a much larger group of islands which both Parties were agreed are an integral part of the Eritrean mainland coast. Consequently, between these islets and the mainland, the sea is Eritrean internal waters. The Tribunal had therefore, as will be seen below, no difficulty in rejecting this “balancing” argument of Yemen, as it does not compare like with like.

119. In its assessment of the equities of the “effect” to be given to these northern islands and islets, the Tribunal decided not to accept the Yemen plea that they be allowed a full, or at least some, effect on the median line. This decision was confirmed by the result that, in any event, these mid-sea islands would enjoy an entire territorial sea of the normal 12 miles—even on their western side.

120. One practical result of the Yemen balancing arguments regarding the northern mid-sea islands is that Yemen did not argue in the alternative about possible base points on the islands fringing the Yemen *mainland* coast—which islands could much more cogently be said to balance the Dahlaks.

121. The Eritrean argument concerning this northern stretch of the line was relatively simple: it argued strongly against the Yemen balancing suggestions, and here asked for the mainland coastal median line. At first, it was not clear what were the base points used by Eritrea. However, in answer to a question from the Tribunal, Eritrea did produce two complete sets of base points for the Eritrean coast and also a set for the Yemen coast. (see charts 1 and 2).

122. The latitude of 14°25’N—where the Yemen northern sector becomes the Yemen central sector—results from another factor on which the Parties differ. This line of latitude is not chosen at random by Yemen. It is the point at which the Yemen median line is no longer controlled by Zubayr as a base point but enters under the control of the north-western point of the island of Zuqar. The Eritrean lines, for indeed there are two of them, continue southwards, ignoring the possible effect of the Zuqar–Hanish group. The “historic” median line (map 3) cuts through Zuqar, and the coastal median line cuts through the island of Greater Hanish (map 7).

123. The Tribunal did not find it easy to resolve this divergence of method, but finally the Tribunal decided to continue its lines as a mainland coastal line until the presence of Yemen’s Zuqar–Hanish group compels a diversion westwards. (The Tribunal’s line, as will appear, is neither the Yemen line nor yet the Eritrean line.)

124. In support of its enclave solution for certain of the Eritrean islands, Yemen entered upon an assessment of the relative size and importance of the Eritrean islands generally, as if they were islands whose influence on the boundary line falls to be assessed, not as being possibly in an area of overlapping territorial sea, but as if they were to be assessed solely by reference to articles 74 and 83 of the Convention. This approach enabled Yemen to argue that these Eritrean “navigational hazards” were insignificant even when compared with

the Yemen Zuqar–Hanish group; and that accordingly the South West Rocks and the Haycocks ought to be enclaved and the boundary line taken onto the Eritrean side of them, thus leaving the two enclaves isolated on the Yemen side of the boundary line.

125. The Tribunal, as will appear below, has had little difficulty in preferring the Eritrean argument, which brings into play article 15. This solution also has the advantage of avoiding the need for awkward enclaves in the vicinity of a major international shipping route.

126. The Yemen “southern sector” began at the line of latitude 13°25’N. Again, this is not an arbitrary choice. It was the point at which Yemen’s median line, which had hitherto been controlled by Suyul Hanish, first came under the control of the nearest point on the mainland coast of Yemen. The Yemen line then continued throughout the southern sector as a coastal median line.

127. In the main part of this southern sector, therefore, there were only differences of detail between the Yemen and Eritrean lines because there were no mid-sea islands to complicate the problem. There was indeed the large complication of the Bay of Assab and of its off-lying islands, but here Yemen rightly assumed that this bay is integral to the Eritrean coast and is internal waters, and that the controlling base points would therefore be on the low-water line of the outer coastal islands.

128. In the course of its passage from the overlapping territorial seas areas to the relatively simple stretch between parallel coasts of the southern sector, the Yemen line was again a median line controlled by the Yemen islands as well as by the Eritrean mainland coast. However, the line preferred by the Tribunal, mindful of the simplicity desirable in the neighbourhood of a main shipping lane, is one that would mark this passage directly and independently of the Yemen and Eritrean islands. It is no easy to trace the Eritrean median line in this area because of the complication of its box system for the traditional fishing areas. Indeed, this review of the Parties’ arguments and the Tribunal’s view of them does somewhat scant justice to the complicated and carefully researched Eritrean scheme for delimitation of the traditional fishing areas, but this matter has been dealt with in Chapter IV.

This chapter will now turn to describe the boundary line determined by the Tribunal.

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#### *The boundary line determined by the Tribunal*

129. The task of the Tribunal in the present Stage of this Arbitration is defined by article 2 of the Arbitration Agreement, and is to “result in an award delimiting the maritime boundaries.” The term “boundaries” is here used, it is reasonable to assume, in its normal and ordinary meaning of denoting an international maritime boundary between the two State Parties to the Arbitration; and not in the sense of what is usually called a maritime “limit”, such as the

outer limit of a territorial sea or a contiguous zone; although there might be places where these limits happen to coincide with or be modified by the international boundary.

130. Article 2 provides that, in determining the maritime boundaries, the Tribunal is to take “into account the opinion it will have formed on questions of territorial sovereignty, the United Nations Convention on the Law of the Sea, and any other pertinent factor.” The reasons for taking account of the Award on Sovereignty are clear enough and both Parties have agreed in their pleadings that, in the Second Stage, there can be no question of attempting to reopen the decisions made in the First Award. The requirement to take into account the United Nations Convention on the Law of the Sea of 1982 is important because Eritrea has not become a party to that Convention but has in the Arbitration Agreement thus accepted the application of provisions of the Convention that are found to be relevant to the present stage. There is no reference in the Arbitration Agreement to the customary law of the sea, but many of the relevant elements of customary law are incorporated in the provisions of the Convention. “Any other pertinent factors” is a broad concept, and doubtless included various factors that are generally recognized as being relevant to the process of delimitation such as proportionality, non-encroachment, the presence of islands, and any other factors that might affect the equities of the particular situation.

131. It is a generally accepted view, as is evidenced in both the writings of commentators and in the jurisprudence, that between coasts that are opposite to each other the median or equidistance line normally provides an equitable boundary in accordance with the requirements of the Convention, and in particular those of its articles 74 and 83 which respectively provide for the equitable delimitation of the EEZ and of the continental shelf between States with opposite or adjacent coasts. Indeed both Parties to the present case have claimed a boundary constructed on the equidistance method, although based on different points of departure and resulting in very different lines.

132. The Tribunal has decided, after careful consideration of all the cogent and skilful arguments put before them by both Parties, that the international boundary shall be a single all-purpose boundary which is a median line and that it should, as far as practicable, be a median line between the opposite mainland coastlines. This solution is not only in accord with practice and precedent in the like situations but is also one that is already familiar to both Parties. As the Tribunal had occasion to observe in its Award on Sovereignty (paragraph 438), the offshore petroleum contracts entered into by Yemen, and by Ethiopia and Eritrea, “lend a measure of support to a median line between the opposite coasts of Eritrea and Yemen, drawn without regard to the islands, dividing the respective jurisdiction of the Parties.” In the present stage the Tribunal has to determine a boundary not merely for the purposes of petroleum concessions and agreements, but a single international boundary for all purposes. For such a boundary the presence of island requires careful consideration of their purposes effect upon the boundary line; and this is done in the explanation which follows. Even so it will be found that the final solution is that the international maritime boundary line remains for the greater part a median line between the mainland coasts of the Parties.

133. The median line is in any event some sort of coastal line by its very definition, for it is defined as a line “every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of the two States is measured” (article 15 of the Convention), although the same definition will be found in many maritime boundary treaties and also in expert writings. The “normal” baseline of the territorial sea as stated in article 5 of the Convention—and this again accords with long practice and with the well established customary rule of the law of the sea—is “the low-water line along the coast as marked on large scale charts officially recognized by the coastal State.” There do arise some questions about what is to be regarded as the “coast” for these purposes, especially where islands are involved; and these questions, on which the Parties differ markedly, require decisions by the Tribunal.

134. First, it is necessary to deal with a complication that arises in the present case concerning this general rule of measuring from the low-water line. The domestic legislative definition of the territorial sea of Eritrea is still the 1953 enactment by Ethiopia which fixed Ethiopia’s territorial waters as “extending from the extremity of the seaboard at maximum annual high tide.” This was done even though an Ethiopian customs enactment of 1952 had provided for a customs zone measured from the “the mean low-water mark at neap tides.” The Yemen claim was that, in view of this 1953 legislation, the Tribunal should measure the median line boundary from the high-water line instead of the low-water line along the Eritrean coast (and indeed Yemen’s median line does).

135. In this matter the Tribunal prefers the Eritrean argument that the use of the low-water line is laid down by a general international rule in the Convention’s article 5, and that both Parties have agreed that the Tribunal is to take into account the provisions of the Convention in deciding the present case. The median line boundary will, therefore, be measured from the low-water line, shown on the officially recognized charts for both Eritrea and Yemen, in accordance with the provision in article 5 of the Convention. The officially recognized charts used by the Tribunal are BA (British Admiralty) charts; those charts use as a chart datum approximately the level of the Lowest Astronomical Tide. These charts were among those relied on by the Parties in the present Stage of the Proceedings.

#### *Northern and southern extremities of the boundary line*

136. There is also a problem relating to both the northern and the southern extremities of the international boundary line. The Tribunal has the competence and the authority according to the Arbitration Agreement to decide the maritime boundary between the two Parties. But it has neither competence nor authority to decide on any of the boundaries between either of the two Parties and neighbouring States. It will therefore be necessary to terminate either end of the boundary line in such a way as to avoid trespassing upon an area where other claims might fall to be considered. It is, however, clearly necessary to consider the choices of the base points controlling the median line first, and then to look at the cautionary termination matter when the line to be thus terminated at its northern and southern ends has been produced.

137. The construction of the international single boundary decided upon by the Tribunal, working generally from the north to the south, will now be described.

*The northernmost stretch of the boundary line*

138. In this stretch, where the two lines claimed respectively by Eritrea and Yemen differed so markedly in their courses, there were three main problems: what to do about the Dahlak islands on the Eritrean side; what to do about the lone mid-sea island of Jabal al-Tayr and the mid-sea island group of Jabal al-Zubayr; and what to do about the cluster of islands and rocks off the northern coast of Yemen. These three questions will now be considered in that order.

*The Dahlaks*

139. The tightly knit group of islands and islet, or “carpet” of islands and islets as Eritrea preferred to call it, of which the larger islands have a considerable population, is a typical example of a group of islands that forms an integral part of the general coastal configuration. It seems in practice always to have been treated as such. It follows that the waters inside the island system will be internal or national waters and that the baseline of the territorial sea will be found somewhere at the external fringe of the island system.

140. A problem that arises here, however, is that the Dahlak fringe of coastal islands is also suitable for the application not of the “normal baseline” of the territorial sea, but of the “straight baselines” described in article 7 of the Convention (as there distinguished from the “normal” baseline described in article 5). The straight baseline system is there described as “the method of straight baselines joining appropriate points”. Yemen appears to have little difficulty in agreeing that the Dahlaks form an appropriate situation for the establishment of a straight baseline system.

141. Eritrea for its part claimed that it has such a system already established. In answer to a question from a Tribunal, Eritrea did give the coordinates for the base points on the Eritrea side for both versions of its claimed “median line”. But these base points in the region of the Dahlaks appear to have been located on a line touching two or perhaps three of the outer islands and the Negileh Rock (for which see paragraphs 146-147) and then continuing in a more or less straight line out to sea in a south-easterly direction. This scheme is probably part of the “quadrilateral” straight baseline system to which Eritrea referred in argument.

142. The reality or validity or definition of this somewhat unusual straight baseline system said to be existing for the Dahlaks is hardly a matter that the Tribunal is called upon to decide. The Tribunal does however have to decide on the base points which are to control the course of the international boundary line. In plotting its own claimed median line boundary, Yemen has employed as its western base points the high-water line of the small outer islets of Segala, Dahret Segala, Zaubur and Aucan. These islets could reasonably be included in a straight baseline system of the ordinary and familiar kind.

143. Eritrea, however, has in particular suggested a feature called the "Negileh Rock" which lies further out than these larger but still small and uninhabited islets. Yemen objected to the use of this feature by reason of the fact that on the BA chart 171 this feature is shown to be a reef and moreover one which appears not to be out of the question as a base point, because article 6 of the Convention (which is headed "Reefs") provides:

In the case of islands situated on atolls or of islands having fringing reefs, the baseline for measuring the breadth of the territorial sea is the seaward low-water line of the reef, as shown by the appropriate symbol on charts officially recognized by the coastal State.

144. This difficulty about the Negileh Rock is reinforced if there is indeed a straight baseline system in existence for the Dahlaks, for paragraph 4 of article 7 provides:

4. Straight baselines shall not be drawn to and from low-tide elevations, unless light-houses of similar installations which are permanently above sea level have been built on them or in instances where the drawing of straight baselines to and from such elevations has received general international recognition.

145. Although Eritrea is not a party to the Convention; nevertheless it has agreed to its application in the present case; and since Eritrea claims the existence of a straight baseline system, that claim seems to foreclose any right to employ a reef that is not proud of the water at low-tide as a baseline of the territorial sea.

146. As will appear more particularly below, the Tribunal has decided that the western base points to be employed on this part of the Eritrean coast shall be on the low-water line of certain of the outer Dahlak islets, Mojeidi and an unnamed islet east of Dahret Segala.

\* \* \*

Next, it is necessary to decide on the treatment of the mid-sea islands of al-Tayr and Zubayr, for on this decision depends on the question of whether it will be necessary to consider base points on the coast of Yemen.

*Jabal al-Tayr and the Zubayr Group*

147. Yemen employed both the small single island of al-Tayr and the group of islands called al-Zubayr as controlling base points, so that the Yemen-claimed median line boundary is "median" only in the area of sea west of these islands. These islands do not constitute a part of Yemen's mainland coast. Moreover, their barren and inhospitable nature and their position well out to sea, which have already been described in the Award on Sovereignty, mean that they should not be taken into consideration in computing the boundary line between Yemen and Eritrea.

148. For these reasons, the Tribunal has decided that both the single island of al-Tayr and the island group of al-Zubayr should have no effect upon the median line international boundary.

\* \* \*

*Base points on the coast of Yemen*

149. Since Jabal al-Tayr and the Zubayr group are not to influence the drawing of the median line boundary, it is necessary to decide upon the base points to be used for this part of the coast of Yemen. For here again there is, if not a carpet, at least a considerable scattering of island and islets which are the beginning of a large area of coastal islands and reef which, extending northward, ultimately form a part of a large island cluster or system off the coast of Saudi Arabia.

150. There is also the relatively large, inhabited and important island of Kamaran off this part of the Yemen coast. This island, together with the large promontory of the mainland to the south of it, forms an important bay and there can be no doubt that these features are integral to the coast of Yemen and part of it and should therefore control the median line. One significant controlling base point is therefore on the westernmost extremity of Kamaran. It seems reasonable also to use as base points the very small islands immediately south of Kamaran and west of the promontory headland mentioned above.

151. The question remains as to the islands to the north of Kamaran. The relatively large islet of Tiqfash, and the smaller islands of Kutama and Uqban further west, all appear to be part of an intricate system of islands, islets and reefs which guard this part of the coast. This is indeed, in the view of the Tribunal, a "fringe system" of the kind contemplated by article 7 of the Convention, even though Yemen does not appear to have claimed it a such. Indeed the Tribunal does not have the advantage of any views of Yemen about this part of its coast because it chose to deploy its arguments differently. It is however the view of the Tribunal that it is right to use as median line base points not only Kamaran and its satellite islets which appear in the Yemen map 12.1, but also the islets to the northwest named Uqban and Kutama.

152. The above decision having been made, it is now possible to compute and plot the northern stretch of the boundary line between turning points 1 and 13 (the list of the coordinates of the turning points is given below; see also the illustrative charts 3 and 4). For this entire part of the line, the boundary should be a mainland-coastal median, or equidistance, line.

153. At turning point number 13, however, a simple mainland/coastal median line approaches the area of possible influence of the islands of the Zuqar-Hanish group, and clearly some decisions have to be made as to how to deal with this situation.

*The middle stretch of the boundary line*

154. It will be convenient for obvious reasons if the Tribunal first decides the question of the boundary line in the narrow seas between the southwest extremity of the Hanish group on the one hand and the Eritrean islands of the Mohabbakahs, High Island, the Haycocks and the South West Rocks on the other. In this part of the boundary there is added to the boundary problem of delimiting continental shelves and EEZ the question of delimiting an area of overlapping territorial seas. This comes about because Zuqar and Hanish,

attributed to the sovereignty of Yemen, both generate territorial seas which overlap with those generated by the Haycocks and South West Rocks, attributed to the sovereignty of Eritrea. It would appear from Yemen map 12.1 that Yemen assumed that Eritrea is entitled only to a strictly 12 mile territorial sea extending from the Eritrean base points chosen by Yemen along the high-water line on the Eritrean coast; the outcome would be, according to Yemen, that the Haycocks and South West Rocks are thus left isolated outside and beyond the Eritrean territorial sea proper.

155. This proposition is questionable, quite apart from the obvious impracticality of establishing limited enclaves around islands and navigational hazards in the immediate neighbourhood of a main international shipping lane. There is no doubt that an island, however small, and even rocks provided they are indeed islands proud of the water at high-tide, are capable of generating a territorial sea of up to 12 miles (article 121.2 of the Convention). It follows that a chain of islands which are less than 24 miles apart can generate a continuous band of territorial sea. This is the situation of the Eritrean islands out to, and including, the South West Rocks.

156. The point that the Yemen suggestion omits to take into account is that the effect of what has been referred to as "leap-frogging" the Eritrean islands and islets in this area is to extend the mainland coast territorial sea beyond the limit of 12 miles from the mainland coast. According to article 3 of the Convention, the territorial sea extends "up to a limit not exceeding 12 nautical miles, measured from the baselines determined in accordance with this Convention." This is permissible because each island, however small or unimportant of itself, creates a further low-water baseline from which the coastal territorial sea is to be measured. This "leap-frogging" point was invoked strongly in support of Eritrea's claims to sovereignty. This reasoning was not accepted by the Tribunal in its Award on Sovereignty, it nonetheless has relevance in the present context.

157. If any further were needed to reject the Yemen suggestion of enclaving the Eritrean islands in this area beyond a limit of 12 miles from the high-water line of the mainland coast, it may be found in the principle of non-encroachment which was described by Judge Lachs in the *Guinea/Guinea-Bissau Award*<sup>15</sup> in the following terms:

As stated in the award, our principal concern has been to avoid, by one means or another, one of the Parties finding itself faced with the exercise of rights, opposite to and in the immediate vicinity of its coast, which might interfere with its rights to development or put its security at risk.

158. It will be seen that the international boundary line must therefore lie somewhere in a belt of sea no more than four or five miles wide. Once it is established that there is an area of Eritrean mainland coast territorial sea, potentially extending beyond the South West Rocks and the Haycock group of islands on the one hand and overlapping the territorial sea generated by the Yemen islands of the Hanish group on the other, the situation suggests a median line

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<sup>15</sup> 25 ILM 251.



boundary. Under article 15 of the Convention the normal methods for drawing an equidistant median line could be varied if reason of historic title or other special circumstances were to indicate the otherwise. However, the Tribunal has considered these reasons and circumstances and finds no variance necessary.

159. Further bearing in mind its overall task of delimitation, the Tribunal also finds this line to be an entirely equitable one. The decision of the Tribunal is therefore that the median line is the international boundary line where it cuts through the area of the overlap of the respective territorial seas of the Parties.

\* \* \*

There remains, however, the part of the boundary line which is to connect the mainland coast median line and the line delimiting the overlapping territorial seas. To the description of this line the Award now turns.

*The boundary line which connects turning point 13 and turning point 15*

160. If the mainland coastal median were continued south of turning point 13, it would cut first the territorial sea of Zuqar and then the territorial sea of Hanish, and then cut through the land territory of the island of Hanish. It must therefore divert to the west round the Zuqar-Hanish group, also respecting the territorial seas of islands if they are to be regarded as generating a territorial sea. That they ought be regarded as having a territorial sea seems reasonable.

161. Various possibilities were considered by the Tribunal. If therefore the international boundary is, after turning point 13 where it meets a 12 mile territorial sea extending from the island of Zuqar, to be diverted in order to respect that area of territorial sea, it could trace the sinuosities of the Zuqar territorial sea boundary until it has to turn southward again in order to join the article 15 boundary. The Tribunal has decided, however, that it would be better that the line here should be a geodetic line joining point 13 with point 14, making it necessary southwestwards excursion to join the territorial sea median line described above. Moreover, the Tribunal's task is, as mentioned above, to determine the maritime boundary; this does not include setting the limits of the territorial seas.

162. From turning point 14, again with a simple line in view, the southward excursion of the international boundary is a geodetic line joining points 14 and 15 where it becomes the article 15 median. This boundary decided upon by the Tribunal between turning points 14 and 15 is also very near to the putative boundary of a Yemen territorial sea in this area, but makes for a neater and more convenient international boundary.

*The southern part of the international boundary line*

163. From turning point 20, which is the southernmost turning point on the overlapping territorial seas median line, the boundary needs to turn generally south-eastwards to rejoin the mainland coast median line. This it does through a geodetic line which connects turning point 20 and point 21, the latter being the

intersection of the extended overlapping territorial seas median line and the coastal median line. Thence the international boundary line resumes as a median line controlled by the two mainland coasts. The Bay of Assab is internal waters, so the controlling base points of the boundary line are seaward of this bay.

*The northern and southern end points of the boundary line*

164. Reference has been made above to the need not to extend the boundary to areas that might involve third parties. The points where the decision of the Tribunal halts the progress of the boundary line are, for the northern end, turning point 1 and, for the southern end, point 29. The effect can, of course, also be seen on the illustrative charts 3 and 4 in the map section of the Award. The Tribunal believes that these terminal points are well short of where the boundary line might be disputed by any third State.

\* \* \*

*The test of proportionality*

165. The principle of proportionality was described by the International Court of Justice in the North Sea Continental Shelf cases as “the element of a reasonable degree of proportionality, which a delimitation in accordance with equitable principles ought to bring about between the extent of the continental shelf areas appertaining to the coastal State and the length of the coast measured in the general direction of the coastline, account being taken for this purpose of the effects, actual or prospective, of any other continental shelf delimitations between adjacent States in the same region.” This was also described as one of the “factors” to be taken into account in delimitation.<sup>16</sup> It is not an independent mode or principle of delimitation, but rather a test of equitableness of a delimitation arrived at by some other means.<sup>17</sup> So, as the Award stated in the Anglo-French Channel case, “it is disproportion rather than any general principle of proportionality which is the relevant criterion or factor”.<sup>18</sup>

166. The Parties in the present case have disagreed strongly in their arguments of this matter, not so much about the meaning of “proportionality” as over the respective lengths of their coasts for the purposes of the calculation. There is in the Tribunal’s view no doubt that the “general direction” of the coast means that the calculation of the Eritrean coastal length should follow the outer circumference of the Dahlak group of islands, although Eritrea was more inclined to have it follow the line of the mainland coast.

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<sup>16</sup> I.C.J. Reports 1969, p. 54.

<sup>17</sup> See I.C.J. Reports 1981, p. 58. the *Libya/Malta* case.

<sup>18</sup> 18 ILM 60.

167. A much debated point was: how far north the Eritrean coast should go. Eritrea wished to include in the proportionality calculation the whole of its mainland coast up to the latitude line of 16°N; and, indeed, this line was used by Yemen to define what it called its northern sector of the area in question. The Tribunal however doubts the appropriateness of employing a horizontal line of latitude to divide, for the purposes of the proportionality test, waters of the Red Sea which lie at an angle of roughly 45°. The Tribunal has therefore considered the relevant proportion of the Eritrean coast, which can be said to be “opposite” that of Yemen, as ceasing where the general direction of that coast meets a line drawn from what seems to be the northern terminus of the Yemen land frontier at right angles with the general direction of the Yemen coast. In the same way the Tribunal determined the southern end point to be considered for the computation of the length of the Yemen coast.

168. The Tribunal through its expert in geodesy has calculated the ratio of the lengths of the coasts concerned, measured by reference to their general direction, and the ratio between the water areas it has attributed to the Parties. The first ratio, of coastal lengths, Yemen: Eritrea, is 387026 metres to 507110 metres, or 1:1.31. The second ratio of water areas, including the territorial seas, Yemen: Eritrea is 25535 kilometres<sup>2</sup> to 27944 kilometres<sup>2</sup>, or 1:1.09. The Tribunal believes that the line or delimitation it has decided upon results in no disproportion.

#### Chapter VI. *Dispositif*

169. Accordingly, THE TRIBUNAL,  
taking into account the foregoing considerations and reasons,  
UNANIMOUSLY FINDS IN THE PRESENT CASE THAT

The International Maritime Boundary between Eritrea and Yemen is a series of geodetic lines joining, in the order specified, the following points. The points are defined in degrees, minutes and seconds of the geographic latitude and longitude, based on the World Geodetic System 1984 (WGS 84). The line and the numbers of the turning points are shown for purpose of illustration only in charts 3 and 4 in the map section of this Award.

<i>Turning Point</i>	<i>Latitude</i>	<i>Longitude</i>
1	15° 43' 10"N	41° 34' 06"E
2	15° 38' 58"N	41° 34' 05"E
3	15° 15' 10"N	41° 37' 31"E
4	15° 04' 00"N	41° 46' 43"E
5	15° 00' 12"N	41° 50' 42"E
6	14° 46' 06"N	41° 58' 47"E
7	14° 43' 30"N	42° 00' 42"E
8	14° 36' 05"N	42° 10' 02"E
9	14° 35' 14"N	42° 11' 35"E
10	14° 27' 16"N	42° 16' 54"E
11	14° 21' 11"N	42° 22' 04"E
12	14° 15' 23"N	42° 26' 09"E

<i>Turning Point</i>	<i>Latitude</i>	<i>Longitude</i>
13	14° 08' 39"N	42° 31' 33"E
14	14° 03' 39"N	42° 28' 39"E
15	13° 39' 30"N	42° 37' 39"E
16	13° 36' 13"N	42° 38' 30"E
17	13° 35' 51"N	42° 38' 14"E
18	13° 33' 38"N	42° 39' 37"E
19	13° 27' 28"N	42° 43' 25"E
20	13° 26' 39"N	42° 48' 21"E
21	13° 24' 01"N	42° 52' 47"E
22	13° 14' 23"N	42° 59' 47"E
23	13° 10' 54"N	43° 03' 03"E
24	13° 06' 57"N	43° 05' 21"E
25	13° 06' 08"N	43° 06' 06"E
26	13° 04' 05"N	43° 08' 42"E
27	13° 00' 27"N	43° 10' 54"E
28	12° 58' 10"N	43° 12' 45"E
29	12° 54' 23"N	43° 13' 58"E

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Done at London 17th December 1999

The President of the Tribunal

/s/ Professor Sir Robert Y. JENNINGS

The Registrar

/s/ Tjaco VAN DEN HOUT

## ANNEX 1

### *The Arbitration Agreement*

The Government of the Republic of Yemen and the Government of the State of Eritrea (hereinafter "the Parties");

Prompted by the desire to re-establish their peaceful relations in the spirit of the traditional friendship between their two peoples.

Conscious of their responsibilities toward the international community as regards the maintenance of international peace and security as well as the safeguard of the freedom of navigation in a particularly sensitive region of the world,

Considering the "Agreement on Principles" between Yemen and Eritrea signed at Paris the twenty-first day of May 1996 (hereinafter "the Agreement on Principles");

Have agreed as follows:

#### *Article 1*

1. On or before 31 December 1996, the Parties will provide the names and addresses of their appointed arbitrators to one another and to France. The four arbitrators thus named shall meet within two weeks to consider the choice of the President of the Tribunal.

2. Within two weeks thereafter the four arbitrators will narrow their consideration to a list of five names which they will then circulate to the Parties.
3. The Parties will have two weeks from the date of the circulation of the list during which they may present their views concerning the list.
4. The four arbitrators shall then attempt to reach agreement on the choice of the President. On reaching agreement, they will inform the Parties that the Tribunal has been formed.
5. If no agreement has been reached by 15 March 1997, they shall so inform the President of the International Court of Justice and, pursuant to the Agreement on Principles, they shall request him to choose the President of the Tribunal. In transmitting this request, the four arbitrators shall make known any views that the Parties have expressed on the choice of the President of the Tribunal. The President of the International Court of Justice shall choose within two weeks and after consultation with the Party-appointed arbitrators. By 31 March 1997 at the latest, he shall notify the Parties, the four arbitrators and France that the Tribunal has been formed and of the name of the President of the Tribunal.
6. The Tribunal shall meet on or before 11 April 1997.
7. All members of the Tribunal commit themselves to exercise their powers impartially and conscientiously.
8. France shall transmit a certified copy of the Agreement on Principles and of this Arbitration Agreement to the members of the Tribunal as soon as they are chosen.

#### *Article 2*

1. The Tribunal is requested to provide rulings in accordance with the international law, in two stages.
2. The first stage shall result in an award on territorial sovereignty and on the definition of the scope of the dispute between Eritrea and Yemen. The Tribunal shall decide territorial sovereignty in accordance with the principles, rules and practices of international law applicable to the matter, and on the basis, in particular, of historic titles. The Tribunal shall decide on the definition of the scope of the dispute on the basis of the respective positions of the two Parties.
3. The second stage shall result in an award delimiting maritime boundaries. The Tribunal shall decide taking into account the opinion that it will have formed on questions of territorial sovereignty, the United Nations Convention on the Law of the Sea, and any other pertinent factor.
  - (a) The Tribunal shall describe the course of the delimitation in a technically precise manner. To this end, the geometric nature of all elements of the delimitation shall be indicated and the position of all the points mentioned shall be given by reference to their coordinates in the World Geodetic System 1984 (W.G.S. 84).

The Tribunal shall also indicate for illustrative purposes only the course of delimitation on an appropriate chart.
  - (b) After consultation with the Parties, the Tribunal shall designate a technical expert to assist it in carrying out the duties specified in letter (a).

#### *Article 3*

1. The participation of all Tribunal members shall be required for the awards. The presence of all members shall also be required for all proceedings and decisions other than the awards except that the President may determine that the absence of not more than a single member from my proceedings or decision other than the awards is justified for good cause.
2. (a) If a member of the Tribunal chosen by a Party is unable or unwilling to act and to continue to perform his functions, this Party shall name a replacement within a period of one month from the date on which the Tribunal declares the existence of the vacancy.

(b) If the President of the Tribunal is unable or unwilling to act and to continue to perform his functions, a replacement shall be chosen by the Party-appointed members of the Tribunal within a maximum period of two months from the date on which the Tribunal declares the existence of the vacancy. If they cannot agree within this period, the President of the Tribunal shall be chosen by the President of the International court of Justice.

(c) Where a vacancy has been filled after the proceedings have begun, the proceedings shall continue from the points they had reached at the time the vacancy had occurred.

3. All members of the Tribunal shall be deemed to be present for the purposes of the provision of paragraph 1 of this article and notwithstanding the existence of vacancies where the only matter for consideration is the declaration of vacancies for the purposes of paragraph 2 of this article or where either Party has neglected to fill a vacancy as provided by paragraph 2, letter (a) of this article.

#### *Article 4*

1. The participation of all Tribunal members shall be required for the awards. The presence of all members shall also be required for all proceedings and decisions other than the awards except that the Presidency may determine that the absence of not more than a single member from any proceedings or decision other than the awards is justified for good cause.

2. In the case of an even division of the votes in the circumstances referred to in paragraph 3 of article 3 above, the vote of the President shall be decisive.

#### *Article 5*

Subject to the provisions of this Arbitration Agreement, the Tribunal shall decide on its rules of procedure and on all questions relating to the conduct of the arbitration.

#### *Article 6*

1. Each Party, within thirty days of the signature of this Arbitration Agreement, shall designate an Agent, who will represent it and act on its behalf for the purposes of the arbitration, and shall communicate the name and address of its Agent to the other Party and, upon its formation, to the Tribunal.

2. Each Agent so designated shall be entitled to name one Co-Agent or more to act for him where necessary. The name and the address of the Co-Agent (s) so named shall be communicated to the other Party and, upon its formation, to the Tribunal.

#### *Article 7*

1. The Tribunal shall sit in London.

2. The Tribunal shall appoint a Registrar after consultation with the Agents, as soon as possible and in any event no later than its first meeting.

The Registrar shall perform his functions impartially and conscientiously.

3. After consultations with the Agents the Tribunal may engage such staff and secure such services and equipment as it deems necessary.

4. The Tribunal may consult any experts of its choice after notice to the Parties. Such experts shall perform their functions impartially and conscientiously.

5. (a) At any time during the arbitral proceedings the Tribunal may call upon either Party to produce documents or other evidence relevant to the question within such a period of time as the Tribunal may draw from this failure any appropriate evidentiary inference and may make an award based upon the evidence before it.

(b) If either Party fails to respond to a request for the production of documents or evidence under paragraph a), the Tribunal may draw from this failure any appropriate evidentiary inference and may make an award based upon the evidence before it.

(c) At any time during the arbitral proceedings the Tribunal may request if necessary that a nonparty to this Arbitration Agreement provide to it documents or other evidence relevant to the question. Any documents or other evidence so provided shall be transmitted simultaneously to both Parties.

#### *Article 8*

1. The proceedings before the Tribunal shall be adversarial.

2. Without prejudice to any question relating to the burden of proof, the proceedings before the Tribunal shall include two stages as follows.

3. The first stage concerning questions of territorial sovereignty and the definition of the scope of the dispute mentioned in article 2, paragraph 2 of this Arbitration Agreement shall include two phases, one written and the other oral.

3.1 The written pleadings shall consist of:

(a) A memorial to be submitted by each Party to the Tribunal and to the other Party not later than 31 August 1997;

(b) A counter-memorial to be submitted by each Party to the Tribunal and to the other Party not later than three months after submissions of the memorials;

(c) Any other pleading that the Tribunal deems necessary, such pleadings to be submitted not later than two months after submission of the counter-memorials.

3.2 An oral phase shall follow the written phase.

(a) It shall be held at the seat of the Tribunal, at the place and on the dates determined by the Tribunal after consultation with the Agents. The oral phase shall start in so far as possible not later than three months after the submission of the last written pleadings of the Parties under article 8, paragraph 3.1.

(b) Each Party shall be represented in the oral phase of the proceedings by its Agent or, as appropriate, by its Co-Agent, and by such counsel, advisers and experts as it may designate.

3.3 At the conclusion of the oral phase, the Tribunal shall declare the end of the proceedings in the first stage. Notwithstanding such declaration, the Tribunal may request from the Parties their written views on any issues necessary for the elucidation of any aspect of the matters of before the Tribunal until the award on questions of territorial sovereignty and the definition of the scope of the dispute is rendered.

3.4 The Tribunal shall render its award, which shall be binding, on question of territorial sovereignty and the definition of the scope of the dispute in so far as possible not later than three months from the end of the proceedings as declared under article 8, paragraph 3.3 above.

3.5 The Tribunal shall communicate this award to the Agents on the day of its rendering. The Tribunal and the Parties may make public this award as of the day of its rendering.

4. The second stage concerning questions of delimitation of maritime boundaries mentioned in article 2, paragraph 3 of this Arbitration Agreement shall begin immediately upon the rendering of the award which concludes the first stage. It shall include two phases, one written and the other oral.

4.1 The written pleadings consist of:

(a) A memorial to be submitted by each Party to the Tribunal and to the other Party not later than four months after the rendering of the award on questions of territorial sovereignty and the definition of the scope of the dispute;

(b) A counter-memorial to be submitted by each Party to the Tribunal and to the other Party not later than two months after submission of the memorials;

(c) Any other pleading that the Tribunal deems necessary, such pleading to be submitted not later than two months after submission of the counter-memorials.

4.2 The oral phase shall follow the written phase.

(a) It shall be held at the seat of the Tribunal, at the place and on the dates determined by the Tribunal after consultation with the Agents. The oral phase shall start in so far as possible not later than three months as of the submission of the last written pleadings of the Parties under article 8, paragraph 4.1;

(b) Each Party shall be represented in the oral phase of the proceedings by its Agent or, as appropriate, by its Co-Agent, and by such counsel, advisers and experts as it may designate.

4.3 At the conclusion of the oral phase, the Tribunal shall declare the end of the proceedings in the second stage. Notwithstanding such declaration, the Tribunal may request from the Parties their written views on any issues necessary for the elucidation of any aspect of the matters before the Tribunal until the award on questions of delimitation of maritime boundaries is rendered.

4.4 The Tribunal shall render its award on questions of delimitation of maritime boundaries in so far as possible not later than three months after the end of the proceedings before it as declared under article 18, paragraph 4.3.

5. The Tribunal shall be empowered for good cause only to extend the time periods established in this article on its own or at the request of either Party. The total cumulative extension of the time periods granted by the Tribunal at the request of either Party during the proceedings under the provisions of this sub-paragraph cannot exceed two months for each Party for each stage.

6. The Registrar shall provide the Parties with an address for the filing of their written pleadings and of any other document. The Registrar shall transmit to the Parties simultaneously copies of all written pleadings and documents upon receipt thereof.

7. If, within the period of time fixed by this Arbitration Agreement or by the Tribunal, either Party fails to make a scheduled appearance or file a written pleading, the Tribunal shall continue the proceedings nonetheless and shall make an award based upon the pleadings before it.

#### *Article 9*

1. The written and oral pleadings before the Tribunal shall be in English. Decisions of the Tribunal shall be in English.

The Tribunal shall keep a verbatim transcript of all hearings.

Verbatim transcripts of the oral proceedings shall be communicated to the Agents as soon as possible.

2. All documentary evidence shall be filed in their original languages by the Parties. The Parties shall arrange for any translation that they deem necessary for their own preparation of the case.

The Tribunal may avail itself of translation services where it deems appropriate.

Any translations thus generated shall be provided to the Parties.

3. All written pleadings and verbatim transcripts of the oral proceedings and all the deliberations of the Tribunal shall be confidential.

4. Members of the public shall not be admitted to the oral proceedings.

#### *Article 10*

1. The remuneration of the members of the Tribunal and of the Registrar shall be borne equally by the Parties.



2. The general expenses of the arbitration shall be borne equally by the Parties. The Registrar shall keep a record and render a final account of the expenses.

3. Each Party shall bear all the expenses incurred by it in the preparation and conduct of its cases.

#### *Article 11*

1. Without prejudice to the provisions of the Agreement on Principles, the Tribunal, either on its own or after examining the request of one of the two Parties, may prescribe any provisional measure which it considers appropriate under the circumstances to prevent irreparable harm or damage to the natural resources of the area or to preserve the status quo as 21 May 1996. The Parties shall apply such measures within the time period prescribed by the Tribunal.

2. In no event will a request for provisional measures or a prescription of provisional measures affect the time periods for the submission of pleadings or rendering of the awards under article 8 above.

#### *Article 12*

1. (a) The awards of the Tribunal shall state the reasons upon which they are based.

(b) The awards of the Tribunal shall include the time period for their execution.

(c) For each award of the Tribunal, each member of the Tribunal shall be entitled to attach an individual or dissenting opinion.

2. The Tribunal shall notify immediately to the Agents or Co-Agents its awards, signed by the President and the Registrar of the Tribunal, and any individual or dissenting opinion.

3. At the end of the second stage, the Tribunal shall make public both awards and any individual or dissenting opinions.

#### *Article 13*

1. The awards of the Tribunal shall be final and binding. The Parties commit themselves to abide by those awards, pursuant to article 1, paragraph 2, of the Agreement on Principles. They shall consequently apply in good faith and immediately the awards of the Tribunal, at any rate within the time periods as provided for by the Tribunal pursuant to article 12, paragraph 1 (b), of this Arbitration Agreement.

2. The Tribunal is empowered to correct within three months of the rendering of its awards any material error relating to those awards such as arithmetical, mathematical, cartographical or typographical errors. Any such corrections shall in no event affect the time-tables set out in article 8.

3. Each Party may refer to the Tribunal any dispute with the other Party as to the meaning and the scope of the awards within thirty days of their rendering. The Tribunal shall render a decision regarding any such dispute within sixty days of the day on which the dispute is referred to the Tribunal. Pending this decision, the time periods for the submission of written pleadings set forth in article 8 may be suspended by the Tribunal.

#### *Article 14*

1. This Arbitration Agreement shall enter into force thirty days after the date of its signature by the two Parties.

2. The Tribunal shall apply the provisions of this Arbitration Agreement.

*Article 15*

1. Nothing in this Arbitration Agreement can be interpreted as being detrimental to the legal positions or to the rights of each Party with respect to the questions submitted to the Tribunal, nor can affect or prejudice the decision of the Arbitral Tribunal or the considerations and grounds on which those decisions are based.

2. In the event of any inconsistency between the Agreement on Principles and this Arbitration Agreement implementing the procedural aspects of that Agreement on Principles, this Arbitration Agreement shall control. Except with respect to such inconsistency, the Agreement on Principles shall continue in force.

*Article 16*

1. France shall deposit a copy of this Arbitration Agreement within thirty days of its entry into force with the Secretary-General of the United Nations, with the Secretary-General of the Organization of African Unity, and with the Secretary-General of the Arab League.

2. The President of the Tribunal shall deposit a copy of both awards as soon as possible after the rendering of the award on delimitation of maritime boundaries with the Secretary-General of the United Nations, with the Secretary-General of the Organization of African Unity, and with the Secretary-General of the Arab League.

IN WITNESS WHEREOF, the undersigned, being duly authorized by their respective Governments, have signed this Arbitration Agreement.

Done At PARIS, this third day of October, one thousand nine hundred and ninety-six, in three original copies, each one in the Arabic, English and French languages, the English text being authentic.

For the Government  
of the Republic of Yemen

Hussein Ali AL-HUBAISHI  
Legal Advisor of the Government

For the Government  
of the State of Eritrea

Saleh MEKY  
Minister of Marine Resources

**ANNEX 2***Yemen's answer to Judge Schwebel's Question Put to Yemen on Tuesday, 13 July 1999*

On day 6 of the proceedings (Transcript, Day 6, 13 July 1999, pp. 99-100), Judge Schwebel put a question to Yemen's counsel as follows:

"Ms. Malintoppi, during oral argument in the first round Yemen maintained that it was beyond the Tribunal's authority at that stage to consider matters of *res communis condominia* and the like, stating that to do so would prefigure topics which might be considered only at the second stage. An argument which was remarkable, since Eritrea had said nothing in such regards, nor had the Tribunal. Just now, you argue that it is too late for Eritrea to argue such matters indicating, if I understood correctly, that they were for the first stage. Are Yemen's pertinent arguments consistent?"

In Yemen's submission, Yemen's arguments are consistent. This can be seen from reviewing the context in which Yemen raised the matter in the first stage, the points raised by Ms. Malintoppi in her intervention relating to the second stage, and the terms of the Arbitration Agreement.

The matter first arose at paragraph 20 of Yemen's written submission on the relevance of the oil agreements and activities dated 8 June 1998. There, Yemen stated the following:

"It is always attractive to seek to discover a basis for dividing a group of islands, not least in an arbitration. The attraction must be the greater when the task of the Tribunal extends to

the process of maritime delimitation, and no doubt caution will be needed to avoid a prefiguring of equitable principles, and concepts, which are in law only relevant in the second phase of these proceedings.”

The point to which Yemen was referring concerned the applicable law. In the first stage, Yemen considered that the applicable law was derived from the principles of international law relating to territorial sovereignty and title to territory. It was Yemen’s submission that equitable principles, *infra legem*, were primarily related to the law of maritime delimitation – a matter to be dealt with in the second stage – not to the law of territorial sovereignty *per se*. Yemen’s view was thus that the concept of equitable principles was particularly relevant to the second stage of the proceedings, and that this issue should not be prefigured in the first stage. Yemen made no specific reference to concepts such as *res communis* or *condominia* when it raised the matter.

In the second stage of these proceedings, Yemen fully accepts that equitable principles form part of the applicable law of maritime delimitation. However, and this was the point discussed by Ms. Malintoppi, the application of equitable principles to maritime delimitation, when read in conjunction with the scope of the Tribunal’s mandate as established in the Arbitration Agreement and the Agreement on Principles, does not encompass the creation or modalities of “joint resource zones” around Yemen’s islands in the manner that Eritrea’s Prayer for Relief requests.

It follows that Yemen does not maintain that Eritrea’s arguments in favour of the creation of such zones are too late at this stage, but rather that the applicable law, together with the provisions of the Arbitration Agreement and the Agreement on Principles, does not provide a legal or jurisdictional basis for acceding to Eritrea’s requests.

It should be noted, however, that the 1994 and 1998 Agreements between Yemen and Eritrea, particularly those sections related to fishing, clearly indicate that Yemen and Eritrea are currently involved in working together to administer the fish resources throughout the southern Red Sea region.

*Yemen’s Answer to the Tribunal’s Question Put to Yemen on Friday, 16 July 1999*

At the close of the oral hearings (Transcript, Day 8, 16 July 1999, page 45), the Tribunal put the following question to Yemen:

“The Tribunal has noted that, in the arguments of Yemen, relatively little has been said about the traditional fishing regime which the Tribunal recalls is an essential part of the *Dispositif* of the Award of 9 October 1998. Would Yemen indicate how, if at all, the traditional fishing regime should be taken into account in the delimitation, particularly taking into consideration the agreements signed by the two Governments in 1994 and 1998?”

Yemen’s answer was as follows:

Yemen recognizes that, in deciding the issue of sovereignty over various Red Sea Islands in the first Award, the Tribunal stated in *Dispositif* that the sovereignty found to lie with Yemen “entails the perpetuation of the traditional fishing regime in the region, including free access and enjoyment for the fishermen of both Eritrea and Yemen” (paragraph 527 (vi) of the Award). This decision is final and binding between the Parties, as stipulated in article 13 (a) of the Arbitration Agreement. Yemen is fully committed to apply and implement the Award in all of its aspects, including with respect to the perpetuation of the traditional fishing regime for the fishermen of both Eritrea and Yemen.

As was clear from the Parties’ presentations during the oral hearings, both Parties’ consider that the Tribunal’s *Dispositif* must be read in conjunction with the reasoning that appears in the body of the Award. With respect to “the perpetuation of the traditional fishing regime in the region,” Yemen has also taken note of the Tribunal’s pronouncements in other parts of the Award which bear on the issue. For example, the first sentence of paragraph 526 provides:

“In finding that the Parties each have sovereignty over various of the Islands the Tribunal stresses to them that such sovereignty is not inimical to, but rather entails, the perpetuation of the traditional fishing regime in the region.”

The historical basis of this finding was further explained in paragraph 128 where the Tribunal stated:

“This traditionally prevailing situation reflected deeply rooted cultural patterns leading to the existence of what could be characterized from a juridical point of view as *res communis* permitting the African as well as the Yemeni fishermen to operate with no limitation throughout the entire area and to sell their catch at the local markets on either side of the Red Sea. Equally, the persons sailing for fishing or trading purposes from one coast to the other used to take temporary refuge from the strong winds on any of the uninhabited islands scattered in that maritime zone without encountering difficulties of a political or administrative nature.”

It is Yemen's view that the holdings of the Tribunal in the first Award with respect to the traditional fishing regime constitute *res judicata* without prejudice to the maritime boundary that the Tribunal decides on in the second stage of the proceedings. In other words, the traditional fishing regime that has existed for the benefit of the fishermen of both countries throughout the region is to be perpetuated notwithstanding the decision that the Tribunal reaches as to the delimitation of the maritime boundary between the two countries. Indeed, it is clear that both Parties understood this to be a mutual obligation which existed apart from the question of delimitation of their maritime boundary in that, as the November 1998 Agreement between the two Governments indicates, Yemen and Eritrea have been formulating a regime of cooperation with respect to fishing in the spirit of good neighbourliness and friendship which has prevailed since the Award in the first stage of this arbitration.

In Yemen's submission, the delimitation to be effectuated by the Tribunal in its second Award will have a different purpose than the preservation of the traditional fishing regime. For example, counsel for Eritrea admitted during its rebuttal presentation that issues such as mineral extraction were not included in the Tribunal's notion of the traditional fishing regime (Transcript, Day 8, 16 July 1999, page 27). Clearly, mineral extraction is related to the delimitation of the continental shelf, a matter which is relevant to the second stage.

Similarly, the delimitation of the column of water or Exclusive Economic Zone of the Parties, as well as of their respective territorial seas in the Central and Southern Sectors, involves matters which, pursuant to the 1982 Convention on the Law of the Sea, go beyond the preservation of the traditional fishing regime. It is in this connection that Yemen advanced the dependence of its coastal population on fishing and the incidence of Yemen's fishing practices in the region as relevant circumstances to be taken into account in the delimitation process.

In short, the perpetuation of the traditional fishing regime is not synonymous with the rights and obligations of the Parties that will be determined by a delimitation of a single maritime boundary throughout the relevant area. It is for these reasons that Yemen does not consider that the decision of the Tribunal on the traditional fishing regime should have any impact on the delimitation of the maritime boundaries between the two Parties in the second stage.

In this connection, it is appropriate to refer to the 1994 Agreement between Yemen and Eritrea to which specific reference is made in the Tribunal's question. As can be seen from its terms, the 1994 Agreement is entirely consistent with the preservation of the traditional fishing regime decided by the Tribunal in the first stage.

The Agreement was signed by the Minister of Fish Wealth on behalf of Yemen and the Minister of Marine Wealth on behalf of Eritrea. The latter, of course, also acts as Eritrea's Agent in the present arbitration.

It is significant that paragraph 1 of the Agreement specifically provides for a fishing regime that is remarkably similar to that recognized in the Tribunal's first Award. That paragraph provides, *inter alia*, that:

“Both the State of Eritrea and the Republic of Yemen shall permit fishermen who are citizens of the two States, without limiting their numbers, and who carry cards to engage in the occupation of fishing, to fish in the territorial waters of the two States, the contiguous zone and the Exclusive Economic Zone of the two countries in the Red Sea (with the exception of the internal waters), provided that the fishermen of the two countries be enumerated and that they be granted official licenses to engage in the occupation of fishing specifying the locations where they will be received and may market their products in appendix No. 1.”

Moreover, paragraph 4 of the Agreement provides in relevant part that the persons included in Paragraph 1 shall be permitted to "market their fish products in the territory of the other State and in the locations specified in appendix No. 1 of this Memorandum of Understanding". The Tribunal will note that these provisions are very similar to the Tribunal's findings set out in paragraph 128 of the Award in the first stage.

Unfortunately, the 1994 Agreement could not be fully implemented at the time due to the events of 1995. Nonetheless, the Agreement remains in effect, and Yemen remains fully committed to its implementation. As can be seen from its terms, the 1994 Agreement envisages a regulatory framework which is well suited to addressing the kinds of concern raised by Eritrea in its pleadings regarding traditional fishing in the region.

The Tribunal's question also makes reference on the Agreement signed between the two Parties in November 1998. In Yemen's view, this Agreement evidences the good faith of both Parties in pursuing mutual cooperation in a number of areas, including fishing. In particular, article 1(d) of the Agreement provides for the formation of a Committee for Cooperation in the Area of Fish Wealth and Maritime Fishing. Pursuant to article 3 (4) of the Agreement, this committee would be expected to address the question of drafting a special agreement "in the area of fish wealth, maritime fishing and the protection of the maritime environment."

With respect to the relevance of the 1994 and 1998 Agreements to the perpetuation of the traditional fishing regime, it is appropriate to recall what counsel for Yemen had to say on this matter during the oral hearings:

"Indeed, as Mr. Picard has shown, the Parties have already established a framework for addressing the modalities of their fishing activities in the Red Sea with their 1994 and 1998 agreements. These agreements could well represent a very important context within which any further questions between the Parties as to the preservation of the traditional fishing practices mentioned in paragraph 526 of the Award could be dealt with." (Transcript, Day 6, 13 July 1999, page 88).

Implementation of these two Agreements would also be consistent with the letter of the President of the Tribunal, dated 8 November 1998, which indicated that these issues "are a matter for the Parties themselves to resolve in good faith, bearing in mind what the Tribunal has found in paragraph 526 of the Award."

In conclusion, Yemen considers that the Tribunal has already decided on the preservation of the traditional fishing regime between the Parties in its first Award. The Award as it stands is *res judicata*, and in view of the language of article 13, paragraph 3 of the Arbitration Agreement, it is not appropriate to interpret the meaning and the scope of the Award in the first stage at this point in the proceedings. Therefore, and bearing in mind the framework that has been established by the 1994 and 1998 Agreements, Yemen does not believe that the traditional fishing regime needs to be further taken into account in the delimitation of the maritime boundary between the Parties at this stage of the proceedings.

*Eritrea's Answer to Judge Schwebel's Question*

*[letterhead: The State of Eritrea Zuqar–Hanish Archipelago  
Arbitration Office]*

Mrs. Phyllis Hamilton  
Permanent Court of Arbitration  
Peace Palace, the Hague  
The Netherlands

August 12, 1999

By facsimile: 31-70-3024167

Re: Eritrea/Yemen Arbitration

Dear Mrs. Hamilton:

As you probably recall, during the July oral hearings on the maritime phase of the Eritrea/Yemen arbitration, the Tribunal requested that the State of Eritrea supply it with the coordinates for the historic median line which was referred to in Eritrea's written and oral pleadings. It was requested that these co-ordinates be supplied within four weeks of the close of the hearings (simultaneously with the filing of Yemen's response to the question that it was asked.)

I am attaching the coordinates to this letter. In fact, you will find attached to this letter two sets of co-ordinates, one for the historic median line and one for the western boundary of the shared resource zone described in Eritrea's written pleadings. The difference between the two is that the historic median line gives full effect to the Eritrean Mohabbaka and Haycock islands and to Southwest Rock. The western boundary of the shared resource zone does not, and thus runs to the west of historic median line. The coordinates that have been chosen for drawing these two lines are either on land territory of Eritrea or on straight baselines drawn in accordance with the United Nations Convention on the Law of the Sea.

I hope that you will forward this information to the Tribunal, and also to Counsel for the Republic of Yemen (after Yemen submits its response to the question that was posed to them). At the point that you receive this, I will be in transit from Asmara to New Haven and so I hope that no problems arise concerning our submission. I will be reachable in New Haven by the end of the day on Friday, August 13 if any problems do arise, and I hope that you will be able to forward to me there the answer that Yemen submits to the question that the Tribunal has presented it with.

Many thanks again for your cordial assistance.

Sincerely yours,

/s/

Professor R. Lea BRILMAYER  
Co-Agent, the State of Eritrea

## Basepoint Coordinates for Eritrea's Proposed Historic Median Line

	<i>Longitude</i>	<i>Latitude</i>
1	40.256123	16.261644
2	40.260834	16.088427
3	40.610901	15.894623
4	40.627377	15.881909
5	40.675121	15.845072
6	40.705509	15.821624
7	40.726833	15.800971
8	40.774303	15.754568
9	40.821114	15.722202
10	40.859592	15.697753
11	40.873196	15.684411
12	40.899334	15.658775
13	40.923637	15.634940
14	40.959450	15.599816
15	40.984978	15.574780
16	41.007191	15.552997
17	41.033173	15.527514
18	41.064766	15.496529
19	41.090080	15.471701
20	41.097931	15.464003
21	41.194546	14.617983
22	41.315613	14.490411
23	41.327480	14.467098
24	41.333321	14.454417
25	41.674259	14.101558
26	41.682278	14.093115
27	41.992912	13.888812
28	42.033104	13.856160
29	42.083229	13.815438
30	42.143177	13.766736
31	42.163944	13.749866
32	42.597202	13.634215
33	42.597584	13.634094
34	42.597961	13.633973
35	42.629669	13.539982
36	42.630470	13.539621
37	42.649868	13.350410
38	42.649937	13-349084
39	42.898411	13.022588
40	42.909142	13-015216
41	42.945763	12.990066
42	42.946693	12.989246
43	42.972328	12-966615
44	42.999687	12.942464
45	43.027813	12.909046
46	43.046738	12,879812

Basepoint Coordinates for Eritrea's Proposed Historic Median Line in Degrees and Minutes (Approximated)

	<i>Longitude</i>		<i>Latitude</i>	
	<i>Degree</i>	<i>Minute</i>	<i>Degree</i>	<i>Minute</i>
1	40	15	16	16
2	40	16	16	5
3	40	37	15	54
4	40	38	15	53
5	40	41	15	51
6	40	42	15	49
7	40	44	15	48
8	40	46	15	45
9	40	49	15	43
10	40	52	15	42
11	40	52	15	41
12	40	54	15	40
13	40	55	15	38
14	40	58	15	36
15	40	59	15	34
16	41	0	15	33
17	41	2	15	32
18	41	4	15	30
19	41	5	15	28
20	41	6	15	28
21	41	12	14	37
22	41	19	14	29
23	41	20	14	28
24	41	20	14	27
25	41	40	14	6
26	41	41	14	6
27	42	0	13	53
28	42	2	13	51
29	42	5	13	49
30	42	9	13	46
31	42	10	13	45
32	42	36	13	38
33	42	36	B	38
34	42	36	13	38
35	42	38	B	32
36	42	38	13	32
37	42	39	13	21
38	42	39	13	21
39	42	54	13	1
40	42	55	13	1
41	42	57	12	59
42	42	57	12	59
43	42	58	12	58
44	43	0	12	57
45	43	2	12	55
46	43	3	12	53



## Basepoint Coordinates for the Western Edge of Eritrea's Proposed Delimitation

<i>Western Basepoint Coordinates</i>	<i>Longitude</i>	<i>Latitude</i>
1	40.256123	16.261644
2	40.260834	16.088427
3	40.610901	15.894623
4	40.627377	15.881909
5	40.675121	15.845072
6	40.705509	15.821624
7	40.726833	15.800971
8	40.774303	15.754568
9	40.821114	15.722202
10	40.859592	15.697753
11	40.873196	15.684411
12	40.899334	15.658775
13	40.923637	15.634940
14	40.959450	15.599816
15	40.984978	15.574780
16	41.007191	15.552997
17	41.033173	15.527514
18	41.064766	15.496529
19	41.090080	15.471701
20	41.097931	15.464003
21	41.194546	14.617983
22	41.315613	14.490411
23	41.327480	14.467098
24	41.333321	14.454417
25	41.674259	14.101558
26	41.682278	14.093115
27	41.992912	13.888812
28	42.033104	13.856160
29	42.083229	13.815438
30	42.143177	13.766736
31	42.163944	13.749866
32	42.182957	13.719868
33	42.209858	13.677422
34	42.236946	13.629816
35	42.290718	13.558626
36	42.292160	13.556718
37	42.314285	13.507826
38	42.332073	13.468508
39	42.456223	13.322620
40	42.502346	13.277068
41	42.548088	13.231894
42	42.583633	13.196643
43	42.621857	13.158704
44	42.659718	13.121125
45	42.696766	13.094354
46	42.898411	13.022588
47	42.909142	13.015216
48	42.945763	12.990066

49	42.946693	12.989246
50	42.972328	12.966615
51	42.999687	12.942464
52	43.027813	12.909046
53	43.046738	12.879912

*Eastern Basepoint Coordinates*

54	41.725754	16.630884
55	41.734745	16.575695
56	41.739692	16.551414
57	41.749630	16.541800
58	41.775238	16.519312
59	41.812977	16.486170
60	41.839870	16.462553
61	41.863270	16.442003
62	41.990649	16.417961
63	41.961689	16.292364
64	42.269432	15.701794
65	42.266293	15.700562
66	42.274937	15.697087
67	42.276882	15.685533
68	42.366718	15.489594
69	42.401192	15.467257
70	42.512936	15.415102
71	42.530704	15.291346
72	42.594810	15.210606
73	42.603222	15.200403
74	42.690079	15.195890
75	42.612560	15.189135
76	42.749393	15.179667
77	42.621025	15.169647
78	42.638046	15.163574
79	42.972595	14.600204
90	42.983734	14.391216
91	42.983959	14.384205
82	43.016117	14.331929
83	43.034367	14.299636
84	43.052059	14.248733
85	43.085064	14.107971
96	43.096539	14.067361
87	43.103230	14.054599
88	43.122894	14.017092
89	43.141998	13.980651
90	43.158348	13.949471
91	43.189007	13.916190
92	43.229725	13.821691
93	43.252224	13.484743
94	43.248089	13.434113
95	43.242542	13.374463
96	43.228340	13.302191
97	43.224674	13.271644
98	43.208839	13.259463
99	43.207760	13.243280

100	43.225060	13.202319
101	43.225647	13.199706
102	43.236843	13.168642
103	43.253857	13.136574
104	43.288876	13.080974
105	43.303009	13.063622

Basepoint Coordinates for the Western Edge of Eritrea's Proposed Delimitation in Degrees and Minutes (Approximated)

<i>Western Basepoint Coordinates</i>	<i>Longitude</i>		<i>Latitude</i>	
	<i>Degree</i>	<i>Minute</i>	<i>Degree</i>	<i>Minute</i>
1	40	15	16	16
2	40	16	16	5
3	40	37	15	54
4	40	38	15	53
5	40	41	15	51
6	40	42	15	49
7	40	44	15	48
8	40	46	15	45
9	40	49	15	43
10	40	52	15	42
11	40	52	15	41
12	40	54	15	40
13	40	55	15	38
14	40	58	15	36
15	40	59	15	34
16	41	0	15	33
17	41	2	15	32
18	41	4	15	30
19	41	5	15	28
20	41	6	15	28
21	41	12	14	37
22	41	19	14	29
23	41	20	14	28
24	41	20	14	27
25	41	40	14	6
26	41	41	14	6
27	42	0	13	53
28	42	2	13	51
29	42	5	13	49
30	42	9	13	46
31	42	10	13	45
32	42	11	13	43
33	42	13	13	41
34	42	14	13	38
35	42	17	13	34
36	42	18	13	33
37	42	19	13	30
38	42	20	13	28
39	42	27	13	19
40	42	30	13	17
41	42	33	13	14
42	42	35	13	12

43	42	37	13	10
44	42	40	13	7
45	42	42	13	5
46	42	54	13	1
47	42	55	13	1
48	42	57	12	59
49	42	57	12	59
50	42	58	12	58
51	43	0	12	57
52	43	2	12	55
53	43	3	12	53
54	41	44	16	38
55	41	44	16	35
56	41	44	16	33
57	41	45	16	33
58	41	47	16	31
59	41	49	16	29
60	41	50	16	28
61	41	52	16	27
62	41	53	16	25
63	41	58	16	18
64	42	16	15	42
65	42	16	15	42
66	42	16	15	42
67	42	17	15	41
68	42	22	15	29
69	42	24	15	28
70	42	31	15	25
71	42	32	15	17
72	42	36	15	13
73	42	36	15	12

---

### ANNEX 3

#### TRANSLATION

#### Memorandum of Understanding between the State of Eritrea and the Republic of Yemen for cooperation in the areas of Maritime Fishing, Trade, Investment, and Transportation

Based on the spirit of friendship and cooperation and to translate into action the common objectives and interests between the two fraternal countries of the State of Eritrea and the Republic of Yemen and achieve the interests of the two fraternal peoples, the delegation of the Republic of Yemen headed by Dr. Abd al-Rahman Abd al-Qadir Ba-Fadhil, the Minister of Fish Wealth, visited the State of Eritrea and received a warm reception from Ali Sayyid Abdallah, the Interior Minister, on 11 November 1994. They held initial discussions at the Eritrean Interior Ministry in the capital, Asmara, followed by talks between the two parties in the city of Massawa. Dr. Salih Makki, the Minister of Marine Wealth for the State of Eritrea, chaired the Eritrean side, while Dr. Abd al-Rahman Abd al-Qadir Ba-Fadhil, the Minister of Fish Wealth for the Republic of Yemen, chaired the Yemeni side.

The talks between the two sides resulted in agreement on the following matters:

*The area of fish wealth*

1. Both the State of Eritrea and the Republic of Yemen shall permit fishermen who are citizens of the two States, without limiting their numbers, and who carry cards to engage in the occupation of fishing, to fish in the territorial waters of the two States, the contiguous zone and the Exclusive Economic Zone of the two countries in the Red Sea (with the exception of the internal waters), provided that the fishermen of the two countries be enumerated and that they be granted official licenses to engage in the occupation of fishing specifying the locations where they will be received and may market their products in appendix No. 1. Each fisherman must submit a fishing license application to the other party within three months from the date of the signing of this Memorandum of Understanding while complying with the following:

- a. The use of sound fishing methods, the non-use of explosives and not polluting the marine environment, as well as the non-use of poisons, chemicals or other means of extermination.
- b. Not to use methods and fishing equipment damaging the growth of marine organisms.
- c. Not to remove or cut marine plants or coral reefs of any kind.
- d. Confinement to the fishing seasons in both of the two countries.
- e. Use of all means to ensure the protection of the environment and rationalization of fishing practices.
- f. Adherence to all laws and regulations of the other country in the sea to the extent these laws and regulations are applicable and do not conflict with the above provisions.

2. For the purposes of paragraphs 1.d and 1.f, the concerned authorities in both States in the Red Sea must notify the concerned authorities in the other State of laws, regulations and rules or any agreements with a third party in the waters the other party is using. Each party shall undertake to issue directives for compliance with that information.

3. Each fishermen or worker on any fishing vessel located in the territorial waters of the other [S]tate must carry a fishing license and a card establishing his identity and nationality in accordance with the laws and regulations of his State, and he must fly the flag of his State over his vessel.

4. Person included in the provisions of paragraph (1) shall be permitted to do the following:
  - a. Market their fish products in the territory of the other State and in the locations specified in appendix No. 1 of this Memorandum of Understanding.
  - b. Obtain the appropriate facilities for maintenance of the vessels and obtain food-stuffs, fuels, and ice at the prevailing prices in the country where they are present and for the period during which they remain at sea.

5. If the authorities in either of the two States are compelled to detain any fishing vessel or fisherman or worker on board any vessel, the authorities of that State must notify immediately the authorities of the other State of the names of the detained individuals and the vessels and the property contain [ed] therein and specify the reasons for and date of the detention.

6. The two States shall cooperate in the area of fishery research, protection of the maritime environment from pollution, and the exchange of technical expertise and training at specialized institutions in the two countries.

*The area of maritime trade, investment and transportation*

1. Study the possibility of creating joint fishing companies between the two States.
2. Study the conclusion of a maritime transportation agreement between the two States.
3. Study the conclusion of a trade agreement between the two States. Until such [a]n agreement can be concluded, the concerned authorities in each of the two countries shall offer all facilities available to them according to their laws to facilitate the transporting of locally-produced goods in the two countries.

*The area of security*

The two States shall work to implement the Protocol signed by the Interior Ministries of the two countries in Sanaa on 10 November 1993 to achieve the objectives provided for in the said Protocol.

*The implementation of the subjects of the memorandum*

1. The concerned authorities in each of the two States, following the signing of this Memorandum of Understanding, shall take all necessary measures including but not limited to the issuance of decrees, orders, licenses, or directives to implement the contents of this Memorandum of Understanding.

2. The concerned agencies in the two States shall organize patrols off their coasts in the Red Sea and establish communication networks between the major security centers of the two States in the Red Sea at a time and method to be agreed by them.

3. Special offices shall be established in the two States to monitor and execute the articles of this Memorandum [...] The headquarters for these offices shall be specified in appendix No. 1 of this Memorandum.

4. Contacts between the two sides regarding the implementation of this Memorandum of Understanding shall take place through diplomatic channels while abiding by the contents of paragraph (2) of article (4).

5. The two Governments shall consult on matters tha[t] may arise from the implementation of this Memorandum of Understanding, anything related to amendment, deletion or addition, as well as amendment or addition to the appendix.

Signed at Massawa on this day, 15 November 1994.

For the Republic of Yemen  
Dr. Abd al-Rahman Abd al-Qadir BA-FADHL  
Minister of Fish Wealth

For the State of Eritrea  
Dr. Salih MAKKI  
Minister of Marine Wealth

**APPENDIX NO. 1****A. Centres for Fishing Registration and Monitoring and Marketing in the Republic of Yemen:**

1. Maydi
2. Khoba
3. Hodeidah
4. Khokha
5. Mocha

**Centres for Fishing Registration and Monitoring and Marketing in the State of Eritrea:**

1. Assab
2. Tio
3. Dahlak
4. Massawa

**APPENDIX NO. 2****Members of the State of Eritrea Delegation:**

1. Dr. Salih Makki, Minister of Marine Wealth
2. Ramadhan Ouliyay, Naval Forces Commander
3. Musa Rabi'a, Eritrean Police Chief
4. Muhammad Idris Amir, Middle East Bureau, Foreign Ministry

## Members of the Republic of Yemen Delegation:

1. Dr. Abd al-Rahman Abd al-Qadir Ba-Fadhl, Minister of Fish Wealth
2. Col. Abd al-Karim Muharram, Chief of Staff, Naval Forces
3. Co. Muhammad Rizq al-Sarami, Undersecretary, Central Agency of Political Security
4. Ambassador Ahamd al-Basha, Ambassador of the Republic of Yemen to the State of Eritrea
5. Ambassador Muhammad al-Wazir, Chairman, African Bureau, Foreign Ministry
6. Dr. Rashad al-Ulaymi, Director-General, Legal Affairs, Interior Ministry
7. Najib Abd al-Qawi Hamim, Director-General, External Cooperation, Ministry of Supply & Commerce
8. Khalid Sa-id al-Dhubhani, Director, Fishing Administration, Ministry of Planning & Development
9. Ali al-Maqalih, Director, Office of the Minister of Fish Wealth

مذكرة تفاهم بين دولة ارتريا  
والجمهورية اليمنية  
للتعاون فى مجالات الصيد البحرى والتجارة  
والاستثمار والنقل



**مذكرة تفاهم  
بين دولة أرتريا والجمهورية اليمنية  
للتعاون في مجالات الصيد البحري والتجاري  
والاستثمار والتفئل**

انطلاقاً من روح المداقة والتعاون وترجمة للاهداف والمصالح المشتركة بين البلدين الشقيقتين دولة أرتريا والجمهورية اليمنية وتحليقاً لمصالح الشعبين الشقيقتين زار دولة أرتريا وفد الجمهورية اليمنية برئاسة الإخ/ الدكتور عبدالرحمن عبدالقادر بأفضل وزير الثروة السمكية وقد استقبل استقبالاً حاراً من الإخ/ علي سيد عبدالله وزير الداخلية يوم الجمعة الموافق ١١/١١/٩٤ م وأجريت محادثات أولية في وزارة الداخلية الأرترية في العاصمة أسمرا أعقبها محادثات بين الطرفين في مدينة مصوع رأس الجانب الأرتري الدكتور صالح مكى وزير الثروة البحرية في دولة أرتريا ورأس الجانب اليمني الدكتور عبدالرحمن عبدالقادر بأفضل وزير الثروة السمكية في الجمهورية اليمنية . وقد أسفرت المحادثات بين الجانبين الى الاتفاق حول الأمر التالية :-

**أولاً: في مجال الثروة السمكية :-**

١- تسمح كل من دولة أرتريا والجمهورية اليمنية للصيادين من مواطني الدولتين دون تحذيد أعدادهم والحاملين لبطائق سزاولة مهنة الاصطياد بالاصطياد في المياه الإقليمية للدولتين والمنطقة المتاخمة وكذا المنطقة الاقتصادية الخالصة للدولتين في البحر الأحمر ( عدا المياه الداخلية ) على أن يتم حصر الصيادين لكلا البلدين ومنحهم رخصاً رسمية لممارسة مهنة الصيد المحدده أماكن استقبائهم وتسويق منتجاتهم في المرفق رقم ( ١ ) على أن يتقدم كل صياد بطلب الترخيص له بالاصطياد من الطرف الأخر وذلك خلال ثلاثة اشهر من تاريخ توقيع مذكرة التفاهم هذه مع مراعاة مايلي :-

أ - استخدام طرق الاصطياد السلمية وعدم استعمال المتفجرات وتلويث البيئة البحرية . وكذا عدم استعمال السموم - والمواد الكيميائية وغير ذلك من طرق الابادة

- ب - عدم استخدام وسائل ومعدات صيد تضر بنمو الاحياء المائية  
ج - عدم نزع أو قطع الاعشاب البحرية والشعب المرجانية على اختلاف انواعها  
د - التقيد بمواسم الاصطياد في كلا البلدين .  
ه - استخدام كل السبل الكفيلة بحماية البيئة وترشيد عملية الاصطياد .  
و - التقيد بكافة قوانين وأنظمة البلد الأخر في البحر الى المدى الذي تسرى فيه هذه القوانين والأنظمة ، وبما لا يتعارض مع ماذكر أعلاه .

( ٢ )

٢- لأغراض الفقرتين ( د ) و ( و ) من ( ١ ) أعلاه ، على السلطات المعنية في كلا الدولتين في البحر الأحمر اعلام السلطات المعنية في الدولة الأخرى بالقوانين واللوائح والأنظمة أو أية اتفاقيات مع طرف ثالث في المياه التي يستخدمها الطرف الآخر ويتولى كل طرف إصدار التوجيهات بذلك المعلومات بالتقيد بها .

٣- يجب أن يحمل كل صياد او عامل على أي قارب صيد يتواجد في المياه الإقليمية للدولة الأخرى رخصة صيد . وبطاقة تثبت شخصيته وجنسيته ، طبقاً لقوانين وأنظمة دولته ، ويجب أن يرفع علم دولته على قارب الصيد .

٤- يسمح للأشخاص المشمولين بأحكام البند ( ١ ) أعلاه بمايلي :-

١ - تسويق انتاجهم من الاسماك في إقليم الدولة الأخرى وفي الاماكن المحددة بالمرقق رقم ( ١ ) لمذكرة التفاهم هذه .

ب- الحصول على التسهيلات المناسبة لصيانة القوارب والحصول على المواد الغذائية والحروقات والثلج بالاسعار السائدة في البلد الذي يتواجدون فيه ولفترة بقائهم في البحر .

٥- اذا اضطرت سلطات أي من الدولتين الى احتجاز قارب صيد أو صياد أو عامل على أي قارب فعلى سلطات تلك الدولة إشعار سلطات الدولة الأخرى فوراً بأسماء الاشخاص والقوارب المحتجزة وماتحتويه من ممتلكات وتحديد أسباب وتاريخ الاحتجاز .

٦- يتعاون الجانبان في مجال الابحاث السمكية وحماية البيئة البحرية من التلوث ، وتبادل الخبرات الفنية وتدريبها في المعاهد التخصصية القائمة في البلدين .

ثانياً : في مجال التجارة والاستثمار والنقل البحري :-

١- دراسة امكانية انشاء شركات صيد مشتركة بين البلدين .

٢- دراسة عقد اتفاقية للنقل البحري بين الدولتين .

٣- دراسة عقد اتفاقية تجارية بين الدولتين : وحتى يتم عقد تلك الاتفاقية تقدم الجهات المختصة في كلا البلدين كافة التسهيلات المتاحة لها بموجب قوانينها لتسهيل أمور انتقال البضائع ذات المنشأ المحلي في البلدين .

ثالثاً : فى مجال الأمن

تعمل الدولتان على تنفيذ البروتوكول الموقع بين وزارتى الداخلية فى البلدين فى العاصمة صنعاء بتاريخ ١٠ نوفمبر ١٩٦٢م لما من شأنه تحقيق الاهداف المنصوص عليها فى البروتوكول المشار اليه اعلاه . . .

رابعاً : فى مجال تنفيذ مواضع المذكرة

- ١- تتخذ السلطات المختصة فى كلا الدولتين بعد التوقيع على مذكرة التفاهم هذه كافة الاجراءات اللازمة شاملة دون حصر إصدار قرارات أو أوامر أو رخص او توجيهات لتنفيذ ماورد فى مذكرة التفاهم هذه .
- ٢- تسيير الاجهزة المعنية فى الدولتين دوريات مقابل شواطئها فى البحر الاحمر وتنشأ شبكات اتصال بين المراكز الأمنية الرئيسية للدولتين فى البحر الاحمر فى الوقت والأسلوب الذى يتفق عليه بينهما .
- ٢- تنشأ مكاتب خاصة فى كلا البلدين لمراقبة وتنفيذ ماورد من بنود فى هذه المذكرة وتحدد مقار تلك المكاتب طبقاً للمرفق رقم ( ١ ) من هذه المذكرة .
- ٤- يتم الاتصال بين الجانبين فى شأن تنفيذ مذكرة التفاهم هذه بالطرق الدبلوماسية مع مراعاة ماورد فى البند ( ٢ ) من رابعاً اعلاه .
- ٥- تتشاور الحكومتان حول ماقد ينشأ عن تنفيذ مذكرة التفاهم هذه او فيما يتعلق من تعديل او حذف او اضافة . وكذا تعديل او اضافة للمرفق .

وقع فى مصوع يوم الثلاثاء الموافق ١٤ نوفمبر ١٩٩٤م .

عن دولة ارتريا  
د/ صالح مكى  
وزير الثروة البحرية



عن الجمهورية اليمنية  
د/ عبدالرحمن عبدالقادر بافضل  
وزير الثروة السمكية



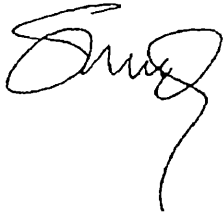
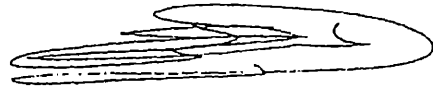
المرفق رقم ( ١ )

١/ المراكز الخاصة بتسجيل ومراقبة الاصطياد والتسويق في  
الجمهورية اليمنية :-

- ١- ميدى
- ٢- الخوبة
- ٣- الحديدية
- ٤- الخرقة
- ٥- المخا

المراكز الخاصة بتسجيل ومراقبة الاصطياد والتسويق في دولة  
ارتريا :-

- ١- عصب
- ٢- طيمو
- ٣- رهلك
- ٤- مصوع

## المرفق ( ٢ )

## اعضاء جانب دولة ارتريا :-

- |                     |                                      |
|---------------------|--------------------------------------|
| ١- الدكتور صالح مكى | وزير الثروة البحرية                  |
| ٢- رمضان اوليائى    | قائد القوات البحرية                  |
| ٣- موسى رابعة       | مدير الشرطة الارترية                 |
| ٤- محمد ادريس عامر  | دائرة الشرق الاوسط - بوزارة الخارجية |

## اعضاء جانب الجمهورية اليمنية :-

- |                                   |   |
|-----------------------------------|---|
| الدكتور عبدالرحمن عبدالقادر بافضل | وزير الثروة السمكية                                 |
| ٢- العقيد عبدالكريم محرم          | رئيس هيئة اركان القوات البحرية                      |
| ٣- العقيد محمد رزق الصرمى         | وكيل الجهاز المركزى للامن السياسى                   |
| ٤- السفير أحمد الباشا             | سفير الجمهورية اليمنية لدى دولة<br>ارتريا           |
| ٥- السفير محمد الوزير             | رئيس دائرة افريقيا بوزارة الخارجية                  |
| ٦- الدكتور رشاد العليمى           | مدير عام للشؤون القانونية بوزارة<br>الداخلية        |
| ٧- نجيب عبدالقوى حاميم            | مدير عام التعاون الخارجى بوزارة<br>التموين والتجارة |
| ٨- خالك سعيد الذبحانى             | مدير ادارة الاسماك بوزارة التخطيط<br>والتنمية       |
| ٩- علي المقالع                    | مدير مكتب وزير الثروة السمكية                       |

TREATY ESTABLISHING THE JOINT YEMENI-ERITREAN COMMITTEE FOR BILATERAL  
COOPERATION BETWEEN THE GOVERNMENT OF THE REPUBLIC OF YEMEN  
AND THE GOVERNMENT OF THE STATE OF ERITREA

Based on the progressive civilized example set by bilateral relations between the Republic of Yemen and the State of Eritrea, and

Affirming their shared desire to continue to strengthen and reinforce these relations in service to their common interests, and

Aware of the importance of strengthening and developing bilateral cooperation in all fields of mutual concern,

The two parties have agreed to the following:

*Article One*

The two parties shall form a Joint Committee for Bilateral Cooperation between them in all fields of mutual concern, containing representatives of each party, to be called the "Joint Yemeni-Eritrean Committee," with the two Ministers of Foreign Affairs presiding. The Ministry of Planning and Development from the Yemeni side and the Ministry of Foreign Affairs from the Eritrean side, with the presence of required assistants, shall have jurisdiction over the secretariat and monitor implementation of Joint Committee results.

*Article Two*

The Joint Committee shall assume the following tasks:

1. Studying programs and recommendations designed to expand bilateral cooperation between the two countries and signing agreements, protocols, and implementation programs in that regard.
2. Monitoring the implementation of agreements, protocols, memoranda of understanding and minutes signed between the two countries in the fields referenced in paragraph 1 of this article.
3. Discussing proposals submitted by either country with the purpose of strengthening and developing the horizons of cooperation between them in all various fields of mutual interest.
4. Encouraging the exchange of bilateral visit and meetings between officials of both countries, and exchanging information and documents relevant to joint cooperation relations.

*Article Three*

1. The committee may form permanent and temporary subcommittees and work teams to carry out certain specific tasks in the framework of Joint Committee work.
2. The subcommittees and work teams referred to in paragraph 1 of this article shall submit their recommendations to the Joint Committee for approval.

*Article Four*

The draft agenda for each round of exchanging recommendations shall be prepared through diplomatic channels and shall be submitted sufficiently in advance of the convening of the round. The Joint Committee may assign a technical committee from both sides to prepare for its meetings.

*Article Five*

The Joint Committee shall convene its round annually, alternating between Sanaa and Asmara. Special minutes shall be prepared for each round, signed by the chairman of both sides on the Joint Committee, and approved by the relevant authorities in both countries pursuant to the laws and regulations in effect in each country.

*Article Six*

This treaty shall come into force on the date the ratification instruments are exchanged in accordance with the constitutional procedures in effect in each country. It shall remain in force for five (5) years and shall be renewed automatically for identical periods, provided neither party informs the other party in writing of its desire to terminate the treaty six months prior to its expiration date. Any additions or amendments to the articles of this treaty shall only be made with the written approval of both parties thereto.

The treaty has been drawn up in Sanaa on 25 Jumada II 1419, equivalent to 16 October 1998, in two original copies in the Arabic language, both having equal legal weight.

For the Government of the State of Eritrea  
[Signed]

Hail WOLDENSE  
Minister of Foreign Affairs

For the Republic of Yemen  
[Signed]

Abd al-Qdir Abd al-Rahma BA-JAMMAL  
Deputy Prime Minister and Foreign Minister

اتفاقية

أسسس اللجنة اليمنية - الإريترية المشتركة

للتعاون الثنائي

بين

حكومة الجمهورية اليمنية

وحكومة دولة إريتريا.



إنطلاقاً من النموذج الحضاري المتقدم الذي تجلّس في العلاقات الثنائية بين الجمهورية اليمنية ودولة إريتريا.  
 وتأكيداً لرغبتها المشتركة في مواصلة تقوية وتعزيز هذه العلاقات بما ينسجم مصالحهما المشتركة.  
 وإدراكاً منها بأهمية تعزيز وتطوير التعاون الثنائي في كافة المجالات ذات الاهتمام المشترك.  
 اتفقتا على ما يلي :-

### المادة الأولى

يشكل الطرفان لجنة مشتركة للتعاون الثنائي بينهما في كافة المجالات ذات الاهتمام المشترك، تضم ممثلين عن كل منهما، تسمى "اللجنة اليمنية - الإريترية المشتركة للتعاون الثنائي" ويشار إليها فيما يلي :- "اللجنة المشتركة" يرأسها وزير الخارجية البلديسن، وتتولى سكرتارية اللجنة ومتابعة تنفيذ نتائجها وزارة التخطيط والتنمية عن الجانب اليمني ووزارة الشؤون الخارجية عن الجانب الإريترى بوجود المساعدين اللغويين وذلك بحكم الاختصاص.

### المادة الثانية

تضطلع اللجنة المشتركة بالمهام التالية :-  
 ١٠ - دراسة البرامج والمقترحات الهادفة إلى توسيع التعاون الثنائي بين البلدين، وتوثيق الاتفاقيات وبروتوكولات وبرامج تنفيذية بشأنها.




- ٢- متابعة تنفيذ الاتفاقيات والبروتوكولات ومذكرات التفاهم والمحاضر الموقعة بين البلدين في المجالات المشار إليها في الفقرة (١) من هذه المادة.
- ٣- ستانسة الاقتراحات التي يقدمها أي من البلدين والتي من شأنها العمل على تعزيز وتطوير أفاق التعاون بينهما في كافة المجالات المختلفة ذات الاهتمام المشترك.
- ٤- تشجيع تبادل الزيارات واللقاءات الثنائية بين المسؤولين من كلا البلدين وتبادل المعلومات والروائز ذات الصلة بعلاقات التعاون المشترك.

#### المادة الثالثة

- ١- يمكن للجنة أن تشكل لجاناً فرعية وفرق عمل دائمة ومؤقتة لإنجاز بعض المهام المحددة في إطار عمل اللجنة المشتركة.
- ٢- تقوم اللجان الفرعية وفرق العمل المشار إليها في الفقرة (١) من هذه المادة برفع توصياتها إلى اللجنة المشتركة للمصادقة عليها.

#### المادة الرابعة

يتم إعداد مشروع جدول أعمال كل دورة بتبادل الاقتراحات عبر القنوات الدبلوماسية على أن يقدم قبل موعد انعقاد الدورة بوقت كافٍ، ويجوز للجنة المشتركة تكليف لجنة فنية من الجانبين لإعداد اجتماعاتها.

#### المادة الخامسة

تعقد اللجنة المشتركة دورتها سنوياً، وبالتناوب في كلٍ من صنعاء وأسمه وبعده لكل دورة من الدورات محضر خاص، يوقع عليه من قبل رئيسي الجانبين في اللجنة

٢

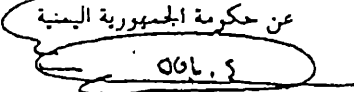


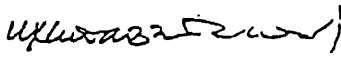

المشتركة ويصادق عليه من قبل السلطات المختصة في البلدين طبقاً للقوانين والأنظمة المعمول بها في كل منهما.

#### المادة السادسة

يبدأ العمل بهذه الاتفاقية اعتباراً من تاريخ تبادل روائق التصديق عليها ونقياً للإجراءات الدستورية المعمول بها في كلا البلدين، وتظل سارية المفعول لمدة (٥) سنوات وتتمدد تلقائياً لمدة مماثلة، ما لم يقيم أحد الطرفين بإبلاغ الطرف الآخر كتابياً برغبته في إنقائها قبل انتهاء مدتها بـ (٦) أشهر وأية إضافات أو تعديلات في مواد هذه الاتفاقية لا - تتم إلا بموافقة الطرفين الكتابية عليها.

حررت هذه الاتفاقية في صنعاء يوم الجمعة بتاريخ ٢٥ جمادى الآخر ١٤١٩ هـ الموافق ١٦/١٠/١٩٩٨ م من نسختين أصليتين باللغة العربية ولكل منهما نفس الحجته القانونية.

عن حكومة الجمهورية اليمنية  
  
 عبد القادر عبد الرحمن باجمال  
 نائب رئيس الوزراء  
 وزير الخارجية.

عن حكومة دولة إريتريا  
  
 هيلي ولدتمارسي  
 وزير الشؤون الخارجية

**List of Abbreviations**

EEZ	Exclusive Economic Zones
FAO	Food and Agriculture Organization of the United Nations
I.C.J. Reports	International Court of Justice—Reports of Judgments, Advisory Opinions and Orders
ICLQ	International and Comparative Law Quarterly
ILR	International Law Reports
UNDP	United Nations Development Program
WGS	World Geodetic System

**Communications from the President of the Tribunal  
dated 25 February 2000**

**Communications du President du Tribunal en date du 25 fevrier 2000**

1. The president of the Arbitral Tribunal (hereinafter the “Tribunal”), Sir Robert Y. Jennings, acknowledges with thanks the receipt of letters from the agent of the Government of the state Eritrea (“Eritrea”) 14 January 2000, from the Agent of the Government of the Republic of Yemen 1 February 2000, and from the Foreign Minister for Eritrea 9 February 2000. The President has consulted with the other members of the Tribunal regarding the exchange of the correspondence detailed below and Eritrea’s request that the Tribunal “determine whether there is a dispute with the other Party as to the meaning and the scope of the award”.

2. On 15 January 2000, the Registry received a letter from Professor Brilmayer, the Agent for Eritrea, addressed to the President of the Tribunal with a copy to the Agent for Yemen containing a request for a clarification pursuant to article 13, paragraph 3, of the Arbitration Agreement. Professor Brilmayer enclosed two press releases issued by the Government of the Republic of Yemen which raise the possibility that its interpretation of the Award differs from that of the Government of Eritrea on certain important points. Although the State of Eritrea believes the Awards is quite clear with regard to these particular points, the fact that the Republic of Yemen has issued press releases making claims to the contrary shows the need for clarification by the Tribunal.

3. On 1 February 2000, the Agent of Yemen, responded to Professor Brilmayer in a letter to the President of the Tribunal with a copy to the Agent for Eritrea. The reply of Yemen stated that the Republic of Yemen considered Eritrea’s request for interpretation inadmissible because it failed to identify the existence of a dispute between the Parties as to the meaning and scope of the Award.

4. Yemen further responded that “... in Yemen’s considered opinion, the Award is sufficiently clear on its face and does not require any clarification by the Tribunal.” The Agent described the meeting of the Parties at Asmara on 23 and 24 January, where it was agreed to form a committee which, amongst other things, will be charged with “monitoring, coordination and cooperation on issues of the activities in which the two countries and their citizens are engaged in the Southern Red Sea in a manner consistent with the award by the international arbitration tribunal in this regard”. In his response, the Agent of Yemen referred also to a letter from the President of Yemen to the President of Eritrea, dated 23 January 2000, which he appended to his letter. Also appended to his letter. Also appended was a 26 January 2000 joint statement issued by the Foreign Ministers of Yemen and Eritrea following talks that were held in Asmara.

5. The Eritrea Minister of Foreign Affairs then responded in a letter to the President of the Tribunal, dated 9 February 2000, with copy to the Agent for Yemen. He questioned whether the response from Yemen showed that the Parties “in fact agree on the meaning and scope” of the Award. He also said that at the Asmara meeting, Eritrea sought and held been given assurances that its cooperation in the formation of the Committee would not be regarded as a renunciation “of its outstanding requests to the Tribunal”. This assurance in the terms reported by Eritrea, would not, however, in the view of the Tribunal, amount to recognition by Yemen that there was in fact an existing dispute over the meaning of the Award.

6. There remains the concern of Eritrea that some parts of the Yemen press releases “raise the possibility that its interpretation of the Award differs from that of the Government of Eritrea on certain important points”, wherefore it asks the Tribunal to “determine whether there is a dispute with the there party as to the meaning and scope of the Award”.

7. The Yemeni Government has made no further response. It must therefore be understood as standing by its statement in its letter of 1 February responding to the particular and carefully defined concerns of Eritrea as set out in Eritrea’s letter of 14 January, that “no dispute exists between the parties as to the meaning and scope of the Award”.

8. The materials and correspondence thus laid before the Tribunal by the Parties fall short of showing that there has been a reference to the Tribunal of an actual “dispute with the other Party as to the meaning and scope of the awards”, within the meaning of the provision of article 13, paragraph 3, of the Arbitration Agreement.

9. It is accordingly the conclusion of the Tribunal that it is not now called upon to render any decision under these provisions of the Arbitration Agreement.

Done at The Hague 25 February 2000

On behalf of the Tribunal,

Sir Robert Y. JENNINGS  
*President of the Tribunal*

Tjaco VAN DEN HOUT, *Registrar*

**Communication from the President of the Tribunal  
dated 31 March 2000**

**Communication du Président du Tribunal en date du 31 mars 2000**

1. The President of the Arbitral Tribunal (hereinafter the “Tribunal”), Sir Robert Y. Jennings, acknowledges with thanks the receipt of letters from the Foreign Minister of the Government of the State of Eritrea (“Eritrea”) 7 March 2000, from the Agent for the Republic of Yemen (“Yemen”) 14 Agent for Yemen 22 March 2000. Copies of the correspondence were transmitted to the other Members of the Tribunal for their consideration.

2. On 15 March 2000, the Registry notified the Agents for the Parties that owing to office closings for the Islamic holidays the time for the Tribunal to answer the request for clarification was extended so that all Members of the Tribunal could review the exchange of letters. On 16 March 2000 the Registrar solicited the agreement of the Parties to a further extension of time in order to provide the Agent for Yemen with copies of the materials received from the Agent of Eritrea.

3. It appears that there is still possibility of a misunderstanding over “Yemen’s (alleged) rights to fish in the Dahlak Islands” (as it was described in Eritrea’s letter of 7 March requesting the Tribunal to exercise its power under article 13.3 of the Agreement for Arbitration). This question of the status of the waters within the Dahlak Islands arose from a passage in one of Yemen’s press releases, copies of which attached to Eritrea’s letter of request.

4. It might therefore be helpful to the Parties if the Tribunal restates what the Award in the second stage recognized to be the legal position of the waters within the Dahlak Islands group. In this connection the Tribunal reminds the Parties of the terms of four paragraphs dealing specifically with the heading *The Dahlaks*, which read as follows.

This tightly knit group of islands and islets, or “carpet” of islands and islets as Eritrea preferred to call it, of which the larger islands have a considerable population is a typical example of a group of islands that forms an integral part of the general coastal configuration. It seems in practice always to have been treated as such. It follows that the waters inside the island system will be internal or national waters and that the baseline of the territorial sea will be found somewhere at the external fringes of the island system.

This view of the legal status of the Dahlak Island group was recognized by the Award not only because a glance at a map confirms it, but also because (i) this was recognized by general repute (see e.g. the opinion of the late Professor D.P. O’Connell’s *The International Law of the Sea*, published posthumously in 1982, p.258 note 87) and (ii) it was the view of Yemen throughout its pleadings in the Second Stage of Arbitration; indeed Yemen’s own claimed median line international boundary was based on the same basic premise in regard to the legal status of the Dahlak Islands Group (see the reference in paragraph 114 of the Award).

5. The Tribunal has been hesitant to treat this matter as amounted to a “dispute” within the meaning of article 13.3 of the Agreement for Arbitration. The reason for the Tribunal’s hesitation is that the view expressed in article 139 of the Maritime Boundaries Award, as to the legal status of the waters within the Dahlak Islands is, in the Tribunal’s view, indisputable. Moreover, it was the adopted and expressed view of Yemen throughout the arbitration proceedings.

6. When, therefore, Yemen replied to the Eritrean request by insisting that there was no dispute for the Tribunal to settle, the Tribunal readily agreed, assuming that Yemen was thus resorting to an elegant way of indication that it was not disposed to attempt to dispute the Eritrean position on this question of the status of the waters within the Dahlak Island group.

7. Some misunderstanding between the Parties having nevertheless persisted, the Tribunal has therefore found itself under some obligation to remind the Parties of the terms of paragraph 139 of the Award, even though this amounts to stating what may be legally obvious.

8. The Tribunal takes this opportunity to remind the Parties that paragraphs 149 ff. Of the Award extended the like treatment to the cluster of islands off the opposite coast of Yemen. This decision was likewise justified on the ground that these Yemen “features are integral to the coast of Yemen and part of it”(paragraph 150).

9. The Tribunal intends that this restatement of what is already expressly and clearly stated in the Award will serve to settle the misunderstandings that appear to have arisen from one infelicitous passage in one Yemen press release.

10. The recent exchanges of correspondence, besides the status of the waters within the Dahlak group, also allude to other undefined matters of possible contention concerning the traditional fishing regime. It might be useful to the Parties if the Tribunal points out one common feature of such potential questions.

11. The Tribunal draws the attention of the Parties to the fact that the traditional fishing regime was not the creation of the Tribunal. The Tribunal found it already in existence; its concern therefore was that it should not be prejudiced in any way by the Tribunal’s findings in the first stage Award on sovereignty over the disputed islands.

12. Thus the knowledge of the details of the ways in which the regime has been traditionally implemented, and the locations where it traditionally has operated from time to time, are peculiarly within the range of the knowledge of the Parties themselves. These are therefore precisely the matters suited to consideration by the Joint Committee that the Parties are in the process of establishing.

13. If the Parties were for any reason inclined to submit to this or another tribunal one or more of these questions for decision it would, of course, be necessary for the Parties to draft a new agreement addressing both the jurisdiction of that tribunal and the precise questions to be submitted to it.

Done at The Hague 31 March 2000,

On behalf of the Tribunal,

Sir Robert Y. JENNINGS  
*President of the Tribunal*

Tjaco VAN DEN HOUT, *Registrar*



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