BEAGLE CHANNEL ARBITRATION

between

THE REPUBLIC OF ARGENTINA AND THE REPUBLIC OF CHILE

REPORT AND DECISION OF THE COURT OF ARBITRATION

PART I: REPORT

A. PERSONNEL OF THE CASE

THE COURT:

Members (as appointed on 22 July 1971):

Judge Sir Gerald Fitzmaurice (President)
Judge André Gros
Judge Sture Petrén
Judge Charles Onyeama
Judge Hardy C. Dillard

Registrar:

Professor Philippe Cahier

THE PARTIES:

The Argentine Republic, represented by

As Agents:

His Excellency Señor Ernesto de la Guardia, Ambassador Extraordinary and Plenipotentiary on Special Mission.
His Excellency Señor Julio Barboza, Ambassador Extraordinary and Plenipotentiary on Special Mission.

disposition of the various categories of islands that include the PNL group,- namely the second (i.e. last) sentence of Article III (the "Islands clause"), beginning with the words "As for the islands" ("En cuanto a las islas"). It attributes certain categories of islands to Argentina, and others to Chile. In the latter attribution there figure "all the islands to the south of the Beagle Channel up to Cape Horn" ("y pertenecerán a Chile todas las islas al Sur del canal 'Beagle' hasta el Cabo de Hornos"). It is this attribution that raises the issues involved by the division of the Channel into its two eastern arms, passing respectively north of Picton Island or south-west of it, the geography of which has been described in paragraphs 3 and 4 above. With this preliminary mention of the Islands clause, it will now be convenient to take the provisions of the Treaty in the order in which they occur.

(2) The title of the Treaty

18. "Tratado de Límites" - of limits - Boundary Treaty. This title suggests the spirit and intention of the Treaty as a whole,- for a limit, a boundary, across which the jurisdictions of the respective bordering States may not pass, implies definitiveness and permanence. As the International Court of Justice said in the Temple of Préah Vihéar case (1962 Reports, at p. 34), "when two countries establish a frontier between them, one of the primary objects is to achieve stability and finality". It is true that, in the present case, the only one amongst the provisions of the 1881 Treaty having effect as allocations of territory, or as recognitions of existing title, that fails to draw or define a specific boundary, is the one just mentioned in paragraph 17 above, in which the Fuegian Islands are dealt with. A boundary nonethe-

less resulted from the attributions made, as will become clear in due course.

(3) The Preamble

19. Although Preambles to treaties do not usually - nor are they intended to - contain provisions or dispositions of substance - (in short they are not operative clauses) - it is nevertheless generally accepted that they may be relevant and important as guides to the manner in which the Treaty should be interpreted, and in order, as it were, to "situate" it in respect of its object and purpose. As the Vienna Convention says (Article 31, paragraph 2),

> "The context for the purpose of the interpretation of a treaty shall comprise, in addition to its text, including its preamble and annexes ..." /stress added/.

The Preamble to the Treaty of 1881 cannot be any exception in this respect. First, it evidences the intention of the Parties of "resolving" (Spanish "resolver"[6]) their previous or existing boundary controversies,- from which it is legitimate to deduce the consequences stated in paragraph 7(d)(i) and (ii) above, namely that the regime set up by the Treaty, and no other, was meant thenceforth to govern the question of boundaries and title to territory, and that it was meant to be definitive, final and complete, leaving no boundary undefined, or territory then in dispute unallocated or, it might be added, left over for some future allocation. This view is confirmed by the

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[6] The English "terminating", in the text in paragraph 15 above, does not, in the context, give quite the right effect.

terms of the final phrase of the second paragraph of Article VI of the Treaty which, after specifying that any differences that might "unhappily arise" on account of the Treaty, or "from any other cause whatsoever", were to be "submitted to the decision of a friendly Power", then proceeded to add:

> "the boundary specified in the present settlement /"arreglo"/ remaining in any case /"quedando en todo caso"/ as the immovable limit /"limite inconmovible"/ between the two countries."[7]

This provision, already mentioned in paragraph 12 above, is discussed again in a later context - see paragraphs 173 and 174 below.

20. Secondly, the Preamble of the 1881 Treaty also emphasizes the Treaty's terminal and final character by, in effect, contrasting it with the provisional character of "Article 39 of the Treaty of April 1856"-(signed in 1855 but ratified the following year) by which - see paragraph 12 supra - the Parties deferred the settlement of boundary questions for further discussions and agreement or, failing the latter, for reference to arbitration, and for the time being recognized as the boundaries of their respective territories those existing in 1810 - (the uti possidetis juris). This was clearly intended as a temporary régime only, to last until the future settlement by agreement or arbitration that was evidently contemplated,- and it seems to the Court that the object, or one of the objects, of the Preamble to the 1881 Treaty was to make it clear that the Treaty constituted precisely the contemplated settlement, duly reached by agreement, since it stated that the Parties were desirous of "giving effect" to

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[7] The translation given here is closer to the Spanish original than that of the English text of Article VI in paragraph 15 above.

Article 39 of the 1855-6 Treaty (Spanish "dando cumplimiento",- literally "giving completion" or "fulfilment" to[8]).

21. Up to this point there would not be much difference of view between the Parties, so that the deduction figuring as subparagraph (iii) of paragraph 7(d) above would, subject to the reservation there specified, be legitimate, as well as those indicated in subparagraphs (i) and (ii) already mentioned in connexion with this Preamble. But beyond this, the Parties' views diverge in one important respect. The Chilean view appears to be that for all practical purposes the 1881 Treaty erases or eliminates all applicability or relevance of the former uti possidetis juris, which was thenceforth replaced entirely by the Treaty. The contrary, Argentinean, view does not go so far as to maintain that uti possidetis overrides the Treaty settlement whenever the latter conflicts with it,- for that would be to transform the settlement into a work of supererogation. What Argentina does maintain is that uti possidetis survives as a traditional and respected principle, in the light of which the whole Treaty must be read, and which must prevail in the event of any irresolvable conflict or doubt as to its meaning or intention. Without pronouncing on this contention, considered as a general proposition that might be applicable in the case of other Latin-American treaties, the Court must point out that, in the particular case of the 1881 Treaty, no useful purpose would be served by attempting to resolve doubts or conflicts regarding the Treaty, merely by referring to the very same principle or doctrine, the uncertain effect of which in the

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[8] This is another instance of a not quite adequate English rendering - see previous two footnotes.

reads "it being understood that by the provisions of this covenant", i.e. of the Act itself, instead of, as in the Protocol, "by the provisions of the said Treaty" - /stress added in both phrases/. The latter version is clearly more favourable to the Argentine thesis, but in the Court's opinion does not produce any real change in the resulting position.

78. It is possible that the Argentine contentions that have been under consideration above are really part of a more general theory to the effect that when a boundary Treaty provides for a demarcation on the ground it cannot (or the boundary definitions it contains cannot) be regarded as final and conclusive until the demarcation has been carried out. The Court will state elsewhere (see paragraph 169(b) below) why it cannot agree with this view, at least in the form in which it has been put forward in the present case. But in any event it can have no application in respect of the attributions made in the Islands clause of the 1881 Treaty, since no demarcation was provided for in respect of these, or for the Beagle Channel itself.

(vi) Conclusion regarding the Argentine attribution

79. The Court can therefore only conclude from the aggregate of the considerations set out above, that it has not been established that the PNL group was attributed to Argentina under the Islands clause of the Treaty. Accordingly, the Court will now turn to the question of whether the group falls within the Chilean attribution under that clause.

as necessarily more correct or more objective, they have, prima facie, an independent status which can give them great value unless they are mere reproductions of - or based on originals derived from - maps produced by one of the Parties,- or else are being published in the country concerned by, or on behalf, or at the request of a Party, or are obviously politically motivated. But where their independent status is not open to doubt on one or other of these grounds, they are significant relative to a given territorial settlement where they reveal the existence of a general understanding in a certain sense, as to what that settlement is, or, where they conflict, the lack of any such general understanding.

(3) The temporal or chronological factor - The principles indicated in sub-paragraph (1) above, however valid in themselves, nevertheless require to be applied in close relation to the temporal or chronological setting in which the map concerned appears. This element can be relevant with respect to both the above classes of cases, but is particularly so - indeed constitutes an essential ingredient - in the evaluation of the first,- namely maps emanating from the Parties. The significance of a map illustrating a territorial settlement or disputed boundary may vary greatly according to the date when, or the period within which, it is issued or published. Where there is controversy, the implications of any given map can be correctly assessed only if account is taken of the date of its publication,- and also of the circumstances of the time. Thus, maps appearing contemporaneously with the territorial settlement or within a relatively short period after it will, other things being equal, have greater probative value than those produced later when the

3. Acts of jurisdiction considered as confirmatory or corroborative evidence

164. Chile has contended that her title to the PNL group, resulting, as she maintains (and as the Court has found) from a correct interpretation of the 1881 Treaty, is confirmed by numerous acts of jurisdiction in and relative to the three islands of the group - in manifestation of sovereignty over it - and to the total exclusion of any comparable acts on the part of Argentina. She has supplied the Court with a voluminous number of documents in support of this contention[127]. Argentina, on the other hand, has argued that in the circumstances of the present case, and as a matter of law, such acts have no probative value.

165. The Court does not consider it necessary to enter into a detailed discussion of the probative value of acts of jurisdiction in general. It will, however, indicate the reasons for holding that the Chilean acts of jurisdiction, while in no sense a source of independent right, calling for express protest on the part of Argentina in order to avoid a consolidation of title, and while not creating any situation to which the doctrines of estoppel or preclusion would apply, yet tended to confirm the correctness of the Chilean interpretation of the Islands clause of the Treaty.

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[127] These documents, numbering 320 and running to 572 pages, are reproduced in chronological order from 1826 to 1971 in the Chilean Memorial, vol. III. Approximately two thirds are devoted to the period 1881-1915, of which some 110 are prior to 1906.

169. The Court's views on the above described Argentine arguments, briefly stated, are as follows:-

(a) Regarding paragraph 5, heads (i) and (ii), the Court cannot accept the contention that no subsequent conduct, including acts of jurisdiction, can have probative value as a subsidiary method of interpretation unless representing a formally stated or acknowledged "agreement" between the Parties. The terms of the Vienna Convention do not specify the ways in which "agreement" may be manifested. In the context of the present case the acts of jurisdiction were not intended to establish a source of title independent of the terms of the Treaty; nor could they be considered as being in contradiction of those terms as under tood by Chile. The evidence supports the view that they were public and well-known to Argentina, and that they could only derive from the Treaty. Under these circumstances the silence of Argentina permits the inference that the acts tended to confirm an interpretation of the meaning of the Treaty independent of the acts of jurisdiction themselves.

(b) Regarding paragraph 5, head (iii), the Court equally cannot agree with the Argentine contention that merely because the Treaty provides procedures for demarcation on the ground, no subsequent conduct of the Parties, including acts of jurisdiction, can have any probative value. The purpose of such procedures is not to delay the allocation of sovereign rights over territories, which it is the very purpose of a boundary treaty to determine, but simply to make adjustment of such particular lines as may not be sufficiently clear from the necessarily general terms of the Treaty,- that is to say lines which can be adjusted in the light of purely local conditions without affecting the principles on the

basis of which they were adopted. True, this may affect the application of the terms of the Treaty within an already allocated area, but this is a far cry from concluding that the Treaty itself is inoperative for as long as delays, tardiness or other circumstances hold up the demarcations, and that in the meantime it creates no capacity for either Party to act within the area it considers allocated to it.[133]

170. Two further points are made by Argentina: (a) she asserts that through the publication of certain Argentine cartography, Chile was put on notice that Argentina did not agree with the Chilean interpretation of the Treaty (the maps referred to are the "Pelliza" map, those of Paz Soldan and the later "Latzina" and "Hoskold" maps - the Court's comments on these maps will be found in paragraphs 126-128, 149, 153, 157 and 159 above); (b) Argentina argues further that as "soon as it was obvious that there was a difference of opinion between the two countries as to the proper interpretation of Article III ... there took place the negotiations of 1904-05 with a view to its settlement" (Counter-Memorial, p. 411),- and while these negotiations failed, Argentina yet insists that they are significant as disclosing a lack of concurrence on the meaning of the Treaty.

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[133] These observations, although the Court has thought it desirable to make them, are really in the nature of obiter dicta since (see paragraph 78 supra) the 1881 Treaty makes no provision for any demarcation of the boundary in the Beagle Channel region,- a fact which tends to bear out the conclusion reached earlier (paragraphs 94ff.) that the negotiators were in no doubt as to what it was.