

# The Beagle Channel Arbitration

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The dispute between Argentina and Chile with respect to sovereignty over a number of islands in the Beagle Channel has been simmering for more than sixty years. Three protocols were signed between 1915 and 1960 with a view to settling the matter by adjudication but none of them was ratified. Eventually, in 1967 the Chilean Government, invoking the 1902 Arbitration Treaty between the two countries, invited the British Government to intervene as arbitrator in the dispute and a *compromis* was signed by Argentina and Chile whereby they agreed to the Court of Arbitration appointed by the British Government. Its membership was Dillard (USA), Fitzmaurice (UK), Gros (France), Onyeama (Nigeria) and Petren (Sweden).

The central issue of the dispute was expressed in somewhat different terms in Article I of the *compromis*. According to paragraph (1):

'The Argentine Republic requests the Arbitrator to determine what is the boundary-line between the respective maritime jurisdiction of the Argentine Republic and of the Republic of Chile from meridian 68°36'38.5"W., within the region referred to in paragraph (4) of this Article, and in consequence to declare that Picton, Nueva and Lennox Islands and adjacent islands and islets belong to the Argentine Republic.'

Whereas, according to paragraph (2):

'The Republic of Chile requests the Arbitrator to decide, to the extent that they relate to the region referred to in paragraph (4) of this Article, the questions referred to in her Notes of 11th December 1967 to Her Britannic Majesty's Government and to the Government of the Argentine Republic and to declare that Picton, Lennox and Nueva Islands, the adjacent islands and islets, as well as the other islands and islets whose entire land surface is situated wholly within the region referred to in paragraph (4) of this Article, belong to the Republic of Chile.'

For the moment the discussion will concentrate on the sovereignty issue with regard to the three islands, but at a later stage it will be necessary to consider the significance of the 'maritime jurisdiction' reference in paragraph (1) (the Argentinian formulation of the issue).

## **The location of the dispute**

The frontier between Argentina and Chile was laid down in the Boundary Treaty of 1881, which has been a fruitful source of disagreement and

international litigation. The provision in issue in this case was Article III which, in the English translation used by the Court,<sup>1</sup> reads as follows:

'In Tierra del Fuego a line shall be drawn, which starting from the point called Cape Espiritu Santo, in parallel 52°40', shall be prolonged to the south along the meridian 68°34" west of Greenwich until it touches Beagle Channel. Tierra del Fuego, divided in this manner, shall be Chilean on the western side and Argentine on the eastern. As for the islands, to the Argentine Republic shall belong Staten Island, the small islands next to it, and the other islands there may be on the Atlantic to the east of Tierra del Fuego and of the eastern coast of Patagonia; and to Chile shall belong all the islands to the south of Beagle Channel up to Cape Horn, and those there may be to the west of Tierra del Fuego.'

The crucial issue was whether the reference to the Beagle Channel meant the largely east-west route running along the southern coast of Tierra del Fuego, or whether it could be taken to mean one or other of the alternative routes between Picton Island and Navarino Island and then either between Navarino and Lennox Islands or between Lennox and Nueva. In other words the dispute centred round the sovereignty over the three main islands of Picton, Nueva and Lennox together with various adjoining islets, although the sovereignty over the island territories within the Channel was also an issue.

#### The relevance of the *uti possidetis* principle

It was not disputed that, prior to the 1881 Treaty, the territorial rights of the parties were governed *prima facie* at least by the *uti possidetis* principle. This principle the Court described as follows (Award, paras 9-10<sup>2</sup>):

'This doctrine—possibly, at least at first, a political tenet rather than a true rule of law—is peculiar to the field of the Spanish-American States whose territories were formerly under the rule of the Spanish Crown,—and even if both the scope and applicability of the doctrine were somewhat uncertain, particularly in such far-distant regions of the continent as are those in issue in the present case, it undoubtedly constituted an important element in the inter-relationships of the continent.

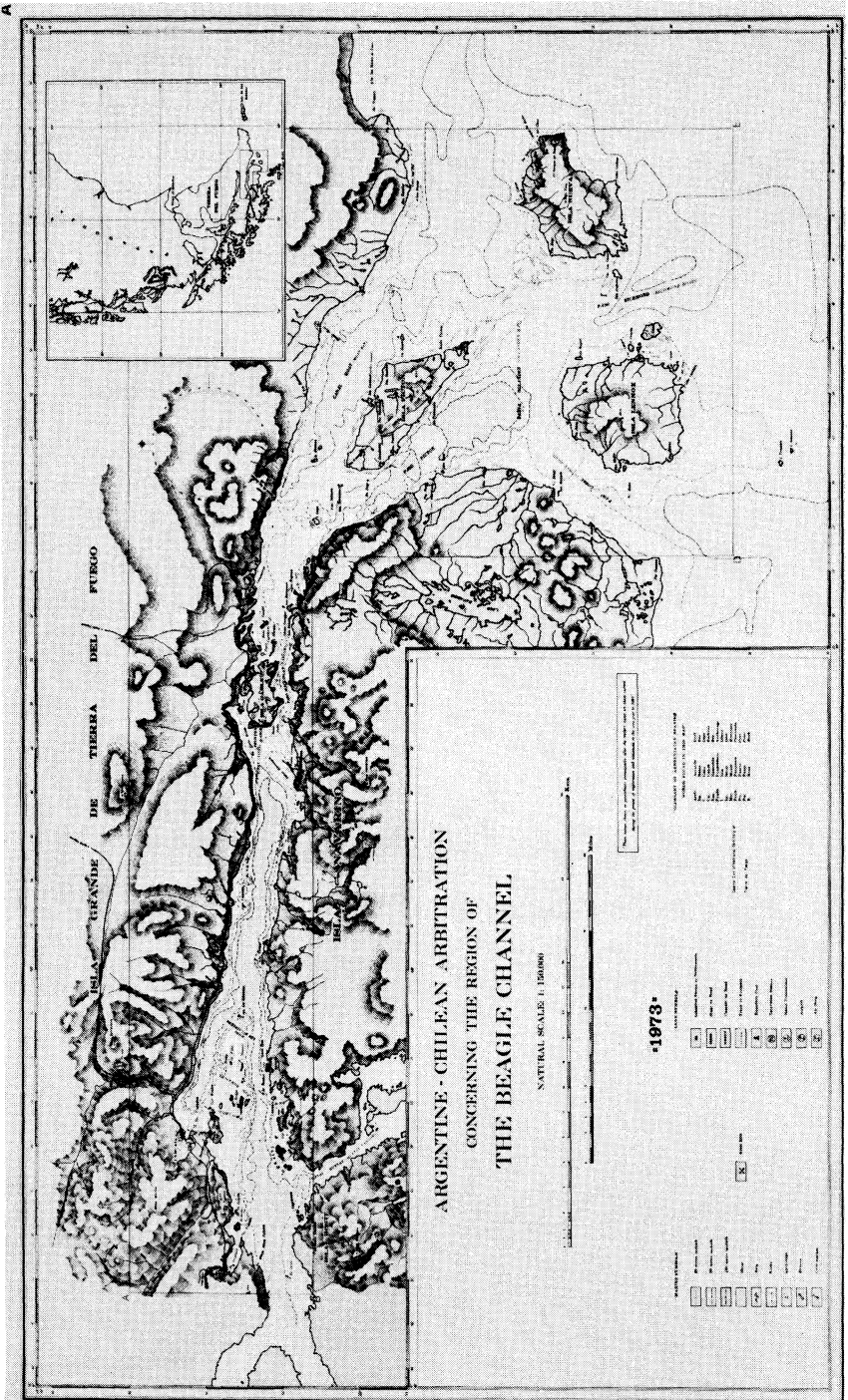
As the Court understands the matter, the doctrine has two main aspects. First, all territory in Spanish-America, however remote or inhospitable, is deemed to have been part of one of the former administrative divisions of Spanish colonial rule (vice-royalties, captaincies-general, etc). Hence there is no territory in Spanish-

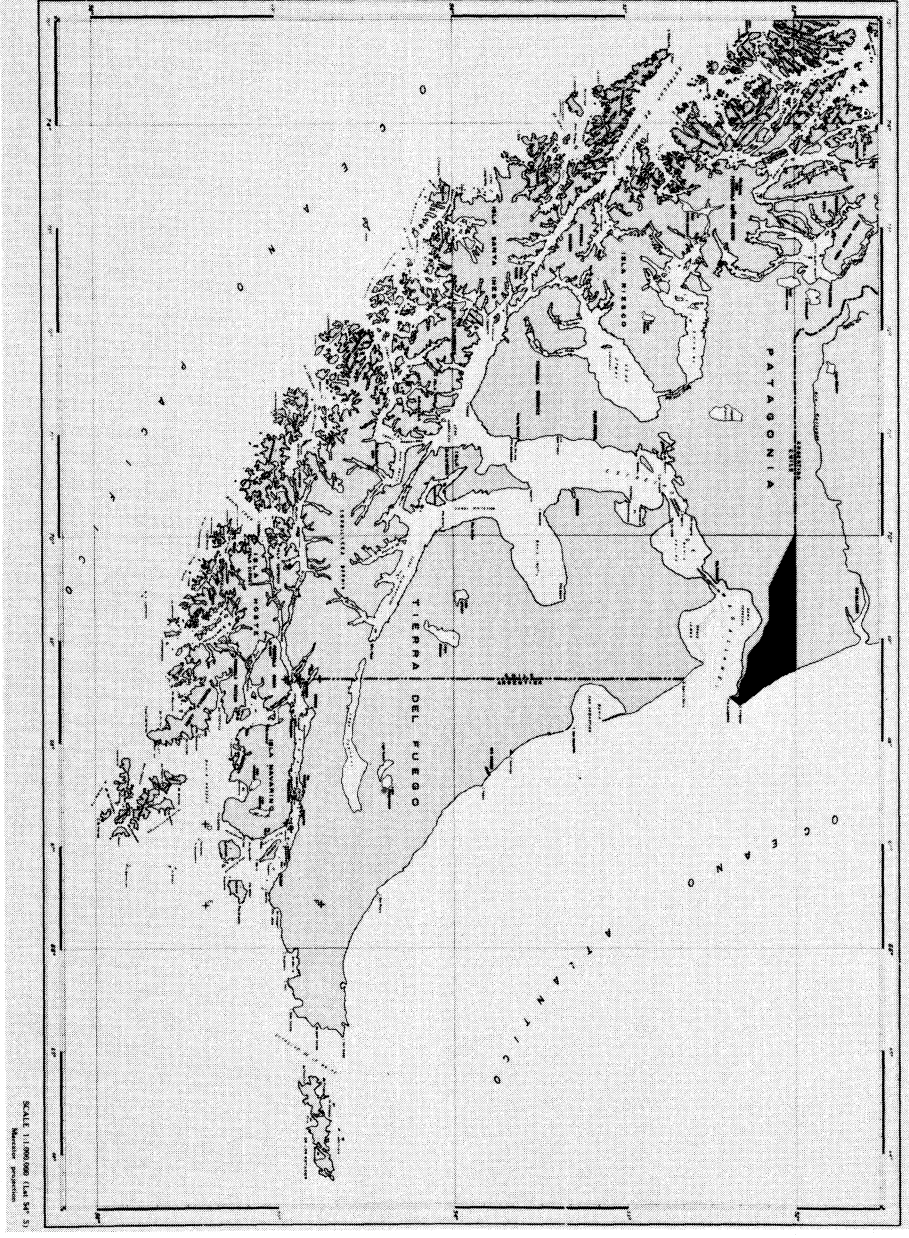
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1. According to fn 5, para 15 of the Judgment:

'Each side has furnished its own English version, and these do not always quite correspond. The Chilean is used here because it was supplied to the Court in a convenient, self-contained form,—but where material differences of translation exist in relevant contexts, these are commented upon in the appropriate place'.

2. The text of the Award appears in (1978) 17 ILM 634. The references to the Court's judgment are given by paragraph number.





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America that has the status of *res nullius* open to an acquisition of title by occupation. Secondly, the title to any given locality is deemed to have become automatically vested in whatever Spanish-American State inherited or took over the former Spanish administrative division in which the locality concerned was situated (*uti possidetis, ita possideatis*,—the full formula). Looked at in another way, *uti possidetis* was a convenient method of establishing the boundaries of the young Spanish-American States on the same basis as those of the old Spanish administrative divisions, except that the latter were themselves often uncertain or ill-defined or, in the less accessible regions, not factually established at all,—or again underwent various changes.'

The Tribunal took the view, however, that *uti possidetis* no longer had any application to the relations of Argentina and Chile. In the first place, the parties had themselves accepted (para 7) that 'their rights in respect of the disputed area, and in particular of the PNL group, are governed exclusively by the Boundary Treaty'. Secondly, the Preamble to the 1881 Treaty specifically referred to the parties' intention of resolving their outstanding boundary differences, and this impression was reinforced by the statement in Article VI that 'the boundary specified in the present settlement shall remain in any case as the immovable limit between the two countries' (para 19). Accordingly, 'the Boundary Treaty of 1881 was intended to provide, and must be taken as constituting, a complete, definitive and final settlement of all territorial questions still outstanding at that time, so that nothing thereafter remained intentionally unallocated, even if detailed demarcations of boundaries on the ground were left over to be carried out later, or particular differences of interpretation might still require to be resolved' (para 7).

The Court was thus substantially accepting the Chilean stand on the relevance of *uti possidetis*, and rejecting the view of Argentina that it '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' (para 21). The particular reason Argentina had in pressing for at least a residual application of *uti possidetis* was its hope of thus gaining recognition for the so-called 'Oceanic' principle. It was claimed that, according to this principle, 'each Party had a sort of primordial or *a priori* right to the whole of—and to anything situated on—in the case of Argentina, the Atlantic coasts and seaboard of the continent, and in the case of Chile the Pacific' (para 22). The first part of Article III of the Boundary Treaty was patently in accord with this assumption in that the principal island of Tierra del Fuego was divided in such a way as to allocate to Argentina the entire eastern part except for the entrance to the Straits of Magellan, which in its entirety belonged to Chile. It followed, according to this line of reasoning, that the remainder of Article III should also be applied in this light in such a way as to bring all the Atlantic islands, including the PNL group, within Argentinian sovereignty (para 28).

### The relevance of Article II

Article I of the Boundary Treaty dealt with the north-south boundary along the Andes as far as the line of latitude 52°S. Article II then went on to provide as follows:

'In the southern part of the Continent, and to the north of the Straits of Magellan, the boundary between the two countries shall be a line which, starting from Point Dungeness, shall be prolonged by land as far as Monte Dinero; from this point it shall continue to the west, following the greatest altitudes of the range of hillocks existing there, until it touches the hill-top of Mount Aymond. From this point the line shall be prolonged up to the intersection of the 70th meridian with the 52nd parallel of latitude, and thence it shall continue to the west coinciding with this latter parallel, as far as the *divortia aquarum* of the Andes. The territories to the north of such a line shall belong to the Argentine Republic, and to Chile those extending to the south of it, without prejudice to what is provided in Article III, respecting Tierra del Fuego and adjacent islands.'

It was argued on behalf of Chile that this provision was itself a provisional allocation of the disputed territory to that State. Admittedly the first sentence dealt only with the area to the north of the Straits of Magellan, but this limitation did not extend to the second and third sentences. Indeed, the 'without prejudice' in the third sentence could only make sense if the line referred to in the third sentence were limited to the line established by the second sentence alone, so that the 'territories . . . extending to the south' of that line were not restricted by the introductory part of the first sentence.

The Court accepted the Chilean view as a general proposition, though the precise effect of Article II considered in this light was dependent upon the extent to which Article III more specifically dealt with the disputed area. The Court was reinforced in its assessment of Article II by what it regarded as the balance of adjustment made by the Treaty settlement. Argentina argued that the Chilean interpretation involved the allocation to Chile of an area out of all proportion to the area to which Argentina became entitled as a result of the Treaty. It was Argentina's view that the only benefit Argentina obtained out of Article II was the small eastern section where its territory was extended south of 52°S nearly to the Straits of Magellan. Accordingly, the last sentence could not be taken as referring to *all* territories to the south of the line, but only to those on the continental mainland.

The premise of this contention the Court rejected. The compromise could only be regarded as excluding Patagonia proper ('by a very great deal the largest area involved in the Treaty settlement' (para 29)) if the title of Argentina was 'so manifestly valid as to admit of no serious question' (ibid). However, this was far from being the case. It did not matter whether Chile's claim to Patagonia proper was 'good or bad, or strong or weak': what did matter was that it was 'sustainable, even if only

as a bargaining . . . counter' (para 31). As the Court went on to explain (ibid):

'Chile at different times claimed various boundaries considerably to the north of the Dungeness-Andes line, Argentina declining successively to accept them,—and the agreement eventually arrived at, which gave Chile nothing north of this line, was the price she had to pay for obtaining in return the exclusive control of the Straits and of the whole Magellanic region, which was her chief desideratum throughout,—just as Argentina's was the definitive recognition of her exclusive title to all of Patagonia except that small part of it that lay south of the Dungeness-Andes line as far as the Straits. This was what Chile conceded by giving up a claim that still had enough vitality and content, at least politically, to make its final abandonment of primary importance to Argentina.'

However, the Court was more influenced by the fact that, whatever Argentina might say, the Treaty did deal with Patagonia proper, and did so in a way that demonstrated its attributive effect. Article II was not confined to the eastern portion of the Dungeness-Andes line but was explicit and unqualified in its reference to the territories 'north of the said line'. Furthermore, the provision made clear that it was not recognising that the territories in question already belonged to Argentina, but was allocating them for the future: the territories 'shall belong to the Argentine Republic' (para 30).

Once the balance of the compromise was recognised, there was nothing unjust about the apparent allocation of territories 'extending to the south of the line' to Chile. Whether the above phrase did include the islands in dispute had still to be decided. Apart from the obvious limitation on this part of Article II in the final 'without prejudice' clause ('without prejudice to what is provided in Article III, respecting Tierra del Fuego and adjacent islands'), Argentina argued that the last sentence was qualified by the opening words of the Article: 'In the southern part of the Continent, and to the north of the Straits of Magellan'. The Court did not accept this meaning of the provision. The opening words were merely designed to define the area through which the boundary line was to run and in no way affected the scope of the territorial allocation envisaged by the Article as a whole.

However, the relationship of Article II with Article III, despite the closing words of the former, raised more difficult issues of interpretation. If the Chilean view of Article II were correct (that the provision allocated all land to the south of the line to Chile, subject of course to the operation of Article III on Tierra del Fuego and the adjacent islands), then all that Article III need make specific provision for was those localities which were attributed to Argentina in derogation from Article II. In fact, however, Article III did make allocations of territory to Chile as well as to Argentina. Either the former allocations were redundant or Article II did not bear the interpretation asserted for it by Chile. If the Argentine approach to Article II were adopted of restricting it to the southern part

of the Continent to the north of the Straits of Magellan, Article III would be fully effective. In response Chile pointed out that this in turn would have the effect of rendering redundant part of Article II: there would be no need for the 'without prejudice' clause if Articles II and III were totally distinct.

The Court expressed the view that 'the rival theses are closely balanced', although the balance seemed 'to tilt somewhat in favour of the Chilean view' (para 49). The reason for this opinion rested (it appears: see para 46) upon its earlier assessment of the balance between the allocation of Patagonia proper to Argentina and, in return, the *prima facie* allocation of the territories to the south of the Dungeness-Andes line to Chile under Article II. However, the Court decided not to reach any definite conclusion on the issue until it had considered other aspects of the case.

### **The operation of Article III**

The first part of Article III, the so-called *Isla Grande* clause, divided *Tierra del Fuego* between the two States by means of a line, 'which starting from the point called *Cape Espiritu Santo*, in parallel  $52^{\circ}40'$ , shall be prolonged to the south along the meridian  $68^{\circ} 34'$  west of Greenwich until it touches *Beagle Channel*.' It would have been open to the parties in their Treaty to have continued this line by some method to the south. However, the second part of Article III, the 'Islands clause', was drafted in a way that appears largely unrelated to the first part:

'As for the islands, to the Argentine Republic shall belong *Staten Island*, the small islands next to it, and the other islands there may be on the Atlantic to the east of *Tierra del Fuego* and of the eastern coast of Patagonia; and to Chile shall belong all the islands to the south of *Beagle Channel* up to *Cape Horn*, and those there may be to the west of *Tierra del Fuego*.'

It was this sentence which was at the heart of the dispute. There was no doubt about the identification of *Staten Island* and the small islands next to it, but the following part was fraught with possible ambiguities. In the first place what was meant by *Tierra del Fuego*? Was it just the *Isla Grande* or did it include the adjoining islands, particularly those lying to the south as far as *Cape Horn*? The islands in dispute lay west of the eastern point of *Isla Grande*, but east of the southerly tip of the archipelago.

Secondly, could it be argued that the expression 'to the east of the eastern coast of Patagonia' ('coasts' in the more correct Argentinian translation) referred to the coasts of the entire southern part of the continent including the archipelago? It could certainly be shown that Patagonia was given that wider meaning in a number of other contexts.

Thirdly, there was the question of identifying the course of the *Beagle Channel* itself. Did it run east-west along the southern coast of *Isla Grande*, or did it pass at the eastern end in a south-easterly direction between some or all of the islands in dispute and *Navarino Island*?



### 1. *Tierra del Fuego*

The Chilean view (para 56) was that the reference to *Tierra del Fuego* in the islands clause must mean the *Isla Grande* because that was the meaning attributed to it elsewhere in the Treaty ('In *Tierra del Fuego* a line shall be drawn;' and again '*Tierra del Fuego* divided in this manner'). Moreover, a majority of maps, even some of Argentinian origin, used the term to refer to the *Isla Grande* alone. The Court expressed the view (para 64):

'The Chilean version, although not . . . entirely free from difficulty, is the more normal and natural on the basis of the actual language of the text. It amounts to this,—that the PNL group does not come within the Argentine attribution because, whether or not it is "on the Atlantic", and whether or not the Atlantic, in the context, means the ocean that washes the southern shores of the continent, the PNL group is not situated "to the east of *Tierra del Fuego*"—ie of the *Isla Grande*; and even if *Tierra del Fuego* should here be regarded as comprising the archipelago, the group is part of the archipelago and not situated east of it. This interpretation is certainly not manifestly incorrect: it is the one that would in principle prevail, unless displaced by very persuasive considerations.'

The Court could not accept that the Argentinian arguments on this issue were persuasive. The suggestion that *Tierra del Fuego* included the whole of the archipelago was not unreasonable, even if it was the less likely interpretation. However, even if it did have that meaning, the phrase 'to the east of *Tierra del Fuego*' would have to be read as 'in the eastern part [or 'on the eastern fringe'] of the archipelago of *Tierra del Fuego*', a most unnatural contortion of the words used (para 65(a)).

### 2. *Patagonia*

The attempt to equate the reference to *Tierra del Fuego* to the whole of the archipelago may have been an error of judgment on the part of Argentina. It was unnecessary in the light of its approach to the term 'Patagonia' in the Islands clause. In the view Argentina presented to the Court, it claimed that the word was used to include the whole southern part of the region south of the east/west Argentina/Chile border to the north of the Straits of Magellan. It was a contention that suffered from the disadvantage of being largely superfluous if the Argentinian interpretation of *Tierra del Fuego* was correct. Furthermore, the Court felt able to dismiss it on the ground that it would require an even more strained reading than would have been required in relation to *Tierra del Fuego*. It would have had to become something like 'in the eastern part . . . of the eastern coasts of Patagonia/*Tierra del Fuego*' (para 65(b)).

The Court's conclusion on this point provided little in its support. It was conceded that Holdich had drawn a map, published by the Royal Geographical Society in 1904, which showed the whole southern region from 140 miles north of the Dungeness-Andes east-west border line as 'Patagonia' (para 58). Nevertheless, the 'phrase "to the east of . . . the

eastern coasts of", though clumsy, and at least concealing a redundancy, is intelligible on the assumption that the Patagonia referred to is the region of Patagonia lying between the Dungeness-Andes line and the Straits of Magellan, for this has not only eastern but western (Pacific) coasts as well. If this is not the Patagonia referred to, then the difficulty would remain that Patagonia would be doing double duty for Tierra del Fuego' (para 65(b)).

With respect, this is not an adequate justification on a crucial issue. In the first place, Holdich, a distinguished geographer who had been one of the arbitrators in the 1902 Award on the Andean boundary, probably knew the topography of the southern region better than any Englishman then or since. In his book, *The Countries of the King's Award* (1904), he described the journeys he had undertaken as a guest of the Argentinian and Chilean navies throughout the region, as far as Cape Horn itself. He was at pains to set out the differences of geographical opinion that had separated the two sides, particularly in relation to the Cordillera of the Andes which had formed the substance of the 1902 Award. However, Holdich was emphatic on the definition of Patagonia. In addition to including in the book a map similar to that published by the Royal Geographical Society, he wrote (p 43) of the area south of the 52°S line of latitude:

'This is the region of the Patagonian Andes, Patagonia comprising all the southern extremity of South America south of the River Negro . . .'

The Court dismissed the Society's map with the words 'even as late as 1904' (para 58), suggesting some form of anachronistic aberration. But, as has already been pointed out, Holdich's account was based upon close contact over a period of months with Argentinian and Chilean naval and governmental officials.<sup>3</sup>

One accepts of course that the vital question was 'what did "Patagonia" mean in the Islands clause of the Treaty?' (para 58). Nevertheless, if one takes the text itself, the more extensive meaning of Patagonia has much to commend it. The expression 'to the east . . . of the eastern coasts of Patagonia' only makes sense if Patagonia has a number of *eastern* (not western as would be required by the Court's reference to Pacific coasts in the quotation given above) coasts. The importance of the plural is signified by the mistranslation of '*costas*' in the Chilean English version as the singular 'coast'. The 'eastern coasts' suggests strongly a series of independent or unconnected coastlines which could exist most obviously in the islands of the Fuegian archipelago. The Court felt able to reach an opposite conclusion, observing that the 'expressions "coasts" and "the eastern coasts of"' suggest something in the nature, more or less, of

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3. It should also be mentioned that in the communication of 20 December 1881 by the British Minister to the Foreign Office with which was enclosed a copy of the Irigoyen map (matters greatly relied upon by Chile—Chilean Memorial, Annex No 47—and by the Court—see para 122), the whole region was referred to as 'Patagonia, as far as Rio Negro to the North, and Tierra del Fuego with the Islands to the South'.

continuous coastlines, such as those of a mainland or major island territory. These notions are inappropriate and hard to apply in the case of an archipelago with small scattered units separated by considerable stretches of sea' (para 65(c)). This deduction verges on the absurd. The use of the singular 'coast' would undoubtedly have suggested the continuous coastline; for the plural to do likewise is an exercise in logic that must appeal solely to the judges who gave utterance to it.

The only substantial reason to support the Court's conclusion is that the islands to be allocated can hardly be east of themselves. Hence Patagonia should have some identifiable 'core' in order to have islands to the east of it. The use of 'coasts' however makes that core impossible to identify and the meaning of the clause equally impossible to ascertain. In the circumstances it is difficult to avoid the impression that the Court's adoption of one meaning rather than another was entirely arbitrary.

The alternative approach to that adopted by the Court makes even greater sense if one does not also attempt to give 'Tierra del Fuego' a similarly extended meaning. The reference to Tierra del Fuego in the clause, 'the other islands there may be on the Atlantic to the east of Tierra del Fuego and of the eastern coasts of Patagonia', reads acceptably enough as a particular aspect of the wider reference to Patagonian coasts which follows.

This reading would have the advantage of fitting in more readily with the geographical division that seems to exist in the three principal articles of the Treaty, in which Article III is confined in its scope to the extreme south of the continent. This view of the Treaty (strongly advocated by the Argentinians) was not accepted by the Court (para 26):

'At the outset the Court observes that the parties do not agree on the way the three territorial articles are related *inter-se*. According to Argentina there is no link between them except that they follow in sequence. Each article is intended to apply to a predetermined sector to the exclusion of any other, and each sector is to be determined by one article and one only. Each article is, so to speak, autonomous. Thus Argentina claims that the geographic scope of Article II in the north must necessarily stop at the latitude to which the effects of Article I extend southwards; and to the south, the scope of the same Article must stop where the effects of Article III begin. In contrast, Chile claims that the Treaty must be viewed as an integrated or organic whole, and that the geographic scope of the three articles cannot be fully understood without reference to the compromise which conditioned their field of application. Thus Article II cannot be understood without reference to the provisions of Article I, nor can it be understood without reference to Article III. This view appears to the Court to be the correct one.'

One can easily accept the notion that the provisions need to be regarded in conjunction for the purposes of interpretation without rejecting the proposition that the three articles deal principally with different geographical regions. It would seem illogical for Article III to deal with the

dividing line in Tierra del Fuego and the various island territories of Staten Island and Tierra del Fuego (if any) and, in the same clause as the latter, take a geographical leap to the north to deal with islands off the coast of territories allocated under Articles I and II.

One final point worth making is that the wording of Article III is inconsistent with the Court's reading of the Treaty as a final and definitive settlement. Even if one does not accept the Argentinian version that the implementation of the Treaty depended upon subsequent arrangements, either expressly under the Treaty itself (the Experts required by Article IV to demarcate the boundary lines laid down in Articles II and III; or the reference of any 'question that may unhappily arise . . . to the decision of a friendly Power' under Article VI) or by later agreement (as in the case of the 1893 Protocol), it is arguable that the Islands clause is not capable of immediate application. The use of the expression 'the other islands there may be' could mean either 'islands not yet discovered', or 'islands that fall into the category described herein as belonging to Argentina by reason of their being in the Atlantic'. The use of the term 'islands' as opposed to 'small islands' (the expression used immediately before in relation to the islands near Staten Island) makes it unlikely that the Treaty was referring to undiscovered territories because only very small islands might have escaped detection by 1881. The Court avoided accepting the alternative Argentinian thesis in the following pronouncement (para 65 (d)):

'The expression "the other" (or "remaining") islands . . . , coming as it does immediately after the attribution of Staten Island and neighbouring islets, coupled with the rather insistent indications of an eastern orientation, suggests—at least as the initial idea to which the mind is directed—the notion of something in the same general direction as Staten Island, and not something in the quite different direction of the PNL Group.'

One can only suppose that the excessive caution with which this statement was worded is a measure of the Court's embarrassment that such an inference could be drawn. The real reason for adopting such a view, though not one that the Court was prepared to admit, was that it fitted conveniently into its later deduction that, when the Argentinians were claiming their inviolable sovereignty over the Atlantic coastline, it was a coastline which they envisaged as stretching no further southwards than Staten Island.<sup>4</sup>

### 3. *The Beagle Channel*

The Court assumed (para 80) that the Channel divided into two arms at its eastern end so that it was necessary to determine which arm constituted the Channel for the purposes of Article III. This determination was not possible on the basis of their physical characteristics so that the solution depended on the intended meaning contained in the Treaty itself.

However an argument based upon the east of the Patagonian coast

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4. See below p 379.

approach advanced above would have had particular significance in the context of the Court's rejection of the idea that the Beagle Channel did not extend as far east as the PNL islands. The Court had this to say (para 81):

'It is evident that the difficulty caused by the existence of the two arms could, in a certain sense, be at least avoided if the Channel proper, or as such, were regarded as stopping just before it divides at Picton Island or, if looking westwards, as only starting there, the two arms constituting simply entrances or exits,—and some colour is lent to this idea by the number of maps that show the words "Beagle Channel" placed so as to finish before Picton. But suppose this were a legitimate process, it would ultimately solve nothing. It would by no means with absolute certainty take the islands outside all possibility of being regarded as coming within Chile's attribution (depending on the interpretation given to expression "to the south of"),—but even if it did, they would not thereby necessarily become part of Argentina's, since all the difficulties attendant upon that, which have already been noticed, would remain. It might indeed be easier to view them as islands "on the Atlantic" (though again not as regards Picton), rather than as appurtenant to the Channel . . . , but they would still not be situated "to the east of" Tierra del Fuego or Patagonia, however these appellations were interpreted . . . The final result would thus be that the group would emerge as not definitively attributed to either Party—a result that certainly could never have been intended.'

If the length of the Channel intended by the Treaty was dependent upon whether Article III otherwise left the PNL Group unallocated the proposition that, on an alternative reading, the islands would fall east of the Patagonia coast line and therefore under Argentinian sovereignty, would obviously assume considerable significance.

In any case the Court decided that there was no ground for deeming that the Channel terminated west of Picton Island. The western end was divided into two arms by the Isla Gordon (both being regarded as part of the Channel); and there was no reason why a similar view should not be taken of the eastern end, the only differences being 'that the eastern arms are somewhat broader and are divided by the presence of three islands instead of one' (para 82). The Court rejected the possibility that the Channel should pass between Nueva and Lennox Islands. Although it gave no reason, juridical or geographical, for reaching this conclusion it was presumably impressed by the fact that neither party had argued in favour of such an alternative. However, it would certainly have been a more reasonable alternative than the Lennox/Navarino construction which the Court for some reason treated as the Argentinian view.

When it came to considering which arm constituted 'the Beagle Channel' for the purposes of the Treaty, the Court pointed out that the text gave no express indication of which was intended. Indeed, it was reasonable to suppose that, from the total absence of discussion of the

matter in the protracted negotiations that preceded the Treaty, the identification of the Channel must have been regarded as self-evident (para 87).

If it was self-evident, one would have supposed that there would have been contemporary maps which demonstrated a generally accepted passage as the Channel. However the information supplied to the Court showed a good deal of confusion about the eastern end of the Channel. For example in 1918 when it first seemed likely that Britain would be called upon to arbitrate the dispute, an Admiralty Memorandum was prepared in which the northern Channel was stated to be the correct one, although it was admitted 'at the present moment the Admiralty Charts and Sailing Directions have, in some respects, departed from the definition originally given to the Beagle Channel by King and Fitzroy' (quoted para 89(a)). It was stated by the Foreign Office, however, that the Foreign Secretary 'would deprecate any change in charts and sailing directions at the present moment' (ibid).

The reference to the Fitzroy definition is surprising because in 1896, in reply to an official Argentinian enquiry, the British Admiralty responded that it did not find that Captain Fitzroy (commander of HMS 'Beagle' which first charted the Channel in 1830) 'ever strictly defined the course and limits of the Beagle Channel nor is there anything to show which of the arms passing by Picton Island he considered to be the principal one' (cited para 88). The accuracy of this pronouncement is borne out by the contemporaneous version of the Admiralty Chart covering the disputed area, which the Court referred to as 'the only map which, so it seemed to be assumed, the negotiators must have taken account of for *Beagle Channel purposes*' (para 90; emphasis in the original). The Court described the lack of precision of the map in the following passage in which it also expressed the view that the map was of no support to the Argentinian case (para 90):

'This chart and its forebears, going back to the ancestor chart of Fitzroy . . . , and appearing frequently, in various editions and formats, in the cartography furnished by both sides, was much relied upon by Argentina as tending to show, by a process of negative inference, that the Channel, after the western point of Picton Island, proceeded by the southern arm. This inference was drawn from the fact that whereas the two *western* arms at Isla Gordon were duly designated as the north-west and south-west arms, the eastern arm north of Picton was designated "Moat Bay"—(it does contain a Moat Bay)—while the southern arm, in the section passing between Picton and Navarino, was given no appellation at all. The inference was therefore said to be that this unnamed section must have been regarded as being the true course of the Beagle Channel, and the other (called Moat Bay) not. The Court fully appreciates the point, but does not think it possible to draw any firm conclusion on such an ephemeral basis. The words "Beagle Channel" do appear on the chart, but are confined to the central section, west not only of Picton

but even of Gable Island,—and it surely could never be claimed that because the lettering of these words does not reach beyond Gable, therefore the section Gable-Picton is not Beagle Channel. Again, to deduce that the negotiators must have regarded the section passing between Picton and Navarino as being the Channel merely because the chart did *not* say so, and the words “Moat Bay” are inscribed in the northern arm appears to the court to be far-fetched and too conjectural to be acceptable.’

With respect, the Argentinian case was stronger than this extract suggests. The reference to Moat Bay was much more important if one takes account of the fact that Fitzroy’s map also mentioned Oglander Bay. This was the designation given to the open area of water between Navarino, Picton and Lennox and was not a Bay in the generally accepted sense. It marked the end of the Beagle Channel’s south-westerly course, in the same way as Moat Bay marked the end of its easterly course, ie, in the waters beyond the Bécasses (then Woodcock) Islands between Picton and Isla Grande. Moreover Fitzroy expressly stated that to ‘the north of Lennox Island is the eastern opening of the Beagle Channel’.<sup>5</sup> Finally, if the map had been linked in the judgment to the uncertainties referred to by the Admiralty in the communication quoted from para 88(a), the Court could not so lightly have dismissed the argument that the eastern end of the Channel was not sufficiently clear to have been included in the Treaty reference to ‘the Beagle Channel’. Moreover, there is an alternative possibility, namely that the Channel came no further east than the *northerly* end of Picton Island opposite the Bécasses Islands. A number of contemporary records, relied upon by Chile in support of other matters, lend weight to this thesis. For example, Lt Martin, the Argentinian Assistant to the Boundary Sub-Commission in Tierra del Fuego, wrote to the Argentinian Expert in May 1894,<sup>6</sup> in terms which appeared to favour the Chilean claims. However, on this specific issue, it is interesting to note that, having commented that Nueva Island was ‘further to the south than the direction of the Beagle Channel’ (ie, it was not to the south of the actual Channel itself), he went on to state that Picton Island was in ‘the very mouth of the Channel . . . right in its eastern mouth.’

This alternative theory that the Beagle Channel terminated at Picton Island is also borne out by an entry of Captain Fitzroy when he first charted the Channel. Appendix B of the Chilean Counter-Memorial employed the extract to refute the Argentinian claim that the Channel turned sharply south at this point. In fact, it seems to support the idea that the Channel went no further east. Fitzroy’s words were:

‘This singular canal like passage is almost straight and of mostly a uniform width . . . for one hundred and twenty miles.’

Furthermore, in the passage mentioned above in which Fitzroy referred to the eastern opening of the Channel being north of Lennox, the text

5. Cited Argentinian Memorial, Chap II, para 42.

6. Chilean Annex, No 362.

continued by stating that the Channel 'runs one hundred and twenty miles, in nearly a direct line between ranges of high mountains'.<sup>7</sup>

Such a general description as 'north of Lennox Island' could equally apply to the northern end of Picton as to its southern end. In any case, it can hardly be denied that, once the coast of Navarino Island turned away to the south-east, the 'channel' ceased to show that uniformity of appearance (*a fortiori* where Picton Island takes a similar course along its eastern coastline).

One additional point worth noticing in this context is that of identifying the terminal points of Fitzroy's 120 miles. As the Argentinian Counter-Memorial pointed out,<sup>8</sup> 'if the end of the South-West Arm be taken as the starting point, the Channel would be 117 miles to the line joining the southern extremity of Picton and the eastern extremity of Navarino; 120 miles to a point north of Lennox in Oglander Bay, but 125 miles if it was regarded as ending between Cape San Pio and Point Waller on Nueva Island.'

Nevertheless the Court reached the position that the evidence available from outside the text of the Treaty provided no 'really certain result', although 'it may be thought that the weight of the evidence . . . tends to favour the northern arm' (para 91). However, it was within the text itself that the Court found a number of factors 'pointing to the northern arm as being the "Treaty" arm.'

In the first place by 'a process of simple elimination' this interpretation could produce 'a complete allocation of all the territories and islands in dispute' (para 92). This argument is acceptable enough if the alternative had been that sovereignty with respect to the PNL group would have been left in limbo. However, 'a total failure of the Treaty in respect of the PNL group' was not the only alternative, as has already been pointed out, quite apart from Argentina's attempt to rely upon the Oceanic principle.

Secondly, the Court relied upon 'the very terms of the Chilean attribution'; by this it meant that the use of 'south' of the Beagle Channel suggested that the boundary line envisaged by the Treaty must run east-west. It followed, in the Court's view, that 'the negotiators of the Treaty, in specifying a "to the south of" criterion, cannot possibly have contemplated a Channel which, over an important stretch of its course, would depart from the direction in respect of which that criterion was relevant and efficacious, suddenly to assume one that ended by pointing almost the opposite way' (para 93).

'Finally and principally', to use its own words, the Court referred once more to a point it had made already,—the negotiators of the Treaty had carefully defined (a premise hardly borne out by the historical record) all the other boundaries, so that it was reasonable to suppose they believed they had done the same by employing the line of the Beagle Channel. By resorting to a perpendicular line on the map as far as the Beagle Channel and referring to the Isla Grande as being 'divided in this manner' so that

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7. Cited Argentinian Memorial, Chap II, para 32.

8. Chap I, para 29.



it was Chilean on the western side and Argentinian on the eastern, they had accomplished a complete delimitation. From this the Court made the following deduction (para 94): 'this automatically had the effect of making the south shore of the Isla Grande, from Cape Buen Suceso near Staten Island, back westwards to Point X on the Beagle Channel (with the appurtenant waters), the southern limit of Argentina's allocation under the Treaty, except of course as regards any islands south of that limit that might be attributed to her under the Islands clause of Article III.' To put it another way (para 95):

'It was this entire southern shore (which comprises, but is not co-terminous with, the north shore of the Beagle Channel) that was the base line, the Channel being mentioned because it was the most prominent feature of the locality, and the terminal to which the Isla Grande perpendicular descended at its southern end. The inevitable effect of this, however, was that the boundary line of the south shore of the Isla Grande not only encompassed the Beagle Channel from Point X eastwards, but coincided absolutely with the north shore of the Channel, *and with the north shore of the northern arm of the Channel*, up to the latter's terminating point.'

On this basis, the Court concluded (para 96) that it was 'almost mandatory, or at least a matter of compelling probability' that the negotiators

'could only have seen the Beagle Channel as continuing past Picton by its northern arm, and to consider it as scarcely conceivable that, without comment, they can have intended a Channel that would turn away from the south shore of the Isla Grande at Picton Island, and proceed in quite a different direction, pointing ultimately towards Cape Horn.'

It need hardly be said that the same reasoning does not destroy the alternative suggestion based upon the proposition that, at the time the Treaty was made, the Beagle Channel was not regarded as extending further east than the point where both 'arms' joined to the west of Picton Island. This would have provided a basis for arguing that the PNL group, not being to the south of the Channel, was attributable to Argentina because of the 'eastern principle' already described.

Alternatively, was it not possible to regard the southerly arm of the Channel as passing between Nueva and Lennox? While this theory would have left Lennox to the south of the Channel, it would at least have preserved an Argentinian claim to Picton and Nueva. At one time there was evidence to suggest that this had been the Argentinian approach. In the Martin letter which has already been mentioned (above, p 346), there was a reference to the possibility that the Channel commenced to the east of Picton Island and in fact passed both sides of it. Indeed as late as 1963 in a book entitled *La Controversia sobre el Canal Beagle*, Admiral Ernesto Basile of Argentina admitted<sup>9</sup> that a number of islands, though east of Cape Horn, being south of the Beagle Channel, belonged to Chile.

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9. Quoted in English, Chilean Counter-Memorial, Chap IV, para 51, fn 1.

The list included Lennox, but did not mention Picton or Nueva. It would seem that the author regarded the Beagle Channel as passing between Lennox and Nueva, and not between Lennox and Navarino.

In any case, the Court's suggestion that the Argentinian case rested on the Channel passing ultimately between Lennox and Navarino, and its slight tone of ridicule about the Channel 'pointing ultimately in the direction of Cape Horn', are misleading. The Argentinian case<sup>10</sup> was that the Channel mouth lay to the north of Lennox. This view had direct support from the Sailing Directions prepared by Fitzroy and indirect support from the fact that the waters between Picton and Navarino had been named on Fitzroy's chart 'Moat Bay' while the expanse of water between Navarino, Picton and Lennox had been marked 'Oglander Bay'.<sup>11</sup>

In other words, if there was a northern entrance to the Channel it was between Picton and Isla Grande at the *western* end, while the southern entrance was where Oglander Bay gave way to the passage between Picton and Navarino. On this approach, it could be argued that Lennox was to the south of the (entrance to the) Channel and presumably this was the reason for the conclusion reached by Admiral Basilica. However, Argentina based its claim to Lennox on the ground that, not being to the south of, but only at the entrance to, the Channel, it was attributable to Argentina by virtue of the fact that it was to the east of Cape Horn in the Atlantic Ocean.

Be that as it may, the Court re-inforced its conclusion by reference to a number of incidental matters. For example, it was pointed out that in the period between 1848 and 1901, it was the northern outlet which was preponderantly used. Moreover, a British Admiralty Memorandum of 1915 had observed that the southern arm had been 'much less surveyed and charted' and appeared to be 'distinctly more dangerous and less convenient' than the northern arm (para 97(i)). However, here again the important issue is whether the ships that sailed there regarded themselves as being in the Beagle Channel as soon as they entered the waters between Isla Grande and Nueva Island. All that the Court could refer to was an Argentinian report of 1885 in which the Governor of Tierra del Fuego had mentioned Banner Cove as a Chilean port, Banner Cove being on Picton Island in the northern arm of the Channel (para 97 (iii)). These facts can hardly be conclusive in view of the Court's earlier admission that the extrinsic evidence provided no clear indication of the meaning of the Beagle Channel reference in Article III.

The Court then dealt with a number of possible objections to its approach. It had been argued that such a conclusion 'involved a gratuitous and unwarranted substitution for the boundary contemplated by the Treaty (said to be the Beagle Channel) of a different boundary, the Isla Grande shore' (para 98(b)). This contention the Court regarded as 'com-

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10. See Memorial, Chap VI, para 39; Counter-Memorial, Chap I, paras 2-6; Reply, para 60.

11. Argentinian Memorial, Chap VI, para 28.

pletely fallacious'. The Beagle Channel was not, as such, 'a boundary', but merely a reference line for the attribution of the islands lying to the south of it. The Court went on (*ibid*):

'The notion of the Channel as a boundary must have come about largely because of the contingency that what the Court thinks is the real boundary, namely the Isla Grande shore and its appurtenant waters, happens to coincide over about half of its length in the section Buen Suceso to Point X, with such a prominent geographical feature as is constituted by the Channel. But it is with the northern shore and northern arm that it so coincides. The course of the Channel for the purposes of the Treaty being thus evident, no doubt the Channel itself—not originally seen as a "boundary"—became regarded as such,—but that is another matter: it cannot change the fact that, in contrast to what the negotiators did under the other territorial provisions of the Treaty, which necessitated the definition or drawing of boundaries that were artificial or not self-evident, these same negotiators, in this region, drew no lines and specified no boundaries because, as the court sees it, these were not required. The boundaries of Argentina's Isla Grande attribution,—namely the perpendicular, the Atlantic coast-line, and the line of the south shore to Point X, were self-evident. The rest was done by specific attributions. The Beagle Channel, seen by the negotiators—for the reasons already explained—as proceeding by way of the northern arm to Cape San Pio, left the PNL group to the south of it and therefore within Chile's attribution.'

Despite its superficial attraction, this pronouncement is open to criticism. Treaties are often entered into which appear to provide a definitive solution to a range of issues. Later examination in the light of new problems will reveal areas of uncertainty of which the parties, despite protestations to the contrary, might well have been aware at the time of the negotiations. The 1881 Treaty was no exception in this regard. By failing to establish a fixed southern boundary line, the Treaty left unsettled the question of sovereignty over islands actually *within* the Channel. Hence it is not an entirely convincing argument that the PNL group *must* have been allocated under the provisions of the Treaty when other islands (at least on the approach adopted by the Court<sup>12</sup>) could only be designated Chilean or Argentinian by the operation of principles of law operating outside the wording of the Treaty itself.

However, this point apart, the passage quoted above is open to the objection that it is not consistent with the following sub-paragraph. In answer to the question why 'the Chilean attribution did not simply take the form of specifying "all the islands to the south of the Isla Grande (or of Tierra del Fuego)"', the Court stated that 'this was not done because, unless qualified in some detail, it would have resulted in the attribution to Chile not merely of the islands south of the Channel but of the whole Channel itself . . . Chile was only intended to have the south shore, with

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12. See below, p 351.

appurtenant waters, in the section between Point X and Cape San Pio or Punta Jesse, Argentina having the north shore, with appurtenant waters' (para 98(c)).

This is perhaps the most difficult aspect of the Court's judgment. It treated the Channel as a form of boundary, but refused to accept the logical consequences of such a proposition (there is no suggestion, for example, that the islands in the Channel should be held in common by the two States). On the other hand, it was equally emphatic that the islands in the Channel could not be regarded as unallocated, a possibility that might have let in some principle based upon *uti possidetis*. Nevertheless it is clear that these islands do not fit comfortably into the Treaty allocations. They are not

- (1) Chilean by virtue of the Islands clause because they are not *south* of, but *in*, the Beagle Channel;
- (2) nor are they east (or west) of Tierra del Fuego;
- (3) nor are they in any obvious way subject to Article II, ie, belonging to Chile by virtue of the fact that they are territories to the south of the east/west boundary line through Patagonia.

Looked at in this perspective, the exclusion of Chilean sovereignty under (1) and the non-applicability of (2) might suggest that the islands should be Argentinian. Moreover possibility (3) was rejected as a basis of avoiding such a conclusion. The Court said (para 107) that, whatever might be the general effect of Article II,

'the Court regards the Chilean view as unacceptable in the context of the small islands situated within the Beagle Channel itself,—because applied in that context it would have the effect of allocating to Chile not only these islands, but the Channel as such, and all its waters. This would be incompatible with the specific attribution to Argentina, under the first part of Article III of the Treaty, of the whole north shore of the Channel from Cape San Pio to Point X, as part of the south shore of the eastern half of the Isla Grande that went to Argentina according to that provision;—for the Court considers it as amounting to an overriding general principle of law that, in the absence of express provision to the contrary, an attribution of territory must *ipso facto* carry with it the waters appurtenant to the territory attributed; and therefore, on the Channel, those extending up to some sort of median line'.

It was in this reference to a median line that the Court saw a means of avoiding the unpalatable consequences of the Chilean view, and also, although the issue was not raised, an allocation to Argentina on the ground that the islands were not south of the Channel. The Court's approach was tantamount to regarding the islands in the Channel as subject to allocation under the first part of Article III (ie, as appendages of the adjacent coast). Not only does this come close to treating the Channel as a boundary, it also amounts to a rewriting of the text of the Islands clause. The Court is saying that the operation of the first part of Article III requires the Islands clause to be read as allocating (to Chile)

not the islands to the south of the Beagle Channel, but those to the south of the median line of the Channel (denoting the main waterway). The passage in the judgment (para 108) justifying this reading of the provision relied on a combination of median line and main waterway as an appropriate criterion:

'An obvious principle of appurtenance required that accessory and minor formations not specifically allocated, should be deemed so to have been by implication, together with the larger pieces of territory to which they were immediately appurtenant. Combined with this, however, was a criterion of the main waterway, which has nothing to do with appurtenance as such, but may provide a basis of selection in the case of islands in mid-stream.'

Such a basis for decision, however, can only be ascribed to a general consent of the parties. At least the Court was able to rely upon the fact that both parties had provided maps giving their version of the boundary. Although the lines in the respective maps differed, along the main part of the Beagle Channel there was no doubt that they both had relied upon some such principle in dividing the waters (and island territories) between them. While this might have been reasonable enough in the main Channel as far east as Picton Island (indeed this was, naturally enough, the limit of Argentinian acceptance of such a line: thence Argentina's map was based upon the south-western arm of the Channel), but from there on other factors (particularly the so-called 'Atlantic principle'<sup>13</sup>) should have come into play. The real difficulty, as will then be discussed, is that the area of territory covered by the submission to arbitration (see Art. I(4) of the Arbitration Agreement) extended barely further east than Nueva Island.<sup>14</sup> Hence, once the Court had decided that the northern arm constituted part of the Channel for the purposes of the Treaty, the wider ramifications of the territorial allocation beyond the Channel fell outside its terms of reference.

### **Subsequent Events**

On the basis of the evidence available of the circumstances leading to the formation of the Treaty, the Court had concluded that there was nothing pointing definitively to the view of one side or the other. Even on the wording of the Treaty itself, the Court's decision in favour of Chile is open to doubt. It involved some gloss on the terminology used. In addition on a number of issues alternative interpretations could plausibly have been adopted that would have been much more favourable to the Argentinian case.

However, the most substantial support for the Chilean case came from events immediately after the Treaty was made. The parties were prepared to accept that interpretation of that Treaty should be based on 'the principles now enshrined in Articles 31-33 of the Vienna Convention of 1969 on the Law of the Treaties' (para 7 (d) (i)), which the Court later

13. Considered below p 374.

14. See further below, p 382.

referred to as 'the traditional canons of treaty interpretation' (para 15). It could well be argued that the formulation of the principles in the Convention did involve some shifts in emphasis from the traditional rules. The parties, however, obviously regarded whatever differences might have existed as immaterial.

Nevertheless the point needs to be made that the text of the Convention is far from helpful when it comes to deal with subsequent events. McNair in *The Law of Treaties* (1961) dealt consecutively with preparatory work and subsequent practice and said of the latter (at p 424) that

'when there is doubt as to the meaning of a provision or an expression contained in a treaty, the relevant conduct of the contracting parties after the conclusion of the treaty (sometimes called "practical construction") has a high probative value as to the intention of the parties at the time of its conclusion.'

All that the Vienna Convention expressly states (Article 31.3) is that there 'shall be taken into account, together with the context. . . (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation'. For conduct falling short of what is necessary to establish such an agreement, presumably Article 32 is applicable:

'Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.'

Despite the uncertainty arising from the failure of this latter provision to specify subsequent practice as a 'supplementary means of interpretation', it is abundantly clear that it is a powerful influence on treaty interpretation, and was recognised as such at the time of the 1881 Treaty.

In the *Chamizal Arbitration*,<sup>15</sup> the tract of land in dispute had been formed by the southward movement of the Rio Grande since 1852. As this had occurred, the American city of El Paso had extended onto the new land thus formed, while the Mexican city of Juarez suffered a corresponding loss of territory. By treaties of 1848 and 1853 the Rio Grande had been designated as the boundary in this particular sector. Mexico relied upon wording in both treaties suggesting, it was alleged, that the boundary line was intended to be fixed and to remain unaffected by erosion and accretion. The Tribunal rejected this argument on the ground that relations between the parties in the period 1848-53 showed that changes in the river had taken place and the effect of this on the boundary line had been recognised. In order to support its view of the two treaties, Mexico had found it necessary to rely upon the principle of non-retroactivity of treaties because Article I of a later (1884) treaty had laid down

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15. (1911) 11 UNRIAA 309.

that the river itself should constitute the boundary. The provision in question read:

'The dividing line shall forever be that described in the aforesaid [1848] treaty and follow the centre of the normal channel of the rivers named, notwithstanding any alterations in the banks or in the course of these rivers, provided that such alterations be affected by natural causes through the slow and gradual erosion and deposit of alluvium and not by the abandonment of an existing river bed and the opening of a new one.'

Obviously there was a good deal of authority to support the non-retroactivity of treaties, but the Tribunal held that the principle was not applicable to the present case. In the Tribunal's own words,<sup>16</sup> the 'internal evidence contained in the convention of 1884 appears to be sufficient to show an intention to apply the rules laid down for the determination of difficulties which might arise through the changes in the Rio Grande, whether these changes had occurred prior to or after the convention, and they appear to have been intended to modify the rules for the interpretation of the previous treaties of 1848 and 1853 which had formed the subject of diplomatic correspondence between the parties'.

However, what is important in the context of the present discussion is the Tribunal's ready acceptance of the conduct of the parties as a relevant factor in determining their intentions. 'If any doubt could be entertained', the Tribunal said,<sup>17</sup> 'as to the intention of the parties in making this Convention, it would disappear upon a consideration of the uniform and consistent manner in which it was subsequently declared by the two Governments to apply to past as well as future changes in the river'. After an examination of the practice of the States concerned, the Tribunal concluded:<sup>18</sup>

'Thus in all areas dealt with by the two Governments after the convention of 1884 referring to river changes occurring prior to that date, the provisions of that convention are invariably and consistently applied. On the whole it appears to be impossible to come to any other conclusion than that the two nations have, by their subsequent treaties and their consistent course of conduct in connection with all cases arising thereunder, put such an authoritative interpretation upon the language of the treaties of 1848 and 1853 as to preclude them from now contending that the fluvial portion of the boundary created by those treaties is a fixed line boundary.'

The Court in the *Beagle Channel* arbitration considered the post-1881 practice of the States under the general heading of 'Corroborative or confirmatory incidents and material' and three sub-headings: 'The immediate post-Treaty period'; 'The cartography of the case'; and 'Acts of jurisdiction considered as confirmatory or corroborative evidence'. For

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16. At p 325.

17. Ibid.

18. At p 328.

the purposes of this paper, however, the only categories that will be used will be 'Maps' and 'Other examples of State practice'.

### 1. Maps

The Court commented on the fact that the parties had tabled more than 400 maps. Until fairly recently maps had been treated with a good deal of caution by international tribunals, although the International Court had 'manifested a greater disposition to treat map evidence on its merits' (para 137).<sup>19</sup> In the present case, the Court of Arbitration pointed out, 'it is not a matter of setting up one or more maps in opposition to certain Treaty attributions or boundary definitions, but of the elucidation of the latter,—in which task map evidence may be of assistance' (ibid).

In the period immediately after the 1881 Treaty was made, the Court was able to point to a number of striking events which it regarded as supporting the Chilean cause. In the first place the British Foreign Office had been given some form of statement of the terms of the Treaty by the Argentine Minister in London (para 118). The contents of the communication were passed on to the Admiralty with a request that a map should be prepared showing the new boundaries on the basis of the information provided. The map which was produced showed the boundary as running along the south shore of the Isla Grande and the words Beagle Channel indicating the northern and not the southern arm (para 120).

Argentina argued that the British map was based on incorrect information and was not therefore of any value as evidence. This view the Court did not accept. A few months after receiving the communication from the Argentine Minister, the British had received copies, identical with those made available to foreign missions in Santiago, of a map, attached to a copy of the Treaty, prepared by the Chileans. This map clearly showed the PNL Group as part of Chile. On this matter the Court observed (para 121):

'It seems to the Court inconceivable that the British Admiralty, thus obtaining information about the same Treaty from both the Parties to it, and finding (if that had been the case) some significant discrepancy, would not at once have started an enquiry, especially as it either just had drawn up, or was in the process of drawing up, a map, . . . based on the information obtained from one of these sources. Clearly the Admiralty interpreted the expression "to the south of the Beagle Channel"', which appeared in what was received from both Parties, in such a way as to leave the PNL group to Chile. Nothing received from the Argentine side contradicted this interpretation, while that coming from the Chilean side confirmed it. The Court also finds it difficult to believe that the Argentine Government could have remained in complete ignorance of the dissemination to foreign Legations in Santiago of a map so entirely at variance (in respect of the course of the Beagle Channel) with the view that Argentina is now alleged to have then held concerning the attribution

19. Referring to *Minquiers and Ecrehos* case, ICJ Rep 1953, p 47; *Frontier Land* case, ICJ Rep 1959, p 209; *Temple* case, ICJ Rep 1962, p 6.



to her of the PNL group. True, Argentina was not at the time in diplomatic relations with Chile, but she maintained a Consul-General in Santiago. Yet no record exists of any Argentine protest made, or dissent expressed.'

This interpretation of the events was re-inforced by a map which the Argentinian Foreign Minister (Sr Irigoyen) sent to the British Minister in Buenos Aires. In that document the PNL group was shown as part of 'the southern islands . . . actually ceded to Chile by the recent Treaty'.<sup>20</sup> A variety of objections were raised by Argentina to the value of this evidence, of which the only one regarded by the Court as of any significance was that the communication by Sr Irigoyen had been made privately on a personal basis (para 123). The Court dealt with this contention as follows (para 124):

'the fact of its communication to the British Minister by Senor Irigoyen himself . . . appears inconceivable unless he regarded it as accurately depicting the settlement. That this communication may not have amounted to an act of the Argentine Government as such, does not seem to the Court to matter, since it would necessarily be taken by Mr Petre (and Senor Irigoyen could not have supposed otherwise) as meaning that the boundaries and attributions shown on the map as resulting from the Treaty, represented Senor Irigoyen's own view of those results. What counted was official conduct in relation to the map,—and a communication of this kind, made by a Foreign Minister in office, to a foreign Head of Mission *en poste*, cannot be evaluated as if it were a purely private act not in any way binding on the Government. But in any event, that is not the way in which the Court finds it necessary to look at the matter. It sees the episode simply as one that has a very high probative or supporting value in favour of the conclusions earlier arrived at . . . that the negotiators of the Treaty—of whom Senor Irigoyen was one—regarded the Beagle Channel as flowing along the northern arm past Cape San Pio and Nueva Island.'

If that were not enough, in the following year, a map appeared in a publicity work entitled *The Argentine Republic as a Field for European Emigration*, published under the auspices of the President and of Sr Irigoyen who had by then become Minister of the Interior. This map also showed the islands as Chilean. In the words of the Court (para 128), the map of 1882-3 'provides an excellent example of the relevance of a map not so much for its own sake . . . but for the circumstances of its production and dissemination, making it of high probative value on account of the evidence afforded by this episode, namely of official Argentine recognition, at the time, of the Chilean character of the PNL group'.

By the end of the decade, however, there was a change of policy on the part of the Argentine Government. Two decrees, of 1891 and 1893, provided that works on national geography already produced were not to

20. The words of Petre, the British Minister, in a despatch to the Foreign Office: para 122.

be considered as officially approved without the imprimatur of the Foreign Ministry. Indeed the 1891 Decree recited a decision of the president of 1889 denying official character to earlier charts and maps. From then on an increasing number of Argentinian maps appeared, including new versions of earlier ones, showing the PNL group as Argentinian.

That the Court regarded these as of less importance than those produced at the time, or immediately after the making of the Treaty, is not surprising. The following well-known statement of the International Court in the *Status of South-West Africa* case<sup>21</sup> was referred to by Brownlie appearing on behalf of the Government of Chile:<sup>22</sup>

'Interpretations placed upon legal instruments by the parties to them, though not conclusive as to their meaning, have considerable probative value when they contain recognition by a party of its own obligations under an instrument.'

The significance of this pronouncement to the present case was that the declarations made by the South African government were adopted by the International Court despite later changes in policy and attitude by the State concerned. Nevertheless although the time span was not dissimilar (the South African attitude changed with the change of Government in 1948), the circumstances and the quality of the acts were entirely different. There was a good deal of uncertainty about a number of aspects of the boundary treaty (which was not surprising in view of the less than adequate geographical knowledge then available). Indeed, the use of an allocation of unspecified islands rather than the prescription of a particular boundary line demonstrates an obvious area of uncertainty. Moreover, unlike the South African situation, there was no definitive statement in cartographical form of the Argentinian view. While it might have been permissible for the Court to conclude that, on balance, the evidence supported the Chilean cause, there was nothing which amounted to a categorical and definitive statement on behalf of the Argentinian State that the PNL group had been allocated to Chile by the Treaty.

## 2. Acts of Jurisdiction

The admissibility and relevance of acts of jurisdiction carried out by Chile with respect to the disputed islands created problems for the parties and for the Court for three principal reasons:

(i) For Chile to rely upon them as acts of sovereignty might suggest either that the territories were *terra nullius* (even on the pre-1881 principle of *uti possidetis*, this could not have been so), or that the islands had not been allocated by the 1881 Treaty (an approach quite contrary to the entire thrust of the main Chilean contention in the case).

(ii) If acts of sovereignty are exercised on the basis of a misunderstanding of the meaning of a treaty, is it necessary that there should be conduct

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21. ICJ Rep 1950, pp 135-6. The reference was made as part of an extract from Lauterpacht, *The Development of International Law by the International Court*, p 170.

22. Verbatim Records, day 5, p 103.

amounting to an estoppel preventing the 'dispossessed' State from reasserting a claim?

In the *Temple* case,<sup>23</sup> the French authorities in Indo-China and the Siamese Government had acted on the basis that a demarcation in a certain map reproduced an accurate representation of the watershed of a range of mountains specified as the boundary in a Treaty of 1904. It was therefore assumed that the Temple area was in French (later Cambodian) territory and not in Siam (Thailand). The International Court held that the Siamese attitude towards the boundary precluded that State from later contesting its validity. Even more strongly did it rely upon the failure to object on a later occasion when a Siamese prince visited the area and was received by a French governor in a ceremony at which the French flag was flown. In the International Court's own words:<sup>24</sup>

'Looking at the incident as a whole, it appears to have amounted to a tacit recognition by Siam of the sovereignty of Cambodia (under French Protectorate) over Preah Vihear, through a failure to react in any way, on an occasion that called for a reaction in order to affirm or preserve title in the face of an obvious rival claim.'

It would seem therefore that the International Court was prepared to rely upon a combination of estoppel and tacit recognition.

However, as far as estoppel was concerned, there was a degree of uncertainty as to its essential characteristics. In particular, to what extent did a State seeking to rely upon an estoppel have to show that it had acted to its detriment in reliance upon the acts or acquiescence of the other State? According to Judge Fitzmaurice in the *Temple* case, it was an 'essential condition of the operation of the rule of preclusion or estoppel, as strictly to be understood'.<sup>25</sup> This condition, he believed, had been fulfilled. The low level of sovereign activity on the part of France and, later, Cambodia, was based on an assumption of Siam's acceptance of the boundary as depicted on the map. Clearly, 'if Thailand could now be heard to deny this acceptance, the whole legal foundation on which the relative inactivity of France and Cambodia in this region was fully explicable would be destroyed'.<sup>26</sup>

In its Counter-Memorial, Chile did rely upon the absence of any Argentinian protest at Chilean governmental activities until 1915,<sup>27</sup> concluding with the proposition that 'Argentina's failure to react to consistent Chilean state activity in a situation of this nature gives rise, to use the language of the International Court in the *Temple* case, to an inference that the Argentine Government accepted the Chilean conduct as a reflection of the true interpretation of the 1881 Treaty'.<sup>28</sup> The Court of Arbitration largely accepted the force of Chilean activities (para 166), but

23. ICJ Rep 1962, p 6.

24. At pp 30-1, cited Chilean Counter-Memorial, Chap IV, para 29.

25. ICJ Rep 1962, p 63.

26. At p 64, cited Chilean Counter-Memorial, Chap IV, para 27.

27. Loc cit, para 17.

28. Loc cit, para 28.

avoided any difficulties of classification in the following passage (para 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.'

(iii) International tribunals have generally preferred to rely upon acts of jurisdiction compatible with a possible interpretation of a boundary treaty as an aid to ascertaining the meaning of an instrument rather than as an independent basis of sovereignty. The pronouncement of the Court cited above is a manifestation of this attitude.

The reluctance to admit acts of sovereignty as capable of operating outside the application of the treaty stems from a fear that such acts might be destructive of the settlement. In the *Temple* case, the International Court, having expressed the view that the Parties had subsequently 'adopted an interpretation of the treaty settlement which caused the map line, in so far as it may have departed from the line of the watershed, to prevail over the relevant clause of the treaty', went on to state:<sup>29</sup>

In general, when two countries establish a frontier between them, one of the primary objects is to achieve stability and finality. This is impossible if the line so established can, at any moment, and on the basis of a continuously available process, be called in question, and its rectification claimed, whenever any inaccuracy by reference to a clause in the parent treaty is discovered. Such a process could continue indefinitely, and finality would never be reached so long as possible errors still remained to be discovered. Such a frontier, so far from being stable, would be completely precarious.'

The Court had no doubt that the primary object of the parties had been to achieve certainty and finality. The border between Siam and French Indo-China had been a cause of trouble and friction giving rise to what was described as 'growing tension'.<sup>30</sup> The Court concluded, therefore, that 'an important, not to say a paramount object of the settlements of the 1904-1908 period (which brought about a comprehensive regulation of all outstanding frontier questions between the two countries), was to put an end to this state of tension and to achieve frontier stability on a basis of certainty and finality.'<sup>31</sup>

Such an approach was applicable *a fortiori* to the relations between Chile and Argentina between which States there had been a total lack of agreement on the extent of their respective territories in the remote

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29. ICJ Rep 1962, p 34.

30. Ibid.

31. At pp 34-5.

southern parts of the Continent. At one time Chile had even presented as a basis for settlement the proposition that all lands stretching south of 50°S should belong to Chile.<sup>32</sup> On the other hand, the Argentinian view had been that the Andes had always constituted its western boundary and that the chain of mountains had extended as far as Cape Horn.<sup>33</sup> It was only towards the end of 1876 that a compromise along the lines later adopted in the 1881 Treaty was proposed by Argentina.<sup>34</sup> That Treaty was more than the 'terminating in a friendly and dignified manner the boundary controversy existing between the two countries' (to use the words of the Preamble); it involved the allocation of large areas of disputed territory.

The dividing line between (historical) 'consolidation of title' which the Court of Arbitration specifically stated was not applicable here,<sup>35</sup> and acts of jurisdiction in confirmation of the Chilean interpretation of the Treaty, may not always be that easy to draw. In the *Minquiers and Ecrehos* case,<sup>36</sup> both France and the United Kingdom claimed to rely upon an 'ancient or original title' to the islands which had been maintained from feudal times. Hence, in the International Court's opinion the case did not 'present the characteristics of a dispute concerning the acquisition of sovereignty over *terra nullius*'.<sup>37</sup> Despite a wealth of evidence adduced by the parties as to events since the feudal period, the Court preferred to base its decision on more recent activities. 'What is of decisive importance', it said,<sup>38</sup> 'is not indirect presumptions deduced from events in the Middle Ages, but the evidence which relates directly to the possession of the Ecrehos and Minquiers groups'. In more modern times the acts of jurisdiction relating to the islands had emanated principally from the British possessions of the Channel Islands and on that basis the Court decided in favour of the United Kingdom.

In the context of the present discussion what is of particular significance is the fact that amongst the events around which much argument centred was the Treaty of Calais of 1360. The earlier Treaty of Paris of 1259 granted to the King of England rights in the Channel Islands, though subject to the sovereignty of the King of France. The 1360 Treaty confirmed the right of the King of England to all the islands he 'now holds', but no longer subject to the feudal overlordship of the King of France. Whether these arrangements extended to the two island groups was not made clear in the Treaty itself. Judge Basdevant was prepared to draw the inference that, as English rights in the Channel Islands themselves had been obtained by force of arms, this authority, by the same

32. Despatch from Chilean Foreign Minister to Chilean Minister in Buenos Aires of 30 March 1865: Chilean Memorial, Chap III, para 14; see also para 24.

33. Diplomatic note of 15 December 1847 to the Government of Chile: Chilean Memorial, Chap III, para 6.

34. *Ibid.*, paras 25-6.

35. See the quotation from para 165 given above p 359.

36. ICJ Rep 1953, p 47.

37. At p 53.

38. At p 57.

token, extended to the nearby, uninhabited rocks and islets which comprised the Minquiers and Ecrehos. This tentative conclusion was supported by subsequent practice in the form of the activities of the Jersey authorities which 'have for a long time, on repeated occasions and in a consistent manner, concerned themselves with what was happening on the Ecrehos and the Minquiers'. The Judge concluded:<sup>39</sup>

From the facts thus alleged and, in particular, from the action of the Jersey authorities, unimpeded by competing action on the part of the French authorities, it is possible to deduce some *ex post facto* confirmation of the reasonableness of the hypothesis previously stated, according to which the King of England, who held the principal islands in 1360, was in a position to exercise power over the Ecrehos and the Minquiers and that he held these islets within the meaning of the Treaty.

From these same facts it appears that, in the absence of the establishment of a separate local authority on the disputed islets, there was, to the extent permitted by the character of these islets, greater and more continuous activity on the part of the Jersey authorities than on the part of the French authorities and that in this way a tradition of the attachment of the islets to Jersey has grown up. This reveals the interpretation which in practice has been given to the division of 1360. An interpretation already manifested before the birth of controversy between the two Governments as to sovereignty which has subsisted in practice throughout the course of this controversy. This interpretation confirms the interpretation previously advanced.'

In relation to the Chile-Argentina dispute, the acts of jurisdiction alleged by Chile strongly supported its case. In 1892 a decree encouraging colonisation in the region was published in the Official Gazette and an office was established on Lennox Island. In 1894 a system of land leases was inaugurated, and in 1896 a concession was granted to a British settler on Picton Island. In 1905 a postal service was begun. These activities were largely prompted by a gold-rush on Lennox and Nueva Islands, but there was no doubt that they emanated exclusively from Chile. As the Court observed (para 166(b)), during 'the ensuing years, Chile engaged in many other State activities, customarily associated with the existence of sovereignty, such as the provision of public medical services and education, the exercise of civil and criminal jurisdiction—etc'. In contrast, not only did Argentina make no protest until 1915, but Chile was able to point to a number of official Argentinian Decrees between 1883 and 1904 which dealt with the Administrative Divisions of the Argentine National Territories but which made no reference to the PNL group.

In reply Argentina argued inter alia that the subsequent practice of Chile did not have the effect claimed for it by that State. Article 31.3(b) of the Vienna Convention only allowed such practice to be taken into account in the application of the Treaty if it establishes 'the *agreement of*

39. At p 83.

the parties regarding its interpretation'. It was that agreement, in the words of Jennings, appearing on behalf of Argentina, 'and no less', which 'has to be established by the subsequent conduct': 'there must be evidence of a common will'.<sup>40</sup> In Jennings' view<sup>41</sup> 'where there has been no treaty disposition, peaceful possession, undisturbed by any counter-vailing gesture, may ripen into a title with the passage of a considerable time of such possession'. However

'Where the question is one of treaty interpretation, unilateral acts—we are not after all concerned with concordant acts of both Parties—unilateral acts are irrelevant unless,

(i) they are in accord with a proper textual interpretation of the treaty, and

(ii) the conduct of the other Party can, in all the circumstances, be said to amount to an acceptance of, or agreement about, that interpretation. Otherwise the unilateral action of one Party is no more than evidence of its own ostensible interpretation of the Treaty.'

In the present case, the practice had comprised unilateral acts by the Chilean authorities to which the Argentinian Government had never in any sense agreed.

The Chilean response to this contention was not entirely convincing. Indeed, it was probably better explained by the Court itself in the following passage (para 168(i)):

'Chile's answer to this line of reasoning takes the form of a simple denial of the meaning of the Vienna Convention advanced by Argentina. The concept of "agreement" in the clause cited does not require a formal "synallagmatic" transaction. It means consensus, and can be satisfied if "evidenced by the subsequent practice of the Parties which can only involve the acts, the conduct, of the Parties duly evaluated". . . . The agreement, so Chile maintains, stems *from conduct*—in this instance from the open, persistent and undisturbed exercise of sovereignty by Chile over the islands, coupled with knowledge by Argentina and the latter's silence. In support of this conclusion, Chile points out that it would be quite inconceivable for a State to seek agreement in the exercise of its asserted sovereign rights. By their very nature such rights are unilateral and intended to be exclusive to the State performing them;—put concretely, a State does not ask another State's agreement to establish a postal service or to exercise civil and criminal jurisdiction.'

The quotation contained in this statement was taken from the address by Brownlie.<sup>42</sup> However, neither he nor the Court fully met the force of the Jennings' argument. As far as the 'unilateral' nature of the activities in question was concerned, Brownlie had this to say:<sup>43</sup>

'It is the case that if a State is exercising rights of sovereignty, under

40. Verbatim Records, day 13, p 163.

41. Loc cit, pp 164/170.

42. Verbatim Records, day 19, p 184.

43. Day 20, p 2.

Treaty or some other title, then in the nature of things that exercise of sovereignty is in a certain sense "unilateral" since, apart from the situation where there is a condominium, the exercise of sovereignty is by its very nature exclusive, and not dependent on the agreement of others. In the case of the subsequent conduct of the Parties to the Treaty of Boundaries, each Party exercises sovereignty in areas allocated to it and stays out of areas allocated to the other Party. Each Party, in face of lawful possession under the Treaty by the other, would have nothing to say, provided that possession is in accordance with the Treaty provisions. The normal evidence of a stable allocation of territory consists precisely of a juxtaposition of sovereignties, without incidents on the ground, and without protests about usurpations of rights. It is the separate but concordant exercise of rights of sovereignty which involves the concordance in the application of the provisions of a boundary treaty.'

The Court itself was also prepared to rely upon a somewhat strained interpretation of Article 31.3(b) in order to suit the facts of the present case. It said (para 169(a)):

'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 understood 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.'

It will be seen that, despite the Chilean attempt, argued by Brownlie, to bring the circumstances within Article 31.3(b), there remained a gap between an implied agreement (as that expression would normally be understood) and an application of the Treaty in a particular manner. Indeed, in the above passage from the Court's judgment, while the first part suggests the possibility of some form of tacit consensual arrangement, the last part avoids stating that such an arrangement could be implied in the circumstances of the case. The silence of Argentina no more than 'permits the inference that the acts tended to confirm an interpretation of the meaning of the Treaty'. Or as the Court later stated (para 172), 'the important point is that her continued failure to react to acts openly performed, ostensibly *by virtue* of the Treaty, tended to give some support to that interpretation of it which alone could justify such acts.'

While the ultimate conclusion might seem unassailable, the fault in the



reasoning lies in the unnecessary attempt to relate the subsequent practice to Article 31 of the Vienna Convention. It has already been suggested<sup>44</sup> that the difficulties arise from the defective drafting of that Convention. Where subsequent practice falls short of establishing an agreement or understanding between the parties as to the Treaty's interpretation (as may well have been the case here), it should be treated as of similar value as pre-Treaty conduct. Although Article 32 does not specifically mention subsequent practice as a 'supplementary means of interpretation', it has regularly been employed as such by international tribunals.<sup>45</sup>

It is interesting to note that Waldock, as Special Rapporteur of the International Law Commission's Third Report on the Law of Treaties, included as part of a draft article (Article 71(2)) the following provision:<sup>46</sup>

'Reference may be made to other evidence or indications of the intentions of the parties and, in particular, to the preparatory work of the treaty, the circumstances surrounding its conclusion and the subsequent practice of parties in relation to the treaty'

for the purposes then enumerated. In the accompanying commentary, Waldock had this to say:<sup>47</sup>

'The probative value of subsequent practice is well recognised. As Sir G Fitzmaurice has said<sup>48</sup> while *travaux préparatoires* contain only the statement of the intention of the parties, subsequent practice shows the putting into operation of that intention. The use of this means of interpretation is well established in the jurisprudence of international tribunals and, more especially, of the World Court. The Court appears, in general, to put subsequent practice as a means of interpretation on the same basis as *travaux préparatoires*—as evidence to be used for confirming the natural and ordinary meaning or for ascertaining the meaning in cases of doubt.'

Following the submission of the draft Articles to governments for comment, the Commission reconsidered the text in the light of their reactions. It was at this stage that the contents of Article 71 was resited in a revised text. In particular, the reference to subsequent practice became part of the 'general rule of interpretation' contained in Article 69, whereby a treaty 'shall be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in the light of . . .

(b) Any subsequent practice in the application of the treaty which establishes the common understanding of the meaning of the terms as between the parties generally.'

In commenting upon the change of terminology, the Special Rapporteur observed<sup>49</sup> that the word 'understanding' had been 'chosen by the Commission instead of "agreement" expressly in order to indicate that the

44. Above, p 353.

45. YbILC 1964, Vol II, p 5.

46. Loc cit p 52.

47. Page 59.

48. (1957) 33 BYBIL, p 223.

49. YbILC 1966, Vol II, p 99.

assent of a party to the interpretation may be inferred from its reaction or absence of reaction to the practice'. At the end of the Commission's 1966 Session, the sequence of the Articles was changed, so that those dealing with interpretation appeared in the order (with only minor subsequent variations) in which they were later adopted by the Vienna Conference. The wording given above dealing with subsequent practice was not altered, although it was transposed to a new paragraph 3 in line with the final form of the eventual Convention.

At the Vienna Conference, it was the Drafting Committee which made the final amendment of the Article, including the change from 'understanding' to 'agreement'. At the same time, a Spanish proposal<sup>50</sup> to incorporate a further reference to 'the subsequent acts of the parties' as one of the supplementary means of interpretation in what became Article 32 of the Convention was rejected. The Conference also decided to delete the ILC draft Article 38 according to which a treaty 'may be modified by subsequent practice in the application of the treaty establishing the agreement of the parties to modify its provisions'. It might be supposed that this step was taken on the ground that the changes to the provisions on interpretation had rendered the draft Article otiose. This view was certainly the one given by Castren on behalf of Sweden.<sup>51</sup> Other States regarded such a modification as exceptional<sup>52</sup> and therefore not yet sufficiently clearly defined in the practice of States (eg, did it apply just to technical agreements, as suggested by France;<sup>53</sup> or only to secondary, and not to essential, provisions, as suggested by Spain;<sup>54</sup> or what number of parties needed to be involved in the practice<sup>55</sup>). Some States went so far as to suggest that such a rule was unacceptable as being destructive of the principle of *pacta sunt servanda*. In the words of the Venezuelan representative, practice 'incompatible with a treaty constituted no basis for a new rule of law, but the abuse of law and violation of the treaty'.<sup>56</sup>

It would thus appear that the ambivalence shown by the Court of Arbitration towards the role of subsequent practice was also present, though on a wider scale, in the deliberations of the Vienna Conference. Since then, of course, the International Court has had reason to consider the effect of the conduct of UN members on the application of the Charter in the *Namibia* case.<sup>57</sup> It had been argued that the crucial Security Council Resolution 276 (1970) had been declared adopted despite abstentions by the United Kingdom and France, both permanent members of the Council. According to Article 27.3 of the Charter, decisions of the Council on non-procedural matters require 'an affirmative vote of nine

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50. See UN Conf on the Law of Treaties, Documents, pp 150-1.

51. UN Conf, 1st sess, pp 207-8, para 57.

52. Poland, *ibid*, p 211, para 15.

53. Page 208, para 64.

54. Para 69.

55. Page 210, para 3.

56. Page 208, para 60; see also the Chilean representative, p 210, para 75; and the Guinea representative, p 212, paras 30-32.

57. ICJ Rep 1971, p 16.

members including the concurring votes of the permanent members'. The Court rejected the argument that the Resolution had not been validly passed. In its own words:<sup>58</sup>

'the proceedings of the Security Council extending over a long period supply abundant evidence that presidential rulings and the positions taken by members of the Council, in particular its permanent members, have consistently and uniformly interpreted the practice of voluntary abstention by a permanent member as not constituting a bar to the adoption of resolutions. . . . This procedure followed by the Security Council . . . has been generally accepted by Members of the United Nations and evidences a general practice of that Organisation.'

The significant point about this pronouncement is that it avoids providing any explanation of how legal effect was given to the practice. Was it on the basis of a *de facto* revision (ie, amendment) of the Charter (which seems to have been the view of Judge Bustamante in the *Expenses* case<sup>59</sup>)? Or was it a legally effective amendment on the basis that it was confirmed by implication as a result of the 1965 amendment of Article 27 (the opinion of Judge Castro in the *Namibia* case<sup>60</sup>)? Or was it simply a practice which followed a particular interpretation of a provision that was otherwise ambiguous (the approach of Judge Dillard in the *Namibia* case<sup>61</sup>)?

Of course, the Court in the *Beagle Channel* case did not have to face one major problem which exercised the minds of those who drafted the Vienna Convention and of the judges of the International Court, namely that of 'amending' a multilateral treaty. In a bilateral agreement, such as the 1881 Treaty between Argentina and Chile, there is less danger of a party objecting to an established practice (indeed, it would probably be estopped from doing so). The difficulty here was that referred to in the pleadings, namely the 'unilateral' nature of the practice. Chile was relying upon its own actions and the absence of any reaction to that activity on the part of Argentina. It has already been pointed out that it is not easy to equate conduct plus an initial failure to respond with an 'agreement', even an implied one. Indeed, the Court fought shy of reaching such a conclusion. In the passage already cited<sup>62</sup> from para 169(a) of the Court's judgment, the first sentence is equally consistent with the notion that 'subsequent practice' may be regarded as a 'supplementary means of interpretation': 'the Court cannot accept the contention that no subsequent conduct . . . can have probative value as a subsidiary means of interpretation unless representing a formally stated or acknowledged "agreement" between the parties'. The reference to 'subsidiary means' is more suggestive of Article 32 than it is of Article 31.3. It is true that the

58. At p 22.

59. ICJ Rep 1962, pp 291-2.

60. ICJ Rep 1971, p 186.

61. At pp 153-4; see also this Year Book, Vol 6, p 98.

62. Above p 363.

following sentence ('The terms of the Vienna Convention do not specify the way in which "agreement" may be manifested') tends to tie the first sentence to Article 31.3. However, the final sentence of the paragraph ('the silence of Argentina permits the inference that the acts tend to confirm an interpretation of the meaning of the Treaty') is based entirely on the wording used in Article 32 ('Recourse may be had to supplementary means of interpretation . . . in order to confirm the meaning resulting from the application of Article 31'). By implication the Court was recognising that subsequent practice has two roles to play in the interpretation of a treaty, both on a consensual basis as a force for clarifying (perhaps even varying) the treaty, and as means of reinforcing an interpretation already discernable from the text itself.

#### **Wider considerations of treaty application**

The draft text of what became Articles 31 and 32 of the 1969 Convention survived strong criticism from the United States delegation at the Vienna Conference. It was the American view that the two provisions should be amalgamated in order 'to eliminate the rigidities, restrictions and hierarchical distinctions' in the draft articles. As the American representative explained:<sup>63</sup>

'The rigid and restrictive system of Articles [31] and [32] should not be made international law because it could be employed by interpreters to impose upon the parties to a treaty agreements that they had never made. The parties to a treaty could well have a common intent quite different from that expressed by the "ordinary" meaning of the terms used in the text. The imposition upon the parties of certain alleged "ordinary" meanings, combined with the preclusionary hierarchy of means set forth in Articles [31] and [32], could lead to the arbitrary distortion of their real intentions.'

It is a criticism of some substance. Under the final version of those Articles, a Court should approach a problem of treaty interpretation along the following lines:

1. Try to apply the text in dispute according to what appears to be its 'ordinary meaning' (Article 31.1).
2. The ordinary meaning is dependent upon the context in which words are used (Article 31.1). However 'context' is given an extremely narrow definition by virtue of Article 31.2:

'The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:  
(a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;  
(b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.'

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63. UN Conf, 1st sess, p 168.

3. Together with the context, a Court shall also take account of (according to Article 31.3):

- (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
- (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
- (c) any relevant rules of international law applicable in the relations between the parties.'

If these factors are to be in some way equated with 'context', why do they not appear in paragraph 1? The answer to this question might well be that 'context' has two different shades of meaning. First, the reference to context in paragraph 1 means no more than the siting of the terms in relation to the rest of the Treaty (the 'text, including its preamble and annexes' mentioned in the first part of paragraph 2), and the inferences to be deduced therefrom. Secondly, in a wider and secondary sense, 'context' includes 'any agreement' and 'any instrument' referred to in the second part (sub-paragraphs (a) and (b)) of paragraph 2. In this sense, the 'context' is on a par with the three factors specified in paragraph 3. What is clear, however, is that Article 31 is itself hierarchical even before one comes to Article 32.

4. That the first, narrower meaning of 'context' is the appropriate one is confirmed by Article 32 in its reference to the circumstances of the conclusion of a treaty as a 'supplementary means of interpretation'. It is quite clear from this that 'context' does not extend to the 'historical context'. The background setting to the treaty will be admissible only in so far as it is necessary to cast light on the 'object and purpose' of the treaty in accordance with Article 31.1.<sup>64</sup>

5. Unless a Court feels that this information is necessary to shed light on the object and purpose of the treaty, then it can only consider such evidence (whether as preparatory work or as circumstances surrounding its conclusion) as a basis for confirming the apparent meaning produced by the application of Article 31 or determining the meaning if the interpretation under Article 31 is ambiguous or obscure or is absurd or unreasonable.

The *Beagle Channel* arbitration demonstrates some of the restraints which stem inevitably from the very structured approach imposed by Articles 31 and 32, and also the (perhaps fortunate) fact that it is a structure which tends to break down in practice. However, the conse-

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64. This is presumably the basis of the International Court's approach in the *Aegean Sea* case, ICJ Rep 1978, p 3, in which it had to determine whether the statement in the Brussels Communiqué of 31 May 1978, whereby the Prime Ministers of Greece and Turkey 'decided that those problems should be resolved peacefully by means of negotiation and as regards the continental shelf of the Aegean Sea by the International Court at The Hague', amounted to an acceptance of the Court's jurisdiction. The Court observed (para 100) that the 'divergence of views as to the interpretation of the Brussels Communiqué makes it necessary for the Court to consider what light is thrown on its meaning by the context in which the meeting of 31 May 1978 took place and the Communiqué was drawn up'.

quence of the attempt to keep within the framework of the Convention often leads to confusion over what historical material is relevant in which context. Some is admissible at the outset (ie, to record the object or purpose of the treaty); other evidence may only be admissible at a later stage (eg, as a supplementary means of clearing up an ambiguity). However, as the present writer has observed,<sup>65</sup> 'in order to gain a total picture of a particular provision and the treaty of which it forms part, it is necessary to consider the history of their formation and application, and the logical order in which to do so is chronologically'. The effect of Articles 31 and 32 is to break up this natural progression in a manner that is often less than satisfactory.

The Court of Arbitration commenced its consideration of the 1881 Treaty by referring to 'the traditional canons of treaty interpretation now enshrined in the Vienna Convention' (para 15). Then, having quoted the text of the Treaty in full, it referred to the nature of the Treaty as a compromise 'between the different and often directly conflicting claims of the Parties' (para 16). This 'general consideration of major importance' was presumably vital to an understanding of the object and purpose of the treaty and particularly to the meaning of (or at least the scope to be attributed to) Article II.

The Court considered the title and the preamble of the Treaty as implying 'definitiveness and permanence' (para 18) and as creating a regime intended to be 'definitive, final and complete, leaving no boundary undefined, or territory then in dispute unallocated' (para 19). If the Treaty was to 'accomplish its purpose', it had to deal with Patagonia; the area around the Straits of Magellan; the Isla Grande of Tierra del Fuego; and the islands off the shores of the allocated areas (para 24). In the ensuing discussion of the actual terms of the Treaty (paras 26-111), the only substantial pieces of evidence of the meaning to be attributed to its terms taken from outside the text itself were the so called 'Bases of Negotiations' of 1876, proposed by the Argentinian Foreign Minister, Irigoyen, and the 'Valderrama amendment' put forward by the Chilean Foreign Minister of that name early in 1881. As a result, the impression one obtains from reading the judgment of the Court is not the same as that which one receives when considering the boundary issues in their historical perspective.<sup>66</sup>

When considering the question of which arm of the Beagle Channel was that contemplated by the Treaty, the Court pointed out that the Treaty itself contained no express indication of what was intended. The absence of any discussion of the matter during the course of negotiations led the Court to conclude that the matter was self-evident (para 87). The Court's efforts to obtain guidance from various contemporary sources produced no 'really certain result', although the weight of evidence tended to favour the Chilean case (para 91). The decision in the case was, however, reached upon factors within the Treaty itself pointing to an east-west

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65. This Year Book, Vol 6, p 88.

66. See further below, p 372.

boundary line allocating all the islands to Chile (paras 92-96).<sup>67</sup> In the Court's own words, it was 'almost mandatory, or at least a matter of compelling probability, to conclude that . . . the negotiators of the Treaty could only have seen the Beagle Channel as continuing past Picton by its northern arm' (para 96).

This conclusion was, in the Court's view, 'strongly supported by later confirmatory material' (para 99). As has already been mentioned,<sup>68</sup> this material the Court divided into three categories: (1) activities in the immediate post-Treaty period; (2) the cartography of the case; and (3) acts of jurisdiction considered as confirmatory evidences.

(1) As far as the first category was concerned, the Court deduced two conclusions from the evidence:

- (a) that it supported the Chilean view that the expression 'to the east of Tierra del Fuego' in the Islands clause of Article III meant east of Isla Grande and therefore did not include the PNL group (para 116); and
- (b) that the Chilean acts were entirely consistent throughout with its present stance on the siting of the boundary, whereas Argentina had, immediately after 1881, adopted an attitude which seemed to be in agreement with the Chilean view. As far as Chile's actions were concerned, they were important not because the State 'could by her own acts confer upon herself rights or territorial attributions not provided for by the Treaty, but simply because these acts were consistent with, and bear out, the interpretation of the Islands clause which Chile now, *as then*, puts forward as being the correct one' (para 129). Furthermore, the Chilean version of the effect of the islands clause was well enough known to have required some express dissent on the part of Argentina long before that in fact occurred (para 135).

(2) The cartographic evidence was also supportive of the Chilean case, both because maps emanating from Chilean sources were consistent in showing the PNL group as part of Chilean territory, and because those from Argentina were too contradictory to support effectively that State's case (para 162). However, the Court stressed, 'its conclusion to the effect that the PNL group is Chilean according to the 1881 Treaty has been reached on the basis of its interpretation of the Treaty . . . independently of the cartography of the case which has been taken account of only for the purposes of confirmation or corroboration' (para 163).

(3) A good deal of space has already been devoted to the significance of subsequent practice. The Court preferred to treat acts of jurisdiction on the part of Chile as no more than 'corroborative evidence', which 'tended to confirm the correctness of the Chilean interpretation of the Islands clause of the Treaty' (para 165). Similarly, the 'continued failure' by Argentina 'to react to acts openly performed, ostensibly by virtue of the

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67. Dealt with above, p 347.

68. Above p 354.

Treaty, tended to give some support to that interpretation of it which alone could justify such acts' (para 172).

### Uti Possidetis and the Oceanic Principle

One consequence of this breaking up of the historical record (and total disregard of significant parts of it) was to leave a degree of uncertainty over the validity of the so called 'Atlantic' or 'Oceanic principle' which lay at the heart of the Argentinian case. There were a number of props to this theory:

- (i) the *uti possidetis* doctrine according to which the two States were inheritors of the Spanish Empire which, as far as the southern part of the continent was concerned, broke up in 1810;
- (ii) the Andean or Cape Horn principle, which saw Cape Horn as being the ultimate extremity of the Andes mountains and therefore the terminating point of the mutual boundary between the two States;
- (iii) the division of the Oceans, which also marked the division of authority between the two States, Chile being a Pacific power, Argentina an Atlantic power.

The Court's decision to the effect that the all-embracing formula laid down in the 1881 Treaty excluded the operation of the *uti possidetis* principle was possibly dictated in part by the complexity of the evidence relating to the limits of the Spanish administrative units in the southernmost parts of the Continent. In any case application of the principle would not necessarily have been of direct advantage to Argentina. The doctrine itself had been designed to protect the emergent Latin American States from a fresh wave of European colonisation. It never proved an effective means of demarcation amongst the new States themselves. It certainly did not preclude the assertion of claims by one State on the basis of a *de facto* occupation of areas that may well have formed part of a Spanish Vice-Royalty which later constituted the territory of another State. Nor did it prevent the later adjustment of territorial rights by reference to such acts of occupation. Hence, even if one accepted the Argentinian view of the historical evidence,<sup>69</sup> it would not have followed that the *uti possidetis* principle would have been a ground for declaring invalid Chilean claims to parts of the Magellanic region.

Where the Argentinian case suffered from the approach adopted by the Court was in the latter's refusal even to accept the principle as the essential background against which the 1881 Treaty had to be interpreted.<sup>70</sup> Argentina had consistently argued that the principle 'was present during all the earlier negotiations, and that it forms part of the Treaty of 1881, at the same time constituting an essential element for its interpretation'.<sup>71</sup> The Court not only rejected the first proposition, that the principle formed part of the Treaty, but also took the view that it was not a relevant factor in the interpretation and application of the Treaty. The

69. Cp Annex A of the Chilean Counter-Memorial with Chap X of the Argentinian Reply.

70. Above p 336.

71. Argentinian Counter-Memorial, Chap II, para 2a; see also Argentinian Reply, Chap II, para 3.



Court's justification for its stand was not, however, entirely convincing (para 21):

'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 territorial relations between the Parties, had itself caused the Treaty to be entered into, as constituting the only (and intendedly final) means of resolving this uncertainty. To proceed in such a manner would merely be to enter a *circulus inextricabilis*.'

If the Treaty was complete and unambiguous in its application, there would be no need to look further, but the dispute had arisen solely because the Islands clause was open to differing interpretations. As the Treaty had been designed to effect a compromise in a situation where one party was alleging that the other was seeking to disturb the former's understanding of the effects of *uti possidetis*, it was not unreasonable for it to regard that doctrine as providing the substratum upon which the settlement was based. Departure from that principle was therefore a form of derogation from a pre-existing order and could only be interpreted satisfactorily in the light of that order.

The remoteness of the southern extremities of the Continent meant that, until well into the nineteenth century, it was the coastline which was the only part that received any attention. Indeed the very uncertainties about its geography had the consequence that the boundaries were referred to in the most general terms. For example, the Chilean Constitution of 1833, which, as Argentina was quick to point out,<sup>72</sup> remained in force until after 1881, provided that the territory of Chile 'extends from the Atacama Desert as far as Cape Horn, and from the Cordillera of the Andes as far as the Pacific Sea'. It was implicit in such a provision that the land east of the Cordillera to the Atlantic Ocean belonged to Argentina and that the boundary formed by the Cordillera extended as far as Cape Horn.

The Chilean activities along the Strait of Magellan were justified on two grounds: the arguments that the southernmost Spanish Viceroyalty had been one of the group of administrative units which formed part of Chile, and, secondly, that, as the Cordillera did not extend so far south, the more southerly areas of the Continent could be subject to occupation by Chile. The latter contention was not spelt out with any clarity, but it was presumably regarded as valid by the Court. It will be recalled<sup>73</sup> that, when

72. Argentinian Memorial, Chap III, para 15.

73. See above p 337.

discussing the nature of the compromise achieved by Articles I and II of the Treaty, the Court commented (para 31) that, though it was 'unnecessary to consider whether Chile's claim to Patagonia proper, previous to the conclusion of the Treaty, was good or bad, or strong or weak. It was certainly sustainable'. The only doubt is whether the Court was treating the point as arguable in a political sense, or as one having legal substance. One suspects that the former was the more likely in view of its reference later in the same paragraph to the Chilean claim as having 'enough vitality and content, at least politically, to make its final abandonment of primary importance to Argentina'. Nevertheless, the claim was regarded as sufficient to establish some sort of consideration to balance, in the Court's view at any rate, the relinquishment by Argentina of almost the entire Strait of Magellan, part of Tierra del Fuego and the islands to the south of the Beagle Channel. Moreover, the presence of Chile on the Strait was evidently enough to support that State's claim to almost the whole of the coast of the Strait, a claim that was admitted under the 1881 Treaty.

It is difficult to avoid the conclusion that the Chilean position on the Andean boundary is highly suspect. In the first place, there existed an international instrument in the form of the Treaty of Peace and Friendship between Chile and Spain of 1844<sup>74</sup> which did recognise the extent of the territory of the Chilean State. The relevant provision (Article I) was in terms similar to those of the Chilean constitution:

'Her Catholic Majesty, by virtue of the faculty conferred on her by the Decree of the Cortes Generales of the Realm dated 4th of December, 1836, recognises the Republic of Chile as a free, sovereign and independent nation, composed of the countries specified in its Constitutional Law, that is; all the territory stretching from the Atacama desert to Cape Horn, and from the Andes Mountains to the Pacific Ocean, together with the Archipelago of Chiloe and the islands adjacent to the coast of Chile. And Her Majesty renounces, both for herself and for her heirs and successors, all claims to government, dominion and sovereignty over the said countries.'

This is in striking comparison to the more general terms of the equivalent provision (Article I) in the Argentina-Spain Treaty of Recognition, Peace and Amity of 1859:<sup>75</sup>

'Her Catholic Majesty recognizes the Argentine Republic or Confederation as a free, sovereign and independent nation, composed of all the provinces mentioned in its Federal Constitution now in force, and of the other territories which legitimately belong to it, or which may thereafter belong to it; and in the exercise of the right which belongs to her by arrangement with the General Cortes of the Kingdom, of December 4, 1836, she renounces in every way and for ever, for herself and her successors, the sovereignty, as well as the rights and powers which belonged to it, over the territory of the said Republic.'

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74. Chilean Memorial, Annex No 4.

75. 53 BFSP 307.

It is surprising that more should not have been made of the contrast between the two agreements.<sup>76</sup> Prior to 1881 Argentina had the strongest basis for claiming by cession all territories to the east of the Andes, a chain of mountains that notionally at least must extend to Cape Horn itself. It is small wonder that the British Minister referred to the 1881 Treaty as involving a cession of 'eastern' territory to Chile. However, it would seem that the 1881 Treaty was not just in derogation of some vague principle of *uti possidetis* but marked a departure from a territorial settlement based upon cessions from Spain.

Secondly, the Chilean approach to the question of identifying the extent of the Andes varied according to the claim it was wishing to pursue. Shortly, in the context of the Oceanic principle, it will be necessary to consider how this case has a bearing on the vexed question of the sovereignty over the American Antarctic region (as Chile and Argentina are wont to call the area of, and adjoining, the Antarctic Peninsula subject to their respective claims). However, in support of the Chilean claim, Chile has long advanced the contention that the Peninsula is geologically no more than an extension of the Chilean mainland. In a speech of 21 January, 1947 to the Chilean Senate, the Chilean Foreign Minister, Sr Juliet, stated<sup>77</sup> that 'it had been proved that Chile and the Antarctic are united by a submerged chain of mountains'. In particular the Minister quoted with approval the opinion of a distinguished Chilean geologist, Professor Bruggen, that the Andes Mountains did not terminate in Tierra del Fuego but continued 'as a submarine chain' across the Drake passage. Although the geological evidence would not have been available in 1833, these subsequent pronouncements in no way contradict the supposition that, when the Constitution of that year referred to the Andes as the north-south boundary, it was on the understanding that they stretched, at least notionally, as far south as Cape Horn.

The main thrust of the Argentinian case was, however, that Cape Horn was of the utmost importance because it marked the division between the Atlantic and Pacific Oceans. Moreover, the *uti possidetis* doctrine had a particular application in relation to Chile and Argentina in providing the basis for this Oceanic principle whereby Argentina was exclusively an Atlantic power and Chile was confined to the Pacific. This principle had special historical relevance to the extreme south of the continent which had been, and still largely continued to be, accessible only by sea. Indeed, the 1881 Treaty, in Article III, accepted the significance of the maritime nature of the frontier by abandoning fixed territorial lines and identifying

76. In commenting upon Chile's alleged rights to the southern region, Barboza, on behalf of Argentina, had this to say (Verbatim Records, day 8, pp 31-32):

'If the *uti possidetis juris* of 1810 was against that fabulous claim, if the Chilean Constitutions and the Treaty with Spain had clearly defined the territory of Chile . . . , how could Chile claim Patagonia and Tierra del Fuego, beside the Strait of Magellan, the eastern part of which was Argentine according to those principles?'

77. *La Nacion* (Santiago) 22 Jan 1947, translated and enclosed with a despatch from the American Embassy in Santiago to Washington.

the boundary by reference to a marine feature, namely, the Beagle Channel. Moreover, that Article specifically identified as Argentinian, in addition to Staten Island and the small islands next to it, 'the other islands there may be on the Atlantic to the east of Tierra del Fuego and of the eastern coasts of Patagonia'. To have interpreted these coastal areas in the manner adopted by the Court had the effect of rendering meaningless the reference to the Atlantic. Moreover, an allocation based upon the east and west of (Isla Grande of) Tierra del Fuego was equally nonsensical, because many islands attributed to Chile were in fact north, rather than west of Isla Grande. To make sense of both the Atlantic reference and the allocation based upon the east/west division it was necessary in the Islands clause to interpret the Patagonian coasts as including the entire Fuegian archipelago. Read in this sense the clause was entirely consonant with the Oceanic principle.

This approach would also help to explain a further aspect of the Islands clause, that is the allocation to Chile of 'all the islands to the south of Beagle Channel up to Cape Horn'. In the Argentinian view, this expression made clear that the Treaty was laying down a further line, from the eastern end of the Channel to Cape Horn, a line which was consistent with the southerly path for the Channel advocated by that State and with the Oceanic principle. This boundary reinforced the limits placed upon Chile's access to the Atlantic Ocean.

In addition, Argentina stressed what it regarded as the importance of the Protocol of 1893 in which the two countries made more particular provision for giving effect to their 1881 Treaty. Article II of the 1893 instrument provided:

'The undersigned declare that, in the opinion of their respective Governments, and according to the spirit of the Boundary Treaty, the Argentine Republic retains her dominion and sovereignty over all the territory that extends from the East of the principal chain of the Andes as far as the Atlantic coasts, just as the Republic of Chile over the Western territory as far as the Pacific coasts; *it being understood that, by the provisions of the said Treaty, the sovereignty of each state over the respective coastline is absolute, in such a manner that Chile cannot lay claim to any point towards the Atlantic, just as the Argentine Republic can lay no claim to any toward the Pacific* [stress added]. If in the peninsular part in the South approaching parallel 52° South, the Cordillera should be found penetrating among the channels of the Pacific there existing, the Experts shall undertake a survey of the ground in order to fix a dividing line leaving to Chile the shores of these channels, as a result of which surveys both Governments shall determine the line amicably.'

It was the Argentinian standpoint that this provision amply supported the existence of the Oceanic principle, and its application, not only to the Magellanic area, but also to the Continent's southernmost extremities.

The Chilean reaction to this last contention was to argue, on the basis of the *travaux préparatoires* of the Protocol, that it was entirely con-

cerned with the territories to the north of 52°S, the end of the main chain of the Andes. Certainly there was ample evidence to show that, on a strict application of Article I of the 1881 Treaty, Argentina would have been entitled to access to the Pacific by a number of deep inlets which cut across the Andes. It was to rectify this situation that the Protocol was executed.<sup>78</sup> Nor is there any reason to object to the assertion<sup>79</sup> that Article I of the Protocol was concerned with the northerly part of the boundary and not with the attribution of any islands.

However, the middle part of Article II, set out above in italics, does have a wider significance. The reference to 'the provisions of the said Treaty' is beyond doubt or argument a reference to all the provisions of that Treaty and not just to Article I or to the provisions (if any others) dealing solely with the Andean boundary. In other words, Article II of the Protocol was setting out the east/west division in relation to the principal chain of the Andes, on the understanding that this division was in accordance with the underlying principle that 'the sovereignty of each state over the respective coastline is absolute'.

The Court, in rejecting the Argentinian approach, and in largely adopting the Chilean view, took an exceedingly narrow line. It did not explain satisfactorily why Argentina did agree to renounce its claim under the Treaty to Pacific waters. The answer must be that Article I of the Treaty did not carry out the parties' intentions either in the particular region regarded in isolation, or judged against some wider principle. Article II of the Protocol specifically refers to the division of Oceans as that principle. Indeed, this principle represents the spirit of the 1881 Treaty itself. This much was admitted by Chile (though presumably without realising its significance) when Brownlie cited a statement made by the Argentine Expert, Dr Costa, on 16 March 1893 that the agreement on which the Protocol was based 'amounted to a settlement of that which both Parties judged to be the true spirit of the Treaty of 1881'.<sup>80</sup> That spirit was represented by an east/west division down the chain of the Andes to Cape Horn, subject to the exceptions otherwise set out in the Treaty.

The Oceanic principle based upon Cape Horn was closely related to the land frontier based upon the Andes and its extension to the Cape. In particular instances, it was not altogether clear what the consequences of the 1881 division would be. The 1893 Protocol was necessary to apply the wider principle to the particular areas covered by the Protocol, while at the same time Article II spelt out the wider principle as the *raison d'être* of the boundary modification. When it came to analyse the full implications of the Islands clause it is not surprising that Argentina was hoping for an acknowledgment of the wider principle on the part of Chile similar to that accepted by Argentina in 1893.

Perhaps it would be more realistic to say that those full implications have only become apparent with the post-1945 extensions of maritime

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78. See Verbatim Records, day 6, pp 61-4.

79. Loc cit, p 71.

80. Page 74/80.

jurisdiction through the continental shelf. Argentina first declared areas of its 'epicontinental sea' as 'temporary zones of mineral resources', for which applications for prospecting rights had to be made, by a Decree of 24 January 1944 and this was followed by a Decree of 11 October 1946 which declared that 'the Argentine epicontinental sea and continental shelf are subject to the sovereign power of the nation'.<sup>81</sup> Chile followed suit in a Presidential Decree of 29 June 1947.<sup>82</sup> By Articles (1) and (2) the Government of Chile 'confirms and proclaims its national sovereignty' over the continental shelf and over the seas adjacent to its coasts. Furthermore, Article (3) provided in part:

'Protection and control is hereby declared immediately over all the seas contained within the perimeter formed by the coast and the mathematical parallel projected into the sea at a distance of 200 nautical miles from the coasts of Chilean territory. This declaration will be calculated to include the Chilean islands, indicating a maritime zone contiguous to the coasts of the said islands, projected parallel to those islands at a distance of 200 nautical miles around their coasts.'

Argentina was faced with a tactical problem. The dispute had been simmering for the best part of a century. To attach too much significance to the effects of more recent extensions of national jurisdiction would be almost to admit a lesser interest in the past as to the future of the disputed islands. Argentina contented itself with a brief reference at the end of its Memorial to the issue, in the course of which it was stated:<sup>83</sup>

'It must be considered that in the last decades there has been a great extension of pretensions to national maritime jurisdiction beyond the territorial seas strictly so called, whether by the law concerning the continental shelf, or the new tendencies to claim large exclusive fishing zones, pollution jurisdiction controls especially in very cold waters, or a more or less extensive area of "patrimonial sea" or "economic zone". It is already clear that seaward extensions of national jurisdiction in one form or another are likely to be a feature of the future international law of the sea. And whatever the immediate future may hold, Argentina and Chile are at one in claiming a maritime patrimony of 200 miles in extent from the base line, so that it is in those terms that the seaward influence of territorial claims to off-lying islands must now be assessed.

Nor would it be right to fail to consider the effect of the determination of the questions submitted in this arbitration concerning these small islands upon continental shelf jurisdiction. It must not be forgotten that the establishment of Chilean sovereignty in these Atlantic islands would, in its effect on that jurisdiction, entail a very considerable intrusion of Chilean sovereign rights into the Atlantic Ocean, dwarfing the local significance of the islands as such'.

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81. Texts in UN Leg Ser No 1, pp 3-5.

82. *Loc cit*, pp 6-7.

83. Chap VI, Sec 3, para 64.

The Chilean Reply devoted a prefatory section<sup>84</sup> to belittling what it referred to as the 'geopolitical considerations' that were to be found in the Argentine pleadings. Accusations that Chile had embarked upon a long developed policy of gaining control over the Atlantic south of Isla Grande were rejected as being totally unrelated to the territorial settlement of 1881. Nevertheless, given the not infrequent periods of tension between the two States, it is hardly surprising that a suggestion by Chilean geographers that the notional boundary of the Pacific Ocean should be moved eastwards should have been regarded by Argentina as an attempt to undermine its claim to the 'Atlantic' islands south of Isla Grande.<sup>85</sup> Moreover, the French made use, apparently with success, of political and strategic arguments in relation to the continental shelf entitlement of the British Channel Islands in the *Delimitation of the Continental Shelf Arbitration* of 1977 between Britain and France.<sup>86</sup> Could it not be said that similar factors should be taken into account when considering the effects of a treaty the precise meaning of which was not entirely clear?

Chile also argued that the Atlantic principle had never been understood in the sense that was now being alleged by Argentina. Once Chile had shown itself willing to relinquish its claim to Patagonia and to recognise Argentina's sovereignty over Staten Island, 'the Argentine Government was naturally led to seek the establishment of a geographic link between these two territories'. The Chilean argument continued: 'it was not a maritime jurisdiction over the Atlantic Ocean to which the Argentine Government laid claim but a jurisdiction over the continent, that is to say, land jurisdiction, and this land jurisdiction was sought to the south-eastern extremity of Tierra del Fuego prolonged by its natural appendix, Staten Island.'<sup>87</sup> This explanation was accepted by the Court in rejecting the Oceanic principle in the terms assigned to it by Argentina. The Court said (para 66 (2) (b)):

'It has already been indicated . . . that there is no real ground for postulating the existence of an accepted "Oceanic" principle (ultimately deriving from the very *uti possidetis* which, as such, the

84. Chap I, paras 4-6.

85. In a Report submitted by Chile to the Xth International Congress of the International Geodesical and Geophysical Union (IGGU) held at Rome in 1954, it was argued on geological grounds that the 'natural delimitation between the Southern Pacific and Atlantic Oceans is the arc of the Austral Antilles, and passes by Staten Island, Burdwood Bank, Cormoran Rocks, Black Rocks, South Georgia Islands, South Sandwich Islands and the South Orkney Islands until it reaches the extreme North-East of the Antarctic Peninsular' (see Argentinian Counter-Memorial, Chap XI, Section B, para 60). While the scientific foundation of this proposition is now well established, it does not follow that the previously accepted dividing line of the Oceans at Cape Horn should be abandoned. It is interesting of course that the Chileans were here adopting their own version of an 'Oceanic principle' which the Argentinians were fearful would be used in support of Chilean claims to the islands involved in the present dispute. In fact it has been employed in the context of Chile's claims to the South Shetland Islands but not in relation to any others, even those forming part of the arc.

86. (1979) 18 ILM 397.

87. Chilean Counter-Memorial, Chap II, para 17.

Treaty was intended to supersede) figuring as something that must *a priori* govern the interpretation of the Treaty as a whole. Particular parts of it, such as those relating to the boundary-lines defined in Articles II and III were clearly based on Argentine *desiderata* relating to the Atlantic coast in those particular localities . . . but since the underlying balance of the Treaty as a whole was . . . the polarity Patagonia/Magellanic area and control of the Straits, any "Atlantic" motivations are, the Court thinks, to be given effect to only in respect of the individual Articles that clearly show this intention by reason of their method of drafting or content. This must especially be the case on the basis of the Argentine non-overlapping view of the Treaty. . . . The Islands clause of Article III does not exhibit this element,—or if it does, seems to do so only by the attribution to Argentina of Staten Island and the other islands east of Tierra del Fuego (whether the Isla Grande or the archipelago) and east of "Patagonia";—while the attribution to Chile of "*all* [stress added] the islands south of the Beagle Channel" seems positively to exclude the east of Cape Horn/west of Cape Horn principle of division, by attributing to Chile all those islands that in fact are situated south of the Beagle Channel "as far as Cape Horn", irrespective of whether they lie east or west of the Horn.'

This pronouncement is not convincing. In order to support it, the Court had to consider the significance of the following extract from the statement made by Sr Irigoyen, the Argentinian Foreign Minister, to the national Parliament on the subject of the 1881 settlement (quoted, para 66(3)):

'We bore in mind the political consideration of maintaining our jurisdiction over the Atlantic coasts, and we have achieved this. These coasts extend for approximately 1500 miles . . . and they will remain under the exclusive jurisdiction of this Republic, whose flag will be the only one flying as a symbol of sovereignty, from Rio Negro down to the Strait and Cape Horn.'

The Court dismissed its significance in two ways:

1. By quoting a diametrically opposed view expressed a few weeks later by the Chilean Foreign Minister, the Court suggested that the two statements in some way cancelled each other out (*ibid*). With respect, this suggestion was irrelevant in the context in which it was made because the issue was whether Argentina was concerned with the Atlantic coastline only as far as Staten Island. On this question, the view of the Chilean Government was not capable of cancelling out the opinions expressed by the Argentinians themselves.

2. By referring to other parts of the same speech, the Court attempted to establish that Sr Irigoyen used the reference to Cape Horn in a rhetorical or figurative way and was solely concerned with the coast as far as Staten Island (para 114). This suggestion is certainly highly significant for the Court's conclusion on the Atlantic principle set out above, but even if the Court's reasoning is accepted, it is still not conclusive. On its own



admission the Court was aware that Irigoyen appeared to be avoiding the question of the southern islands (para 114(vi)). The reason for this omission, the Court reflected, might have been the remote and inhospitable nature of the far south, facts which had been referred to by both sides at the time of the 1881 Treaty.

However, it is arguable, and indeed likely, that there was a second and more important reason for Irigoyen's reticence. It could well have been that the parties were not entirely sure of the effects of the Islands clause. Whether or not its potential ambiguity was fully understood is less important than the fact that the parties could well have had differing views on its application. Irigoyen was therefore unwilling to dwell at length on the allocation made under the Treaty because he would naturally have been reluctant to reveal the existence of such uncertainties so soon after the conclusion of the Treaty. Nevertheless it is not unprecedented for States to negotiate a treaty in the knowledge that their final determination of the matters covered by the instrument may give rise to subsequent disagreements. Indeed, in the course of the 1902 Arbitration on the failure of the parties to implement satisfactorily Article I of the 1881 Treaty and subsequent agreements, the Tribunal reported as follows:<sup>88</sup>

'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 made 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.'

It should not be surprising, therefore, that even at the time of the conclusion of the 1881 Treaty doubts might have existed over the effects of the Islands clause of Article III, and different interpretations legitimately placed upon it by the two parties.

### **Conclusions**

The Court tackled the case from the standpoint that the Treaty, or at any rate the Islands clause, had a correct and ascertainable meaning. Despite the fact that even the Chilean interpretation involved acknowledging that aspects of the clause (or other parts of that Article or of the Treaty) could not be adequately explained, the Court settled for a definitive statement of its meaning and effects. In doing so, it was able to reduce the influence of subsequent acts, the early contradictions in the Argentinian view of the Treaty, and the more constant examples of Chilean jurisdiction over or in relation to the Islands in dispute.

However, if one does accept the more realistic assumption that the Islands clause was ambiguous both in its general wording and as far as the

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88. 9 UNRIAA 33 at 40.

precise location of the Beagle Channel was concerned, the conduct of the parties would have been placed in perspective as the true determinant of the case. It is not unreasonable to suggest that the parties reached only a partial solution to the problem of their southernmost boundaries, a problem that they could finally resolve in the course of time (just as the Andean boundary was subject to later adjustment, whatever the Court might have said about the preamble to the Treaty demonstrating 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' (para 19)<sup>89</sup>). In the event Chilean activities over the ensuing period of nearly a century may be regarded as establishing something of a *fait accompli* in political terms and a basis for asserting that they were giving effect to the intentions of the parties in the areas where the 1881 allocation was unclear. The validity of this latter argument could only be assessed in the light of the strength and consistency of Argentinian protests and of the extent to which the Chilean activities accorded with the spirit of the Treaty. On the facts, Argentina had made a stronger case on the basis of the spirit of the Treaty (particularly the Oceanic principle) than the Court was prepared to admit though it is possible that Argentina's vacillations in the early post-Treaty years would have rendered ineffective its later protests about Chilean conduct.

The impression remains that the Court adopted a very narrow view of its role. While it was limited by the *compromis* to a consideration of the islands within the small area of the 'hammer', this was no reason for its neglecting to take account of the effects of the decision on areas outside that zone. It is arguable that, to be successful, boundary awards should aim at some form of compromise between conflicting claims. In the course of his advice to the Tribunal (of which he was a member) which adjudicated in the 1902 Andean boundary dispute, Sir Thomas Holdich had no doubt as to the need to adjust as equitably as possible the conflicting claims of the two States. He proposed 'to assign to Chile all that is possible towards such a proportion of territory as will be of equal value with that retained by Argentina.' He then continued by suggesting that strategic considerations, 'as well as those referring to occupation point to only one way in which anything like a satisfactory compromise of this nature can be effected, and that is, shortly assign to Chile as much as possible in the southern districts and to leave to Argentina lands which she has effectively occupied in the north'.<sup>90</sup> Holdich himself later described the award as being 'dependent chiefly on the consideration of the spirit of the Treaty rather than its text'.<sup>91</sup>

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89. See above p 336.

90. Text in Chilean Memorial in the 1966 *Frontier Case*, p 111: cited Munkman, 'Adjudication and Adjustment—International Judicial Decision and the Settlement of Territorial and Boundary Disputes', (1972-73) 46 BYBIL 1 at p 32.

91. *The Countries of the King's Award* (1904), p 54.

Giving all to one side according to strict legal principles may be acceptable enough (1) where the territory in question has both little intrinsic value and would provide no economic or strategic benefits, and (2) where the States concerned are on amicable terms. Both these requirements were satisfied in the *Minquiers and Ecrehos* case.<sup>92</sup> On the other hand, in the Anglo-French *Continental Shelf Delimitation* of 1977,<sup>93</sup> in which potential economic benefits were at stake, principles of equity were applied to make what the tribunal regarded as a fairer adjustment of the boundary between the same two countries. In the *Beagle Channel* arbitration, neither requirement was satisfied. Although the islands were intrinsically of little importance they had economic and geopolitical significance far beyond their size; moreover, relations between Chile and Argentina had verged on hostilities on a number of occasions.

The substance of the dispute, namely sovereignty over the PNL group, may have given the Court what it felt was little room for manoeuvre in the sense that Argentinian arguments about the more southerly course of the Beagle Channel, even if supported by some historical evidence, were belied by subsequent Chilean acts of administration with regard to the islands. Nevertheless, the Argentinian concern with the effects of the sovereignty upon the maritime boundaries of the two States was clear from the different way in which the *compromis* set out the rival pretensions. As has already been pointed out,<sup>94</sup> Argentina requested 'the Arbitrator to determine what is the boundary line between the respective maritime jurisdictions of the Argentine Republic and of the Republic of Chile' within the designated area. However, this area was so small that the Tribunal had no competence to consider maritime boundaries, other than the boundary between the territorial waters of the two States in the Channel. Even on the ocean side of Nueva the south-eastern edge of the 'hammer' was no more than 8 miles from the nearest point on the island. As the dispute had achieved its contemporary significance largely because of the 200 mile claims to an 'epicontinental sea', the Court was in fact being asked a preliminary issue to what was, in Argentina's eyes at least, the real substance of that dispute. It was hardly surprising therefore that the decision in the case did nothing to resolve the essential differences between the parties.

The Argentine Government was notified of the Award on 2 May 1977. Claiming to act under Article XIII of the General Treaty of Arbitration of 1902, the Argentinian Government issued, on 25 January 1978, a Declaration of Nullity. In the words of that Declaration:<sup>95</sup>

'The analysis that has been carried out has convinced the Argentine Government that the decision of the special court has serious and numerous defects and it has concluded that the decision has been given in violation of international rules by which the Court had to

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92. ICJ Rep 1953, p 47.

93. (1979) 18 ILM 397.

94. Above p 332.

95. 17 ILM 738 at 740.

abide in its task. Therefore, that decision, and the subsequent Award of Her Britannic Majesty are null and void, since they do not meet the requirements to be considered as valid by international law.'

It is outside the scope of the present paper to examine the validity of the Argentinian Declaration: it is cited to demonstrate the ineffectiveness of the Court's decision to settle the dispute. Indeed, early in 1978 the Presidents of the two Republics met and, at a second meeting less than a month after the Declaration of Nullity, issued the so-called Puerto Montt Act.<sup>96</sup> This instrument provided for the setting up of consultation procedures through two separate Commissions. The first of these bodies was to recommend, 'within 45 days of the date of this Agreement, measures tending to set up the necessary conditions of harmony and equity, whilst an integral and definitive solution to the problem mentioned in item 3 is achieved'. The second commission was to 'analyze' a number of points, including the 'definitive delimitation of Argentine and Chilean jurisdictions in the Southern Region'. It was to complete its work within six months of the date on which the Governments had agreed to the proposals of the first Commission. In fact this Commission issued a press release on 2 November, 1978, the day upon which the time limit expired, in which it made the following admission:

'Even though the subject of delimitation was discussed and examined in depth, it was not possible to find common grounds; the Commission has consequently suggested that the two Governments seek such means of peaceful solution as they deem adequate.'

Even before the 2 November deadline, there were military preparations by both sides. Fears were expressed that Argentina might occupy the disputed islands by force. However, discussions took place during November on the possibility of appointing a mediator. Amid growing tensions, an appeal was made by the Pope to both Presidents to settle the dispute peacefully. The suggestion that the Pope should act as mediator was taken up, and formally accepted by the parties in an agreement of 8 January 1979.<sup>97</sup> Under this arrangement, the Pope's appointment of Cardinal Samore as his Special Representative was acknowledged and the parties also gave an undertaking not to resort to the use of force in their mutual relations. The relevant documents were, at the request of the two countries, brought to the attention of the Security Council.

The fundamental issue remains not so much the sovereignty over the PNL group as the implications which the allocation of those islands has on Argentinian claims to the Southern Atlantic. Its worst fears were realised when the Chilean Government took the decision as justification for establishing a system of straight base-lines from Nueva, to Evout, to Barnevelt, to the island off the southern extremity of Deceit, to Cape Horn (Decree of 14 July 1977). Quite apart from the fact that Argentina argued that a number of these islands were east of Cape Horn and not covered by the Beagle Channel arbitration, the existence of the base lines

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96. (1978) 17 ILM 793 gives an alternative text.

97. (1979) 18 ILM 1.

coupled with Chile's legislation for a 200 mile epicontinental sea marked a dramatic incursion of Chilean jurisdiction into the southern Atlantic. Furthermore, despite the declarations of the parties that the outcome of the Beagle Channel arbitration was not to affect their rights in Antarctica,<sup>98</sup> the fact remains that the decision might well have harmful implications for Argentina. The Cape Horn archipelago was in Chile's view in the hands of that State. Consequently any reliance upon contiguity would, if that view became confirmed, be of greater benefit to Chile than to Argentina. In addition, the Atlantic principle had been seriously questioned by the Court, at least as far as waters south of Staten Island were concerned.

It is on this point that the decision of the Court was most open to criticism. It was not necessary for its decision (which could readily be based upon the text of the Islands clause interpreted in the light of subsequent practice) to rule out so emphatically the *uti possidetis* principle, nor to take such an unsympathetic line towards the concomitant Oceanic principle. In so far as the Treaty of 1881 was not concerned with the delimitation of maritime boundaries (and indeed such a need could not have been foreseen at that time), there was scope for the application of *uti possidetis*, at least in the form of the Oceanic principle.

If principles of equity such as those applied by a similar tribunal in the *Delimitation of the Continental Shelf in the English Channel case*<sup>99</sup> are equally applicable to the allocation of continental shelf and exclusive economic zone areas between Chile and Argentina, then the Oceanic principle should be a highly relevant factor to take into account in assessing the competing 'equities'. Even on the assumption that one can accept the Court's characterisation of a host of Argentinian statements about its national jurisdiction extending 'as far as Cape Horn' as being largely figurative and therefore of little significance to the allocation of islands beyond Staten, it does not necessarily follow that they are devoid of value in adjusting rights to the ocean itself. While Argentina had been speaking about claims as far as Cape Horn, Chile had never asserted rival claims (even figuratively) to the entire area 'beyond Cape Horn as far as Staten Island'.

The increasing recognition of equity as an important component of International Law provides a means of producing a compromise that gives greater assurance that the decision will be respected by the parties. In the Beagle Channel dispute as submitted to the Court there was little room for compromise; rules of equity can have no tempering effect on acts of jurisdiction confirming the title of one of the claimants. In the context of the real substance of the dispute—that over rights to possible

98. The Declaration of Salta of 1971 by the Presidents of the two countries was stated to give 'expression to the constructive desire for joint co-operation in scientific research in Antarctica, and to the parties' agreement that the final decision on the Beagle Channel dispute shall not be interpreted as prejudging the question of sovereignty of either party over the territories situated south of the 60th parallel' (translation of Spanish text reproduced in *La Prensa* (Buenos Aires) 25 July 1971).

99. (1979) 18 ILM 397.

off-shore resources—equity would have a part to play in establishing a satisfactory settlement. It is to be hoped that the Papal view of what is equitable in the circumstances will provide a compromise that it is acceptable to the two States concerned.