International Rivers and Lakes

A Newsletter prepared jointly by the Department of Development Support and Management Services, United Nations, New York and the Economic Commission for Latin America and the Caribbean, Santiago, Chile

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The editor encourages contributions of news items for the information exchange exercise from interested readers.

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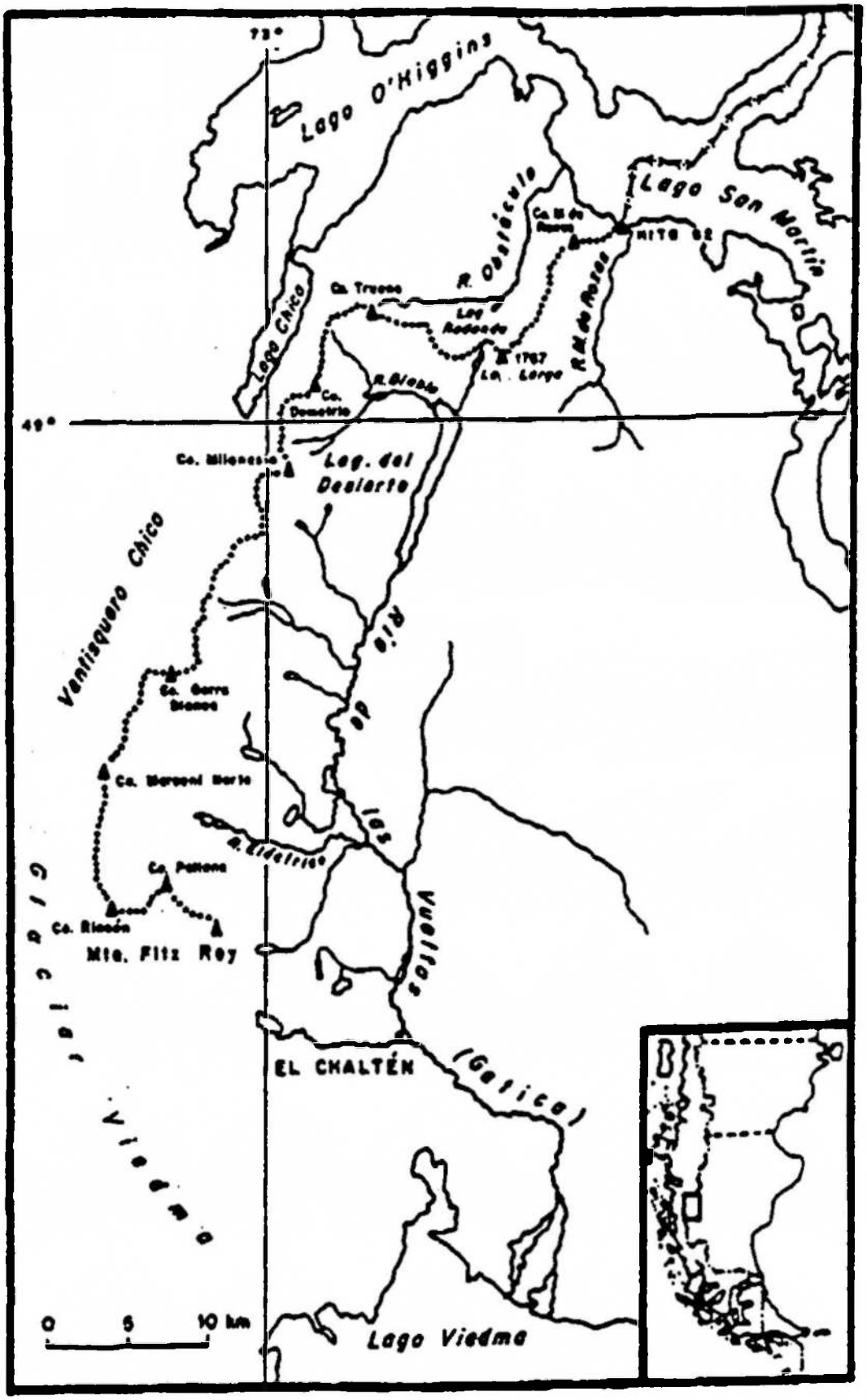

Map showing boundary between Argentina and Chile, according to decision of 21 October 1994

International Boundaries and River Basins: Decision of 21 October 1994: Controversy Over the Boundary Line Between Argentina and Chile (sector between landmark 62 and Mount Fitz Roy).[1]

Summary of award by international tribunal.

Introduction:

On 2 August 1991, the Governments of Argentina and Chile agreed to submit a controversy on the placement of the boundary line between landmark 62 and Mount Fitz Roy in the Southern Region of the two countries, to arbitration.

The Arbitrative Tribunal had to decide the placement of the boundary line between the two points identified above. The decision was to be based on the interpretation and application of a previous arbitration (Arbitration of 1902).

In 1991 the Tribunal consisted of five members, and decisions required an absolute majority. It was constituted in Rio de Janeiro on 16 December 1991. It had powers to interpret the agreement, decide on its competence, and establish procedural rules (in the absence of rules agreed by the parties).

The award of the Tribunal had to determine who was responsible for its execution, the manners and deadlines for execution, and the demarcations to be done in the field. The Tribunal does not cease in its functions until demarcations based on the award were carried out, approved by it, and notified to the parties. The expenses of the arbitration were equally shared by the parties. The adjudication is final, its execution and compliance being left to the honour of the two nations. The award is to be executed without delays, in the manner and within the time period decided by the Tribunal. The proceedings of the arbitration, after execution of the award, were to be deposited with the Secretary General of the Organization of American States. The agreement was signed on 31 October 1991.

Both parties requested specific placements for the boundary line in the sector of the controversy. The requests indicated the parties' claims on the delineation of the boundary between landmark 62 and Mount Fitz Roy. Argentina requested that the delineation of the boundary, described in its Memoir and attached geographical charts, be declared as the local water divide in the area. Chile opposed the Argentinean claim.

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[1] Summary of Original Award in 113 pages: "Tribunal Arbitral International, Sentencia del 21 de Octubre de 1994, Controversia sobre el recorrido de la traza entre el Hito 62 y el Monte Fitz Roy". Copia del Texto de Sentencia.

Background:

Historically, Argentina and Chile endeavoured to define their boundaries according to the principle of **uti possidetis** as of 1810. Art 39 of the Treaty of Friendship, Commerce and Navigation, 30 August 1855, determines that "...the two parties acknowledge that the boundaries of their territories are those possessed by each party at the time of their separation from Spanish domination in 1810. The parties agreed that differences on these matters would be postponed for peaceful and friendly discussion..."

A Boundary Treaty was signed on 23 July 1881. Article 1 of the Treaty establishes that "...the boundary between Argentina and Chile is the Andes from North to South, until parallel 52°. The boundary line shall follow, in that length, the highest summits dividing waters, and shall pass between the watersheds flowing to one side and the other..."

An Agreement, for actual demarcation and implementation of the 1881 Treaty was signed on 20 August 1888. Experts were appointed by each party to determine, on the ground, the actual demarcation of the lines indicated by the Treaty of 1881.

Field surveys showed that in the patagonic zone the continental water divide frequently abandons the Cordillera de los Andes, to be found to the east of them, while on the western side some stretches of the Andes submerge into the Pacific Ocean. Therefore, according to some interpretations, Argentina could have ports on the Pacific, while the Chilean territory could be extended until the patagonic plains. On 12 January 1892, the Chilean expert, Sr. Barros Arana, suggested that it would be beneficial to have instructions including a general interpretation of the Agreement of 1881. According to him the boundary line was the **continental divortium aquarum**. The Argentinean expert did not agree with his Chilean counterpart.

An additional Protocol, for the explanation of the Agreement of 1881, was signed on 1 May 1893. Art. 1 of the Protocol states that the boundary line runs along the highest summits of the Cordillera de los Andes, which divide waters, and will pass between the watersheds flowing to one side and the other. Experts and sub-commissions shall adhere to this principle as the non-variable norm guiding their procedures. The lands and waters at the east of the highest summits of the Cordillera de los Andes dividing waters are the absolute dominion and ownership of Argentina. Those at the West are under the absolute dominion and ownership of Chile. Chile cannot claim areas towards the Atlantic, beyond the boundary line; while a similar principle applies regarding Argentina and the Pacific. Should the Cordillera de los Andes intern into the southern channels of the Pacific Ocean when approaching the parallel 52°, the two governments will amicably determine a dividing line, according to which Chile shall keep the shores of such channels.

On 17 April 1896, the two parties agreed to submit their differences to the arbitration of Great Britain. On 29 August 1898, the Chilean expert presented a proposal on the limit, together with a geographical chart containing the most relevant points of the boundary. He stated that the proposal was based on the principles of the Treaty of 1881 and the Protocol of 1893.

Accordingly, "The proposed boundary line runs along all the highest summits of the Andes, which divide waters and constantly separate the watersheds of the rivers belonging to each or other country". On 3 September 1898, the Argentinean expert presented his proposal. Differences were submitted to the arbitration of the British Crown, while the areas where there was agreement were "accepted as part of the dividing line in the Cordillera de los Andes, between the Argentine Republic and the Republic of Chile".

Regarding the differences, the British Arbitral Tribunal was constituted, meeting for the first time on 27 March 1899. On 19 November 1902, the Tribunal approved and signed its report for the British Crown, with the corresponding maps. Paragraph 10 of the report summarized the pretensions of the parties.

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

Paragraph 15 of the Report acknowledges that the orographical and hydrographical lines are frequently irreconcilable, neither fully conforming to the spirit of the agreements submitted to the Government Tribunal's interpretation. "...the terms of the Treaty and Protocols are inapplicable to the geographical conditions of the countries to which they refer.... The wordings of the agreements are ambiguous and susceptible to the diverse and antagonistic interpretations placed upon them by the representatives of the two Republics."

Paragraph 16 states that the question submitted to the Tribunal is to determine--**within the limits defined by the extreme claims on both sides**-- the precise boundary line which in the opinion of the tribunal would best interpret the intention of the diplomatic instruments submitted for the consideration of the Tribunal.

Paragraph 17 of the Report states that the Tribunal confined itself to opinions and recommendations on the delimitation of the boundary, adding that in the view of the Tribunal actual demarcation should be carried out in the presence of officers deputed by the Arbitrating Power in the next summer season in South America.

A Demarcation Commission was appointed by the Arbitrator, and it was agreed that no landmarks would be required for places where the boundary line was clearly and doubtlessly determined by the topography of the land. **Landmarks were to be used only to identify the points where the boundary line was to cross rivers or lakes, at the highest summits of the mountain passes, and in open areas where topographic elements do not allow an easy determination of the boundary line.**

Differences regarding the boundary and the placement of landmarks have been peacefully solved by the two countries. Legal mechanisms for that purpose have been available since the beginning of the century. In addition, a Treaty of Peace and Friendship was signed at the Vatican on 29 November 1984.

The difference settled by the award summarized in this article is included within the terms of the 1984 Treaty.

The Present Controversy:

The differences solved by the award were already present in 1898. In 1902 the arbitral award divided the eastern (Argentina) and western (Chile) basins of lakes Buenos Aires, Pueyrredon (or Cochrane), and San Martin; "...the dividing ranges carrying the lofty peaks known as Mounts San Lorenzo and Fitz Roy". A stone landmark (No 62) was placed at the Southern shore of Lake San Martin. The boundary in that sector corresponded to a line drawn from landmark 62 to Mount Fitz Roy. There was agreement on the placement of the extreme points of the boundary. However, there were differences on the demarcation of the connecting line on the ground.

In 1991, Argentina and Chile decided to subject the difference to arbitration, within the terms of Peace and Friendship Treaty of 1984.

The Landscape:

The area between landmark 62 and Mount Fitz Roy is quasi-rectangular, with three main mountain ranges from north-northeast to south-southwest. In the second (towards the east) mountain range there are two headwaters: Río Obstáculo, draining towards the Pacific; and a tributary of the Laguna Larga-Laguna del Desierto-Río Las Vueltas (or Gatica)-Lake Viedma system, on the Atlantic watershed. Total surface area is approximately 481 Km^2.

The Arbitration:

The Tribunal was requested to decide the course of the boundary line in the sector located between landmark 62 and Mount Fitz Roy. The decision of the Tribunal was to be based on the interpretation and application of the Arbitral Award of 1902.

The Tribunal could interpret the Agreement of 1991; decide on its own competence; and establish procedural rules absent norms agreed by the parties.

The Tribunal was an autonomous jurisdictional organ resulting from the agreements of 1991 and 1984. Its functions were to decide the placement of the demarcation, between landmark 62 and Mount Fitz Roy, of the boundary line established by the Award of 1902. The award was acknowledged by the parties as **res judicata**, and was not subject to any appeal, review, or annulment whatsoever. Since the Tribunal was allowed to decide on its own competence, it was

considered to be a jurisdictional body, and not a political or administrative arrangement.[2]

The Tribunal was required to decide on the drawing of the demarcation of the boundary line in a sector of the frontier between Argentina and Chile. Any norm of international law in force for the parties could be applied by the Tribunal. The instruments of the award of 1902 include the decision proper; the report of the Tribunal; and the map of the Arbitrator. Chile added a fourth element: the demarcation. The Tribunal accepted the criterion of the adjudication of 1966 according to which the award of 1902 consisted of the report of the Tribunal, the map of the Arbitrator, and the decision proper.[3] The Tribunal noted that adjudication and demarcation are two different and separate acts, which in the present case emanate from two different instruments: the Agreement of 1896 and the Act of 28 May 1902. This type of sequence agrees with international practice, according to which demarcations are expressly requested as acts different from the adjudication.

The Tribunal emphasized that the authority of **res judicata** is a universal and absolute principle of international law. Therefore, the parties are bound by the terms of the 1902 award, to which they have not objected. The authority of **res judicata** applies to the dispositive parts of the award and also to the considerations based on which it was adjudicated.[4]

The **res judicata** also includes the meaning of terms used in pronouncing an arbitral award. The interpretation is utilized to determine the intention of the arbitrator in the present case. [5]

International law utilizes three general norms of interpretation:
natural and ordinary sense of the words; the context where terms are used; and useful effect.[6] Awards, sentences and adjudications are subject to rules stricter than the general rules of interpretation given above. In these cases preparatory documents and subsequent actions of the

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[2] The award quoted treaties and jurisprudence in this respect: Art. 3, para. 2, du traité de Lausanne-Frontière entre la Turquie et l'Irak, C.P.J.I., Série B, No 12, pp. 26 and 27; Award in the matter of an arbitration concerning the border between the Emirates of Dubai and Sharjah, 1981 p.58.

[3] Award of Queen Elizabeth II, interpreting the Award of 1902 in relation to the Palena (or Encuentro) river.

[4] The 1994 decision quoted international law and jurisprudence: Interprétation des arrets Nos 7 et 8-Usine de Chorzów, C.P.J.I., Série A, No 13, pp. 20-21; Affaire de la délimitation du plateau continental entre la Royaume-Uni de la Grande-Bretagne et de l'Irlande du Nord et la République francaise, Décision du 10 mars 1978, R.I.A.A., Vol. XVIII, p. 366.

[5] R.I.A.A., vol. XVI, p. 174.

[6] See the award, p. 48; also see William W. Bishop, Jr., 1971, *International Law Cases and Materials*, Third Edition, Little, Brown and Company, Boston-Toronto, pp. 166/191.

parties are not resorted to in order to interpret the adjudication.[7]

The interpretation of adjudications implies not just the precision of the text of the resolutive parts of the decision, but also the determination of the reach, sense, and finality or purpose of the decision, according to its considerations.[8]

Interpretation is an activity for the precision of the meaning of a norm, but it cannot modify such meaning. The interpretation of the text of awards and adjudications cannot modify the **res judicata**. It is not a tool to determine what a Tribunal would have decided in light of new facts and arguments. Interpretation cannot result in a consequence contrary to international law. In addition, the scope of the jurisdiction and the competence of international judges and tribunals is determined by the powers that the parties give to the Tribunal, and by their extreme claims (**non ultra petita partium**).

The same principle applies to the interpretation of awards and adjudications: the interpretation cannot go beyond the limits of the award.[9]

The claims of the parties:

Argentina claimed that in the present case Chile was vindicating territory beyond its extreme claim at the time of the 1898-1902 arbitration. Argentina sustained that the extreme claim of Chile in 1902 was the continental water divide (**divortium aquarum continental**), according to which the Atlantic watersheds (river basins) were to belong to Argentina; while the watersheds (river basins) of the Pacific would belong to Chile. The claim under present consideration according to Argentina was: a request of jurisdiction, by Chile, over a river (Gatica, o Las Vueltas) belonging to the Atlantic watershed.

Chile did not agree with the Argentinean argument: in 1898-1902 the extreme claims of the parties were delineated on maps; and the Arbitrator of 1902 also delineated the boundary by means of drawing a line on a map. If those lines are reviewed, they show that the present Chilean claim does not go beyond its maximum claim in 1898-1902. "In that region the boundary line claimed by Chile was at the south of the true continental water divide (farther south than the **divortium aquarum**). Accordingly, the boundary line, and the zone now claimed are essentially within the perimeter claimed then...[1898-1902]. ...Regarding the expression of the Chilean

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[7] R.I. A.A. Vol. XVI, p. 174.

[8] Corte I.D.H. Caso Velásquez Rodríguez, Interpretación de la Sentencia de Indemnización Compensatoria, Sentencia del 17 de Agosto de 1990 (art. 67 Convención Americana sobre Derechos Humanos) Serie C. No 9, par. 26.

[9] Demande d'interpretation de l'Arret du 20 november 1950 en l'affaire du droit d'asile. Arret du 27 novembre de 1950; CIJ, Recueil 1950, p. 403.

claim on the definition of the limit, what really matters is the line drawn on the map". Therefore, the limits of the Chilean claim were not determined by its general adhesion to the theory of the continental water divide (**divortium aquarum**), but by the lines effectively drawn on the maps submitted to the Tribunal by Chile and Argentina, and considered by the Tribunal as the expression of the limits of the Chilean claim.

Moreover, the Chilean claim of 1898-1902 cannot be interpreted according to present geographic knowledge, but in light of the knowledge existing at that time, when there still were unexplored areas, and others that were not sufficiently known.

According to the Tribunal of 1991, the extreme Chilean claim in 1898-1902 should result from the Chilean presentations before the Arbitrator. At a meeting (29 August 1898), the Chilean expert declared that the boundary between the two countries was determined by "...the natural and effective division of the waters of the South-American continent, between parallels 26°52'45" and 52°." Therefore, the boundary between the two countries is the continental water divide, also named **divortium aquarum**. The Tribunal also quotes the Chilean presentation of 27 October 1902, where Chile stated: "The existence of 'a sole and absolute rule' of demarcation -- that is to say an 'invariable rule' -- in the treaty is officially declared by the two nations in the Protocol of 1893. ...**there is no other possible invariable rule...but that of the water-parting....**"

Therefore the Tribunal of 1991 concluded that Chile vindicated before the Arbitrator the line of the continental **divortium aquarum** as the limit established by the Treaty of 1881 and the Protocol of 1893. In doing this, the Tribunal mentions a declaration by the Chilean expert (1898), where the expert declared that the topographical location of the proposed line is entirely independent from the accuracy of maps and charts ("planos" in the Spanish original). For this reason, the expert declares that the line is no other than the natural and effective water divide of the South American continent between parallels 26°52'45" and 52°; which can be demarcated on the ground without any topographical operations other than the ones needed to determine which would be the direction of the water run-off in the places where waters do not materially flow.[10]

Chile also ascertained that the line of the continental water divide is recommended by the correct principles of geography and international law. It is a single line, easy to determine, to find on the ground, and to demarcate. It is designated by nature and not subject to mistakes or ambiguities. The waters being the **whole** of the waters flowing over the coterminous territories ...must involve the existence of a natural divide ...[of] ...easy identification and necessary continuity ...[which can be] recognized as wholly adequate to serve as the international boundary. ...It is difficult to imagine that any "parts" of a river should not belong to the country where the whole of it lies...the line indicated in article 1 being defined by a principle of demarcation, and not by predetermined material points. The mission of the experts was to strictly apply this **principle** on the ground ...the rule of following the water parting could give rise to

[10] Declaration of the Chilean expert, as per records of 29 August 1898.

no ambiguity in practice ...because if subordinate and partial water partings were taken into consideration, the expression would cease to be definite and the stipulation founded on it would cease to be valid.

It was acknowledged that two opposite flows of water must have a line of separation somewhere, and thus at least the **real existence** of a continuous line is secured...the line shall first be marked out **on the ground** and the data shall then be collected for the sole purpose of **drawing the line on the maps**. The principle of demarcation established by the Treaty did not depend on maps, demarcation not being subordinated to maps, since no maps were needed to know that a unique and real line of water-parting existed between Chile and Argentina or to find and identify such line on the ground. Therefore, the Tribunal of 1991 decided that in its presentations Chile had established a ranking of priorities according to which the natural line of the continental water divide prevailed over written texts and maps; and also over cartographic representations, independent of their accuracy. The same criterion applies to unexplored and remote areas. These expressions were clear, definite and reiterated.

The Tribunal searched for the extreme claim of Chile in 1898/1902. At the time of this arbitration the upper basin of the Gatica (Las Vueltas) river was still unexplored. The boundary line claimed by Chile was north of the headwaters of the Gatica river basin, which was left entirely at the other side of the frontier, whatever its extension. Therefore, according to the Chilean claim of 1898/1902, what was essential were not the precise points of the frontier line drawn on a map, but that it effectively fulfilled its function of separating the basins of San Martín Lake and the Gatica or las Vueltas River.

The Tribunal found that the extreme claim of Chile in 1902 was the effective and natural line of the **divortium aquarum**, except for the case of Mount Fitz Roy. The application of the rule of the extreme claim is independent from its full acceptance by the Arbitrator of 1902. Although this award did not accept the **divortium aquarum** as the sole criterion for delimitation, there are several segments of the limit drawn over the continental divide, because it was so decided by the award.

Demarcating the boundary line between landmark 62 and Mount Fitz Roy:

The Arbitration of 1902 does not have a definition of "water-parting". Therefore, the concept of "water-parting" has to be interpreted, according to the meaning of the term at the time of the award, and also in agreement with the rules of efficacy, intent, and purpose of the act of law. For Argentina the water divide has four essential characteristics: a) it is a line which, in each one of its points, divides river basins; b) it is a line which cannot cross rivers or lakes; c) it is a continuous line; and d) it is a line between two predetermined points.

Argentina claimed that the term "water-parting" is the essential concept, while the qualifications of "local" and "continental" are ancillary notions. In this view "continental" is the line parting the waters draining towards the Atlantic and towards the Pacific and "local water-parting" is the water parting within a sector comprised between two specific points, such as landmark 62 and

Mount Fitz Roy. Words should be understood according to their ordinary and current sense (or usage [Newsletter addition]) and also within context. The local and continental water-parting can overlap and coincide.

Chile claimed, in its memoir, that the continental water-parting marks the separation between the waters flowing towards the Pacific or the Atlantic, while the "...local water-partings separate waters draining to one ocean." Accordingly, "...a water parting could not -- at the same time -- be local and continental." Therefore, there is no local continuous water-parting carrying a line between landmark 62 and Mount Fitz Roy. Thus, the description of the limit in the 1902 Report does not coincide with actual geography.

However, when making its oral allegation, Chile defined the line that it proposed as a true water-parting, even if it cuts surface waters and coincides with a segment of the continental water-parting. Chile then affirmed that there would be a local water-divide between the two extreme points of the segment subjected to arbitration.

Therefore, the Tribunal found, the notions of continental and local water-divide would not exclude each other. The Tribunal also ruled that the **res judicata** included the dispositive part of the arbitration, the considerations based on which it was decided, and the meaning of the terms used in the adjudication. Such meaning could not be changed by usages after the award; evolutive changes in language; or activities, or decisions of any of the parties in the controversy.

In this context the meaning of the term "water-parting" becomes relevant. The notion appears in the Treaty of 1881; acquiring particular relevance in the arbitration of 1898-1902 because Chile claimed that the **divortium aquarum** was the boundary between itself and Argentina. According to the Chilean statement:

> "The condition of dividing the waters and that of being traversed by a watercourse are incompatible and contradictory....The Chilean government has never applied the expression '**water-parting line**' to a line that is traversed by watercourses large or small. ...If the boundary follows a watercourse it also is specified, and is called a river, and not a water-parting. ...To sum up, the Chilean Republic not only has given no categorical recognition to the terms **divortium aquarum** or water parting ever being applied to a line cut by watercourses ...but it has not made a misuse of the term in any case whatever. ... '**divortium aquarum**' means a line through which no water flows". On that part of the South-American continent only the continental divide is a line not crossed by watercourses.

The usual meaning of **divortium aquarum** consists of a mathematical line, that no superficial drainage line can cross. **The line of the divortium aquarum cannot cut across a watercourse, because if that should happen the line would cease being a water parting.**

Argentina claimed that the Treaties only determine the watershed of the high crests, the

watershed of the main chain, and that the continental divide is never mentioned in them. The line, then, must be within the Cordillera de los Andes, running along the most elevated crests, that may divide the waters of the same. Argentina did not identify the watersheds belonging to the highest crests with the continental divide. The boundary should pass over the most elevated crests. Should a bifurcation exist, differences are to be settled. Should there be a lack of coincidence between the highest crests and the water-divide, the [boundary] line must be marked out along the mountain range.

The Arbitrator of 1902 pointed out that "...the orographical and hydrographical lines are frequently irreconcilable". Later, the Tribunal quotes an award from 1945 according to which, between two points of a ground surface there is only one, and just one, water-divide. The water-divide corresponds to the trace separating surface water courses that have different outlets.[11] The concept of water-parting of the 1902 award is protected by the **res judicata** and cannot be modified, after the award. Either by usages, evolutive changes in language, or activities and decisions of one of the parties involved in the controversy.

The water-divide between landmark 62 and Mount Fitz Roy as a "local" water-divide:

The award of 1902 termed the water-divide between landmark 62 and Mount Fitz-Roy as a "local" one. The report of 1902 used the term "local" to designate lines drawn between identified points. Except for one case, the designation is used to identify sectors where the frontier cuts across rivers or lakes; or raises from surface waters, with its starting point not coinciding with "a continental divide". Local water divides were represented with pecked lines, representing natural features known to exist, but whose exact position had not been accurately located.

Chile claimed that there is no local water divide between landmark 62 and Mount Fitz Roy and also that "local water divides" separate waters flowing into the same ocean. The application of these concepts would result in the 1902 award not being applicable to the sector between landmark 62 and Mount Fitz Roy, the reason being that landmark 62 is in the Pacific watershed, while Mount Fitz Roy corresponds to the Atlantic watershed. Therefore, according to the rule of efficacy of legal norms, the Tribunal did not accept the claim made by Chile. In addition, the Tribunal found that the term "local" designates a feature or characteristic limited to a place or zone, and consequently not widely distributed. In this context, "local water-parting" does not mean a water divide cutting across rivers, but that the boundary line can in certain cases, cut across rivers, connecting ground-points specifically identified.

Conduct of the Parties Subsequent to the 1902 award:

The behaviour of the parties, subsequent to the award of 1902 is not relevant to the determination

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[11] A. Phillipson "Studien uber Wasserscheiden", Leipzig, 1886; Apéndice "A", Contramemoria de Chile en caso 1991/1994, p. 235; D. Braz Dias de Aguiar, Arbitral Award of 14 July 1945 between Ecuador and Perú.

of the arbitrator's intention. The conduct of private individuals and local authorities is also irrelevant in determining such intention. Yet, since both parties invoked subsequent conduct in relation to cartography, exercise of jurisdiction, and demarcation works, the Tribunal addressed the issues brought before it.

In relation to cartography, the Tribunal found that there is a determinant intention to locate the basin of River Gatica, or Las Vueltas, in Argentinean territory.

In relation to the exercise of jurisdiction the finding was that jurisdictional acts were not consistent, unequivocal, or effective enough to generate legal effects relevant to the case. In this connection the Tribunal applied the precedent of the Preah Vihear Temple: "...the Court finds it difficult to regard such local acts as overriding and negativing the consistent and undeviating attitude of the Central Siamese authorities to the frontier line as mapped..."[12]

Finally, the Tribunal found that demarcation works taking place after the 1902 award were irrelevant to determine the intention of the arbitrator in relation to the sector determined by landmark 62 and Mount Fitz Roy.

Accordingly, The Tribunal decided that:

The drawing of the limit (between Argentina and Chile,) between landmark 62 and Mount Fitz Roy is the local water-parting, as identified in paragraph 151 of the award;

This divide consists of a line from landmark 62 to Mount Martinez de Rozas. The line divides the waters flowing into the Martinez de Rozas River from other waters flowing into the San Martin-O'Higgins Lake. From Mount Martinez de Rozas the divide continues towards the South-Southwest following the summits of the Martinez de Rozas chain, dividing the basins of the Obstaculo and Martinez de Rozas Rivers and reaching a mountain (unnamed) at altitude 1767 m.

From there the line of the water-divide turns to the northeast, descending to the pass between lagoons Redonda and Larga, then ascends towards the west-southwest and then to the northwest, reaching an unnamed mount (altitude 1629 m). It continues towards the west-northwest until Mount Trueno (altitude 2,003 m). In this region the divide runs between the Obstáculo river basin to the north and the Diablo river basin and some other streams, which discharge into the Desierto lagoon, to the south.

From the Trueno Mount the water-divide turns to the south-southwest to the Demetrio Mount (altitude 1,717 m), then to the Tambo Pass to reach the summit of Mount Melanesio or Ventisquero (altitude 2,053 m). In this region, the divide separates the river Diablo basin, discharging into the Desierto Lagoon from the streams and ravines discharging into Chico Lake.

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[12] Case concerning the Temple of Preah Vihear-Cambodia Vs. Thailand -- Merits. Judgement of 15 June 1962. I.J.C. Reports 1962, p. 30.

The line then runs to Mount Gorra Blanca (altitude 2,907 m), towards the south-southwest. This part of the divide separates tributaries of the Gatica or Las Vueltas river from tributaries discharging into Ventisquero Chico.

The water-divide continues to the south, turns west, descends, and reaches the Marconi Pass. Thereafter, it ascends to the Marconi Norte Mountain, continuing south to the Rincón Mount (altitude 2,465 m), separating Ventisquero Chico and Glacier Marconi and then glaciers Viedma and Marconi.

Finally, the divide runs towards the east, separating the basins of the Electric river to the north; the Fitz Roy river and Viedma Glacier to the south. By doing so, the line passes through mounts Domo Blanco (altitude 2,507 m), Pier Giorgio (altitude 2,719 m), Pollone (2,579 m), ending up at the summit of Mount Fitz Roy.

The award is to be executed before 15 February 1995.

The Tribunal consisted of five members. Three voted for the affirmative; two recorded dissidences.

Tentative Agreement on the Mekong River[13]

In December 1994, the countries riparian to the Mekong River (Thailand, Laos, Cambodia, and Viet Nam) reached a tentative agreement to cooperate in the development of the river.

During a three day meeting in Hanoi, these four countries pledged to coordinate their individual use of the Mekong for hydro, irrigation, navigation, tourism and domestic uses.

The agreement establishes and provides an institutional framework for implementation of development plans for the Mekong River. The Mekong River Commission will be established with three permanent bodies. The Council, consisting of both a Ministerial and Cabinet level, will be responsible for making policies, decisions, and resolving disputes. The Joint Committee will be the primary body to carry out policies. The role of the Secretariat will be to provide both technical and administrative support to the Commission.

The document was based on a set of principles, so that the resources of the Mekong can be used in a reasonable and equitable manner. The principles call for sovereign equality, territorial integrity and environmental protection. The agreement allows the freedom to navigate throughout the mainstream of the Mekong River, based on the equality of right, without regard to territorial

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[13] *Time Magazine*, 12 December 1994, p. 27, and Press Release from the Fifth Meeting of the Mekong Working Group held in Hanoi, Viet Nam 28 November 1994.

boundaries. This will enable transportation and communication while promoting regional cooperation and development.

The four signatory countries will adapt the concept of a Basin Development Plan. This will focus on joint and basin-wide development projects. By taking into account the geography, hydrology, environment and climactic conditions, the plan will attempt to identify and prioritize specific projects. The need to harness the destructive power of the Mekong River during the wet season will also be acknowledged.

Roy Morey, the Resident Representative of UNDP in Viet Nam, stated: "For the first time there is a clear set of principles for the use of the Mekong Resources".

In the past, efforts to cooperate were hindered by several factors, including the Viet Nam War and the estrangement of Cambodia. Thailand and Viet Nam have often disagreed on the use of the river for hydropower and irrigation. The river flow is crucial for Viet Nam (the Mekong Delta accounts for 60% of Vietnamese agricultural production). Therefore, Viet Nam seeks more control over such flow, particularly during the dry season.

The tentative agreement establishes a Committee to help resolve disputes. According to Mr. Morey, the riparian countries have realized the usefulness of a multilateral [rather than bilateral] framework for discussion and negotiation of problems. However, any multilateral framework would still be impaired without the participation of China and Burma.

Committee on Natural Resources of The Economic and Social Council Discusses Global Instruments in Relation to Water[14]

The Working Group on Water Resources of the Committee, meeting in March 1994, had before it a report of the Secretary General of the United Nations, on international instruments for global action.

Several experts emphasized the importance of raising the level of international attention and action on the global water crisis through the establishment of some form of legal instrument which might accord greater importance to water issues. Discussions on what it might entail included the consideration of different alternative codes of conduct; water legislation; framework conventions and declaration of principles. It was generally believed that it would be more difficult to obtain agreement on a binding convention.

One expert suggested that the focus of such an instrument should be integrated water

[14] E/1994/26; E/C.7/1994/13, p. 39

management and greater balance in water use.

Other experts stressed the importance of the water cycle and the links between water and land resources, together with the need to protect water resources from pollution.

A representative from ECE gave details on the conventions subscribed with the auspices of ECE in the fields of water management, air pollution, environmental impact assessment, and industrial accidents while affirming that they have a strong impact on the level of public awareness and on capacity building, particularly for the economies in transition, which require new laws and infrastructure to strengthen water management. It was suggested that the successes in Europe might be related to the relatively high degree of awareness about water issues.

Inputs from ECE were suggested and conveyed to the Commission on Sustainable Development.

Guidelines on Integrated Environmental Management in Countries in Transition[15]

The Economic Commission for Europe and the United Nations Environment Programme have published a set of guidelines on integrated environmental management.

Since river basin management has a close correlation with general environmental management, a summary of the guidelines is being submitted to the readership of this Newsletter. Copies of the guidelines will be made available on request.

The guidelines have been prepared for countries in transition, but the issues discussed have a global reach. Therefore they will be of interest for many countries.

1. Strengthening Policy Development

Environmental policy, planning and management are negatively affected by several factors. Some include, **inter alia**, inadequate legislation, the lack of political clout of environmental authorities, low public awareness, limited target groups, inadequate information and a lack of financial resources.

(a) Environmental institutions

Countries should establish a coherent system of environmental authorities, with a clear division

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[15] From ECE/UNEP: "Guidelines on Integrated Environmental Management in Countries in Transition," ECE/UNEP/FP/2101-92-02 (3002), UN/NY/1994.

of competencies between the national, provincial or regional and local levels.

Generally, the national level should be responsible for formulating the policies, objectives and programmes and following them up. It should also be responsible for legislative proposals, development of environmental instruments like permits, impact assessment procedures and methodologies, integration between environmental and sectoral policies, coordination, promotion of research and education and international cooperation.

Environmental functions may be concentrated in either specialized units within regional administration, or in regional bodies subordinated to the national environmental authorities. **Dependence and subordination to regional development structures should be avoided, since environmental impact statements should be carried out independently.**

Environmental inspection units and coordination among ministries are stressed.

(b) Legislation and enforcement

Environmental policies should be considered on a par with other policies. Constitutions may include environmental provisions. Environmental legislation should be consistent.

Comprehensive and integrated legislation should include a clear determination of powers and responsibilities of the different actors within the system. It should be coherent and strict. Permit applications must be coordinated, with an ultimate objective of issuing a single, integrated permit. Environmental considerations should be included in sectoral policies, plans and programmes at all levels of government. Monitoring and evaluation should include existing plants and installations with the eventual change and adjustment of existing infrastructure. Environmental impact assessment should be mandatory, public authorities should periodically report on the status of the environment, private corporations and economic actors should provide regular and adequate information on their activities. The public right to have environmental information must be included in legislation, as well as the standing to act in court.

Where necessary, national legislation should be adjusted according to the requirements of legally binding international agreements and treaties. Implementation of such agreements should include adequate legal, administrative and other required instruments. Negotiations should be pursued with the participation of affected sectors.

Environmental standards to be enacted must be feasible and enforceable, and coordinated with realistic compliance-scheduled plans. Compliance schedules should be aimed at achieving sustainable growth. Permits should be issued for specific periods of time, subject to review, monitoring, termination, reporting and compliance schedules.

Effective responsibility and liability systems should be developed, strengthened and enforced. The principles to be applied include: preventive action, polluter pays, public rights to request termination and restriction of polluting activities, and also compensation for pollution damages.

Strict liability and financial security schemes to cover environmental damages are endorsed.

Effective sanctions, including the suspension and revocation of permits and the discontinuation of activities, that violate environmental requirements and seriously threaten human health and the environment, are suggested.

(c) Policy planning

Environmental policy should be based on the following principles: precautionary, polluter pays, sustainability, prevention of pollution at the source, concerted actions and shared responsibility.

Environmental protection should be based on an integrated, cross media approach, including water, soil and air, in such a manner that the protection of one medium does not result in damage to another. Detailed targets and appropriate priority setting are endorsed. Objectives might be regional.

Transboundary and global problems should be given proper attention, as well as commitments within the framework of relevant international agreements. The long-term national goals should strive to achieve a convergence of environmental conditions and instruments throughout Europe.

Internationally agreed policy principles and elements should be used as much as possible, in the formulation of policy. Relevant agreed international instruments should be disseminated among the appropriate levels of government.

The policy instruments usable in achieving policy objectives include regulations, planning, economics and voluntary compliance. Environmental policy should be subjected to regular and comprehensive follow up.

(d) Public participation

There is a need to promote public participation in environmental decision-making, based on increased public awareness and access to environmental information. Such information should be in a form amenable to mass communication. Restrictions in information should be an exception, based on justifiable reasons of personal privacy, security, commercial secrecy, etc. Such restrictions should be motivated on a case-per-case basis.

The information from companies to the public should include: policies, objectives, targets, environmental activities, performance, status of environmental management systems, etc. Public involvement and participation should also be a part of the system to grant permits. Standing to act in Court and administrative fora is a relevant part of the system of public participation.

2. Integration with Reform Processes

(a) Privatization in Industry

Privatization differentiates the regulated from the regulator, allowing monitoring without a conflict of interest. (Yet, when mixed economy corporations are created, the conflict may persist, Newsletter notes.)

Privatization should include environmental objectives, together with its traditional objectives. Environmental authorities must have a designated part in the privatization process. Environmental clauses should be a part of the model privatization contracts on equal footing with standard clauses on investments, benefits etc. (However, it is possible to find clauses according to which environmental legislation is "frozen" at the time of contracting, and any subsequent changes, representing higher costs for the private contractor, are to be borne by Governments or subject to negotiations. These types of provisions are mainly found in contracts related to natural resources, like oil, Newsletter notes.)

Guidelines on environmental damage, responsibility and liability should be clear and uniform. Responsibility and liability for past environmental damage should be decided before privatization, when property rights still rest with the state.

Other subjects include environmental evaluation risks associated with environmental clean-up. Evaluation statements and remedial clean up programmes need to be finalized before transactions are completed. The evaluation should be published.

(b) Rural reform

Rural reform should include specific provisions for the protection of soil, ground and surface waters, conservation of biodiversity and protection of landscapes. Protected areas must be specifically referred to, with adequate management programmes for each one.

Ownership of water resources should be clearly defined by law. If on private land they should be regulated with a view to their protection and sustainable use (in most systems waters are entirely public, Newsletter note). Rights of access are to be protected. Groundwater should be either private, or adequately regulated. Rights to use should be preferred to private ownership. Permits and rights should be subjected to precise regulation, including transfer, modification or abolition of use rights. Protection should include quantity and quality.

(c) Structural Changes

Environmental authorities should take advantage of the restructuring of national economies to integrate environmental requirements within economic policies, and to improve the environmental attitude and performance of economic sectors. The principles to be applied in this regard include the **five Rs**: reduction, replacement, recovery, recycling, and reuse.

Self regulation by the private sector should be promoted, including voluntary efforts to comply with environmental standards and use more environmentally sound approaches and voluntary eco-audit schemes. Eco-labelling is another important tool.

(d) Economic instruments

Environmental resources should be properly priced and environmental costs must be internalized. Economic instruments should be linked to regulations, standards, and other means of public and administrative control. The principle should be polluter pays and user pays, with appropriate allowances and compensation schemes for the most disadvantaged social sectors. Rates should be high enough (higher than the cost of actual prevention or reduction) in order to encourage environmentally responsible behaviour. They should be part of a system including penalties, enforcement, and monitoring measures. They should be properly assessed to ensure the efficiency of the system as a whole. Resources, prices and charges should be subjected to the same principles as rate-setting.

However, price-raising should be accompanied by income support measures for vulnerable groups. Water and water-related services should be appropriately priced. Emission trading is encouraged provided that there are suitable scales, large numbers of polluters and adequate controls.

3. International Cooperation

Wider participation should be ensured in major international environmental conventions and in the environmental activities of international organizations. Special attention should be paid to the recommendations of UNCED and the activities of the Commission on Sustainable Development.

The possibility of ratifying or adhering to environmental conventions on air pollution; protection and use of water resources; handling of hazardous waste; environmental impact assessment; prevention; preparations for and responses to industrial accidents; climatic change; protection of the ozone layer; biodiversity; nature conservation; and protection of the marine environment should be given particular attention.

The provisions of the conventions should be reflected in national legislation. In addition the countries may, where necessary, enter into international agreements or other arrangements in order to define mutual responsibilities for the protection and rational management of the environment and natural resources, such as transboundary waters and shared protected areas. They should encourage the sharing of information and expertise. Joint bodies, with the involvement of local authorities, should be established where appropriate.