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NOTES

THE BEAGLE CHANNEL AFFAIR: A FAILURE IN JUDICIAL PURSUASION

I. INTRODUCTION

The Republic of Chile and the Argentine Republic narrowly avoided warfare in December 1978 over three islands at the southern tip of South America.[1] These islands lie in the vicinity of the Beagle Channel, which runs to the south of Tierra del Fuego.[2] The islands are part of a longstanding border controversy[3] that erupted anew after reports of undersea oil[4] and minerals[5] located in the area. The recent trend toward acceptance of the two-hundred mile limit for national jurisdiction over adjacent seabed[6] makes the ownership of the islands crucial to the exploitation of these resources.

After the failure of repeated attempts to settle the controversy through bilateral negotiations,[7] the parties agreed in 1971 to arbitrate the dispute. A Compromiso set forth the issue to be arbitrated.[8] Additionally, the Compromiso provided that the dispute was to be arbitrated under the terms of the parties' 1902 Treaty of

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1. THE ECONOMIST, Dec. 30, 1978, at 34; Statement by Argentine Ministry of Foreign Affairs and Worship, *reprinted in* Embassy of Argentine Republic, Argentina-Chile: Some Background Documents 7-17 (1978) [hereinafter cited as Argentine Background Documents].

2. *See* map at Appendix, *infra*, taken from Embassy of Chile, Chilean-Argentine Relations: The Beagle Channel Controversy plate 1 (1978) [hereinafter cited as Chilean Background Documents]. *See also* the map at 71 AM. J. INT'L L. 733, 737 (1977).

3. 71 AM. J. INT'L L. 733, 734 (1977).

4. In April 1977, the Argentine government authorized companies to conduct seismic studies for oil in the area. Wall St. J., April 14, 1977, at 15, col. 4. Oil was first discovered off Argentina's south Atlantic coast in March, 1978. *Id.*, March 28, 1978, at 17, col. 1. The Argentine government authorized offshore drilling near Tierra del Fuego in April, 1978. *Id.*, April 14, 1978, at 38, col. 5.

5. THE ECONOMIST, Dec. 30, 1978, at 34.

6. *Id.* at 35.

7. Report and Decision of the Court of Arbitration, rendered to Her Britannic Majesty's Government in the United Kingdom, Feb. 30, 1977, *reprinted in* 17 INT'L LEGAL MATERIALS 636 (1978) [hereinafter cited as Arbitration Report].

8. Arbitration Agreement (or Compromiso), July 22, 1971 (Cmnd. 4781), *reprinted in* 17 INT'L LEGAL MATERIALS 637 (1978) [hereinafter cited as Compromiso].

Arbitration;[9] the decision, however, was not to be made solely by the arbitrator named in that Treaty, the Government of the United Kingdom. Instead, the United Kingdom was to select five members from the International Court of Justice[10] to serve as a Court of Arbitration ("Court"), and the decision of that Court was to become effective only upon ratification by the United Kingdom.[11]

The Court was duly appointed and deliberated for nearly six years. On February 18, 1977, the Court unanimously awarded all three disputed islands to Chile.[12] The Court also fixed a nine month period for the implementation of the decision, running from the time the parties were notified of ratification.[13] The United Kingdom ratified the decision on April 18, 1977,[14] and the parties were officially notified on May 2, 1977.[15]

Argentina rejected the decision[16] and both parties made preparations for war. Thus the decision reached after six years of legal proceedings failed to win the parties' voluntary compliance. An examination of the decision may indicate whether its rejection by Argentina was due to that country's intransigence or to defects in the decision itself.

II. Post-Award Developments

A. *Argentina's Declaration of Nullity*

Although the Government of Chile accepted the Award immediately upon notification,[17] the Government of Argentina once again proposed bilateral negotiations.[18] This proposal was rejected by

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9. General Treaty of Arbitration, May 28, 1902, Argentina-Chile, 35 Martens Nouveau Recueil 297 (2d ser. 1908).

10. *Id.* at arts. 1, 3.

11. Compromiso, *supra* note 8, arts. XII, XIII, at 640.

12. Decision of the Court of Arbitration, Feb. 30, 1977, *reprinted in* 17 Int'l Legal Materials 634, 643 (1978) [hereinafter cited as Arbitration Decision].

13. Dispositif, *id.* at 674. The Court was empowered to set this time period by Articles 1 and 2 of the Compromiso, *supra* note 8, at 640.

14. Declaration of Her Majesty Queen Elizabeth II, April 18, 1977, *reprinted in* 17 Int'l Legal Materials 632 (1978).

15. *See* Official statement by the Government of Chile, *reprinted in* Chilean Background Documents, *supra* note 2, at 111.

16. Argentine Republic, Declaration of Nullity, *reprinted in* 17 Int'l Legal Materials 739 (1978) (unofficial translation) [hereinafter cited as Declaration of Nullity].

17. Official Statement by the Government of Chile, *reprinted in* Chilean Background Documents, *supra* note 2, at 111.

18. Statement by Argentine Ministry of Foreign Affairs and Worship, *supra* note 1, at 7.

Chile.[19] On July 14, 1977, Chile declared maritime jurisdiction reaching two hundred miles to the east of straight baselines drawn between the easternmost points of the three islands.[20] As the end of the nine-month implementation period drew closer without any sign of acceptance by Argentina,[21] the Presidents of the two countries met on January 19, 1978, in an attempt to reach agreement.[22] The meeting was unsuccessful, and six days later Argentina announced its Declaration of Nullity.[23] The Declaration held the Award invalid as being contrary to international law. Argentina once again proposed that the dispute be discussed in bilateral negotiations.[24]

B. *Cardinal Samoré's Mediation*

Although Chile refused to agree to any discussion of questions covered by the Award,[25] it did agree on February 20, 1978, to consult with Argentina in a series of three bilateral commissions.[26] Consultation came to an end in November of that year when the second commission ended as a result of a failure to agree on the scope of the issues to be discussed.[27] After this breakdown, it was

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19. *Id.*

20. Republic of Chile, Supreme Decree No. 416 at *id.*

21. Since both parties were notified on May 2, 1977, of ratification by the United Kingdom, the nine month period ended on February 2, 1978. *See* text accompanying note 13, *supra.*

22. Puerto Montt Act, Feb. 20, 1978, *reprinted in* Argentine Background Documents, *supra* note 1, at 1. *See also* THE ECONOMIST, Dec. 30, 1978, at 34.

23. "[T]he Government of the Republic of Argentina declares that, as an effect of the manifest nullity of the decision of the Court of Arbitration and the Award of Her Britannic Majesty, which is its consequence, it deems itself not obliged to abide by it." Declaration of Nullity, *supra* note 16, at 750.

24. "[T]he Argentine Government feels that the most suitable route for finding permanent and definitive solutions . . . is to negotiate bilaterally the jurisdictional differences existing between the two countries . . . ." Argentine Republic, Note to the Government of the Republic of Chile, Jan. 25, 1978, *reprinted in* 17 INT'L LEGAL MATERIALS 738-39 (1978) (unofficial translation).

25. [S]uch negotiations can never deal—as they have not dealt in the past—with questions resolved by the decision of Her Britannic Majesty. You are well aware of the fact that the Chilean government expressed its complete acceptance of the decision of May 2, 1977, and has fully carried it out.

Republic of Chile, Note to the Government of the Argentine Republic, Jan. 26, 1978, *reprinted in* 17 INT'L LEGAL MATERIALS 750, 751 (1978) (unofficial translation).

26. Puerto Montt Act, *supra* note 22.

27. Second Joint Commission of the Puerto Montt Act, Press Release,

suggested that Juan Carlos, King of Spain, undertake mediation, but he refused.[28] At the time of his refusal, each country's armed forces were actively preparing for war.[29] In December 1978, 100,000 Argentine and 45,000 Chilean troops faced each other along the border, and the navies of both countries were stationed in the vicinity of the disputed islands.[30] As war looked imminent, the Pope offered and the parties accepted Cardinal Antonio Samoré as a peace envoy.[31] Three weeks later, on January 8, 1979, Cardinal Samoré succeeded in persuading the parties to sign an agreement. The agreement provided for a pullback of military forces and a reopening of negotiations under a formula that would allow Chile to keep possession of the disputed islands but would establish a "demilitarized binational zone" over the Channel itself.[32] If this formula is implemented, the decision of the Court of Arbitration will become a nullity.[33]

The apparent success of Cardinal Samoré stands in sharp contrast to the failure of the Court of Arbitration to resolve the dispute after six years of legal proceedings. Since all five members of the Court also sat for the International Court of Justice,[34] it is even more remarkable that they were unable to produce an effective decision.

III. DECISION OF THE COURT

A. *Argentina's Arguments*

The Compromiso empowered the Court of Arbitration to determine "in accordance with the principles of international law"[35] the boundary between Argentina and Chile within an area known as

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reprinted in Argentine Background Documents, *supra* note 1, at 19. According to Chile, the Argentine negotiators insisted that the subject matter of the negotiations include disputes over the territory within the area covered by the Award. The Chilean negotiators refused to agree. Chilean Ministry of Foreign Affairs, Statement of Aug. 16, 1978 (unofficial translation).

28. THE ECONOMIST, Dec. 30, 1978, at 35.

29. *Id.* at 34.

30. THE ECONOMIST, Jan. 13, 1979, at 54.

31. *Id.*

32. *Id.*

33. "[D]enouncement by one party and acquiesence by the other" is an accepted ground for invalidity of treaties in international law. 5 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 297 (1943).

34. Letter by Sir Gerald Fitzmaurice (British president of the Court of Arbitration), *reprinted in* THE ECONOMIST, Feb. 17, 1979, at 4.

35. Compromiso, *supra* note 8, art. I, para. 7, at 639.

"the hammer."[36] This area contains the three disputed islands of Picton, Nueva, and Lennox (the PNL group).[37] At the time of the dispute, about twenty Chileans inhabited the three islands. The area also includes various uninhabited smaller islands.[38]

Although no boundary line had ever been drawn,[39] the general terms of the 1881 Treaty of Delimitation (Treaty) arguably covered the area.[40] Article 3 of that Treaty provides:

> 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.[41]

Argentina argued that the reference to islands "on the Atlantic" included the PNL group.[42] Argentina admitted that the islands were neither "east of Tierra del Fuego" nor east of "the eastern coast of Patagonia," but insisted that the islands were nonetheless on the eastern fringes of the area in question.[43] Argentina also pointed out that the PNL group had to be included in the phrase "other islands there may be" in order for the language to have any useful effect, since there were no other islands in that area which were not already covered by other Treaty language.[44]

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36. *Id.* at art. I, para. 4, at 638; Arbitration Decision, *supra* note 12, para. 1, at 643, and Map A, at 676. The parties were unable to agree on the wording of the question to be submitted to arbitration, and therefore each submitted a different question. The Court, however, held that both questions amounted "to much the same thing." *Id.* at 644.

37. Arbitration Decision, *supra* note 12, para. 3, at 644.

38. Note, *The Beagle Channel Affair*, 71 AM. J. INT'L L. 733, 734 (1977).

39. *Id.*

40. Treaty of Delimitation, July 23, 1881, Argentina-Chile, 12 Martens Nouveau Recueil 491 (2d ser. 1887), *reprinted in* 17 INT'L LEGAL MATERIALS 646 (1978).

41. Treaty of Delimitation, *supra* note 40, art. 3, at 647.

42. Arbitration Decision, *supra* note 12, para. 55, at 656.

43. *Id.* para. 60, at 658.

44. Declaration of Nullity, *supra* note 16, at 745-46. Argentina also argued that the Spanish text, "que haya sobre el Atlantico," must be read to refer to such islands not in the conditional ("such as there may be") but in the declarative

Finally Argentina argued that the entire Treaty, including Article 3, should be read in conjunction with an underlying "Oceanic" principle which dictated that islands lying on the Atlantic side of the area belonged to Argentina.[45] Argentina stated that it gave up its claim to the Straits of Magellan in 1881 in return for Chile's application of the Oceanic or Atlantic/Pacific principle to the areas in dispute.[46] Further, Argentina argued that the principle is derived from the doctrine of *uti possedetis juris* of 1810.[47] This doctrine holds that all territory in Spanish America was governed by one or the other of the administrative subdivisions of Spanish rule, and that such territory vested in the newly independent states that replaced the various Spanish administrative subdivisions.[48] In accordance with this doctrine, Argentina had emphasized claims to territory from the Atlantic coast to the peaks of the Andes since 1810 whereas Chile had emphasized claims from the peaks to the Pacific. This course of conduct, according to Argentina, gave rise to the principle that Argentina should be an Atlantic power and Chile a Pacific one.[49] The application of this principle to the areas in dispute in 1881 was illustrated by the attribution to Argentina of the Atlantic, or eastern, half of Tierra del Fuego and the attribution to Chile of the Pacific or western half. Likewise, with regard to smaller islands south of Tierra del Fuego, the Treaty gave Argentina the Atlantic islands and Chile the Pacific ones. Since the PNL group was on the Atlantic side, it was attributed to Argentina.[50]

As further evidence of the existence of this Atlantic-Pacific principle, Argentina cited the following language from a Protocol signed in 1893:[51]

> [A]ccording to the spirit of the Boundary Treaty [of 1881], the Argentine Republic retains her dominion and sovereignty over all the territory that extends from the East of the principle 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 un-

("such as are"). Arbitration Decision, *supra* note 12, para. 55, at 647, para. 61, at 658. The Argentine translation is set out at 71 AM. J. INT'L L. 736 (1977).

45. Arbitration Decision, *supra* note 12, para. 74, at 664.
46. *Id.* para. 11, at 646.
47. *Id.* para. 10, at 645.
48. *Id.*
49. *Id.* para. 11, at 645.
50. *Id.* para. 28, at 651.
51. Protocol, May 1, 1893, Argentina-Chile, Chilean Annex 62, *reprinted in* 17 INT'L LEGAL MATERIALS 664 (1978).

derstood that, by the provisions of that Treaty, the sovereignty of each state over the respective coastlines 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.

According to Argentina, this language when read in conjunction[52] with Article 3 of the 1881 Treaty revealed the parties' intention to split the islands south of Tierra del Fuego along the Cape Horn meridian, which geographically divides the Atlantic and Pacific Oceans.[53] Argentina argued that the division of Tierra del Fuego along a line to the west of the meridian and the failure to divide Navarino island occurred because the parties intended that only islands lying wholly to the west or east of the meridian could lie completely in separate jurisdictions.[54]

B. *Chile's Arguments*

Chile argued that the Treaty did not illustrate the application of an oceanic principle, but rather embodied a trade-off of Chile's claims to Patagonia in return for Argentina's recognition of Chilean dominion over the Straits of Magellan. As a consequence of this trade-off, Chile received the Strait and all territory south of it under Article 2, except as specifically provided otherwise by Article 3.[55] Furthermore, in light of the literal meaning of the words and the Patagonia/Magellan trade-off, the interpretation of the islands clause of Article 3 need not be strained. Chile pointed out that the clause speaks of islands "on the Atlantic, *to the east of*

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52. *Id.* art. 2.

53. Arbitration Decision, *supra* note 12, para. 60, at 658.

54. *Id.*

55. *Id.* para. 27, at 651, para. 92 at 669. Article 2 provides:

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 Dinera; 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.

Id. para. 15, at 647.

Tierra del Fuego" (emphasis added), and argued that the word "Atlantic" did not refer to the Atlantic/Pacific (or oceanic) principle.[56] Finally, Chile argued that even if the general language of Article 2 did not describe Chilean dominion of the islands, the following specific language of Article 3 awarded such dominion: "to Chile shall belong all the islands to the south of the Beagle Channel . . . ."[57]

C. *The Court's Conclusion*

The Court applied the rules of the Vienna Convention on the Law of Treaties in interpreting the Treaty between Chile and Argentina.[58] Under those rules, which stress the subjective intent of the parties,[59] the Court considered the text, the *travaux préparatoires*, and the historical context of the 1881 Treaty. In interpreting the text, the Court found that both the title "tratado de Limites" (Boundary Treaty) and the Preamble revealed an intent to reach a complete, permanent, and definite settlement of boundary questions.[60] With regard to the *travaux préparatoires*, the Court considered the Argentine proposals, known as the "Bases of 1876," which started the negotiations that led to the Treaty.[61] The Court also examined the course of the negotiations and attempted to put them into historical context.[62] On the basis of these considerations, the Court concluded that the Treaty must be interpreted in such a way that would allocate *all* territory in dispute at the time of the Treaty.[63] Furthermore, the Court rejected the Argentine view that the Treaty was a trade-off of Argentine interest in controlling the Straits of Magellan for the Chilean recognition of the oceanic principle. The Court found that the wording of Article 1, which attributed Patagonia to Argentina, was inconsistent

56. *Id.* para. 62, at 659.

57. *Id.* para. 80, at 665; 71 AM. J. INT'L L. 735-36 (1977). Since the Beagle Channel, according to Chile, ran in an east-west direction, dividing the Tierra del Fuego on the north from the PNL group on the south, the PNL was indisputably Chilean.

58. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, U.N. Doc. A/CONF. 39/27 (1969); *see also* Arbitration Decision, *supra* note 12, para. 7, at 645.

59. Vienna Convention, *supra* note 58, arts. 31, 32, 33.

60. Arbitration Decision, *supra* note 12, paras. 18, 19, at 648-49.

61. *Id.* para. 25, at 650.

62. *Id.* para. 14, at 646.

63. Treaty of Delimitation, *supra* note 40, Preamble; Arbitration Decision, *supra* note 12, paras. 18, 19, at 648.

with the Argentine view.[64] The Court held that "it was the antithesis Patagonia/Magellan rather than the Magellan/Atlantic which constituted the fundamental element of the Treaty settlement."[65] Moreover, the language of the 1893 Protocol had to be interpreted in light of the delineation of the Andes boundary[66] and could not serve as evidence of an all-prevailing "Atlantic" or oceanic principle.[67] Since no such principle could justify interpreting "on the Atlantic to the east of Tierra del Fuego" in Article 3 as meaning "on the eastern fringes of Tierra del Fuego,"[68] the Court rejected the Argentine argument for attribution of PNL under Article 3.

In view of the Court's finding that the Treaty was intended to attribute all disputed territory to one party or another, it would appear that a rejection of the Argentine attribution would necessarily lead to the conclusion that the islands were attributed to Chile. The Court, however, was not content with such a conclusion,[69] and evaluated the Chilean attribution independently. The Court first examined Chile's claim of a general attribution under Article 2 and found it to be inconclusive.[70] Consequently, the Court explored Chile's claimed attribution under the following language in Article 3: "To Chile shall belong all the islands to the south of Beagle Channel up to Cape Horn." This language confronted the Court with the difficult task of defining the course of the Channel at its eastern end. The general course of the Channel is clear in the narrow space between Navarino Island and Tierra del Fuego, but when the coast of Navarino turns south the Channel ceases to be self-evidently defined by geography.[71] The Channel's course had not been discussed during the negotiations leading up to the Treaty.[72] If the Channel ran in an east-west line between PNL and Tierra del Fuego, PNL would be south of the Channel and would be attributed to Chile. Conversely, if the Channel turned with the coast of Navarino and ran in a north-south line between that island

64. Arbitration Decision, *supra* note 12, para. 29, at 651.

65. *Id.* para. 31, at 651.

66. The Protocol was signed in an effort to speed the work of the experts attempting to establish a boundary line along the highest points of the Andes pursuant to the Treaty of 1881. *Id.*, paras. 74, 75, at 664.

67. *Id.* para. 75, at 664.

68. *Id.* para. 79, at 665.

69. *Id.* para. 52, at 655.

70. *Id.* para. 49, at 654.

71. *See* map, *infra*, at Appendix.

72. Arbitration Decision, *supra* note 12, para. 87, at 666-67.

and PNL, then the Treaty term "south of" would have no meaning and another provision of the Treaty would have to cover the PNL group.[73] Since the Treaty had to be interpreted to allocate the islands to one party and no other Treaty provisions covered the PNL, the Court concluded that the Channel, at least for Treaty purposes, ran in an east-west line between PNL and Tierra del Fuego.[74] The Court observed that the clause "to the south of Beagle Channel" lacked meaning when applied to a channel running north-south. Therefore, the Court held that the Treaty attributed the islands to Chile, and drew a boundary line in accordance with that finding.[75] The Court noted that certain "confirmatory or corroborative incidents and materials," including the post-Treaty conduct of the parties, the cartography of both sides, and acts of jurisdiction, confirmed its conclusion.[76] The Court emphasized that these materials were merely confirmatory, however, and formed no part of the basis for the decision.[77]

IV. ARGENTINA'S REJECTION OF THE DECISION

A. *Legal and Political Sufficiency Distinguished*

Argentina rejected the decision of the Court despite its commitment to be legally bound.[78] In its Declaration of Nullity, Argentina listed the following grounds for invalidation of the Award under international law: "(A) Distortion of Argentine Theses . . . (B) Opinion on disputed questions that had not been submitted to arbitration . . . (C) Contradictions in the reasoning of the Court . . . (D) Interpretation Defects . . . (E) Geographical and historical errors . . . (F) Imbalance in the evaluation of the argumentation and evidence submitted by each Party . . . ."[79] Since the Court's decision was made pursuant to the 1902 Arbitration

73. *Id.* para. 93, at 669.

74. *Id.* para. 96, at 670, para. 99, at 671; 71 AM. J. INT'L L. 738 (1977).

75. Dispositif, *id.* See map at Appendix, *infra.* A more detailed depiction of the line as drawn by the Court can be found in Chilean Background Documents, *supra* note 2, at plate 2.

76. Arbitration Decision, *supra* note 12, at 634 n.1; 71 AM. J. INT'L L. 739 (1977).

77. Arbitration Decision, *supra* note 12, para. 163, at 634 n.1.

78. "The Award shall be legally binding upon both the Parties and there shall be no appeal from it, except as provided in Article XIII of the Treaty." Compromiso, *supra* note 8, art. XIV, at 640. Article XIII refers to the discretionary power given Her Britannic Majesty to ratify the Court's decision and so constitute it the Award. *Id.*

79. Declaration of Nullity, *supra* note 16, at 739.

Treaty, Argentina's grounds for rejecting the Award do not violate international law if they follow the rules regarding the invalidation of treaties. The Vienna Convention on the Law of Treaties recognizes the following grounds for invalidating treaties: mistake, fraud, corruption or coercion of a representative of a state, and compulsion under threat of force.[80] None of the Argentine arguments for rejection included any of these grounds.

It is, however, widely accepted that the decision of an international tribunal may be nullified on less stringent grounds.[81] Although their specific nature is subject to wide disagreement, the grounds are as follows: "(1) excess of power,[82] (2) corruption of a member of the tribunal, or (3) a serious departure from a fundamental rule of procedure."[83] The first ground, a tribunal exceeding its power by ruling beyond the scope of or contrary to the rules of the compromise submitted by the parties, is the most often cited ground in cases of non-compliance.[84] Argentina's Declaration of Nullity contains two examples of this first ground: opinions on questions not submitted and interpretation defects. There is some question whether a claim of nullity based on interpretation defects automatically entitles a party to a review of the arbitral award on the merits. This appears to have been the practice in Latin America,[85] but is not generally accepted elsewhere.[86] Furthermore, the language in the Compromiso providing that there shall be no appeal militates against the effectiveness of such an argument in this case.[87]

Absent such an argument, only the ground of "opinions on ques-

80. Vienna Convention, *supra* note 58, *reprinted in* 63 AM. J. INT'L L. 875, 890-91 (1969).

81. Schachter, *The Enforcement of International Judicial and Arbitral Decisions*, 54 AM. J. INT'L L. 1, 3 (1960).

82. "Exces de pouvoir" means acting beyond jurisdictional authority. *Id.*

83. *Id.* Excess of power is the most often cited ground.

84. *Id.*

85. *See* dissenting opinion of Judge U. Holguin in Case Concerning the Arbitral Award Made by the King of Spain on 23 December 1906 (Honduras v. Nicaragua), [1960] I.C.J. 192, 223-26. "In Latin America, strongly-felt territorial issues have been the main sources of cases of non-compliance and claims of nullity." Schachter, *supra* note 81, at 4-5. *See also* H. KELSEN, PRINCIPLES OF INTERNATIONAL LAW 545 n.118 (R. Tucker ed., 1966).

86. Claims of nullity are treated as "excuses" for non-performance rather than as grounds for review of the decision. Schachter, *supra* note 81, at 4, 5. *See also* Case Concerning the Arbitral Award Made by the King of Spain [1960] I.C.J. 192, 214; H. KELSEN, *supra* note 85, at 545-46.

87. Compromiso, *supra* note 8, art. XIV, at 640.

tions not submitted" appears to have *prima facie* validity under international law. This claim will be examined in more detail below. None of the remaining Argentine arguments meet the accepted criteria for invalidity of treaties or nullity of arbitral awards. The alleged distortion of Argentine theses merely illustrates the result of the risk of non-persuasion that must be borne by any party to an arbitral proceeding. The advocates on each side must make their respective legal positions clear. The objections concerning logical contradictions and geographical and historical errors involve the risk of non-persuasion. Such errors may contribute to a bad decision, but the parties bargained for a legal holding and international law requires its acceptance.[88]

Although the Argentine objections are insufficient to invalidate the decision under international law, they may highlight weaknesses in the opinion that justify a political rejection. The Award, like most decisions governed by international law, is not backed by any effective physical sanction.[89] The Award therefore depends upon the parties' enlightened self-interest, fear of public opinion, and fear of retaliation for implementation.[90] The strength of these motives is to some extent outside the control of the Court, but the Court can affect them through the logic and moral force of its decision.[91] Even if a morally and logically defensible decision is

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88. H. KELSEN, *supra* note 85, at 543-46.

89. "In the international field, the existence of obligations that cannot in the last resort be enforced by any legal process, has always been the rule rather than the exception . . . ." South West Africa Cases [1966] I.C.J. 6, 45. *See also* E. DEUTSCH, AN INTERNATIONAL RULE OF LAW 266-67 (1977); 1 S. ROSENNE, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT OF JUSTICE 119-22, 125-26 (1965); 1 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 12 (1940); P. BROWN, INTERNATIONAL REALITIES 21 (1917). It is elementary that decisions of international tribunals are often enforced by the parties themselves despite the absence of physical sanction. *See, e.g.*, Fisheries Case (United Kingdom v. Norway), [1951] I.C.J. 116; Eastern Greenland Case (Denmark v. Norway), [1933] P.C.I.J., ser. A/B, No. 53; Free Zones of Upper Savoy and the District of Gex, [1932] P.C.I.J., ser. A/B, No. 46.

90. 1 G. HACKWORTH, *supra* note 89, at 12.

91. One noted jurist stated that:

> [T]he moral force of a judgment of decision will be at a maximum when the following conditions are satisfied: . . . 2) The judge has no direct or indirect interest (even emotional) in the outcome of the case. 3) The judge confines his decision to the controversy before him and attempts no regulation of the parties' relations going beyond that controversy . . . . 6) Each disputant is given ample opportunity to present his case.

L. FULLER, THE PROBLEMS OF JURISPRUDENCE 706 (Temp. ed. 1949). Argentina's ground B, opinion on questions not submitted, and ground F, imbalance, implicate conditions 3 and 6 above, respectively. Condition 2 above may be violated

reached, however, a failure to articulate clearly its grounds may deprive the decision of the persuasiveness that is especially critical in international adjudication.

B. *Distortion of Argentine Theses*

The first ground alleged in the Declaration of Nullity, "[d]istortion of Argentine theses,"[92] is primarily a reference to the dispute over the course of the Beagle Channel at its eastern end. Argentina claimed it had never argued that the Channel ran in a north-south direction between PNL and Navarino, but that the Channel instead stopped short of PNL to the west of Picton. According to Argentina, the Court had incorrectly attributed the former argument[93] to their government and then had concluded that such an interpretation made the phrase "south of Beagle Channel"[94] meaningless.[95] The Court reached this conclusion, however, after taking note of and rejecting the Argentine thesis that the Channel stopped short of PNL.[96] Argentina's short-Channel thesis, according to the Court, would have left the islands unallocated under the Treaty, which was "a result that certainly could never have been intended" by the parties.[97]

C. *Opinion on Questions not Submitted*

Argentina claimed that the Court had "passe[d] judgment on the status of" islands to the south of the hammer area.[98] In dealing

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by the presence of a British citizen on the Court. Britain and Argentina are parties to a long-standing dispute over the Falkland Islands, which are in the Atlantic to the east of PNL. 71 AM. J. INT'L L. 734 (1977).

92. Declaration of Nullity, *supra* note 16, at 740.

93. *Id.* at 741. *See also* the Court's description of a map submitted by Argentina which shows the Channel stopping short of PNL. Arbitration Decision, *supra* note 12, para. 108, at 673. After the decision the Argentine Embassy distributed a map that emphasized a Beagle Channel running to the west of the PNL group between PNL and Navarino Island.

94. Treaty of Delimitation, *supra* note 40, art. 3, at 647.

95. Arbitration Decision, *supra* note 12, para. 80, at 665, para. 90 at 668-69, para. 93 and 69, para. 96 at 670.

96. *Id.* para. 54, at 655.

97. *Id.* para. 81, at 665.

98. Declaration of Nullity, *supra* note 16, at 742. *See* Arbitration Decision, *supra* note 12, para. 60, at 658. Argentina also claims that the Court passed on matters beyond its competence when it declared Punta Dungeness, near the Strait of Magellan, to be on the Atlantic. Declaration of Nullity, *supra* note 16, at 743. This claim is without merit because the boundaries in that region are

with Argentina's Oceanic argument, the Court referred to islands outside the hammer. The Court noted that division along the Cape Horn meridian, which divides the Atlantic from the Pacific,

> would cover the PNL group. It would also cover a number of other islands not actually in dispute in the present proceedings, the title to which it is not within the competence of the Court to pronounce upon. Yet they must be named, because it is not otherwise possible to understand the precise nature of the Argentine "Atlantic" contention, and what is meant by the claim that all islands fringing the Cape Horn meridian on its eastern side were assigned to Argentina under the Islands Clause [of Article 3].[99]

The Court then named and located the islands, saying in parenthesis that "all of them, as the Court understands it, [are] actually in Chilean physical possession."[100] This statement is obviously not the same as one passing judgment. Thus, Argentina's claim that the Court exceeded its power is unfounded. Excess of power is properly applicable only to those cases in which a Court actually goes beyond the limits of its competence in making its award. It does not apply to a mere passing remark.[101]

Even though the Court's reference to islands outside the hammer does not lead to nullity by reason of excess of power, there was clearly no judicial necessity for making the statement. Argentine sensitivity on this issue must have been apparent. Indeed, bias appears to be the underlying Argentine objection to this statement.[102] Thus, the Court weakened the moral force of its decision by not carefully avoiding the appearance of prejudice.

D. *Contradictions and Problems of Interpretation*

The Court's unfortunate reference to islands outside the hammer occurred in its response to Argentina's contention that the

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undisputed and the characterization of Punta Dungeness as being on the Atlantic does not require any conclusion about the attribution of the area in dispute. Arbitration Decision, *supra* note 12, para. 24, at 649, para. 31, at 651.

99. Arbitration Decision, *supra* note 12, para. 60, at 658.

100. *Id.*

101. Excess of power was more properly relied upon by the United States in rejecting the decision of the King of Holland in the Northeastern Boundary Dispute Arbitration of 1831. In that case the King of Holland was directed to choose one of two boundary lines as correct, and instead he drew an intermediate line. Schachter, *supra* note 81, at 3 n.9.

102. *See* Declaration of Nullity, *supra* note 16, at 749.

Islands Clause[103] had to refer either to PNL or nothing at all.[104] Argentina claimed in its Declaration of Nullity that the Court's conclusion that the clause does not cover PNL deprives the language of useful effect.[105] This is an incorrect reading, however, since the Court's interpretation simply permits the language to provide certainty and completeness with regard to any islands within the specified areas that might have been overlooked.[106] This is a reasonable interpretation, especially in light of Chile's evidence concerning the existence of certain small islands lying east of Tierra del Fuego and unnamed in the Treaty.[107] Furthermore, the placement of the clause in Article 3 indicates that the drafters intended to include islands to the east of Staten Island and Patagonia, but not the area in which PNL lies.[108]

Argentina's basic objection to the Court's interpretation of the Islands Clause is that the Court failed to incorporate an underlying Oceanic principle.[109] The Court held 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 [1881] Treaty was intended to supersede) figuring as something that must *a priori* govern the interpretation of the Treaty as a whole."[110] In other words, the Court determined that the travaux preparatuires did not warrant an assumption of the Oceanic principle. The Court further stated that "[s]ince it has to be assumed that the negotiators were neither ignorant of, nor indifferent to, the geography of the region, it can only be supposed that they regarded the Channel's course as too evident to need discussion or definition."[111] In view of the Court's findings concerning the confusion that existed among contemporary cartographers over the course of the Channel,[112] this assumption is questionable. It would be more

103. "[T]o the Argentine Republic shall belong . . . the other islands there may be on the Atlantic to the east of Tierra del Fuego and of the eastern coast of Patagonia . . . ." Treaty of Delimitation, *supra* note 40, art. 3.

104. Arbitration Decision, *supra* note 12, para. 60, at 658.

105. Declaration of Nullity, *supra* note 16, at 746.

106. Arbitration Decision, *supra* note 12, para. 61, at 658-59.

107. *Id.*

108. *Id.* para. 65, at 661.

109. Declaration of Nullity, *supra* note 16, at 745.

110. Arbitration Decision, *supra* note 12, para. 66, at 662. *See also id.*, para. 22, at 649. With regard to the language of the 1893 Protocol, the Court said it was "unable to give so wide and general a scope to a phrase that is so evidently set in a particular context,—that of the Andes boundary . . . ." *Id.*, para. 75, at 664.

111. *Id.* para. 87, at 667.

112. *Id.* para. 163, at 634 n.1.

reasonable to assume that the negotiators agreed on specific attributions and an underlying Oceanic principle but did not examine all of the details. This view is supported by the provision in the 1881 Treaty[113] and the 1893 Protocol[114] that required experts to more specifically delineate the boundary.

Although the Court's conclusion results from a defensible method of treaty interpretation,[115] such a broad dismissal of the Oceanic principle was not necessary to the Court's conclusion that PNL was attributed to Chile. Since the "south of Beagle Channel" phrase of Article 3, according to the Court, required attribution of the islands specifically to Chile, the existence or non-existence of a residual Oceanic principle could not affect the legal conclusion. The declaration that no such principle exists, on the other hand, dramatically affected the political acceptability of that legal conclusion. It needlessly antagonized the party whose voluntary compliance would be most difficult to secure. The Court either underestimated the symbolic importance of the principle or ignored ways of using that symbolism to advantage.[116]

In addition to the argument that the Court ignored the Oceanic principle, Argentina claims in her Declaration of Nullity that the Court contradicted itself. Argentina points out that the Court divided the small islands "lying within the Channel" between Navarino and Fuego according to proximity to undisputed territory while refusing to do so in the case of PNL. The Court rejected division by appurtenance for PNL on the following grounds:

> Since its [the Court's] terms of reference require it to decide in accordance with international law, a division [of PNL] would have to be based on a difference of a juridical character between the situation of one of the islands as compared with that of the other two. The Court cannot find any such difference.[117]

The Court then stated that the islands within the Channel were not attributed under the Treaty since, because they lie in the Beagle Channel, they obviously "cannot lie to the south of it."[118] Con-

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113. Treaty of Delimitation, *supra* note 40, arts. 1, 4.

114. Protocol, *supra* note 51, art. 2, at 664.

115. An example of historical sources from which contradictory inferences can be drawn is given by the Court in the Arbitration Decision, *supra* note 12, para. 66, at 662-63 & n.37.

116. The principle plays an important symbolic role in Cardinal Samore's post-rejection peace formula. THE ECONOMIST, Jan. 13, 1979, at 54.

117. Arbitration Decision, *supra* note 12, para. 83, at 666.

118. *Id.* para. 106, at 672.

sequently the Court divided the islands by "mixed factors of appurtenance, coastal configuration, equidistance, and also of convenience, navigability, and the desirability of enabling each party as far as possible to navigate in its own waters."[119]

Argentina argued that the Treaty phrase "to the south of Beagle Channel"[120] is no less ambiguous with regard to PNL than it is with regard to the small islands within the group. According to Argentina, "the Court divide[d] the Beagle Channel, as defined by the Court itself, into two sections subject to different juridical regimes, without supplying any justification for it."[121] The Court, however, provided some justification by concluding that the Treaty's directives ought be measured from the northern arm of the Channel at its eastern end, thus placing PNL to the south of the Channel. In reaching this conclusion, the Court rejected the Argentine thesis of a short Channel on the grounds that it would leave PNL unallocated.[122] Thus the Court was willing to accept a failure of allocation under the Treaty with regard to the small islands while rejecting this premise with respect to PNL. Although it could conceivably make sense to reject the premise for the larger islands and accept it for the smaller ones on the ground that the negotiators were less likely to bother with exact division of the latter, the Court should have clearly articulated its reasoning. Failure to do so set the stage for Argentina's charge.

Even overlooking the apparent inconsistency, Argentina's short-Channel thesis does not necessarily leave the islands unallocated. An application of the Argentine thesis of an underlying Atlantic principle limited to territory not otherwise specifically allocated by the Treaty would cover PNL. The Court apparently did not consider this possibility,[123] having previously terminated the principle's consideration.[124] At one point, however, the Court recognized that the 1893 Protocol lent weight to the principle's existence. The Court stated that although there is some validity to the principle, "The Court feels unable to give so wide and general a scope to a

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119. *Id.* para. 110, at 673.

120. *Id.* para. 3, at 644.

121. Declaration of Nullity, *supra* note 16, at 744.

122. Arbitration Decision, *supra* note 12, para. 81, at 665. It should be noted that the short-Channel hypothesis does not leave PNL unallocated if an Oceanic element is accepted as underlying the Treaty.

123 *Id.*

124. *Id.* para. 75, at 664.

phrase that is evidently set in a particular context,—that of the Andes boundary."[125]

E. *Historical and Geographic Errors*

The Court attempted to bolster its conclusion regarding the eastern Treaty arm of the Beagle Channel by referring to "confirmatory" cartographical and historical evidence.[126] Both Argentina and a member of the Court criticized the use of this evidence. Judge André Gros stated in a separate opinion that the consideration of cartography "was not necessary from the legal point of view."[127] Since the Court purported to use this material only to reinforce conclusions already reached, the inclusion of such material in the decision seems unwarranted. The Court pointed out that inferences drawn from historical and geographical sources are contradictory.[128] Furthermore, the devotion of part II of the Decision to these materials belies the Court's disclaimer of their importance. Despite the specific Argentine criticism of the Court's conclusions regarding these materials,[129] it is clear that the Court itself laid the groundwork for such criticism.

F. *Imbalance and Style*

Argentina's complaint of "[i]mbalance in the evaluation of the argumentation and evidence"[130] is understandable in light of that nation's historical feud with the arbitrator over the Falkland Islands.[131] Fear of biased arbitration may have been responsible for Argentina's repeated attempts to return to bilateral negotiation.[132] It was probably at Argentina's insistence that the terms of arbitration were changed to provide for a decision by five members of the International Court of Justice, subject to ratification by the United Kingdom, rather than the United Kingdom's unilateral decision.[133]

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125. *Id.*

126. *Id.* para. 101, at 671-72.

127. *Id.* para. 3, at 675.

128. *Id.* para. 66, at 662-63 & n.37.

129. Declaration of Nullity, *supra* note 16, at 749-50.

130. *Id.* at 749.

131. 71 AM. J. INT'L L. 734 (1977).

132. *E.g.*, responding to Chile's request in 1967 for arbitration with a proposal to bilaterally negotiate the applicability of the arbitration Treaty to the dispute. Arbitration Report, *supra* note 7, at 637.

133. Compromiso, *supra* note 8, at 637-38. The president of the Court of Arbitration, Sir Gerald Fitzmaurice, was British. Arbitration Report, *supra* note

Argentina's dissatisfaction with the arbitration was further exemplified by her denunciation, on March 11, 1972, of the 1902 Treaty of Arbitration.[134] Argentina's hostility to arbitration made acceptance of an unfavorable decision even less likely.

Beyond its allegation of bias, Argentina attacked the Court's style. Argentina stated that the Court did not clearly favor Chile's interpretation, but "merely prefer[ed] it to the Argentinian interpretation, after having weighed up the sum total of their respective weaknesses."[135] This criticism, though not literally correct, is nonetheless well-founded, as the following passages demonstrate. After a consideration of Argentine and Chilean arguments for attribution under Article 2 of the 1881 Treaty, the Court stated as follows:

> Normally, the Court would now endeavour to reach a conclusion about the extent of the Chilean allocation effected by Article II, considered in itself. But it has been seen that the rival theses are closely balanced, even if the balance seems to tilt somewhat in favour of the Chilean view, though perhaps not with complete finality. In these circumstances the Court proposes not to reach any definite conclusion on the matter at this stage, but to defer it, and return to it if necessary when other aspects of the case have been examined.[136]

The Court then considered the question of attribution under the Islands clause of Article 3. At the outset it was forced to determine whether a conclusion that PNL fell within the attribution of one party precluded the necessity for evaluating the other party's attribution. The Court decided that such an evaluation was not precluded, but proceeded with its inquiry only after stating a strong argument against doing so:

> *The first* preliminary question that arises is whether the Court must necessarily go into both the sets of attributions effected by the Islands clause—the Argentine and the Chilean,—that is to say whether, if it should be found that the PNL group falls within one (*i.e.* either) of these attributions, it would be necessary also to estab-

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7, at 636, 638. *See also* Letter by Sir Gerald Fitzmaurice, THE ECONOMIST, Feb. 17, 1977, at 4.

134. The parties agreed that the renunciation would have no effect on the Court's proceedings. Declaration of Her Majesty Queen Elizabeth II, *supra* note 14, at 633. Soon after renunciation Argentina signed a new treaty that provided for arbitration only by the International Court of Justice. Treaty of Arbitration, April 5, 1972, Argentina-Chile.

135. Declaration of Nullity, *supra* note 16, at 749.

136. Arbitration Decision, *supra* note 12, para. 49, at 654.

> lish that it does *not* fall within the other. Such a process, which must of course imply that the group could fall under both attributions, ought, in principle, to be excluded *a priori*: . . . since it must be axiomatic that the negotiators cannot have intended a double attribution of the same islands to both Parties. Thus a definite finding in the one sense, not only ought to preclude a finding in the other, but also to act as a bar, *in limine*, even to the examination of it. However, the Court does not propose to proceed in that way, if only because it may not be possible to reach a sufficiently definite conclusion in favour of the one attribution without also considering the other.[137]

The consideration of both sets of attributions did not lead to a very definite conclusion. With regard to Article 3, the Court concluded that "[T]he Chilean version, although not itself entirely free from difficulty, is the more normal and natural on the basis of the actual language of the text."[138] To clear up the question left open about Article 2 attribution, the Court stated that "[R]ecourse to that article is however unnecessary, since it is clear that independently of it, the PNL group, and the small islands within the Channel, can be attributed under the Islands clause of Article III . . . ."[139]

It has already been noted that the Court had previously adjudicated that the Treaty did not attribute the small islands within the Channel.[140] If it is assumed, however, that the rival theses were closely balanced and therefore necessitated an independent evaluation of each side's arguments, it was inadvisable for the Court to stress logical objections to such independent evaluation.[141] Once the decision had been reached, the Court's duty was to articulate a persuasive opinion. That job was not furthered by highlighting the understandable hesitation and qualification the Court went through prior to reaching its decision.

V. THE POLITICAL FUNCTION OF AN INTERNATIONAL TRIBUNAL

A. *Theoretical Necessity for a Concern with Politics*

This Note has presented the argument that the Court of Arbitra-

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137. *Id.* para. 52, at 655.
138. *Id.* para. 64, at 660.
139. *Id.* para. 111, at 673.
140. *Id.* para. 106, at 672.
141. Similarly, the Court's off-hand reference to Chile's occupation of Argentina's claim to disputed islands outside the hammer was not necessary to the Decision and merely weakened it. *Id.*, at 658, para. 60, at 670, para. 96.

tion failed, in writing its opinion, to pay sufficient attention to political realities bearing on compliance with the decision. It may be objected that a prospective concern on the part of the Court for the political acceptability of its decisions would be outside the proper function of the Court. One authority on the International Court of Justice has argued that the Court's proper function is

> to isolate, in the concrete case, the legal problem from the circumstances in which it had its immediate origin, to consider that legal problem in an objective and even abstract way, and to articulate its decision on the basis of that examination, to the exclusion of all political, moral, or other extra-legal considerations.[142]

After making this statement, the same authority goes on to point out the fundamental difference between international and domestic law:

> It is precisely the absence in the international sphere of any conception of superior sovereignty that distinguishes the functioning of international tribunals from that of municipal tribunals . . . .
>
> The judgment of an international tribunal does not, and cannot, partake of the character of an order from the sovereign to the litigants and to the law-enforcement agencies. There is no international sovereign concerned to ensure compliance with justice administered in his name.[143]

This difference between international and municipal tribunals provides a sound basis for the proposition that a concern with the political acceptability of its decisions has added significance for an international court. International law exists only insofar as states can be said to act within its confines, and the lack of municipal coercive power to secure such compliance therefore places a great burden upon international tribunals to write persuasive opinions. The Court's failure to meet this burden in the instant case reduced the likelihood of compliance. Although the decision should not have been made primarily on a political or other non-legal basis, the opinion should have been drafted after due consideration of political reality.

B. *Practical Necessity for a Concern with Politics*

One might object that a prospective concern with compliance would be misplaced in most cases, since judgments of international

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142. S. ROSENNE, *supra* note 89, at 100.
143. *Id.* at 122.

tribunals are rarely defied.[144] In response to this issue, it should be noted that "[t]he fact that there has been statistically a good record of compliance must be assessed in light of the relatively unimportant disputes that have been submitted to arbitration or judicial settlement."[145] Perhaps the best known instance of non-compliance in the post-war period, the *Corfu Channel Case*,[146] is also an example of an important dispute taking place in a highly charged political atmosphere. On October 22, 1946, British warships struck mines while passing through Albanian territorial waters in the straits between Albania and Italy. Many British sailors lost their lives. Albania, which had adopted a Communist government just after the war, knew of the mines but had failed to warn the British ships. The United Kingdom sued in the International Court of Justice for damages, and the Court granted the claim on December 15, 1949. Albania offered $40,000 in settlement of the judgment, but Britain refused it on the ground it was insufficient. The United Kingdom then attempted to attach Albanian property in Britain, but none was found. Subsequent British efforts to collect the judgment have been unsuccessful, and it remains unpaid.[147]

The instant dispute, like *Corfu*, is "primarily a manifestation or symbol of a more generalized conflict between the parties so that acceptance of an adverse decision is not likely to be dissociated from the underlying tension."[148] The Cold War was the underlying strain in *Corfu*. In the instant case the tension underlying the dispute was the national prestige tied up in longstanding claims to possession of coastlines. In such cases it behooves the Court to be sensitive to "political, moral, or other extra-legal considerations"[149] in expressing its opinion. The Court of Arbitration in the instant case was not entirely insensitive to these considerations, but it nonetheless failed to deal with them effectively. A better opinion might not have guaranteed implementation, but certainly would have reduced the likelihood of outright rejection.

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144. H. KELSEN, *supra* note 84, at 545 n.118; Schachter, *supra* note 81, at 2 n.3, 5 n.12.
145. Schachter, *supra* note 81, at 5.
146. [1949] I.C.J. 4.
147. *Id.*; E. DEUTSCH, *supra* note 89, at 268-70.
148. Schachter, *supra* note 81, at 5.
149. S. ROSENNE, *supra* note 89, at 100.

VI. Comparison of the Beagle Channel Arbitration with Honduras v. Nicaragua

A. *Context of Honduras v. Nicaragua*

The setting of the instant decision is somewhat similar to *Case Concerning the Arbitral Award Made by the King of Spain on 23 December 1906 (Honduras v. Nicaragua)*.[150] On October 7, 1894, Nicaragua and Honduras signed the Gamez-Bonilla Treaty,[151] which established a mixed commission to settle a longstanding boundary dispute. The Treaty provided that it would "be in force for a period of ten years, in case its execution should be interrupted."[152] In addition, the Treaty provided a specific procedure to be followed for the appointment of an arbitrator to decide disputes not resolved by the mixed commission.[153] The exchange of ratifications took place on December 24, 1896.[154] On July 4, 1901, the commission noted its disagreement over the appropriate boundary.[155] On October 2, 1904, the two national members of the mixed commission agreed by "common consent" that the provisions for selecting an arbitrator had been complied with and that the King of Spain would be requested to decide the question.[156] The King of Spain consented on October 17, 1904.[157] On December 23, 1906, the regent rendered his decision, which was generally favorable to the Honduran position.[158] Both parties appeared to accept the decision at that time.[159] In 1912, however, Nicaragua challenged its validity. Nicaragua claimed that the failure to comply with the specific steps set out in the Treaty for the selection of an arbitrator, as well as defects in the award itself, rendered the award a nullity.[160] Various attempts at mediation failed.[161] In 1957 the Organization of American States procured the parties' agreement to take the dispute to the International Court of Justice.[162] Honduras argued be-

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150. [1960] I.C.J. 192.
151. *Id.* at 199-202.
152. Gamez-Bonilla Treaty, art. 11, *reprinted in* [1960] I.C.J. at 202.
153. *Id.* arts. 3, 5, *reprinted in* [1960] I.C.J. at 200-01.
154. [1960] I.C.J. at 208.
155. *Id.* at 202.
156. *Id.* at 206.
157. *Id.* at 208.
158. *Id.* at 194. The decision is reprinted in part in [1960] I.C.J. at 202-03.
159. *Id.* at 210-11.
160. *Id.* at 203.
161. *Id.*
162. *Id.* at 194, 203.

fore the International Court of Justice that the award was valid and that Nicaragua was obligated under international law to comply. Nicaragua challenged the appointment of the King of Spain as arbitrator, asserting that the Gamez-Bonilla Treaty expired before his appointment and that the procedures used to appoint him violated the Treaty.[163] Nicaragua further attacked the validity of the award itself because the award allegedly contained "essential errors," lacked support by an adequate statement of reasons, was rendered by an arbitrator who exceeded his jurisdiction and contained "omissions, contradictions and obscurities."[164] For purposes of deciding this case two *ad hoc* judges, one nominated by each of the parties, joined the thirteen-man International Court of Justice.[165] The Court decided by fourteen votes to one that the award was valid.[166] Specifically, the Court held that the Treaty had come into force upon the exchange of ratifications, not upon signing, and therefore ten years had not expired when the King of Spain was appointed.[167] With regard to procedural requirements, the Court held that the expression of common consent to the appointment of the King of Spain vitiated any later objection.[168] Concerning the other four grounds, the Court held that Nicaragua's acquiesence precluded such complaints.[169] Nicaragua complied with the decision.[170]

B. *Style of the Honduras Court*

Since the members of the *Beagle* Court were all members of the International Court of Justice, their style can be aptly compared with that of the *Honduras* Court. Concerning preclusion, the *Honduras* Court stated:

> In the judgment of the Court, Nicaragua, by express declaration and by conduct, recognized the Award as valid and it is no longer open to Nicaragua to go back upon that recognition and to challenge the validity of the Award. Nicaragua's failure to raise any question with regard to the validity of the Award for several years after the full

163. *Id.* at 205.
164. *Id.* at 210.
165. *Id.* at 194-95.
166. *Id.* at 217.
167. *Id.* at 209.
168. *Id.* at 207.
169. *Id.* at 213.
170. *See* S. ROSENNE, *supra* note 89, at 121; J. GAMBLE & D. FISCHER, THE INTERNATIONAL COURT OF JUSTICE 48-49 (1976).

> terms of the Award had become known to it further confirms the conclusion at which the Court has arrived.[171]

The style in *Honduras* is more forceful than the conclusionary paragraphs of the *Beagle* opinion. There is no outward hesitation in the Court's language. Other examples from which a comparison can be made will appear in the course of examining the Court's rationale regarding nullity on the merits.[172]

C. *Rationale of Honduras on the Nullity Question*

The *Honduras* Court's position regarding Nicaragua's claims of nullity on the merits gives some indication of the validity of Argentina's Declaration of Nullity.[173] In both cases the parties claim excess of power or jurisdiction, essential errors of history and geography, and inadequate reasoning. Nicaragua argued that the King of Spain exceeded his jurisdiction by deciding the case without proper reliance on the rules of historical and geographical interpretation laid down in Article 2 of the Gamez-Bonilla Treaty.[174] In considering this claim, the Court described its function as follows:

> [T]he Award is not subject to appeal and . . . the Court cannot approach the consideration of the objections raised by Nicaragua to the validity of the Award as a Court of Appeal. The Court is not called upon to pronounce on whether the arbitrator's decision was right or wrong. These and cognate considerations have no relevance to the function that the Court is called upon to discharge in these proceedings, which is to decide whether the Award is proved to be a nullity having no effect.[175]

The Court refused to second guess the arbitrator's award on the merits, contrary to Nicaragua's request. Argentina appears to demand a similar second guess in the instant case. Also, the Court held that the arbitrator's award had been "based on historical and legal consideration (*derecho historicó*) in accordance with paragraphs 3 and 4 of Article II" and therefore was not a nullity.[176] The Court likewise failed to find the "essential error" ground valid:

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171. [1960] I.C.J. 213.

172. One judge suggested that the Court should have based its conclusion entirely on grounds of preclusion. *Id.* at 219-20 (separate opinion of Judge Spender). Another judge suggested that preclusion was insufficient. *Id.*, at 217-18 (separate opinion of Judge Quintana).

173. *See id.* at 214-17.

174. *Id.* at 214-15. *See also* Gamez-Bonilla Treaty, *id.* at 199-200.

175. *Id.* at 214.

176. *Id.* at 215.

> The instances of 'essential error' that Nicaragua has brought to the attention of the Court amount to no more than evaluation of documents and of other evidence submitted to the arbitrator. The appraisal of the probative value of documents and evidence appertained to the discretionary power of the arbitrator is not open to question.[177]

This same argument could be made concerning Argentina's contention regarding historical, geographical, and interpretive errors in the *Beagle* Arbitration. If the *Honduras* decision is good precedent on the question of nullity, then Argentina's arguments do not appear to be convincing.

VII. COMPARISON OF BEAGLE ARBITRATION WITH CARDINAL SAMORÉ'S MEDIATION

A. *Punctuality*

Not only does the *Beagle* decision fare poorly in comparison with another international tribunal's decision in a somewhat similar case, it also compares unfavorably with another party's mediation in the same controversy. The long delay in rendering the *Beagle* decision is highlighted when compared to the punctuality of Cardinal Samoré's arbitration. Although Cardinal Samoré undoubtedly had the advantage of the parties' post-Award confrontation, their Roman Catholicism, and the high tension of the moment, he constructed an acceptable peace formula within three weeks as opposed to the Court's six year time period. The Cardinal's punctuality also compares favorably with the usual time necessary for the International Court of Justice to decide a contentious case. One study reveals that in most cases the International Court of Justice has delivered a decision within three years.[178] The decision in *Honduras v. Nicaragua* took only two years and four months.[179]

In *Beagle*, the first request for arbitration was made in 1967, and a Compromiso was agreed upon in 1971. After five years of preliminaries,[180] oral argument commenced in September, 1976. The

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177. *Id.* at 215-16.

178. J. GAMBLE & D. FISCHER, *supra* note 170, at 68-69.

179. *Id.* at 58-59.

180. On June 10, 1972, the Court established its seat at Geneva. It set a deadline for submission of memorials by January 1, 1973, and then extended it to July 2, 1973. The Court set a deadline for counter-memorials at July 2, 1974, and later extended it to October 2, 1974. Another nine months was allowed for reply briefs, and nine months after that, in March 1976, the Court visited the scene of the dispute. Arbitration Report, *supra* note 7, at 637, 641-43.

Court began deliberating in October, 1976, and announced its decision on February 18, 1977.[181] Thus, it would appear that international arbitration can be so lengthy that it is of no use in the case of a heated dispute.

B. *Sensitivity to Symbolism*

Punctuality is not the only respect in which Cardinal Samoré's mediation proved superior to the Court's arbitration. Unlike the Court, the Cardinal grasped the symbolic importance and face-saving potential of the Oceanic principle. Although his peace formula, like the Court's gives Chile rights to PNL, it assuaged Argentina's fear of interference with sea routes by declaring that the Channel itself should be demilitarised and binational. Furthermore, Chile agreed to accept the Oceanic principle, and in consequence agreed to accept both a twelve mile maritime boundary around PNL[182] and an Argentine presence on "enclaves on nearby islets and on Cape Horn."[183] Chile's apparent willingness to accept the Oceanic principle on these terms belies the Court's conclusion that no such principle exists.

VIII. CONCLUSION

It has been demonstrated that although the Argentine Declaration of Nullity does not contain valid legal arguments for rejection, it does indicate weaknesses in the Court's opinion that make it vulnerable to rejection for political reasons. Specifically, the Court's remarks about Chilean possession of disputed islands outside the hammer were especially ill-advised. In addition, the Court failed to clearly articulate the reason for dividing the small Channel islands by appurtenance while refusing to do so for PNL. Finally, the Court's refusal to apply an Oceanic principle, even in a narrow sense, was questionable in a case in which the legal arguments based upon the Treaty text were closely balanced. The Court's lack of power to decide "ex aequo et bono" did not prevent a broad interpretation of the Treaty to include some version of the Oceanic principle. Although the Court's refusal to apply the Oceanic principle was logically defensible, its broadside discrediting of the principle was not. The Court's adverse findings were

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181. *Id.*

182. This compares with the 200 mile limit declared on July 14, 1977. *See* note 20 and accompanying text, *supra*.

183. THE ECONOMIST, Jan. 13, 1979, at 54.

made even more unacceptable to Argentina by virtue of such flaws in style. If the members of the International Court of Justice are to play a more important role in resolving future heated international disputes, they will have to speed up the procedure of the bodies on which they serve, improve their judicial style, and pay more attention to the symbolism of international politics.

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