INTERNATIONAL COURT OF JUSTICE

CASE CONCERNING

ARBITRAL AWARD OF 3 OCTOBER 1899

CO-OPERATIVE REPUBLIC OF GUYANA

v.

BOLIVARIAN REPUBLIC OF VENEZUELA

GUYANA'S MEMORIAL ON THE MERITS

VOLUME I

---

8 March 2022

Table of Contents

Chapter 1 Introduction 1

I. Reasons for the Institution of Proceedings against Venezuela 2

II. The Scope of the Dispute.....8

III. Structure of this Memorial 10

Chapter 2 Guyana and the Essequibo Region..... 19

I. Geographical and Ecological Features.....19

II. Natural Resources and Economic Activity.....27

III. Human Settlement 28

IV. Governance 37

Chapter 3 The Boundary Dispute between Great Britain and Venezuela and the Parties' Agreement to Settle It by International Arbitration... 41

I. The Boundary Dispute between Great Britain and Venezuela 41

II. The Intervention of the United States.....49

III. The Terms of the Agreement to Arbitrate 59

IV. The Arbitral Proceedings and the Tribunal's Award 66

Chapter 4 Venezuela's Acceptance of the Arbitral Award..... 79

I. Venezuela's Acceptance of the Arbitral Award 80

II. The Joint Boundary Commission, the Demarcation of the Boundary and the 1905 Agreement 83

III. Venezuela's Strict Adherence to the 1899 Award and 1905 Agreement and Refusal to Accept any Modifications to the Boundary with British Guiana 96

IV. Venezuela's Demarcation of its Boundary with Brazil and the Tri-Junction Point with Brazil and British Guiana in Strict Conformity with the 1899 Award and 1905 Agreement 103

V. Venezuela's Declaration that the Boundary with British Guiana Was *Chose Jugée*, and its Repeated Official Statements Reaffirming the Legal Validity of the 1899 Award and the 1905 Agreement.....117

Chapter 5 Venezuela's Repudiation of the 1899 Award 131

I. Venezuela's Change of Position on the Arbitral Award.....131

II. The Examination of Archival Documents and the Conclusion of the Geneva Agreement.....140

Chapter 6 The 1899 Award Was Intended to Be Final and Binding, and Is Entitled to a Presumption of Validity 147

I. The 1899 Award Is Final and Binding.....147

A. Arbitral Awards Are Final and Binding as a Matter of Law 147

B. The 1899 Award Was Intended to Be Final and Binding 153

C. The Award Continued to Be Final and Binding Following the Geneva Agreement.....158

II. The 1899 Award Enjoys a Presumption of Legal Validity.....161

A. Arbitral Awards Benefit from a Presumption of Validity 162

B. The Burden and Standard of Proof of Alleged Invalidity 164

C. The Applicable Law on the Invalidity of Awards and the Existing Grounds of Invalidity in 1899 168

Chapter 7 The *Compromis* Was Validly Concluded and the Tribunal Was Properly Constituted 173

I. No Error, No Fraud, No Corruption.....174

A. Conditions for Invalidating a Treaty on the Grounds of Error, Fraud or Corruption 175

B. The Special Agreement Was Concluded by Venezuela with Full Knowledge of all the Relevant Facts 183

C. Venezuela's Knowledge and Approval of the Composition of the Tribunal 193

II. No Coercion or Duress 199

A. The Notion of Coercion in an Intertemporal Perspective and in its Relationship with Treaty Law 200

B. To the Extent that Pressure Can Be Said to Have Existed, It Was Exerted on Great Britain 203

C. The Alleged Pressures on Venezuela Are Not Such as to Invalidate the Treaty 212

Chapter 8 The Arbitral Tribunal Properly Exercised its Functions and Produced a Legally Valid Award 217

I. The Arbitral Tribunal Fulfilled the Functions Conferred upon It under the Treaty and Neither Exceeded its Authority nor Committed Error 217

A. The Written and Oral Proceedings before the Arbitral Tribunal Were Conducted in Conformity with the Treaty 217

B. The Award Complied with the Formal Requirements Contained in the Treaty 221

C. The Award Demonstrates that the Arbitral Tribunal Fulfilled its Functions and Did Not Exceed its Powers ... 222

II. Venezuela's Allegations of Corruption, Collusion and Nullity 225

A. The Mallet-Prevost Memorandum 225

B. Report by Venezuelan Experts to the National Government of Venezuela (1965).....231

III. Response to Venezuela's Allegations of Nullity.....232

A. The Absence of Reasons in the Award Does Not Render the Award a Nullity.....232

B. The Arbitrators Did Not Fail to Take into Account Applicable Principles of Law or Fail to Investigate and Ascertain the Extent of the Territories Belonging to the Netherlands and Spain at the Date of Great Britain's "Acquisition" 238

C. The Arbitrators Did Not Fail to Comply with the Requirements in the Treaty Concerning the Calculation and Application of the 50-Year Prescription Rule 243

D. The Arbitral Tribunal Did Not Exceed its Powers by Determining the Free Navigation of the Barima and Amakura Rivers 245

E. Venezuela's Allegation that Great Britain Submitted Doctored Maps to the Arbitral Tribunal and that these Maps Were of "Decisive Importance".....247

F. Venezuela's Allegation that the Award Is a Nullity Because It Was the Product of Coercion and a "Political Compromise" or "Political Deal" 253

Chapter 9 The Legal Consequences of Venezuela's Prolonged Acceptance of the Award and the Boundary 273

I. The Legal Effect of the Prolonged Acceptance of the Award on the Award Itself and on the Right of Venezuela to Raise a Nullity Claim.....276

II. The Legal Effect of the Prolonged Acceptance of the Outcome of the Award on the Delimitation It Effectuated.....284

SUBMISSIONS 287

CHAPTER 1

INTRODUCTION

1.1 The Co-operative Republic of Guyana ("Guyana") instituted these proceedings against the Bolivarian Republic of Venezuela ("Venezuela") by Application dated 29 March 2018. In its Application, Guyana asked the Court to resolve the controversy that has arisen as a result of Venezuela's contention, formally asserted for the first time in 1962, that the 1899 Arbitral Award Regarding the Boundary between the Colony of British Guiana and the United States of Venezuela (the "1899 Award" or the "Award") is "null and void".

1.2 In regard to jurisdiction, Guyana invoked the 30 January 2018 decision of the United Nations Secretary-General, António Guterres, to select the Court as the means of settlement for the controversy. The Secretary-General acted pursuant to the authority conferred upon him by the agreement of the Parties reflected in Article IV, paragraph 2, of the "Agreement to Resolve the Controversy Between Venezuela and the United Kingdom of Great Britain and Northern Ireland Over the Frontier Between Venezuela and British Guiana", signed at Geneva on 17 February 1966 (the "Geneva Agreement").

1.3 By an order dated 19 June 2018, the Court decided that the question of its jurisdiction would be determined separately prior to any proceedings on the merits. In accordance with the timetable set by the Court, on 19 November 2018, Guyana filed its Memorial on Jurisdiction. By a letter dated 12 April 2019, Venezuela indicated that it had decided "not to participate in the written procedure". Nevertheless, it later submitted a detailed document entitled "Memorandum of the Bolivarian Republic of Venezuela on the Application filed before the International Court of Justice by the Co-operative Republic of Guyana on March 29th, 2018",

together with a 155-page "Annex" containing various arguments regarding the controversy and the Court's jurisdiction in respect of Guyana's Application.

1.4 On 30 June 2020, the Court held a public hearing on the question of its jurisdiction. Venezuela did not participate. By its Judgment dated 18 December 2020, the Court held that it has jurisdiction in respect of Guyana's Application.[1] The scope of that jurisdiction is addressed further in Section II below.

1.5 By an Order dated 8 March 2021, the Court fixed the deadline for the filing of Guyana's Memorial on the Merits as 8 March 2022 and the deadline for Venezuela's Counter-Memorial on the Merits as 8 March 2023. Guyana submits this Memorial in accordance with that Order.

I. Reasons for the Institution of Proceedings against Venezuela

1.6 Guyana is a developing country in the northeast mainland of South America. It is the third smallest (by geographic area) and second smallest (by population) of the twelve South American States. It is also one of the youngest, having attained independence on 26 May 1966, following several centuries of colonial rule by the Dutch (from the early seventeenth century until the early nineteenth century) and then the British (from then until the attainment of independence some 162 years later).

[1] *Arbitral Award of 3 October 1899 (Guyana v. Venezuela)*, Jurisdiction of the Court, Judgment, I.C.J. Reports 2020 (hereinafter "*Jurisdiction Judgment*"), p. 455.

1.7 Guyana's neighbour to the west, Venezuela, is more than four times larger by territory and has a population more than thirty-five times greater than that of Guyana. Venezuela is endowed with abundant natural resources (which are reported to include the largest proven oil reserves of any country in the world).[2]

1.8 In the second half of the nineteenth century, a dispute regarding the location of the boundary between Venezuela and the then-British colony of British Guiana arose. The United States took Venezuela's side in the dispute, based on its "Monroe Doctrine", by which it opposed territorial claims by European colonial powers in the Americas. Tensions rose to such a level that the United States even threatened war against Britain, but diplomacy prevailed. Facilitated by the United States, in 1897, Venezuela and Great Britain concluded an agreement — the Treaty of Washington — by which they agreed to submit the dispute regarding the location of the boundary to binding arbitration ("the 1899 Arbitration" or "the Arbitration") before a tribunal of eminent jurists, including the heads of the judiciary of the United States and Great Britain ("the Arbitrators", "the Arbitral Tribunal" or "the Tribunal").

1.9 On 3 October 1899, the Arbitral Tribunal delivered its Award, which determined the boundary between Venezuela and British Guiana ("the 1899 Award"). The 1899 Award was the culmination of arbitral proceedings during which the respective territorial claims of Great Britain and Venezuela were addressed at great length and in detail by distinguished legal counsel representing the two States, including through many thousands of pages of written submissions

[2] People's Power Ministry of Petroleum ("PDVSA"), "Exploration and Production", *available at* http://www.pdvsa.com/index.php?option=com_content&view=article&id=6545&Itemid=900&lang=en (last accessed 22 Feb. 2022).

and more than 200 hours of oral hearings before the Arbitral Tribunal. Under the terms of the Treaty of Washington, Great Britain and Venezuela agreed that they would "consider the result of the proceedings of the Tribunal of Arbitration as a full, perfect, and final settlement" of all matters referred to the Tribunal.

1.10 For more than six decades after the 1899 Award was delivered, Venezuela treated the Award as a final settlement of the matter: it consistently recognised, affirmed and relied upon the 1899 Award as "a full, perfect, and final" determination of the boundary with British Guiana. In particular, between 1900 and 1905, Venezuela participated in a joint demarcation of the boundary, in strict adherence to the letter of the 1899 Award, and emphatically refused to countenance even minor technical modifications of the boundary line described in the Award. Venezuela proceeded to formally ratify the demarcated boundary in its domestic law and thereafter published official maps, which depicted the boundary following the line described in the 1899 Award. In July 1928, Venezuela concluded a boundary agreement with Brazil that expressly confirmed the tri-junction point of the boundaries of British Guiana, Venezuela and Brazil as described in the 1899 Award. For more than sixty years, Venezuela gave full effect to that Award, and never raised a concern as to its validity and binding legal effects.

1.11 As British Guiana's independence came into view in the early 1960s, however, Venezuela abruptly and drastically changed tack. After more than half a century of recognition, affirmation and reliance, Venezuela sought to repudiate the 1899 Award for the first time. On the basis of that departure from its longstanding recognition of the Award, Venezuela began to make far-reaching and aggressive claims that it was entitled to three-quarters of Guyana's sovereign territory. In the decades since Guyana attained independence, Venezuela has continued to advance

those claims, with increasing menace, and in disregard of the impact of its claims on Guyana and the wider region.

1.12 Venezuela's words have been reinforced by aggressive actions, including unlawful occupation of Guyana's sovereign territory, interception of vessels in Guyana's territorial waters, and various other actions designed to interfere with and prevent economic development activities authorised by Guyana in its territory west of the Essequibo River. Venezuela's claims and conduct have had — and continue to have — a profoundly detrimental effect on Guyana. Since its emergence as a sovereign State in 1966, Guyana's stability and development have been unsettled by Venezuela's repudiation of the 1899 Award and by its aggressive claims to three-quarters of Guyana's sovereign territory. These actions on Venezuela's part have impeded foreign investment in Guyana and cast a long and anxious shadow over the security of Guyana's territory, economy and people.

1.13 Venezuela's contention of nullity on the eve of Guyana's independence set in train a protracted process during which Venezuela was given every opportunity to explain, investigate and substantiate the allegations underlying its new contention, including by appointing a panel of experts to review previously confidential archival materials relating to the 1899 Arbitration. Despite this extensive investigation, Venezuela was unable to produce any documentary evidence to support its contention that the Arbitral Tribunal or any of its members acted improperly in carrying out their mission to determine the boundary between Venezuela and British Guiana. Nevertheless, Venezuela persisted in its claim that the Award was null and void due to such alleged impropriety.

1.14 As mentioned, on 17 February 1966, the Governments of the United Kingdom, Venezuela and British Guiana concluded the Geneva Agreement. This

was intended to establish a binding and effective mechanism for achieving a permanent resolution of the controversy arising from Venezuela's repudiation of the 1899 Award. Under the auspices of the Geneva Agreement, a Mixed Commission was established for the purpose of "seeking satisfactory solutions for the practical settlement of the controversy" arising from Venezuela's contention of nullity. The Mixed Commission held numerous meetings during its four-year term between 1966 and 1970 but was unable to make any progress towards the settlement of the controversy. Following a twelve-year moratorium between 1970 and 1982 and a seven-year period of consultations on a means of settlement between 1983 and 1990, the Parties then engaged in a twenty-seven-year Good Offices Process, under the authority of the United Nations Secretary-General, between 1990 and 2017, including a one-year Enhanced Mediation Process. Once again, this process yielded no significant progress towards the resolution of the controversy.

1.15 Venezuela has been afforded ample time and opportunity to explain and substantiate its contentions of nullity under the various procedures established under the Geneva Agreement in the six decades since it first formally sought to question the validity of the 1899 Award. Nevertheless, it has adduced no evidence that is remotely capable of substantiating its claims that the Award was the product of coercion, collusion, fraud or some other nullifying factor. On the contrary, the evidence overwhelmingly confirms what Venezuela itself accepted for more than half a century: namely, that the 1899 Award was a lawful, conclusive and binding delimitation of the Parties' boundary.

1.16 Guyana's case before the Court is both legally and factually straightforward. It is founded upon two basic and fundamental principles of international law that underpin the orderly relations of States, namely, *pacta sunt*

servanda and the binding character of international arbitral awards. The case involves the application of those axiomatic precepts to a factual record which is clear, consistent and irrefutable. The relevant legal principles and facts point to only one conclusion: the 1899 Award is valid and binding, and the Parties' boundary follows the line described therein.

1.17 As the principal judicial organ of the United Nations, the Court will be fully aware of the harm that can ensue when States choose to disregard binding treaties and arbitral awards. Those deleterious consequences are particularly stark in a case involving the location of a longstanding international boundary, and where the repudiation is asserted in aid of aggressive and expansionist claims by a larger State in respect of the territory of a much smaller one.

1.18 Venezuela's rejection of the 1899 Award undermines the basic norms of international law, respect for which is fundamental to maintaining international peace, security and stability. Venezuela's disregard for its international legal obligations is an acute threat to Guyana. It impedes Guyana's development and imperils the security of the entire region by undermining the sanctity of longstanding and voluntarily executed arbitral awards and boundary agreements. So long as Venezuela continues to advance its unfounded claims to vast swathes of Guyana's sovereign territory, Guyana will be unable to fulfil its full potential as an independent sovereign State.

1.19 The decision of the Secretary-General of the United Nations to select the Court as the means of settlement of the controversy reflects this stark reality and the need for an authoritative, independent and binding affirmation of the Parties' rights and obligations under the 1899 Award.

1.20 Since attaining independence in 1966, Guyana has consistently treated the international rule of law as the bedrock of its relations with its neighbours. As it explained at the jurisdictional phase of the proceedings, Guyana has brought its Application with the firm conviction that adherence to international agreements, respect for international judicial and arbitral awards and the inviolability of established territorial boundaries are crucial to maintaining amity between sovereign States. Guyana files this Memorial in accordance with that conviction and in the confident expectation that the Court will determine its Application independently, fairly and in accordance with international law.

II. The Scope of the Dispute

1.21 By its Judgment dated 18 December 2020, the Court held that it has jurisdiction "in so far as it concerns the validity of the Arbitral Award of 3 October 1899 and the related question of the definitive settlement of the land boundary dispute between the Co-operative Republic of Guyana and the Bolivarian Republic of Venezuela". The Court concluded that it "does not have jurisdiction to entertain the claims of the Co-operative Republic of Guyana arising from events that occurred after the signature of the Geneva Agreement" on 17 February 1966.[3]

1.22 In reaching these conclusions as to the scope of its jurisdiction, the Court observed that "the subject-matter of the controversy which the parties agreed to settle under the Geneva Agreement relates to the validity of the 1899 Award and its implications for the land boundary between Guyana and Venezuela".[4] The Court added that "the object and purpose of the Geneva Agreement … was to ensure a

[3] *Jurisdiction Judgment*, p. 455, para. 138.

[4] *Ibid.*, para. 129.

definitive resolution of the dispute between Venezuela and the United Kingdom over the frontier between Venezuela and British Guiana".[5] In this regard, the Court observed that, "it would not be possible to resolve definitively the boundary dispute between the Parties without first deciding on the validity of the 1899 Award about the frontier between British Guiana and Venezuela".[6]

1.23 The Court therefore concluded that it has jurisdiction *ratione materiae* with respect to both "Guyana's claims concerning the validity of the 1899 Award about the frontier between British Guiana and Venezuela *and* the related question of the definitive settlement of the land boundary dispute between Guyana and Venezuela".[7] At paragraph 137 of its Judgment, the Court reiterated its conclusion that it has jurisdiction *ratione materiae* in respect of:

> "Guyana's claims concerning the validity of the 1899 Award about the frontier between British Guiana and Venezuela *and* the related question of the definitive settlement of the land boundary dispute between the territories of the Parties."[8]

1.24 Accordingly, given the Court's conclusions as to the scope of its jurisdiction *ratione materiae* and *ratione temporis*, Guyana's Memorial addresses the validity of the 1899 Award and the related question of the definitive settlement of the land boundary dispute between Guyana and Venezuela. In so doing, and in

[5] *Ibid.*, para. 129.

[6] *Ibid.*, para. 130.

[7] *Ibid.*, para. 135.

[8] *Ibid.*, para. 137 (emphasis added).

keeping with the decision of the Court in its Judgment on Jurisdiction, Guyana does not address any claims arising from events that occurred after 17 February 1966.

III. Structure of this Memorial

1.25 Guyana's Memorial on the Merits consists of four volumes. Volume I contains the main text of the Memorial. Volumes II — IV contain supporting documents.

1.26 Volume I consists of nine Chapters, followed by Guyana's Submissions. After this Introduction, the following four Chapters address the factual aspects of this dispute. The final four Chapters then address the relevant legal principles and their application to the facts and circumstances of the case.

1.27 **Chapter 2** provides a description of Guyana's geography and, in particular, the land territory between the Essequibo River and the boundary with Venezuela established by the 1899 Award. It sets out the principal geographic and ecological features of that territory — which include some of the most pristine and ecologically diverse rainforests in the world — as well as its economic importance to the country, its settlement by the Dutch, who occupied and administered the territory between the Essequibo and Orinoco Rivers until the early nineteenth century, when they were supplanted by the British, and the governance of the territory by Guyana since it achieved independence in 1966.

1.28 The three Chapters that follow then describe the historical background to the controversy concerning the validity and effect of the 1899 Award. **Chapter 3** recounts the origin of the dispute over the boundary between British Guiana and Venezuela in the middle of the nineteenth Century, and then describes how,

following the intercession of the United States, Great Britain and Venezuela agreed in the 1897 Treaty of Washington to settle the dispute by international arbitration. The Chapter describes the Treaty's provisions, which called for the establishment of an Arbitral Tribunal comprising five eminent jurists, including two "on the part of Great Britain … two on the part of Venezuela" and a fifth to be selected by the other four;[9] and its stipulation that the Tribunal determine the legal status of the disputed territory as at the date when Great Britain acquired the colonial possessions of the Dutch, and that it ascertain what territory could have been lawfully claimed by the Dutch and Spanish, respectively, at that time. As explained in Chapter 3, the Treaty contained detailed and prescriptive provisions concerning the constitution of the Arbitral Tribunal, the process to be followed during the proceedings and the form and content of the final Award. It also prescribed various "Rules", which the Arbitral Tribunal was required to apply in deciding the location of the boundary. The Chapter describes the written and oral phases of the 1899 Arbitration, during which the respective territorial claims of the two States were addressed in great detail. Following the hearings, the Tribunal engaged in several days of intensive deliberations and handed down a unanimous decision on the location of the boundary, as detailed in this Chapter.

1.29 **Chapter 4** addresses Venezuela's prolonged acceptance of, and acquiescence in, the boundary as determined by the 1899 Award. It begins by describing Venezuela's immediate approbation and acceptance of the Award, which it hailed as an emphatic "victory" for Venezuela and a costly defeat for Great Britain. The Chapter then explains how, between 1900 and 1905, Venezuela

[9] Treaty between Great Britain and the United States of Venezuela Respecting the Settlement of the Boundary Between the Colony of British Guiana and the United States of Venezuela, 5 U.K.T.S. 67 (2 Feb. 1897). AG, Annex 1.

participated in a laborious and meticulous joint demarcation of the entire 825-kilometre boundary in strict accordance with the description contained in the 1899 Award, culminating in a formal agreement on the boundary signed by the representatives of the two States. In the decades that followed, Venezuela participated in the maintenance and replacement of boundary markers and published numerous official maps, which depicted the boundary following the line demarcated by the Joint Boundary Commission in accordance with the 1899 Award. Venezuela repeatedly and consistently insisted that all boundary markers must be placed in strict conformity with the precise letter of the 1899 Award, and it refused to assent to any deviation — no matter how technical or minor — from the line described in the Award. During this period, Venezuela consistently regarded the boundary, in the words of its Ministry of Foreign Affairs, as a "*frontier du droit*" and a "*chose jugée*".[10]

1.30 **Chapter 5** describes how, following more than 60 years of acceptance and affirmation of the 1899 Award and acquiescence in the boundary established and described therein, in February 1962 Venezuela seized upon the advent of Guyana's independence with intimations of "Cold War" considerations to contrive an unfounded and meritless claim that the 1899 Award was null and void. The radical nature of that *volte-face* is reflected by the fact that, less than a month earlier, Venezuela had told the United States Government that it did not question the legality of the 1899 Award.

[10] *See Letter* from the Venezuelan Minister for Foreign Affairs, P. Itriago Chacín, to W. O'Reilly (31 Oct. 1931). MMG, Vol. III, Annex 53; *Letter* from the Venezuelan Foreign Minister, E. Gil Borges, to British Ambassador to Venezuela, D. Gainer (15 Apr. 1941). MMG, Vol. III, Annex 56.

1.31 The reversal in Venezuela's position was purportedly based on a single document, a memorandum written in obscure circumstances in 1944 by one of Venezuela's legal counsel in the 1899 Arbitration, Mr Severo Mallet-Prevost. The memorandum, the original of which has never been made available, was allegedly reproduced and published posthumously in 1949 — some fifty years *after* the events which it purported to describe and some thirteen years *before* Venezuela first repudiated the 1899 Award. The memorandum consisted of a mixture of Mr Mallet-Prevost's purported recollections of events half a century earlier (many of which were demonstrably false) together with unsubstantiated speculations about the existence of a secret Anglo-Russian "deal" regarding the outcome of the 1899 Arbitration.

1.32 The Chapter goes on to describe how, in an effort to dispel any doubts regarding the validity of the 1899 Award and avoid any impediment to the orderly progress towards British Guiana's independence, the British Government offered to participate with Venezuela in an examination of documentary material regarding the 1899 Arbitration. Following Venezuela's acceptance of this offer, experts appointed by Venezuela and Great Britain examined documents at the official archives in Caracas and London. Those examinations did not yield any documents that supported Venezuela's contention of nullity. Nor did the four-year proceedings before the Mixed Commission, established by the Geneva Agreement, between 1966 and 1970, turn up any material to support the allegations of coercion, corruption and a secret Anglo-Russian "deal". Nor in the five decades since then has Venezuela produced any credible evidence whatsoever in support of its contention of nullity.

1.33 The final four Chapters of the Memorial address the relevant legal principles and their application to the factual circumstances summarised in the preceding Chapters.

1.34 **Chapter 6** addresses the presumption of validity to which the 1899 Award is entitled under international law, and the implications in respect of the burden and standard of proof of its alleged invalidity that flow from this presumption. It is well established that, in view of their final and binding character, arbitral awards benefit from a presumption of validity. Accordingly, Guyana does not bear any burden to establish the validity of the 1899 Award; rather, the burden rests squarely on Venezuela to establish that the 1899 Award is null and void. It is equally well established that any contention of nullity is subject to a high standard of proof, which can only be met by evidence of "weighty" or "exceptional" circumstances. The onerous nature of that standard of proof is reflected by the fact that the Court has never previously found an arbitral award to be null and void.

1.35 **Chapter 7** addresses the validity of the Treaty of Washington and the constitution of the Arbitral Tribunal. The Chapter begins by considering the conditions for establishing that a treaty is null on the grounds of error, fraud or corruption. It explains how the Treaty of Washington was concluded in circumstances where Venezuela had full knowledge of all relevant facts. It then explains why Venezuela's claim that the Treaty of Washington is invalid is entirely without merit. First, the 65-year delay between the conclusion of the Treaty in 1897 and Venezuela's first attack on its validity means that Venezuela has unequivocally lost any right to challenge the Treaty. Second, at the date when the Treaty was signed in 1897, coercion was not a recognised basis for invalidating a treaty. Accordingly, even if (*quod non*) Venezuela's contention of coercion had any basis in fact, the argument that this invalidated the Treaty is legally untenable. Third, and

in any event, there is no evidence whatsoever that Venezuela entered the Treaty as a result of any coercion. On the contrary, to the extent that the Treaty was the product of any pressure at all, that pressure was directed solely at Great Britain by the United States, which was acting on behalf and at the behest of Venezuela. Venezuela, for its part, actively sought and welcomed the conclusion of the Treaty. In short, the Treaty cannot be characterised as involving any coercion or fraud against Venezuela.

1.36 The Chapter also describes how the Arbitral Tribunal was constituted in full conformity with the terms of the Treaty and all applicable rules of international law. The five Arbitrators were all distinguished jurists, each appointed in strict accordance with the terms of the Treaty. Venezuela's nomination of its two Arbitrators reflected its conviction that the appointment of two Supreme Court Justices from the United States would serve to guarantee the effective future implementation of the Award. The President of the Tribunal, Prof Fyodor Martens from Russia — one of the most experienced, distinguished and highly-regarded international lawyers of his era — was chosen by the four party-appointed Arbitrators with the consent of the parties.

1.37 **Chapter 8** explains why Venezuela is manifestly incapable of discharging its burden of proving the invalidity of the 1899 Award itself. The Chapter begins by describing how the written and oral proceedings before the Arbitral Tribunal conformed to the terms of the Treaty. The Chapter then explains how the 1899 Award itself complied with the formal requirements contained in the Treaty and demonstrates beyond any doubt that the Arbitral Tribunal fulfilled its functions and did not exceed the powers conferred upon it by the Treaty.

1.38 The Chapter then addresses and refutes the allegations of nullity advanced by Venezuela from 1962 onwards. It explains why the absence of reasons for the Arbitral Tribunal's decision was in accordance with the requirements of the Treaty, the contemporaneous expectation of the parties, and the general prevailing practice at the time. It then refutes Venezuela's misconceived allegations that the Arbitral Tribunal failed to take into account applicable principles of law and that it failed to comply with its obligation to investigate and ascertain the extent of the territories belonging to the Netherlands and Spain at the date of Great Britain's acquisition of the relevant territory. The Chapter then addresses Venezuela's baseless claims that the Arbitral Tribunal exceeded its powers by determining the free navigation of the River Barima and River Amacuro and that Great Britain fraudulently submitted doctored maps to the Arbitral Tribunal.

1.39 The Chapter concludes by addressing Venezuela's claim that the 1899 Award is a nullity because it was the product of coercion and a secret "political compromise" or "political deal". Contemporaneous documents authored or produced by the Arbitrators demonstrate conclusively that the Tribunal engaged in earnest, intensive and wide-ranging deliberations regarding the location of the boundary, and that the individual Arbitrators initially held divergent views in relation to this issue. Those same documents demonstrate that through that process of discussion and deliberation, a settled consensus ultimately emerged — a consensus that was the product of mutual compromises and adjustments in the Arbitrators' respective positions, including compromises facilitated by the Tribunal's President, who strove to achieve a unanimous Award. Contrary to what Venezuela alleges, there is not a shred of evidence to substantiate the claim that the boundary unanimously determined by the 1899 Award was the product of improper coercion exerted over any of the Arbitrators or a secret "political deal" concocted by Great Britain and Russia, or by anyone else. The allegation of an Anglo-Russian

"political deal" is flatly inconsistent with the Arbitrators' own contemporaneous private documents and correspondence, and the outcome of the Award, which gave Venezuela the mouth of the Orinoco River — the most prized and important strategic point at stake — and which was hailed at the time and subsequently by Venezuela as a great triumph. Venezuela's allegations of nullity are entirely devoid of any credible factual basis.

1.40 Finally, **Chapter 9** addresses the legal significance of Venezuela's prolonged acceptance of the 1899 Award. It explains how even if (*quod non*) the 1899 Award were to be adjudged a nullity, this would not affect the location of the Parties' boundary. This is because, for more than half a century after the 1899 Award was delivered, Venezuela positively and emphatically insisted that the boundary line described in the Award, and demarcated by a Joint Boundary Commission that produced a formal boundary agreement executed by both parties in 1905, was the correct and legally binding boundary. Venezuela repeatedly manifested its acceptance of that boundary as legally binding over the course of the following decades, including in the course of installing a physical marker of the tri-junction point where the boundaries of British Guiana, Brazil and Venezuela meet in accordance with "the letter of the [1899] award", because this was, in Venezuela's official view, a "*frontier de droit*". In 1941, more than four decades after the 1899 Award was delivered, Venezuela continued to assure Great Britain that the boundary between Venezuela and British Guiana was "*chose jugée*".

1.41 It was only in 1962 — more than six decades after the 1899 Award was handed down — that Venezuela first adopted an official position that the Parties' boundary was not, in fact, as described in the Award. In the circumstances, under well-established principles of international law, Venezuela's prolonged recognition, acceptance and insistence upon the boundary described in the Award

requires that, irrespective of the legal status of the Award, the Parties' land boundary follows the line described therein.

1.42 The Memorial concludes with Guyana's Submissions on the Merits.

CHAPTER 2

GUYANA AND THE ESSEQUIBO REGION[11]

2.1 This Chapter describes Guyana and its land territory located between the Essequibo River in the east and the boundary with Venezuela in the west, as fixed by the 1899 Award and the 1905 Boundary Agreement between British Guiana and Venezuela. It highlights key geographical and ecological features, natural resources and economic activity, early settlement and modern-day governance.

I. Geographical and Ecological Features

2.2 Guyana is located on the northeast coast of South America.[12] As depicted in **Figure 2.1**,[13] the Atlantic Ocean lies to its north, and three neighbouring States are adjacent to it: the Republic of Suriname, to the east; the Federative Republic of Brazil, to the south and southwest; and the Bolivarian Republic of Venezuela, to the west.[14] The Essequibo Region comprises all of Guyana's land territory lying to the west of the Essequibo River, for which the Region is named.[15] Measuring

[11] In this Memorial, the term "Essequibo Region" refers to the geographic area that extends from the east bank of the Essequibo River to the boundary with Venezuela defined in the 1899 Arbitral Award and the 1905 Agreement. This area is not formally designated by Guyana as the "Essequibo Region", but is comprised of six separate Administrative Regions as identified in note 16 below.

[12] Its location is approximately Latitude 5°N and Longitude 59°W. Guyana Lands and Surveys Commission, "Fact Page on Guyana: Introduction", *available at* https://factpage.glsc.gov.gy/geography/ (last accessed 22 Feb. 2022).

[13] Worldometer, "Map of Guyana (Road)" (2018). MMG, Vol. II, Figure 2.1.

[14] Guyana Lands and Surveys Commission, "Fact Page on Guyana: Introduction", *available at* https://factpage.glsc.gov.gy/geography/ (last accessed 22 Feb. 2022).

[15] Guyana Lands and Surveys Commission, "Fact Page on Guyana: Counties of Guyana", *available at* https://factpage.glsc.gov.gy/counties-of-guyana/ (last accessed 22 Feb. 2022); Dr Odeen Ishmael,

approximately 159,500 square kilometres, the Essequibo Region accounts for roughly three-quarters of Guyana's total land territory of approximately 215,000 square kilometres.[16]

"A Documentary History of the Guyana-Venezuela Border Issue" (1998, updated Jan. 2013), *available at* www.guyana.org/features/trail_diplomacy.html (last accessed 22 Feb. 2022).

[16] Guyana Ministry of Foreign Affairs, Annual Report, 1998, p. 101, *available at* https://parliament.gov.gy/documents/acts/4979-annual_report_foreign_affairs_1998.pdf (last accessed 22 Feb. 2022); Guyana Lands and Surveys Commission, "Fact Page on Guyana: Counties of Guyana", *available at* https://factpage.glsc.gov.gy/counties-of-guyana/ (last accessed 22 Feb. 2022); Six out of the ten Administrative Regions in Guyana are in the Essequibo. These are: Region 1 - Barima-Waini, to its east, Region 2 - Pomeroon-Supenaam, to its east, Region 3 - Essequibo Islands-West Demerara, and moving south below Regions 1 and 2, Region 7 - Cuyuni-Mazaruni, Region 8 - Potaro-Siparuni, and Region 9 - Upper Takutu-Upper Essequibo. Much of the current data on the Essequibo is organised by these Administrative Regions. Guyana Lands and Surveys Commission, "Fact Page on Guyana: Administrative Regions", *available at* https://factpage.glsc.gov.gy/admin-regions-detailed/ (last accessed 22 Feb. 2022).

Figure 2.1. Map of Guyana

2.3 "Guiana" is an Amerindian word which means the "land of many waters".[17] It is an apt name for this territory. Guyana has a hydrographic network consisting of fourteen major drainage basins.[18] As can be seen in **Figure 2.2**,[19] it has three principal river systems all of which discharge into the Atlantic Ocean. From west to east, these are the Essequibo River, the Demerara River, and the Berbice River. In the extreme east, a large segment of Guyana's boundary with Suriname is formed by the Corentyne River.[20]

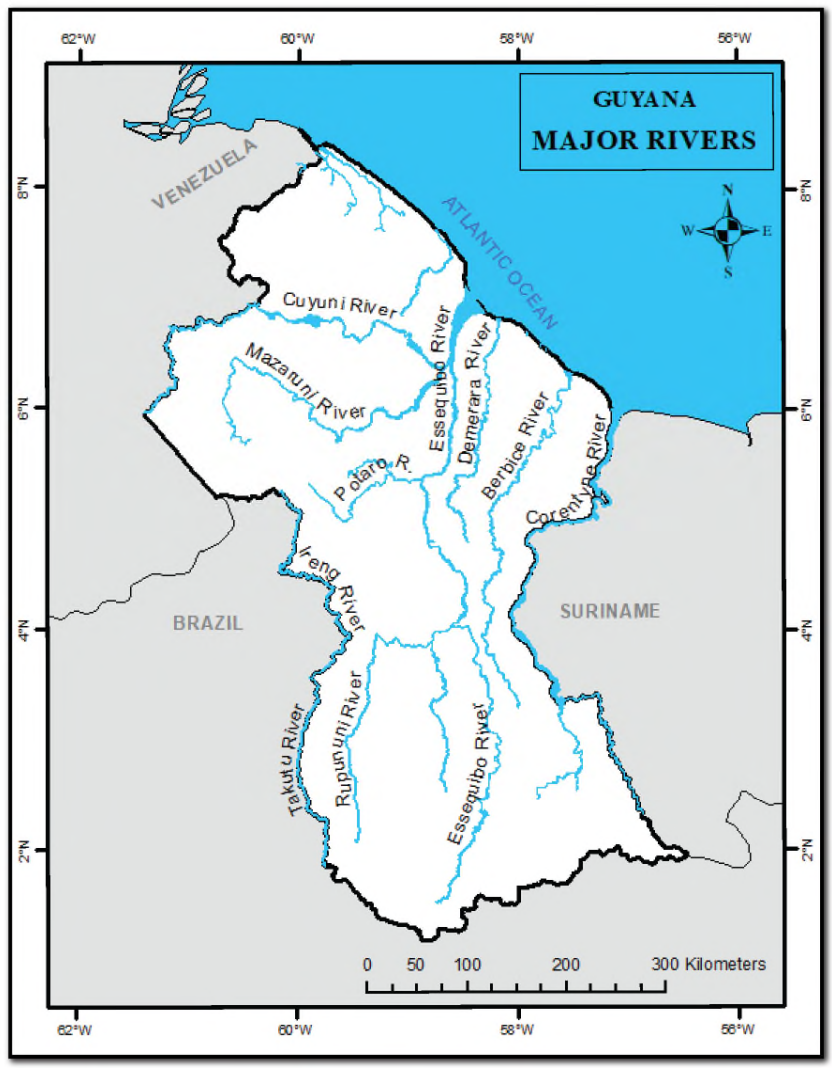
[17] U.S. Army Corp of Engineers, "Water Resources Assessment of Guyana" (Dec. 1998), *available at* https://www.sam.usace.army.mil/Portals/46/docs/military/engineering/docs/WRA/Guyana/Guyana%20WRA.pdf (last accessed 22 Feb. 2022), p. i.

[18] *Ibid.*, p. 8.

[19] Guyana Lands and Surveys Commission, "Fact Page on Guyana: Major Rivers" (undated). MMG, Vol. II, Figure 2.2.

[20] *Ibid.*

Figure 2.2. Guyana's Major Rivers



2.4 The Essequibo River is by far the longest in Guyana, extending for some 1,014 kilometres, and is amongst the largest in South America. Its major tributaries,

which flow through the Essequibo Region are the Potaro, the Cuyuni (part of which borders Venezuela), the Mazaruni and the Rupununi.[21]

2.5 The Essequibo River and its tributaries are the arteries and capillaries that nourish Guyana's growth and development. They provide vital highways for access throughout the Region, and for trade and social intercourse. They sustain the rainforests and diverse landscapes, provide fresh water, unique ecosystem services, biodiversity and carbon sinks, all of which are managed sustainably for Guyana's national development, and in the context of Climate Change, generate life-giving resources for the sustenance of future generations.

2.6 In addition to its rivers, Guyana is also traversed by a series of inter-connecting mountain ranges, which are shown in **Figure 2.3**.[22] These are primarily located in the Essequibo Region. The most prominent are the Pakaraima Mountains, where Mount Roraima, the highest mountain in Guyana at 2,810 metres, forms a tripartite boundary between Guyana, Venezuela and Brazil.[23] Mount Roraima National Park is believed to be one of the oldest rock formations on Earth — dating back two billion years — and is home to a diverse ecosystem of great natural beauty, including waterfalls and plateaus, as well as mountains.[24]

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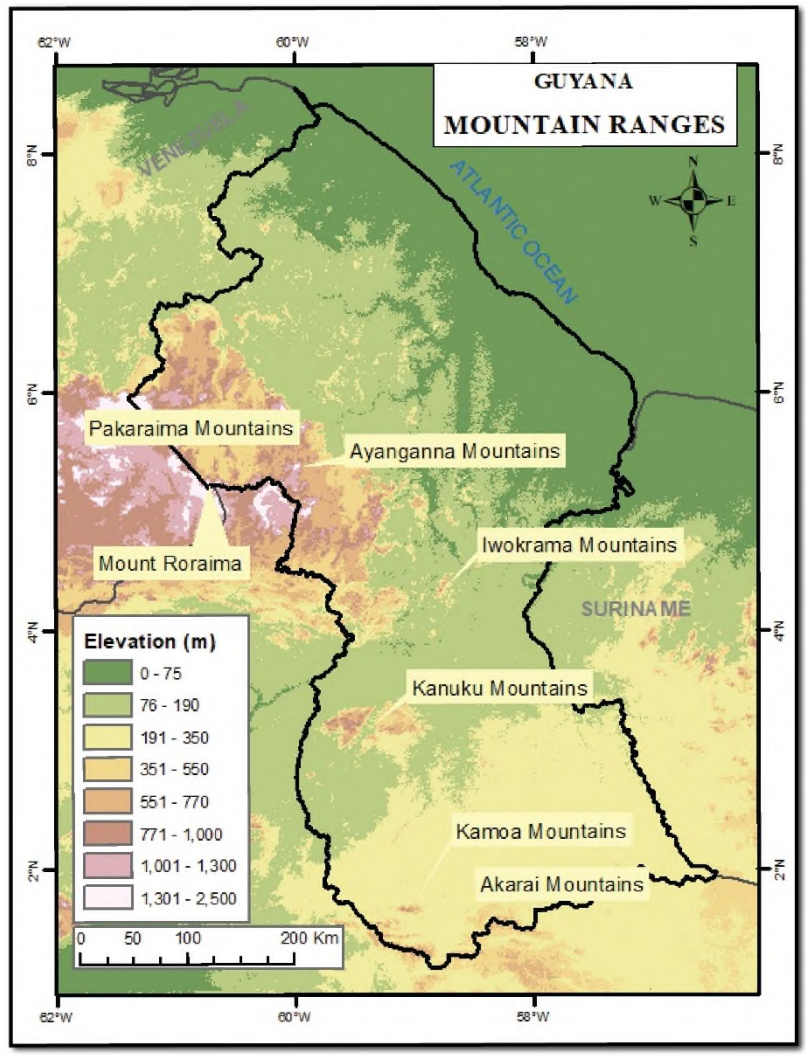
[21] *Ibid*.

[22] Guyana Lands and Surveys Commission, "Fact Page on Guyana: Mountain Ranges" (undated). MMG, Vol. II, Figure 2.3.

[23] Guyana Lands and Surveys Commission, "Fact Page on Guyana: Mountain Ranges" (undated). MMG, Vol. II, Figure 2.3.

[24] Nelson Joaquim Reis, "Mount Roraima, State of Roraima: The Sentinel of Macunaíma, Geological and Palaeontological Sites of Brazil", *available at* http://sigep.cprm.gov.br/sitio038/sitio038english.pdf (last accessed 22 Feb. 2022).

Figure 2.3. Guyana's Mountain Ranges



2.7 The Iwokrama Rainforest, situated in the centre of the Essequibo Region, is one of the last four untouched tropical rainforests in the world, and is of global

significance.[25] It is referred to as the "green heart" of Guyana.[26] In all, it encompasses 3,716 square kilometres.[27] It is extremely rich in species diversity, including over 420 species of fish, 90 species of bats, and 500 species of birds, more than any comparable area in the world,[28] as well as numerous animals that are threatened with extinction.[29] As such, it is a sanctuary for conservation, scientific research and ecotourism.[30] Guyana has been a steadfast protector of the rainforest and its rich biodiversity. Preservation of the Iwokrama Rainforest was established by the Iwokrama Act (1996), and a joint mandate between Guyana and the Commonwealth Secretariat (an international organisation).[31] Protection of "Guyana's natural heritage and natural capital" within the Essequibo Region is also ensured by the Protected Areas Act. It protects and conserves a system of National

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[25] Protected Planet, "Iwokrama International Centre", *available at* https://www.protectedplanet.net/116298 (last accessed 22 Feb. 2022); Iwokrama, "About Us", *available at* https://iwokrama.org/about-us/ (last accessed 22 Feb. 2022).

[26] Iwokrama, "About Us", *available at* https://iwokrama.org/about-us/ (last accessed 22 Feb. 2022).

[27] Protected Planet, "Iwokrama International Centre", *available at* https://www.protectedplanet.net/116298 (last accessed 22 Feb. 2022); Iwokrama, "About Us", *available at* https://iwokrama.org/about-us/ (last accessed 22 Feb. 2022).

[28] Wildlife World, "Iwokrama Rainforest", *available at* https://www.wildlifeworldwide.com/locations/ iwokrama-rainforest (last accessed 22 Feb. 2022).

[29] Dr. Mark Engstrom & Dr. Burton Lim, GUIDE TO THE MAMMALS OF THE IWOKRAMA (1999), *available at* https://iwokrama.org/wp-content/uploads/2018/01/Iwokrama-Mammal-Guide-2017-Web.pdf (last accessed 22 Feb. 2022), p. 14.

[30] Iwokrama Rainforest, "Wildlife World", *available at* https://www.wildlifeworldwide.com/locations/iwokrama-rainforest (last accessed 22 Feb. 2022). The Iwokrama Rainforest is renowned as one of the best places in the world to see a jaguar in its natural habitat. The same is true for many other species that inhabit its trees and canopy, including the squirrel monkey, red and green macaw, red billed toucan, harpy eagle, tree boa, paca and hula tree frog.

[31] Iwokrama, "About Us", *available at* https://iwokrama.org/about-us/ (last accessed 22 Feb. 2022).

Protected Areas including the Iwokrama Rainforest, Kaieteur National Park and Shell Beach, among other areas in the Region.[32]

II. Natural Resources and Economic Activity

2.8 The Essequibo Region is the source of abundant natural resources and economic activity that are critical to Guyana's development. Gold mining has been conducted in the Region since the nineteenth century,[33] and records show that annual production reached 4,400 kilograms in 1894. One of the largest mines, the Omai Gold Mine, is on the west bank of the Essequibo River. In April 2021, Omai announced that it had struck high-grade gold in its 5,000-metre drilling programme.[34] Gold is also mined in the Barima-Waini area and the Potaro-Sipuruni area of the Essequibo Region, where Mazda Mining Company Ltd. has the largest mining operation.[35] Considerable deposits of calcined and metal grade bauxite have also been discovered in the Essequibo and will be mined at the Bonasika Mining Project. Most of Guyana's known deposits of manganese are also found in the region. Guyana Manganese Inc. is now preparing a new round of production.

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[32] Protected Areas Trust Guyana, "Protected Areas", *available at* https://protectedareastrust.org.gy/protected-areas/ (last accessed 22 Feb. 2022); Wildlife World, "Mammals", *available at* https://iwokrama.org/mammals/frame.html (last accessed 22 Feb. 2022).

[33] M. Moohr, "The Discovery of Gold and the Development of Peasant Industries in Guyana, 1884-1914: A Study in the Political Economy of Change", *Caribbean Studies*, Vol. 15, No. 2 (July 1975), p. 61.

[34] "Omai strikes high-grade gold in Region 7", *Guyana Times* (22 Apr. 2021), *available at* https://guyanatimesgy.com/omai-strikes-high-grade-gold-in-region-7/ (last accessed 22 Feb. 2022).

[35] Ministry of Local Government and Regional Development, "Region 1 – Barima-Waini", *available at* https://mlgrd.gov.gy/category/region-1/ (last accessed 22 Feb. 2022); Ministry of Local Government and Regional Development, "Region 8 – Potaro–Sipuruni", *available at* https://mlgrd.gov.gy/category/region-8/ (last accessed 22 Feb. 2022).

2.9 The Essequibo Region is also a major agricultural area, especially in the low-lying regions along the coast, where the topography has lent itself to rice cultivation.[36] The Pomeroon-Supenaam area is even known as the "Rice Land".[37] The oldest co-operative rice mill in Guyana, at Vergenoegen (an old Dutch name), facilitates the milling of paddy planted in the Region.[38] In the Upper Essequibo area, cattle are raised for beef and dairy,[39] and there are large ranches at Aishalton, Annai, Dadanawa and Karanambo, where much of the beef is exported to Brazil.[40]

III. Human Settlement

2.10 The South American coast between the mouths of the Orinoco River in the northwest and the Amazon River in the southeast was a difficult and unwelcoming terrain to early European explorers. The region was populated by numerous Amerindian peoples, including the powerful Caribs, who did not welcome

[36] UNICEF, "Essequibo Islands – West Demerara", *available at* https://www.unicef.org/lac/media/4591/file/PDF%20Essequibo%20Islands-West%20Demerara.pdf (last accessed 22 Feb. 2022).

[37] Ministry of Local Government and Regional Development, "Region 2 – Pomeroon-Supenaam", *available at* https://mlgrd.gov.gy/category/region-2/ (last accessed 22 Feb. 2022).

[38] UNICEF, "Essequibo Islands – West Demerara", *available at* https://www.unicef.org/lac/media/4591/file/PDF%20Essequibo%20Islands-West%20Demerara.pdf (last accessed 22 Feb. 2022), p. 4.

[39] Ministry of Local Government and Regional Development, "Region 2 – Pomeroon-Supenaam", *available at* https://mlgrd.gov.gy/category/region-2/ (last accessed 22 Feb. 2022); Ministry of Local Government and Regional Development, "Region 3 – Essequibo Islands – West Demerara", *available at* https://mlgrd.gov.gy/category/region-3/ (last accessed 22 Feb. 2022).

[40] Ministry of Local Government and Regional Development, "Region 9 - Upper Takutu – Upper Essequibo", *available at* https://mlgrd.gov.gy/category/region-9/ (last accessed 22 Feb. 2022).

explorers or would-be settlers. It was for these reasons that the territory came to be known in Europe as the "Wild Coast".[41]

2.11 The first Europeans to settle in present day Guyana, including the Essequibo Region, were the Dutch. They arrived in 1598, seventeen years after the "United Provinces" declared independence from Spain.[42] They explored the Orinoco inland, up to the Caroni River.[43] From there they moved eastward along the coast and established settlements at various points between the Orinoco and the Amazon Rivers.[44] In 1607, the Dutch established the West India Company and sought to exercise "full right of trade and navigation with the Indies".[45] In 1616, the Anglo-Dutch firm Courteen and Co. sponsored Dutch businessmen to migrate to the Essequibo Region and establish settlements there.[46] In the same year, Dutch Commander Adrian Groenewegen founded the Essequibo Colony and built Fort

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[41] Cornelis Ch. Goslinga, THE DUTCH IN THE CARIBBEAN AND ON THE WILD COAST 1580–1680 (1971), p. 56, p. 409.

[42] *See Account* of a Journey to Guiana and the Island of Trinidad, performed in the Years 1597 and 1598, submitted to the States-General by the "Commies-Generaal", A. Cabeliau (3 Feb. 1599). MMG, Vol. III, Annex 8.

[43] *See ibid*.

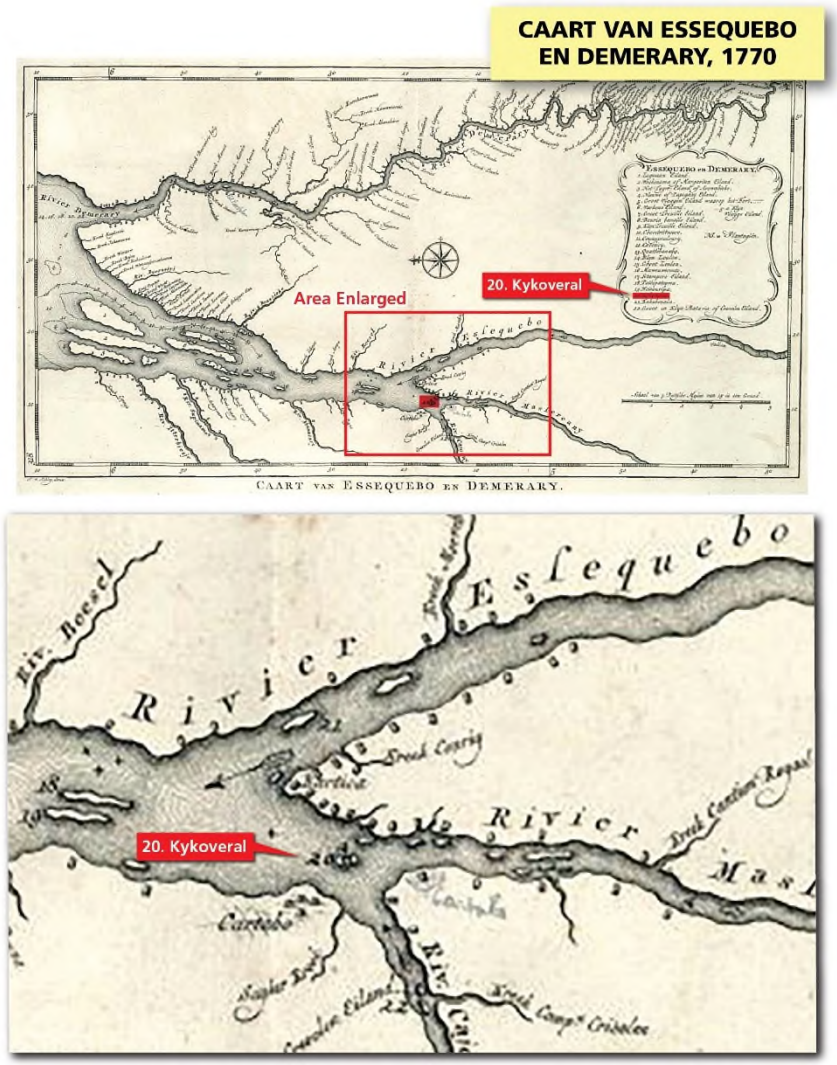
[44] *See Petition* to the Noble and Mighty Lords the States-General of these United Provinces concerning the Population of the Coasts of Guiana situated in America (undated). MMG, Vol. IV, Annex 94. *See also Extract from a Report* on Trinidad de la Guayana in reference to the Dutch Settlements on the Coast between the Amazon and the Orinoco, from Señor Don Antonio de Muxica, Deputy Governor of Santo Thomé de la Guayana, to His Majesty (25 June 1613). MMG, Vol. IV, Annex 58.

[45] *See Extract from a Despatch* in reference to the founding of a Dutch West India Company from Don Juan de Mancicidor to Secretary Prada (7 Jan. 1607). MMG, Vol. III, Annex 46; *Extract from Despatches* in reference to Treaty of Truce finally made in 1609 from the Marquis de Spinola to the King of Spain (7 Jan. 1607). MMG, Vol. III, Annex 9.

[46] *See* Silvia Kouwenberg, "The historical context of creole language emergence in Dutch Guiana", *Revue belge de Philologie et d'Histoire*, Vol. 91, No. 3, (2013), pp. 696-97.

Kykoveral as its governing seat. The location of the colony and Fort Kykoveral is shown in **Figure 2.4**.[47]

Figure 2.4. Map of Essequibo and Demerary (Demerara) Rivers (1770), Highlighting Ft. Kykoveral



[47] Jacobus van der Schley, "Caart van Essequibo en Demerary" (G. Tielenburg, 1770). MMG, Vol. II, Figure 2.4.

2.12 In 1621, the Dutch States General granted a Charter to the West India Company, including a 24-year monopoly on trade.[48] One of the Company's Chambers, the Zeeland Chamber, formally carried out the colonization of the Essequibo Region.[49] The Charter authorised the making of contracts, alliances, fortresses, appointment of governors and the full right of trade and navigation with the Indies.[50] The seat of government for the Essequibo Colony was formally established at Kykoveral, and, from there, the United Provinces exercised possession, control and political authority over the territory between the Essequibo and Orinoco Rivers.

2.13 The nearest Spanish settlement was farther to the west, at Santo Thomé, on the banks of the Orinoco River. Spanish colonization of northern South America began in the sixteenth century, at New Granada, where present-day Colombia is located, and slowly extended eastward as far as the Orinoco River. In 1621, the King of Spain issued a decree ordering fortification of Santo Thomé to defend against attacks by the Dutch, who had already built numerous settlements between the Orinoco and the Essequibo Rivers.[51] The Spanish Governor of Santo Thomé

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[48] *Charter* Granted by their High Mightiness the Lords the States-General to the West India Company (3 June 1621). MMG, Vol. IV, Annex 77. *See also Venezuela-British Guiana Boundary Arbitration*, The Case of the United States of Venezuela (1898), Vol. I, pp. 54-55. MMG, Vol. IV, Annex 123.

[49] *Venezuela-British Guiana Boundary Arbitration*, The Case of the United States of Venezuela (1898), Vol. I, p. 75. MMG, Vol. IV, Annex 124. *See* various letters and reports issued by the Zeeland Chamber of the West India Company managing logistics of colonization in the Guianas: *Proceedings* of the West India Company (Zeeland Chamber) (1626-1628). MMG, Vol. III, Annex 57; *Report* on Conditions for Colonies, adopted by the West India Company (the Nineteen) (22 Nov. 1628). MMG, Vol. IV, Annex 59.

[50] *Charter* Granted by their High Mightiness the Lords the States-General to the West India Company (3 June 1621). MMG, Vol. IV, Annex 77.

[51] *Cedula* Issued by the King of Spain to the Governor of the City of Santo Thomé de la Guyana (9 Aug. 1621). MMG, Vol. III, Annex 10; *Letter* of the Request of the City of Santo Thomé and Island

acknowledged the vulnerability of his position "on account of [Santo Thomé] being so far distant from" other Spanish settlements "the nearest being Venezuela, distant 120 leagues [over 650 kilometres]".[52]

2.14 The Spanish did not establish settlements east of the Orinoco River. Historical records show that the last Spanish expedition across the Orinoco River, for more than a century, took place in 1619, and was rebuffed by the Dutch. After that defeat, the Spanish focused their efforts on holding Santo Thomé.[53] By the 1630s, Dutch authority extended to all ports east of the Orinoco River.[54] As the closest Spanish settlement, Santo Thomé was a repeated target of attack by Dutch forces.[55]

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of Trinidad of the Presidency of Guayana for Help (undated, likely issued in 1621). MMG, Vol. III, Annex 11.

[52] *Letter* of the Request of the City of Santo Thomé and Island of Trinidad of the Presidency of Guayana for Help (undated, likely issued in 1621). MMG, Vol. III, Annex 11.

[53] *See* Letter from Don Diego Lopez de Escobar, Governor of Guayana and Trinidad (28 May 1637) (*Inclosure in Letter* from Jacques Ousiel, late Public Advocate and Secretary of the Tobago, to the West India Company (1637)). MMG, Vol. III, Annex 13; *Memorandum* by Don Juan Desologuren as to the Powers of the Dutch in the West Indies (19 Nov. 1637). MMG, Vol. IV, Annex 61. *See also Report* of the Council of War to the King respecting the state of Guayana (10 May 1662). MMG, Vol. IV, Annex 62 (noting that the only permanent Spanish settlements in the region were that of Santo Thomé and the Island of Trinidad).

[54] *Extract of Letter* from the Corporation of the Island of Trinidad to the King of Spain (22 Apr. 1637). MMG, Vol. III, Annex 12.

[55] *See Report* from the Council of the Indies to the King of Spain (8 July 1631). MMG, Vol. IV, Annex 60 (recounting the sacking of the town in 1629); *Letter* to the King of Spain from the Corporation of Trinidad Concerning the state of the town of Santo Thomé of Guiana, taken, plundered, and burnt by the Dutch, and the Indian Caribs, who also threatened the said island of Trinidad with a powerful fleet (27 Dec. 1637). MMG, Vol. III, Annex 14 (calling for aid after the burning of the town by the Dutch in 1637).

2.15 In 1648, by the Treaty of Münster, Spain formally accepted the independence of the United Provinces of the Netherlands. The Treaty provided that Spain and the Netherlands would accept and respect the *status quo* in regard to their existing colonies in both the West and East Indies, with the Dutch retaining authority over their colonies, and the Spanish retaining authority over theirs.[56] Specifically, Article V of the Treaty preserved Dutch and Spanish sovereignty, respectively, over territories held and possessed by each State at the time the Treaty was executed, as well as the territories that either State should "come to conquer and possess". Spain thus relinquished any claims it might have had, *inter alia*, in respect of the territory held and administered by the Dutch east of the Orinoco River.[57]

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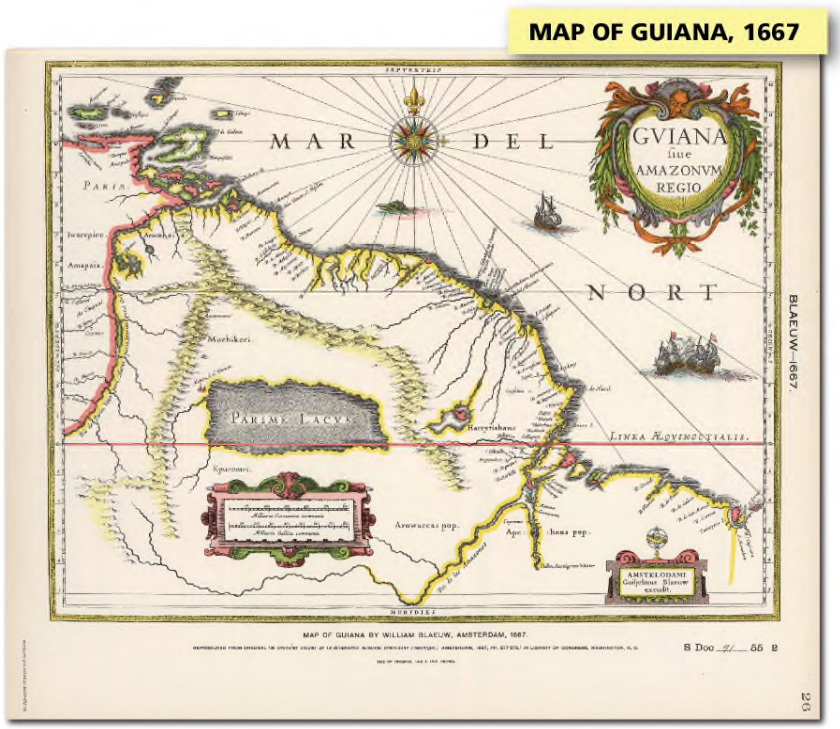
[56] *See Venezuela-British Guiana Boundary Arbitration*, The Case of the United States of Venezuela (1898), Vol. I, pp. 71-74. MMG, Vol. IV, Annex 124.

[57] Articles of the Peace of Münster (30 Jan. 1648), Art. V. MMG, Vol. IV, Annex 78: "The navigation and trade of the East and West Indies shall be maintained pursuant to and in conformity with the Charters already given, or yet to be given, therefore, and for the security of which the present Treaty and the ratification to be procured from both sides shall serve. *And there shall be comprised under the aforesaid Lords States, or those of the East and West India Company*, in their name, are within the limits of their said Charter, in friendship and alliance. And each party, to wit, the aforesaid Lords, the King and States respectively, shall continue to possess and enjoy such lordships, towns, castles, fortresses, commerce, and lands in the East and West Indies, as also in Brazil and on the coasts of Asia, Africa, and America respectively hold and possess, amongst which are specially included the places which the Portuguese have since the year 1641 *taken from the Lords States and occupied, or the places which they shall hereafter come to acquire and possess*". (emphasis added). *See also, ibid.*, Art. III ("E[ach] party shall retain and actually enjoy the countries, towns, places, lands, and lordships which he at present holds and possesses, without being troubled or molested therein, directly or indirectly, in any way whatsoever, in which are understood to be included the hamlets, villages, dwellings, and fields belonging thereunto".).

2.16 A 1667 Dutch map — **Figure 2.5** below[58] — depicts the Orinoco River as the boundary between Dutch and Spanish territory in northern South America, in accordance with the Treaty of Münster:

Figure 2.5. Map of Guiana by William Blaeuw (1667), Highlighting the Extent of Dutch Authority and Control



2.17 In 1713, the Treaty of Utrecht reaffirmed the provisions of the Treaty of Münster, underscoring Dutch authority over the territory and settlements between the Essequibo and Orinoco Rivers. In the meantime, Dutch expansion into the interior of the Essequibo Region continued, extending throughout the basins of the Pomeroon, Moruca, Waini, and Barima Rivers, as well as the Upper Cuyuni River.

[58] William Blaeuw, "Map of Guiana" (1667). MMG, Vol. II, Figure. 2.5.

In 1744, a fort was constructed at Zeelandia, and the seat of the Dutch administration of the Essequibo Colony was moved there from Kykoveral.[59]

2.18 Dutch control of this territory was never threatened by Spain. However, differences between The Netherlands and its former ally, Great Britain — including the former's support for Britain's North American colonies during their War for Independence in the late eighteenth century — led to Britain's seizure of the Dutch territory in the early 1800s.[60] In 1803, by way of the Articles of Capitulation of Essequibo and Demerara, the Netherlands relinquished its colonies in this region, including Essequibo, to British control.[61]

2.19 The British continued to exercise authority under this instrument until, at the end of the Napoleonic Wars, the Netherlands officially ceded title to the colonies of Essequibo-Demerara and Berbice to the British in the Convention of London of 1814. The cession was later confirmed in the Treaty of Paris of 1815. (Suriname, the easternmost of the Dutch colonies, was returned to the Netherlands). The British administered Essequibo-Demerara and Berbice as separate colonies until 1831, when King William IV formally consolidated them into a single entity as "British Guiana".[62] Great Britain then exercised control over British Guiana,

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[59] *See Boundary between the Colony of British Guiana and the United States of Venezuela*, The Case on behalf of the Government of Her Britannic Majesty (1898), pp. 35-36.

[60] *See Letter* from Captain Edward Thompson, R.N., to Lord Sackville (22 Apr. 1781). MMG, Vol. III, Annex 15.

[61] Articles of Capitulation of Demerara and Essequibo (18-19 Sept. 1803). MMG, Vol. IV, Annex 79.

[62] British Guiana, Letters Patent constituting the Colony of British Guiana and appointing Major-General Sir Benjamin D'Urban, K.C.B., Governor (4 Mar. 1831). MMG, Vol. IV, Annex 80.

including the Essequibo Region, exclusively and uninterruptedly until 26 May 1966, the date on which Guyana became an independent State.

2.20 A legacy of the Dutch and British influence on the region, through the practice of bringing enslaved people to the colony and later indentured labourers, is the diversity of the people of the Essequibo Region: They are 39.8% of East Indian descent, 29.3% of African descent, 19.9% mixed race, 10.5% Amerindian, and 0.5% other ethnic groups.[63] There are, in present day, nine Indigenous/Amerindian tribes or ethnic groups in Guyana. They include the Arawak (Lokono), Warau, Carib (Karinya), Akawaio, Patamona, Arekuna, Macushi, Wapishana and Waiwai.[64] All of these Indigenous peoples live either entirely or largely within the Essequibo Region.[65] The largest of these are the Arawak and Carib tribes.

[63] Enclyclopedia Britannica, "People of Guyana", *available at* https://www.britannica.com/place/Guyana/People (last accessed 22 Feb. 2022). Guyana's racial diversity is rooted in a dark period of human history. The country's Afro-Guyanese are primarily the descendants of African slaves forcibly brought to Guyana, and the Indo-Guyanese are primarily descendants of Indian indentured labourers brought to Guyana by the colonizers when slavery ended.

[64] Inter-American Development Bank, p. 7, *available at* https://publications.iadb.org/publications/english/document/Guyana-Technical-Note-on-Indigenous-Peoples.pdf (last accessed 22 Feb. 2022).

[65] *Ibid.*, p. 10.

IV. Governance

2.21 The Dutch governed the Essequibo colony — as they did their other colonies in the region — in accordance with the precepts of Roman Dutch law. In the 1905 case, *De Freitas v. Jardim*, the local Chief Justice noted:

> "The general law of Demerara and Essequebo [sic] (so far as it remains unaltered by legislation) is declared by Ordinance of the 4th October, 1774, to be the Roman-Dutch law therein indicated, and in art. 1 of the Articles of Capitulation 1803 [by which the Dutch provisionally ceded control of these colonies to the British], that law is retained in force".[66]

2.22 In the nineteenth century, under British rule, Roman Dutch law eventually gave way to English common law, in the Essequibo Region and throughout British Guiana. Upon independence, Guyana inherited and maintained the common law system. Administratively, in modern times Guyana has exercised its governmental authority in the Essequibo Region in the same manner as in the rest of the country.[67] Public order, for example, is maintained by the Guyana Police Force.[68] Electricity is supplied by Guyana Power and Light Company.[69] Other public services include

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[66] M. Shahabudeen, THE LEGAL SYSTEM OF GUYANA (1973), p. 184.

[67] Guyana Lands and Surveys Commission, "Fact Page on Guyana: Administrative Regions", *available at* https://factpage.glsc.gov.gy/admin-regions-detailed/ (last accessed 22 Feb. 2022).

[68] Guyana Police Force (2019), *available at* https://www.guyanapoliceforce.gy/ (last accessed 22 Feb. 2022).

[69] Guyana Power & Light, "What We Do", *available at* https://gplinc.com/about-us/what-we-do/ (last accessed 22 Feb. 2022); Guyana Department of Public Information, "Essequibo electricity grid boosted with new 5.4MW Power Plant" (27 Apr. 2019), *available at* https://dpi.gov.gy/essequibo-electricity-grid-boosted-with-new-5-4mw-power-plant/ (last accessed 22 Feb. 2022).

housing,[70] water,[71] universal healthcare,[72] sanitation and waste management,[73] public education,[74] postal service,[75] licensing and regulation of fishing,[76] environmental conservation and protection[77] and investment in infrastructure

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[70] Guyana Ministry of Finance, "National Development Strategy" (June 2017), *available at* https://finance.gov.gy/wp-content/uploads/2017/06/nds.pdf (last accessed 22 Feb. 2022), p. 17; Guyana Bureau of Statistics, "Guyana Population and Housing Census 2012: Preliminary Report" (June 2014), *available at* https://statisticsguyana.gov.gy/wp-content/uploads/2019/10/2012_Preliminary_Report.pdf (last accessed 22 Feb. 2022); Housing officials for Essequibo Coast outreaches, https://dpi.gov.gy/housing-officials-for-essequibo-coast-outreaches/ (last accessed 22 Feb. 2022).

[71] Guyana Water, Inc., "Regional Profiles", *available at* https://gwiguyana.gy/regional-profiles (last accessed 22 Feb. 2022); Guyana Water, Inc., "Increasing number of Guyanese gaining potable water access in Hinterland", *available at* https://gwiguyana.gy/news/increasing-number-guyanese-gaining-potable-water-access-hinterland (last accessed 22 Feb. 2022).

[72] Pacific Prime, "Guyana Health Insurance", *available at* https://www.pacificprime.com/country/americas/guyana-health-insurance-pacific-prime-international/#:~:text=The%20government%20of%20Guyana%20operates,of%20Guyana's%20public%20healthcare%20system (last accessed 22 Feb. 2022).

[73] Ministry of Local Government and Regional Development, "Solid Waste Management", *available at* https://mlgrd.gov.gy/solid-waste-management/ (last accessed 22 Feb. 2022).

[74] Guyana Ministry of Education, "List All Schools", *available at* https://education.gov.gy/web2/index.php/other-resources/other-files/list-of-schools (last accessed 22 Feb. 2022).

[75] The postal service in the Essequibo is run by the Guyana Post Office Corporation. Guyana Post Office Corporation, "About Us", *available at* https://guypost.gy/about-us/ (last accessed 22 Feb. 2022). The towns within the Essequibo are all served by the Guyana Post Office Corporation. Guyana Post Office Corporation, "Post Office Telephone Directory", *available at* https://guypost.gy/directory/ (last accessed 22 Feb. 2022).

[76] Guyana Ministry of Agriculture, "Fisheries", *available at* https://agriculture.gov.gy/fisheries/ (last accessed 22 Feb. 2022).

[77] Guyana Environmental Protection Agency, "Annual Report 2018", *available at* https://www.epaguyana.org/epa/resources/annual-reports/summary/10-annualreport/528-annual-report-2018 (last accessed 22 Feb. 2022); Guyana Environmental Protection Agency, "EPA meets the public (Region 2)", *available at* https://www.epaguyana.org/epa/news/194-epa-meets-the-public-region-2 (last accessed 22 Feb. 2022); Guyana, Act No. 14 of 2011, *Protected Area's Act 2011* (7 July 2011), *available at* http://extwprlegs1.fao.org/docs/pdf/guy172057.pdf (last accessed 22 Feb. 2022).

projects.[78] No other State has engaged in any of these administrative activities since Guyana achieved independence in 1966, or at any time prior thereto, except for the Dutch and British colonial authorities.

2.23 Likewise, Guyana collects taxes from business entities and individuals within the Essequibo Region, the same as it does throughout the country, through the Guyana Revenue Authority.[79] Guyana also carries out a census every ten years.[80] The last census, carried out in 2012, covered every village in the Essequibo Region.[81] It showed that the population of the Essequibo Region was 235,928,[82] or nearly one third of Guyana's entire population of 746,955. Perhaps the most renowned of Guyana's citizens to hail from the Essequibo Region, on the international level, is Dr Mohamed Shahabuddeen, who, among his other

[78] For instance, a 1993 World Bank Staff Appraisal Report shows that Guyana obtained funding for the Essequibo Road Rehabilitation Project. World Bank, "Staff Appraisal Report, Guyana, Infrastructure Rehabilitation Project", (22 Feb. 1993), *available at* http://documents1.worldbank.org/curated/en/263761468250853522/text/multi-page.txt (last accessed 22 Feb. 2022). More recently in 2019, the World Bank published its *Analytical Evidence to Support Guyana's Green State Development Strategy: Vision 2040 Resilient Infrastructure and Spatial Development*, which noted that Guyana's non-urban infrastructure including coastal protection and connections to the hinterlands was a cornerstone of the green transition, and includes multiple Essequibo projects. Guyana Energy Agency, "Annex A(5), Analytical Evidence to Support Guyana's Green State Development Strategy: Vision 2040 Resilient Infrastructure and Spatial Development", *available at* https://gea.gov.gy/wp-content/uploads/2019/07/A5-Resilient-Infrastructure-and-Spatial-Development.pdf (last accessed 22 Feb. 2022).

[79] Guyana Revenue Authority, "About Us", *available at* https://www.gra.gov.gy/about-us/ (last accessed 22 Feb. 2022).

[80] Guyana Bureau of Statistics, "Demography, Vital & Social Statistics—Population & housing Census", *available at* https://statisticsguyana.gov.gy/publications/ (last accessed 22 Feb. 2022).

[81] Guyana Bureau of Statistics, "Population and Housing Census – 2012, Household by Dwelling Ownership and by Village", *available at* https://statisticsguyana.gov.gy/publications/ (last accessed 22 Feb. 2022).

[82] *Ibid*.

outstanding achievements, served for nine years as a Judge on the International Court of Justice, and also as a Judge and Vice President of the International Criminal Tribunal for the Former Yugoslavia. Dr Shahabuddeen was raised in the village of Huis T'Dieren, and served as a magistrate in the village of Suddie, in the Essequibo Region.[83]

2.24 Guyana also administers national and regional elections in the Essequibo Region. The official results of the last national elections, which were held on 2 March 2020, reflect that votes were cast by Guyanese citizens throughout the Essequibo Region,[84] and that 21 Members of the national Parliament (out of a total of 25) were elected from geographical constituencies in the Region.[85]

2.25 In sum, the Essequibo Region is an integral part of Guyana. Taken together, the geography, economic activity and continuous governance of the land and peoples in the Region — first by the Dutch and British colonial authorities, and then by Guyana itself following independence — demonstrate the deep and abiding linkage between the Essequibo Region and the rest of the country.

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[83] Dr Shahabuddeen was not only a jurist, but a scholar of history, especially Guyanese history. His major works include M. Shahabudeen, CONSTITUTIONAL DEVELOPMENT IN GUYANA: 1621-1978 (1978).

[84] Guyana Elections Commission (GEM), "Official List of Electors 2020", *available at* https://www.gecom.org.gy/home/ole_list (last accessed 22 Feb. 2022).

[85] Guyana, "Legal Suplement – B", *The Official Gazette* (20 Aug. 2020), *available at* https://gecom.org.gy/assets/docs/gre-2020/GRE20_Gazetted_Results.pdf (last accessed 22 Feb. 2022).

CHAPTER 3

THE BOUNDARY DISPUTE BETWEEN GREAT BRITAIN AND VENEZUELA AND THE PARTIES' AGREEMENT TO SETTLE IT BY INTERNATIONAL ARBITRATION

3.1 This Chapter recounts the rise of the boundary dispute between Great Britain and Venezuela in the middle of the nineteenth century and the circumstances which led the two States to agree to settle it by final and binding arbitration. It then describes the terms of their arbitration agreement, as embodied in the 1897 Treaty of Washington, and the arbitration process itself, which resulted in the Award issued in 1899.

3.2 Section I describes Great Britain's efforts to survey, demarcate and establish the limits of the territory it had formally obtained from the Dutch at the end of the Napoleonic Wars and consolidated into the single colony of British Guiana in 1831. It also describes the origin of Venezuela's claim to the territory bounded by the Orinoco River in the west and the Essequibo River in the east, in conflict with Britain's claim to the same territory. Section II recounts the intercession by the United States and its efforts to facilitate an agreement between Venezuela and the United Kingdom to submit the controversy over title to the disputed territory to final and binding international arbitration, which culminated in the 1897 Treaty of Washington. Section III then describes the terms of the 1897 Treaty, and Section IV addresses the arbitral process that took place under the Treaty and the issuance of a unanimous final Award on 3 October 1899.

I. The Boundary Dispute between Great Britain and Venezuela

3.3 After the British consolidated the former Dutch colonies of Essequibo, Demerara and Berbice into a single colonial entity in 1831, they set out to survey

and demarcate the territorial limits of newly established British Guiana. Between 1835 and 1839, at the behest of the Royal Geographical Society, German-born botanist, surveyor, and geographer Robert Schomburgk conducted three expeditions into this area, during which he explored and sketched out the contours of the territory between the Essequibo River and the western boundary formerly claimed by the Dutch.[86]

3.4 In 1840, after Schomburgk completed his work on behalf of the Royal Geographical Society, the British Government commissioned him to survey and demarcate the colony's boundaries for eventual communication to the Governments of Brazil and Venezuela.[87] Great Britain informed Venezuela of the commissioning of these efforts prior to their commencement.[88] The President of Venezuela responded positively, writing that he "ha[d] conceived this to be the best opportunity to settle definitively this affair, which interests both nations".[89] The Venezuelan President proposed that, prior to Schomburgk's exercise, Venezuela and Great Britain conclude a Treaty of Limits establishing a Joint Commission for carrying out the survey.[90] No such Treaty was concluded, however, since

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[86] *See Letter* from Mr. Schomburgk to Governor Light (1 July 1839) (*Inclosure in Letter* from the Colonial Office to the Foreign Office (6 Mar. 1840)). MMG, Vol. III, Annex 16. "Map Depicting the Expeditions of Robert Schomburgk (1835-1839)" in Vol. II, Annex of Maps and Figures shows the routes that Schomburgk followed on these expeditions. MMG, Vol. II, Figure 3.1 (in Vol. II only).

[87] *Letter* from Lord J. Russell to Governor Light (23 Apr. 1840) (*Inclosure in Letter* from Colonial Office to Foreign Office (28 Apr. 1840)). MMG, Vol. III, Annex 17.

[88] *Letter* from Viscount Palmerston to Sir R. Ker Porter (28 Nov. 1840), *Letter* from Mr. O'Leary to Viscount Palmerston (24 Jan. 1841) and *Letter* from Mr. O'Leary to Viscount Palmerston (2 Feb. 1841). MMG, Vol. III, Annex 18 (charging Sir Ker Porter to communicate the commission of Mr Schomburgk to the Government of Venezuela).

[89] *Ibid*.

[90] *Ibid*.

Schomburgk had already embarked on his mission by the time Venezuela's letter was received in London.[91]

3.5 Between 1841 and 1844, Schomburgk conducted five more expeditions across the territory claimed by the British.[92] During the first of these expeditions, in 1841, Schomburgk traversed the Barima and Cuyuni Rivers, and he raised British flags and placed other marks of the Crown at the mouth of the Amakura River and at Barima Point.[93] As he explained:

> "The British Empire acquired, therefore, Guiana, with the same claims to the termini of its boundaries as held by the Dutch before it was ceded by Treaty to Great Britain .... Of equal importance is the determination of the western boundary of British Guiana, the limits of which have never been completely settled. The Dutch, when in possession of the Colony, extended their sugar and cotton plantations beyond the River Pomaroon. They recognized neither the mouth of the River Pomaroon nor that of the Moroco [Moruca], where a military fort was established as the limits of their territory. They had even occupation of the eastern banks of the small River Barima (before the English, in 1666, had destroyed the fort of New Zealand, or New Middleburg), which military outpost they considered to be their western boundary. When the settlements were in the possession of the Netherlands the present countries of

[91] *Letter* from Señor Aranda to Governor Light (31 Aug. 1841) and *Letter* from Governor Light to Señor Aranda (20 Oct. 1841) (*Inclosures in Letter* from Governor Light to Lord Stanley (21 Oct. 1841)). MMG, Vol. III, Annex 19.

[92] Schomburgk' expeditions during this period are shown in "Map Depicting the Expeditions of Robert and Richard Schomburgk (1840-1844)." MMG, Vol. II, Figure 3.2 (in Vol. II only).

[93] *See Letter* from Señor Aranda to Governor Light (31 Aug. 1841) and *Letter* from Governor Light to Señor Aranda (20 Oct. 1841) (*Inclosures in Letter* from Governor Light to Lord Stanley (21 Oct. 1841)). MMG, Vol. III, Annex 19. *See also Boundary between the Colony of British Guiana and the United States of Venezuela*, The Case of the Government of Her Britannic Majesty (1898), p. 66. MMG, Vol. IV, Annex 119.

> Demerara and Essequibo were divided into the Colonies of Pomaroon, Essequibo, and Demerara (vide Hartsinck, '*Beschryving Van Guiana*', Amsterdam, 1770, vol. 1, p. 257).
>
> As the first was the most western possession, and formed the boundary between Spanish Guiana, its limits were considered to extend from Punta Barima, at the mouth of the Orinoco, in latitude 8º 4' north, longitude 60º 6' west, south-west and by west to the mouth of the River Amacura, following the Caño Cuyuni from its confluence with the Amacura to its source, from whence it was supposed to stretch in a south-south-east line towards the River Cuyuni (a tributary of the Essequibo), and from thence southward towards the Massaruni."[94]

3.6 Based on these findings, Schomburgk determined the outer limit of British territory to be the Amakura River, four miles west of Barima Point "as it is no doubt the most natural limit west of the former possessions of the Dutch".[95] He noted in his report that Dutch settlements abutted the Barima River and that throughout the eighteenth century, disinterested scholars acknowledged the Barima as the boundary of Dutch territory.[96] Schomburgk published a report of his findings and devised a map of the territory. The map included a proposed territorial boundary line, separating British Guiana from Venezuela, which later came to be known as the Schomburgk Line. This is depicted below, on **Figure 3.3**, as the "Original Schomburgk Line".

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[94] *Letter* from Mr. Schomburgk to Governor Light (1 July 1839) (*Inclosure in Letter* from the Colonial Office to the Foreign Office (6 Mar. 1840)). MMG, Vol. III, Annex 16.

[95] *Letter* of Mr. Schomburgk to Governor Light (30 Nov. 1841) *enclosing Memorandum* by Mr. Schomburgk. MMG, Vol. III, Annex 21.

[96] *Ibid*.

3.7 The publication of the Schomburgk Line in 1844 alarmed Venezuela and prompted it to assert a claim, for the first time, to territory lying east of the Orinoco River, which Schomburgk had determined to be British. Subsequently, Venezuela made various protests to the British, eventually asserting its sovereignty over all of the territory between the Orinoco and Essequibo Rivers.[97] Venezuela based its claims on the alleged Spanish discovery of the Americas, broadly speaking, with little assessment of the extent of Spanish exploration of the Guianas in particular, or of their historical settlement and control by the Dutch, followed by the British. Venezuela argued that, in accordance with a 1493 Papal Bull issued by Pope Alexander VI (a Spaniard), "[t]he right of Spain [and Venezuela by rights of succession] to the territory of America has always been indisputable in the eyes of all the nations of the world".[98] For Venezuela, the treaties by which the British acquired British Guiana from the Dutch could not be respected because the Netherlands was unable to convey "what did not belong to her, and what she knew did not belong to her — to England".[99] Great Britain rejected these arguments, emphasising that Dutch dominion over the Essequibo Region was confirmed by Spain in the Treaties of Münster and Utrecht, and by the absence of any Spanish settlement of the Region.[100]

3.8 This standoff persisted until 1877, when the Venezuelan Minister in London, José de Rojas, wrote to the British Foreign Secretary, proposing an

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[97] *See, e.g.*, *Letter* from Señor de Rojas to the Earl of Derby (13 Feb. 1877). MMG, Vol. III, Annex 23 (reiterating Venezuela's claim of all land west of the Essequibo River and proposing an amicable settlement through a mutually agreed upon conventional line).

[98] *Letter* from Señor Calcaño to the Earl of Derby (14 Nov. 1876). MMG, Vol. III, Annex 22.

[99] *Ibid*.

[100] *See, e.g.*, *Letter* from The Marquess of Salisbury to Señor de Rojas (10 Jan. 1880). MMG, Vol. III, Annex 24.

amicable settlement.[101] In 1880, the two States entered formal negotiations on a boundary line. Great Britain proposed a line based on Schomburgk's initial surveys of the region further west than the Schomburgk Line.[102] The British claim commenced at a point 29 miles due east of the right (eastern) bank of the Barima River, and extending south from that point to the Accarabisi River until its junction with the Cuyuni River, and thence to its source in the Essequibo River along the line proposed by Schomburgk.[103] This proposal is depicted in **Figure 3.3**, as the "Extreme Boundary Claimed by Great Britain". **Figure 3.3**[104] also depicts the

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[101] *Letter* from Señor de Rojas to the Earl of Derby (13 Feb. 1877) (reiterating Venezuela's claim of all land west of the Essequibo River and proposing an amicable settlement through a mutually agreed upon conventional line). MMG, Vol. III, Annex 23.

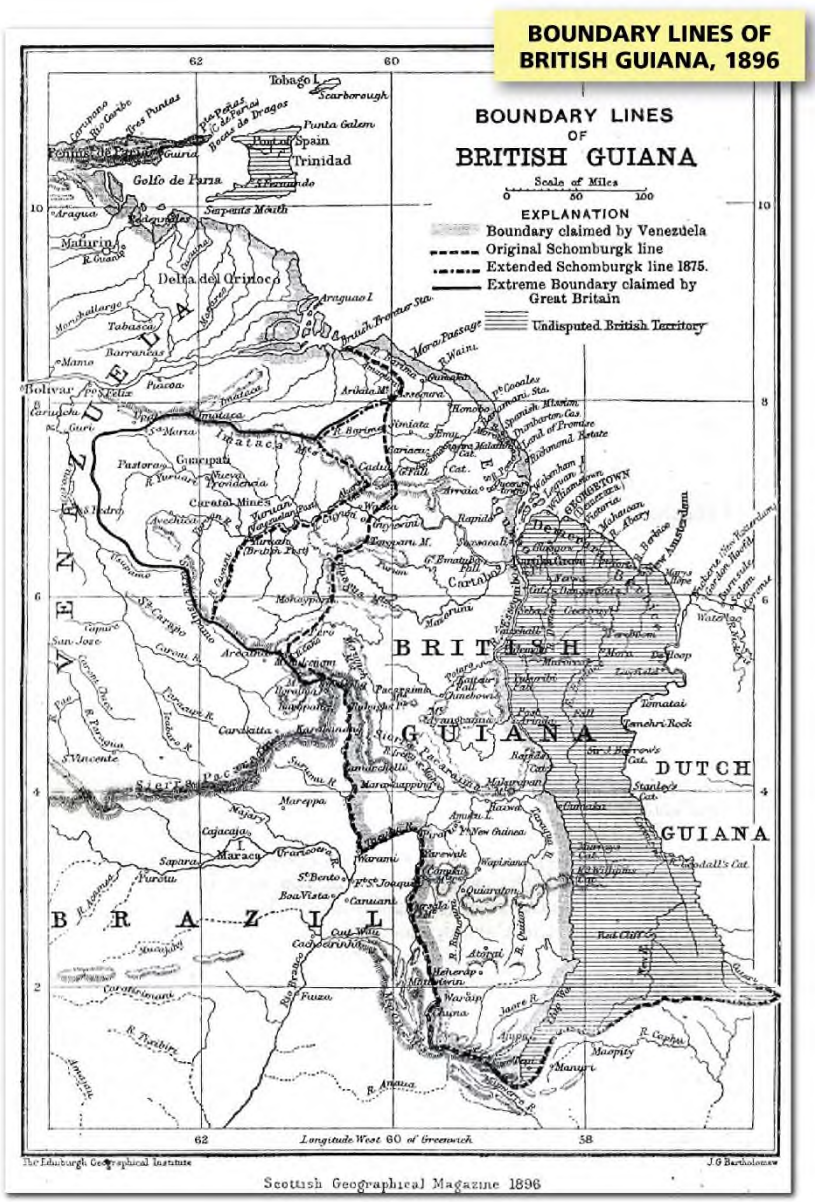
[102] The boundary line Schomburgk proposed largely followed natural features, based on what he considered "the absolute necessity that the boundaries of British Guiana should be based upon natural divisions" (*see Letter from* Mr. Schomburgk to Governor Light (15 Sept. 1841). MMG, Vol. III, Annex 20). On this basis, he attributed the Yuruari River basin, in the west, to Venezuela even though it had been settled and controlled by the Dutch. Great Britain was unwilling to make the concession proposed by Schomburgk. It continued to claim what it regarded as the full extent of the former Dutch possessions, including the Yuruari River and its basin, holding fast to the position that British Guiana's territory extended far beyond the Schomburgk Line, while emphasising that the territory had been under the uninterrupted possession of The Netherlands and Great Britain for two centuries. *See Boundary between the Colony of British Guiana and the United States of Venezuela*, The Case of the Government of Her Britannic Majesty (1898), p. 18. MMG, Vol. IV, Annex 117 ("In 1840 Mr R. H. Schomburgk was employed by the British Government to survey the boundaries of British Guiana. He laid down a line which commenced at the mouth of the Amakuru, followed that river to its source in the Imataka Mountains, thence followed the crest of that ridge to the sources of the Acarabisi Creek, and descended that creek to the Cuyuni, which it followed to its source in Mount Roraima. This line, which is clearly defined in his reports and shown on two of the original maps drawn by him, possesses advantages in point of physical features, but would have given to Venezuela a large tract of territory north and west of the Cuyuni which was never occupied by the Spanish Missions, which was, on the other hand, formally claimed by the Dutch, and to which Great Britain is now entitled as part of British Guiana".).

[103] *Memorandum* on the Question of Boundaries between British Guiana and Venezuela, (*Inclosure* in *Letter* from Earl Granville to Señor de Rojas (15 Sept. 1881)). MMG, Vol. IV, Annex 63.

[104] *Scottish Geographical Magazine*, "Boundary Lines of British Guiana" (1896). MMG, Vol. II, Figure 3.3.

Original Schomburgk Line and Venezuela's claim to the entire area between the Orinoco and Essequibo Rivers.

Figure 3.3. Boundary Lines of British Guiana (1896)



3.9 In November 1883, there having been no progress toward an agreement, Venezuela proposed that the boundary be settled by arbitration rather than negotiation. This was communicated in a letter from the Venezuelan Foreign Minister, Rafael Seijas, to Colonel C. E. Mansfield, the British Minister in Caracas. The letter explained that Venezuela was barred by its constitution from voluntarily ceding any of its sovereign territory, and coupled with the inflexibility of Britain's demands, it would be impossible to bring "this discussion to a conclusion by any other means than by the decision of an Arbitrator who, freely and unanimously chosen by the two Governments, would judge and pronounce a sentence of a definite character".[105]

3.10 In response, on 29 February 1884, the British Foreign Minister expressed concern that:

> "if Her Majesty's Government consent to arbitration, the same provision of the Constitution may be invoked as an excuse for not abiding by the Award should it prove unfavourable to Venezuela. If, on the other hand, the arbitrator should decide in favour of the Venezuelan Government to the full extent of their claim, a large and important territory, which has for a long period been inhabited and occupied by Her Majesty's subjects, and treated as part of the Colony of British Guiana would be severed from the Queen's dominions."[106]

[105] *Letter* from Señor Seijas to Colonel Mansfield (15 Nov. 1883). MMG, Vol. III, Annex 25.

[106] *Letter* from Earl Granville to Colonel Mansfield (29 Feb. 1884). MMG, Vol. III, Annex 27.

3.11 Venezuela replied by giving its assurances that the Venezuelan Constitution would not be an impediment to acceptance and compliance with an arbitral award fixing its boundary with British Guiana:

> "[W]hen both nations, putting aside their independence (of action) in deference to peace and good friendship, create by mutual consent a Tribunal which may decide in the controversy, the same is able to pass sentence that one of the two parties, or both of them, have been mistaken in their opinions concerning the extent of their territory. Thus the case would not be in opposition to the Constitution of the Republic, there being no alienation of that which shall have been determined not to be her property.
>
> *Arbitration alone possesses that advantage among the means for settling international disputes,* above all when it has become palpable that an arrangement or transaction has become an impossibility for attaining the desired aim."[107]

3.12 Despite this assurance, the British were unwilling to submit the settlement of the boundary to arbitration. On 20 February 1887, Venezuela informed Great Britain that, due to the protraction of the dispute and alleged aggravation thereof by the British, it had decided to suspend diplomatic relations, since it was not "fitting to continue friendly relations with a State which thus injures her".[108]

II. The Intervention of the United States

3.13 The impasse between Great Britain and Venezuela provoked the diplomatic engagement of the United States, which regarded the British claims as a threat to

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[107] *Letter* from Señor Seijas to Colonel Mansfield (9 Apr. 1884) (*Inclosure* in *Letter* from Colonel Mansfield to Earl Granville (18 Apr. 1884)). MMG, Vol. III, Annex 26 (emphasis added).

[108] *Letter* from Señor Urbaneja to Mr. F. R. St. John (20 Feb. 1887). MMG, Vol. III, Annex 28.

its enforcement of the Monroe Doctrine, by which the U.S. had sought, since the 1820s, to resist or limit European colonization in the Western Hemisphere.

3.14 In February 1887, the U.S. Secretary of State, Thomas Bayard, serving under President Grover Cleveland, communicated the President's willingness to provide good offices to achieve a settlement of the dispute. The Secretary of State's letter stated that the United States maintained a "sense of responsibility ... in relation to the South American republics", and as a warning to the British, asserted that the Monroe Doctrine remained in force.[109]

3.15 Venezuela welcomed the intervention of the United States and, at the outset, asked it to act directly on its behalf with respect to the dispute with Great Britain,[110] in the hope that intercession from the United States would induce Great Britain's agreement to arbitrate. On 18 September 1888, the Venezuelan *chargé d'affaires* in Washington, Fr Antonio Silva, sent a letter to Colonel George Gibbons, the diplomatic agent of Venezuela in New York. This stated:

> "To the President of the United States, Grover Cleveland, my country is largely indebted for his sympathy and the notion taken by him toward the Government of Great Britain, in showing that Government that the United States of America was not indifferent

[109] *Letter* from Mr. Olney to Mr. Bayard (20 July 1895), *in* U.S. Department of State, *Papers Relating to the Foreign Relations of the United States, with the Annual Address of the President*, Part I (Transmitted to Congress 2 Dec. 1895) (1896), Doc. 527, *available at* https://history.state.gov/historicaldocuments/frus1895p1/d527 (last accessed 22 Feb. 2022), *quoting* American Secretary Of State Thomas Bayard To The American Minister To Great Britain, Edward John Phelps, February 1887.

[110] *Ibid.*

> to the unwarranted acts of encroachment by Great Britain on the territory of the Republic of Venezuela.
>
> This timely interference on the part of President Cleveland has for the present stopped the English Government in her attempted acts of spoilation, encroachment, and appropriation to herself of very nearly one-third of our whole republic, and besides taking possession of the Orinoco River, which connects with the River Amazon and the Plate, the possession of which would have given to Great Britain the absolute control of the trade of the whole of South America. My Government and people feel that in President Cleveland they have a friend and protector, and that the power of Great Britain over this trade is at an end, and that closer commercial and friendly relations between the United States and my country are firmly established in the wishes of my country men and will be carried out by my Government."[111]

3.16 It took years before President Cleveland's efforts to encourage the parties to submit their dispute to binding international arbitration, as Venezuela desired,

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[111] *Letter* from Venezuelan Chargé d'Affaires In The United States Of America, Fr. Antonio Silva, to Col. George Gibbons, Diplomatic Agent Of Venezuela In New York Doc. 870 (18 Sept. 1888) *available at* http://www.guyana.org/Western/1888-1891.html (last accessed 22 Feb. 2022). *See also*, subsequent entreaties from Venezuelan government authorities to the United States: *Letter* from Mr. Peraza to Mr. Blaine (17 Feb. 1890), *in* U.S. Department of State, *Papers Relating to the Foreign Relations of the United States, with the Annual Address of the President*, (Transmitted to Congress 1 Dec. 1890) (1891), Doc. 496, *available at* https://history.state.gov/historicaldocuments/frus1890/d496 (last accessed 22 Feb. 2022); *Letter* from Mr. Scruggs to Mr. Blaine (6 Mar. 1890), *in* U.S. Department of State, *Papers Relating to the Foreign Relations of the United States, with the Annual Address of the President*, (Transmitted to Congress 1 Dec. 1890) (1891), Doc. 488, *available at* https://history.state.gov/historicaldocuments/frus1890/d488 (last accessed 22 Feb. 2022); *Letter* from Mr. Peraza to Mr. Blaine (24 Apr. 1890), *in* U.S. Department of State, *Papers Relating to the Foreign Relations of the United States, with the Annual Address of the President*, (Transmitted to Congress 1 Dec. 1890) (1891), Doc. 497, *available at* https://history.state.gov/historicaldocuments/frus1890/d497 (last accessed 22 Feb. 2022); *Letter* from M. Andrade to Mr. Gresham (31 March 1894), *in* U.S. Department of State, *Papers Relating to the Foreign Relations of the United States, with the Annual Address of the President*, (Transmitted to Congress 3 Dec. 1894) (1895), Doc. 820, *available at* https://history.state.gov/historicaldocuments/frus1894/d820 (last accessed 22 Feb. 2022).

bore fruit. As of 1894, the President was still pursuing this end. In his Annual Address to the U.S. Congress in that year, he said:

> "The boundary of British Guiana still remains in dispute between Great Britain and Venezuela. Believing that its early settlement on some just basis alike honorable to both parties is in the line of our established policy to remove from this hemisphere all causes of difference with powers beyond the sea, I shall renew the efforts heretofore made to bring about a restoration of diplomatic relations between the disputants and to induce a reference to arbitration, a resort which Great Britain so conspicuously favors in principle and respects in practice and which is earnestly sought by her weaker adversary."[112]

3.17 By 1895, the United States' frustration with Great Britain's refusal to submit the boundary dispute with Venezuela to arbitration prompted the U.S. Secretary of State, Richard Olney, to send a communication to the British Prime Minister, Lord Salisbury, invoking the Monroe Doctrine and threatening U.S. military intervention in support of Venezuela's claims:

> "Thus far in our history we have been spared the burdens and evils of immense standing armies and all the other accessories of huge warlike establishments, and the exemption has largely contributed to our national greatness and wealth as well as to the happiness of every citizen. But, with the powers of Europe permanently encamped on American soil, the ideal conditions we have thus far enjoyed cannot be expected to continue. We too must be armed to the teeth, we too must convert the flower of our male population into soldiers and sailors, and by withdrawing them from the various

[112] *Annual Message* of President Grover Cleveland to the Congress of the United States (3 Dec. 1894), *in* U.S. Department of State, *Papers Relating to the Foreign Relations of the United States, with the Annual Address of the President*, (Transmitted to Congress 3 Dec. 1894) (1895), *available at* https://history.state.gov/historicaldocuments/frus1894/message (last accessed 22 Feb. 2022).

> pursuits of peaceful industry we too must practically annihilate a large share of the productive energy of the nation…
>
> In these circumstances, the duty of the President appears to him unmistakable and imperative. Great Britain's assertion of title to the disputed territory combined with her refusal to have that title investigated being a substantial appropriation of the territory to her own use, not to protect and give warning that the transaction will be regarded as injurious to the interest of the people of the United States as well as oppressive in itself would be to ignore an established policy with which the honor and welfare of this country are closely identified."[113]

3.18 Lord Salisbury responded that the dispute between British Guiana and Venezuela was not a manifestation of colonial expansion but rather a boundary dispute between territorial neighbours that warranted no involvement on the part of the United States, let alone invocation of the Monroe Doctrine:

> "But the circumstances with which President Monroe was dealing, and those to which the present American Government is addressing itself, have very few features in common. Great Britain is imposing no "system" upon Venezuela, and is not concerning herself in any way with the nature of the political institutions under which the Venezuelans may prefer to live. But the British Empire and the Republic of Venezuela are neighbours, and they have differed for some time past, and continue to differ, as to the line by which their dominions are separated. It is a controversy with which the United States have no apparent practical concern. It is difficult, indeed, to see how it can materially affect any State or community outside those primarily interested, except perhaps other parts of Her Majesty's dominions, such as Trinidad. The disputed frontier of Venezuela has nothing to do with any of the questions dealt with by

[113] *Letter* from Mr. Olney to Mr. Bayard (20 July 1895), *in* U.S. Department of State, *Papers Relating to the Foreign Relations of the United States, with the Annual Address of the President*, Part I (Transmitted to Congress 2 Dec. 1895) (1896), Doc. 527, *available at* https://history.state.gov/historicaldocuments/frus1895p1/d527 (last accessed 22 Feb. 2022).

> President Monroe. It is not a question of the colonization by a European Power of any portion of America. It is not a question of the imposition upon the communities of South America of any system of government devised in Europe. It is simply the determination of the frontier of a British possession which belonged to the Throne of England long before the Republic of Venezuela came into existence."[114]

3.19 In December 1895, one month after receiving Lord Salisbury's response, President Cleveland issued another Message to the U.S. Congress, once again citing the Monroe Doctrine, and indicating that it had become "incumbent" on the United States "to take measures" to establish the "true" boundary between Venezuela and British Guiana:

> "[T]he [Monroe] doctrine upon which we stand is strong and sound, because its enforcement is important to our peace and safety as a nation and is essential to the integrity of our free institutions and the tranquil maintenance of our distinctive form of government ...,
>
> If a European power by an extension of its boundaries takes possession of the territory of one of our neighboring Republics against its will and in derogation of its rights, it is difficult to see why to that extent such European power does not thereby attempt to extend its system of government to that portion of this continent which is thus taken ....
>
> [T]he dispute has reached such a stage as to make it now incumbent upon the United States to take measures to determine with sufficient

[114] *Letter* from Lord Salisbury to Sir Julian Pauncefote (26 Nov. 1895), *in* U.S. Department of State, *Papers Relating to the Foreign Relations of the United States, with the Annual Address of the President*, Part I (Transmitted to Congress 2 Dec. 1895) (1896), Doc. 529, *available at* https://history.state.gov/historicaldocuments/frus1895p1/d529 (last accessed 22 Feb. 2022).

> certainty for its justification what is the true divisional line between the Republic of Venezuela and British Guiana."[115]

3.20 Soon after delivering this message, President Cleveland, with financial support from the Congress, established the United States Venezuela Border Commission to investigate, as a third party, the competing territorial claims of Great Britain and Venezuela.[116] To chair this Commission, President Cleveland selected Supreme Court Justice David J. Brewer, who would later be appointed as one of the members of the Tribunal in the 1899 Arbitration.[117] Four other prominent U.S. citizens who enjoyed the confidence of the President were also appointed, one of whom, Mr Andrew Dickson White of New York, described the Commission's work in his autobiography, published in 1905.[118] The Commission was staffed by a Secretary, Mr Severo Mallet-Prevost, a lawyer from New York who would later serve as one of Venezuela's counsel in the 1899 Arbitration.[119] The Venezuelan

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[115] *Speech* of Grover Cleveland: Message Regarding Venezuelan-British Dispute (17 Dec. 1895), *available at* https://millercenter.org/the-presidency/presidential-speeches/december-17-1895-message-regarding-venezuelan-british-dispute (last accessed 22 Feb. 2022).

[116] United States 54th Congress, Act of the United States Congress, *Public Act No. 1* (21 Dec. 1895). MMG, Vol. IV, Annex 82 (appropriating one hundred thousand dollars "for the expenses of a commission to be appointed by the President to investigate and report upon the true divisional line between the Republic of Venezuela and British Guiana".).

[117] United States 55th Congress, 1st Session, *Report from the Secretary of State regarding the Work of the Special Commission Appointed to Reexamine and Report upon the True Line between Venezuela and British Guiana*, Transmitted to the U.S. Senate Committee on Foreign Relations, Doc. No. 106 (25 May 1897). MMG, Vol. IV, Annex 65.

[118] White was a founder of Cornell University. The other members of the U.S. Commission included Richard H. Alvey, Chief Justice of the Court of Appeals of the District of Columbia; F.R. Coudert, international scholar and president of New York bar (1890–91); and Dr D.C. Gilman, geographer and President of the Johns Hopkins University.

[119] *See* United States 55th Congress, 1st Session, *Report from the Secretary of State regarding the Work of the Special Commission Appointed to Reexamine and Report upon the True Line between Venezuela and British Guiana*, Transmitted to the U.S. Senate Committee on Foreign Relations, Doc. No. 106 (25 May 1897). MMG, Vol. IV, Annex 65.

Minister of Foreign Affairs, Mr Pedro Ezequiel Rojas, communicated to U.S. Secretary of State Richard Olney his Government's support of the Commission, as well as an offer to transmit archival documents to assist the Commission's efforts.[120]

3.21 The British were not quite as content. According to Mr White's account, President Cleveland was frustrated by Britain's refusal to agree to arbitration and settled on the Commission as a means to pressure the British to change their position. He wrote that the President proposed a U.S. Commission "since Great Britain would not intrust the finding of a boundary to arbitration" but would fear more the appointment by the U.S. President of "commissioners to find what the proper boundary was, and then, having ascertained it, should support its sister American republic in maintaining it".[121] As Mr White explained:

> "Of course, every thinking Englishman looked with uneasiness toward the possibility that a line might be laid down by the United States which it would feel obligated to maintain, and which would

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[120] *Letter* from Mr. Andrade to Mr. Olney (1 Feb. 1895), *in* U.S. Department of State, *Papers Relating to the Foreign Relations of the United States, with the Annual Address of the President*, Part I (Transmitted to Congress 2 Dec. 1895) (1896), Doc. 766, *available at* https://history.state.gov/historicaldocuments/frus1895p2/ (last accessed 22 Feb. 2022); *Letter* from Mr. Andrade to Mr. Olney (1 Feb. 1895), *in* U.S. Department of State, *Papers Relating to the Foreign Relations of the United States, with the Annual Address of the President*, Part I (Transmitted to Congress 2 Dec. 1895) (1896), Doc. 767, *available at* https://history.state.gov/historicaldocuments/frus1895p2/d767 (last accessed 22 Feb. 2022). *See also* Venezuela Ministry of Foreign Affairs, *Memorandum by The Ministry of Foreign Affairs of Venezuela relative to the Note of Lord Salisbury to Mr Richard Olney, dated November 26, 1895, on the question of boundary between Venezuela and British Guayana* (1896), pp. 3-4 (*Letter* from P. Ezequiel Rojas to Richard Olney (28 Mar. 1896)). MMG, Vol. IV, Annex 64 (providing to the Commission a Memorandum containing the Government of Venezuela's assessment of the history of the territorial claims).

[121] Andrew D. White, AUTOBIOGRAPHY OF ANDREW DICKSON WHITE (1917), Vol. II, p. 118.

necessitate its supporting Venezuela, at all hazards, against Great Britain."[122]

3.22 The pressure on the British succeeded. As related by Mr White:

> "The statesmanship of Mr Cleveland and Mr Olney finally triumphed. Most fortunately for both parties, Great Britain had at Washington a most eminent diplomat ... Sir Julian, afterward Lord, Pauncefote. His wise counsels prevailed; Lord Salisbury [the British Prime Minister/Foreign Secretary] receded from his position; Great Britain agreed to arbitration; and the question entered a new stage".[123]

3.23 Upon Britain's agreement to arbitrate, in April 1896, U.S. Secretary of State Olney wrote to Supreme Court Justice Brewer, as Chairman of President Cleveland's Commission:

> "The United States and Great Britain are in entire accord as to the provisions of a proposed treaty between Great Britain and Venezuela. The treaty is so eminently just and fair as respects both parties — so thoroughly protects the rights and claims of Venezuela — that I cannot conceive of its not being approved by Venezuelan President and Congress. It is thoroughly approved by the counsel of Venezuela here and by the Venezuelan Minister at this capital."[124]

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[122] *Ibid.*, p. 124.

[123] *Ibid.*, p. 124.

[124] United States 55th Congress, 1st Session, *Report from the Secretary of State regarding the Work of the Special Commission Appointed to Reexamine and Report upon the True Line between Venezuela and British Guiana*, Transmitted to the U.S. Senate Committee on Foreign Relations, Doc. No. 106 (25 May 1897), p. 13. MMG, Vol. IV, Annex 65.

3.24 In his December 1896 Annual Message to Congress, President Cleveland claimed success in his efforts to obtain Britain's agreement to submit its dispute over British Guiana's boundary with Venezuela to binding arbitration:

> "The Venezuelan boundary question has ceased to be a matter of difference between Great Britain and the United States, their respective Governments having agreed upon the substantial provisions of a treaty between Great Britain and Venezuela submitting the whole controversy to arbitration. The provisions of the treaty are so eminently just and fair that the assent of Venezuela thereto may confidently be anticipated."[125]

3.25 Indeed, Venezuela promptly assented. Its President, Joaquín Sinforiano De Jesús Crespo, hailed the crucial role played by President Cleveland in encouraging the British to assent to arbitration, as "solicited by Venezuela".[126] In a speech delivered to the National Congress of Venezuela, the President highlighted that, in conducting its negotiations with Great Britain, the United States consulted with the Venezuelan Legation in Washington and that, when a protocol for the basis of an arbitration treaty was negotiated, it was submitted directly to him for his review

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[125] *Annual Message* of President Grover Cleveland to the Congress of the United States (3 Dec. 1894), *in* U.S. Department of State, *Papers Relating to the Foreign Relations of the United States, with the Annual Address of the President*, (Transmitted to Congress 7 Dec. 1896) (1897), p. 121, *available at* https://history.state.gov/historicaldocuments/frus1896/message-of-the-president (last accessed 22 Feb. 2022).

[126] "The Venezuelan Treaty: President Crespo's Message to Congress Regarding the Document Received Here", *The New York Times* (12 March 1897) ("The Department of Foreign Affairs has given during the past year particular attention to the boundary question of British Guiana, a question of absorbing interest ever since his Excellency, Mr Cleveland, demonstrated to the world the way in which the United States intended to exercise the intervention solicited by Venezuela. After this the dispute assumed a most favorable aspect… While the Venezuelan Government, through the patriotic and earnest efforts of its Foreign Office, was presenting and urging its rights before the Boundary Commission, the State Department at Washington, with laudable efforts, was endeavoring to secure arbitration from the British Ministry, in order to adjust with greater facility and success this unpleasant dispute of almost a century".).

and approbation. The Venezuelan President pointed out, in particular, that he had procured a change to the protocol to ensure that "Venezuela should have a voice in the naming of the arbitral tribunal".[127]

III. The Terms of the Agreement to Arbitrate

3.26 The Treaty of Arbitration between Great Britain and Venezuela was signed in Washington on 2 February 1897.[128] The "Treaty of Washington", as it came to be known, stated in its Preamble that its purpose was "*to provide for an amicable settlement of the question which has arisen between their respective Governments concerning the boundary between the Colony of British Guiana and the United States of Venezuela, having resolved to submit to arbitration the question involved*".[129] The mandate of the Arbitral Tribunal was spelled out in Articles I, III, IV (including the rules laid out in that Article) and V. In due course, the Tribunal proceeded to elaborate further rules of procedure for the Arbitration, which it adopted unanimously without objection from either party.[130]

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[127] *Ibid.*

[128] Treaty Between Great Britain and the United States of Venezuela Respecting the Settlement of the Boundary Between the Colony of British Guiana and the United States of Venezuela, 5 U.K.T.S. 67 (2 Feb. 1897). AG, Annex 1.

[129] *Ibid.*, (emphasis added).

[130] *Boundary between the Colony of British Guiana and the United States of Venezuela*, First Day's Proceedings (25 Jan. 1899). MMG, Vol. IV, Annex 96. *Boundary between the Colony of British Guiana and the United States of Venezuela*, Second Day's Proceedings (15 June 1899), pp. 6-8. MMG, Vol. IV, Annex 97.

3.27 Article I stated the question to be decided:

> Article I
>
> An Arbitral Tribunal shall be immediately appointed to determine the boundary line between the Colony of British Guiana and the United States of Venezuela.

3.28 In making this determination, Article III provided that the Tribunal should consider the legal status of the disputed territory as of the time Great Britain acquired the colonial possessions from the Dutch and ascertain what territory could have been lawfully claimed by the Dutch and the Spanish, respectively, at that time.

> Article III
>
> The Tribunal shall investigate and ascertain the extent of the territories belonging to, or that might lawfully be claimed by the United Netherlands or by the Kingdom of Spain respectively at the time of the acquisition by Great Britain of the Colony of British Guiana, and shall determine the boundary line between the Colony of British Guiana and the United States of Venezuela.

3.29 Article IV set out the rules governing the Arbitration and applicable law:

> Article IV
>
> In deciding the matters submitted, the Arbitrators shall ascertain all facts which they deem necessary to a decision of the controversy, and shall be governed by the following Rules, which are agreed upon by the High Contracting Parties as Rules to be taken as applicable to the case, and by such principles of international law not inconsistent therewith as the Arbitrators shall determine to be applicable to the case:
>
> "Rules.
>
> a) Adverse holdings or prescription during a period of fifty years shall make a good title. The Arbitrators may deem exclusive political control of a district, as well as actual settlement thereof, sufficient to constitute adverse holding or to make title by prescription

b) The Arbitrators may recognize and give effect to rights claims resting on any other ground whatever valid according to international law, and on principle of international law which the Arbitrators may deem to be applicable to the case, and which are not in contravention of the foregoing rule.

c) In determining the boundary-line, if the territory of one Party be found by the Tribunal to have been at the date of this Treaty in occupation of the subjects or citizens of the other Party, such effect shall be given to such occupation as reason, justice, the principles of international law, and the equities of the case shall, in the opinion of the Tribunal, require."

3.30 Article V provided that the Tribunal "shall proceed impartially and carefully to examine and decide the questions laid before them".[131] To assure that the Tribunal's decisions would finally and permanently settle all boundary-related questions, Article XIII stipulated that the parties "engage to consider the result of the proceedings ... as full, perfect and [the] final settlement of all the questions referred to the Arbitrators".[132]

3.31 The manner of constituting the Tribunal was specified in Article II, which called for a panel of five Arbitrators, two to be selected by Great Britain, two selected by Venezuela, and the fifth by the other four. By the time the Treaty was in force, the four party-appointed Arbitrators had already been selected, and their official appointments were recorded:

[131] Treaty Between Great Britain and the United States of Venezuela Respecting the Settlement of the Boundary Between the Colony of British Guiana and the United States of Venezuela, 5 U.K.T.S. 67 (2 Feb. 1897), Art. V. AG, Annex 1.

[132] *Ibid.*, Art. XIII.

> "The Tribunal shall consist of five jurists; two on the part of Great Britain, nominated by the members of the Judicial Committee of Her Majesty's Privy Council, namely, the Right Honourable Baron Herschell, Knight Grand Cross of the Most Honourable Order of Bath, and the Honourable Sir Richard Henn Collins, Knight, one of the Justices of Her Britannic Majesty's Supreme Court of the Judicature; two on the part of Venezuela, nominated, one by the President of the United States of Venezuela, namely, the Honourable Melville Weston Fuller, Chief Justice of the United States of America, and one nominated by the Justices of the Supreme Court of the United States of America, namely, the Honourable David Josiah Brewer, a Justice of the Supreme Court of the United States of America; and of a fifth jurist to be selected by the four persons so nominated, or in the event of their failure to agree within three months from the exchange of ratification of the present Treaty, to be so selected by His Majesty the King of Sweden and Norway. The jurist so selected shall be the President of the Tribunal."[133]

3.32 The composition of the Tribunal was exactly as sought by Venezuela in the negotiation of the Treaty. On 26 January 1897, James Storrow, Legal Counsel to Venezuela during the negotiation, highlighted this accomplishment in his communication to the Venezuelan Foreign Minister:

> "I think you have got what you desired — a clear and formal recognition of the appointing power of Venezuela on the face of the treaty; precisely the same two Jurists whom, at Caracas, you told me you preferred; and in addition to that you will have (if the plan is carried out) two of the highest judicial officers, on the part of Great Britain. This you owe to the tact of Mr Andrade, to the kindly help of President Cleveland and Mr Olney, and in considerable part

[133] *Ibid.*, Art. II.

> to the disposition of the English Government to make the arrangement agreeable to Venezuela."[134]

3.33 Mr. Andrade himself wrote to the Foreign Minister on the eve of the Treaty's signature, explaining the benefit to Venezuela of having two prominent American jurists on the Arbitral Tribunal:

> "The more I think of it, the more I am convinced that Venezuela, far from wishing to restrict the participation of the United States in the composition of the Tribunal, should seek to augment it so that she (the U.S.A.) may have greater moral responsibility with regard to the result of the arbitration, and that more effective her concern during the judgment".[135]

3.34 The four Arbitrators chosen by the parties were among the most distinguished jurists in their respective countries. Due to the unfortunate passing of Baron Herschell after the first preliminary meeting of the Tribunal,[136] he was replaced, in conformity with paragraph 2 of Article II of the Treaty, by the Right Hon. Lord Russell of Killowen, Lord Chief Justice of England.[137] One of the American Arbitrators, U.S. Supreme Court Justice David J. Brewer, was the same jurist whom President Cleveland had appointed the previous year as Chairman of his United States Venezuela Border Commission. This fact was well known to the parties, and there was no objection.

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[134] *Letter* from James J. Storrow to Dr P. Ezequiel Rojas, Venezuelan Minister of Foreign Relations (26 Jan. 1897). MMG, Vol. III, Annex 31.

[135] *Letter* from Señor Andrade to Minister Ezequiel Rojas (9 Jan. 1897). MMG, Vol. III, Annex 30.

[136] *Boundary between the Colony of British Guiana and the United States of Venezuela*, First Day's Proceedings (25 Jan. 1899), p. 1. MMG, Vol. IV, Annex 96.

[137] *Ibid*.

3.35 All of the Arbitrators were highly accomplished and widely respected individuals. Lord Justice Collins was first a Judge of the High Court of Justice, and subsequently became Lord Justice of Appeal in the Court of Appeal, the second highest of the Courts of England and Wales.[138] His diligence and impartiality were widely recognised and were reflected in his subsequent elevation to two of the most senior judicial offices in Great Britain.[139] The Right Hon. Lord Russell of Killowen was not only the Lord Chief Justice of England, but also represented Britain in the *Bering Sea Arbitration*. He had served as Attorney-General and been a member of the Appellate Committee of the House of Lords and the Judicial Committee of the Privy Council (respectively the highest Courts in the United Kingdom and the British Empire). Chief Justice Melville Weston Fuller led the U.S. Supreme Court for twenty-two years, and was on the Permanent Court of Arbitration for ten years.[140] At the time of his appointment to the Tribunal, it was said that, "the feeling is wide, and steadily widening, that the great office [of Chief Justice] was never in abler, cleaner, safer hands".[141] Finally, Justice David Josiah Brewer spent his career in the judiciary, beginning as a district judge and rising to the U.S. Supreme Court,

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[138] As an article published in the American Law Review in 1897 explained: "His [Lord Justice Henn Collins'] professional reputation could hardly be higher. Appeals from his decisions are not enterprises lightly undertaken; for his knowledge is not greater than his care, patience, and zeal in investigating every case brought before him .... His fairness, courtesy, and painstaking, are always spoken of with unbounded admiration; and a decision of his is as likely to be absolutely right as any conclusion of a man of flesh and blood can be." (G.C. Worth & G. H. Knott, "The Venezuela Boundary Arbitration", *Am. L. Rev.*, Vol. 31, No. 481 (1897), p. 493).

[139] In 1901, Lord Justice Collins was appointed Master of the Rolls (the second most senior judicial position in the Court of Appeal). In 1907, he was appointed a Lord of Appeal in Ordinary and thereafter sat for a number of years on the Appellate Committee of the House of Lords.

[140] Clare Cushman, "Melville W. Fuller 1888-1910" *in* THE SUPREME COURT JUSTICES: ILLUSTRATED BIOGRAPHIES, 1789-2012 (CQ Press, 2013). MMG, Vol. III, Annex 6.

[141] G.C. Worth & G. H. Knott, "The Venezuela Boundary Arbitration", *Am. L. Rev.*, Vol. 31, No. 481 (1897), pp. 493, 501.

where he served for twenty years and was considered an expert on substantive due process.[142] He was renowned for his independence and integrity.[143]

3.36 In accordance with their mandate under Article II, the four appointed Arbitrators jointly selected the fifth, who would serve as President of the Tribunal. They unanimously agreed upon Russian jurist, Fyodor Fyodorovich Martens, to head the Tribunal.

3.37 Among his many accomplishments in the field of international law and dispute settlement, Prof Martens was one of the principal architects of the First Hague Convention for the Pacific Settlement of International Disputes, which entered into force in 1899. As a leading international legal scholar, Prof Martens had authored a number of texts on international law.[144] By the time of the 1899 Arbitration, he had established a track record of impartially adjudicating international disputes. Between 1895 and 1897, for example, he served as the sole arbitrator in the *Costa Rica Packet Arbitration* between Great Britain and the Netherlands.[145] The high esteem in which Prof Martens was held as a jurist and arbitrator at the date of his appointment to the Tribunal was reflected in the fact that he was commonly known by the sobriquets "Lord Chief Justice of

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[142] Clare Cushman, "David J. Brewer 1890-1910" *in* THE SUPREME COURT JUSTICES: ILLUSTRATED BIOGRAPHIES, 1789-2012 (CQ Press, 2013). MMG, Vol. III, Annex 5.

[143] *See* G.C. Worth & G. H. Knott, "The Venezuela Boundary Arbitration", *Am. L. Rev.*, Vol. 31, No. 481 (1897), pp. 493, 498 ("in all the long and bright array of men who have adorned that position, none ever came to it with cleaner hands than those of David J. Brewer").

[144] For example, *see* Fedor Fedorovich Martens, TRAITÉ DE DROIT INTERNATIONAL (Léo Alfred trans., Chevalier-Marescq et cie) (1883) and the 15-volume Fedor Fedorovich Martens, *Recueil des Traités et conventions conclus par la Russie avec les puissances étrangeres* (1874).

[145] *Costa Rica Packet Arbitration, (Great Britain v Netherlands)* (1897) 184 C.T.S. 240.

Christendom"[146] and "Lord Chancellor of Europe".[147] Prof Martens' contribution to the development of international law was subsequently marked by various international honours and awards,[148] including numerous nominations for the Nobel Peace Prize.[149]

IV. The Arbitral Proceedings and the Tribunal's Award

3.38 On the first day of the proceedings before the Tribunal, counsel for Venezuela, Mr Mallet-Prevost, praised the "Arbitrators whose distinguished records and whose high reputation give us the assurance that the questions involved will be decided in justice and equity".[150] Similar sentiments were expressed by

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[146] *See* F. De Martens, "International Arbitration and the Peace Conference at the Hague", *The North American Review*, Vol. 169, No. 516 (Nov. 1899), p. 604, note 1.

[147] Willard L. King, MELVILLE WESTON FULLER – CHIEF JUSTICE OF THE UNITED STATES 1888-1910 (Macmillan Company, 1950), p. 254. MMG, Vol. III, Annex 2.

[148] For example, in 1902 he received the Red Cross Distinguished Service Award for services to society. His contribution to the development of international law was also recognised by the conferring of honourary degrees from the universities of Oxford, Cambridge, Edinburgh and Yale.

[149] In respect of the qualification of the members of the Arbitral Tribunal, the President of the United States stated in an address given on 5 December 1898: "the two members named on behalf of Venezuela, Mr Chief Justice Fuller and Mr Justice Brewer, chosen from our highest court, appropriately testify the continuing interest we feel in the definitive adjustment of the question according to the strictest rules of justice. The British members, Lord Herschell and Sir Richard Collins, are jurists of no less exalted repute, while the fifth member and president of the tribunal, M. F. De Martens, has earned a world-wide reputation as an authority upon international law". *Annual Message* of President William Mckinley to the Congress of the United States (5 Dec. 1898), *in* U.S. Department of State, *Papers Relating to the Foreign Relations of the United States, with the Annual Address of the President*, (Transmitted to Congress 5 Dec. 1898) (1901), p. 274, *available at* https://history.state.gov/historicaldocuments/frus1898/message-of-the-president (last accessed 22 Feb. 2022).

[150] *Boundary between the Colony of British Guiana and the United States of Venezuela*, First Day's Proceedings (25 Jan. 1899), p. 4. MMG, Vol. IV, Annex 96.

counsel for Great Britain, Sir Richard Webster.[151] In a closing argument on behalf of Venezuela, its lead counsel likewise emphasised that the constitution of the Tribunal rendered it "absolutely impartial":

> "It seems to me that, if this process of settling international difficulties is to commend itself to the nations, it can only be by setting up for the trial of such questions an absolutely impartial, judicial Tribunal ... It seems to me, Mr President, that anticipating what seemed to be so prominent in this discussion at the Hague, these nations have adopted that basis in the constitution of this Tribunal."[152]

3.39 During the course of the oral proceedings, Justice Brewer reportedly "expressed great admiration for the impartial and strict sense of justice shown by the British arbitrators during the proceedings of the Tribunal".[153]

3.40 Both sides were represented by capable and distinguished legal counsel. Each party appointed an Agent, as required by Article V of the Washington Treaty, to "attend the Tribunal, and to represent it generally in all matters connected with the Tribunal".[154] Great Britain was represented by a four-person legal team led by

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[151] *Ibid.*, pp. 3, 9. During his opening speech at the start of the substantive hearing, Sir Richard Webster hailed Prof Martens' "reputation as a jurist, as a lawyer, as a diplomatist is not confined to the boundaries of his own country, but extends to every civilized nation". *Boundary between the Colony of British Guiana and the United States of Venezuela,* Second Day's Proceedings (15 June 1899), p. 9. MMG, Vol. IV, Annex 97.

[152] *Boundary between the Colony of British Guiana and the United States of Venezuela*, Fiftieth Day's Proceedings (19 Sept. 1899), p. 2982. MMG, Vol. IV, Annex 111.

[153] *Letter* from Mr Buchanan to Lord Salisbury, No. 52 (24 July 1899). MMG, Vol. III, Annex 34.

[154] Treaty Between Great Britain and the United States of Venezuela Respecting the Settlement of the Boundary Between the Colony of British Guiana and the United States of Venezuela, 5 U.K.T.S. 67 (2 Feb. 1897), Art. V. AG, Annex 1.

the Attorney-General of Great Britain, Sir Richard Webster, and one of his predecessors in that office, Sir Robert Reid.[155] Venezuela was similarly represented by a four-person team of counsel who were led by the former President of the United States, Benjamin Harrison,[156] and Benjamin F. Tracy, a former U.S. Secretary of State, as well as Mr Severo Mallet-Prevost and Mr Jarvey Russell Soley.[157]

3.41 The arbitration was conducted in two phases, written and oral. The written phase consisted of three rounds of written pleadings, submitted simultaneously by the parties. The first of these submissions (the "Cases") were delivered to the Tribunal on 15 March 1898. Venezuela's opening brief consisted of 236 pages, and more than 900 pages of annexed documentary evidence. Great Britain's pleading encompassed 164 pages, plus over 1,600 pages of documentary evidence.

3.42 Four months later, on 15 July 1898, the parties presented their "Counter Cases", of lengths similar to those of their initial "Cases", as well as additional documentary evidence. Finally, four months after that, on 15 November 1898, the parties submitted their "Printed Arguments", which included new evidence and highlighted the main arguments of their previous pleadings.

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[155] Sir Richard Webster and Sir Robert Reid were both later appointed to high judicial office: Sir Richard Webster was Lord Chief Justice (as Lord Alverstone) between 1900 and 1913 and Sir Robert Reid was Lord Chancellor (as Lord Loreburn) between 1905 and 1912.

[156] Harrison was the 23rd President of the United States between 1889 and 1893.

[157] Tracy served as United States Secretary of the Navy between 1889 and 1893. Prior to this, he spent 11 years as United States Attorney for the Eastern District of New York.

3.43 The oral hearings opened in Paris on 25 January 1899 and closed more than eight months later, on 3 October 1899, after fifty-six sessions that included more than two hundred hours of oral argument and testimony.[158]

3.44 The records show that the opening arguments of each party lasted thirteen days each. In his opening remarks for Venezuela, Mr Mallet-Prevost declared:

> "Today has realized for Venezuela a dream that she has had for years, and the efforts of her statesmen for half a century past have been towards this end. It is a matter of great congratulations not only for Venezuela but I think I may be permitted to say ....
>
> [T]he old cordiality and friendship which existed between the two Nations has been renewed and cemented firmly, and that we are today able to submit the very serious questions involved not only to a Tribunal of Arbitration, but to Arbitrators whose distinguished records and whose high reputation give us assurances that the questions involved will be decided in justice and equity."[159]

3.45 This view was shared by his co-counsel, former President Harrison, who closed Venezuela's arguments by stating:

> "I have been most courteously dealt with, Mr President, by every member of this Tribunal, not only as we sit here, but in the intercourse which we have had with one another in these long weeks of our session. If they have been in any way a manifestation of

[158] A comprehensive record of the proceedings was published by Her Majesty's Stationery Office in 1899.

[159] *Boundary between the Colony of British Guiana and the United States of Venezuela*, First Day's Proceedings (25 Jan. 1899), p. 4 (Mallet-Prevost). MMG, Vol. IV, Annex 96.

personal respect I beg to assure every member of this Tribunal that I deeply and fully reciprocate that feeling."[160]

3.46 In addition to the many hundreds of pages of written submissions and over 200 hours of oral arguments, more than 2,600 documents were placed before the Tribunal.[161]

3.47 In accordance with Article XI of the Treaty — which required the Arbitrators to "keep an accurate record of their proceedings" — a verbatim record of the oral proceedings was produced day by day, issued in 56 parts. The published record of the entire oral proceedings ran to more than 3,200 pages.

3.48 As Sir Richard Webster observed, there was a "very vast mass of matter… discussed and… presented to the Tribunal".[162] To similar effect, in his closing address to the Tribunal, former U.S. President Harrison explained that Venezuela's counsel had "present[ed] a full and complete discussion of every question of law and fact that we thought was in the case".[163]

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[160] *Boundary between the Colony of British Guiana and the United States of Venezuela*, Fifty-Fifth Day's Proceedings (27 Sept. 1899), p. 3233 (Harrison). MMG, Vol IV, Annex 115.

[161] *Boundary between the Colony of British Guiana and the United States of Venezuela*, Fifty-Sixth Day's Proceedings (3 Oct. 1899), p. 3238. MMG, Vol. IV, Annex 116 (Prof Martens: "Our special thanks we owe to the Counsel of both Powers, who in their most eloquent speeches with great wisdom and ability have put before the Tribunal all the arguments, all the facts, all the documents, which are more than 2650 in number, and thanks to that oral argument the Tribunal has been able to have a clear view of whole case put before them".).

[162] *Boundary between the Colony of British Guiana and the United States of Venezuela*, Second Day's Proceedings (15 June 1899), p. 9 (Webster). MMG, Vol. IV, Annex 97.

[163] *Boundary between the Colony of British Guiana and the United States of Venezuela*, Fiftieth Day's Proceedings (19 Sept. 1899), pp. 2984-2985 (Harrison). MMG, Vol. IV, Annex 111.

3.49 In the proceedings, Venezuela argued that Spain discovered the area and, "by a first and timely settlement of a part of the whole, perfected her title to the whole of the geographical unit known as Guiana".[164] Venezuela dismissed the significance of the 1648 Treaty of Münster on the ground that, in its interpretation, Spain ceded to the Dutch only the places in Guiana that the Dutch physically possessed, and that the rest of the territory remained open to future possession by Spain.[165] On this basis, Venezuela argued that all the territory to the north and west of the Dutch settlements were Spanish territory on which the Dutch were prohibited from encroaching by the Treaty. Thus, according to Venezuela, the Dutch could not transfer those lands to Great Britain by the 1814 London Convention or the 1815 Treaty of Paris, and Great Britain was not entitled to any territory beyond that physically held by the Dutch at the time of the Treaty of Münster of 1648.

3.50 Based on these arguments, Venezuela claimed the entire Essequibo Region as far east as the western bank of the Essequibo River, and south as far as the border with Brazil.[166] It claimed that the Amakura, Barima and Waini River Basins were

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[164] *Boundary between the Colony of British Guiana and the United States of Venezuela*, The Printed Argument on behalf of the United States of Venezuela (1898), Vol. II, p. 719. MMG, Vol. IV, Annex 135; *See also Venezuela-British Guiana Boundary Arbitration*, The Case of the United States of Venezuela (1898), Vol. I, pp. 35-36. MMG, Vol. IV, Annex 122. *Venezuela-British Guiana Boundary Arbitration*, The Case of the United States of Venezuela (1898), Vol. I, p. 221. MMG, Vol. IV, Annex 127.

[165] *Venezuela-British Guiana Boundary Arbitration*, The Case of the United States of Venezuela (1898), Vol. I, pp. 71-74. MMG, Vol. IV, Annex 124. *Venezuela-British Guiana Boundary Arbitration*, The Case of the United States of Venezuela (1898), Vol. I, p. 221. MMG, Vol. IV, Annex 127. *Venezuela-British Guiana Boundary Arbitration*, The Case of the United States of Venezuela (1898), Vol. I, p. 231. MMG, Vol. IV, Annex 129; *Boundary between the Colony of British Guiana and the United States of Venezuela*, The Printed Argument on behalf of the United States of Venezuela (1898), Vol. II, p. 719. MMG, Vol. IV, Annex 135.

[166] *Venezuela-British Guiana Boundary Arbitration*, The Case of the United States of Venezuela (1898), Vol. I, p. 14. MMG, Vol. IV, Annex 121.

Venezuelan, on the ground that they formed an integral part of the Orinoco Delta Region.

3.51 Great Britain, however, denied that there was extensive Spanish exploration or any Spanish settlement between the Essequibo River in the east and the Orinoco River in the west. The British argued that: "Discovery and exploration, unless followed by possession within a reasonable time, are insufficient to give title".[167] The British recognised that the Spanish had established one settlement on the Orinoco River (at Santo Thomé), but argued that the Orinoco Delta did not include the Amakura, Barima or Waini River Basins because those rivers were not tributaries of the Orinoco River.[168] To this end, Great Britain argued that it was entitled to all of the area east of the Orinoco River.

3.52 Both parties presented historical and contemporaneous maps in support of their respective submissions. In addition, the Tribunal received substantial evidentiary material from President Cleveland's Commission, which had conducted its own investigation of the claims of the two parties and deliberated over the boundary line that should be drawn to settle the dispute justly. However, as reported by one of the Commissioners:

> "Arbitration having been decided upon, our commission refrained from laying down a frontier-line, but reported a mass of material, some fourteen volumes in all, with an atlas containing about

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[167] *Boundary between the Colony of British Guiana and the United States of Venezuela*, The Counter-Case of the Government of Her Britannic Majesty (1898), p. 130. MMG, Vol. IV, Annex 131.

[168] *Boundary between the Colony of British Guiana and the United States of Venezuela*, The Counter-Case of the Government of Her Britannic Majesty (1898), pp. 6-7. MMG, Vol. IV, Annex 130; *Boundary between the Colony of British Guiana and the United States of Venezuela*, The Case of the Government of Her Britannic Majesty (1898), pp. 54-55. MMG, Vol. IV, Annex 118.

> seventy-five maps, all of which formed a most valuable contribution to the material laid before the Court of Arbitration at Paris."[169]

3.53 The three-rounds of written submissions and 56 days of oral proceedings demonstrate that both parties had a full and ample opportunity to present their respective cases to the Tribunal, including all of their factual evidence and legal arguments. Neither party objected to the manner in which the proceedings were conducted, nor were there any complaints about unfair or unequal treatment, or a denial of justice.

3.54 On 3 October 1899, the Tribunal issued a unanimous Award signed by all five Arbitrators, in which they indicated that they had "duly heard and considered the oral and written arguments" of the two parties and that, in so doing, they "impartially and carefully examined the questions laid before them, and have investigated and ascertained the extent of the territories belonging to or that might lawfully be claimed by the United Netherlands or by the Kingdom of Spain respectively at the time of the acquisition by Great Britain of the Colony of British Guiana". The Tribunal thus applied the legal standard advocated by Venezuela for determining which parts of the disputed territory fell to Venezuela and which to Great Britain.

3.55 In fulfilment of its mandate under Articles I and III of the Treaty of Washington, the Tribunal then determined the boundary between British Guiana and Venezuela on this basis, as follows:

> "Starting from the coast at Point Playa, the line of boundary shall run in a straight line to the River Barima at its junction with the

[169] Andrew D. White, AUTOBIOGRAPHY OF ANDREW DICKSON WHITE (1917), Vol. II, p. 124.

> River Mururuma, and thence along the mid-stream of the latter river to its source, and from that point to the junction of the River Haiowa with the Amakuru, and thence along the mid-stream of the Amakuru to its source in the Imataka Ridge, and thence in a south-westerly direction along the highest ridge of the spur of the Imataka Mountains to the highest point of the main range of such Imataka Mountains opposite to the source of the Barima, and thence along the summit of the main ridge in a south-easterly direction of the Imataka Mountains to the source of the Acarabisi, and thence along the mid-stream of the Acarabisi to the Cuyuni, and thence along the northern bank of the River Cuyuni westward to its junction with the Wenamu ... to its westernmost sources, and thence in a direct line to the summit of Mount Roraima, and from Mount Roraima to the source of the Cotinga, and along the mid-stream of that river to its junction with the Takutu, and thence along the mid-stream of the Takutu to its source, thence in a straight line to the westernmost point of the Akarai Mountains, and thence along the ridge of the Akarai Mountains to the source of the Corentin called the Cutari River."[170]

3.56 The boundary established by the Tribunal did not match the claim of either party, but divided the disputed territory between them. Venezuela's claim to the entire Essequibo Region, comprised of all the territory between the Essequibo and Orinoco Rivers, was rejected. Likewise, Great Britain's "Extreme Boundary Claim" and its alternative claim based on the Schomburgk Line were rejected. Instead, the Tribunal adopted the standard that Great Britain was entitled to the territory possessed by the Dutch at the time the British acquired it from them, and Venezuela was entitled to the territory belonging to Spain at that time. The Tribunal drew a line that, as it described, divided the Amakura and Barima basins, leaving the former on the Venezuelan side and the latter on the British side, with the result

[170] *Award regarding the Boundary between the Colony of British Guiana and the United States of Venezuela, Decision of 3 October 1899*, RIAA, Vol. XXVIII, p. 331-340 (3 Oct. 1899) (hereinafter "*1899 Award*"), p. 338.

that Venezuela was given Point Barima on the Atlantic Coast, with a strip of land about fifty miles long. This gave it dominion and control over the entire mouth and surrounding delta of the Orinoco River. And it left the British with far less territory than it would have received if the Original Schomburgk Line had been adopted as the boundary, let alone the more extreme boundary claimed by Great Britain.

3.57 The map produced in **Figure 3.4** depicts the boundary adopted by the Arbitral Tribunal in comparison with the British claim. As shown, the Tribunal awarded the British 50,000 square kilometres less than they had claimed in the Arbitration.

Figure 3.4. Sketch Map of the 1899 Arbitral Award and British Claim

3.58 Commission member White recorded in his autobiography that, after extensive historical and legal research and prior to its suspension, the boundary Commission appointed by President Cleveland produced its own proposed boundary line between British Guiana and Venezuela, and that:

> "It is with pride and satisfaction that I find their [*i.e.*, the Tribunal's] award agreeing, substantially, with the line which, after so much trouble, our own commission had worked out."[171]

3.59 And of the boundary line itself he wrote:

> "I believe it to be thoroughly just, and that it forms a most striking testimony of the value of international arbitration in such questions, as a means, not only of preserving international peace, but of arriving at substantial justice."[172]

3.60 Others, likewise, considered the boundary line fixed by the Tribunal to be just. According to Lord Russell:

> "I think the Award gives Her Majesty no territory or advantage to which she is not justly entitled and I think it does give to her substantially all to which she is entitled."[173]

3.61 President Cleveland considered the Award favourable to Venezuela. As he explained:

> "The line they determined upon as the boundary-line between the two countries begins in the coast at a point considerably south and

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[171] Andrew D. White, AUTOBIOGRAPHY OF ANDREW DICKSON WHITE (1917), Vol. II, p. 124.

[172] *Ibid.*, p. 123.

[173] *Letter* from Lord Russell to Lord Salisbury (7 Oct. 1899), *in* Papers of 3rd Marquess of Salisbury, Vol. A/94, Doc. No. 2, p. 2. MMG, Vol. III, Annex 36.

> east of the mouth of the Orinoco River, thus giving to Venezuela the absolute control of that important waterway, and awarding to her valuable territory near it. Running inland, the line is so located as to give to Venezuela quite a considerable section of territory within the Schomburgk line. This results not only in the utter denial of Great Britain's claim to any territory lying beyond the Schomburgk line, but also in the award to Venezuela of a part of the territory which for a long time England had claimed to be so clearly hers that she would not consent to submit it to arbitration."[174]

3.62 Venezuela agreed. Four days after the 1899 Award was rendered, Mr Andrade, who had played an important role in the negotiation of the 1897 Treaty and the Arbitration itself, and had been appointed as Venezuela's Minister to London, declared:

> "Greatly indeed did justice shine forth when in the determination of the frontier we were given the exclusive dominion over the Orinoco which was the principal aim we sought to achieve through arbitration."[175]

[174] Grover Cleveland, THE VENEZUELAN BOUNDARY CONTROVERSY (Princeton University Press, 1913), pp. 117-118.

[175] *Letter* from the Venezuelan Ambassador to the United Kingdom to the Venezuelan Minister of Foreign Affairs (7 Oct. 1899), p. 2. MG, Vol. II, Annex 3.

CHAPTER 4

VENEZUELA'S ACCEPTANCE OF THE ARBITRAL AWARD

4.1 This Chapter recounts Venezuela's acceptance of the Arbitral Award for over 60 years — from 1899 until 1962 — until, on the eve of Guyana's independence, Venezuela first formally challenged the validity of the Award.

4.2 Section I addresses Venezuela's immediate acceptance and celebration of the Award in 1899, including its declaration that "Venezuela's victory" in winning the prized territory of Point Barima at the mouth of the Orinoco River was a "costly defeat" for the British. Section II describes the meticulous and arduous process of demarcating the border fixed by the Arbitral Award between 1900 and 1905 by a Joint Boundary Commission, which culminated in an international agreement on the entire length of the boundary, from the northernmost point on the Atlantic Coast at Punta Playa to the border with Brazil in the south. Section III sets out Venezuela's strict adherence to the 1899 Award and 1905 Agreement and its refusal to countenance any modifications to the boundary, even for practical reasons, because it was a legal boundary that had been duly ratified and could not be changed. Section IV relates Venezuela's demarcation of its boundary with Brazil and the tri-junction point where its boundaries with Brazil and British Guiana met in conformity with the 1899 Award and 1905 Agreement. Finally, Section V addresses Venezuela's unequivocal declaration that its boundary with British Guiana was "*chose jugée*", and its repeated reaffirmation until 1962 of the legal validity of the 1899 Award and the 1905 Agreement. The last four of these Sections display contemporaneous, official Venezuelan maps showing the boundary with British Guiana as determined in the Arbitral Award and demarcated in the 1905 Agreement.

I. Venezuela's Acceptance of the Arbitral Award

4.3 As set out in Chapter 3, the Arbitral Tribunal delivered its unanimous Award on 3 October 1899, in the presence of the formal representatives and counsel of both parties. Venezuela immediately accepted the land boundary with British Guiana established by the Tribunal.

4.4 In a telegram to the Venezuelan Minister of Foreign Affairs, the Agent of Venezuela before the Arbitral Tribunal, Dr José M. Rojas, described the Award as follows:

> "Sentence of Tribunal: England gives up Point Barima and the coast until Point Playa from thence the line goes until Schomburgk's (line) which it follows until the junction of the Cuyuni and Wenamu. This gives us five thousand square miles east of the Schomburgk line. Arbiters and Counsel for Venezuela were brilliant. Important details by French mail."[176]

4.5 The reference at the outset to Point Barima and the coastline west of Point Playa reflected the great importance that both parties attached to this territory. By awarding it to Venezuela, the Arbitral Tribunal attributed to that State the entire Orinoco Delta, including all of the Orinoco River's principal distributaries. In a message dated 7 October 1899, the Ambassador of Venezuela in London, José Andrade — the brother of Venezuelan President Ignacio Andrade — triumphantly declared, as indicated above, that "in the determination of the frontier we were

[176] *Letter* from the Venezuelan Ambassador to the United Kingdom to the Venezuelan Minister of Foreign Affairs (7 Oct. 1899), p. 1 (internal quotations omitted). MG, Vol. II, Annex 3.

given the exclusive dominion over the Orinoco which was the principal aim we sought to achieve through arbitration".[177]

4.6 Ambassador Andrade further observed that, while in his view it was "unjust" for Venezuela not to have been awarded the entire territory in dispute, the Award "nevertheless proves that Venezuela did well in forcing England to submit the question to arbitration in 1897".[178]

4.7 The President of Venezuela agreed:

> "[L]'arrêt était un motif de satisfaction pour le pays, car la justice internationale lui avait restitué une partie de son territoire usurpé et donnait raison à son bon droit."[179]

4.8 Venezuela's counsel also claimed that the Arbitral Award was a victory for Venezuela. According to its principal advocates before the Arbitral Tribunal, former U.S. President Benjamin Harrison and Mr Severo Mallet-Prevost:

> "[I]n order to appreciate the significance of the award pronounced by the tribunal it should be remembered that up to the time of the intervention of the United States Government Great Britain had distinctly refused to submit to arbitration any portion of the territory lying to the east of the Schomburgk line, alleging that her title to the territory was so clear that it could not be the subject of dispute.

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[177] *Letter* from the Venezuelan Ambassador to the United Kingdom to the Venezuelan Minister of Foreign Affairs (7 Oct. 1899). MG, Vol. II, Annex 3.

[178] *Ibid.*

[179] «Nouvelles de l'Étranger: Venezuela», *Le Temps* (11 Oct. 1899) *quoting* Venezuelan President Ignacio Andrade. ("The award was a source of satisfaction for the country, as international justice had returned a part of its territory that had been usurped, and vindicated its right".) (Translation of Guyana).

> Within the Schomburgk line lay the Amakuru river and Point Barima, the latter forming the southern entrance to the great mouth of the Orinoco. No portion of the entire territory possessed more strategic value than this, both from a commercial and a military standpoint, and its possession by Great Britain was most jealously guarded.
>
> This point had been awarded to Venezuela, and along with it a strip of coast about 50 miles in length, both giving to Venezuela the entire control of the Orinoco river. In the interior another long tract to the east of the Schomburgk line, some 3,000 square miles in extent had also been awarded to Venezuela, and thus, by a decision in which the British arbitrators had themselves concurred, the position taken up by the British Government until 1895 had been shown to be without foundation. This in no way expressed the extent of Venezuela's victory. Great Britain had put forward a claim to more than 30,000 square miles of territory west of the Schomburgk line, and it was this territory which in 1890 Great Britain was disposed to submit to arbitration. Every foot of this territory had been awarded to Venezuela."[180]

4.9 There was no indication of any dissatisfaction with the Award by Venezuela or its ally, the United States. Nor was there any hesitation on Venezuela's part in proceeding to implement the Award. To the contrary, as set out below, Venezuela indicated its eagerness to demarcate the boundary established by the Arbitral Tribunal and obtain the United Kingdom's signature to a permanent boundary agreement.

[180] "Declarations from Mallet-Prevost and General Harrison, Venezuelan's Agents before the 1899 Tribunal", *The Times* (4 Oct. 1899).

II. The Joint Boundary Commission, the Demarcation of the Boundary and the 1905 Agreement

4.10 Soon after the 1899 Award was delivered by the Tribunal, the parties established a Joint Boundary Commission and appointed its members, who proceeded to physically demarcate the boundary.[181] Given the remote and inhospitable location of the newly established frontier, this was a costly and challenging exercise that took five years to complete. Venezuela was particularly eager to demarcate the boundary with precise measurements to ensure that there would be no doubt that the territory awarded to it by the Arbitral Tribunal fell under its sovereignty. In particular, as early as 1900, at Venezuela's instigation,[182] the parties concluded a preliminary agreement on the location of the northern land boundary terminus on the coast at Punta Playa, from which the demarcation of the full boundary extending to its southern terminus proceeded.[183]

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[181] The British members were Michael McTurk (Senior Boundary Commissioner), Arthur Wybrow Baker (Second Commissioner), John Charles Ponsonby Widdup (3rd Commissioner), and Harry Innis Perkins (4th Commissioner). The Venezuelan members were Felipe Aguerrevere (Commissioner and Engineer-in-Chief), and Trino Celis Rios (Commissioner and Legal Adviser), Santiago Aguerrevere (1st Assistant Engineer), Abraham Tirado (2nd Assistant Engineer), Dr Elias Toro (Medical Officer), Lorenzo M Osio (Draughtsman) and Gustave Michelena (Interpreter). *See* British Guiana, *Report of the British Commissioners appointed to Demarcate the boundary between the colony of British Guiana and the United States of Venezuela* (8 Dec. 1900). MMG, Vol. IV, Annex 67; *Letter* from Sir Cavendish Boyle to Michael McTurk, Esquire, and Captain Arthur Wybrow Baker (24 Sept. 1900). MMG, Vol. III, Annex 37; Ministry of Foreign Relations of Venezuela, *[Resolución de 8 de junio de 1903, por la cual se reconstituye la Comisión Venezolana de límites con la Guayana Británica] Resolution of June 8, 1903, reconstituting the Venezuela Commission on Boundaries with British Guiana* (8 June 1903). MMG, Vol. IV, Annex 68.

[182] *Letter* from Sir M.E. Grant Duff to Lord Salisbury, No. 101 (26 Sept. 1900). MMG, Vol. III, Annex 38.

[183] For original (in Spanish) *see* Republic of Venezuela, Ministry of Foreign Affairs, *[Tratados públicos y acuerdos internacionales de Venezuela: 1920-1925] Public Treaties and International Agreements 1920-1925*, Vol. III (1927), Act of Mururuma, p. 356. MMG, Vol. IV, Annex 84.

4.11 In November 1900, the Commission began the process of demarcation by determining the initial point of the boundary at Punta Playa on the Atlantic Coast based on astronomical observations. The geographical position of Punta Playa as agreed by the Commissioners (English and Venezuelan) on 24 November 1900 was Latitude 8º33'22" North and Longitude 59º59'48" West.[184] Both the British and Venezuelan Commissioners made observations, twelve in total, to determine the exact position of the boundary. As their results differed slightly, a mean latitude was chosen, and a formal agreement was signed, as "drawn up by the Legal Adviser of the Venezuelan Commissioners and at their instigation."[185] A concrete beacon

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The agreement provided in relevant part that:

"Whereas the undersigned, members of the Commission appointed by Her Majesty the Queen of Great Britain and Ireland to technically delineate the dividing line between the United States of Venezuela and the Colony of British Guiana, in execution of the Paris Award of October 3, 1899, Messrs. Michael Mc. Turk, C. M. G., 1st. Commissioner, ... on the one hand, and on the other hand, Doctors Felipe Aguerrevere and Trino Celis Ríos, ... respectively, of the Commission appointed by the Government of the United States of Venezuela for the same purpose, hereby certify that as both Commissions have established themselves at Punta Playa, a place on the coast designated in said Award as the starting point for the boundary line, with the relevant scientific work and operations having been carried out, by mutual and perfect agreement they determine the geographical location of the said place Punta Playa at

Latitude 8°. 33' . 22" . North

Longitude 59° . 59' . 48" . West of Greenwich,

therefore, the starting point of the boundary line between the United States of Venezuela and the Colony of British Guiana on the Atlantic coast is thus fixed in accordance with the arbitral decision of October 3, 1899".

[184] *Ibid.*

[185] *Letter* from Michael McTurk (24 Nov. 1900). MMG, Vol. III, Annex 39. *See also* British Guiana, *Report of the British Commissioners appointed to Demarcate the boundary between the colony of British Guiana and the United States of Venezuela* (8 Dec. 1900), pp. 9-10. MMG, Vol. IV, Annex 67.

was then constructed to mark this site as the northern terminus of the land boundary.[186] Its location is depicted in **Figure 4.1**.

Figure 4.1. Sketch Map Indicating the Location of Punta Playa

4.12 The boundary beacon contained the following inscription on its sides: on the east, "British Guiana", and on the west, "EEUU de Venezuela [United States of Venezuela]". Its latitude and longitude were also inscribed. And "[a]nother beacon [was] erected three hundred metres from the first one in the same straight line towards Point Playa in order completely to facilitate the determining of the

[186] *Letter* from Michael McTurk (24 Nov. 1900). MMG, Vol. III, Annex 39; British Guiana, *Report of the British Commissioners appointed to Demarcate the boundary between the colony of British Guiana and the United States of Venezuela* (8 Dec. 1900). MMG, Vol. IV, Annex 67; *Letter* from F.M. Hodgson to Alfred Lyttelton *enclosing* Abraham Tirado, Minister of Foreign Affairs, *Report of the Frontier towards British Guiana* (20 Mar. 1905). MMG, Vol. III, Annex 42.

boundary limits for all future time".[187] Two more markers were added further inland at the mouth of the Haiowa River near Mururuma (Latitude 8º13'4" North and Longitude 59º56'39" West).[188] Recent photographs of what appears to be one of these markers are shown in **Figure 4.2**[189] and **Figure 4.3**.[190]

[187] British Guiana, *Report of the British Commissioners appointed to Demarcate the boundary between the colony of British Guiana and the United States of Venezuela* (8 Dec. 1900). MMG, Vol. IV, Annex 67.

[188] Republic of Venezuela, Ministry of Foreign Affairs, *[Tratados públicos y acuerdos internacionales de Venezuela: 1920-1925] Public Treaties and International Agreements 1920-1925*, Vol. III (1927), Haiowa Act on 21 January 1901, p. 358. MMG, Vol. IV, Annex 84.

[189] *Guyana Times*, "Guyana-Venezuela boundary marker located in Region 1" (4 Dec. 2017). MMG, Vol. II, Figure 4.2.

[190] *Guyana Times*, "Guyana-Venezuela boundary marker located in Region 1" (4 Dec. 2017). MMG, Vol. II, Figure 4.3.

Figure 4.2. Photograph of Boundary Marker Found in the Barima-Waini Region (2017)

Figure 4.3. Photograph with Close-Up of Boundary Marker (2017)

4.13 By April 1901, the Commission had completed the demarcation of the boundary south of Punta Playa as far as the head of the Amakura River.[191] By November 1902, they had reached the Imataka Mountains and the source of the Barima River and concluded four written agreements identifying the geographic coordinates of particular points along the boundary line.[192]

4.14 In 1903 and 1904, as the demarcation process continued into less accessible terrain, the boundary was demarcated along the Cuyuni and Venamo Rivers to its southern limit on the summit of Mount Roraima.[193] Great care was taken to achieve an accurate demarcation, in strict compliance with the 1899 Arbitral Award. The Venezuelan Commissioners, in particular, strove to ensure "that the demarcation which is to be carried out on the frontier shall be of permanent character to avoid any uncertainty in the future or doubt as to the real frontier between either territory".[194]

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[191] *Letter* from Walter Sendall to J. Chamberlain (10 Apr. 1901). MMG, Vol. III, Annex 40.

[192] Republic of Venezuela, Ministry of Foreign Affairs, *[Tratados públicos y acuerdos internacionales de Venezuela: 1920-1925] Public Treaties and International Agreements 1920-1925*, Vol. III (1927), Act of Mururuma. MMG, Vol. IV, Annex 84.

[193] During this period, the Commission was reconstituted. The British members included Harry Innis Perkins (Senior Commissioner on behalf of British Guiana), and Charles Wilgress Anderson (Second Commissioner on behalf of British Guiana), and the Venezuelan members were Dr Abraham Tirado (Chief of the Boundary Commission), and Dr Elias Toro (Second Commissioner on behalf of Venezuela). Ministry of Foreign Relations of Venezuela, *[Resolución de 8 de junio de 1903, por la cual se reconstituye la Comisión Venezolana de límites con la Guayana Británica] Resolution of June 8, 1903, reconstituting the Venezuela Commission on Boundaries with British Guiana* (8 June 1903). MMG, Vol. IV, Annex 68. *Letter* from Alejandro Ybarra to P.C. Wyndham (19 June 1905). MMG, Vol. III, Annex 43.

[194] *Letter* from Alejandro Ybarra to P.C. Wyndham (19 June 1905). MMG, Vol. III, Annex 43.

4.15 This is reflected in the reports sent by Dr Abraham Tirado, the leading Venezuelan member of the Commission, to the Foreign Ministry in Caracas:

> "Immediately upon arrival I started on the technical astronomical work by observing the absolute conditions of the chronometers and their ratings: — observations that were essential, and which it was most important to make with the greatest accuracy, seeing that they were necessarily the foundation for the most delicate part of the work, viz. the determination of Longitudes. The careful attention paid to this matter has been well rewarded by the completeness of the results obtained; and I am personally very proud of being able to present a plan of the outcome of our work which, considering the very unfavourable conditions under which our various journeys were made, is wonderfully accurate."[195]

4.16 Such meticulous work was undertaken all along the 825-kilometre boundary, including deep into the tropical jungles of the interior, by setting up camps along different rivers and waiting for adequate weather conditions to undertake astronomical observations. In certain places, geographical features like rivers and mountain ridges were used to mark the boundary. In most locations on land, however, the Commission marked the boundary by clearing a path along the boundary line. In key locations, they left more permanent marks, inscribing rocks and trees with the initials of their countries: "V.B.G."[196] This was done, for example, on Mount Roraima, at the southern boundary terminus, where "the

[195] *Letter* from F.M. Hodgson to Alfred Lyttelton *enclosing* Abraham Tirado, Minister of Foreign Affairs, *Report of the Frontier towards British Guiana* (20 Mar. 1905). MMG, Vol. III, Annex 42.

[196] *Ibid.*, p. [pdf] 16. MMG, Vol. III, Annex 42. *Letter* from Mr. Perkins to Government Secretary (9 Jan. 1905), p. [pdf] 9. MMG, Vol. III, Annex 41.

boundary was marked on a rock, with the initials of the two nations and of the Commissioners, separated by a vertical straight line".[197]

4.17 These efforts were not without considerable risk. Several members of the Commission — including Venezuela's Dr Tirado — became gravely ill from tropical diseases, while others — including Venezuelan Commissioner Dr Armando Blanco — perished. The conditions were such that even the local Indigenous people who had been hired to assist in the work succumbed to illness and died. The circumstances were described by Dr Tirado:

> "I ought not to omit to mention the unforeseen trials, the difficulties, and the discomforts, the excessive exertion and the laborious struggling, the endless hardships, and the great determination that was necessary to enable us to arrive at the objective of the first expedition which we attained at the most westerly source of the Venamo river. There lay, as a mute witness to all that this implies, the remains of a poor fellow whose hardihood and habitual life in the forest stood him in no stead against the conditions of life which we had to endure there. There physical energy was annihilated and one's spirits were so depressed that it was only an exalted sense of duty, and the satisfaction that one felt in serving one's country that could possibly sustain us during such dismal days."[198]

4.18 By 1905, Dr Tirado reported with great satisfaction that the demarcation of the boundary had been completed in conformity with the 1899 Arbitral Award:

> "The long and tedious work in this town, up to the day of writing [20th March 1905], has consisted in (i) The calculation of more than

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[197] *Letter* from F.M. Hodgson to Alfred Lyttelton *enclosing* Abraham Tirado, Minister of Foreign Affairs, *Report of the Frontier towards British Guiana* (20 Mar. 1905), p. [pdf] 33. MMG, Vol. III, Annex 42.

[198] *Ibid.*, pp. [pdf] 16-17.

two thousand observations and the correlation of their results, which was effected by the method of least squares, with the view of accepting the most satisfactory of them; — the preliminary calculations these, for the drafting of the general map: (ii) The drafting of that map from Punta Playa to Roraima on a scale of 1 in 200,000, in which the whole of the boundary line is contained; for this we agreed to use the system of polyconical projection with Clarke's spheroidal data: (iii) A copy of all the data obtained by the English Commission, when on account of special circumstances I was not able to take them directly from the country, as for instance in the case of the explorations of the Parima and Camarang: (iv) The interesting collection of data and a sketch of triangulations made by Mr Anderson: (v) Calculations to determine the altitude of the different points, both by means of the aneroids and by the boiling point of water: (vi) Partial drafts of the different surveys of the whole of the Venamo river: (vii) A tracing of the general map of the boundary line on tracing paper: (viii) Detailed correspondence with the Ministry on a subject concerning the honourable office, with information and a sketch-plan relative to the modification of the Venamo-Roraima straight line, and a Minute giving the astronomical positions of the different points of the boundary line as laid down by the Arbitral Award of Paris."[199]

4.19 Dr Tirado concluded:

"The honourable task is ended, and the delimitation between our Republic and the Colony of British Guiana an accomplished fact.

I, satisfied with the part which it has been my lot to play, congratulate Venezuela in the person of the patriotic Administrator who rules her destinies and who sees with generous pride the long-standing and irritating dispute that has caused his country so much annoyance settled under his regime."[200]

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[199] *Ibid*., pp. [pdf] 36-37.

[200] *Ibid*., pp. [pdf] 3-39.

4.20 On 10 January 1905, the Agreement Between the British and Venezuelan Boundary Commissioners with Regard to the Map of the Boundary ("the 1905 Boundary Agreement" or "the 1905 Agreement") was signed, demarcating the entire boundary between British Guiana and Venezuela in compliance with the 1899 Arbitral Award.[201] The Agreement provided that the parties:

> "regard this Agreement as having a perfectly official character with respect to the acts and rights of both Governments in the territory demarcated; that they accept the points mentioned below as correct, the result of the mean of the observations and calculations made by both Commissioners together or separately, as follows. ... That the two maps mentioned in this Agreement, signed by both Commissioners, are exactly the same ... containing all the enumerated details related to the demarcation, with the clear specification of the Boundary line according with the Arbitral Award of Paris".[202]

4.21 The official map produced by the Commissioners, preceded by its cover page, are reproduced in **Figure 4.4**[203] and **Figure 4.5**.[204] The agreed boundary is

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[201] Agreement Between the British and Venezuelan Boundary Commissioners with Regard to the Map of the Boundary (10 Jan. 1905) reprinted in Government of the Republic of Venezuela, Ministry of External Affairs, Public Treaties and International Agreements of Venezuela, Vol. 3 (1920-25) (1927). AG, Annex 3.

[202] *Ibid.*

[203] "Map of the Boundary Line between British Guiana and Venezuela, Surveyed by the Commissioners of Both Countries from November 1900 to June 1904, Georgetown" (7 Jan. 1905). MMG, Vol. II, Figure 4.4.

[204] "Map of the Boundary Line between British Guiana and Venezuela, Surveyed by the Commissioners of Both Countries from November 1900 to June 1904, Georgetown" (7 Jan. 1905). MMG, Vol. II, Figure 4.5.

shown by a red line, from Punta Playa to Mount Roraima, "with the clear specification of the Boundary line according with the Arbitral Award of Paris".[205]

[205] Agreement Between the British and Venezuelan Boundary Commissioners with Regard to the Map of the Boundary (10 Jan. 1905) reprinted in Government of the Republic of Venezuela, Ministry of External Affairs, Public Treaties and International Agreements of Venezuela, Vol. 3 (1920-25) (1927). AG, Annex 3.

Figure 4.4. Cover Page of Map Produced by the Joint Boundary Commission in 1905

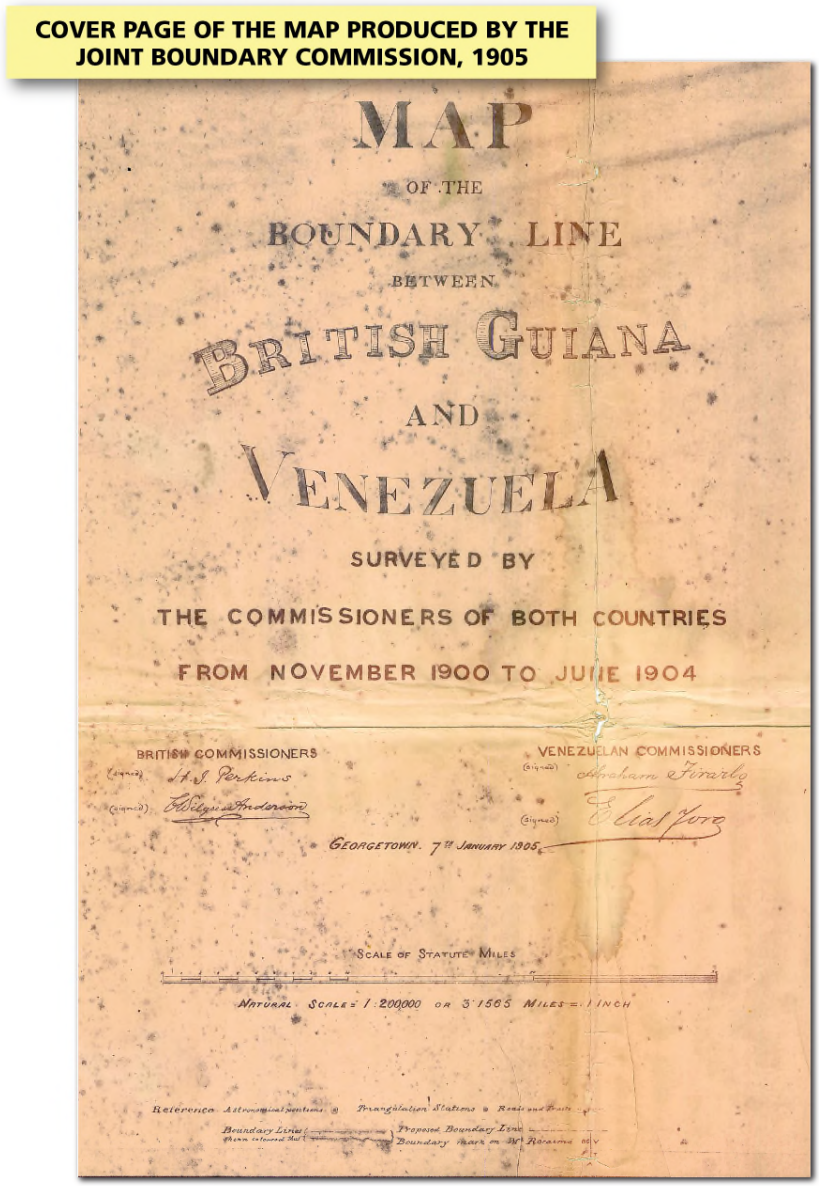
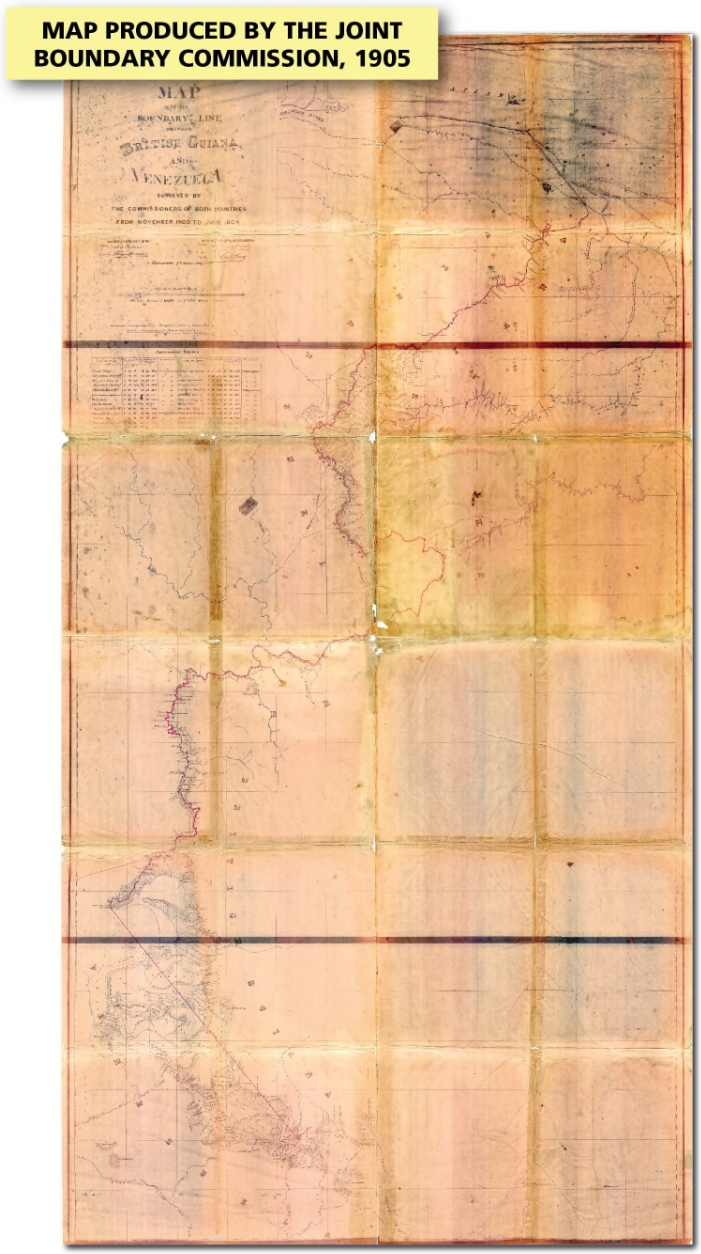


Figure 4.5. 1905 Map Produced by the Joint Boundary Commission, Demarcating the Boundary Line between British Guiana and Venezuela



4.22 Accordingly, as of 10 January 1905, there was a formal and official international agreement on the location of the entire land boundary between British Guiana and Venezuela, in strict accordance with the terms of the 1897 Washington Treaty and the 1899 Arbitral Award. In the words of Venezuela's Chief Boundary Commissioner, who signed the 1905 Agreement:

> "The honourable task is ended, and the delimitation between our Republic and the Colony of British Guiana an accomplished fact."[206]

III. Venezuela's Strict Adherence to the 1899 Award and 1905 Agreement and Refusal to Accept any Modifications to the Boundary with British Guiana

4.23 In the years that followed the conclusion of the 1905 Boundary Agreement, Venezuela formally and repeatedly recognised the boundary established by the 1899 Award, as implemented by the 1905 Agreement and, on several occasions, resisted even the most modest technical changes to it. For Venezuela, the boundary fixed by the Award and the Agreement was immutable, and it had to be fully respected.

4.24 In October 1905, Dr Abraham Tirado, Boundary Commissioner for Venezuela, endorsed a slight modification of the boundary that had been recommended by his British counterparts,[207] and which he considered beneficial to Venezuela. He communicated his position to the Venezuelan Foreign Ministry:

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[206] *Letter* from F.M. Hodgson to Alfred Lyttelton *enclosing* Abraham Tirado, Minister of Foreign Affairs, *Report of the Frontier towards British Guiana* (20 Mar. 1905). MMG, Vol. III, Annex 42.

[207] British Guiana, *Recommendations of the Boundary Commissioners for the Adoption of the Line of the Watershed between the Caroni, Cuyuni and Mazaruni River Systems as the Boundary between the Source of the Wenamu River and Mount Roraima in place of the Direct Line Mentioned in the*

> "[T]he English Commissioners suggested to me the substitution of the watershed between the Orinoco and the Essequibo for the straight Venamo-Roraima line that the Paris Award declared to be the boundary.
>
> I thought over the matter, and being convinced that the modification was undoubtedly to the advantage of my country, I answered them that I would at once report on the above-mentioned proposal to my Government through the proper channel, viz., the Minister for Foreign Affairs, my official head. And I did so accordingly in a special despatch; in which I enumerated as clearly as I possibly could what I considered, and still consider to be, real advantages."[208]

4.25 In the absence of a response on the matter from Caracas, in February 1906, Great Britain formally requested that the Venezuelan Minister for Foreign Affairs obtain his country's approval of the recommended change in the boundary.[209] This resulted in an exchange of diplomatic correspondence in which Venezuela's Foreign Minister, José de Jesús Paúl, advised the British that: (1) the 1905 Agreement had been duly ratified by Venezuela's Federal Executive; and (2) the proposed modification of the boundary was rejected by the Venezuelan Congress upon the recommendation of the Federal Executive.[210] In respect of the ratification of the 1905 Agreement, the Venezuelan Minister wrote:

Award of the Arbitral Tribunal of Paris, Dated 3rd October 1899, British Guiana Combined Court, Annual Session (10 Jan. 1905). MMG, Vol. IV, Annex 69.

[208] *Letter* from F.M. Hodgson to Alfred Lyttelton *enclosing* Abraham Tirado, Minister of Foreign Affairs, *Report of the Frontier towards British Guiana* (20 Mar. 1905). MMG, Vol. III, Annex 42.

[209] *Letter* from Mr. Bax-Ironside to General Ybarra (20 Feb. 1906) (*Inclosure in Letter* from Mr Bax-Ironside to Sir Edward Grey (10 Mar. 1906)). MMG, Vol. III, Annex 44.

[210] *Letter* from Dr. Paúl to Mr. Bax-Ironside (10 Oct. 1906). MMG, Vol. III, Annex 45; *Letter* from Mr. O'Reilly to Sir Edward Grey (July 1907) (*Inclosure in Letter* from Foreign Office to Colonial Office (11 July 1907)). MMG, Vol. III, Annex 47; *Letter* from Sir Edward Grey to Mr. O'Reilly

> "The ratification of the Federal Executive is thus limited to the work done by the Mixed Delimitation Commissions in accordance with the Paris Award of the 6th [sic] of October, 1899, and recorded in a Report and maps prepared by the last Commissioners at Georgetown, and dated at the capital of British Guiana on the 10th January, 1905".[211]

4.26 On Venezuela's refusal to agree to the proposed modification of the 1905 Agreement, the Minister explained:

> "[R]elative to the demarcation of the frontier between Venezuela and British Guiana in accordance with the Paris Award of the 6th [sic] October 1899, I have the honour to inform you that the question of the modification of the boundary-line by the adoption of the watershed as the frontier between the most westerly source of the River Venamo and Mount Roraima instead of the straight line laid down by the Award, was laid before Congress at its last Session through the Ministry of Foreign Affairs, and that Congress, concurring in the opinion of the Federal Executive, approved the Report of the Permanent Committee of both Houses on Foreign Affairs and declared the modification proposed to be inacceptable, principally because it amounts to a veritable cession of territory."[212]

(18 Oct. 1907). MMG, Vol. III, Annex 49; *Letter* from Sir V. Corbett to Dr. José de Paúl (25 Feb. 1908) (*Inclosure in Letter* from Sir V. Corbett to Sir Edward Grey (25 Feb. 1908)). MMG, Vol. III, Annex 50; *Letter* from Señor Paúl to Mr. O'Reilly (4 Sept. 1907) (*Inclosure in Letter* from Mr. O'Reilly to Sir Edward Grey (5 Sept. 1907)), pp. 1-2. MMG, Vol. III, Annex 48; *Letter* from J. de J. Paúl to Sir Vincent Corbett (12 Mar. 1908) (*Inclosure in Letter* from Sir Vincent Corbett to Sir E. Grey (16 Mar. 1908)). MMG, Vol. III, Annex 51. Department of Foreign Affairs of Venezeula, *[El Libro Amarillo: Presentado al congreso Nacional en sus sesiones de 1911] The Yellow Book: Presented to the National Congress in its 1907 Sessions* (1911), p. xxxiv. MMG, Vol. IV, Annex 70.

[211] *Letter* from Señor Paúl to Mr. O'Reilly (4 Sept. 1907) (*Inclosure in Letter* from Mr. O'Reilly to Sir Edward Grey (5 Sept. 1907)), pp. 1-2. MMG, Vol. III, Annex 48.

[212] *Ibid.*, pp. 1-2.

4.27 In 1908, the British Ministry of Foreign Affairs communicated its insistence on the proposed deviation from the 1899 Award line[213] but was once again rebuffed by the Venezuelan Foreign Minister, Dr Paúl, who reiterated that Venezuela was committed to strict adherence to the 1899 Arbitral Award and would not agree to any change in the 1905 Agreement that deviated from the "Paris award":

> "the ratification accorded by the Federal Executive to the labours of the Commissions for the delimitation of the frontier between Venezuela and British Guyana … *is entirely restricted to that part which is conformity with the Paris award* of October 6th [sic] 1899, without extending the deviation of the line recommended by the Commissioner".[214]

4.28 This remained Venezuela's steadfast position, as reflected in further exchanges with the British regarding the installation or replacement of pillars to mark the course of the boundary. In 1911, for example, it was discovered that the concrete beacon that marked the northernmost boundary terminus at Punta Playa — which had been installed in 1900 — had been washed away by the sea. Commissioners from both Venezuela and British Guiana collaborated to replace the marker:

> "After the sea destroyed the post placed between Venezuela and British Guiana on the seaside in Punta de Playa and inundated part of the land around this post, it has been agreed with the English government that commissions from the two governments will

[213] *Letter* from Sir V. Corbett to Dr. José de Paúl (25 Feb. 1908) (*Inclosure in Letter* from Sir V. Corbett to Sir Edward Grey (25 Feb. 1908)). MMG, Vol. III, Annex 50.

[214] *Letter* from J. de J. Paúl to Sir Vincent Corbett (12 Mar. 1908) (*Inclosure in Letter* from Sir Vincent Corbett to Sir E. Grey (16 Mar. 1908)). MMG, Vol. III, Annex 51.

> proceed in replacing a post at a point exactly marked by the boundary line between Venezuela and British Guiana."[215]

4.29 The Venezuelan commissioners emphasised that the new marker had to be placed at precisely the same point as determined by the 1899 Award, pursuant to a decree issued by President Juan Vincente Gómez:

> "WHEREAS the Government of the Republic has accepted the proposition made by the English Government to replace the said post with another which must be placed *at the precise site in which the boundary line between the two countries out the new coast which was fixed in the year nineteen hundred in accordance with the award signed at Paris the 3rd of October 1899 by the Mixed Commission Anglo-Venezuelan* [sic].
>
> …
>
> WHEREAS I confer FULL POWERS that in his capacity a Commissioner following the instructions given will proceed to replace the post which was washed away by the sea in the extreme of the Frontier between Venezuela and British Guiana at Punta Playa with another which necessarily will be placed at the precise point where the boundary line cut now the line fixed in nineteen hundred in accordance with the Award signed at Paris the 3rd of October 1899 by the Mixed Commission Anglo-Venezuelan [sic]."[216]

4.30 Given the firmness of Venezuela's commitment to the 1899 Award and the 1905 Boundary Agreement, it is unsurprising that the official Venezuelan

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[215] Department of Foreign Affairs of Venezeula, [*El Libro Amarillo: Presentado al congreso Nacional en sus sesiones de 1907] The Yellow Book: Presented to the National Congress in its 1907 Sessions* (1911), p. xxviii. MMG, Vol. IV, Annex 70.

[216] *Letter* from General Juan Vicente Gomez, President of the U.S. of Venezuela (1 Feb. 1911). MMG, Vol. III, Annex 52.

cartography of the period unambiguously identified the boundary line as that fixed by the Award and demarcated by the Joint Boundary Commission with no reservation or other indication of provisionality. This is first of all the case of the map annexed to the Agreement of 10 January 1905 on the demarcation of the boundary, which is "annexed to an official text of which [it forms] an integral part"[217] and therefore falls "into the category of physical expressions of the will of the State … concerned".[218]

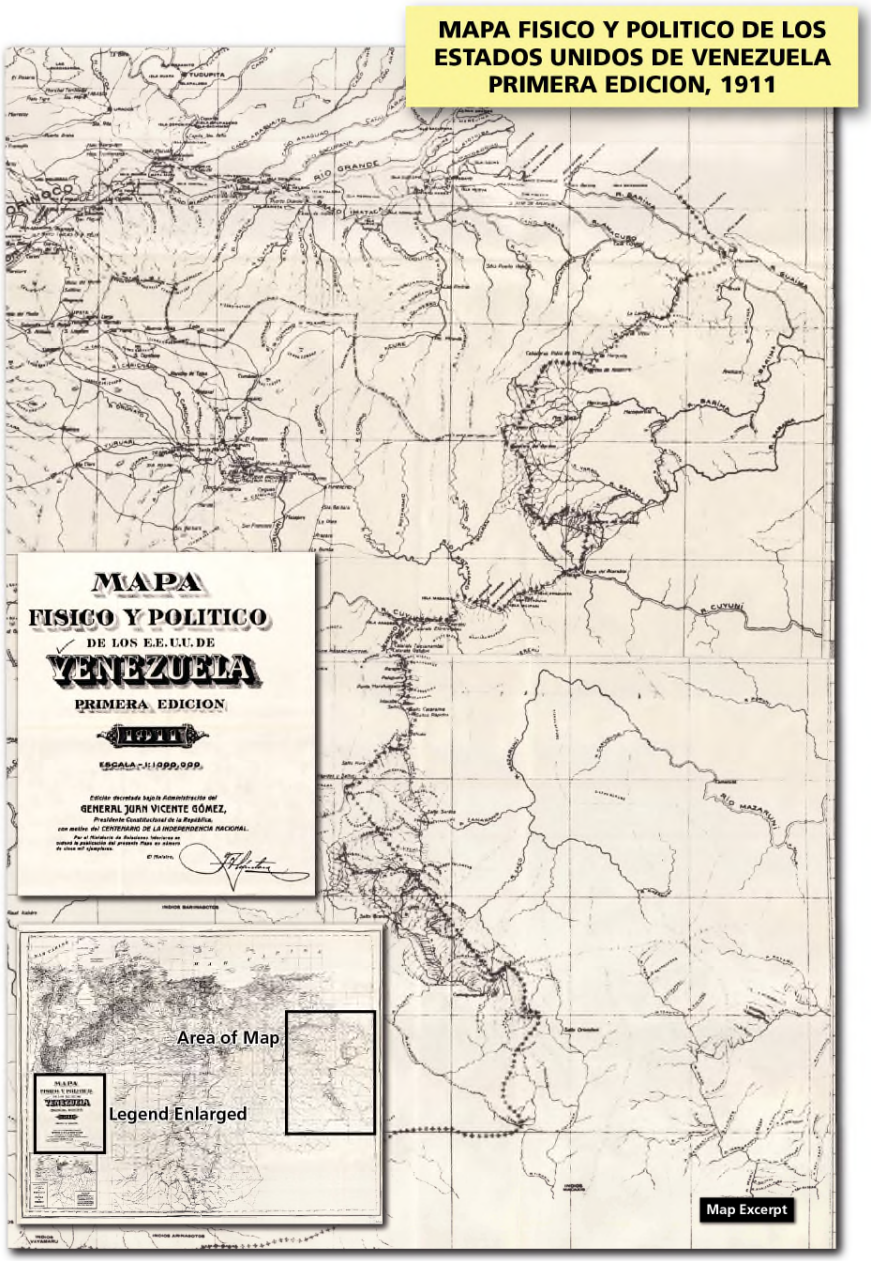
4.31 The same is true of the official map prepared and published by the Venezuelan Ministry of the Interior in 1911, reproduced as **Figure 4.6**.[219]

[217] *Frontier Dispute (Burkina Faso/Republic of Mali)*, Judgment, I.C.J. Reports 1986 (hereinafter "*Frontier Dispute (Burkina Faso/Republic of Mali)*"), p. 582, para. 54.

[218] *Ibid.*, p. 582, para. 54; p. 583, para. 56.

[219] Department of Internal Affairs of Venezuela, "Mapa Físico y Político de los E.E.U.U de Venezuela, 1: 1,000,000" (1a ed., 1911). MMG, Vol. II, Figure 4.6.

Figure 4.6. Physical and Political Map of Venezuela, Commissioned by President J. V. Gomez (1911)



4.32 As shown in the succeeding Sections of this Chapter, official Venezuelan maps between 1905 and 1962 continuously and consistently showed that the boundary between Venezuela and British Guiana was the one determined by the 1899 Arbitral Award and demarcated by the 1905 Agreement.

IV. Venezuela's Demarcation of its Boundary with Brazil and the Tri-Junction Point with Brazil and British Guiana in Strict Conformity with the 1899 Award and 1905 Agreement

4.33 Venezuela further affirmed and demanded strict adherence to the boundary established by the 1899 Award, as demarcated by the 1905 Agreement, during the process to fix the tri-junction point where its boundaries with British Guiana and Brazil meet. The process began in 1926 with a boundary agreement between British Guiana and Brazil, continued through 1928 with a Venezuela/Brazil boundary agreement, and concluded with a tripartite agreement on the tri-junction point in 1932. Throughout this six-year process, Venezuela repeatedly insisted upon absolute conformity with the terms of the 1899 Award.

4.34 The Treaty and Convention between His Majesty and the President of the Brazilian Republic for the Settlement of the Boundary between British Guiana and Brazil was signed on 22 April 1926 and ratified on 16 April 1929. It provided that the boundary would end "where Venezuelan territory commences … on the said Roraima mountains", as provided in the 1899 Award and 1905 Agreement.[220] An exchange of notes confirmed that the boundary terminus would be "at the point of

[220] United Kingdom, Brazil, Treaty Series No. 14, *Treaty and Convention for the settlement of the Boundary between British Guiana and Brazil* (22 Apr. 1926). MMG, Vol. IV, Annex 83.

junction of the three territories of British Guiana, Brazil and Venezuela".[221] Venezuela did not protest; indeed, it reached a similar agreement with Brazil in 1928.

4.35 The "Protocol between Brazil and Venezuela respecting the Demarcation of the Frontier" was signed in Rio de Janeiro on 24 July 1928, with ratifications exchanged on 31 August 1929, four months after the agreement between Brazil and British Guiana was ratified. Both agreements placed the tri-junction point on the summit of Mount Roraima in accordance with the 1899 Award. The Venezuela/Brazil agreement specified that:

> "the frontier between the two countries should be clearly defined, from the island of Sao Jose to a point on Mount Roraima where the frontiers of Brazil, Venezuela and British Guiana meet."[222]

4.36 In accordance with both agreements, a physical marker, numbered B-BG/0, was placed on the summit of Mount Roraima in 1931 at the following coordinates: Latitude 05°12'08".30 North, Longitude 60°44'09".20 West, at an altitude of

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[221] Exchange of Notes between the United Kingdom and Brazil approving the General Report of the Special Commissioners Appointed to Demarcate the Boundary-Line between British Guiana and Brazil, 51 U.K.T.S. 1946 (15 Mar. 1940). MMG, Vol. IV, Annex 87.

[222] Protocol between Brazil and Venezuela respecting the Demarcation of the Frontier, Ratification exchanged at Rio de Janeiro 31 Aug. 1929 (24 July 1928), *available at* https://babel.hathitrust.org/cgi/pt?id=mdp.39015035801896&view=1up&seq=4&skin=2021 (last accessed 22 Feb. 2022), p. 448.

See also League of Nations, "Brazil and Venezuela: Exchange of Notes for the Execution of the Provisions regarding the Frontier Delimitation between the two Countries, contained in the Protocol signed at Rio-de-Janeiro, July 24, 1928. Caracas, November 7, 1929", *Treaty series: Publications of treaties and international engagements registered with the Secretariat of the League of Nations* (1930). MMG, Vol. IV, Annex 86.

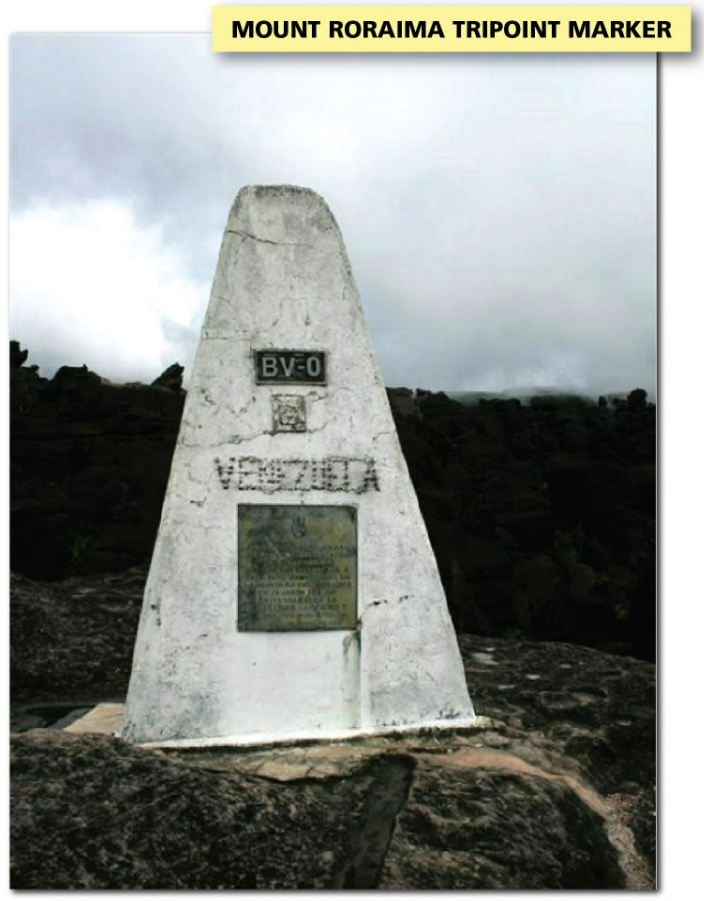
2771.8 metres.[223] The marker is a pyramidal structure of approximately 2.50 metres in height, made of stones and covered with cement. It has the names of each of the three countries on the sides facing their respective territories. The sides facing Brazil and Venezuela are inscribed with "BRAZIL", "VENEZUELA", and "1931" and have the Coats of Arms of each country. And it has "on the side facing British Guiana … a brass plate inscribed 'BRITISH GUIANA'".[224] An image of one side of this marker, facing Venezuela, appears in **Figure 4.7**.[225]

[223] Exchange of Notes between the United Kingdom and Brazil approving the General Report of the Special Commissioners Appointed to Demarcate the Boundary-Line between British Guiana and Brazil, 51 U.K.T.S. 1946 (15 Mar. 1940). MMG, Vol. IV, Annex 87.

[224] *Ibid. See also* Federative Republic of Brazil, Ministry of Foreign Affairs, "9.4 – BV-0 Mount Roraima Marker". MMG, Vol. IV, Annex 92.

[225] "Mount Roraima Tripoint Marker, Venezuela's Side" (undated). MMG, Vol. II, Figure 4.7.

Figure 4.7. Tri-Junction Point Marker between Venezuela, British Guiana and Brazil



4.37 In fixing the tri-junction point, Venezuela insisted on strict adherence to the 1899 Award. In particular, in September 1931, during the demarcation process between Brazil and British Guiana, it became apparent that the boundary marker installed by the Venezuela-British Guiana Boundary Commission in 1904 had been incorrectly placed. Instead of being on the actual summit of Mount Roraima as stipulated in the 1899 Award, the marker was on one of its edges, such that the geographical coordinates in the 1905 Agreement were also inaccurate. The British proposed to Venezuela that the boundary established by the 1904 marker and 1905 Agreement be maintained, even if it did not mark the exact summit of Mount Roraima.[226] Venezuela rejected the British proposal and insisted that the tri-junction point must be fixed so that its location was fully and exactly consistent with the boundary established by the 1899 Award, referring to this boundary as the "*frontier de droit*".[227]

4.38 This is reflected in a statement by Venezuela's Foreign Minister, Pedro Itriago Chacín, in a communication to Great Britain's envoy to Venezuela, William Edmund O'Reilly:

> "I have most carefully considered the proposal contained in your letter of the 25th of September last relative to a modification of the frontier *de droit* between Venezuela and British Guiana.
>
> A similar modification was proposed as long ago as 1904 by the British members of the commission which then demarcated the frontier and was considered by the Venezuelan Government, which found itself, however, unable to accept it for many reasons of which the principal and conclusive one was the Venezuelan constitutional

[226] *Letter* from the Venezuelan Minister for Foreign Affairs, P. Itriago Chacín, to W. O'Reilly (31 Oct. 1931). MMG, Vol. III, Annex 53.

[227] *Ibid.*

> principle which forbids the alienation, in whole or in part, of national territory to a foreign Power.
>
> At the present time also there exist objections of principle to an alteration by agreement of the frontier *de droit*, since, as this frontier is the result of a public treaty ratified by the Venezuelan legislature, it could only be modified by a process which would take considerable time, even supposing that other difficulties, also of principle, could be got over."[228]

4.39 The Foreign Minister further pointed out that it was in the interests of both parties to remain faithful to the "Paris Award":

> "As you will realise, it would be impossible in any case, for lack of time, to take advantage of the present expedition of the Venezuelan and British Commissioners to Roraima, and it is clear that both parties have a legitimate interest in the completion, as soon as possible, of the work required to carry out the Paris Award."[229]

4.40 In conclusion, the Foreign Minister advised the British:

> "[The] Venezuelan government regret that for constitutional reasons they are unable to depart from the letter of the award."[230]

4.41 Venezuela's position on the primacy of the 1899 Award was reiterated in a Memorandum of 25 December 1931, prepared by its Foreign Ministry's Directorate of International Political Affairs:

> "In accordance with the Paris Award of the 3rd October, 1899, the Anglo-Venezuelan boundary ends with a straight line drawn from

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[228] *Ibid.*

[229] *Ibid.*

[230] *Telegram* from P. Itriago Chacín, to W. O'Reilly (23 Nov. 1931). MMG, Vol. III, Annex 54.

> the sources of the Venamo to the summit of Roraima. The latter is also the terminal point of the Anglo-Brazilian boundary."[231]

4.42 The British agreed to Venezuela's demand that the tri-junction point be fixed at the summit of Mount Roraima, in conformity with the 1899 Award, and to place a new boundary marker at that location.[232] Venezuela responded with satisfaction, in a note signed by the Foreign Minister on 3 November 1932:

> "The Government of the Republic has noted with satisfaction that His Majesty's Government has decided to accept the Venezuelan proposal that the boundary in question should be a straight line drawn from the source of the Wenamu river to the point of tri-junction on Mount Roraima of the frontiers of Venezuela, British

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[231] *Memorandum* from the Venezuelan Ministry of Foreign Affairs, No. 1638 (16 Dec. 1931) *in* Caracas *despatch* No. 51 (25 Dec. 1931). MMG, Vol. IV, Annex 71. *See also* Bulletin of the Ministry of Foreign Affairs of Venezeula, *[Acta de Inaguracion de dos hitos Venezolano-Brasileros en el Monte Moraima] Act of Inaguration of two Venezuelan-Brazilian Boundary Marks on Mount Roraima*. MMG, Vol. IV, Annex 95.

[232] The tri-junction marker, relocated to the summit of Mount Roraima, remains standing at that location. It continues to be recognised by Brazil, as well as Guyana as the terminus of its boundary with Venezuela. On 23 August 1973, in an official act signed during the 41st Conference of the Brazil-Venezuela Mixed Commission for Boundary Demarcation, the Brazilian representatives responded to Venezuela's assertion that the tri-junction point was subject to a territorial claim as follows:

> "The Head of the Brazilian Commission then stated that he took due note of the statement made by his distinguished colleague, but wished to place on record that, for purposes of the relevant demarcation, the location of this boundary marker is the same as the location described in the respective Inauguration Act that was drawn up and signed by the representatives of the Venezuelan and Brazilian Commissions on December 29, 1931."

Ministry of Foreign Relations, Mixed Venezuelan-Brazilian Commission on the Demarcation of Boundaries, *[Acta de la Cuadragesima Primera Conferencia] Minutes of the Forty-First Conference* (1973). MMG, Vol. IV, Annex 91; Ministry of Foreign Affairs of Brazil, First Brazilian Commission to Establish Borders, "8.1 – Brazil – Guyana –Venezuela Tri-Border Area (Mount Roraima)". MMG, Vol. IV, Annex 93.

> Guiana and Brazil, as recently determined and marked with a pillar by the Commissions of the three countries — giving thereby a clear proof of the spirit of justice, good faith and cordiality which animates its actions in the conduct of international relations."[233]

4.43 Throughout this period, and beyond, Venezuela's official maps continued to depict the boundary between Venezuela and British Guiana in conformity with the 1899 Award and the 1905 Agreement. For instance, the boundary is clearly defined in a 1928 map of Venezuela commissioned at the order of Venezuelan President Juan Vincente Gómez (reproduced as **Figure 4.8**).[234] The official national map was updated in 1937, once again clearly depicting the border with neighbouring British Guiana in accordance with the 1899 Award and the 1905 Agreement (**Figure 4.9**).[235]

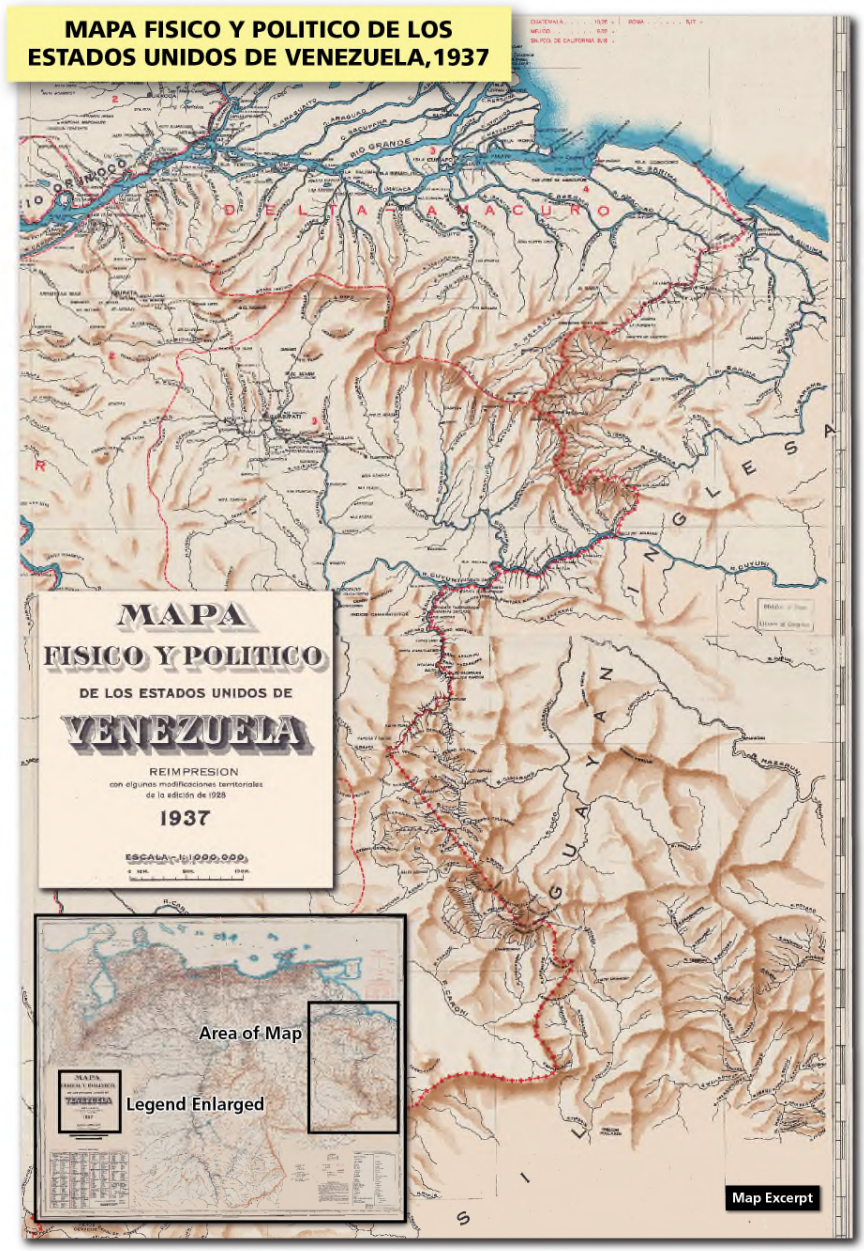
[233] *Letter* from P. Itriago Chacín, No. 1157/2 (3 Nov. 1932). MMG, Vol. III, Annex 55.

[234] Department of Internal Affairs of Venezuela, "Mapa Físico y Político de los Estados Unidos de Venezuela, Escala: 1: 1,000,000" (1a ed., 1928). MMG, Vol. II, Figure 4.8.

[235] "Mapa Físico y Político de los Estados Unidos de Venezuela" (1937), *reprint of* "Mapa Físico y Político de los Estados Unidos de Venezuela" (1928) (with territorial modifications). MMG, Vol. II, Figure 4.9.

Figure 4.8: Physical and Political Map of Venezuela, Commissioned by President J. V. Gomez (1928)

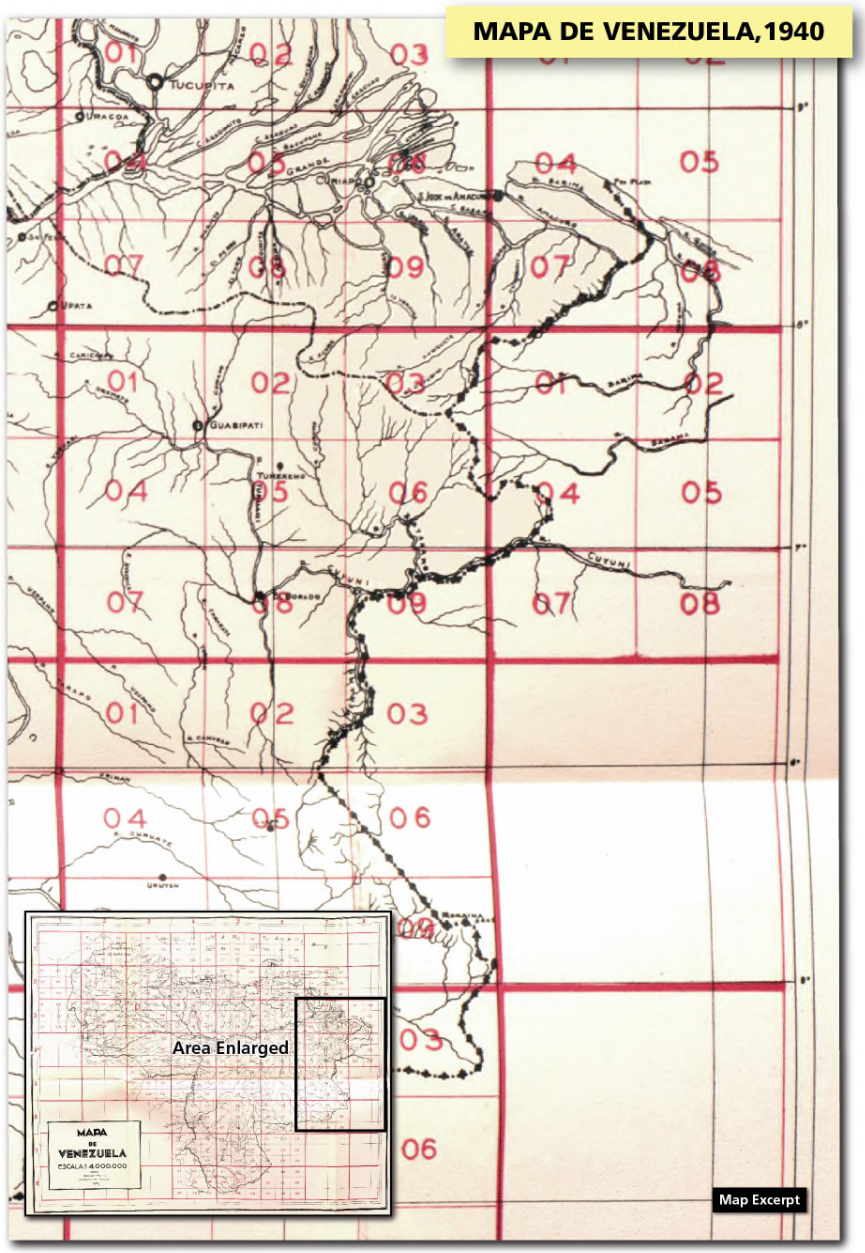
Figure 4.9: Physical and Political Map of Venezuela (1937)



4.44 In 1940, the Ministry of Public Projects and the National Cartography Directorate produced the *Atlas of Venezuela* (reproduced in **Figure 4.10**[236]), also in conformity with the 1899 Award and the 1905 Agreement.

[236] U.S. of Venezuela, Ministry of Public Works, National Cartography Directorate, Division of Map and Atlas, "Mapa de los EE.UU. de Venezuela" (1939, published in 1940). MMG, Vol. II, Figure 4.10.

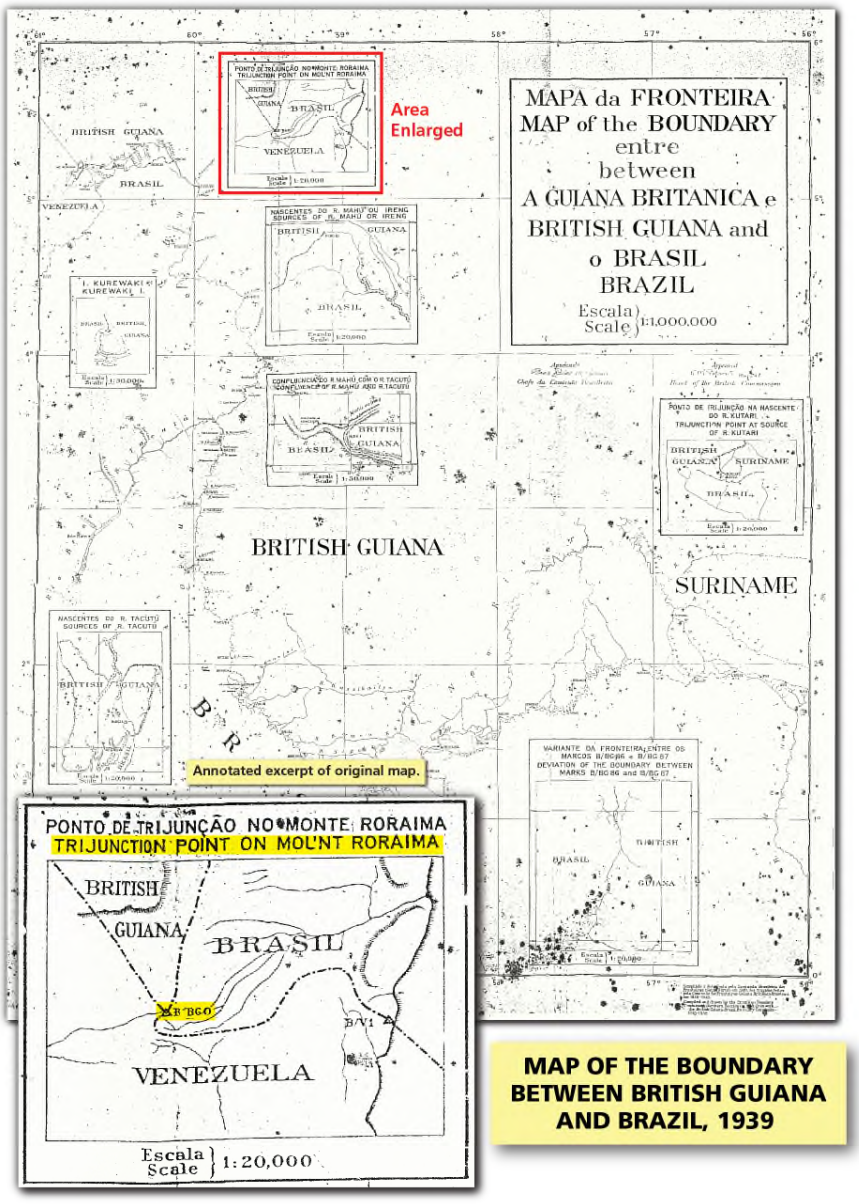
Figure 4.10. Atlas of Venezuela (1940)



4.45 To these may be added the official map published in 1939 by the British War Office, which shows the boundary between British Guiana and Brazil (**Figure 4.11**[237]). Venezuela could not have been unaware of this map which was the work of the Mixed Brazil-British Guiana Boundary Commission, with the participation of a Venezuelan Commissioner for fixing the tri-junction point between the three countries. Venezuela did not protest.

[237] British War Office, "Map of the Boundary between British Guiana and Brazil, Scale 1;1,000,000" (1939). MMG, Vol. II, Figure 4.11.

Figure 4.11. Map of the Boundary between British Guiana and Brazil (1939)



V. Venezuela's Declaration that the Boundary with British Guiana Was *Chose Jugée,* and its Repeated Official Statements Reaffirming the Legal Validity of the 1899 Award and the 1905 Agreement

4.46 In 1940 and 1941, with Britain fully engaged in war with the Axis Powers, articles began to appear in the nationalist Venezuelan press, expressing discontent with the 1899 Award and urging the Government to reclaim the portion of the Essequibo Region that the Arbitral Tribunal had awarded to British Guiana. These articles caused concern in London and prompted the British to seek reassurances from Venezuela of its continued acceptance of the Award and the boundary demarcated in the 1905 Agreement.

4.47 Venezuela responded in clear and express terms. In the words of its Foreign Minister, Dr Esteban Gil Borges, in April 1941, the boundary between Venezuela and British Guiana was "*chose jugée*":

> "Reports that a Caracas newspaper recently published series of three articles alleging that His Majesty's Government had unjustly appropriated a part of Venezuelan territory and incorporated it into British Guiana. Finally an award had been made which was unfair to Venezuela and which should therefore be upset.
>
> In reply to enquiry, Dr Gil Borges replies that *his view and that of Venezuelan Government were definitively* that matter was *chose jugée* and that views expressed by the paper never had been and were not now shared by him or his Government."[238]

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[238] *Letter* from the Venezuelan Foreign Minister, E. Gil Borges, to British Ambassador to Venezuela, D. Gainer (15 Apr. 1941). MMG, Vol. III, Annex 56 (emphasis added). During the proceedings on Jurisdiction, it was erroneously stated that Borges' reply was made in 1944. *Letter* from the Ambassador of the United Kingdom to Venezuela, to J.V.T.W.T. Perowne, U.K. Foreign Office (3 Nov. 1944), pp. 1-2. MG, Vol. II, Annex 11. *See also* Foreign Ministry of Guyana, THE NEW CONQUERORS: THE VENEZUELAN THREAT TO THE SOVEREIGNTY OF GUYANA (2016), p. 20 (emphasis in original). MMG, Vol. III, Annex 7 ("From time to time an odd article about British Guiana appears in the Press but that I need take no notice of that; the articles were obviously written

4.48 While the Venezuelan Government's position did not change, some nationalist groups and politicians continued to criticise the 1899 Award. In 1944, a British Colonial Office report stated that some Venezuelans, including politicians in the Venezuelan Congress, "feel a grievance" over the boundary settlement "and wish to re-open the matter", with some referring to the Award as an "unparalleled miscarriage of justice".[239]

4.49 Nevertheless, the Venezuelan Government made clear that, despite these sentiments it continued to accept the validity and binding character of the 1899 Award. That same year, in 1944, the Venezuelan Ambassador to the United States made the following statement in an address to the Pan-American Society in Washington:

> "*We have accepted the verdict of the arbitration for which we have so persistently asked*; but in the heart of every Venezuelan there is the undying hope that one day the spirit of equity will prevail in the world and that this will bring us the reparation which morally and justly is due to us."[240]

4.50 Venezuela's acceptance of "the verdict of the arbitration" of 1899 and the resulting 1905 Boundary Agreement continued through its accession to the United

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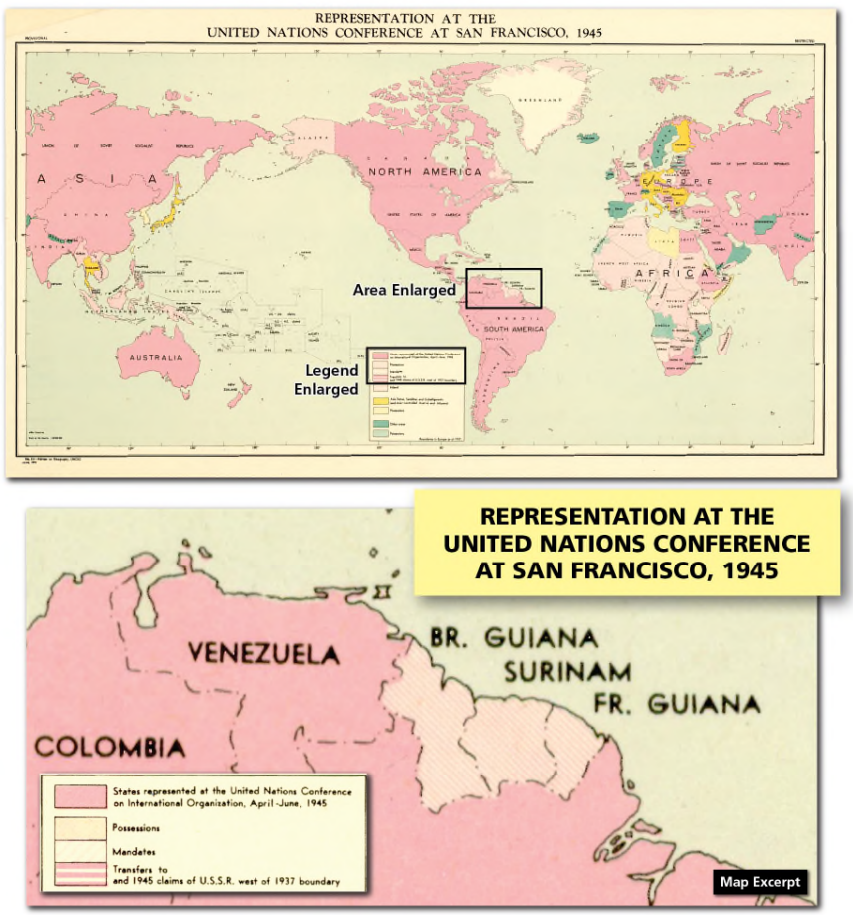
by persons of little knowledge who have never had access to official files. So far as the Venezuelan Government were concerned the one really satisfactory frontier Venezuela possessed (at that time) was the British Guiana frontier and it would not occur to them to dispute it." (emphasis omitted)).

[239] McQuillen & Brading, *Minutes regarding the Venezuelan - British Guiana Boundary Dispute* (10 Mar. 1944) (9 Sept. 1944). MMG, Vol. IV, Annex 88.

[240] *Speech* by the Venezuelan Ambassador to the United States, to the Pan-American Society of the United States (1944), p. 2. MG, Vol. II, Annex 9 (emphasis added).

Nations as one of its founding members in 1945, as reflected in the U.N. map published in that year (reproduced in **Figure 4.12**[241]).

Figure 4.12. Map Presented at United Nations Conference at San Francisco (1945)

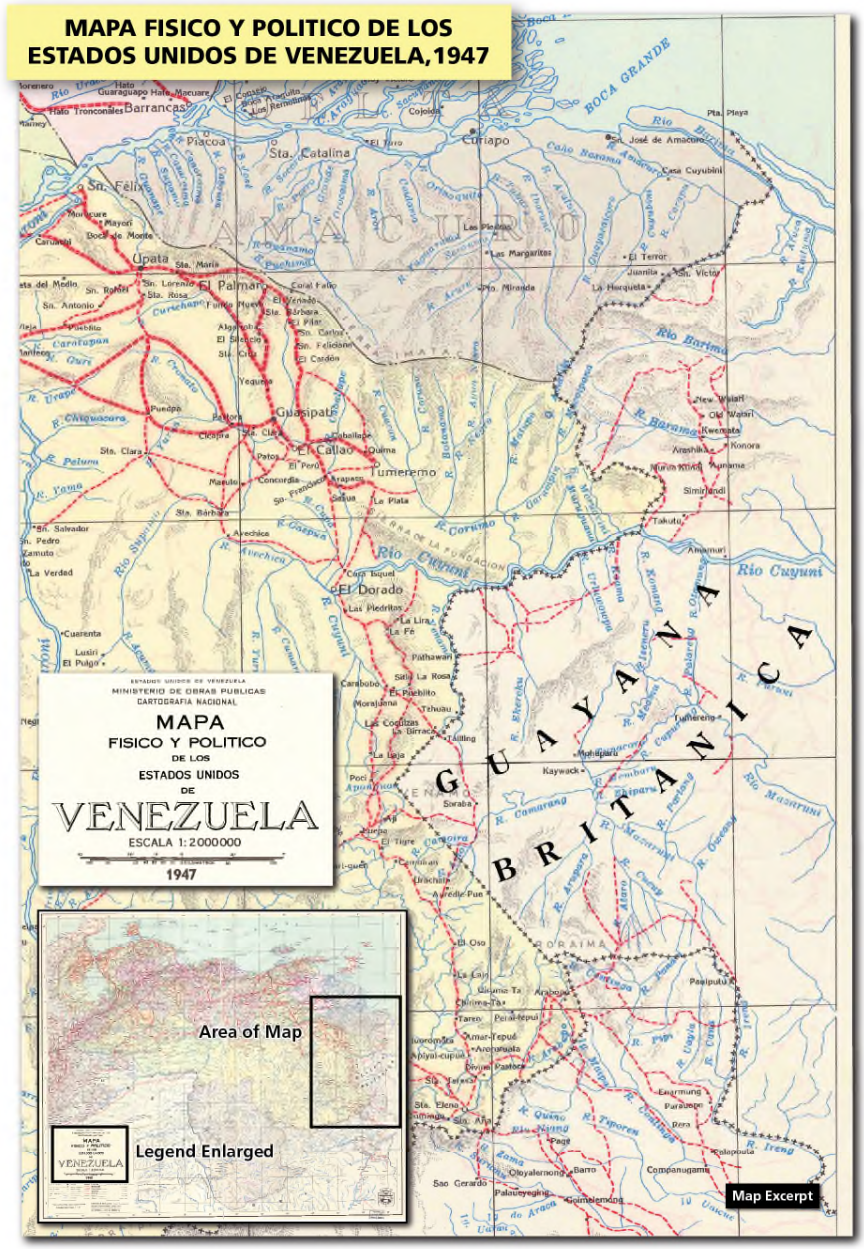


[241] "States Represented at the United Nations Conference on International Organisation", San Francisco (Apr.-June 1945). MMG, Vol. II, Figure 4.12.

4.51 Two years thereafter, in 1947, Venezuela's Ministry of Public Works published an official map (**Figure 4.13**[242]) that reaffirmed the same boundary between Venezuela and British Guiana.

[242] U.S. of Venezuela, Department of National Cartography, Ministry of Public Works, "Carta Aeronáutica de Venezuela, Escala: 1: 1,000,000 (5 sheets)" (1947). MMG, Vol. II, Figure 4.13.

Figure 4.13. Physical and Political Map of Venezuela (1947)



4.52 The following year, in 1948, Venezuela's Congress promulgated the Organic Law of the Federal Territories [*Ley orgánica de los Territorios Federales*], which confirmed that the Province of the Delta Amacuro, in Venezuela's northeast, was bordered in the east by British Guiana and that the border followed the boundary line demarcated in the 1905 Boundary Agreement in accordance with the 1899 Award:

> "Article 5. — The Delta Amacuro Federal Territory is formed by the region found within the following boundaries: the Gulf of Paria and the Atlantic Ocean to the north, the Atlantic Ocean and British Guyana *to the east, as defined by the Border Treaty between Venezuela and Great Britain*: 'From Punta Playa in a straight line to the confluence of the Barima and the Baruma. It continues along the mainstream of this river until its source. From this point along a straight line to the junction of the Haiwoa and the Amacuro. It continues along the mainstream of the Amacuro to its source in the Imataka Mountains; it continues southwest along the highest peaks of the Imataka to the highest point opposite the source of the Barima. Monagas State to the west, from which it is separated by the Caño Manamo and the Brazo del Orinoco until the foot of the Imataka Mountains between San Miguel and Aramaya; and Bolivar State to the south'."[243]

4.53 The map published by the Venezuelan Ministry of Public Works in 1950, reproduced in **Figure 4.14**,[244] also showed that that the boundary between Venezuela and British Guiana was the one determined by the Award of 1899 and agreed in 1905.

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[243] U.S. of Venezuela, *[Ley orgánica de los Territorios Federales] Organic Federal Territories Law* (14 Sept. 1948), Article 5. MMG, Vol. IV, Annex 89 (emphasis added).

[244] U.S. of Venezuela, Department of National Cartography, Ministry of Public Works, "Mapa Físico y Político de los Estados Unidos de Venezuela" (1950). MMG, Vol. II, Figure 4.14.

Figure 4.14. Physical and Political Map of Venezuela (1950)

4.54 In the early 1950s, when British Guiana began to prepare for self-rule as a first step toward its eventual independence in accordance with Great Britain's obligations under the U.N. Charter, Venezuelan officials commented that the change in British Guiana's status should not prejudice its "just demand" for an "equitable rectification of the frontier".

4.55 As expressed in 1954 by Venezuela's representative to the Tenth Inter-American Conference:

> "In the particular case of the British Guiana, the Government of Venezuela declares that no change of status which may occur in that neighbouring country can prevent the National Government from pressing its just demand that the injury suffered by the Nation when its frontier line with British Guiana was demarcated should be redressed by an equitable rectification of the frontier, in view of the unanimous feelings of the Venezuelan people and the special circumstances prevailing at the time. Hence, no decision on the subject of colonies adopted at the present Conference can adversely affect Venezuela's rights in this respect, nor can it be interpreted in any way as a renunciation of those rights."[245]

4.56 The same position was expressed by Venezuela's Ambassador in Washington in a 1961 address to the Pan-American Society:

> "In the opinion of the Government of Venezuela, no change of status which may occur in British Guiana as a consequence of the international situation, of any measures which may be adopted in the future or of the advance of the territory's inhabitants towards self-determination will prevent Venezuela, in view of the special circumstances prevailing when the frontier line with the British Guiana was defined, from pressing its just demand that the injury

[245] *Ibid.*, p. 18; *See also Minutes and Documents* from the Tenth Inter-American Conference (1-28 Mar. 1954). MMG, Vol. IV, Annex 90.

> suffered by the Nation on that occasion should be redressed by an equitable rectification of the frontier."[246]

4.57 Despite Venezuela's nascent calls for an "equitable rectification of the frontier", beginning in the 1950s, it did not challenge the *legal validity* or *binding nature* of the 1899 Award, the 1905 Agreement or the resulting boundary with British Guiana. Instead, it hoped to obtain relief from the "injury suffered by the Nation when its frontier line with British Guiana was demarcated" by means of a new, more "equitable" agreement with Great Britain. There was no rejection of the 1899 Award, denunciation of the 1905 Agreement, or questioning of their legal status, and no protest to such effect was made to the British or to any other party. Meanwhile, official Venezuelan maps continued to recognise the boundary with British Guiana in conformity with the 1899 Award and the 1905 Agreement.

4.58 **Figure 4.16**,[247] **Figure 4.17**[248] and **Figure 4.18**[249] depict maps published by the Venezuelan Ministry of Public Works in 1956, 1960 and 1962, respectively,

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[246] *Letter* from the Permanent Representative of Venezuela to the Secretary-General of the United Nations (14 Feb. 1962), *reprinted in* U.N. General Assembly, Fourth Committee, 16th Session, *Information from Non-Self-Governing Territories transmitted under Article 73 of the Charter*, U.N. Doc A/C.4/536 (15 Feb. 1962), p. 16. MG, Vol. II, Annex 17.

[247] U.S. of Venezuela, Department of National Cartography, Ministry of Public Works, "Mapa de la República de Venezuela" (1956). MMG, Vol. II, Figure 4.16. *See also* Republic of Venezuela, Department of National Cartography, Ministry of Public Works, "Mapa Físico y Político de la República de Venezuela" (1955). MMG, Vol. II, Figure 4.15 (in Vol. II only).

[248] U.S. of Venezuela, Department of National Cartography, Ministry of Public Works, "Mapa de la República de Venezuela" (1960). MMG, Vol. II, Figure 4.17.

[249] U.S. of Venezuela, Department of National Cartography, Ministry of Public Works, "Mapa de la República de Venezuela" (1962). MMG, Vol. II, Figure 4.18.

all of which recognise the boundary established by the 1899 Award and the 1905 Agreement.

Figure 4.16. Official Map of Venezuela (1956)

Figure 4.17. Official map of Venezuela (1960)

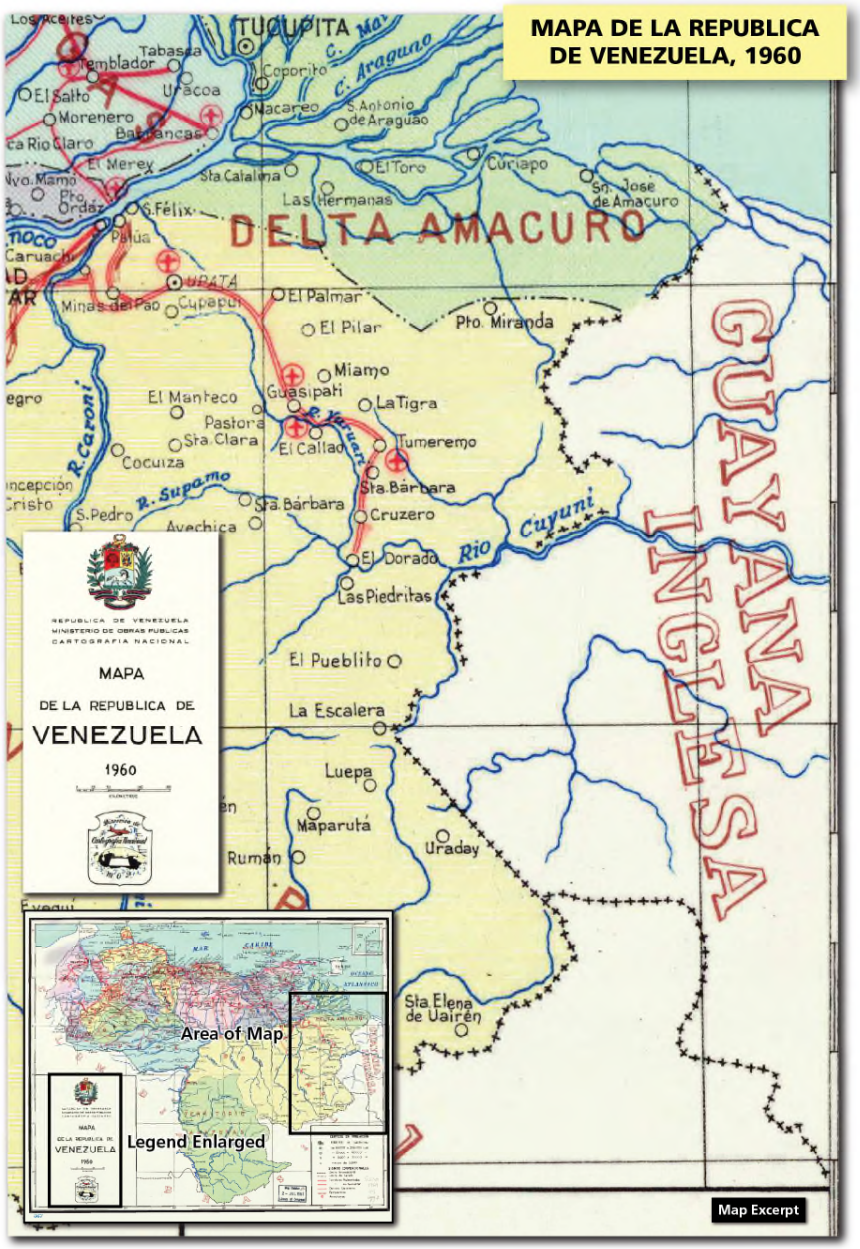

Figure 4.18. Official map of Venezuela (1962)

4.59 In sum, between 1899 and 1962, Venezuela consistently manifested its recognition and acceptance of the 1899 Arbitral Award and the 1905 Boundary Agreement, without exception, in a plethora of official statements and actions, including:

(i) the express acceptance of the Award by Venezuela's highest authorities;

(ii) the demarcation of an agreement upon a boundary drawn in strict accordance with the 1899 Award;

(iii) the ratification of the 1905 Boundary Agreement by the Federal Executive;

(iv) Venezuela's refusal to accept any modification of the boundary that deviated in the slightest degree from the terms of the 1899 Award;

(v) the agreement with Brazil and with British Guiana on a tri-junction point consistent with the 1899 Award and the 1905 Agreement;

(vi) Venezuelan officials' assertions to the British that the boundary was *chose jugée*;

(vii) the continuous and unbroken recognition and respect for the agreed boundary for more than half a century;

(viii) Venezuela's failure to protest or question the legal validity or binding nature of the Award or the 1905 Boundary Agreement between 1905 and 1962; and, finally,

(ix) the publication of official maps that uniformly recognised the boundary as determined by the 1899 Award and demarcated by the 1905 Agreement.

4.60 In regard to the maps, Guyana is aware that they may have limited evidentiary value in the context of territorial disputes;[250] however, in the present case, the maps shown above offer a different and more authoritative conclusion: as with the map annexed to the 1905 Agreement, such maps, drawn and published by official branches of the Venezuelan Government, "fall into the category of physical expressions of the will of the State ... concerned".[251] Moreover, they have at least the legal value "of corroborative evidence endorsing a conclusion at which [the Court will arrive] by other means unconnected with the maps".[252]

[250] *See* the celebrated analysis by the Chamber of the Court in its pre-cited Judgment of 22 December 1986, (*Frontier Dispute (Burkina Faso/Republic of Mali)*, pp. 582-583, paras. 54-56). *See also Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, 19 November 2012, I.C.J. Reports 2012, p. 661, para. 100; *Kasikili/Sedudu Island (Botswana/Namibia)*, Judgment, I.C.J. Reports 1999 (hereinafter "*Kasikili/Sedudu Island (Botswana/Namibia)*"), p. 1098, para. 84.

[251] *Frontier Dispuste (Burkina Faso/Republic of Mali)*, pp. 582-583, para. 54-56.

[252] *Ibid*.

CHAPTER 5

VENEZUELA'S REPUDIATION OF THE 1899 AWARD

I. Venezuela's Change of Position on the Arbitral Award

5.1 After more than sixty years of affirmation and acceptance of the 1899 Award and the 1905 Agreement, Venezuela changed course in 1962. In that year, Venezuela made its first formal contention that the 1899 Award was null and void. Previously, in the 1950s, as described in the preceding Chapter, Venezuela had begun to express its discontent with the boundary that resulted from the Award and its desire for an "equitable rectification", but it never challenged the Award's legal validity or binding character. Only in 1962, for the first time, did Venezuela officially change its position and claim that the Award was invalid.

5.2 Venezuela's change of position followed closely upon the United Kingdom's decision to grant independence to British Guiana and its acceleration of the decolonisation process. These events were precipitated by the United Nations General Assembly's near-unanimous adoption, on 14 December 1960, of Resolution No. 1514 — the Declaration on the Granting of Independence to Colonial Countries and Peoples. That historic Declaration called upon all colonial powers, *inter alia*, to respect the right of self-determination of their colonised peoples, including the right to choose independence from colonial rule. One year later, on 18 December 1961, the Premier of British Guiana, Dr Cheddi Jagan, petitioned the Special Political and Decolonization Committee of the General Assembly — the Fourth Committee — to support "the immediate political

independence of his country".[253] In response, the United Kingdom informed the Committee that it would soon hold a constitutional conference on the independence of British Guiana.[254]

5.3 Within one month of Dr Jagan's petition to the Fourth Committee, on 15 January 1962, Venezuela delivered a memorandum to the United States Department of State in Washington asserting that the 1899 Award was inequitable, indicating that it would bring its complaint to the attention of the Fourth Committee to forestall British Guiana's independence, and calling for negotiations with the United Kingdom to reach agreement on a new boundary with British Guiana. The memorandum to the U.S. Department of State took pains to make clear, however, that Venezuela "was not questioning the legality of the Arbitral Award". As reported by the U.S. Department of State:

> "Inasmuch as Venezuela has long cherished the aspiration of having the 1899 Arbitral Award revised, it felt obliged to put its aspiration on the record of the United Nations. …
>
> *Venezuela was not questioning the legality of the Arbitral Award* but felt it only just that the Award should be revised since it was handed down by a Tribunal of five judges which did not include on it any Venezuelans; Venezuela believes that the two British judges and so-called neutral Russian judge had colluded in arriving at a decision to support the British claims; and only valiant action by the two US judges prevented the Award from recognising the extreme

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[253] U.N. General Assembly, Fourth Committee, 16th Session, 1252nd Meeting, *Agenda item 39: Information from Non-Self-Governing Territories transmitted under Article 73 of the Charter*, U.N. Doc A/C.4/SR.1252 (18 Dec. 1961). MG, Vol. II, Annex 14.

[254] *Ibid*.; *see also Lette*r from the Permanent Representative of the United Kingdom, to the Secretary-General of the United Nations (15 Jan. 1962), *reprinted in* U.N. General Assembly, Fourth Committee, 16th Session, *Information from Non-Self-Governing Territories transmitted under Article 73 of the Charter*, U.N. Doc A/C.4/520 (16 Jan. 1962). MG, Vol. II, Annex 15.

> British claim. For these reasons Venezuela *considers the Award to have been inequitable and questionable from a moral point of view (viciado).*"[255]

5.4 Despite Venezuela's assurances to the United States that it was not questioning the legality of the 1899 Award, just one month later it changed position and did just that. In a letter from its Permanent Representative to the United Nations, Dr Carlos Sosa Rodríguez**,** to U.N. Secretary-General, U Thant, dated 14 February 1962, Venezuela declared for the first time that "it cannot recognize an award" that was "the result of a political transaction".[256] Given the lack of any prior protest, Venezuela referred only to the two official statements quoted in Chapter 4, made in 1954 and 1961, in which it asserted that the boundary was inequitable and called for its rectification, but refrained from challenging the legal validity of the 1899 Award or the boundary itself.[257] Venezuela's letter asserted, for the first time, that:

> "The award was the result of a political transaction carried out behind Venezuela's back and sacrificing its legitimate rights. The frontier was demarcated arbitrarily, and no account was taken of the specific rules of the arbitral agreement or of the relevant principles of international law.
>
> Venezuela cannot recognize an award made in such circumstances. Ever since the date of the decision, Venezuelan public opinion has unanimously refused to acknowledge its validity and has demanded

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[255] U.S. Department of State, *Memorandum of Conversation*, No. 741D.00/1-1562 (15 Jan. 1962) (emphasis added) (partial emphasis in original). MG, Vol. II, Annex 16.

[256] *Letter* from the Permanent Representative of Venezuela to the Secretary-General of the United Nations (14 Feb. 1962), *reprinted in* U.N. General Assembly, Fourth Committee, 16th Session, *Information from Non-Self-Governing Territories transmitted under Article 73 of the Charter*, U.N. Doc A/C.4/536 (15 Feb. 1962). MG, Vol. II, Annex 17.

[257] *See supra* paras. 4.55-4.56.

> that the injustice suffered by Venezuela should be redressed. When it obtained clear evidence of the defects which invalidate that decision, the Government of Venezuela explicitly reserved its rights at the Fourth Meeting of Consultation of Ministers of Foreign Affairs of the American Continent in 1951 (annex II) and at the Tenth Inter-American Conference in 1954 (annex III)."[258]

5.5 The change in Venezuela's position on recognition of the 1899 Award occurred at a time when Cold War tensions were at a peak, and Western countries, especially the United States, were increasingly concerned about the spread of communism in Latin America and the Caribbean, including the fear of a "communist takeover in British Guiana" following the Cuban Revolution of the late 1950s.[259] Venezuela sought to take advantage of this political context. Its President, Rómulo Betancourt, defended his country's challenge to the 1899 Award both as a means to delay British Guiana's independence and to establish a "*cordon sanitaire*" between Venezuela and a potential communist enclave in the former colony. President Betancourt's strategy was revealed in a May 1962 despatch from the U.S. Ambassador in Caracas to the U.S. State Department in Washington:

> "Through a series of conferences with the British before Guiana is awarded independence a *cordon sanitaire* would be set up between the present boundary line and one mutually agreed upon by the two countries. Sovereignty of this slice of British Guiana would pass to Venezuela but a carefully worded agreement would give preference to British, Venezuelan and [the] U.S. capital to develop the zone. The Venezuelans are convinced that the area contiguous to the

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[258] *Letter* from the Permanent Representative of Venezuela to the Secretary-General of the United Nations (14 Feb. 1962), *reprinted in* U.N. General Assembly, Fourth Committee, 16th Session, *Information from Non-Self-Governing Territories transmitted under Article 73 of the Charter*, U.N. Doc A/C.4/536 (15 Feb. 1962). MG, Vol. II, Annex 17.

[259] *Memorandum* on British Guiana from Secretary of State Dean Rusk for President John F. Kennedy *enclosing Action Program for British Guiana* (12 July 1962), p. [pdf] 25. MMG, Vol. II, Annex 72.

> present boundary abounds in mineral resources .... Of course, the reason for the existence of the strip of territory, according to the President, is the danger of communist infiltration of Venezuela from British Guiana if a Castro-type government ever were established."[260]

5.6 A subsequent memorandum from U.S. Secretary of State Dean Rusk to President John F. Kennedy made clear that it was U.S. strategy to prevent the establishment of a communist government in British Guiana by encouraging Venezuela to pursue territorial claims that would destabilise the colony and delay its independence:

> "Should the program described above fail completely there are other actions which could be taken to hamper or prevent a communist takeover in British Guiana. Each has several drawbacks and is less desirable than the action proposed. .... [Which was to] [e]ncourage Venezuela and possibly Brazil to pursue their territorial claims. This could result in an indefinite delay in independence."[261]

5.7 Venezuela has stated that it reactivated its territorial claims under pressure from the United States. President Hugo Chávez publicly disclosed this on various occasions, including, for example, in February 2007, when he reported that President Betancourt's Government had been pressured by the U.S. to press Venezuela's claim to the territory east of the boundary line established by the 1899 Award and the 1905 Agreement:

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[260] *Foreign Service Despatch* from C. Allan Stewart, U.S. Ambassador to Venezuela, to the U.S. Department of State (15 May 1962) (emphasis in original). MG, Vol. II, Annex 21.

[261] *Memorandum* on British Guiana from Secretary of State Dean Rusk for President John F. Kennedy *enclosing Action Program for British Guiana* (12 July 1962), p. [pdf] 25. MMG, Vol. IV, Annex 72.

> "In February 2007, President Chavez [sic] claimed, and since then has repeated on several occasions, that the renewal of the Venezuelan claim to Essequibo territory in 1962 by the government of Romulo Betancourt was the result of pressure from the United States, which was supposedly interested in destabilising the autonomous (though not yet independent) government of the Prime Minister of what was then known as British Guiana, Cheddi Jagan, who was a Marxist — a self-confessed Leninist."[262]

5.8 Not surprisingly, these were not the grounds cited by Venezuela in 1962 for its abrupt *volte face* on the validity of the 1899 Award and the resulting boundary with British Guiana. The first formal challenge to the Award was made by Venezuela's Permanent Representative to the United Nations, Carlos Sosa Rodriguez, before the Fourth Committee of the U.N. General Assembly on 22 February 1962, while the Committee was discussing the question of British Guiana's decolonization. Exercising his right of reply in the Fourth Committee of the United Nations General Assembly on 22 February 1962, the Representative of the United Kingdom, Sir Hugh Foot, stated that:

> "the United Kingdom government regarded the question of the western boundary of British Guiana with Venezuela as finally settled by the award of the Tribunal of Arbitration which had followed the Treaty of 2 February 1897. Under article XIII of that Treaty both Governments had pledged themselves to accept the Tribunal's award as 'a full, perfect and final settlement'."[263]

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[262] S. Garavini Di Turno, "[La traición de Chávez] Chávez's treason", *El Imparcial* (22 Jan. 2012). MMG, Vol. III, Annex 4.

[263] *Statement* made by the Representative of the United Kingdom at the 132nd meeting of the Fourth Committee on 22 February 1962, *reprinted in* U.N. General Assembly, Fourth Committee, 16th Session, *Information from Non-Self-Governing Territories transmitted under Article 73 of the Charter*, U.N. Doc A/C.4/540 (22 Feb. 1962), para. 42 (emphasis in original). MG, Vol. II, Annex 23.

5.9 The legal grounds for Venezuela's challenge were not fully provided until 1 October 1962, in a speech to the General Assembly by Venezuela's Foreign Minister, Dr Falcon Briceño. According to Dr Briceño, Venezuela could no longer accept the validity of the Arbitral Award because it "was the outcome of political compromise rather than of the application of the rules of law to which the parties had agreed".[264] This rendered it, in Venezuela's view, null and void.

5.10 The basis for Venezuela's claim that the 1899 Award was the product of a "political compromise" was, according to Dr Briceño, a memorandum allegedly drafted on 8 February 1944 by Venezuela's counsel in the arbitral proceedings, Mr Severo Mallet-Prevost; this was some forty-five years after the Award was issued ("the Mallet-Prevost Memorandum" or "the Memorandum"). The Memorandum was first made public in 1949, one month after the author's death, allegedly at his request. In it, Mr Mallet-Prevost expressed the opinion that the boundary established by the Arbitral Tribunal was the result of a "political transaction" between the Russian President of the Tribunal, Prof Fyodor Martens, acting on behalf of his own Government, and the British, by which Britain would receive more territory than it deserved in the Arbitration in exchange for British support for Russian objectives in another part of the world. No documents were cited in Mr Mallet-Prevost's Memorandum, and no other supporting evidence for Mr Mallet-Prevost's opinion was provided or referenced. He did not specify how he learned of the purported "deal" between Russia and Britain brokered by Prof Martens or offer any indication of any source for this belief.

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[264] *Speech* by Dr. Marcos Falcón Briceño, *reprinted in* U.N. General Assembly, 17th Session, *Agenda item 9*, U.N. Doc. A/PV.1138 (1 Oct. 1962), pp. 242-246, para. 68.

5.11 By the time it changed position in 1962, Venezuela had been aware of this Memorandum for at least thirteen years, yet it had never previously made public reference to it, much less cited it as a basis for challenging the Arbitral Award. Nevertheless, in his 1962 speech to the General Assembly Dr Briceño quoted from it extensively, referring to it as the "inside story" of the Arbitration and the 1899 Award.[265] The Mallet-Prevost document, its blatant errors and overall lack of credibility, and the inappropriateness of Venezuela's reliance on it, are addressed in detail in Chapter 8. It is worth noting here, however, that Dr Briceño assured the members of the General Assembly that Venezuela had been "able to obtain evidence which corroborates Mallet-Prevost's testimony", which, he pledged, would be published "in due course".[266] Yet, despite his assurances, no such evidence has ever been made public. To the contrary, published accounts of the Arbitral Tribunal's deliberations, from the private correspondence and memoirs of the participants, tell a different story, as described in Chapter 8.

5.12 In fact, Prof Martens, in his diary, confirmed that the British Arbitrators, especially Lord Russell, were displeased with his efforts to obtain concessions from them in order to produce a unanimous Award:

> "*I opened the session with the story about my negotiations and made it clear that I find a firm basis for the possible and complete agreement in the concessions made by the Americans*. My speech irritated Lord Russell, who is inherently bad-tempered. He started to talk defiantly, saying that the concluded negotiations between the chairman and the members of the tribunal seem awkward and confusing to him and that he is not going to make any concessions. My brief and clear response was that I consider it not only as my

[265] *Ibid*, para. 68.

[266] *Speech* by Dr. Marcos Falcón Briceño, *reprinted in* U.N. General Assembly, 17th Session, *Agenda item 9*, U.N. Doc. A/PV.1138 (1 Oct. 1962), pp. 242-246, paras. 68-70.

> right, but rather as a moral *duty* to carry out such negotiations to ensure full unanimity between the arbitrators and to achieve the greatest objective — a unanimous arbitral award. Due to this I consider the accusations of Lord Russell groundless and I do not regret about the measures I undertook, which I always immediately communicated to both sides."[267]

5.13 The following passage from Prof Martens' diary further dispels the suggestion that he colluded with the British to produce a result in their favour:

> "Lords Russell and Collins are still angry with me as I literally *forced* them to be more flexible and to waive their excessive demands.… Even though I did not take any side they still felt that I put them in such a position that they had to make one more concession and to accept my line from Cap Palaya. It was obvious that if the British had not agreed to my compromise, I would have joined the Americans rather than them. This is the reason of Lords Russell and Collins, and that is how I managed to have the unanimity of all the arbitrators. This is a great triumph!"[268]

5.14 To be sure, Prof Martens, as President of the Tribunal, sought to achieve a unanimous Award, which the Arbitrators appointed by the two opposing sides could accept. He made no secret of his objective in this regard:

> "I was extremely happy about my triumph of having a unanimous arbitral award, despite the complete opposition of interests, views and law systems of both parties."[269]

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[267] *Private Diary Entries* of Prof Fyodor Fyodorovich Martens (4 June 1899 - 3 Oct. 1899). (emphasis in original). MMG, Vol. III, Annex 33.

[268] *Ibid.*

[269] *Ibid.*

5.15 However, there is no reference in the correspondence, memoirs or diaries of any of the members of the Arbitral Tribunal to an alleged "deal" between Britain and Russia, let alone one that affected the Arbitral Award or the deliberations that produced it.

II. The Examination of Archival Documents and the Conclusion of the Geneva Agreement

5.16 The reaction of the British Government to Venezuela's 1962 contention that the 1899 Award was "null and void" was strong and unequivocal.

5.17 The response to Foreign Minister Briceño's statement in the U.N. General Assembly was given by its then deputy-Permanent Representative, Mr Colin Crowe, who emphasised that his Government still considered that the boundary of British Guiana with Venezuela had been finally settled by the Award which the Arbitral Tribunal had announced on 3 October 1899, and that the frontier had been demarcated in accordance with that Award by a boundary commission appointed by the British and Venezuelan Governments and recorded in an agreement signed by the British and Venezuelan boundary commissioners on 10 January 1905.[270] Mr. Crowe further highlighted that the composition and rules of procedure of the Arbitral Tribunal had been laid down by the Treaty and, most important of all, under Article XIII of that instrument the two Governments had pledged themselves to accept the Tribunal's award as "a full, perfect and final settlement".[271] His

[270] *Speech* by Dr. Marcos Falcón Briceño, *reprinted in* U.N. General Assembly, 17th Session, *Agenda item 9*, U.N. Doc. A/PV.1138 (1 Oct. 1962), para. 180.

[271] *Statement* made by the Representative of the United Kingdom at the 349th meeting of the Special Political Committee on 13 November 1962, *reprinted in* U.N. General Assembly, Special Political Committee, 17th Session, *Question of Boundaries between Venezuela and the Territory of British Guiana*, U.N. Doc A/SPC/72 (13 Nov. 1962), p. 2. MG, Vol. II, Annex 24.

Government therefore could not agree that there could be any dispute over the question settled by the Award.

5.18 The British representative thus:

> "[urged] the Committee to consider most seriously whether, after fifty-seven years from the date on which a frontier settlement is put into effect, it is allowed to be re-opened, particularly when there is no new evidence which has to be taken into account."[272]

5.19 While it asserted and maintained this principled view, Britain feared that, given Venezuela's change of position, a newly independent Guyana would be vulnerable to a military seizure of its territory by far superior Venezuelan armed forces. Accordingly, notwithstanding Britain's conviction that Venezuela's claim was entirely without merit, its representative to the Fourth Committee, Mr Crowe, made a proposal for a peaceful resolution of the controversy. While emphasising that the British Government did not accept that there was a boundary dispute to discuss, he proposed that, to enable British Guiana to "move forward" with its independence "without a shadow of a doubt about its frontiers", a tripartite examination of the "voluminous documentary material relevant to this question" could be undertaken.[273] Mr Crowe made clear that this was not "an offer to engage in substantive talks about revision of the frontier", as this been settled by the Arbitral Award in 1899.[274] Instead, he explained, the British offer was intended only "to dispel any doubts which the Venezuelan Government may still have about

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[272] *Ibid.*, p. 15.

[273] *Ibid.*, p. 17.

[274] *Ibid.*, p. 17.

the validity or propriety of the arbitral award".[275] Venezuela accepted the British proposal, and the Chairman of Fourth Committee noted that, an agreement having been reached, there was no need for further debate.[276]

5.20 Pursuant to this agreement, Venezuelan experts travelled to London to examine the British archives, following which British experts travelled to Caracas to study the Venezuelan archives. Upon his examination of the Venezuelan archives, Sir Geoffrey Meade, who was the United Kingdom's expert and also acted on behalf of British Guiana at its request, reported that Venezuela had no evidence to support Mr Mallet-Prevost's opinion that the 1899 Award was the product of an Anglo-Russian political deal:

> "The main result of my visit to Caracas may therefore be summed up as showing that Dr Falcon's claim in his United Nations speech that 'the recent discovery of extraordinary important historical documents enable us to be acquainted with the history of the Arbitral award' is not justified.
>
> In fact he took his stand on Mallet-Prevost's memorandum which however, contains only one new factor — which is only the writer's personal opinion — that the award was influenced by a Russo-British deal. So far the Venezuelan authorities have been unable to supply a single shred of evidence to support this opinion and I feel confident that the references asked for ... will not add any substance to an aged lawyer's flights of fancy which he was suffering from the immediate after-effect of the receipt of a high Venezuelan decoration."[277]

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[275] *Ibid.*, p. 17.

[276] *Ibid.*, p. 17.

[277] United Kingdom, Department of External Affairs, *Memorandum: Venezuelan Claim to British Guiana Territory*, No. CP(64)82 (25 Feb. 1964) (emphasis omitted). MG, Vol. II, Annex 26.

5.21 The "high Venezuelan decoration" to which Sir Geoffrey refers was, in fact, Venezuela's highest civilian decoration: the Order of the Liberator. It was bestowed on Mr Mallet-Prevost by the President of Venezuela in January 1944, one month before Mr Mallet-Prevost produced his Memorandum.

5.22 The examination of archival documents concluded on 3 August 1965, with the exchange of the experts' reports. These were diametrically opposed; Venezuela's experts claimed the 1899 Award was "void",[278] while Meade and his colleagues concluded there was no evidence whatsoever to support this contention.[279] In the same year, Venezuela published a new official map — reproduced in **Figure 5.1**. Physical and political map of Venezuela[280] — designating "Guayana Esequiba" as a "Zona en Reclamación"; a territory which was to be "reclaimed" in disregard of the 1899 Award.

[278] Hermann González Oropeza, S.J. & Pablo Ojer, *[Informe que los expertos venezolanos para la cuestión de límites con Guayana Británica presentan al Gobierno Nacional] Report submitted by the Venezuelan Experts to the National Government on the Issue of the Boundaries with British Guiana* (18 Mar. 1965), p. 43. MMG, Vol. IV, Annex 74.

[279] Sir Geoffrey Meade, *Report on the Exposition presented by the Venezuelan Experts* (3 Aug. 1965). MMG, Vol. IV, Annex 75.

[280] U.S. of Venezuela, Department of National Cartography, Ministry of Public Works, "Mapa Físico y Político de la República de Venezuela, Escala 1:4.000.000" (1965). MMG, Vol. II, Figure 5.1.

Figure 5.1. Physical and Political Map of Venezuela (1965)

5.23 In view of the urgency created by the imminent independence of British Guiana, and Venezuela's increasingly aggressive rhetoric in regard to its "reclaimed" territory, the parties agreed to meet in London to attempt to reach agreement on a peaceful means of resolution of the controversy. A Joint Communiqué was released on 10 December 1965, which stated that "[i]deas and proposals for a practical settlement of the controversy were exchanged".[281] Negotiations continued in Geneva on 16-17 February 1966, culminating in the 1966 Geneva Agreement which set out the agreed procedures for choosing the means for resolving the controversy arising from Venezuela's contention that the 1899 Award is null and void. The circumstances leading to the negotiation and execution of the Geneva Agreement are described in Guyana's Memorial on Jurisdiction, at paragraphs 2.4 to 2.49, and in the Court's Judgment on Jurisdiction, at paragraphs 31 to 44.

5.24 As further described in Guyana's Memorial on Jurisdiction, at paragraphs 2.70 to 2.73, and the Court's Judgment on Jurisdiction, at paragraphs 54 to 60, the dispute resolution procedure under the Geneva Agreement provided for a "Good Offices Process" and "enhanced mediation" under the auspices of the U.N. Secretary-General, which took place between 1990 and 2014 and in 2017. Throughout that period, Venezuela maintained the position, first formally articulated in 1962, that the 1899 Arbitral Award was null and void because of the alleged collusion between Great Britain and Russia to produce a boundary between British Guiana and Venezuela that was more favourable to Great Britain, and the conspiracy between the President of the Tribunal and the British Arbitrators to

[281] Government of the United Kingdom, *Record of Discussions between the Foreign Secretary, the Venezuelan Minister for Foreign Affairs and the Premier of British Guiana at the Foreign Office on 9 December, 1965*, No. AV 1081/326 (9 Dec. 1965). MG, Vol. II, Annex 26.

implement this illicit “deal”. However, despite numerous opportunities to do so, and requests by Guyana and the Secretary-General’s representative, Venezuela never — not once — presented any evidence in support of these allegations.

5.25 The following Chapters 6 through 9 apply the relevant legal principles to the facts presented in Chapters 2 through 5.

CHAPTER 6

THE 1899 AWARD WAS INTENDED TO BE FINAL AND BINDING, AND IS ENTITLED TO A PRESUMPTION OF VALIDITY

6.1 The 1899 Arbitral Award is final and binding under the terms of the 1897 Treaty of Washington, and it benefits from a legal presumption of validity. As such, and as this Chapter demonstrates, a party alleging the Award's nullity bears the burden of proving the existence of one of the legally-recognised grounds for nullification at the time it was rendered, by clear and convincing evidence.

I. The 1899 Award Is Final and Binding

6.2 It is a fundamental principle of international law that arbitral awards are final and binding. Such was the case when Great Britain and Venezuela sought to establish their boundary through international arbitration, and it continues to be the case up to this day. This general rule was, furthermore, specifically agreed upon by the parties in the 1897 Washington Treaty, and it was not displaced by the 1966 Geneva Agreement, which recognised the existence of a controversy arising from Venezuela's belated claim of nullity and established procedures for settling that controversy, without affecting the validity of the 1899 Award.

A. Arbitral Awards Are Final and Binding as a Matter of Law

6.3 Where disputing States have consented to arbitration, the resulting arbitral awards are binding on them as a matter of international law. The binding character of arbitral awards entails their finality, unless otherwise explicitly agreed by the

parties. This principle can be traced back to Grotius[282] and has been repeatedly confirmed since the *Alabama Claims* case, widely recognised as inaugurating the era of modern inter-State arbitration.[283] In 1872, the British arbitrator in the *Alabama Arbitration* dissented from the final award, but nevertheless acknowledged that "respect ... is due to the decision of a tribunal by whose award [the parties have] freely consented to abide".[284]

6.4 In 1874, Professor L. Goldschmidt of Leipzig, Rapporteur of the *Institut de Droit International* on International Arbitration, concluded that the finality of arbitral awards was already well "recognized in modern law".[285] In August 1875, the *Institut* adopted the Draft Regulations for International Arbitral Procedure (the

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[282] *See Case concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, Judgment, Dissenting Opinion of Judge Weeramantry, I.C.J. Reports 1991 (hereinafter "*Case concerning the Arbitral Award of 31 July 1989, Dissenting Opinion Weeramantry*"), p. 156 ("International law, though still an infant science, has made remarkable progress since the days of Grotius who, at a very rudimentary stage of its evolution, perceived the need to clothe the international arbitral decision with finality and unquestioned validity".).

[283] Shabtai Rosenne, INTERPRETATION, REVISION AND OTHER RECOURSE FROM INTERNATIONAL JUDGMENTS AND AWARDS (Martinus Nijhoff, 2007), p. 7 ("One of the features of the development of international law and relations and the conduct of international affairs during the nineteenth century has been the increasing use of arbitration procedures for the pacific settlement of international disputes – that is the settlement of a dispute between two or more States (in the nineteenth century conception of 'State') by judges of their own choice. This process reached its culmination in the Alabama arbitration of 1871–72 between Great Britain and the United States of America".).

[284] *Geneva Arbitration, Papers Relating to the Treaty of Washington*, Vol. IV (1872), Opinions of Sir Alexander Cockburn, p. 544.

[285] J.B. Scott, RESOLUTIONS OF THE INSTITUTE OF INTERNATIONAL LAW DEALING WITH THE LAW OF NATIONS: WITH AN HISTORICAL INTRODUCTION AND EXPLANATORY NOTES (Oxford University Press, 1916), p. 205.

"Draft Regulations"),[286] Article 25 of which confirmed that an award "decides … the dispute between the parties".[287]

6.5 In 1899, the First Hague Peace Conference was convened.[288] It proceeded on the basis that an arbitral award "settles the dispute … definitively and without appeal and closes all of the arbitral procedure instituted by the *compromis*".[289] There was discussion of the possibility of revision of awards, if specifically agreed in the *compromis*.[290] But the binding and final character of awards was not disputed.

6.6 On 29 July 1899, the Hague Convention for the Pacific Settlement of International Disputes (the "1899 Hague Convention") was adopted.[291] It established that an award "puts an end to the dispute definitely and without

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[286] J.B. Scott, RESOLUTIONS OF THE INSTITUTE OF INTERNATIONAL LAW DEALING WITH THE LAW OF NATIONS: WITH AN HISTORICAL INTRODUCTION AND EXPLANATORY NOTES (Oxford University Press, 1916), p. 1.

[287] *Ibid.*, p. 7.

[288] Shabtai Rosenne, INTERPRETATION, REVISION AND OTHER RECOURSE FROM INTERNATIONAL JUDGMENTS AND AWARDS (Martinus Nijhoff, 2007), pp. 9-10.

[289] J.B. Scott & Carnegie Endowment for International Peace, THE PROCEEDINGS OF THE HAGUE PEACE CONFERENCES: TRANSLATION OF THE OFFICIAL TEXTS, Vol. I, The Conference of 1899 (Oxford University, 1920) (hereinafter "Hague 1899"), p. 1183.

[290] Shabtai Rosenne, INTERPRETATION, REVISION AND OTHER RECOURSE FROM INTERNATIONAL JUDGMENTS AND AWARDS (Martinus Nijhoff, 2007), pp. 10-12.

[291] Convention for the Pacific Settlement of International Disputes, adopted by the First Hague Conference (29 July 1899), *reprinted in The Advocate of Peace (1894-1920)*, Vol. 81, No. 12 (Dec. 1919) (hereinafter "Hague Convention of 1899").

appeal",[292] and is "binding on the parties who concluded the *Compromis*".[293] To the same effect, Article 31 established that a *compromis* "implies the undertaking of the parties to submit loyally to the Award".[294]

6.7 These basic principles of arbitration were further confirmed by the 1907 Hague Convention for the Pacific Settlement of International Disputes. In particular, Article 81 repeated that an "award … settles the dispute definitely and without appeal",[295] while Article 37 reaffirmed that "recourse to arbitration implies an engagement to submit in good faith to the Award".[296]

6.8 Arbitral practice has also embraced the finality of awards. In 1910, the *Orinoco Steamship Company* tribunal recalled that to "accept, respect and carry out" an arbitral award was not only in the best "interest of peace and the development of the institution of International Arbitration", but was also "essential to the well-being of the nations".[297] Venezuela was a party to that case.

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[292] Hague Convention of 1899, Art. 54.

[293] *Ibid.*, Art. 56.

[294] *Ibid.*, Art. 31.

[295] 1907 Convention for the Pacific Settlement of International Disputes (18 Oct. 1907) (hereinafter "Hague Convention of 1907"), Art. 81.

[296] Hague Convention of 1907, Art. 37.

[297] *Orinoco Steamship Co. Case ("United States v. Venezuela"), Arbitral Award of 25 October 1910*, UNRIAA, Vol. XI, p. 227 (hereinafter "*Orinoco Steamship Co. Case*"), 238 (2006). A few years later, the *Trail Smelter* tribunal remembered that "if it is true that international relations based on law and justice require arbitral or judicial adjudication of international disputes, it is equally true that such adjudication must … remain unchallenged, if it is to be effective to that end". This statement maintains its truth in force today; principally in this dispute. *See also Trail Smelter Case*

6.9 In due course, members of the League of Nations committed to "carry out in full good faith any award or decision [of the Permanent Court of International Justice ("PCIJ")] that may be rendered".[298] No distinction was thus made between the obligation to comply with arbitral awards or with judgments of the newly established PCIJ.

6.10 Regional conventions also reaffirmed the finality of arbitral awards. The General Treaty of Inter-American Arbitration of 1929 established in its Article VII that "the award, duly issued and notified to the Parties, settles the dispute definitively and without appeal".[299] A few years later, the PCIJ acknowledged that "the terms of [an] award are definitive and obligatory".[300] Also, Article 46 of the 1948 American Treaty on Pacific Settlement of Disputes, known as the "Pact of Bogota", considered that an "award ... shall settle the controversy definitively, shall not be subject to appeal, and shall be carried out immediately".[301]

(United States v. Canada) Final Awards of 16 April 1938 and 11 March 1941, UNRIAA, Vol. III, p. 1950.

[298] League of Nations, *Covenant of the League of Nations*, Including Amendments adopted to December 1924 (28 Apr. 1919), Art. 13.

[299] [Tratado General de Arbitraje Interamericano] General Treaty of Inter-American Arbitration, O.E.A. (5 Jan. 1929), entered into force on 28 Oct. 1929, Art. VII ([t]he award, duly issued and notified to the Parties, settles the dispute definitely and without appeal".). MMG, Vol. IV, Annex 85.

[300] *Société Commerciale de Belgique (Belgium v. Greece)*, Judgment, 1939, P.C.I.J. Series A/B, No. 78 (hereinafter "*Société Commerciale de Belgique*"), p. 175.

[301] American Treaty on Pacific Settlement ("Pact of Bogota"), 30 U.N.T.S. 83 (1948), entered into force 6 May 1949, Art. XLVI, *available at* https://www.oas.org/sap/peacefund/resolutions/pact_of_bogot%C3%A1.pdf ("The award, once it is duly handed down and made known to the parties, shall settle the controversy definitely, shall not be subject to appeal, and shall be carried out immediately.").

6.11 In 1950, a Memorandum by the Secretariat of the International Law Commission acknowledged that, "[i]t is an accepted rule of international law, whether or not stated in the *compromis*, that [an] award given is binding on the parties",[302] and underscored that, "[t]he effect of the rule, or of the stated obligation, is to make the decision of the tribunal *res judicata*, *chose jugée* — a final and binding obligation upon the parties from which there is no legal escape except through subsequent agreement between them".[303] On that basis, the ILC adopted in 1958 a set of "Model Rules on Arbitral Procedure",[304] which stated that awards are "binding upon the parties [and] shall be carried out in good faith immediately".[305] They "constitute a definitive settlement of the dispute" submitted.[306]

6.12 In 1991, the Permanent Court of Arbitration ("PCA") sought to "modernize" the 1907 Hague Convention,[307] confirming once more that awards are "final and binding on the parties".[308] The Administrative Council of the PCA

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[302] *Memorandum on Arbitral Procedure, prepared by the Secretariat*, A/CN.4/35 (21 Nov. 1950), reprinted *in* U.N., YBILC 1950/II, U.N. Doc. A/CN.4/SER.A/1950/Add.1 (1950), para. 96, p. 176.

[303] *Ibid.*, para. 96a, p. 176.

[304] U.N., YBILC 1958/II, U.N. Doc. A/CN.4/SER.A/1958/Add.1 (1958), Art. 34, p. 11.

[305] *Ibid.*, Art. 32, p. 10.

[306] *Ibid.*, Art. 32, p. 86.

[307] Shabtai Rosenne, INTERPRETATION, REVISION AND OTHER RECOURSE FROM INTERNATIONAL JUDGMENTS AND AWARDS (Martinus Nijhoff, 2007), p. 23.

[308] Permanent Court of Arbitration, *Optional Rules for Arbitrating Disputes Between Two States* (20 Oct. 1992), Art. 32(2). This rule is also contained in article 34(2) of the PCA Rules of Arbitration, adopted in 2012.

approved this rule as Article 32 of the 1992 Optional Rules for Arbitrating Disputes between Two States.[309]

6.13 There is therefore no doubt that the binding and final character of arbitral awards is a longstanding rule of international law, inherent in the very nature of arbitration as a means for the settlement of international disputes. As recalled by the U.N. Handbook on the Peaceful Settlement of Disputes:

> "The outcome of an arbitration is an award which is binding upon the parties to the dispute. Invariably, in all the *compromis*, parties to the dispute further stipulate that they undertake to abide by the decision of the arbitral tribunal in question."[310]

6.14 This is exactly what happened in 1897, when Great Britain and Venezuela concluded the Treaty of Washington, explicitly expressing the parties' commitment to treat the Award as final and binding.

B. THE 1899 AWARD WAS INTENDED TO BE FINAL AND BINDING

1. The Terms of the 1897 Washington Treaty in Light of its Object and Purpose

6.15 The 1897 Treaty is a "treaty of arbitration"[311] that is to "be interpreted in accordance with the general rules of international law governing the interpretation

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[309] *Ibid.*, Art. 32(2).

[310] U.N., Office of Legal Affairs, *Handbook on the Peaceful Settlement of Disputes between States*, U.N. Doc. OLA/COD/2394 (1992), para. 192, p. 65.

[311] *Jurisdiction Judgment*, paras. 32-33.

of treaties".[312] Its terms unequivocally demonstrate consent and desire for the 1899 Award to be final and binding. Indeed, Article XIII of the Treaty provides in clear terms that:

> "The High Contracting Parties engage to consider the result of the proceeds of the Tribunal of Arbitration as a full, perfect, and final settlement of all the questions referred to the Arbitrators."[313]

6.16 In its Judgment on Jurisdiction, the Court noted this provision.[314] The ordinary meaning of these terms, interpreted in their context and in light of the object and purpose of the Treaty,[315] leads to the inescapable conclusion that the parties solemnly committed themselves to consider the 1899 Award final and binding.

6.17 Article XIII of the 1897 Treaty confirms that the "settlement" that the 1899 Award would provide is described as "full", "perfect", and "final". The term "full" entails that no other decision would be necessary for the "settlement of all the questions referred to the Arbitrators". The term "perfect" demonstrates the parties'

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[312] *See Case concerning the Arbitral Award of 31 July 1989, Dissenting Opinion Weeramantry*, p. 53, para. 48.

[313] Treaty between Great Britain and the United States of Venezuela Respecting the Settlement of the Boundary between the Colony of British Guiana and the United States of Venezuela, 5 U.K.T.S. 67 (2 Feb. 1897). AG, Annex 1, Art. XIII; *see also Arbitral Award of 3 October 1899 (Guyana v. Venezuela)*, Memorial of Guyana, I.C.J. (19 Nov. 2018) (hereinafter "MG"), para. 1.19; *Arbitral Award of 3 October 1899 (Guyana v. Venezuela)*, Application Instituting Proceedings of the Government of the Co-operative Republic of Guyana (29 Mar. 2018) (hereinafter "AG"), para. 31.

[314] *See Jurisdiction Judgment*, para. 33.

[315] As the Court made clear on multiple occasions, the rules on treaty interpretation enshrined in Articles 31 and 32 of the VCLT reflect customary international law and are applicable to treaties concluded prior to its entry into force (*see Jurisdiction Judgment*, para. 70; *Kasikili/Sedudu Island* (*Botswana/Namibia)*, para. 18).

ex-ante consent not to consider the 1899 Award to be flawed in any respect. Finally, the parties recognised that the Award could not be appealed, revised or challenged by agreeing that it was to be "final". The 1897 Treaty makes no provision for appeal, revision or challenge.

2. The Circumstances of the Conclusion of the 1897 Washington Treaty

6.18 Because the ordinary meaning of the terms of the 1897 Washington Treaty, together with its object and purpose, leave no doubt as to the binding and final character of the 1899 Award, recourse to the "circumstances of its conclusion" within the meaning of Article 32 VCLT, is unnecessary.[316] However, to the same extent that "the Court may have recourse to the Treaty's *travaux préparatoires* to confirm its interpretation",[317] the "circumstances" in which the Treaty has been concluded,[318] as well as any other "relevant material",[319] may be relied upon in order to confirm the interpretation of the terms of the Treaty.

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[316] This has been recognised by the Court in the following cases, *inter alia*, *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Preliminary Objections, Judgment, I.C.J. Reports 2018, p. 321, para. 91; *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, Judgment, I.C.J. Reports 2002 (hereinafter "*Sovereignty over Pulau Ligitan and Pulau Sipadan*"), p. 653, para. 53. In fact, the Court has avoided going to the *travaux* of a treaty in these circumstances. *See*, for instance, *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Preliminary Objections, Judgment, I.C.J. Reports 2019, p. 558, para. 112.

[317] *Jadhav (India v. Pakistan)*, Judgment, I.C.J. Reports 2019, p. 439, para. 76.

[318] *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, Preliminary Objections, Judgment, I.C.J. Reports 2017 (hereinafter "*Maritime Delimitation in the Indian Ocean*"), para. 99.

[319] See, for example, *Maritime Dispute (Peru v. Chile)*, Judgment, I.C.J. Reports 2014, para. 60; *Sovereignty over Pulau Ligitan and Pulau Sipadan*, p. 653, para. 53; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1995, p. 21, para. 40; *Territorial Dispute (Libyan Arab*

6.19 These circumstances and relevant materials confirm the commitment of the parties to treat the 1899 Award as final and binding. The Court has acknowledged that, by the time the 1897 Treaty was concluded, Great Britain and Venezuela had conflicting claims over "the territory comprising the area between the mouth of the Essequibo River in the east and the Orinoco River in the west".[320] Until that point, Great Britain had resisted Venezuela's demand that the dispute be settled by international arbitration. The stalemate led the United States to intervene in support of Venezuela's position and especially to "encourage" both parties to submit their territorial claims to binding arbitration. [321]

6.20 In particular, Venezuela's adoption of the Treaty in 1897 confirms its desire for its border dispute with Great Britain to be settled in a final manner by arbitration. On 20 February 1897, President Crespo declared that, under the Treaty, "by means of arbitration ... an end to the old dispute between the two nations" would be achieved, and "manifested the noble desire to see accepted [such] compact which, in his opinion, was just and advantageous".[322]

6.21 Thus, the circumstances leading to this commitment confirm the parties' intention for the 1899 Award to be final and binding. Their conflicting claims had posed a risk to their security and was a matter of interest throughout the continent.

Jamahiriya/Chad), Judgment, I.C.J. Reports 1994 (hereinafter "*Territorial Dispute (Libyan Arab Jamahiriya/Chad)*"), p. 27, para. 55.

[320] *Jurisdiction Judgment*, para. 31.

[321] *Ibid.*, para. 32.

[322] *Message* from President Joaquín Sinforiano De Jesús Crespo to Congress (20 Feb. 1897), *reprinted in* Odeen Ishmael, "Chapter 13 – The Arbitral Tribunal and the Award" *in* TRAIL OF DIPLOMACY (GNI Publications, 1998), *available at* http://www.guyana.org/features/trail_diplomacy_pt3.html#chap13 (last accessed 22 Feb. 2022).

A resolution to such claims needed to be provided with no uncertainty or open-endedness.

3. The Reception and Implementation of the 1899 Award

6.22 Immediately after the delivery of the unanimous 1899 Award, the parties acknowledged its final and binding character. Venezuela was particularly satisfied with the outcome. As indicated previously, four days after the 1899 Award was rendered, Venezuela's Minister to London declared:

> "Greatly indeed did justice shine forth when, in spite of all, in the determining of the frontier the exclusive dominion of the Orinoco was granted to us, which is the principal aim which we set ourselves to obtain through arbitration. I consider well spent the humble efforts which I devoted personally to this end during the last six years of my public life."[323]

6.23 As described in Chapter 4, in the years that followed, Venezuela repeatedly reaffirmed that the 1899 Award was valid and binding, including, *inter alia*: in the 1905 Agreement which made clear that the demarcation carried out by the Joint Boundary Commission was "a clear specification of the Boundary line according with the Arbitral Award of Paris" (the 1899 Award);[324] the assertion by the chief Venezuelan Commissioner that "the delimitation between our Republic and the

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[323] *Letter* from the Venezuelan Ambassador to the United Kingdom to the Venezuelan Minister of Foreign Affairs (7 Oct. 1899), p. 2. MG, Vol. II, Annex 3.

[324] Agreement Between the British and Venezuelan Boundary Commissioners with Regard to the Map of the Boundary (10 Jan. 1905) *reprinted in* Government of the Republic of Venezuela, Ministry of External Affairs, *Public Treaties and International Agreements of Venezuela, Vol. 3 (1920-25)* (1927). AG, Annex 3.

Colony of British Guiana [is] an accomplished fact";[325] the confirmation in 1907 that "[t]he ratification of the Federal Executive is thus limited to the work done by the Mixed Delimitation Commissions in accordance with the Paris Award";[326] the assertion in 1931 that "the tri-junction point where the boundaries of Brazil, British Guiana, and Venezuela meet, [was] based on the southern terminal point of the boundary established by the 1899 Award and the 1905 Agreement";[327] and the declaration in 1941 by Venezuela's Minister of Foreign Affairs that the location of the boundary between Venezuela and the British Guiana was "*chose jugée*" and that there was no reason to fear that Venezuela would ever seek to revise it.[328]

C. THE AWARD CONTINUED TO BE FINAL AND BINDING FOLLOWING THE GENEVA AGREEMENT

6.24 The Geneva Agreement of 17 February 1966 states in Article I that it was concluded for the purpose of settling the:

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[325] *Letter* from F. M. Hodgson to A. Lyttelton, CO. 111/546 (12 Oct. 1905) *enclosing Report* of the Minister for Foreign Affairs (Venezuela) to the National Congress, in constitutional session, 1905 (20 Mar. 1905). MMG, Vol. III, Annex 42.

[326] *Letter* from Señor Paúl to Mr. O'Reilly (4 Sept. 1907) (*Inclosure in Letter* from Mr. O'Reilly to Sir Edward Grey (5 Sept. 1907)). MMG, Vol. III, Annex 48.

[327] Exchange of Notes between the United Kingdom and Brazil approving the General Report of the Special Commissioners Appointed to Demarcate the Boundary-Line between British Guiana and Brazil, 51 U.K.T.S. 1946 (15 Mar. 1940), para. 12. MMG, Vol. IV, Annex 87; *see also* MG, Vol. I, para. 1.28. The Venezuelan Government subsequently published the formal Exchange of Notes recording the demarcation of the tripoint in its official treaty series. Republic of Venezuela, Ministry of Foreign Affairs, *Public Treaties and International Agreements, Vol. V (1933-1936)* (1945), p. 548. MG, Vol. II, Annex 12.

[328] MG, Vol. I, para. 1.28; Government of United Kingdom, Foreign Office, *Minute by C.N. Brading*, No. FO 371/38814 (3 Oct. 1944). MG, Vol. II, Annex 10; *Letter* from the Ambassador of the United Kingdom to Venezuela, to J.V.T.W.T. Perowne, U.K. Foreign Office (3 Nov. 1944), pp. 1-2. MG, Vol. II, Annex 11.

> "controversy between Venezuela and the United Kingdom which has arisen as the result of the Venezuelan contention that the Arbitral Award of 1899 about the frontier between British Guiana and Venezuela is null and void."[329]

6.25 The terms of the Agreement make clear that Venezuela's nullity claim was not accepted by Great Britain or British Guiana. The Agreement recorded the factual existence of Venezuela's claim, and set out the agreed procedures to settle the controversy that arose from it. It did not alter the legal effect or the validity of the Award as a juridical act.[330]

6.26 The circumstances of the Agreement's conclusion confirm this. The Court has already recognised that in "the discussions … [that] preceded the conclusion of the Geneva Agreement… the United Kingdom and British Guiana rejected the Venezuelan proposal [that the only solution was the return of territory] on the basis that it implied that the 1899 was null and void…".[331] "British Guiana reiterated … that it 'could not accept the Venezuelan contention that the 1899 Award was invalid'".[332] Indeed, as noted by the Court, the "contention by Venezuela [that the 1899 Award is null and void] was consistently opposed by the United Kingdom in the period from 1962 until the adoption of the Geneva Agreement on 17 February

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[329] Geneva Agreement, Art. I. AG, Annex 4.

[330] On the distinction between the non-existence of jurisdictional acts and the invalidity of such acts, see L. Trigeaud, LA NULLITÉ DE L'ACTE JURISDICTIONNEL EN DROIT INTERNATIONAL PUBLIC (Anthémis, 2011), pp. 205 *et seq*.

[331] *Jurisdiction Judgment*, para. 132.

[332] *Ibid*.

1966, and subsequently by Guyana after it became a party to the Geneva Agreement upon its independence, in accordance with Article VIII thereof".[333]

6.27 In its jurisprudence, the Court has confirmed that an agreement to settle a dispute resulting from a State's contention of nullity of an arbitral award that established a boundary has no bearing on the award's final and binding character. In the *Award Made by the King of Spain* case, for example, Nicaragua sought to annul an arbitral award rendered by the King of Spain in 1906, which established a territorial boundary with Honduras. In July 1957, with the aim to settle the dispute arising from Nicaragua's claim, both States concluded the "Washington Agreement", with the support of the Organization of the American States. They agreed to submit "to the International Court of Justice … the disagreement existing between them with respect to the Arbitral Award handed down by His Majesty the King of Spain on 23 December 1906".[334] The Court drew no inference regarding the finality of 1906 Award from the fact that the parties had agreed on procedures to settle Nicaragua's nullity claim. The Court found that "Nicaragua, by express declaration and by conduct, recognized the Award as valid" for years, and it was thus "no longer open to Nicaragua to go back upon that recognition and to challenge the validity of the Award".[335] It also found that, in any event, the grounds for nullity of the award and the obstacles to the award's execution, both raised by

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[333] *Ibid.*, para. 64.

[334] *Case concerning the Arbitral Award made by the King of Spain on 23 December 1906 (Honduras v, Nicaragua)*, Judgment, I.C.J. Reports 1960 (hereinafter "*Arbitral Award made by the King of Spain Case*"), para. 4; *See also ibid.*, pp. 192, 194 ("The Application relies on the Washington Agreement of 21 July 1957 between the Parties with regard to the procedure to be followed in submitting the dispute to the Court; the Application states, furthermore, that the Parties have recognized the compulsory jurisdiction of the Court on the basis of Article 36, paragraph 2, of its Statute".).

[335] *Ibid.*, p. 213.

Nicaragua, had no merits.[336] Thus, the Court rejected the nullity claim and confirmed the validity of the 1906 Award. [337]

6.28 Likewise, the fact that the Parties in this case agreed in 1966 to settle the dispute arising from Venezuela's nullity claim has no bearing on the 1899 Award's finality or binding character. It remains final and binding, as it was in 1899 and at all times thereafter.

II. The 1899 Award Enjoys a Presumption of Legal Validity

6.29 As a result of their final and binding character, arbitral awards benefit from a presumption of validity (**A**). Claims of alleged invalidity must therefore be scrutinised in light of such presumption, which entails important consequences concerning the burden of proof and explains the high standard of proof applicable to any alleged invalidity (**B**). Furthermore, the presumption of validity benefiting arbitral awards, together with basic principles of intertemporal law, limit the available grounds of invalidity to those existing at the time the award was rendered (**C**).

[336] *Ibid.*, pp. 214-217.

[337] *Ibid.*, pp. 192, 217 (The Court, by fourteen votes to one, "finds that the Award made by the King of Spain on 23 December 1906 is valid and binding and that Nicaragua is under an obligation to give effect to it".).

A. ARBITRAL AWARDS BENEFIT FROM A PRESUMPTION OF VALIDITY

6.30 Under international law, arbitral awards enjoy a *praesumptio in favorem validitatis sententiae*.[338] In prior cases where it was seized of a nullity contention, the Court acted on the basis of such presumption because it saw its "function" as being "to decide whether the Award is proved to be a nullity having no effect",[339] rather than determining that it is valid.

6.31 The PCIJ acted on the same basis in the *Société Commerciale de Belgique* case, in 1939. Since it assumed that the award in question was valid, it saw its task to be the confirmation, not the determination, of such validity. [340] Likewise, in the *Award Made by the King of Spain* case, Judge Weeramantry stated that "the validity of ... arbitral award[s] is to be presumed".[341] In support of this view, Judges Aguilar Mawdsley and Ranjeva separately opined that:

> "the irrebuttable presumption of legal truth that attaches to a judicial decision once it has become final is an institution common to all systems of law."[342]

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[338] E. Lauterpacht et al., "Klöckner Industrie-Anlagen GmbH and others v. Republic of Cameroon", *Intl. L. Reports*, Vol. 114 (1999).

[339] *See Case Concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, I.C.J. Reports 1991 (hereinafter "*Case Concerning the Arbitral Award of 31 July 1989, Judgment*"), p. 53, para. 25, *quoting Arbitral Award made by the King of Spain Case*, p. 214 ("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".).

[340] *Société Commerciale de Belgique*, p. 174.

[341] *Case concerning the Arbitral Award of 31 July 1989, Dissenting Opinion Weeramantry*, p. 152.

[342] *Ibid.*, para. 7.

6.32 The presumption of validity of arbitral awards has been confirmed by other courts and tribunals. In the *Beagle Chanel* arbitration between Chile and Argentina, the latter considered the Award rendered by the Court of Arbitration "null and void".[343] Chile requested the "Court's views on" Argentina's nullity argument, to which the Court of Arbitration responded that it was "not capable of impairing the validity of the Award, which in consequence remain[ed] fully operative and obligatory in law".[344]

6.33 The international community has long acknowledged this presumption. The report of the Committee of the League of Nations on a proposal by Finland to confer the PCIJ with appeal jurisdiction over arbitration awards, concluded that they enjoy a presumption of validity under international law.[345] According to the Committee, a "State which disputes its validity introduces a new factor into the case".[346]

6.34 Publicists have likewise confirmed that "the validity of arbitral awards is to be presumed".[347] Hence, there is no question that, under international law, arbitral awards enjoy a presumption of validity. Like any other arbitral award, the 1899 Award benefits from such a presumption of validity. This presumption entails legal

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[343] E. Lauterpacht, "Beagle Channel (Argentina v. Chile)", *Intl. L. Reports*, Vol. 52 (1979), pp. 281-282.

[344] *Ibid.*, p. 282.

[345] *League of Nations Official Journal*, Special Supplement, Vol. 94 (1931), p. 89.

[346] *Ibid.*, p. 89.

[347] A. Balasko, CAUSES DE NULLITÉ DE LA SENTENCE ARBITRALE EN DROIT INTERNATIONAL PUBLIC (1938), p. 201 (« *La validité de la sentence se présume* ») (Translation of Guyana). *See also* D. Guermanoff, *L'excès de pouvoir de l'arbitre* (1929) (« *lorsque l'excès de pouvoir n'est pas évident la présomption doit etre en faveur de la validite de la sentence* ») (Translation of Guyana).

and evidentiary consequences for Venezuela's claims in the present proceeding, as described below.

B. THE BURDEN AND STANDARD OF PROOF OF ALLEGED INVALIDITY

1. The Burden of Proof

6.35 In the face of the principle of presumed validity, the burden of proof is on Venezuela to establish the nullity of the 1899 Award; it is not for Guyana to have to establish that the Award is valid. As the Court has already determined: "[t]he present case concerns a dispute … that has arisen as a result of [Venezuela's] contention that the [1899 Award] is null and void".[348] Hence, the maxim *onus probandi incumbit actori* applies to Venezuela.[349]

6.36 This well-established principle governing the burden of proof applies to nullity contentions of arbitral awards. In the *Award Made by the King of Spain* case, Nicaragua contended that "he who relies upon an arbitral award ... is under an obligation to prove that the person or body giving the decision ... was invested with the powers of an arbitrator".[350] It also argued that the lack of proof thereof,

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[348] *Jurisdiction Judgment*, para. 23. *See also ibid.*, para. 61 referring to the controversy "arising from *Venezuela's contention* that the 1899 Award is null and void" (emphasis added). *See also Ibid.*, para. 65 ("the Geneva Agreement primarily relates to the dispute that has arisen as a result of Venezuela's contention that the 1899 Award is null and void and its implications for the boundary line between Guyana and Venezuela".). This echoes the language of the Geneva Agreement, which, as the Court acknowledged establishes that the dispute "has arisen as the result of the *Venezuelan contention that the Arbitral Award of 1899*… is null and void" (emphasis added). *See Ibid.*, para. 43.

[349] For instance, in the *Award Made by the King of Spain Case*, the Court did not permit a distribution of the burden of proof that the person who had given the award was invested with the powers of an arbitrator. *Award Made by the King of Spain Case*, p. 183.

[350] *Award Made by the King of Spain Case*, p. 198.

provided by Honduras, was a ground for nullity of the 1906 Award. However, the Court firmly rejected this approach: it did not shift the burden of proof to Honduras, and it confirmed the validity of the award.[351]

6.37 In its contention on the invalidity of the 1899 Award, it is therefore for Venezuela to meet the burden of proof over all the grounds of nullity it may seek to advance.[352]

2. The Standard of Proof

6.38 Because arbitral awards are presumed to be valid, any contention about their nullity is subjected to a high standard of proof.[353] The Award in this case can only be revisited if such standard is met. In this respect, the arbitral tribunal in the *Abyei* case ruled that:

> "the party impugning [an] award is at all times under the burden of proving that sufficiently weighty circumstances exist to support its contention that the award is invalid."[354]

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[351] *Ibid.*, pp. 205-207.

[352] *See also Case concerning the Arbitral Award of 31 July 1989, Dissenting Opinion Weeramantry*, p. 152 ("the party impugning the award is at al1 times under the burden of proving that sufficiently weighty circumstances exist to support its contention that the award is invalid".).

[353] *See*, for instance, Kenneth Smith Carlston, THE PROCESS OF INTERNATIONAL ARBITRATION, Columbia University Press, 1972, p. 86 ("Claims of nullity should not be captiously raised. Writers who have given special study to the problem of nullity are agreed that the violation of the *compromis* should be so manifest as to be readily established. In order that a tribunal's decision or a jurisdictional issue shall be considered null, it must, in general, be arbitrary, not merely doubtful or arguable.").

[354] *See Case concerning the Arbitral Award of 31 July 1989, Dissenting Opinion Weeramantry, cited in The Government of Sudan v. The Sudan People's Liberation Movement/Army*, RIAA, Vol. XXXI (PCA), Award, para. 217 (22 July 2009).

6.39 Indeed, "[o]nly 'weighty' or 'exceptional circumstances' will justify a finding of invalidity" of an award.[355] Accordingly, "impugn[ing] an arbitral award bears a 'very great' burden of proof".[356]

6.40 The heightened standard of proof for nullity of awards has never been met in any case before the Court. In the *Arbitral Award by the King of Spain* case and the *Case Concerning the Arbitral Award of 31 July 1989* — the only previous cases where the Court dealt with a claim of nullity of an inter-State award — the Court confirmed the presumed validity of the awards challenged before it and declined to set them aside.[357]

6.41 Further, each particular ground of nullity entails a high standard of proof. For instance, allegations of error by an arbitral tribunal must be "enormous,

[355] *Ibid.*, p. 152 ("the party impugning the award is at al1 times under the burden of proving that sufficiently weighty circumstances exist to support its contention that the award is invalid").

[356] *Ibid.*

[357] *See Case Concerning the Arbitral Award of 31 July 1989, Judgment*, p. 53; *Arbitral Award Made by the King of Spain Case*, p. 192. This standard has also failed to be reached with respect to other inter-State adjudicative decisions, also before the Court. *See inter alia Appeal Relating to the Jurisdiction of the ICAO Council under Article 84 of the Convention on International Civil Aviation (Bahrain, Egypt, Saudi Arabia and United Arab Emirates v. Qatar)*, Judgment, I.C.J. Reports 2020.

glaring",[358] "flagrant",[359] and "manifest".[360] Likewise, allegations of corruption of the tribunal, or of one of its members — a ground for annulment of awards[361] which remains exceptional[362] — are submitted to a "high standard of proof"[363] requiring "clear and convincing evidence".[364]

6.42 The same rigorous and heightened standard of proof applies to Venezuela's contention of nullity. This is all the more so because it was formulated more than

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[358] Geouffre de Lapradelle, « L'excès de pouvoir de l'arbitre », *Rev. de Droit Int'l*, Vol. II, No. 14 (1928), p. 14 (« l'erreur sur la compétence n'est pas elle-même une cause de nullité ; il n'en serait autrement que si la sentence rendue, au fond, par un tribunal incompétent était d'une manière énorme, fantastique, inadmissible ») (Translation of Guyana).

[359] Frede Castberg, « L'excès De Pouvoir dans la Justice Internationale », *Recueil des Cours*, Vol. XXXV, p. 443 (1931) (« il faut qu'il y ait eu une usurpation de pouvoir ... au meme resultat que la doctrine d'après laquelle la nullité de la sentence découle d'un excès de pouvoir flagrant ») (Translation of Guyana).

[360] Alfred Verdross, « L'excès de pouvoir du juge arbitral dans le droit international public », *Rev. de Droit Int'l & Legis. Comp*., Vol. IX, No. 3 p. 229 (« les motifs de nullité de l'excès de pouvoir et de l'erreur essentielle se confondent. Ils existent lorsque la sentence est 'absurde' ou 'manifestment injuste et déraisonnable' ») (Translation of Guyana).

[361] *See*, for instance, Draft Regulations for International Arbitral Procedure (28 Aug. 1875) (hereinafter "Draft Regulations"), Art. 27.

[362] *See* R. Doak Bishop & Silvia M. Marchili, "Part II Grounds for Annulment, 7 Corruption of One of the Members of the Tribunal" *in* ANNULMENT UNDER THE ICSID CONVENTION (2012), para. 7.09.

[363] *See* for instance, *Ioan Micula, Viorel Micula and others v. Romania (II)*, ICSID Case No. ARB/1/29, Award (5 Mar. 2020), para. 378; *Oded Besserglik v. Republic of Mozambique*, ICSID Case No. ARB (AF)/14/2, Award (28 Oct. 2019), para. 362; *South American Silver Limited v. Bolivia*, PCA Case No. 2013-15, Award, (22 Nov. 2018), para. 673; *UAB E energija (Lithuania) v. Republic of Latvia*, ICSID Case No. ARB/12/33, Award of the Tribunal (22 Dec. 2017), para. 541.

[364] *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award (22 Aug. 2017), para. 492; *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines (II)*, ICSID Case No. ARB/11/12, Award (10 Dec. 2014), para. 479.

six decades after the 1899 Award was delivered and duly implemented, with the full support of Venezuela.

C. The Applicable Law on the Invalidity of Awards and the Existing Grounds of Invalidity in 1899

6.43 Venezuela argues that the 1899 Award is invalid in light of the law in force *today* or "at least as of the date on which such invalidity is invoked".[365] This is plainly wrong, and Venezuela cannot move the goalposts in this case.

6.44 It is axiomatic that "a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when the dispute in regard to it arises or falls to be settled".[366] This principle of intertemporal law applies to the appraisal of the legality of the behaviour of States[367] and to the

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[365] *See* Hermann González Oropeza, S.J. & Pablo Ojer, *[Informe que los expertos venezolanos para la cuestión de límites con Guayana Británica presentan al Gobierno Nacional] Report submitted by the Venezuelan Experts to the National Government on the Issue of the Boundaries with British Guiana* (18 Mar. 1965), para. 17. MMG, Vol. IV, Annex 74. *See also* Memorandum of the Bolivarian Republic of Venezuela on the Application filed before the International Court of Justice by the Co-operative Republic of Guyana (29 Mar. 2019), para. 17.

[366] *Island of Palmas Case (Netherlands, USA)*, RIAA, Vol. II (PCA), Award, p. 829, 845 (4 Apr. 1928) ("a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when the dispute in regard to it arises or falls to be settled"); *see also Grisbådarna Case (Norway v Sweden)*, Award, PCA Case No 1908-01, RIAA, Vol. XI, p. 147 (23 Oct. 1909), para. 26 ("in order to ascertain what may have automatically been the line of division of 1658, it is necessary to have recourse to the principles of law in operation at that time"); *North Atlantic Coast Fisheries Case (Great Britain v. United States)*, PCA Case No 1909-01, Award (7 Sept. 1910), p. 196.

[367] International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), Art. 13; *see* recently *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, I.C.J. Reports 2019, p. 95, para. 161.

validity of legal acts,[368] including judicial acts. The only exception to this elementary principle concerns *jus cogens superveniens* in the context of international treaties as regulated under Article 64 of VCLT. That has not been argued in this case and is of no relevance.

6.45 As a result, it is in light of the grounds of nullity of arbitral awards available in 1899 that Venezuela must rebut the presumption of validity and meet its burden of proof that the Award was null and void at the time it was issued: nullity operates *ex tunc*.

6.46 As set out in Chapter 8,[369] the Draft Regulations adopted in 1875 by the *Institut du Droit International* recognised only four limited grounds of nullity of international awards under its Article 27: (i) the invalidity of the *compromis*; (ii) the excess of authority of the Tribunal; (iii) the corruption of one of the Arbitrators; or (iv) an essential error.[370]

6.47 During the 1899 Hague Conference, Russia suggested replicating Article 27 of the Draft Regulations and confirming the possibility of nullifying arbitral awards "in case of a void *compromis* or exceeding of powers, or of corruption proved against one of the arbitrators".[371] The existence of any of these grounds of

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[368] *See, for instance,* The Institute of International Law, "The Intertemporal Problem in Public International Law", *Institut de Droit International*, Art. 2.f) ("any rule which relates to the licit or illicit nature of a legal act, or to the conditions of its validity, shall apply to acts performed while the rule is in force".).

[369] *See infra* para. 247.

[370] Draft Regulations, Art. 27: "The arbitral award is null in case of an invalid *compromis*, or in case of excess of authority, or of proved corruption of one of the arbitrators, or of essential error".

[371] *Hague 1899*, p. 151.

nullity was thought to depend on the establishment of a body that would actually rule upon them.[372] Such a body — the PCA — was established by the 1899 Hague Convention.[373] However, no grounds for nullity of awards were approved at that time, nor even the possibility to seek the nullification of an award. This stands in contrast to the possibility for revision of arbitral awards contemplated under Article 55 of the 1899 Convention, "[if] reserve[d] in the *compromis*".[374]

6.48 The 1907 Hague Convention also did not specify any ground of nullity of awards. This was despite the fact that "the US representatives in the Hague Peace Conference of 1907 supported the establishment of a body that can verify the validity of awards".[375] However, "no agreement could be reached ... on challenging the validity of an arbitral award".[376] Instead, the 1907 Hague Convention simply reiterated that the parties can reserve in the *compromis* the "right to demand the revision of the Award".[377] It must be concluded, therefore, that at the time the 1899 Award was issued, international law provided that it could be revised only if a right of revision was included in the *compromis*, which was not the case.

6.49 Assuming, *quod non*, that an inter-State arbitral award issued in 1899 could be revised or nullified under international law, notwithstanding the absence of such

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[372] *Ibid.*, p. 743 ("The President does not think it possible to provide for cases of nullity, without knowing at the same time who will be the judge to pass upon these cases".).

[373] *See* Hague Convention of 1899, Art. 20.

[374] *See* Hague Convention of 1899, Art. 55.

[375] *See* Karin Oellers-Frahm, "Judicial and Arbitral Decisions, Validity and Nullity", MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Jan. 2019), para. 5.

[376] *See ibid.*

[377] *See* Hague Convention of 1907, Art. 83.

a provision in the *compromis*, the grounds for revising or nullifying it could not extend beyond those recognised at the time under international law (as for example proposed by the *Institut*). That is, even if a challenge to an award were possible, the State seeking its nullification would have to prove, by clear and convincing evidence, that (i) the *compromis* was invalid; (ii) the arbitral tribunal exceeded its authority; (iii) one or more of the Arbitrators were corrupt; or (iv) the tribunal committed an essential error.

6.50 As shown in the following Chapters, the 1899 Award has none of these defects, and Venezuela cannot hope to meet its burden of proving the existence of any of them, let alone by the clear and convincing evidence that is required to rebut the Award's presumption of validity. Its contention of nullity, therefore, fails entirely. The validity of the *compromis* is demonstrated in Chapter 7. Chapter 8 establishes that the Arbitral Tribunal neither exceeded its authority nor committed error and that Venezuela's belated contention, half a century after the Award was issued, that the Arbitrators corruptly colluded to produce the Award is manifestly untenable.

CHAPTER 7

THE *COMPROMIS* WAS VALIDLY CONCLUDED AND THE TRIBUNAL WAS PROPERLY CONSTITUTED

7.1 The present Chapter addresses Venezuela's criticisms of the 1897 Treaty and the constitution of the Tribunal.

7.2 Venezuela's attack on the Treaty and the Arbitral Tribunal's composition was first formally articulated by its Foreign Minister, on 9 December 1965, at the Ministerial Conference in London at which Great Britain and Venezuela sought a means for peaceful settlement of the controversy that arose from Venezuela's contention that the 1899 Arbitral Award was null and void. It consisted of the following allegations:

> "a. That the correspondence exchanged between United States and Great Britain during the decisive period of the negotiation (September to November 1896) was concealed from Venezuela until 1899, in other words, two years after the signature of the Treaty.
>
> b. That whilst assuring Venezuela that the 1850 Agreement remained in effect and protected it from any British usurpation after that date, Secretary of State Richard Olney agreed with Great Britain that both matters would be left to the discretion of the Tribunal.
>
> c. That the same Secretary of State guaranteed Venezuela that the title by adverse possession accepted in the Treaty was to be understood in accordance with international law, i.e. that the possession on which such title was based must be public, in good faith, tacitly consented to, etc. At the same time he reached agreement with Great Britain that it could grant title by adverse possession subsequent to 1850, by settlers not authorized by the

> British Government and against constant public protests by Venezuela.
>
> d. That Secretary of State Richard Olney and Sir Julian Pauncefote agreed that no Venezuelan would sit on the Tribunal, despite the fact, as stated by Pauncefote, that this step 'seemed unfair,' and in disregard of what he himself referred to as Venezuelan 'shrieks.'"[378]

7.3 While no legal argument was clearly enunciated at that time (or thereafter), it can be inferred from these statements that Venezuela somehow considers the conclusion of the *Compromis*, as well as the composition of the Tribunal, to be flawed by reason of error, fraud or corruption (**Section I**) or, possibly, though even more ambiguously, coercion and duress (**Section II**). However fanciful these suggestions may be, in the interest of completeness, Guyana addresses them to demonstrate their lack of merit.

I. No Error, No Fraud, No Corruption

7.4 Before showing that Venezuela agreed to the *Compromis* (**B**), including the composition of the Arbitral Tribunal (**C**), in full knowledge of the facts, it is appropriate to recall the conditions for error (or fraud or corruption) that must be present to render a treaty null and void (**A**).

[378] Dr Ignacio Irabarren Borges, *[Declaración del Dr Ignacio Iribarren Borges, Ministro de Relaciones Exteriores de Venezuela, la Conferencia Ministerial de Londres] Statement Made by Dr Ignacio Iribarren Borges, Venezuelan Foreign Minister, to the Ministerial Conference Held in London* (9 Dec. 1965). MMG, Vol. IV, Annex 76.

A. CONDITIONS FOR INVALIDATING A TREATY ON THE GROUNDS OF ERROR, FRAUD OR CORRUPTION

7.5 Articles 48, 49 and 50 of the 1969 Vienna Convention on the Law of Treaties are respectively devoted to error, fraud and corruption as defects in the consent of a State, which may result in the invalidity of a treaty to which the State is a party. It is appropriate to take those provisions of the VCLT as a starting point, even if the customary rules pertaining to the invalidity of treaties more than a century and a half ago were assuredly less developed than today. Moreover, although these three defects of consent are distinct, they have enough common features to be considered together. Indeed, it appears that Venezuela draws from the same set of factual allegations to support these different grounds of invalidity.

1. Error

7.6 The idea that a material error committed at the time of concluding a treaty is a cause of nullity is long established. It is an extension of what has been recognised traditionally in contract law and is expressed by the Latin maxim *non videtur qui errat consentire*.[379] However, it is also well established that not every error vitiates consent. Contemporaneously to the 1897 Washington Treaty, Pradier-Fodéré already opined:

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[379] Pasquale Fiore, NOUVEAU DROIT INTERNATIONAL PUBLIC SUIVANT LES BESOINS DE LA CIVILISATION MODERNE (1885), pp. 472 *et seq*. *See also* concerning the early recognition of error in international law as a possible ground for nullity, *Orinoco Steamship Co. Case*, pp. 227-241. Within the framework of modern international law, application of error as a cause for invalidity goes back as far as 1798, when the Mixed Commission between Great Britain and the United States recognised that a gross geographical error in the Treaty of Paris of 1783 made it impossible to determine the boundary between Canada and the United States (Albert Geouffre de Lapradelle & Nikolaos E. Politēs, *Recueil des arbitrages internationaux,* Vol. I (1905), pp. 306 *et seq.* or R.I.A.A., vol. XXVIII, pp. 3-4).

> "*Quant à l'erreur de fait, comment admettre que des erreurs matérielles puissent égarer facilement l'intelligence des négociateurs, tromper la volonté des gouvernements, déjouer l'attention de l'opinion, les légitimes susceptibilités de la presse politique et la vigilance patriotique des parlements?*"[380]

7.7 In the interwar period, the Harvard Draft Convention on the Law of Treaties likewise limited the possibility to claim a defect of consent on the basis of a factual error:

> "A treaty entered into upon an assumption as to the existence of a state of facts, the assumed existence of which *was envisaged by the parties as a determining factor moving them to undertake the obligations stipulated*, may be declared by a competent international tribunal or authority not to be binding on the parties, when it is discovered that the state of facts did not exist at the time the treaty was entered into".[381]

7.8 During the discussions leading to the 1969 Vienna Convention, Special Rapporteur Hersch Lauterpacht recalled:

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[380] Paul Pradier-Fodéré, TRAITÉ DE DROIT INTERNATIONAL PUBLIC EUROPÉEN ET AMÉRICAIN, SUIVANT LES PROGRÈS DE LA SCIENCE ET DE LA PRATIQUE CONTEMPORAINE (1885), p. 743, para. 1076. "As for the error of fact, how can we admit that material errors can easily mislead the intelligence of negotiators, deceive the will of governments, thwart the attention of public opinion, the legitimate susceptibilities of the political press and the patriotic vigilance of parliaments?" (Translation of Guyana). *See also* Alfred Chrétien, PRINCIPES DE DROIT INTERNATIONAL PUBLIC (1893), p. 327, para. 331; *see also* Frantz Despagnet, COURS DE DROIT INTERNATIONAL PUBLIC (1894), p. 479; Arrigo Cavaglieri, « Règles Générales du Droit de la Paix », *Recueil des Cours*, Vol. XXVI (1926), p. 510; Paul Fauchille, TRAITÉ DE DROIT INTERNATIONAL PUBLIC, Vol. I, Part III (Rousseau & Cie, 8th ed., 1926), p. 299.

[381] *Draft Convention on the Law of Treaties in AJIL*, Vol. XXIV (1935), Art. 29, p. 1126, para. (a) (emphasis added).

> "[T]he principle that not every error involves the voidability of the treaty. Such effect attaches only to an essential error which goes to the roots of the treaty."[382]

7.9 The Permanent Court as well as the present Court have also maintained that the error invoked must be of such a nature as to vitiate the treaty.[383] As the Court explained in the leading case concerning this matter, "the principal juridical relevance of error, where it exists, is that it may affect the reality of the consent supposed to have been given".[384] In the second phase of the same case, during the examination of the merits of the dispute, the Court repeated this principle and, at the same time, identified three cases where, by way of exception, an essential error would not affect the validity of consent:

> "It is an established rule of law that the plea of error cannot be allowed as an element vitiating consent if the party advancing it contributed by its own conduct to the error, or could have avoided it, or if the circumstances were such as to put that party on notice of a possible error."[385]

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[382] *Report on the Law of Treaties by Mr. H. Lauterpacht, Special Rapporteur*, U.N. Doc. A/CN.4/63 (24 Mar. 1953), *reprinted in* U.N., YBILC 1953/II, U.N. Doc.A/CN.4/SER.A/1953/Add.1 (1953), p. 154, para. 1.

[383] *Case Concerning Sovereignty over Certain Frontier Land (Belgium v. Netherlands)*, Judgment, I.C.J. Reports 1962 (hereinafter "*Case Concerning Sovereignty over Certain Frontier Land"*), p. 222; *See also Readaptation of the Mavrommatis Jerusalem Concessions (Greece v. U.K.)*, Jurisdiction, Judgment, 1925, P.C.I.J. Series A, No. 11 (hereinafter "*Mavrommatis Jerusalem Concessions*"), p. 31; or *Award Made by the King of Spain Case*, pp. 215-216.

[384] *Temple of Preah Vihear (Cambodia v. Thailand)*, Judgment of 26 May 1961, I.C.J. Reports 1961 p. 17 (hereinafter "*Temple of Preah Vihear, 1961 Judgment*"), p. 30.

[385] *Temple of Preah Vihear (Cambodia v. Thailand)*, Judgment of 15 June 1962, I.C.J. Reports 1962 p. 6 (hereinafter "*Temple of Preah Vihear, 1962 Judgment*"), p. 26-27. *See also, Korea - Measures affecting Government Procurement*, Report of the Panel, WT/DS163/R (1 May 2000), paras. 7.120-7.126; *Legal Status of Eastern Greenland*, Judgment, 1933, P.C.I.J. Series A/B, No. 53, p. 71 and *Legal Status of Eastern Greenland*, Judgment, Dissenting Opinion of Judge Anzilotti, 1933, P.C.I.J.

7.10 The first and third exceptions have been retained nearly in the same terms in paragraph 2 of Article 48 of the 1969 Vienna Convention:

> "1. A State may invoke an error in a treaty as invalidating its consent to be bound by the treaty if the error relates to a fact or situation which was assumed by that State to exist at the time when the treaty was concluded and formed an essential basis of its consent to be bound by the treaty.
>
> 2. Paragraph 1 shall not apply if the State in question contributed by its own conduct to the error or if the circumstances were such as to put that State on notice of a possible error.
>
> 3. An error relating only to the wording of the text of a treaty does not affect its validity; article 79 then applies."

7.11 In other words, the strict conditions that must be fulfilled are:

(i) the alleged error must relate to an act or situation which the State invoking it believed to exist when it concluded the treaty;

(ii) it must have formed, at the time, an essential basis of its consent to be bound;

(iii) it does not vitiate the treaty if the State contributed to it or if the circumstances were such that it should have been alerted to the possibility of its occurrence; and

(iv) an error merely on the wording of the provisions can only result in correcting the text of the treaty, in accordance with Article 79 VCLT, not a declaration of nullity.

Series A/B, No. 53 (hereinafter "*Legal Status of Eastern Greenland, Dissenting Opinion of Anzilotti*"), pp. 92-93.

7.12 Moreover, an alleged mistake must be "established by convincing evidence":[386] it cannot simply be asserted, or "based upon hypotheses which are not plausible or accompanied by adequate proof".[387] As the ILC noted, "treaty making processes are such as to reduce to a minimum the risk of errors on material points of substance. In consequence, the instances in which errors of substance have been invoked as affecting the essential validity of a treaty have not been frequent".[388] Finally, it is for the State invoking the error to establish its existence and essential character.[389]

2. Fraud

7.13 Article 49 of the Vienna Convention contemplates the invalidity of a treaty on grounds of fraud:

> "If a State has been induced to conclude a treaty by the fraudulent conduct of another negotiating State, the State may invoke the fraud as invalidating its consent to be bound by the treaty."

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[386] *Case Concerning Sovereignty over Certain Frontier Land*, p. 222.

[387] *Ibid.*, p. 226; *see also* Frede Castberg, "L'excès de pouvoir dans la justice internationale", *Recueil des Cours*, Vol. XXXV, No. 443 (1931).

[388] *Draft Articles on the Law of Treaties with commentaries*, *reprinted in* U.N., YBILC 1966/II, U.N. Doc. A/CN.4/SER.A/1966/Add.1 (1966) (hereinafter "Draft Articles on the Law of Treaties with commentaries"), Art. 45, p. 243, para. 1.

[389] *Mavrommatis Jerusalem Concessions*, p. 30; *Arbitral Award Made by the King of Spain Case*, p. 215; *Temple of Preah Vihear, 1961 Judgment*, p. 26.

7.14 The drafting history of that provision indicates that fraud amounts to "deceit or wilful misrepresentation".[390]

7.15 As the ILC noted, "any fraudulent misrepresentation of a material fact inducing an essential error would be caught by the provisions of the ... article dealing with error", now Article 48 of the Convention.[391] However, the difference between error and fraud is intention. For fraud to exist in the negotiation of a treaty, one State must have had the deliberate intention to deceive another. This fraudulent behaviour must go beyond the mere misrepresentation of a fact.[392] Therefore, "the Commission considered that it was advisable to keep fraud and error distinct in separate articles. Fraud, when it occurs, strikes at the root of an agreement in a somewhat different way from innocent misrepresentation and error. It does not merely affect the consent of the other party to the terms of the agreement; it destroys the whole basis of mutual confidence between the parties".[393]

7.16 As was abundantly emphasised by authors at the time the Treaty of Washington was concluded, the risk of fraud in the negotiation of a treaty was assumed to be extremely low.[394] History proves them right in view of the

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[390] U.N., *United Nations Conference on the Law of Treaties*, First session, U.N. Doc. A/CONF.39/1/ (26 Mar.-24 May 1968), p. 258, para. 64. *See also Draft Convention on the Law of Treaties in AJIL*, Vol. XXIV (1935), p. 1144, Art. 31 – "Fraud. (a) A State which claims that *it has been induced to enter into a treaty with another State by the fraud* of the latter State, may seek from a competent international tribunal or authority a declaration that the treaty is void" (emphasis added).

[391] *See supra* para. 7.10.

[392] *Remarks* by Mr Roberto Ago (13 May 1963), *reprinted in* U.N., YBILC 1963/I, U.N. Doc. A/CN.4/SER.A/1963 (1963), p. 31, para. 47.

[393] Draft Articles on the Law of Treaties with commentaries, Article 46, p. 244, para. 1.

[394] *See supra* para. 7.12.

exceptional occurrence of fraud as underlined by Roberto Ago during the discussion of what was to become Article 49 of the Vienna Convention on the Law of Treaties.[395] As stated by the ILC in its commentaries on the Draft Articles on the Law of Treaties with commentaries, "[c]learly, cases in which Governments resort to deliberate fraud in order to procure the conclusion of a treaty are likely to be rare".[396] Here again, the burden of proof lies with the State claiming invalidity based on fraud.[397]

3. Corruption

7.17 While the Harvard Draft Convention on the Law of Treaties does not cite corruption of the negotiators as a ground for annulment of a treaty, it was sometimes mentioned in the legal literature contemporaneous with the Treaty of Washington,[398] and the principle was accepted in Article 50 of the 1969 Vienna Convention:

> "If the expression of a State's consent to be bound by a treaty has been procured through the corruption of its representative directly or indirectly by another negotiating State, the State may invoke such corruption as invalidating its consent to be bound by the treaty."

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[395] *Remarks* by Mr Roberto Ago (13 May 1963), *reprinted in* U.N., YBILC 1963/I, U.N. Doc. A/CN.4/SER.A/1963 (1963), p. 31, para. 47.

[396] Draft Articles on the Law of Treaties with commentaries, Article 46, p. 244, para. 1.

[397] *Remarks* by Sir Humphrey Waldock, *reprinted in* U.N., YBILC 1963/I, U.N. Doc. A/CN.4/SER.A/1963 (1963), p. 195, para. 76 ("[T]he burden lay on the party wishing to contest the validity of a treaty."); Mark E. Villiger, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIE, (Brill, 2009), p. 616, para. 3.

[398] *See infra* note 400; *see also supra* para. 6.47.

7.18 Absent any precedent, Sir Ian Sinclair saw in this provision a "striking example of progressive development" of international law.[399]

7.19 While some members of the ILC were of the view that corruption, if it occurred, would be a case of fraudulent conduct,[400] the majority "considered that the corruption of a representative by another negotiating State undermines the consent which the representative purports to express on behalf of his State in a quite special manner which differentiates the case from one of fraud".[401] And the Commission commented:

> "The strong term 'corruption' is used in the article expressly in order to indicate that only acts calculated to exercise a substantial influence on the disposition of the representative to conclude the treaty may be invoked as invalidating the expression of consent which he has purported to give on behalf of his State."[402]

7.20 As in the case of error or fraud, these remarks are telling: corruption vitiates the consent to be bound if it exercised "a substantial influence" on the conclusion of the treaty. And, of course, it must be proven by the State which invokes it.

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[399] Ian McTaggart Sinclair, THE VIENNA CONVENTION ON THE LAW OF TREATIES (MUP, 2nd ed. 1984), p. 16.

[400] Draft Articles on the Law of Treaties with commentaries, Article 47, p. 245, para. 2.

[401] *Ibid.*, para. 3.

[402] *Ibid.*, para. 4.

B. THE SPECIAL AGREEMENT WAS CONCLUDED BY VENEZUELA WITH FULL KNOWLEDGE OF ALL THE RELEVANT FACTS

7.21 In very general terms, Venezuela has complained that it "played a very small role in the groundwork for the Treaty";[403] that it had no access to the negotiations during the critical period;[404] that it was told an 1850 treaty between the United States and Great Britain would protect Venezuelan interests against any subsequent appropriation of territory by Great Britain;[405] and that "the title by prescription accepted in the Treaty had to be interpreted according to international law, that is to say, that the occupation, the basis of that title, had to be public, in good will and with tacit consent, etc."[406] Moreover, its Foreign Minister declared in 1965 that "[t]he Secretary of State, Richard Olney, and Sir Julian Pauncefote agreed that no Venezuelan would be part of the Tribunal".[407] These allegations are all unfounded.

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[403] U.N. General Assembly, 17th Session, *Statement of Dr. Marcos Falcón Briceño, Minister for External Relations of Venezuela*, U.N. Doc A/SPC/71 (12 Nov. 1962), p. 10.

[404] ICJ, *White Paper of the Venezuelan Council on Foreign Relations (COVRI) regarding the Pending Case Arbitral Award of 3 October 1899 (Guyana v Venezuela)* (9 Dec. 2020), p. 29, *available at* https://covri.com.ve/index.php/2020/12/10/white-paper-of-the-venezuelan-council-on-foreign-relations-covri-regarding-the-pending-case-arbitral-award-of-3-october-1899-guyana-v-venezuela/.

[405] *Ibid.*, p. 29, para. 49.

[406] *Statement* by Dr. I. Iribarren Borges, Minister of Foreign Affairs of Venezuela, to the National Congress of Venezuela (17 Mar. 1966), *reprinted in* Republic of Venezuela, Ministry of Foreign Affairs, *Claim of Guyana Esequiba: Documents 1962-1981* (1981). MG, Vol. II, Annex 33.

[407] *Ibid.*

1. Alleged Denial of Access to the Negotiations

7.22 Regarding Venezuela's access to the negotiation of 1897 Treaty, the facts are clear:

- Venezuela deliberately entrusted the United States to represent it in the negotiations with Great Britain;
- As has already been pointed out, the United States was given broad discretion in this respect, but made its views and actions known to its principal;
- Despite the wide margin of discretion left to the United States, Venezuela was informed of and consulted during the negotiations that led to the Treaty; and
- Venezuela not only ratified the *Compromis* but expressed its heartfelt gratitude to the United States for faithfully and effectively representing it.

7.23 Each of these points is confirmed by the evidence before the Court.

(a) Venezuela deliberately entrusted the United States to represent it in the negotiations with Great Britain.

7.24 During the negotiations, Venezuela was effectively represented by the United States. From the outset, it had asked the United States "to intervene in a direct and effective way" ("*interposición eficaz y directa"*) in the dispute with Great Britain in order to avoid any interaction by Venezuela with Great Britain.[408] Venezuela, in particular, welcomed U.S. intervention to represent it in the

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[408] *Letter* from Mr. Andrade to Mr. Gresham (19 Dec. 1894), *reprinted in* Venezuela & Great Britain, [HISTORIA OFICIAL DE LA DISCUSIÓN ENTRE VENEZUELA Y LA GRAN BRETAÑA SOBRE SUS LÍMITES EN LA GUAYANA] OFFICIAL HISTORY OF THE DISPUTE BETWEEN VENEZUELA AND GREAT BRITAIN OVER THEIR BOUNDARIES IN GUAYANA (1896), pp. 282-284. *See also* G.B. Young, "Intervention Under the Monroe Doctrine: The Olney Corollary", *Political Science Quarterly*, Vol. 57, No. 2 (June 1942), p. 261, note 43; Charles C. Tansill, THE FOREIGN POLICY OF THOMAS F. BAYARD, 1885-1897 (FUP, 1940), p. 748).

negotiations aimed at obtaining Great Britain's agreement to arbitrate the territorial dispute.[409]

7.25 As early as 1895, the President of the United States, Grover Cleveland, insisted in a special message to the Congress on the necessity of Venezuela's free will to submit its territorial dispute with Great Britain to impartial arbitration then resisted by Great Britain.[410]

7.26 During the negotiations, Venezuela, which had sought the United States' involvement, insisted on the active part taken by the United States "with the consent of the two interested governments".[411]

(b) The United States was given broad discretion in its role of representation of Venezuela, but Venezuela freely made its views known to the U.S.

7.27 The claim that Venezuela had been prevented from expressing its views is not supported by the evidence.

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[409] Venezuela Ministry of Foreign Affairs, *Memorandum by The Ministry of Foreign Affairs of Venezuela relative to the Note of Lord Salisbury to Mr Richard Olney, dated November 26, 1895, on the question of boundary between Venezuela and British Guayana* (1896). MMG, Vol. IV, Annex 64. *See also*, *ibid.*, pp. 3-4 (*Letter* from P. Ezequiel Rojas to Richard Olney (28 Mar. 1896)) (providing to the Commission a Memorandum containing the Government of Venezuela's assessment of the history of the territorial claims).

[410] *Speech* of Grover Cleveland: Message Regarding Venezuelan-British Dispute (17 Dec. 1895), *available at* https://millercenter.org/the-presidency/presidential-speeches/december-17-1895-message-regarding-venezuelan-british-dispute (last accessed 22 Feb. 2022): "any adjustment of the boundary which [Venezuela] may deem for her advantage and *may enter into of her own free* will cannot of course be objected to by the United States" (emphasis added).

[411] *Venezuela-British Guiana Boundary Arbitration*, The Case of the United States of Venezuela (1898), Vol. I, p. 220. MMG, Vol. IV, Annex 127.

7.28 From the outset, two demands were made by Venezuela: "[Venezuela] explicitly required that any arbitration agreement reached should be based on the following two premises: 1) that the entire disputed territory was subject to arbitration; 2) that the matter would be decided by a court of law."[412] Both of these objectives were achieved. Articles I and III of the Treaty state that the Arbitral Tribunal shall "determine [the whole] boundary-line between the Colony of British Guiana and the United States of Venezuela" while Article IV sets out in broad detail the "Rules to be taken as applicable to the case" together with "such principles of international law not inconsistent therewith". As noted by the Venezuelan Foreign Minister in his speech before the U.N. General Assembly in October 1962: "The rules by which the case was to be studied and decided were laid down, as is customary, in the arbitration agreement".[413]

7.29 In order to achieve Venezuela's objectives, the United States was given broad discretion to negotiate with Great Britain. Its mandate cannot, by any means, be linked to any of the defects of consent that may lead to the nullity of a treaty. This is all the more so in the present case, since negotiating through a third-party representative was not unusual at the time. For example, Liechtenstein had given

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[412] Hermann González Oropeza, S.J. & Pablo Ojer, *[Informe que los expertos venezolanos para la cuestión de límites con Guayana Británica presentan al Gobierno Nacional] Report submitted by the venezuelan experts to the National Government on the issue of the boundaries with British Guiana* (18 Mar. 1965), p. 32, para. 12. MMG, Vol. IV, Annex 74.

[413] *Statement* made by the Permanent Representative of the United Kingdom at the 1138th Plenary Meeting, *reprinted in* U.N. General Assembly, 17th Session, *Agenda item 9*, U.N. Doc. A_PV-1138-EN (1 Oct. 1962), p. 244, para. 66.

Switzerland the right to represent it and to conclude a number of treaties on its behalf.[414]

7.30 The evidence makes clear that, contrary to Venezuela's post-1962 assertions, it determined the objectives that the United States was to achieve in the negotiations. The United States faithfully — and successfully — represented Venezuela's interests. Moreover, in November 1962 Venezuela's Foreign Minister stated before the U.N. General Assembly:

> "[I]n February 1897, an arbitral Treaty was signed. ... We have always maintained that we observed this arbitral Treaty, in spite of the fact that Venezuela played a very small role in the groundwork for the Treaty and its actual drafting."[415]

7.31 In other words, even if it were admitted, *quod non* — in contradiction of the historical evidence — that the role of Venezuela in the negotiations was limited, this did not form "an essential basis of its consent to be bound by the treaty".[416]

(c) Despite the wide margin of discretion left to the United States, Venezuela was informed of and consulted during the negotiations that led to the Compromis and made its views known to its principal.

7.32 In this respect also, Venezuela's *post hoc* allegations are contradicted by the evidence — most notably by the message delivered on 20 February 1897 by the

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[414] *See* Traité entre la Suisse et la Principauté de Liechtenstein concernant la réunion de la Principauté de Liechtenstein au territoire douanier suisse (1923), entered into force 1 Jan. 1924, *available at* https://www.fedlex.admin.ch/eli/cc/39/551_565_576/fr (last accessed 22 Feb. 2022), Art. 8.

[415] U.N. General Assembly, 17th Session, *Statement of Dr. Marcos Falcón Briceño, Minister for External Relations of Venezuela*, U.N. Doc A/SPC/71 (12 Nov. 1962), p. 120, para. 20.

[416] Under Article 48 of the 1969 Vienna Convention. *See supra* paras. 7.10-7.12.

Venezuelan President, Joaquín Sinforiano De Jesús Crespo, to the Venezuelan Congress:

> "While the Venezuelan Government, through the patriotic and earnest efforts of its Foreign Office, was presenting and urging its rights before the Boundary Commission, the State Department at Washington, with laudable efforts, was endeavoring to secure arbitration from the British Ministry, in order to adjust with greater facility and success this unpleasant dispute of almost a century. *The first official knowledge the Executive power had of the means employed to induce our powerful adversary to accept arbitration unreservedly and unconditionally, for which Venezuela had always contended, was derived from the publication of the correspondence between the Governments at Washington and London from February to June of the past year*, and which, being so favorable to this republic, was sent here to be translated into Spanish and printed. *Latterly this Government, through its Legation at Washington, was consulted as to a point in relation to those negotiations for arbitration. The reply of the Venezuelan Minister of Foreign Affairs, with an opinion contrary to that which was seemingly suggested on this point*, arrived in Washington at the time when the answers from Great Britain were expected as to the determinate points of the arbitration.
>
> At this juncture the Government was informed that on the 12th of November there had been signed in Washington by his Excellency Mr Olney, Secretary of State of the United States, and Sir Julian Pauncefote, Ambassador of Her Britannic Majesty in Washington, a protocol with the essential bases for a treaty between Venezuela and Great Britain, which, by means of arbitration, would put an end to the old dispute between the two nations. *The bases were then submitted by the Washington Government for the consideration of this Government by means of a letter to me from his Excellency Mr Cleveland*, in which he manifested the noble desire to see accepted a compact which, in his opinion, was just and advantageous."[417]

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[417] *Message* from President Joaquín Sinforiano De Jesús Crespo to Congress (20 Feb. 1897), *reprinted in* Odeen Ishmael, "Chapter 13 - The Arbitral Tribunal and the Award" *in* TRAIL OF

7.33 The italicised passages in this message — emanating from the highest Venezuelan authority — bear witness to the close association of Venezuela to the negotiations, even though the latter were led by the United States on behalf of Venezuela.

7.34 Among others, a Memorandum by Venezuela's Ministry of Foreign Affairs confirms its effective participation in this process.[418] This impressive document of 67 pages, dated 26 November 1895, relates to a note from Lord Salisbury, the British Prime Minister (who also served as Minister of Foreign Affairs), to Mr Olney, the U.S. Secretary of State — the chief negotiators of the *Compromis* — on the question of the boundary between Venezuela and British Guiana, and expounds with great care the Venezuelan position.

7.35 On 13 December 1896, Ambassador José Andrade, who had been appointed Envoy Extraordinary and Minister Plenipotentiary of Venezuela to the United States, stated publicly that, "There was not a word in the treaty which was not previously known to the Venezuelan Government, and which had not been approved in advance".[419]

DIPLOMACY (GNI Publications, 1998), *available at* http://www.guyana.org/features/trail_diplomacy_pt3.html#chap13 (last accessed 31 Jan. 2022), pp. 351-352 (emphasis added).

[418] Venezuela Ministry of Foreign Affairs, *Memorandum by The Ministry of Foreign Affairs of Venezuela relative to the Note of Lord Salisbury to Mr Richard Olney, dated November 26, 1895, on the question of boundary between Venezuela and British Guayana* (1896), p. 67. MMG, Vol. IV, Annex 64.

[419] "Venezuelan Treaty Safe: Its Details Were Known to President Crespo Long Ago", *The New York Times* (13 Dec. 1896). Ambassador Andrade was citing the Protocol ("Agreement between Great Britain and the United States of America on heads of proposed treaty between Great Britain and Venezuela for settlement of the Venezuela boundary question") which had been signed on 12

(d) Venezuela ratified the Treaty and expressed heartfelt thanks to the United States for faithfully and effectively representing it.

7.36 Official Venezuelan reactions, welcoming the successful conclusion of the negotiations and thanking the United States for its role in them, confirm the falsity of Venezuela's belated allegations that it was denied access to them.

7.37 The ratification of the Treaty by Venezuela's National Congress was contemporaneously described as follows:

> "The World published the following cable dispatch from Caracas Venezuela: 'The Congress of Venezuela has unanimously and enthusiastically ratified the Guiana boundary arbitration treaty with Great Britain, which was negotiated by the United States. The measure was first read in the House of Representatives by Seno Aranguren, who spoke eloquently in its favor. The second reading was without incident. It came up on third reading to-day, and after a speech by Senor Briceno, the House voted for the treaty unanimously amid great cheering and enthusiastic demonstrations of gratitude to 'Uncle Sam'. The Treaty was unanimously ratified by the Senate to-day'."[420]

7.38 The evidence shows clearly that none of the defects of consent suggested by Venezuela — be it error, fraud or corruption of the negotiations, is present in this case:

- The outcome of the negotiations was in conformity with the wishes of Venezuela, which was kept informed of the process and expressed its views when it deemed it useful;

November 1896 and comprised all the main features which were ultimately included in the *Compromis*.

[420] "Ratified by Venezuela: The Boundary Arbitration Treaty Enthusiastically Indorsed", *The Indianapolis News* (6 Apr. 1897).

- The United States faithfully represented the views of Venezuela, which were reflected in the text of the *Compromis*;

- The latter was welcomed by Venezuela, which cannot deny its positive appreciation sixty years later;

- No signs of corruption of the U.S. negotiators or of their Venezuelan counterparts can be detected; and indeed none has been officially uttered by Venezuela.

7.39 Venezuela has not offered any evidence in support of its Foreign Minister's December 1965 allegation that it had been assured by the U.S. Secretary of State, Richard Olney that, under the Treaty, Venezuela would be protected against any misappropriation of territory by Great Britain after 1850. Nor is there any evidence to support the claim that it was told that title by prescription would only be based on international law.

7.40 Nowhere in the historical record has Guyana found any assurances of the kind allegedly given to Venezuela by Secretary of State Olney. Had they been given, it is difficult to see how the Venezuelan President and Congress would have been so appreciative of the *Compromis* and the role played by the United States in its negotiation. The commitments set forth in Article IV of the 1897 Treaty very explicitly contain provisions that are contrary to the alleged assurances given by Mr Olney. As aptly noted by Judge Anzilotti in his dissent in the case concerning the *Legal Status of Eastern Greenland*: "If a mistake is pleaded it must be of an excusable character; and one can scarcely believe that a government could be ignorant of the legitimate consequences following upon an extension of sovereignty".[421] The record confirms that Venezuela was fully aware of the seriousness of the issues resolved by the Treaty. This is evident, for example, in

[421] *Legal Status of Eastern Greenland, Dissenting Opinion of Anzilotti*, p. 92.

the message of President Crespo to the Congress on 20 February 1897, calling for a prompt ratification of the Treaty:

> "The responsibilities of those who are intrusted with the administration of public affairs by the suffrage of the people increase and become graver when the preservation of interests closely linked with the National life is the subject to be dealt with. There is in the breast of the Chief Magistrate who has the good of the Republic at heart a struggle between the ideas of the moment and those born of a concern for the future. To study well the former and the latter, to weight the advantages and risks of the one and the other without silencing the dictates of conscience and reason, such are the duties, truly arduous, of the ruler during whose term of office has chanced to fall the settlement of an affair which, like that of the Guiana boundary question, has been growing graver — a struggle without a truce and full of lamentable incidents to the party weak to material defenses. Public opinion, to which the governing power must always listen, especially when the territorial integrity is the subject of discussion, manifested itself so divided as to the bases proposed to Venezuela that it would have been in vain for the most expert observer to have deduced from such adversity of opinions any expression of the public sentiment. ...
>
> And as this is an affair of such importance involving as it does such sacred interests, I beg you that from the moment it is presented for your consideration you will postpone all other business until you shall decide upon it."[422]

7.41 Finally, to the extent that Venezuela complains of a misinterpretation by the Arbitral Tribunal of the provisions of the *Compromis* relating to title by prescription, this would not be a matter of error or fraud, but an appeal against the

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[422] *Message* from President Joaquín Sinforiano De Jesús Crespo to Congress (20 Feb. 1897), *reprinted in* Odeen Ishmael, "Chapter 13 - The Arbitral Tribunal and the Award" *in* TRAIL OF DIPLOMACY (GNI Publications, 1998), *available at* http://www.guyana.org/features/trail_diplomacy_pt3.html#chap13 (last accessed 22 Feb. 2022), pp. 351-352.

Award, on its merits. Such appeal is explicitly excluded by Article XIII, which provides: "The High Contracting Parties engage to consider the result of the proceeds of the Tribunal of Arbitration as a full, perfect, and final settlement of all the questions referred to the Arbitrators".

C. VENEZUELA'S KNOWLEDGE AND APPROVAL OF THE COMPOSITION OF THE TRIBUNAL

7.42 One of Venezuela's complaints against the validity of the *Compromis* seems to concern the composition of the Tribunal, as provided for in Article II of the 1897 Treaty. Its main criticism is directed at the absence of a national from Venezuela.[423]

7.43 In any event, there is no doubt that the Arbitral Tribunal was constituted in accordance with the terms of the Treaty. Article I of the Treaty provided that, "An Arbitral Tribunal shall be immediately appointed to determine the boundary-line between the Colony of British Guiana and the United States of Venezuela". Article II addressed the composition of that Tribunal, in some detail.[424]

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[423] *See e.g.*, U.S. Department of State, *Memorandum of Conversation*, No. 741D.00/1-1562 (15 Jan. 1962), p. 2. MG, Vol. II, Annex 16; *Letter* from the Permanent Representative of Venezuela to the Secretary-General of the United Nations (14 Feb. 1962), *reprinted in* U.N. General Assembly, Fourth Committee, 16th Session, *Information from Non-Self-Governing Territories transmitted under Article 73 of the Charter*, U.N. Doc A/C.4/536 (15 Feb. 1962), p. 3, para. 10. MG, Vol. II, Annex 17; U.N. General Assembly, 17th Session, *Statement of Dr. Marcos Falcón Briceño, Minister for External Relations of Venezuela*, U.N. Doc A/SPC/71 (12 Nov. 1962), p. 120, para. 26.

[424] *See supra* para. 3.31.

7.44 As described in Chapter 3,[425] the four Arbitrators named in Article II were all eminent jurists whose legal ability, fairness and integrity were widely recognised. The same was true of the Right. Hon. Lord Russell of Killowen GCMG, the then-Lord Chief Justice of England and Wales, who was selected to replace Lord Herschell after the latter's passing.

7.45 The absence of Venezuelan arbitrators on the Tribunal was not exceptional at the time. In other arbitration cases, such as *The Pious Fund of the Californias*, Mexico appointed two arbitrators from Holland, Mr T.M.C. Asser and Jonkheer A.F. de Savorin Lohman.[426] Two arbitrators were American but none were Mexican.[427]

7.46 Likewise, there is no evidence that the issue of the appointment of arbitrators was a decisive element for Venezuela in the negotiation of the *Compromis*. Venezuela did not include this among its demands of points to be included in the Treaty.[428] On the contrary, Venezuela considered the appointment

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[425] *See supra* paras. 3.31-3.37.

[426] *The Pious Fund of the Californias (The United States of America v. The United Mexican States)*, PCA Case. No. 1902-01, Award (14 Oct. 1902); *Report* of the US Agent and Counsel on the Pious Fund Case, Part. I; *Letter* from Mr. Olney to Mr. Bayard (20 July 1895), *reprinted in* U.S. Department of State, *Foreign Relations of the United States, 1902, United States vs. Mexico, in the Matter of the Case of the Pious Fund of the Californias*, App. I (1902), p. 11, *available at* https://history.state.gov/historicaldocuments/frus1902app2/comp1 (last accessed 22 Feb. 2022). *See also The Deutsche Amerikanische Petroleum Gesellschaft Oil Tankers (USA v. Reparation Commission)*, RIAA, Vol. II, p. 778 (1926), pp. 777-795.

[427] *Ibid*.

[428] *See* Hermann González Oropeza, S.J. & Pablo Ojer, *[Informe que los expertos venezolanos para la cuestión de límites con Guayana Británica presentan al Gobierno Nacional] Report submitted by the venezuelan experts to the National Government on the issue of the boundaries with British Guiana* (18 Mar. 1965), p. 32. MMG, Vol. IV, Annex 74. *See supra* para. 7.28.

of U.S. Arbitrators, especially the Chief Justice and an Associate Justice of the U.S. Supreme Court, as an incentive for the U.S. to guarantee the effective implementation of the future Award. As stated by President Crespo:

> "the definite acceptance of the bases will always involve for them [*i.e.*, the United States] a sort of friendly responsibility which will be in every case a guarantee of future harmony between the two nations represented by the arbitral tribunal".[429]

7.47 At the time of their appointment, and for the next 60 years, Venezuela never complained about the American jurists appointed in its name. The Chief Justice of the United States Supreme Court, Melvin Weston Fuller, was a judge of exceptional ability and probity. At the time of his appointment to the Tribunal, it was said that "the feeling is wide, and steadily widening, that the great office [of Chief Justice] was never in abler, cleaner, safer hands".[430] Justice David J. Brewer had been a Justice of the United States Supreme Court since 1890 and was renowned for his independence and integrity.[431] Moreover, he was well known to Venezuela for having served as the Chairman of the United States Commission on the Boundary between Venezuela and British Guiana ("the Cleveland Commission"), whose work Venezuela thoroughly endorsed.

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[429] *Message* from President Joaquín Sinforiano De Jesús Crespo to Congress (20 Feb. 1897), *reprinted in* Odeen Ishmael, "Chapter 13 - The Arbitral Tribunal and the Award" *in* TRAIL OF DIPLOMACY (GNI Publications, 1998), *available at* http://www.guyana.org/features/trail_diplomacy_pt3.html#chap13 (last accessed 22 Feb. 2022).

[430] G.C. Worth & G. H. Knott, "The Venezuela Boundary Arbitration", *Am. L. Rev*. Vol. 31 No. 481 (1897), p. 501.

[431] *Ibid.*, p. 498 ("in all the long and bright array of men who have adorned that position, none ever came to it with cleaner hands than those of David J. Brewer").

7.48 The fifth Arbitrator and President of the Tribunal, Prof F. de Martens, a preeminent international jurist, was selected by the other four, as stipulated in the 1897 Treaty. According to a contemporaneous account:

> "Great Britain and Venezuela each submitted a list of distinguished jurists who would be acceptable as umpire. These embraced some of the most noted men of Europe, but M. Maertens's [sic] name was the only one on the list of both countries."[432]

7.49 The Tribunal was thus properly constituted in accordance with the terms of the Treaty. It cannot plausibly be argued that the Arbitrators were unqualified or incapable of fairly and effectively discharging the responsibilities conferred upon them by the Treaty. On the contrary, both Great Britain and Venezuela repeatedly emphasised the exceptional calibre and integrity of the Arbitrators. On the first day of the proceedings before the Tribunal, for example, counsel for Venezuela, Mr Mallet-Prevost, praised the "Arbitrators whose distinguished records and whose high reputation give us the assurance that the questions involved will be decided in justice and equity".[433] Similar sentiments were expressed by counsel for Great Britain, Sir Richard Webster.[434] In his closing argument on behalf of Venezuela,

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[432] *See* "British-Venezuela Boundary, M. Maertens, the Russian Jurist, Chosen as Umpire and President of the Arbitration Court", The New York Times (13 Oct. 1897), *reprinted in* Odeen Ishmael, *The British Guiana-Venezuela Border Dispute* (GNI, 2010), *available at* http://www.guyana.org/Western/NYT_Compiled-reports-web.pdf (last accessed 22 Feb. 2022), p. 565.

[433] *Boundary between the Colony of British Guiana and the United States of Venezuela*, First Day's Proceedings (25 Jan. 1899), p. 4. MMG, Vol. IV, Annex 96.

[434] *Ibid.*, p. 3. During his opening speech at the start of the substantive hearing, Sir Richard Webster hailed Prof Martens' "reputation as a jurist, as a lawyer, as a diplomatist is not confined to the boundaries of his own country, but extends to every civilized nation". *Boundary between the Colony of British Guiana and the United States of Venezuela*, Second Day's Proceedings (15 June 1899), p. 9. MMG, Vol. IV, Annex 97.

General Benjamin Harrison likewise emphasised that the composition of the Tribunal rendered it "absolutely impartial".[435]

7.50 It was not until 1965 that Venezuela began to assert grounds for challenging the validity of the 1897 Treaty and the composition of the Tribunal. By itself, such a delay clearly renders the claim of invalidity dubious. Article 45 of the VCLT, on the "Loss of a right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty", provides:

> "A State may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under articles 46 to 50 or articles 60 and 62 if, after becoming aware of the facts: (a) it shall have expressly agreed that the treaty is valid or remains in force or continues in operation, as the case may be; or (b) it must by reason of its conduct be considered as having acquiesced in the validity of the treaty or in its maintenance in force or in operation, as the case may be."

7.51 In this respect, the circumstances of the present case are comparable to those of the *Arbitral Award Made by the King of Spain on 23 December 1906*, in which Nicaragua had challenged the appointment of the arbitrator to decide its dispute with Honduras:

> "No question was at any time raised in the arbitral proceedings before the King with regard either to the validity of his designation as arbitrator or his jurisdiction as such. Before him, the Parties followed the procedure that had been agreed upon for submitting

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[435] *Boundary between the Colony of British Guiana and the United States of Venezuela*, Fiftieth Day's Proceedings (19 Sept. 1899), p. 2982. MMG, Vol. IV, Annex 111 ("It seems to me that, if this process of settling international difficulties is to commend itself to the nations, it can only be by setting up for the trial of such questions an absolutely impartial, judicial Tribunal. ... It seems to me, Mr President, that anticipating what seemed to be so prominent in this discussion at the Hague, these nations have adopted that basis in the constitution of this Tribunal".).

their respective cases. Indeed, the very first occasion when the validity of the designation of the King of Spain as arbitrator was challenged was in the Note of the Foreign Minister of Nicaragua of 19 March 1912.

In these circumstances the Court is unable to hold that the designation of the King of Spain as arbitrator to decide the boundary dispute between the two Parties was invalid."[436]

7.52 In that case, the Court also found:

"That, having regard to the fact that the designation of the King of Spain as arbitrator was freely agreed to by Nicaragua, that no objection was taken by Nicaragua to the jurisdiction of the King of Spain as arbitrator either on the ground of irregularity in his designation as arbitrator or on the ground that the Gámez-Bonilla Treaty had lapsed even before the King of Spain had signified his acceptance of the office of arbitrator, and that Nicaragua fully participated in the arbitral proceedings before the King, it is no longer open to Nicaragua to rely on either of these contentions as furnishing a ground for the nullity of the Award."[437]

7.53 The same principle must apply in the present case:

- the designation of the five Arbitrators was freely agreed to by Venezuela;
- no objection was taken by Venezuela to the jurisdiction of the Tribunal thus composed on the ground of irregularity in its mode of composition; and
- Venezuela fully participated in the arbitral proceedings before that Tribunal.

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[436] *Arbitral Award Made by the King of Spain Case*, p. 207. *See also Temple of Preah Vihear (Cambodia v. Thailand)*, Preliminary Objections, Judgment of 26 May 1961, I.C.J. Reports 1961, p. 30.

[437] *Arbitral Award Made by the King of Spain Case*, p. 207.

7.54 It is therefore not open to Venezuela, six decades after the Award was issued, to belatedly challenge it based on the *Compromis* or the composition of the Arbitral Tribunal.

II. No Coercion or Duress

7.55 In an Aide-Mémoire of 5 November 1963, Venezuela's Minister of Foreign Affairs, Marcos Falcón Briceño, contended that his country signed the Treaty of Washington "under moral duress" and "was coerced into adhering to the Treaty".[438] More specifically, in their Report of 18 March 1965, Venezuela's "experts" on the boundary issue with British Guiana wrote:

> "Venezuela signed the Arbitration Treaty on February 2, 1897, coerced by Secretary of State Richard Olney and his threats of abandoning it to the mercy of Great Britain. Only 'the dangerous consequences of the abandonment in which the refusal would place Venezuela' — as the Venezuelan Foreign Minister stated in 1896 — could force him to accept the terms of that Treaty."[439]

7.56 As a ground of nullity, coercion has undergone major changes following the establishment of the principle of the prohibition of the use of armed force in

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[438] *[Aide-Memoire presentado por el Dr. Marcos Falcón Briceño al Hon. R. A. Butler] Aide-Memoire presented by Marcos Falcón Briceño to the Hon. R.A. Butler* (5 Nov. 1963), p. 24. MMG, Vol. IV, Annex 73.

[439] Hermann González Oropeza, S.J. & Pablo Ojer, *[Informe que los expertos venezolanos para la cuestión de límites con Guayana Británica presentan al Gobierno Nacional] Report submitted by the venezuelan experts to the National Government on the issue of the boundaries with British Guiana* (18 Mar. 1965), p. 32, para. 12. MMG, Vol. IV, Annex 74. *See also*, ICJ, *White Paper of the Venezuelan Council on Foreign Relations (COVRI) regarding the Pending Case Arbitral Award of 3 October 1899 (Guyana v Venezuela)* (9 Dec. 2020), p. 38, para. 68, *available at* https://covri.com.ve/index.php/2020/12/10/white-paper-of-the-venezuelan-council-on-foreign-relations-covri-regarding-the-pending-case-arbitral-award-of-3-october-1899-guyana-v-venezuela/.

international relations (**A**). In reality, Venezuela's charges relate more to alleged pressures on Great Britain than on Venezuela (**B**) and, in any event, they are not such as to invalidate the Treaty (**C**).

A. The Notion of Coercion in an Intertemporal Perspective and in its Relationship with Treaty Law

7.57 Article 52 of the 1969 Vienna Convention on the Law of Treaties (Coercion of a State by the threat or use of force) provides:

> "A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations."

7.58 The plain meaning of this provision makes clear that the rule cannot be applied retrospectively. It is conditioned by the prohibition of the threat and use of force as embodied in the Charter of the United Nations, and, in particular in its Article 2, paragraph 4, a principle which was not established in international law at the end of the nineteenth century.[440] Moreover, as is well-known, the expression

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[440] Draft Articles on the Law of Treaties with commentaries, Art. 49, p. 247, para. 7: "The question of the time element in the application of the article was raised in the comments of Governments from two points of view: (a) the undesirability of allowing the rule contained in the article to operate retroactively upon treaties concluded prior to the establishment of the modern law regarding recourse to the threat or use of force; and (b) the date from which that law should be considered as having been in operation. The Commission considered that there is no question of the article having retroactive effects on the validity of treaties concluded prior to the establishment of the modern law.[440] 'A juridical fact must be appreciated in the light of the law contemporary with it.'[440] The present article concerns the conditions for the valid conclusion of a treaty – the conditions, that is, for the creation of a legal relation by treaty. An evolution of the law governing the conditions for the carrying out of a legal act does not operate to deprive of validity a legal act already accomplished in conformity with the law previously in force. The rule codified in the present article cannot therefore be properly understood as depriving of validity *ab initio* a peace treaty or other treaty procured by coercion prior to the establishment of the modern law regarding the threat or use of force".

"threat or use of force" is not a catch-all phrase applicable to any kind of pressure but concerns physical force.[441]

7.59 Plainly, there can be no doubt that the existing rule prohibiting the use of force in international relations cannot be transposed and implemented in the case of treaties concluded when the threat or use of force was considered acceptable in relations between States. The Treaty of Washington, which was concluded in 1897, predates not only the U.N. Charter, but also the Covenant of the League of Nations and the Drago-Porter Convention of 18 October 1907.[442] As Despagnet observed in 1894:

> "*[C]e serait détruire l'efficacité de presque tous les traités, bases du Droit international, que de permettre à un Etat de s'en dégager en invoquant la violence exercée contre lui. Tous les auteurs se*

See also, *Fifth Report* on the Law of Treaties by Sir Humphrey Waldock, Special Rapporteur, U.N. Doc. A/CN.4/183 and Add. 1-4, *reprinted in* U.N., YBILC 1966/II, U.N. Doc. A/CN.4/SER.A/1966/Add.1 (1966), pp. 19-20, para. 6 ("Consequently, a peace treaty or other treaty procured by coercion prior to the emergence of the rule codified in the present article would not, under the inter-temporal law, be deprived of its validity by the operation of that rule"); Draft Articles on the Law of Treaties with commentaries, Art. 49, p. 246, para. 1: "The traditional doctrine prior to the Covenant of the League of Nations was that the validity of a treaty was not affected by the fact that it had been brought about by the threat or use of force. However, this doctrine was simply a reflection of the general attitude of international law during that era towards the legality of the use of force for the settlement of international disputes. With the Covenant and the Pact of Paris there began to develop a strong body of opinion which held that such treaties should no longer be recognized as legally valid".

[441] *See Third Report* by G.G. Fitzmaurice, Special Rapporteur, U.N. doc. A/CN.4.115* (18 Mar. 1958), *reprinted in* U.N., YBILC 1958/II, U.N. Doc. A/CN.4/SER.A/1958/Add.1 (1958), p. 38 and 39, para. 62.

[442] *See e.g.*, Patrick Daillier, Mathias Forteau & Alain Pellet, DROIT INTERNATIONAL PUBLIC (8th ed., LGDJ, 2009), pp. 370-371, para. 561; Wolfgang Benedek, "Drago-Porter Convention, in Rüdiger Wolfrum" (1907), *Max Planck Encyclopedia of Public International Law*, *available at* https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e733?rskey=RvqdZQ&result=1&prd=EPIL (last accessed 22 Feb. 2022).

contentent à peu près de cette raison et écartent ainsi la nullité tirée de la violence."[443]

7.60 Similarly, in 1910, in the first edition of his treatise, Oppenheim wrote:

> "As a Treaty will lack binding force without real consent, absolute freedom of action on the part of the contracting parties is required. It must, however, be understood that circumstances of urgent distress, such as either defeat in war or the menace of a strong State to a weak State, are, according to the rules of International Law, not regarded as excluding the freedom of action of a party consenting to the terms of a treaty. The phrase 'freedom of action' applies only to the representatives of the contracting States."[444]

7.61 And, according to Fauchille, writing in 1926:

> "*La violence morale, exercée par un Etat puissant sur un Etat petit et faible ne peut qu'être blâmée, mais elle ne saurait être une cause de nullité du traité ... Quant à la violence matérielle exercée d'Etat à Etat, elle ne saurait être davantage une cause de nullité d'un traité.*"[445]

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[443] "It would destroy the effectiveness of almost all treaties, the basis of international law, to allow a State to escape from them by invoking violence against it. All authors are satisfied with this reason and thus rule out the invalidity of treaties based on violence". Frantz Despagnet, COURS DE DROIT INTERNATIONAL PUBLIC (1894), p. 480 (Translation of Guyana); *see also* John Westlake, INTERNATIONAL LAW (CUP, 1910), p. 290; or Alexandre Mérignhac, TRAITÉ DE DROIT PUBLIC INTERNATIONAL (1907), pp. 638-639.

[444] Lassa Oppenheim & Ronald Roxburgh, INTERNATIONAL LAW: A TREATISE, Vol. I (1905), p. 525, para. 499.

[445] "Moral violence, exercised by a powerful State on a small and weak State, can only be blamed, but it cannot be a cause of invalidity of the treaty. ... As for material violence exercised from State to State, it cannot be a cause of invalidity of a treaty either" (Paul Fauchille, TRAITE DE DROIT INTERNATIONAL PUBLIC, Vol. I, Part III (Rousseau & Cie, 8th ed., 1926), p. 298) (Translation of Guyana).

7.62 In 1935, the commentary of the Harvard Draft Convention on the Law of Treaties acknowledged that there was a doctrinal trend among writers to distinguish between the legitimate and illegitimate use of force, but nevertheless indicated that:

> "The term 'duress' as used in this Convention does not include the employment of force or coercion by one State against another State for the purpose of compelling the acceptance of a treaty. The treaty-making representatives of the latter State may as a result of its defeat in war or the use of force against it, or as a result of other circumstances such as a condition of bankruptcy or financial distress, find themselves under the necessity of giving their consent to a treaty when they would not otherwise do so. Such indirect compulsion is not, however, 'duress' as the term is used in this Convention."[446]

7.63 It can be safely concluded from the above that today's rule that coercion, properly understood, may be a cause for the nullity of a treaty, did not exist in 1897, when the Treaty of Washington was signed.

B. TO THE EXTENT THAT PRESSURE CAN BE SAID TO HAVE EXISTED, IT WAS EXERTED ON GREAT BRITAIN

7.64 Whatever the state of the law at the relevant time, an important feature of the present case is that, to the extent that pressure was exercised, it was brought to bear not on Venezuela but on Great Britain, and at Venezuela's request.

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[446] *Draft Convention on the Law of Treaties in AJIL*, Vol. XXIV (1935), p. 1152. According to Article 32, para. (a) of that draft: "Article 32 (a) As the term is used in this Convention, duress involves the employment of coercion directed against the persons signing a treaty on behalf of a State or against the persons engaged in ratifying or acceding to a treaty on behalf of a State; provided that, if the coercion has been directed against a person signing a treaty on behalf of a State and if with knowledge of this fact the treaty signed has later been ratified by that State without coercion, the treaty is not to be considered as having been entered into by that State in consequence of duress".

7.65 This was expressly acknowledged by the Venezuelan Council on Foreign Relations in its so-called "White Paper" of 9 December 2020: "Relying on the *Monroe Doctrine*, Venezuela called on the United States of America for its good offices".[447]

7.66 As recalled in Chapter 3, as early as 1888, the Venezuelan *chargé d'affaires* in the United States expressed his country's interest in U.S. intercession with Great Britain in opposition to the latter's "unwarranted acts of encroachment" on Venezuela's territory.[448]

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[447] ICJ, *White Paper of the Venezuelan Council on Foreign Relations (COVRI) regarding the Pending Case Arbitral Award of 3 October 1899 (Guyana v Venezuela)* (9 Dec. 2020), p. 30, para. 52, *available at* https://covri.com.ve/index.php/2020/12/10/white-paper-of-the-venezuelan-council-on-foreign-relations-covri-regarding-the-pending-case-arbitral-award-of-3-october-1899-guyana-v-venezuela/.

[448] *Letter* from Venezuelan Chargé d'Affaires in the United States of America, Fr. Antonio Silva, to Col. George Gibbons, Diplomatic Agent of Venezuela in New York, Doc. 870 (18 Sept. 1888) *available at* http://www.guyana.org/Western/1888-1891.html (last accessed 22 Feb. 2022). *See also*, subsequent entreaties from Venezuelan government authorities to the United States: *Letter* from Mr. Peraza to Mr. Blaine (17 Feb. 1890), *reprinted in* U.S. Department of State, *Papers Relating to the Foreign Relations of the United States, with the Annual Address of the President* (Transmitted to Congress 1 Dec. 1890) (1891), Doc. 496, *available at* https://history.state.gov/historicaldocuments/frus1890/d496 (last accessed 22 Feb. 2022); *Letter* from Mr. Scruggs to Mr. Blaine (6 Mar. 1890), *reprinted in* U.S. Department of State, *Papers Relating to the Foreign Relations of the United States, with the Annual Address of the President* (Transmitted to Congress 1 Dec. 1890) (1891), Doc. 488, *available at* https://history.state.gov/historicaldocuments/frus1890/d488 (last accessed 22 Feb. 2022); *Letter* from Mr. Peraza to Mr. Blaine (24 Apr. 1890), *reprinted in* U.S. Department of State, *Papers Relating to the Foreign Relations of the United States, with the Annual Address of the President* (Transmitted to Congress 1 Dec. 1890) (1891), Doc. 497, *available at* https://history.state.gov/historicaldocuments/frus1890/d497 (last accessed 22 Feb. 2022); *Letter* from Mr. Andrade to Mr. Gresham (31 Mar. 1894), *reprinted in* U.S. Department of State, *Papers Relating to the Foreign Relations of the United States, with the Annual Address of the President* (Transmitted to Congress 3 Dec. 1894) (1895), Doc. 820, *available at* https://history.state.gov/historicaldocuments/frus1894/d820 (last accessed 22 Feb. 2022); Hermann González Oropeza, S.J. & Pablo Ojer, *[Informe que los expertos venezolanos para la cuestión de límites con Guayana Británica presentan al Gobierno Nacional] Report submitted by the*

7.67 Two years later, in 1890, N. Bolet Peraza, Venezuelan Minister in the United States, wrote to James G. Blaine, the then-U.S. Secretary of State, in respect of Venezuela's request for "some assurance with regard to the generous steps of the United States Government designed to put a stop to the conflict in which the territorial rights of Venezuela are involved by reason of the possession which has been forcibly taken of a part of Venezuelan Guiana by the Government of Great Britain." In that letter, the Venezuelan Ambassador "once more" requested "the United States Government to use its good offices (*which will be strengthened by its powerful influence*) in order to bring about a settlement of the dispute between Venezuela and Great Britain by the means which international law and the spirit of modern civilization have provided for such cases".[449] And he concluded:

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venezuelan experts to the National Government on the issue of the boundaries with British Guiana (18 Mar. 1965), p. 32, para. 12. MMG, Vol. IV, Annex 74; *Speech* of Grover Cleveland: Message Regarding Venezuelan-British Dispute (17 Dec. 1895), *available at* https://millercenter.org/the-presidency/presidential-speeches/december-17-1895-message-regarding-venezuelan-british-dispute (last accessed 22 Feb. 2022); Nelson M. Blake, "Background of Cleveland's Venezuelan Policy", *The American Historical Review*, Vol. 47, No. 2 (Jan. 1942), p. 272; R. A. Humphreys, "Presidential Address: Anglo-American Rivalries and the Venezuela Crisis of 1895", *Transactions of the Royal Historical Society*, Vol. 17 (1967), p. 155; ICJ, *White Paper of the Venezuelan Council on Foreign Relations (COVRI) regarding the Pending Case Arbitral Award of 3 October 1899 (Guyana v Venezuela)* (9 Dec. 2020), para. 60, *available at* https://covri.com.ve/index.php/2020/12/10/white-paper-of-the-venezuelan-council-on-foreign-relations-covri-regarding-the-pending-case-arbitral-award-of-3-october-1899-guyana-v-venezuela/.

[449] *Letter* from Mr. Peraza to Mr. Blaine (17 Feb. 1890), *reprinted in* U.S. Department of State, *Papers Relating to the Foreign Relations of the United States, with the Annual Address of the President* (Transmitted to Congress 1 Dec. 1890) (1891), Doc. 496, *available at* https://history.state.gov/historicaldocuments/frus1890/d496 (last accessed 22 Feb. 2022) (emphasis added). *See also*, reiterating the same request: *Letter* from Mr. Peraza to Mr. Blaine (24 Apr. 1890), *reprinted in* U.S. Department of State, *Papers Relating to the Foreign Relations of the United States, with the Annual Address of the President* (Transmitted to Congress 1 Dec. 1890) (1891), Doc. 497, *available at* https://history.state.gov/historicaldocuments/frus1890/d497 (last accessed 22 Feb. 2022).

> "The undersigned therefore feels confident that when Your Excellency shall have taken into consideration the critical state of this question, the imminence of a conflict, and the reasons which the undersigned has had the honor to set forth in the present note, you will deign to act in compliance with this request, and that you will inform the Cabinet of St. James that the Washington Cabinet sincerely desires that the present controversy between Great Britain and Venezuela may be settled by the means that are now recognized and made use of by civilized nations for the decision of questions of this kind in accordance with reason and justice.
>
> The same sentiments and desires were expressed by the President of the United States in his message of December 3, 1889, and the undersigned believes that if the idea which they involve were directly manifested by Your Excellency to the Government of Great Britain, it would be sufficient to induce that nation to assent to a peaceful settlement whereby all just rights would be guaranteed; for the voice of the United States has always been listened to with deference by the European powers, especially when this nation has spoken in behalf of the legitimate interests of America, which it has defined in a doctrine that now forms part of its common law."[450]

7.68 In 1894, José Andrade, Head of the Venezuelan Legation to the United States, wrote to W.Q. Gresham, U.S. Secretary of State, and Seneca Haselton, U.S. representative in Venezuela, to insist with the Government of the United States on the latter's effective and direct interposition in view of Great Britain's encroachments on Venezuela's territorial sovereignty, after having exhausted all legal means to reach an amicable settlement.[451]

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[450] *Ibid.*

[451] *Letter* from Mr. Andrade to Mr. Gresham (19 Dec. 1894), pp. 282-284. MMG, Vol. III, Annex 29.

7.69 The United States responded positively to Venezuela's request. In particular, as recalled in Chapter 3, President Cleveland underscored in his message of 3 December 1894 that he intended to "renew the efforts heretofore made to bring about a restoration of diplomatic relations between the disputants and to induce a reference to arbitration".[452] Such intention was endorsed by the Congress which resolved "[t]hat the President's suggestion ... namely, that Great Britain and Venezuela refer their dispute as to boundary limits in Guiana to friendly arbitration — be most earnestly recommended to the favorable consideration at both parties in interest".[453]

7.70 If there was any pressure or bias on the part of the United States, it is quite clear that it was in favour of Venezuela and against Great Britain. In 1895, the U.S. Secretary of State Richard Olney conveyed the President's views on the boundary dispute to the U.S. Ambassador to Great Britain:

> "[T]he United States is practically sovereign on this continent, and its fiat is law upon the subjects to which it confines its interposition. ... It is because, in addition to other grounds, its infinite resources, combined with its isolated position, render it master of the situation and practically invulnerable as against any or all other powers. ...
>
> Being entitled to resent and resist any sequestration of Venezuelan soil by Great Britain, it is necessarily entitled to know whether such sequestration has occurred or is now going on. ... [Unless the British Government should consent to submit the entire matter to arbitration] the transaction will be regarded as injurious to the interests of the people of the United States as well as oppressive in

[452] *Speech* of Grover Cleveland: Message Regarding Venezuelan-British Dispute (3 Dec. 1894), *available at* https://millercenter.org/the-presidency/presidential-speeches/december-3-1894-second-annual-message-second-term (last accessed 7 Feb. 2022). *See supra* para. 3.16.

[453] U.S. Congress, 53rd Session, *Joint Resolution*, H. Res. 252 (10 Jan. 1895). MMG, Vol. IV, Annex 81.

itself ... the honour and welfare of this country are closely identified [with the Monroe Doctrine]."[454]

7.71 Later that year, President Cleveland's words to the U.S. Congress were even stronger:

> "[T]he dispute has reached such a stage as to make it now incumbent upon the United States to take measures to determine with sufficient certainty for its justification what is the true divisional line between the Republic of Venezuela and British Guiana. The inquiry to that end should of course be conducted carefully and judicially, and due weight should be given to all available evidence, records, and facts in support of the claims of both parties.
>
> In order that such an examination should be prosecuted in a thorough and satisfactory manner, I suggest that the Congress make an adequate appropriation for the expenses of a commission, to be appointed by the Executive, who shall make the necessary investigation and report upon the matter with the least possible delay. When such report is made and accepted it will, in my opinion, be the duty of the United States to resist by every means in its power, as a wilful aggression upon its rights and interests, the appropriation by Great Britain of any lands or the exercise of governmental jurisdiction over any territory which after investigation we have determined of right belongs to Venezuela.
>
> In making these recommendations I am fully alive to the responsibility incurred and keenly realize all the consequences that may follow.
>
> I am, nevertheless, firm in my conviction that while it is a grievous thing to contemplate the two great English-speaking peoples of the world as being otherwise than friendly competitors in the onward

[454] *Letter* from Mr. Olney to Mr. Bayard (20 July 1895), *reprinted in* U.S. Department of State, *Papers Relating to the Foreign Relations of the United States, with the Annual Address of the President*, Part I (Transmitted to Congress 2 Dec. 1895) (1896), p. 550, *available at* https://history.state.gov/historicaldocuments/frus1895p1/d527 (last accessed 22 Feb. 2022).

> march of civilization and strenuous and worthy rivals in all the arts of peace, there is no calamity which a great nation can invite which equals that which follows a supine submission to wrong and injustice and the consequent loss of national self-respect and honor, beneath which are shielded and defended a people's safety and greatness."[455]

7.72 The President could hardly have been clearer: either Great Britain would accept his Commission's conclusions, or the United States was prepared to use force. As noted in the *Transactions of the Royal Historical Society*:

> "On the face of it, Cleveland's message was virtually an ultimatum. It sounded the 'note of war'. 'Nothing is heard', wrote Pauncefote to Salisbury, three days later, 'but the voice of the Jingo bellowing out defiance to England'. Only a few observers, ex-Governor Long of Massachusetts, for example, and Pauncefote himself, noted the velvet glove beneath the gauntlet of mail. The proposed Commission, thought Long, provided a way out, 'through which the whole bubble can fizzle and effervesce', and Pauncefote, in similar terms, thought it a 'fine safety valve'."[456]

7.73 In this respect, the analysis made in the 2020 "White Paper" prepared by the Venezuelan Council on Foreign Relations correctly reflects the situation of Great Britain:

> "The United States Congress unanimously acceded to the request of President Cleveland and voted 100,000 dollars for the United States Commission on Boundary between Venezuela and British Guiana, which was established on 1 January 1896. It was evident that the

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[455] *Speech* of Grover Cleveland: Message Regarding Venezuelan-British Dispute (17 Dec. 1895), *available at* https://millercenter.org/the-presidency/presidential-speeches/december-17-1895-message-regarding-venezuelan-british-dispute (last accessed 22 Feb. 2022).

[456] R. A. Humphreys, "Presidential Address: Anglo-American Rivalries and the Venezuela Crisis of 1895", *Transactions of the Royal Historical Society*, Vol. 17 (1967), p. 155.

> report to be made by the Commission might be very embarrassing for United Kingdom. The British Foreign Office was reluctantly, but due to the prospect of war with United States that could lead to the loss of Canada, at the same time when was under the pressure in South Africa with the Boers, and its relationship with Imperial Government of Germany was eroding because the Kruger Telegram (the beginning of the so-called Weltpolitik, the imperialist foreign policy of the Kaiser Wilhelm II); Lord Salisbury finally agreed to enter in negotiations for concluding an arbitration treaty on 5 March 1896. The United States Boundary Commission thereupon disbanded, but presented a report to the President Cleveland on 27 February 1896, which examined the geography of the area and history of Dutch settlements, and an atlas containing seventy-six maps. This material was subsequently made available to Venezuela in order to prepare its case before the future Arbitral Tribunal."[457]

7.74 The U.S. pressure was decisive,[458] and Venezuela welcomed its efforts. As President Crespo explained in a message to the Venezuelan Congress on 29 March 1895:

> "The American Congress in February last, as a consequence of the wise advice contained in President Cleveland's annual message, passed a resolution to this effect ... The terms of this resolution disclose the noblest interest in having this long controversy settled

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[457] ICJ, *White Paper of the Venezuelan Council on Foreign Relations (COVRI) regarding the Pending Case Arbitral Award of 3 October 1899 (Guyana v Venezuela)* (9 Dec. 2020), pp. 33-34, para. 60, *available at* https://covri.com.ve/index.php/2020/12/10/white-paper-of-the-venezuelan-council-on-foreign-relations-covri-regarding-the-pending-case-arbitral-award-of-3-october-1899-guyana-v-venezuela/. *See also* Nelson M. Blake, "Background of Cleveland's Venezuelan Policy", *The American Historical Review*, Vol. 47, No. 2 (Jan. 1942), p. 272.

[458] *See* Hermann González Oropeza, S.J. & Pablo Ojer, *[Informe que los expertos venezolanos para la cuestión de límites con Guayana Británica presentan al Gobierno Nacional] Report submitted to the venezuelan experts to the National Government on the issue of the boundaries with British Guiana* (18 Mar. 1965), p. 32, para. 12. MMG, Vol. IV, Annex 74. "Despite successive requests to the British Government by numerous entities and States asking it to agree to submit the matter to arbitration, Great Britain resisted until, once again, and decisively, the United States intervened in 1895."

> in conformity with the principles of justice and reason. Therein it is earnestly recommended that the two contending parties adopt the course indicated by the President of the United States in order peacefully to settle the dispute, as has been suggested by Venezuela.
>
> The legislative act referred to was approved by both the branches of the American Congress, and his Excellency President Cleveland affixed his seal thereto February 21. Such tokens of the spirit of justice with which the overshadowing question at the Guiana boundary is studied and considered by the Chief Magistrate and legislators of the great Republic of the north requires from Venezuela a significant act of special gratitude which only you can sanction so as to interpret the thought of the whole republic. I am sure that this idea will have the most enthusiastic acceptance in the hearts of the worthy legislators of my country."[459]

7.75 The Venezuelan Congress gave its blessing on 5 April 1897.[460]

7.76 On 12 November 1962, Venezuela's Foreign Minister speaking before the U.N. General Assembly, confirmed that the territorial dispute between his country and Great Britain "gave rise to an extremely grave situation and that the United States was on the verge of going to war with Great Britain".[461]

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[459] *Message* from President Joaquín Sinforiano De Jesús Crespo to Congress (29 Mar. 1895), *reprinted in* Odeen Ishmael, "Chapter 9 - The Intervention of the United States" *in* TRAIL OF DIPLOMACY (GNI Publications, 1998), *available at* http://www.guyana.org/features/trail_diplomacy_pt2.html (last accessed 22 Feb. 2022), pp. 133-134.

[460] "Ratified by Venezuela: The Boundary Arbitration Treaty Enthusiastically Indorsed", *The Indianapolis News* (6 Apr. 1897).

[461] U.N. General Assembly, 17th Session, *Statement of Dr. Marcos Falcón Briceño, Minister for External Relations of Venezuela*, U.N. Doc A/SPC/71 (12 Nov. 1962), p. 9.

7.77 Plainly, Venezuela has no standing to complain about the high degree of pressure exerted by the United States against Great Britain to induce it to submit to arbitration, in conformity with Venezuela's wishes. First, as explained above, the principle of intertemporal law precludes the application of the current rules on the prohibition of the threat of force to situations that arose at the end of the nineteenth century. Second, in the present case, Venezuela is precluded from raising such an argument since the coercion it would complain of was exerted at its own request and for its own benefit. *Nemo auditur propriam turpitudinem allegans* or, in the words of Judge Alfaro's individual opinion in the *Temple of Preah Vihear* case: "the party which by its recognition, its representation, its declaration, its conduct or its silence has maintained an attitude manifestly contrary to the right it is claiming before an international tribunal is precluded from claiming that right (*venire contra factum proprium non valet*)".[462] Third, while the alleged coercion potentially affected only Great Britain's consent, Venezuela is not entitled to make a claim that Great Britain itself has not made.

C. THE ALLEGED PRESSURES ON VENEZUELA ARE NOT SUCH AS TO INVALIDATE THE TREATY

7.78 There is no evidence of coercion of Venezuela. The Treaty of Washington gave it full satisfaction on the essential point which opposed it to Great Britain: the submission to arbitration of the dispute on the determination of the boundary between itself and the Colony of British Guiana. As lead counsel for Venezuela,

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[462] *Temple of Preah Vihear (Cambodia v. Thailand)*, Judgment of 15 June 1962, Separate Opinion of Vice-President Alfaro, I.C.J. Reports 1962 (hereinafter "*Temple of Preah Vihear, Opinion of Alfaro*"), p. 40. *See also* Vienna Convention on the Law of Treaties, 1151 U.N.T.S. 331 (1969), entered into force 27 Jan. 1980, Art. 69, para. 3, and, for the case law: *Factory at Chorzów*, Jurisdiction, Judgment, 1927, P.C.I.J. Series A, No. 9, p. 31 or *Owners of the Tattler (United States) v. Great Britain*, RIAA, Vol. VI, p. 48, 50 (18 Dec. 1920).

General Harrison, stated on the 51st day of the hearings: "Venezuela is too glad to be here with this controversy before this great Tribunal, and it is removed entirely beyond any consideration of mutual strength".[463]

7.79 To be sure, there were diplomatic exchanges between the United States and Venezuela during which the United States sought to convince Venezuela to accept certain details of the *Compromis.* But they by no means went beyond the normal and usual practice in international relations. This was clearly explained by Venezuelan President Crespo in his above-quoted Message to the Venezuelan Congress of 20 February 1897:[464]

> "The Government, in forming its opinion, should naturally take into consideration the conditions under which the protocol was signed and presented. One of the signers was the Secretary of State of the Nation which, fully alive to the grave consequences of its action, generously interposed in this dispute, seeking an arrangement which would at once preserve the laws of the National decorum and the continental integrity. The recourse to arbitration offered itself, and, although by no means in the manner wished for by Venezuela, was more consonant than any other with the desires manifested. The Government deemed it proper to insert in the treaty a provision that Venezuela should have a voice in the naming of the arbitral tribunal. As soon as this change was proposed its acceptance was procured. The action of the United States had produced a result the after effects or which were, from a moral point of view, indispensably subject to the effective and powerful prestige of said Nation.
>
> The plan of settlement was presented for the consideration of Venezuela, with no proposition for co-operative participation, contrary to the sovereignty and independence of the republic;

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[463] *Boundary between the Colony of British Guiana and the United States of Venezuela*, Fifty-First Day's Proceedings (20 Sept. 1899) (Harrison), p. 3014. MMG, Vol. IV, Annex 112.

[464] *See supra* paras. 7.32, 7.40.

> further, as the United States had conducted the negotiations according to their judgment alone, the definite acceptance of the bases will always involve for them a sort of friendly responsibility which will be in every case a guarantee of future harmony between the two nations represented by the arbitral tribunal. It is eminently just to recognize the fact that the great Republic has strenuously endeavored to conduct this matter in the most favorable way, and the result obtained represents an effort of intelligence and good will worthy of praise and thanks from us who are so intimately acquainted with the conditions of this most complicated question.
>
> It is your duty, according to the constitutional law of the republic, to examine the treaty which the Venezuelan Minister Plenipotentiary signed in accordance with the bases referred to and the change proposed by the executive power in regard to the formation of the arbitral tribunal."[465]

7.80 This speech is highly significant. It shows that the Treaty was signed (and then ratified) by Venezuela with full knowledge of the facts — including the influence exerted by the United States on the modalities of the constitution of the Tribunal — and that, on balance, it had more advantages than disadvantages, and was more advantageous to Venezuela than any other potential outcome. Indeed, as the President's speech shows, U.S. influence was not of a kind to inhibit Venezuela's freedom of choice.[466] To sum up: the 1897 Treaty was the result of a compromise which was generally favourable to Venezuela — a point the Venezuelan leadership understood perfectly well. Venezuela also understood that the Treaty enabled it to achieve its objectives of bringing Great Britain into a

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[465] *Message* from President Joaquín Sinforiano De Jesús Crespo to Congress (20 Feb. 1897), *reprinted in* Odeen Ishmael, "Chapter 13 - The Arbitral Tribunal and the Award" *in* TRAIL OF DIPLOMACY (GNI Publications, 1998), *available at* http://www.guyana.org/features/trail_diplomacy_pt3.html#chap13 (last accessed 31 Jan. 2022), pp. 133-134.

[466] *See supra* paras. 7.32, 7.40, 7.79.

binding arbitration procedure to determine the land boundary between Venezuela and British Guiana according to the applicable legal principles, and that the Treaty owed its existence to the pressure exerted on Great Britain by the United States at Venezuela's request. In these circumstances, a claim by Venezuela of treaty nullity on the basis of coercion can have no merit whatsoever.

CHAPTER 8

THE ARBITRAL TRIBUNAL PROPERLY EXERCISED ITS FUNCTIONS AND PRODUCED A LEGALLY VALID AWARD

8.1 As explained in Chapter 3, the Arbitral Tribunal was comprised of five eminent and distinguished jurists and was properly constituted in accordance with the terms of the Treaty. In this Chapter, Guyana explains how the Arbitral Tribunal faithfully exercised — and did not in any respect contravene or exceed — the powers and responsibilities conferred upon it by the Treaty of Washington. It then explains why the allegations of collusion, coercion and other alleged grounds of nullity, which Venezuela advanced for the first time many decades after the 1899 Award was delivered, are entirely without foundation.

I. The Arbitral Tribunal Fulfilled the Functions Conferred upon It under the Treaty and Neither Exceeded its Authority nor Committed Error

A. The Written and Oral Proceedings before the Arbitral Tribunal Were Conducted in Conformity with the Treaty

1. The Written Proceedings

8.2 Article VI of the Treaty provided that, "within a period not exceeding eight months from the date of the exchange of the ratifications of this Treaty", each party must deliver copies of their printed Case "accompanied by the documents, the official correspondence, and other evidence on which each side relies" to the Arbitrators and the Agent of the opposing party. Article IX empowered the Arbitrators to extend that time limit by up to 30 days. In accordance with those provisions, on 15 March 1898, Great Britain and Venezuela each submitted their Cases to the Tribunal. Great Britain's Case comprised 164 pages of written submissions plus seven volumes of annexes (running to a total of more than 1,600

pages).[467] Venezuela's Case comprised 236 pages of written submissions plus two volumes of annexes (running to more than 900 pages).[468]

8.3 Article VII of the Treaty gave each party the right to file "a Counter-Case, and additional documents, correspondence, and evidence, in reply" within four months of the submission of the Cases. In accordance with that provision, four months after they submitted their Cases, on 15 July 1898, the parties submitted their respective Counter-Cases. Venezuela's Counter-Case comprised three volumes (containing nearly 800 pages) and an atlas.[469] Great Britain's Counter-Case comprised two volumes (of more than 550 pages), together with several maps.[470]

8.4 Four months later, on 15 November 1898, the parties filed their final printed Arguments in accordance with Articles VII and IX of the Treaty. Great Britain's Argument comprised a single volume of 55 pages.[471] Venezuela's Argument comprised two volumes running to a total of 765 pages, with an additional 80 pages

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[467] *Boundary between the Colony of British Guiana and the United States of Venezuela*, The Case of the Government of Her Britannic Majesty (1898) and *Boundary between the Colony of British Guiana and the United States of Venezuela*, The Case of the Government of Her Britannic Majesty (1898), Apps. I-VII.

[468] *Boundary between the Colony of British Guiana and the United States of Venezuela*, The Case of the United States of Venezuela (1898), Vols. I-III.

[469] *Boundary between the Colony of British Guiana and the United States of Venezuela*, The Counter-Case of the United States of Venezuela, Vols. I-III.

[470] *Boundary between the Colony of British Guiana and the United States of Venezuela*, The Counter-Case of the Government of Her Britannic Majesty (1898), Apps. I-VII.

[471] *Boundary between the Colony of British Guiana and the United States of Venezuela*, The Argument on behalf of Her Britannic Majesty (1898).

of supplementary materials.[472] On 25 January 1899, at a "preliminary meeting", the Tribunal's President, Prof Martens, confirmed that, "in accordance with the Treaty the preliminary course of the Arbitration, that is, the exchange of cases, counter-cases, and printed arguments, is closed. The Arbitrators are of opinion that the two Governments have worked in accordance with the Treaty of Washington".[473]

2. The Oral Proceedings

8.5 On 15 June 1899, the substantive hearings before the Tribunal began.[474] Between 15 June and 27 September 1899, the Tribunal held 54 four-hour sessions at which Great Britain and Venezuela presented their respective arguments and evidence. They did so at great length and in meticulous detail. Both sides were represented by capable and distinguished legal counsel, as identified in Chapter 3.[475]

8.6 In accordance with Article XI of the Treaty — which required the Arbitrators to "keep an accurate record of their proceedings" — a verbatim record of the oral proceedings was produced by a team of shorthand writers and published contemporaneously. The published record of the entire oral proceedings comprises more than 3,200 pages. The record reflects the diligence, industry and proficiency of the parties' respective counsel. It also demonstrates the Arbitrators' firm grasp

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[472] *Boundary between the Colony of British Guiana and the United States of Venezuela*, The Printed Argument on behalf of the United States of Venezuela (1898), Vols. I-II.

[473] *Boundary between the Colony of British Guiana and the United States of Venezuela*, First Day's Proceedings (25 Jan. 1899), p. 2. MMG, Vol. IV, Annex 96.

[474] As explained at paragraph 3.35, on 1 March 1899, Lord Herschell died unexpectedly. He was duly replaced by Lord Russell of Killowen GCMG.

[475] *See supra* para. 3.40.

of the factual and legal issues that were addressed in the parties' written submissions, as reflected in their active engagement with — and extensive questioning of — the oral submissions advanced by counsel for Great Britain and Venezuela.

8.7 The proceedings before the Tribunal were thorough, exhaustive and fair. There was no restriction on the length or scope of the parties' written submissions or on the evidence they were able to adduce in support of those submissions. The oral proceedings were divided equally between Great Britain and Venezuela and each side's representatives had ample opportunity to respond to all points, evidence and arguments advanced by the opposing side. In addition to the many hundreds of pages of written submissions and approximately 200 hours of oral arguments, more than 2,600 documents were placed before the Tribunal.[476] As Sir Richard Webster, Great Britain's head counsel, observed, there was a "very vast mass of matter ... discussed and ... presented to the Tribunal".[477]

8.8 There can be no doubt that all of the relevant factual and legal issues were addressed in copious detail during the written and oral phases of the arbitral proceedings. Nor can there be any doubt that the equality of arms was preserved. In his closing address to the Tribunal, former U.S. President Benjamin Harrison, Venezuela's head counsel, explained that Venezuela had "present[ed] a full and

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[476] *See Boundary between the Colony of British Guiana and the United States of Venezuela*, Fifty-Sixth Day's Proceedings (3 Oct. 1899), p. 3238 (Martens). MMG, Vol. IV, Annex 116 (Prof Martens: "Our special thanks we owe to the Counsel of both Powers, who in their most eloquent speeches with great wisdom and ability have put before the Tribunal all the arguments, all the facts, all the documents, which are more than 2650 in number, and thanks to that oral argument the Tribunal has been able to have a clear view of whole case put before them".).

[477] *Boundary between the Colony of British Guiana and the United States of Venezuela*, Second Day's Proceedings (15 June 1899), p. 9 (Sir Richard Webster). MMG, Vol. IV, Annex 97.

complete discussion of every question of law and fact that we thought was in the case".[478] He also commented on the state of exhaustion of both counsel and Arbitrators as a result of the length and intensity of the proceedings.[479] As one contemporary news report put it: "No case ever submitted to arbitration has been more thoroughly and fairly examined than this."[480]

B. THE AWARD COMPLIED WITH THE FORMAL REQUIREMENTS CONTAINED IN THE TREATY

8.9 Following the conclusion of the oral proceedings on 27 September 1899, the Arbitral Tribunal retired to consider its decision. A period of intensive deliberations ensued, the content of which is discussed further at paragraphs 8.62 to 8.76, below. A week later, on 3 October 1899, the Tribunal delivered its Award. As required by Article X of the Treaty, the Award was "made in writing and dated" and "signed by the Arbitrators who may assent to it". Although Article V of the Treaty provided that all questions considered by the Tribunal "shall be determined by a majority of all the Arbitrators", the Award was unanimous. It was therefore signed by all five of the Arbitrators. As required by Article X of the Treaty, the Award was produced in duplicate, with one copy delivered to the Agent of Great Britain and one copy delivered to the Agent of Venezuela.

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[478] *Boundary between the Colony of British Guiana and the United States of Venezuela*, Fiftieth Day's Proceedings (19 Sept. 1899), pp. 2984-2985 (General Harrison). MMG, Vol. IV, Annex 111.

[479] *See ibid.*, p. 2981 (General Harrison: "The Counsel who addresses the Tribunal comes to his work in a frame of weariness of mind and body and he addresses judges who are weary. And not only so, Mr President, but he has to deal with propositions of law and of fact that have been tossed from side to side by the Counsel for many weeks.").

[480] "The Venezuela Boundary Award", *The Advocate of Peace (1894-1920)*, Vol. LXI, No. 10 (Nov. 1899), p. 227.

8.10 Accordingly, the form and delivery of the Award fully complied with the applicable stipulations in the Treaty. Indeed, Venezuela has never disputed that the Award fully conformed to these requirements.

C. THE AWARD DEMONSTRATES THAT THE ARBITRAL TRIBUNAL FULFILLED ITS FUNCTIONS AND DID NOT EXCEED ITS POWERS

8.11 As noted above, Article I of the Treaty provided that the function of the Tribunal was "to determine the boundary-line between the Colony of British Guiana and the United States of Venezuela". To this end, Article III of the Treaty provided that:

> "The Tribunal shall investigate and ascertain the extent of the territories belonging to, or that might lawfully be claimed by, the United Netherlands or by the Kingdom of Spain respectively at the time of the acquisition by Great Britain of the Colony of British Guiana, and shall determine the boundary-line between the Colony of British Guiana and the United States of Venezuela."

8.12 The Tribunal's Award expressly confirms that the Arbitrators did exactly that. After setting out in full the terms of the Treaty and summarising the process by which the Arbitrators were appointed, the Award stated:

> "And whereas the said Arbitrators have duly entered upon the said Arbitration, and have duly heard and considered the oral and written arguments of the Counsel representing respectively Her Majesty the Queen and the United States of Venezuela, *and have impartially and carefully examined the questions laid before them, and have investigated and ascertained the extent of the territories belonging to or that might lawfully be claimed by the United Netherlands or*

> *by the Kingdom of Spain respectively at the time of the acquisition by Great Britain of the Colony of British Guiana*."[481]

8.13 Thus, all five members of the Tribunal expressly affirmed in the Award that they had "impartially and carefully" examined the matters which they were required by the Treaty to examine. Having confirmed this, the Award then proceeded to set out the Tribunal's determination of the boundary line between British Guiana and Venezuela:

> "Now we, the undersigned Arbitrators, do hereby make and publish our decision, determination, and award of, upon, and concerning the questions submitted to us by the said Treaty of Arbitration, finally decide, award, and determine that the boundary-line between the Colony of British Guiana and the United States of Venezuela is as follows: —
>
> Starting from the coast at Point Playa, the line of boundary shall run in a straight line to the River Barima at its junction with the River Mururuma, and thence along the mid-stream of the latter river to its source, and from that point to the junction of the River Haiowa with the Amakuru, and thence along the mid-stream of the Amakuru to its source in the Imataka Ridge, and thence in a south-westerly direction along the highest ridge of the spur of the Imataka Mountains to the highest point of the main range of such Imataka Mountains opposite to the source of the Barima, and thence along the summit of the main ridge in a south-easterly direction of the Imataka Mountains to the source of the Acarabisi, and thence along the mid-stream of the Acarabisi to the Cuyuni, and thence along the northern bank of the River Cuyuni westward to its junction with the Wenamu, and thence following the mid-stream of the Wenamu to its westernmost source, and thence in a direct line to the summit of Mount Roraima, and from Mount Roraima to the source of the Cotinga, and along the mid-stream of that river to its junction with the Takutu, and thence along the mid-stream of the Takutu to its

[481] *1899 Award*, p. 338 (emphasis added).

> source, thence in a straight line to the westernmost point of the Akarai Mountains, and thence along the ridge of the Akarai Mountains to the source of the Corentin called the Cutari River:
>
> Provided always that the line of delimitation fixed by this Award shall be subject and without prejudice to any questions now existing, or which may arise, to be determined between the Government of Her Britannic Majesty and the Republic of Brazil, or between the latter Republic and the United States of Venezuela."[482]

8.14 Accordingly, it is clear from the face of the Award that the Tribunal fulfilled the functions and obligations imposed by Article III of the Treaty in addressing the factual evidence and the legal submissions: first by investigating and ascertaining the extent of the territories belonging to or that might lawfully be claimed by the Netherlands or by Spain, respectively, at the time of Great Britain's acquisition of British Guiana; and then proceeding to decide, in light of the outcome of that investigation, the location of the boundary between British Guiana and Venezuela. It is equally clear from the lengthy verbatim record of the proceedings and other contemporaneous evidence that, in determining the matters submitted to the Tribunal, the Arbitrators "ascertain[ed] all facts which they deem[ed] necessary to a decision of the controversy" and applied the "Rules" set out in Article IV of the Treaty.[483] In so doing, they neither exceeded their authority nor committed any error. Venezuela has adduced no evidence whatsoever of the presence of either vice, let alone the kind of clear and convincing evidence that would be required to invalidate the 1899 Award.

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[482] *1899 Award*, p. 338.

[483] *See supra* para. 3.29.

II. Venezuela's Allegations of Corruption, Collusion and Nullity

8.15 As explained in Chapter 4, following the delivery of the Award on 3 October 1899, both Great Britain and Venezuela immediately accepted the validity of the Award and, for many decades thereafter, embraced it as the "full, perfect, and final settlement" of the boundary between Venezuela and British Guiana (including by appointing a Joint Boundary Commission to demarcate the boundary along the line established by the Award, by entering an express agreement to that boundary, and by subsequently fixing the tri-junction point with Brazil).[484] The legal consequences of that prolonged acceptance are discussed in Chapter 9. Before discussing Venezuela's prolonged acceptance of the Award, however, Guyana addresses in the remainder of this Chapter the various allegations of corruption, collusion and other purported grounds of nullity that Venezuela advanced in the years that followed six decades of acceptance. As Guyana will demonstrate, those allegations are incoherent and unsupported by any evidence. They are entirely without substance.

A. THE MALLET-PREVOST MEMORANDUM

8.16 In July 1949 — half a century after the Award was delivered — an American lawyer, Otto Schoenrich, published an article in the American Journal of International Law ("the 1949 Article").[485] The 1949 Article contained what was

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[484] Treaty Between Great Britain and the United States of Venezuela Respecting the Settlement of the Boundary Between the Colony of British Guiana and the United States of Venezuela, 5 U.K.T.S. 67 (2 Feb. 1897), pp. 9-10, Art. XIII. AG, Annex 1. Article XIII of the Treaty provided: "The High Contracting Parties engage to consider the result of the proceedings of the Tribunal of Arbitration as a full, perfect, and final settlement of all the questions referred to the Arbitrators."

[485] Otto Schoenrich, "The Venezuela-British Guiana Boundary Dispute", *The American Journal of International Law*, Vol. 43, No. 3 (July 1949). MMG, Vol. III, Annex 1.

claimed to be a reference to the text of a short Memorandum produced by Mr Mallet-Prevost in February 1944, which had allegedly been "found among his papers" following his death at the age of 88 on 10 December 1948. The Mallet-Prevost Memorandum purported to describe certain events that had allegedly taken place during the course of the Arbitration in 1899 — some forty-five years before the date when the Memorandum was purportedly dictated by Mr Mallet-Prevost and half a century before it was posthumously published.

8.17 In particular, as described in Chapter 5, the Mallet-Prevost Memorandum alleged that, during the Tribunal's deliberations, Mr Mallet-Prevost had been summoned to meet with the American Arbitrators, who informed him that the Tribunal's President, Prof Martens, had told them that the British Arbitrators were ready to hold that the boundary followed the Schomburgk Line, but that the President "is anxious to have a unanimous decision; and if we agree to accept the line which he proposes he will secure the acquiescence of Lord Russell and Lord [Justice] Collins and so make the decision unanimous".[486] The American Arbitrators allegedly sought Mr Mallet-Prevost's views on whether they should concur in Prof Martens' proposed line or file dissenting opinions. After consulting with his co-counsel, former U.S. President Harrison, Mr Mallet-Prevost "advised Chief Justice Fuller and Justice Brewer"[487] that Venezuela's position was that they should concur in the proposal put forward by the President of the Tribunal.

8.18 The Mallet-Prevost Memorandum went on to state that Mr Mallet-Prevost "became convinced" that during the course of a visit by Prof Martens to England

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[486] *Ibid.*, p. 529.

[487] *Ibid.*, p. 530.

during a recess in the arbitral proceedings "a deal had been concluded between Russia and Great Britain to decide the case along the lines suggested by Martens".[488] Mr Mallet-Prevost's purported belief in the existence of a secret Anglo-Russian "deal" was based solely on the alleged conversation with the American Arbitrators described above and on a claim that one of the British Arbitrators, Lord Justice Collins, had exhibited a noticeable "change" in his demeanour following a recess mid-way through the arbitral proceedings. The Mallet-Prevost Memorandum did not refer to any actual evidence of a "deal" between Russia and Great Britain in relation to the outcome of the Arbitration.

8.19 As far as Guyana is aware, the original version of the Mallet-Prevost Memorandum has never been located or published, and there are no indications that any other person has seen or read the alleged document. Apart from the 1949 article published by Mr Schoenrich after Mr Mallet-Prevost's death, there is no evidence to confirm the existence or authenticity of the Memorandum.

8.20 Quite apart from its questionable provenance, the content of the Mallet-Prevost Memorandum (as reported in the 1949 Article) contains a number of obvious and significant errors, which demonstrate that it cannot be relied upon as an accurate and reliable account of the events which it purports to describe. To give one illustrative example, the Mallet-Prevost Memorandum describes how, in January 1899, Mr Mallet-Prevost attended a dinner in London at which he spoke with Lord Russell about international arbitration. According to the Memorandum, "From that moment I knew that we could not count upon Lord Russell to decide

[488] *Ibid.*, p. 530.

the boundary question on the basis of strict rights."[489] However, at the date of that alleged conversation in January 1899, Lord Russell had no involvement whatsoever in the Arbitration, as he had not yet been appointed (as noted in Chapter 3, he was only approached and appointed after the sudden and untimely death of Lord Herschell, which occurred on 1 March 1899). As of January 1899, no one could have had any reason to expect that Lord Russell might have any involvement in the Arbitration at any time in the future. Moreover, if there had been any such conversation between Mr Mallet-Prevost and Lord Russell, it could be expected that Mr Mallet-Prevost or Venezuela would have objected to the appointment, but there is no evidence that this occurred. Accordingly, the claim that in January 1899 Mr Mallet-Prevost had formed the view that Lord Russell would not fairly adjudicate the boundary dispute appears to be as implausible as it is unsubstantiated.

8.21 Shortly after the 1949 Article was published, a researcher and British official, Clifton J. Child, produced a forensic critique and rebuttal of the claims contained in the Mallet-Prevost Memorandum. In an article published in the American Journal of International Law in 1950, Child drew attention to a number of demonstrable "major errors" contained in the Memorandum.[490] As he observed:

> "The fact is, however, that, in January 1899, when Mr. Mallet-Prevost dined with him, the Lord Chief Justice was in no way connected with the boundary dispute and had no prospect of being involved in the arbitration. At that time the arbitrators were M. de Martens, Chief Justice Fuller, Justice Brewer, Lord Justice Collins and Lord Herschell — as provided for in Article II of the Anglo-Venezuelan Treaty of February 2, 1897. As the first British

[489] *Ibid.*, p. 529.

[490] Clifton J. Child, "The Venezuela-British Guiana Boundary Arbitration of 1899", *American Journal of International Law*, Vol. 44, No. 4 (1950), pp. 682-683. MMG, Vol. III, Annex 3.

arbitrator nominated by the Judicial Committee of the British Privy Council, again in accordance with Article II of the Treaty, Lord Herschell was, in January, 1899, actively concerned with the preliminaries of the arbitration, although he was prevented by other business (as was Chief Justice Fuller) from attending the brief and formal first meeting of the Tribunal on January 25. And it was only with his sudden death, after a fall in the street in Washington, D. C. on March 1, 1899 (*i.e.*, two months after Mr. Mallet-Prevost's conversation with Lord Russell), that it became necessary to bring in another arbitrator to replace him. It was then, and only then, that Lord Russell became involved in the arbitration, and it is consequently sheer nonsense for Mr. Mallet-Prevost to suggest that, from the moment when he dined with the Lord Chief Justice in January, he knew that he could not count upon the latter to be fair, and for Judge Schoenrich to adduce this 'circumstance' as having led Mr Mallet-Prevost to the opinion that a 'deal' was concluded behind the scenes between Great Britain and Russia."[491]

8.22 Additionally, Child observed that:

"Apart from these errors in regard to the roles of Lord Russell and Lord Justice Collins, there are minor misstatements of fact in Mr. Mallet-Prevost's narrative which also show how badly his memory must have served him. For instance, he states that after he and Sir Richard Webster had concluded their speeches 'the Tribunal adjourned for a short two weeks holiday.' Now had he deemed it worth his while to refresh his recollection by reference to the printed record, Mr. Mallet-Prevost would have been reminded that the Tribunal did not adjourn after hearing Sir Richard Webster and himself, but went straight on to hear the 'argument' of Mr. Soley. It was then, in the very middle of Mr. Soley's 'argument,' that the Tribunal did adjourn, but only for nine days (August 16-25), and not for 'two weeks,' as stated by Mr. Mallet-Prevost. (This was only one of the Tribunal's ten adjournments, but as it was the longest,

[491] *Ibid.*, p. 684.

> although not by very much, we must assume that it was the one which Mr. Mallet-Prevost had in mind.)"[492]

8.23 In addition to being replete with factual errors, more of which are discussed below at paragraphs 8.77 to 8.92, it is equally clear that the alleged author of the Memorandum, Mr Mallet-Prevost, was not an independent and impartial source. On the contrary, he was a loyal and impassioned supporter of Venezuela who had spent many years of his professional life seeking to promote Venezuela's expansive claims to the territory held by the Award to belong to British Guiana. In addition to being one of Venezuela's four counsel at the 1899 Arbitration, Mr Mallet-Prevost had also served as Secretary to President Cleveland's Venezuela Boundary Commission. In January 1944 (one month before he allegedly authored the Mallet-Prevost Memorandum), Venezuela conferred upon Mr Mallet-Prevost the Order of the Liberator — Venezuela's highest national award. This honour was bestowed upon Venezuela's "friend and adviser" in recognition of "the high estimation in which the Venezuelan people hold and will always hold him" and "to whom Venezuela owes a long-standing debt".[493] Accordingly, even if the error-filled Mallet-Prevost Memorandum was authentic — of which there is no independent documentary or other supporting evidence — it was certainly not reliable or objective.

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[492] *Ibid.*, pp. 685-686.

[493] *Speech* by the Venezuelan Ambassador to the United States to the Pan-American Society of the United States (1944). MG, Vol. II, Annex 9.

B. REPORT BY VENEZUELAN EXPERTS TO THE NATIONAL GOVERNMENT OF VENEZUELA (1965)

8.24 In March 1965, two Venezuelan experts presented a "Report" to the National Government of Venezuela ("the 1965 Report").[494] In addition to contending that the Treaty of Washington was void (an argument which Guyana has already rebutted in Chapter 7), the 1965 Report also contended that the Award was a nullity on various grounds. The content of the 1965 Report is confused and repetitive. The clearest summary of the various grounds on which Venezuela contends that the Award is a nullity can be found in the "Summary of Conclusions" at the end of the Report.[495] In short, the 1965 Report claims that the Award is a nullity because:

(i) The Award did not contain reasons;

(ii) The Arbitrators "did not take into account the applicable rules of law, and in, particular, the principle *uti possidetis juris*; nor did they make any effort to research as far as the territories which belonged to either the Netherlands or the Kingdom of Spain at the time of the acquisition";

(iii) The Arbitrators "did not decide on how the 50-year prescription deadline would be calculated, nor did they apply it in accordance with the Treaty of Arbitration";

(iv) "Even though the arbitrators were not authorised to do so by the arbitral agreement, they set and regulated in their award the free

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[494] Hermann González Oropeza, S.J. & Pablo Ojer, *[Informe que los expertos venezolanos para la cuestión de límites con Guayana Británica presentan al Gobierno Nacional] Report submitted to the venezuelan experts to the National Government on the issue of the boundaries with British Guiana* (18 Mar. 1965). MMG, Vol. IV, Annex 74.

[495] *Ibid.*, p. 12, para. 4.

navigation of two bordering rivers, and in particular against Venezuela"; and

(v) The Award "was the result of a diplomatic compromise", which "shows the arbitrators did not take into account the rules of law contained in the Arbitral Treaty".[496]

8.25 The 1965 Report further alleged that "representatives of Great Britain submitted altered maps (modified in the Colonial Office) to the arbitral Tribunal which were given decisive importance".[497] It also alleged that the boundary established by the Award "had been prepared in the Colonial Office in July 1899" and was "imposed on the American arbitrators by the President of the Tribunal, the Russian Professor Martens, through coercion".[498] Although not expressly presented as reasons for nullity, it appears that Venezuela contends that the Award was null on these grounds too.

8.26 As Guyana explains below, the allegations and criticisms of the Tribunal and the Award contained in the 1965 Report are entirely meritless.

III. Response to Venezuela's Allegations of Nullity

A. The Absence of Reasons in the Award Does Not Render the Award a Nullity

8.27 Although the Award did not contain written reasons for the Arbitral Tribunal's decision, this feature of the Award was neither unexpected, uncommon

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[496] *Ibid.*, p. 13, paras. 4(a)-4(e).

[497] *Ibid.*, p. 12, para. 5.

[498] *Ibid.*, p. 13, para. 6.

nor irregular, having regard to the form adopted by other awards of that period.[499] The absence of written reasons certainly did not vitiate the validity of the Award.

8.28 First, the Treaty did not contain any requirement for reasons to be provided in the Award. Nor did the terms of the Treaty provide any basis for inferring such an obligation. On the contrary, the terms of the Treaty tell against any such requirement. In particular, it is notable that whereas the Treaty contained detailed and prescriptive requirements concerning the Tribunal's responsibilities and the performance of those responsibilities — including various specific requirements regarding the form and content of the Award — it said nothing about the articulation or publication of reasons. In particular:

(i) Article III provided that the Tribunal must investigate and ascertain the extent of the territories that belonged to, or might lawfully be claimed by, the Netherlands and Spain at the time when Great Britain acquired the Colony of British Guiana and must then determine the boundary-line between British Guiana and Venezuela. Article III did not require the Tribunal to summarise the course of that investigation or to describe its outcome in the Award.

(ii) Article IV stipulated that in determining those matters (*i.e.* the extent of the territories that belonged to, or might lawfully be claimed by, the Netherlands and Spain at the date when Great Britain acquired British Guiana), the Arbitrators must ascertain all facts which they deem necessary to a decision on the controversy and must be governed by the particular rules which the parties had agreed were applicable to the case. Those rules were then expressly set out. Article IV did not require the Tribunal to state in the Award which facts the Arbitrators considered necessary to their decision, nor to explain how they had interpreted and applied the three rules set out in Article IV.

[499] *See infra* para. 8.31.

(iii) Article X contained specific provisions concerning the timing, content and format of the Tribunal's Award, but said nothing about any requirement to provide reasons.

(iv) Article XIII of the Treaty stated that Great Britain and Venezuela "engage to consider the result of the proceeds of the Tribunal of Arbitration as a full, perfect, and final settlement of all the questions referred to the Arbitrators". The duty to treat "the result" of the proceedings "as a full, perfect, and final settlement" of the issues referred to the Tribunal was not in any way made contingent upon the provision of reasons for that "result".

(v) The Treaty contained detailed provisions regarding the procedure and practical arrangements for the Arbitration. These provisions made no express or implicit reference to the provision of reasons for the Tribunal's decision. For example:

a. Article V specified the location where the Arbitrators shall meet (Paris) and the period within which they must do so (within 60 days of the submission of the final Arguments under Article VIII). Article V also specified that, "[a]ll questions considered by the Tribunal, including the final decision, shall be determined by a majority of all the Arbitrators".

b. Articles VI to VIII contained detailed provisions concerning the timetable and manner of the filing of the parties' respective printed Cases, Counter-Cases and final Arguments and all accompanying documents, evidence and correspondence.

c. Article XI required the Arbitrators to "keep an accurate record of their proceedings" and empowered them to appoint and employ the necessary officers to assist them.

d. Article XII made provisions for the remuneration of the Arbitrators, the parties' Agents and Counsel and for the payment of expenses connected with the Arbitration.

8.29 The drafters of the Treaty evidently took great care to set out the matters that were considered to be significant, including in relation to form. Had the

drafters intended to require the Tribunal to give reasons for its "final decision", then it would have been straightforward to expressly stipulate that the "final decision" was to be supported by reasons. The absence of any such stipulation, coupled with the detailed and prescriptive provisions concerning various other matters regarding the Tribunal's functions and the form and content of its Award, necessarily implies that the Treaty did not intend to require the Tribunal to give reasons for its decision.

8.30 Second, the conclusion that the Tribunal was not required by the Treaty to provide reasons in the Award is reinforced by the absence of: (a) any evidence of any contemporaneous expectation that the Tribunal would provide reasons for its decision; and (b) any contemporaneous criticism concerning the absence of reasons in the Award. Indeed, following the delivery of the Award, Venezuela expressly acknowledged that the absence of reasons did not in any way call into question the validity of the Award. For example, the former Venezuelan foreign minister, Dr Rafael Seijas, wrote in a report on the Award dated 7 May 1900 that: "As the treaty which set up the arbitral tribunal did not stipulate any requirement to give reasons for its decision, *omission of the grounds for it does not permit any complaint on this score*."[500]

8.31 Third, at the time of the proceedings before the Tribunal it was not uncommon for international arbitral awards to be produced without reasons. By way of example:

[500] *Report* of Counsellor Dr Rafael Seijas (4 May 1900), p. 189 (emphasis added). MMG, Vol. IV, Annex 66.

- In 1893, an arbitral tribunal comprising seven distinguished jurists from the United States, United Kingdom, Canada, France, Italy and Norway delivered an unreasoned award in the *Bering Sea Fisheries Case*.[501]

- In 1897, U.S. President Grover Cleveland delivered an unreasoned award in the *Cerruti Case*.[502]

- In 1902, King Edward VII delivered an unreasoned award in the *Argentine-Chile Boundary Case*.[503]

- In 1904, an arbitral tribunal comprising three arbitrators appointed by the Presidents of the United States and the Dominican Republic delivered an unreasoned award in the *San Domingo Improvement Company Claims Case*.[504]

8.32 Nor was there anything unusual about the length of the 1899 Award, which was entirely consistent with the brevity of many other arbitral awards rendered during this period. For example:

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[501] *Award between the United States and the United Kingdom relating to the rights of jurisdiction of United States in the Bering's sea and the preservation of fur seals, Decision of 15 August 1893*, UNRIAA, Vol. XXVIII, p. 263 (15 Aug. 1893).

[502] *Award of the President of the United States under the Protocol concluded the eighteenth day of August, in the year one thousand eight hundred and ninety-four, between the Government of the Kingdom of Italy and the Government of the Republic of Colombia*, UNRIAA, Vol. XI, p. 394 (2 Mar. 1897). MG, Vol. II, Annex 2.

[503] *Award by His Majesty King Edward VII in the Argentine-Chile Boundary Case*, UNRIAA, Vol. IX, p. 37 (20 Nov. 1902). MG, Vol. II, Annex 5.

[504] *Award of the Commission of Arbitration Under the Provisions of the Protocol of January 31, 1903, Between the United States of America and the Dominican Republic, for the Settlement of the Claims of the San Domingo Improvement Company of New York and its Allied Companies*, UNRIAA, Vol. XI, p. 35 (14 July 1904).

- The award of Victor-Emmanuel III, the King of Italy, in the Guiana boundary case between Brazil and Great Britain in 1904 was two and one-half pages long.[505]

- The award in the *Barotselend* boundary case between Great Britain and Portugal in 1905 was also two and one-half pages long.[506]

- The Mixed Commission in the *Spadafora* case between Italy and Colombia in 1904 produced an award of just one and one-half pages.[507]

8.33 The absence of any general obligation to provide reasons for an international arbitral award in 1899 is also reflected in the discussions that took place at the 1899 Hague Peace Conference. During the course of the conference, there were extensive discussions on whether the draft convention that was under consideration in relation to future arbitral practise should include a duty for reasons to be provided. The Russian draft arbitral code did not contain any such duty. Such a duty was in fact proposed by the German delegation, only to be opposed by the delegations of both Russia and the United States.[508] The existence of these conflicting stances amongst the various delegations at the Hague Peace Conference

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[505] *The Guiana Boundary Case (Brazil v. Great Britain)*, UNRIAA, Vol. XI, p. 11 (6 June 1904).

[506] *The Barotseland Boundary Case (Great Britain v. Portugal)*, UNRIAA, Vol. XI, pp. 67-69 (30 May 1905).

[507] *Sentence de la Commission Mixte Italo-Colombienne dans l'Affaire de M. Vicente Spadafora (Italy v. Colombia)*, UNRIAA, Vol. XI, pp. 9-10 (9 April 1904).

[508] *See* J.B. Scott & Carnegie Endowment for International Peace, THE PROCEEDINGS OF THE HAGUE PEACE CONFERENCES: TRANSLATION OF THE OFFICIAL TEXTS, Vol. I, The Conference of 1899 (Oxford University Press, 1920), pp. 740-741.

demonstrates that there was no clear and settled rule of international law in 1899 requiring reasons to be provided in an arbitral award.[509]

8.34 It is also notable that, as explained in Chapter 6,[510] although the draft arbitral code produced by the *Institut de Droit International* in 1875 referred to a duty to give reasons (see Article 23), a failure to give reasons was *not* included among the list of potential grounds of invalidity in Article 27.

8.35 Accordingly, it follows that there was nothing unusual — and certainly nothing irregular or invalid — about the absence of written reasons for the Tribunal's decision in the 1899 Award.

B. THE ARBITRATORS DID NOT FAIL TO TAKE INTO ACCOUNT APPLICABLE PRINCIPLES OF LAW OR FAIL TO INVESTIGATE AND ASCERTAIN THE EXTENT OF THE TERRITORIES BELONGING TO THE NETHERLANDS AND SPAIN AT THE DATE OF GREAT BRITAIN'S "ACQUISITION"

1. Venezuela's Claim that the Arbitral Tribunal Disregarded the Principle of "Uti Possidetis Juris"

8.36 Venezuela contends that the Tribunal erred in law by failing to take account of the principle of "*uti possidetis juris*". Venezuela has not explained, however, the nature of this alleged failure. It is notable that the Treaty of Washington contains

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[509] It is also notable that in its draft rules of procedure for international arbitration in 1875, the *Institut de Droit International* did not include the absence of reasons as a ground for nullity. By contrast, the International Law Commission's draft rules of arbitral procedure presented to the UN General Assembly in 1953 did include the absence of reasons as a possible (but not automatic) ground for nullity (this proposal was subsequently adopted in the International Law Commission's Model Rules on Arbitral Procedure 1958). This development reflects the fact that international law did not recognise the existence of a duty to give reasons until well after the date of the 1899 Award.

[510] *See supra* para. 6.46.

no reference to *uti possidetis juris*, as part of the applicable law or otherwise. An alleged "failure" to have regard to such a principle therefore does not violate any of the terms of the Treaty.

8.37 Although Venezuela has not explained the basis for its complaint regarding *uti possidetis juris*, it appears that it may be referring to the special rule adopted by Spanish colonies when they became independent in the early nineteenth century. This was the principle that, "the boundaries of the newly established republics should be the frontiers of the Spanish provinces which they were succeeding".[511] The rule only applied between the former Spanish colonies of Central and South America and could not confer title unless the territories were already part of "former Spanish America",[512] which British Guiana plainly was not.

8.38 It is self-evident that the principle could not operate against either the Netherlands or Great Britain in the absence of agreement to this effect. The Treaty contains no such agreement. On the contrary, the principle is inconsistent with the "Rules" expressly set out in Article IV of the Treaty. Venezuela's contention would mean, in effect, that the Tribunal was automatically bound to find that the boundary between British Guiana and Venezuela was whatever the boundary might have been at the time Venezuela became independent from Spain many decades before the Treaty.[513] However, this would be inconsistent both with Rule (a) (which

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[511] *Arbitral Award Made by the King of Spain on 23 December 1906 (Honduras v. Nicaragua)*, Judgment, Dissenting Opinion of Judge Urrutia Holguin, I.C.J. Reports 1960, p. 38.

[512] *See ibid.*, p. 38.

[513] As Venezuela explained in its Case: "Venezuela on July 5, 1811, declared its independence from Spain. In 1819 it became merged with New Granada, under the name of 'Republic of Colombia'. In 1830 it assumed a separate existence under the name of 'Republic of Venezuela;' and finally, on March 30, 1845, its independence was formally recognized by Spain". (*See Boundary between the*

provided that, "[a]dverse holding or prescription during a period of fifty years shall make a good title") and with Rule (c) (which provided that, "[i]n determining the boundary-line, if territory of one party may be found by the Tribunal to have been at the date of this Treaty in the occupation of the subjects or citizens of the other Party, such effect shall be given to such occupation as reason, justice, the principles of international law, and the equities of the case shall, in the opinion of the Tribunal, require").[514]

8.39 Venezuela's argument appears to boil down to a contention that, despite the absence of any reference to *uti possidetis juris* in the Treaty, the omission of a reference to the principle in the 1899 Award rendered the Award a nullity. This argument is manifestly untenable.

2. Venezuela's Claim that the Arbitrators Did Not Make any Effort to Investigate and Ascertain the Extent of the Territories Belonging to the Netherlands and Spain at the Date of the "Acquisition" of British Guiana by Great Britain

8.40 Venezuela alleges that the Arbitrators failed to comply with the requirement in Article III of the Treaty to investigate and ascertain the extent of the territories belonging to the Netherlands and Spain at the date of Great Britain's acquisition of the Colony of British Guiana in 1814. This allegation is unsupported by evidence and is entirely unsustainable.

Colony of British Guiana and the United States of Venezuela, The Case of the United States of Venezuela (1898), Vol. I, p. 163. MMG, Vol. IV, Annex 125.

[514] Treaty Between Great Britain and the United States of Venezuela Respecting the Settlement of the Boundary Between the Colony of British Guiana and the United States of Venezuela, 5 U.K.T.S. 67 (2 Feb. 1897). AG, Annex 1.

8.41 First, the allegation is categorically disproved by the Award itself, which was signed by all five Arbitrators and which states in clear and unequivocal terms that:

> "the Said Arbitrators ... have investigated and ascertained the extent of the territories belonging to or that might lawfully be claimed by the United Netherlands or by the Kingdom of Spain respectively at the time of the acquisition by Great Britain of the Colony of British Guiana".[515]

8.42 Venezuela cannot possibly suggest that this clear and unequivocal statement in the Award is false. The terms of the Award itself are therefore fatal to its argument.

8.43 Second, the fact that the Tribunal investigated and ascertained this issue is borne out by an examination of the parties' written submissions and the verbatim record of the oral proceedings, which demonstrates that this issue was addressed in painstaking detail before the Tribunal. As Venezuela's lead counsel observed, the Tribunal "had laboriously gone through this long historical inquiry and had traced the title of the Netherlands and had traced the title of Spain down to 1814".[516] He added that the parties' counsel "have searched the records at the Hague and at Seville and at Madrid in order to set before this Tribunal as fully as they might, the story of Spanish discovery, of the Dutch war, of the Dutch settlement in Guiana, of the Treaty of Münster, and all the long story between the years 1648 and 1814".[517] The verbatim record of the oral proceedings shows that Arbitrators paid extremely

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[515] *1899 Award*, p. 338.

[516] *Boundary between the Colony of British Guiana and the United States of Venezuela*, Fifty-Second Day's Proceedings (21 Sept. 1899), p. 3087 (General Harrison). MMG, Vol. IV, Annex 114.

[517] *Ibid.*, p. 3087 (General Harrison).

close attention to the parties' extensive submissions regarding this question and actively probed and tested the cogency and evidential support for those submissions.

8.44 Third, contemporaneous documents demonstrate that the Arbitrators' deliberations focused intensively on this issue. For example, in a letter written just four days after the Tribunal delivered its Award, Lord Russell explained that during their deliberations there had been much debate amongst the Arbitrators about "the fundamental question" of whether "Spain acquired the right to Guiana by discovery followed by possession of such a kind and extent as to give her a complete title".[518] While Lord Russell considered that there were "plausible grounds" in support of that argument, he and Lord Justice Collins ultimately considered that this was "untenable" "in view especially of the Treaties of 1648 (Münster) and of 1714 (Utrecht) and of the conduct of both the Powers subsequent to those Treaties". On the other hand, Chief Justice Fuller had "adhered to the Venezuelan contention", while Justice Brewer "refus[ed] assent to the Spanish view", but ultimately "worked out a line of delimitation in the first instance, which ... could only have been justified by the substantial adoption of that view". According to Lord Russell, Prof Martens ultimately endorsed the view of his British colleagues concerning this "fundamental question", but only did so "[a]fter long debate" among the Arbitrators.[519]

8.45 Accordingly, Venezuela's claim that the Tribunal made no effort to investigate and ascertain the extent of the territories belonging to Spain and the

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[518] *Letter* from Lord Russell to Lord Salisbury (7 Oct. 1899), *in* Papers of 3rd Marquess of Salisbury, Vol. A/94, Doc. No. 2, p. 126. MMG, Vol. III, Annex 36.

[519] *Ibid.*, p. 126.

Netherlands at the time of Great Britain's acquisition of British Guiana is contradicted directly by the express terms of the unanimous Award. Further, it is refuted by the contemporaneous record of the written and oral proceedings and the first-hand accounts of the Arbitrators' deliberations.

C. THE ARBITRATORS DID NOT FAIL TO COMPLY WITH THE REQUIREMENTS IN THE TREATY CONCERNING THE CALCULATION AND APPLICATION OF THE 50-YEAR PRESCRIPTION RULE

8.46 Venezuela alleges that the Arbitrators failed to fulfil the obligation under Article IV(a) of the 1897 Treaty regarding the application of the rule that adverse holding or prescription during a period of fifty years shall make a good title. Once again, Venezuela cites no evidence to support this claim.

8.47 The record of the proceedings before the Tribunal shows that the question of the interpretation and application of the fifty-year period under Article IV(a) was fully debated and considered in both the written[520] and oral[521] phases of the

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[520] *See*, for example, *Venezuela-British Guiana Boundary Arbitration*, The Case of the United States of Venezuela (1898), Vol. I, pp. 179. MMG, Vol. IV, Annex 126; *Venezuela-British Guiana Boundary Arbitration*, The Case of the United States of Venezuela (1898), Vol. I, p. 229. MMG, Vol. IV, Annex 128; *Boundary between the Colony of British Guiana and the United States of Venezuela*, The Printed Argument on behalf of the United States of Venezuela (1898), Vol. I, pp. 21-22. MMG, Vol. IV, Annex 133; *Boundary between the Colony of British Guiana and the United States of Venezuela*, The Printed Argument on behalf of the United States of Venezuela (1898), Vol. I, pp. 32-54. MMG, Vol. IV, Annex 134; *Boundary between the Colony of British Guiana and the United States of Venezuela*, The Printed Argument on behalf of the United States of Venezuela (1898), Vol. II, pp. xvii-xix. MMG, Vol. IV, Annex 136; *Report* of Counsellor Dr Rafael Seijas (4 May 1900). MMG, Vol. IV, Annex 66; *Boundary between the Colony of British Guiana and the United States of Venezuela*, The Argument on behalf of Her Britannic Majesty (1898), pp. 2-3. MMG, Vol. IV, Annex 132.

[521] *See*, for example, *Boundary between the Colony of British Guiana and the United States of Venezuela*, Second Day's Proceedings (15 June 1899), pp. 17-19, 23-25 (Sir Richard Webster). MMG, Vol. IV, Annex 98; *Boundary between the Colony of British Guiana and the United States*

proceedings. During the course of the hearings, the Arbitrators posed a significant number of questions to the parties' representatives about the meaning and effect of Rule (a).[522] There is no evidence to support Venezuela's claim that, notwithstanding the detailed submissions by both sides in relation to the application and effect of this Rule, the Arbitrators did not consider how the terms of prescription were to be calculated or otherwise failed to apply the "Rule".

8.48 Furthermore, while there was a difference of opinion between the British and Venezuelan counsel regarding the period of years covered by the fifty-year prescription rule, it was common ground that the interpretation of the Rule was a matter for the Tribunal. In a letter to Sir Richard Webster dated 22 April 1899, for example, Mr Mallet-Prevost stated: "As to which may be the correct view, yours or ours, seems to us to be a proper matter for the Tribunal itself to decide. Such a decision Venezuela will accept."[523] Once again, Venezuela's claim that the Award is a nullity because the Tribunal failed properly to interpret and apply this Rule is groundless.

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of Venezuela, Fifty-Second Day's Proceedings (21 Sept. 1899), pp. 3092-3097 (General Harrison). MMG, Vol. IV, Annex 114.

[522] *See*, for example, the questions posed by Chief Justice Fuller and Lord Russell on the second day of the proceedings: *Boundary between the Colony of British Guiana and the United States of Venezuela*, Second Day's Proceedings, Vol. I (15 June 1899), p. 21 (Chief Justice Fuller), p. 22 (Lord Russell). MMG, Vol. IV, Annex 98.

[523] *Letter* from S. Mallet-Prevost to Sir Richard Webster (22 Apr. 1899), p. 313. MMG, Vol. III, Annex 32.

D. THE ARBITRAL TRIBUNAL DID NOT EXCEED ITS POWERS BY DETERMINING THE FREE NAVIGATION OF THE BARIMA AND AMAKURA RIVERS

8.49 Venezuela alleges that the Tribunal exceeded its powers by determining in the Award that "in times of peace the Rivers Amakuru and Barima shall be open to navigation by the merchant ships of all nations". This complaint represents a departure from Venezuela's contemporaneous approval of this aspect of the Award. For example, in a diplomatic despatch dated 7 October 1899, Venezuela's Ambassador to Great Britain, José Andrade (who had signed the Treaty on behalf of Venezuela and also happened to be the brother of the then-President of Venezuela) stated:

> "I will say nothing concerning the final clause which declares open to free navigation by merchant ships of all nations, the rivers Barima and Amacuro in their English section as in the Venezuelan. Therein is seen an application of a theory of international law which wherever it has been put in practice has greatly contributed to the prosperity of States. Venezuela herself has at times applied it to the navigation on the Orinoco."[524]

8.50 It is true that the Treaty did not expressly require the Tribunal to determine the question of freedom of navigation in respect of the rivers which traverse the parties' territories or which form part of their common boundary. However, the Tribunal's determination of this issue in the Award was directly related to the delimitation of that boundary. This is apparent from the opening words of the ninth recital in the Award:

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[524] *Letter* from the Venezuelan Ambassador to the United Kingdom to the Venezuelan Minister of Foreign Affairs (7 Oct. 1899), p. 2. MG, Vol. II, Annex 3.

> "*In fixing the above delimitation* the Arbitrators considered and decided that in times of peace".[525]

8.51 It is therefore clear that, in interpreting and applying the Treaty, the Arbitrators considered that the issue of freedom of navigation on the Rivers Amakura and Barima was a necessary and integral aspect of the boundary delimitation. This view was in no way unreasonable and cannot plausibly be characterised as an excess of jurisdiction by the Tribunal. In this regard, it is relevant to note that the International Court of Justice not infrequently includes decisions of an ancillary character in judgments determining disputes brought before it.[526]

8.52 Furthermore, in its submissions before the Arbitral Tribunal, Venezuela emphasised the Tribunal's latitude under the Treaty to use its "judgment and discretion" to make "adjustments" to "the relations between the two [States]" in order to "settle the relations of both parties". For example, Venezuela's Argument submitted that the "Rule" enshrined in Article IV(c) of the Treaty:

> "recognizes the fact that when the territories of each party shall have been ascertained by the defining of the true boundary line, it might be found that the subjects or citizens of one party were at the date of the treaty actually settled upon territory thus ascertained to belong to the other. The question would then arise how, with the greatest fairness both to the State in whose territory such settlers were found and to the settlers themselves, an adjustment should be made of the relations between the two; and it was accordingly provided in the Treaty that the Tribunal should itself finally adjust

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[525] *1899 Award*, p. 338.

[526] *See*, for example, *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica)*, Judgment, I.C.J. Reports 2015, p. 665.

> these relations, upon considerations of reason, justice, the principles of international law and the equities of the particular case. It is not stated by the Treaty what form of adjustment, if any, is to be adopted by the Arbitrators in carrying out the provisions of Rule (c). *The whole matter is left to their judgment and discretion. It is clearly contemplated by the Rule that some provision shall be made to settle the relations of both parties*".[527]

8.53 Under the terms of the Award, the Upper Amakura formed part of the boundary line, while the mouths of both rivers were awarded to Venezuela. In these circumstances, it was plainly open to the Tribunal, as an ancillary matter and in the exercise of the "judgment and discretion" which Venezuela recognised it to enjoy, to determine that there should be free navigation of the two rivers. The fact that Venezuela made no attempt to impugn the validity of the Award on this basis for more than 60 years after it was delivered and that the parties consistently respected the right of free navigation throughout that period shows that the decision was perceived and accepted, upon its being handed down and for many decades thereafter, as a reasonable, fair and lawful determination by the Tribunal, in exercise of the powers granted to it.

E. VENEZUELA'S ALLEGATION THAT GREAT BRITAIN SUBMITTED DOCTORED MAPS TO THE ARBITRAL TRIBUNAL AND THAT THESE MAPS WERE OF "DECISIVE IMPORTANCE"

8.54 The 1965 Report asserts that Venezuela has "evidence" that lines marked in maps dated 1841 and 1842, which were presented to the Tribunal, had been tampered with by the Colonial Office. Venezuela also alleges that Great Britain

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[527] *Boundary between the Colony of British Guiana and the United States of Venezuela*, The Printed Argument on behalf of the United States of Venezuela (1898), Vol. I, pp. 56-57 (emphasis added). MMG, Vol. IV, Annex 134.

falsely represented that a map of the Schomburgk Line presented to the Tribunal was a map that had been produced by Schomburgk in 1844. Venezuela has not provided, however, any particulars in support of its allegations that maps were tampered with; nor has it explained how and why those maps were supposedly of "decisive importance" to the Tribunal's determination regarding the location of the boundary. Venezuela's claim that Great Britain deliberately tampered with the maps, and that it thereby succeeded in deceiving the Tribunal as to the location of the boundary, is entirely meritless and fails to support any claim of nullity of the 1899 Award.

8.55 First, the authors of the 1965 Report neither adduced nor identified any actual evidence to support the claims that Great Britain had doctored maps in order to advance or support its case before the Arbitral Tribunal. Nor has Venezuela adduced or identified any evidence to this effect in the 57 years since that report was produced. Venezuela's claim of "tampering" is founded on nothing more than bald and unsubstantiated allegations.

8.56 Second, the 1965 Report implies that questions regarding the authenticity and accuracy of particular maps only emerged sometime after the proceedings before the Tribunal had concluded. This was not the case. In 1896 — three years before the arbitral proceedings commenced — Venezuela's written brief to the Venezuela Boundary Commission alleged that in 1886 the Colonial Office had compelled its cartographer to withhold his existing maps of the boundary and

directed him to amend retrospectively the depiction of the boundary on certain other maps while concealing the fact of these changes.[528]

8.57 Venezuela had therefore already raised the allegation of "tampering" several years *before* the 1899 Arbitration. Despite this, Venezuela did not seek to impugn the validity of the 1899 Award by reference to alleged "tampering" for more than six decades after it was delivered.

8.58 Third, by the time of the 1899 arbitral proceedings, it was widely recognised and acknowledged that the maps of the boundary produced in the mid-to-late-nineteenth century were frequently inaccurate. During the proceedings before the Venezuela Boundary Commission, for example, Mr Mallet-Prevost (who was the Secretary to that Commission) had emphasised that: "All maps of the region in dispute between British Guiana and Venezuela have been made with an imperfect and generally very defective knowledge of the country and are therefore replete with errors".[529] The Report of the Venezuela Boundary Commission likewise stated that, "It was apparent not merely from the information thus obtained, but also from an examination of the maps themselves, that there was great confusion in respect to the lines shown on the several maps. ... The confusion

[528] "THE VENEZUELAN BRIEF – Strong Paper Submitted to the Commission by Mr. Storrow – ANSWER TO THE BRITISH CLAIMS – Based, It Is Said, on a True Divisional Line According to the Undisputed Evidence – REFUTATION OF POLLOCK'S ARGUMENT – Exposure of the Inconsistencies of the English Contentions with Respect to the Famous Schomburgk Map", *New York Times* (20 July 1896), p. 494.

[529] Sir Geoffrey Meade, *Report on the Exposition presented by the Venezuelan Experts* (3 Aug. 1965), para. 28 (internal quotations omitted). MMG, Vol. IV, Annex 75.

apparent on the face of the maps, even of the later ones, suggested a general lack of geographical knowledge".[530]

8.59 Throughout the proceedings before the Arbitral Tribunal, there was much discussion and debate about the provenance and accuracy of particular maps relied on by Great Britain. During the oral hearings, Venezuela's counsel repeatedly challenged the reliability of Great Britain's maps, including by asserting that particular maps on which Great Britain placed great reliance were "misleading"[531] and "untrustworthy"[532] and by commenting that there was "utter confusion ... on

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[530] *Report* of the United States Venezuelan Border Commission to the President of the United States, Grover Cleveland (27 Feb. 1897), *available at* http://www.guyana.org/features/trail_diplomacy_pt2.html (last accessed 22 Feb. 2022).

[531] *See Boundary between the Colony of British Guiana and the United States of Venezuela*, Twenty-Eighth Day's Proceedings (12 Aug. 1899), pp. 1761-1762 (Soley). MMG, Vol. IV, Annex 104 (Venezuela's counsel stated: "Now here I want to call the attention of the Tribunal for a moment to the map which my learned friends have been making use of during the whole of the oral argument of the Attorney General. I do not know what that map represents, or what it is intended to represent. It has on it a large colored area. Now the purpose of a large colored area and the effect of a large colored area are to indicate some sort of continuity of possession, or some sort of unity — some political unity — in the various parts of that area. I mention this fact because the map seems to me to be exceedingly misleading, and I know how strong the impressions are that are produced by the constant inspection of a misleading map like that. That map does not represent the colony of British Guiana. That map does not represent the territory in dispute. It does not represent the British claim unless the British claim today is the claim that was stated by Sir Thomas Sanderson in the year 1890".). *See also Boundary between the Colony of British Guiana and the United States of Venezuela*, Twenty-Eighth Day's Proceedings (12 Aug. 1899), p. 1737 (Solely). MMG, Vol. IV, Annex 103 (Venezuela's counsel argued that a note in the atlas produced by Great Britain constituted an "extraordinary confession … by those who have the monopoly of the geography in this controversy. It means that upon that map … the geographers, or the map-makers, finding that Schomburgk's positions on the coast were inaccurate as compared with the positions in the Admiralty chart … instead of Schomburgk's positions, moved arbitrarily those positions twenty minutes to the east. … They do not know now whether they are correct in the interior and so say; and confess in plain terms that possibly the northern part of the map may be twenty minutes too far to the east as compared with the southern. Now I say that is a most extraordinary confession".).

[532] *See Boundary between the Colony of British Guiana and the United States of Venezuela*, Thirty-Second Day's Proceedings (25 Aug. 1899), p. 1999 (Soley). MMG, Vol. IV, Annex 105. "Now as to this first Schomburgk map which was published in the Parliamentary Papers with Lord

the subject of longitudes".[533] Accordingly, the Tribunal was well aware of Venezuela's criticisms and challenges to the accuracy of Great Britain's cartographic evidence and the existence of mistakes in some of the maps on which the British relied.[534] Venezuela's suggestion that the Tribunal was misled into placing undue weight on the reliability of British maps, and was unaware of doubts regarding their accuracy, is therefore without foundation.

8.60 Fourth, the evidence shows that far from seeking to deceive Venezuela and the Tribunal, Great Britain candidly acknowledged the limitations of the various maps upon which it relied and proactively drew attention to the amendment to its erroneous map, which Venezuela now seeks to characterise as an improper and secret amendment that was concealed from the Tribunal. For example:

- Prior to the start of the oral hearings, the British Agent notified the Venezuelan Agent that an engraver's error had been detected in one of the

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Palmerston's letter it has been suggested that it was an imaginary map, that it represented imaginary localities and imaginary boundaries. I submit, Mr President that that is not the case. With reference to the longitudes I am free to say, as I said about the longitudes on a much later and more carefully prepared map, namely the map in the British atlas, they are quite untrustworthy, they are obviously untrustworthy."

[533] *See Boundary between the Colony of British Guiana and the United States of Venezuela*, Thirty-Third Day's Proceedings (26 Aug. 1899), p. 2063 (Soley). MMG, Vol. IV, Annex 107.

[534] The Arbitrators themselves observed that some of the maps contained obvious errors. For example, the President, Prof Martens, referred to his own "observation…that the maps of the 18th century have very great mistakes". *See Boundary between the Colony of British Guiana and the United States of Venezuela*, Nineteenth Day's Proceedings (29 July 1899), p. 1170 (Martens). MMG, Vol. IV, Annex 102.

maps relied on by Great Britain. This matter was brought expressly to the Tribunal's attention during the oral phase of the proceedings.[535]

- In its printed Case, Great Britain expressly drew attention to the fact that the map in question had been amended in 1886 to correct the error in the depiction of the boundary;[536] this specific passage of Great Britain's Case

[535] *See Boundary between the Colony of British Guiana and the United States of Venezuela*, Thirty-Fourth Day's Proceedings (28 Aug. 1899), p. 2120. MMG, Vol. IV, Annex 108. Sir Richard Webster expressly highlighted that Great Britain had written to Venezuela to notify it of the mistake and of the correction of that mistake in the version of the map published in 1886. The following day, Venezuela's counsel, Mr Soley confirmed that Great Britain had done this: "Mr President, I ought to begin today by saying in reference to the question or matter, to which I called attention yesterday, of the existence of an engraved line on a copy of the map of 1876 in the British atlas, that I find that the Agent of Venezuela received from the Agent of Great Britain, in the month of May last, a notice to the effect that an error existed in that map. Owing to some accident or inadvertence, the information of this fact never reached the counsel for Venezuela, and consequently, when I spoke yesterday, I spoke without any knowledge that the letter had been written. I mention this injustice to my learned friends on the other side, although I would call attention to the fact that my mention of the existence of this engraved line was specifically only in order that the Tribunal might not be misled by the existence of the line upon the map." *See Boundary between the Colony of British Guiana and the United States of Venezuela*, Thirty-Fifth Day's Proceedings (29 Aug. 1899), p. 2149 (Soley). MMG, Vol. IV, Annex 109.

See also Boundary between the Colony of British Guiana and the United States of Venezuela, Thirty-Second Day's Proceedings (25 Aug. 1899), pp. 2011-2012 (Soley). MMG, Vol. IV, Annex 106. ("In the year 1886 the Schomburgk line was published on the great Colonial map which was a change from the map of 1875.").

[536] *Boundary between the Colony of British Guiana and the United States of Venezuela*, The Case of the Government of Her Britannic Majesty (1898), p. 144. MMG, Vol. IV, Annex 120 ("When the British Government was about to issue the Proclamation of 21st October, 1886, [which declared the Schomburgk line to be the British claim line] their attention was called to the boundary-line upon Mr. Stanford's Map of 1875 …. As the line so drawn did not correspond with the real Schomburgk line, the map was altered so as to show the real line traced by Sir Robert Schomburgk, and the note upon the map was erased".).

was also expressly drawn to the Tribunal's attention and quoted verbatim during the oral phase of the proceedings.[537]

- Venezuela's counsel expressly acknowledged Great Britain's candour. In Venezuela's closing submissions, former President Harrison observed that Great Britain's counsel, Sir Robert Reid, had "very candidly" told that the Tribunal that, "We do not know how much probative effect" any of the maps presented by Great Britain to the Tribunal might have.[538]

8.61 Fifth, there is no evidence whatsoever that the maps which Venezuela challenged — during the arbitral proceedings or in the 1965 Report — had any influence on the Tribunal's deliberations or the outcome of the Award. Venezuela's contention that particular maps were of "decisive importance" to the outcome of the Award is not supported by any evidence whatsoever.

F. VENEZUELA'S ALLEGATION THAT THE AWARD IS A NULLITY BECAUSE IT WAS THE PRODUCT OF COERCION AND A "POLITICAL COMPROMISE" OR "POLITICAL DEAL"

8.62 The Arbitral Tribunal's deliberations were earnest, intensive and wide-ranging. Although there is no official written record of the content of those confidential discussions, the contemporaneous correspondence, diary entries and other documents produced by the Arbitrators reflect the breadth and intensity of the exchanges that took place between them in the period between the end of the oral proceedings and the delivery of the unanimous Award six days later on 3

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[537] *See Boundary between the Colony of British Guiana and the United States of Venezuela*, Thirty-Fourth Day's Proceedings (28 Aug. 1899), p. 2119 (Soley). MMG, Vol. IV, Annex 108.

[538] *Boundary between the Colony of British Guiana and the United States of Venezuela*, Fifty-First Day's Proceedings (20 Sept. 1899), pp. 3024-3025 (General Harrison). MMG, Vol. IV, Annex 113.

October 1899. Those contemporaneous documents also demonstrate that the Arbitrators had differing views as to where the boundary line should be drawn and that the Tribunal's ultimate decision was the product of heated debates between the Arbitrators and a series of mutual concessions and compromises brokered by the President, Prof Martens. These deliberations eventually resulted in the emergence of the settled consensus reflected in the Award, one that reflected compromises made by the various Arbitrators.

8.63 Contrary to what Venezuela now alleges, there was nothing improper — nor indeed unusual — about the manner in which the panel of five distinguished jurists discussed and debated the relative merits of their respective views and, as a result of that process, ultimately modified their positions to reach a unified final decision regarding the location of the boundary. Nor is there anything improper or unusual about the fact that the President of the Tribunal, Prof Martens, sought successfully to facilitate a unanimous outcome. In particular, in circumstances where all of the Arbitrators held different initial views as to the correct location of the boundary, it was inevitable that any final decision on this question would necessarily involve a degree of compromise and adjustment of those divergent positions. While there was certainly a debate, an effort to reach a harmony of views, and ultimately a consensus on where the boundary should be drawn, there was nothing "political" or untoward about this process: any international adjudicator will be familiar with the processes of give and take reflected in the course of the deliberations. Moreover, there is not a shred of evidence that the Award was the product of any duress or coercion exerted over any of Arbitrators, whether internally or externally.

1. The Tribunal's Deliberations Show that the Arbitrators Each Held Different Views as to the Location of the Boundary and that the Final Decision Was the Result of Intense Debate and Mutual Compromise

8.64 It is apparent that by the end of the 54 days of oral hearings, the members of the Tribunal had different views as to the extent of the territories which belonged to (or might lawfully be claimed by Spain and the Netherlands) in 1814 and of the correct location of the boundary line. As explained at paragraph 8.44, above, in a letter sent four days after the Tribunal delivered its Award, Lord Russell recounted the heated debate among the Arbitrators in relation to the "fundamental question" of whether Spain had acquired a complete title to Guiana through a process of discovery followed by possession. Lord Russell and Lord Justice Collins had concluded that the Treaties of Münster (1648) and Utrecht (1714), coupled with the subsequent actions of Spain and the Netherlands, meant that Spain had not acquired such title. In contrast, Chief Justice Fuller did consider that Spain had acquired such title, while Justice Brewer had rejected this proposition but "worked out a line of delimitation in the first instance, which ... could only have been justified by the substantial adoption of that view".[539] Following "long debate" between the Arbitrators, Prof Martens eventually came to share the conclusion held by Lord Russell and Lord Justice Collins.

8.65 After the Tribunal had resolved that "fundamental question", Lord Russell "thought that the concession of the Schomburgk line, substantially, would have followed as a matter of course". However, this was not the case and once again the Arbitrators held divergent views:

[539] *Letter* from Lord Russell to Lord Salisbury (7 Oct. 1899), *in* Papers of 3rd Marquess of Salisbury, Vol. A/94, Doc. No. 2, p. 127. MMG, Vol. III, Annex 36.

> "The Venezuelan arbitrators claimed the control of the waterways of the Amakura and the Barima down to the Waini and including the Morawheri, in the first instance, and that a line should be drawn from the latter point to about the Junction of the Essequibo, Cuyuni and Mazaruni. This view was subsequently materially modified and after such weary and wearing discussion the Award line was unanimously agreed to — the Venezuelan Arbitrators coming in very reluctantly."[540]

8.66 Lord Russell's letter makes it clear that the Tribunal approached their task in stages, as required by the Treaty: first, by seeking to ascertain the extent of the territories that could be claimed by Spain and the Netherlands at the date when Great Britain acquired British Guiana; and then by establishing the boundary line in light of that determination. Lord Russell's correspondence is also entirely inconsistent with any suggestion that there may have been collusion between Prof Martens and the British Arbitrators. On the contrary, Lord Russell described how he and Lord Justice Collins were "grievously disappointed" by the fact that although Prof Martens had demonstrated "a good grasp of the legal questions involved and of the facts" and "expressed his opinion on the governing principle in favour of the British contention", he "seemed to cast about for lines of compromise and to think that it was his duty, *above all else*, to secure, if he could, a *unanimous* award".[541]

8.67 Prof Martens' contemporaneous entries in his private diary tell exactly the same story. In particular, they record and reflect the divergence of views amongst the Arbitrators, and Prof Martens' efforts to bridge those differences in order to

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[540] *Ibid.*, p. 127.

[541] *Ibid.* (emphasis in original).

facilitate a unanimous decision — an outcome he considered to be of overriding importance.

8.68 On 2 October 1899, for example — the day before the Tribunal published its Award — Prof Martens wrote that he had "managed to persuade 4 arbitrators to make *mutual concessions* on the borderline between Venezuela and British Guiana".[542] He described how, following "an exchange of thoughts on general issues", there had been "a fierce debate between 4 arbitrators on the drawing of the borderline".[543] During the course of that debate, Prof Martens had managed to persuade both the American and the British Arbitrators to modify their positions, with the result that ultimately a consensus was reached.

8.69 Prof Martens' diary entries show that, far from colluding with the British Arbitrators to procure an outcome favourable to Great Britain, he persuaded the British Arbitrators to modify their positions by making various concessions that would result in Great Britain receiving less territory than Lord Russell and Lord Justice Collins considered it should receive, in particular, less territory than would have fallen to Great Britain under the Schomburgk Line. Prof Martens described how Lord Russell "waived his line, ceding a significant area to the Venezuelans. Further to the south, after my question, he again waived what he demanded". Prof Martens added: "Eager to recruit the American arbitrators, I demanded another concession from the British side ... I suggested that the borderline should start from

[542] *Private Diary Entries* of Prof Fyodor Fyodorovich Martens (4 June 1899-3 Oct. 1899), p. 21 (emphasis added). MMG, Vol. III, Annex 33.

[543] *Ibid*., p. 9.

the coast of the sea halfway between Cap Mocotomo and Palaya. The British agreed, but the Americans did not".[544]

8.70 Prof Martens continued his efforts to obtain a compromise between the British and American Arbitrators:

> "On Sunday morning there was another session and again in vain. Then I decided to get down to this issue in a diplomatic manner. I went to Chief Justice Fuller and urged him to make another small concession. The old man likes me a lot and promised to talk to his colleague Brewer. Then I went to Lord Collins and explained that the British also need to make another concession. But Collins, with whom I have been on the best terms so far, flatly refused and said that he would rather have a simple majority (including me on that side) than unanimity in return for the new concessions. The next day, early Monday next morning, I went to Brewer again and proceeded to persuade him. From him I learned that the dearest Fuller spent two hours at his place the last night, and after long deliberations they agreed to make a concession. I was very happy and thought that the base for an agreement is found. I went to Lord Collins but found him even more unwilling to make concessions than the day before. But then I explained to him that it was not in England's best interest to *force* me to take the Americans' side. This made him reconsider the issue. However, I told Fuller and Brewer that if they do not make a concession, then I will have to take the side of the British à contre-coeur, for I cannot let a scandal to happen, i.e. the situation when the tribunal cannot decide the case, as 4 arbitrators cannot agree with each other, and the super-arbitrator refuses to vote!"[545]

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[544] *Ibid.*, p. 11.

[545] *Ibid.* (emphasis in original).

8.71 It is clear from Prof Martens' diary records that he sought to persuade all of his fellow Arbitrators to modify their initial positions in order to enable the Tribunal to fulfil its duty of determining the boundary line. It is equally clear that he regarded it as highly desirable for the Tribunal's determination of those issues to be a unanimous one. He explained that he had regarded it as his "moral duty to carry out negotiations to ensure full unanimity between the arbitrators and to achieve the greatest objective — a unanimous arbitral award".[546]

8.72 The fact that the Award represented a compromise between the individual Arbitrators' differing positions was neither secret nor unexpected. On the contrary, a compromise was seen as a likely outcome before the Tribunal delivered its Award. In a letter written on the eve of the Award, Venezuela's head counsel, former President Harrison, wrote that, "We have had a long and severe tussle here and I do not know how we are to come out of it. We will probably have some sort of a compromise line".[547]

8.73 In an interview given on the day the Award was delivered, Prof Martens candidly acknowledged that the Award was the product of a compromise between the various members of the Tribunal:

> "[T]he boundary line which is laid down by the judges is a line based on justice and law. The judges have been *actuated by a desire*

[546] *Ibid*. (emphasis omitted).

[547] *Letter* from Benjamin Harrison to the Hon. Henry White (3 Oct. 1899), p. 2. MMG, Vol. III, Annex 35.

> *to establish a compromise in a very complicated question*, the origin of which must be looked for at the end of the fifteenth century".[548]

8.74 Justice Brewer likewise explained in an interview on the same day that:

> "Until the last moment I believed a decision would be quite impossible, and it was *by the greatest conciliation and mutual concessions that a compromise was arrived at*. If any of us had been asked to give an award, each would have given one differing in extent and character. The consequence of this was that *we had to adjust our different views, and finally draw a line running between what each thought right*."[549]

8.75 Contemporaneous news reports of the Award noted and welcomed the fact that the Award had the hallmarks of a compromise. For example, in November 1899, the *Advocate of Peace* observed that:

> "The decision of the tribunal is considered a compromise. It was made unanimously, the British and American members voting together. Though appearing to bear the marks of compromise, the judgment rendered is probably much nearer the right than if it had sustained entirely the contention of either party. Cases have gone to arbitration in which the right was wholly on one side, but it was clearly not so in this case. It has been objected to arbitration that its outcome is so often a compromise. But this, instead of being an argument against it, is one of the strongest in support. In nearly all international controversies of importance right lies more or less on each side. It is the duty of tribunals, as it is their general practice, to decide how far this is the case and allow each party its dues. If the Anglo-Venezuelan tribunal had given the case wholly to Great

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[548] "M. De Marten's Opinion", *The New York Times* (4 Oct. 1899), p. 606 (emphasis added).

[549] "Judge Brewer's Opinion – Venezuela's Arbitrator Tells How the Verdict Was Reached – Final Award A Compromise – There Were Differences on Every Point, but No Real Casting of Votes – Each Conceded Something", *The New York Times* (5. Oct. 1899), pp. 612-613 (emphasis added).

> Britain or to Venezuela, under the evidence examined, arbitration would have lost immeasurably in public confidence .... The decision, which both nations will without doubt loyally accept, commends itself to the world's sense of fairness. It gives neither party ground for exultation over the other or for feeling humiliated because of entire defeat. It is a great triumph of reason and good sense, and must do much to strengthen public sentiment in favor of resort to arbitration even in the most difficult and delicate controversies".[550]

8.76 While the unanimous nature of the Award was unusual at the time, the fact that it was the product of a degree of compromise between the various members of the Tribunal was not. As Prof William Cullen Dennis wrote in 1950, "the methods of the President of the Tribunal in securing a unanimous compromise in this case ... are, in principle, typical of much of the international arbitral procedure of the past".[551]

2. The Award Was Not the Product of Coercion or a Secret Anglo-Russian "Deal"

8.77 The 1965 Report and the Mallet-Prevost Memorandum allege that the Award was the product of a secret "deal" of some sort between Great Britain and Russia and that it was procured through the use of coercion against the American Arbitrators. These claims are entirely without supporting evidence.

8.78 First, there is no documentary evidence whatsoever that is capable of supporting this claim of a secret Anglo-Russian deal. There is nothing in the

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[550] "The Venezuela Boundary Award", *The Advocate of Peace (1894-1920)*, Vol. LXI, No. 10 (Nov. 1899), pp. 227-228.

[551] William Cullen Dennis, "The Venezuela-British Guiana Boundary Arbitration of 1899", *American Journal of International Law*, Vol. 44, No. 4 (Oct. 1950), p. 727.

Arbitrators' contemporaneous correspondence or Prof Martens' private diary entries or the wealth of diplomatic documents which have been made public in the years since the Award was delivered that contains even the slightest hint of a "deal" between Russia and Great Britain regarding the outcome of the Arbitration or the location of the boundary between British Guiana and Venezuela. As Child observed in his convincing rebuttal published a few months after the publication of the Mallet-Prevost Memorandum, "in the fifteen bound volumes of British Foreign Office papers relating to the arbitration and in the almost equally voluminous dispatches and telegrams which passed between London and St. Petersburg during this period there is not one single document which by the widest stretch of the imagination could be considered to indicate a 'deal' between Great Britain and Russia of the sort suspected by Mr. Mallet-Prevost".[552] There is "no real evidence of a 'deal' — and, indeed, no conceivable basis for one — between Great Britain and Russia on the Venezuelan Boundary question".[553]

8.79 A similar conclusion was reached by the distinguished Russian international lawyer Vladimir Pustogarov, who explained in his meticulously researched biography of Prof Martens that:

> "in working with the archival materials of the Russian Ministry of Foreign Affairs connected with Martens' activity, not the slightest trace was discovered of a 'deal' between England and Russia or that

[552] Clifton J. Child, "The Venezuela-British Guiana Boundary Arbitration of 1899", *American Journal of International Law*, Vol. 44, No. 4 (1950), p. 687. MMG, Vol. III, Annex 3.

[553] *Ibid.*, p. 689. Child adds at p. 691 that: "It is surely not without significance that the official Russian *Bolshaya Sovetskaya Entsiklopediya* (Moscow, 1928), Vol. X, p. 170, also speaks of 'the judgment being substantially in favour of Venezuela.' By the time this article was written an intensive study of the Imperial Russian archives had been made, so that, had there been any evidence to suggest that the Tribunal of Arbitration was improperly influenced in favor of Great Britain, the writer of the article would certainly have drawn attention to it".

> Martens, the President of the Tribunal, received instructions regarding the case from his own Government. On the contrary, the diary entries of Martens testify that he acted in the arbitral tribunal autonomously and independently. They contain no indications at all of the 'deal' ascribed to him".[554]

8.80 Apart from outlandish speculation, there is no evidence whatsoever that the British Government ever contemplated, sought or discussed such a "deal" with Russia or that any person ever discussed the possibility of such a "deal" with Prof Martens or either of the British Arbitrators. Beyond this, the suggestion that two of the most senior and respected judges in Great Britain and one of the world's most eminent international jurists would have corruptly colluded to impose the terms of a secret political "deal" on two of the United States' most senior judges is, in the absence of any supporting evidence whatsoever, utterly fanciful.

8.81 Second, the contemporaneous records discussed at paragraphs 8.64 to 8.76, above, belie any suggestion that Prof Martens was seeking to impose the terms of a "deal" arranged in secret by the Governments of Great Britain and Russia. On the contrary, it is apparent that the Tribunal's deliberations were intensive and sincere; that the Arbitrators each held different views as to the merits of the parties' cases and the correct location of the boundary; and that Prof Martens' overriding aim was to bridge these differences in order to achieve a unanimous decision. Prof Martens' diaries show that it was a desire for unanimity, rather than a desire for the delimitation of the boundary along a particular predetermined line, that underlay his successful attempts to broker agreement amongst the Arbitrators.

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[554] Vladimir Vasilevich Pustogarov & William E. Butler, OUR MARTENS – F.F. MARTENS, INTERNATIONAL LAWYER AND ARCHITECT OF PEACE (Kluwer Law International, 2000), pp. 210-211.

8.82 Third, the contemporaneous records also show that the British Arbitrators, Lord Russell and Lord Justice Collins, were persuaded to make substantial concessions during the course of the Tribunal's deliberations and that they were dissatisfied and frustrated about this. Indeed, Prof Martens described how he had "persistently demanded they had to make concessions to the Americans" and had successfully persuaded the British Arbitrators to "waive" and modify their positions during the course of the deliberations.[555]

8.83 Far from the British Arbitrators colluding with Prof Martens, Lord Russell and Lord Justice Collins "were apparently angry that 1) under my influence they had to waive something that as they considered already belonged to them and 2) that due to the unanimity which I persistently demanded they had to make concessions to the Americans".[556] Nevertheless, Prof Martens persuaded them to do so. In his words:

> "Chief Justice Fuller took the floor and suggested his line .... The British protested and strongly refused to waive their line. Having listened to their debate and wrangling, in the end I offered a compromise line from Cap Palaya and down. Due to my personal influence and persuasion, both Americans accepted my suggestion. Finally, when both British saw that I was on the American side, they also agreed to my line. I was extremely happy about my triumph of having a unanimous arbitral award, despite the complete opposition of interests, views and law systems of both parties."[557]

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[555] *Private Diary Entries* of Prof Fyodor Fyodorovich Martens (4 June 1899-3 Oct. 1899), p. 10. MMG, Vol. III, Annex 33.

[556] *Ibid.*

[557] *Ibid.*, pp. 11-12.

8.84 All of this contemporaneous evidence contradicts the fantastical suggestion that the British Arbitrators knowingly colluded with Prof Martens to impose the terms of a secret "deal" agreed between Great Britain and Russia. On the contrary, it is clear that the British Arbitrators considered that the boundary line should have given more territory to British Guiana, and they were frustrated that Prof Martens did not share or support this view and that the Award did not, in this way, reflect it. It is equally clear that, far from being compelled to accept a pre-ordained outcome that was prejudicial to Venezuela, the American Arbitrators succeeded in persuading their colleagues on the Tribunal to accept a boundary line that was significantly less favourable to Great Britain than the line sought by Great Britain throughout the Arbitration.

8.85 Fourth (and related to the point above), the evidence shows that Prof Martens' efforts to broker a unanimous outcome were undertaken entirely independently and were not in furtherance of a conspiracy with the British Arbitrators. This is further confirmed by a letter sent by Lord Russell shortly after the Award was delivered, which reported that:

> "I am sorry to be obliged further to say that he intimated to L.J. Collins, in a private interview, while urging a reduction of the British claims, that if we did not reduce them he might be obliged in order to secure the adhesion of the Venezuelan Arbitrators to agree to a line which might not be just to Great Britain. I have no doubt he spoke in an opposite sense to the Venezuelan arbitrators, and fear of possibly a much worse line was the inducement to them to assent to the Award in its present shape. However this may be I need not say the revelation of Mr. de Martens state of mind was most disquieting."[558]

[558] *Letter* from Lord Russell to Lord Salisbury (7 Oct. 1899), *in* Papers of 3rd Marquess of Salisbury, Vol. A/94, Doc. No. 2, p. 127. MMG, Vol. III, Annex 36.

8.86 The suggestion that the British Arbitrators actively colluded with Prof Martens to foist the outcome of an Anglo-Russian "deal" on the American Arbitrators is manifestly inconsistent with the content and tenor of this private correspondence. On the contrary, the contemporaneous documentary evidence demonstrates that the unanimous nature of the Award was the product of Prof Martens' independent and autonomous efforts to procure concessions from all of his fellow Arbitrators.

8.87 Fifth, the "evidence" cited in the Mallet-Prevost Memorandum in support of the claim of a secret "deal" does not withstand scrutiny. The Memorandum alleges that during a recess in August 1899, "the two British arbitrators returned to England and took Mr Martens with them", and that "during Martens' visit ... a deal had been concluded between Russia and Great Britain". The allegation that a deal must have been concluded rests almost entirely on speculation as to the cause of a supposed "noticeable" change in the demeanour of Lord Justice Collins after the recess. According to the Mallet-Prevost Memorandum, whereas before the recess Lord Justice Collins "gave the impression that he was leaning toward the side of Venezuela", following the recess he "asked very few questions and his whole attitude was entirely different from what it had been. It looked to us … as though something must have happened in London to bring about the change".[559] The Memorandum speculated that this supposed "change" was the result of the fact that, "during Martens' visit to England a deal had been concluded between Russia and Great Britain to decide the case along the lines suggested by Martens and that

[559] Otto Schoenrich, "The Venezuela-British Guiana Boundary Dispute", *The American Journal of International Law*, Vol. 43, No. 3 (July 1949), p. 529. MMG, Vol. III, Annex 1.

pressure to that end had in some way been exerted on Collins to follow that course".[560]

8.88 This speculation is not supported by any evidence. Anyone involved in international legal proceedings understands the need to avoid forming a view as to the likely dispositions of a judge or arbitrator on the basis of their demeanour or, even, any questions that may be asked. Moreover:

(i) While the evidence establishes that Lord Russell did return to England during the recess in question, there is no evidence that either Lord Justice Collins or Prof Martens went there. Given the degree of public interest in the 1899 Arbitration, it is most unlikely that, if they had travelled to England during the recess, this fact would have gone unreported by the press (which assiduously reported on the movements and activities of the members of the Tribunal).[561] Moreover, it is notable that during the period when the "deal" was alleged to have been concluded, both the Prime Minister, Lord Salisbury, and the British Attorney-General, were

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[560] *Ibid.*, p. 530.

[561] As Child explained: "In the case of Lord Russell … there is confirmation in the London *Times* of August 18, 1899, Court Circular (page 4), that 'the Lord Chief Justice (Lord Russell of Killowen) returned from Paris yesterday to his country house, Tadworth Court, near Epsom.' There is, however, no mention of the movements of Lord Justice Collins. Nor is it recorded that M. de Martens accompanied Lord Russell. In fact, there is no mention of M. de Martens having visited Great Britain at all, although M. de Martens was very much in the public eye at the time, not only as President of the Tribunal, but as a prominent figure at the First Hague Conference; so that it seems hardly likely that the *Times* would have ignored him if it had been known that he was returning with Lord Russell. The absence of any mention of the movements of Lord Justice Collins is also remarkable because there is a full account of the movements of the others concerned in the arbitration. For instance, the *Times* of August 19 (Court Circular, p. 7) reported that Sir Robert Reid, one of the Counsel for Great Britain, had 'returned to his country house at Kingsdown, near Walmer, from Paris'; and the *Times* of August 18 (Court Circular, p. 4) likewise reported that the Attorney General, Sir Richard Webster, had 'left Paris for Switzerland for a short holiday'". Clifton J. Child, "The Venezuela-British Guiana Boundary Arbitration of 1899", *American Journal of International Law*, Vol. 44, No. 4 (1950), pp. 687-688 (emphasis in original). MMG, Vol. III, Annex 3.

away (the former with his seriously ill wife, the latter on holiday in Switzerland).[562]

(ii) The claim that there was a sudden and noticeable "change" in Lord Justice Collins' demeanour and attitude is not borne out by the verbatim record of the oral proceedings. Contrary to the account given in the Mallet-Prevost Memorandum, Lord Justice Collins did not give any indication that he was "leaning" in favour of either party at any stage during the proceedings. Nor was there any tangible change in the nature or frequency of his interventions before and after the recess in question, or in the direction that may be implied in any of those interventions. As Mr. Clifton Child explains in his convincing response to the 1949 Article:

> "1. Taking his recorded remarks as a whole, Lord Justice Collins gave no tangible indication that he was leaning toward the side of Venezuela or, indeed, toward the side of Great Britain, either before or after the crucial recess. He allowed Lord Russell to do the greater part of the questioning during Sir Richard Webster's opening speech for Great Britain (June 15-July 13). He followed Mr. Mallet-Prevost with a number of critical questions and observations during the latter's opening speech for Venezuela (July 21-August 10), mildly rebuking him on July 24 for the manner in which he presented his evidence. He gave the same alert attention to the ensuing speeches (Mr. Soley, August 12-29; Sir Robert Reid, August 30-September 4; Mr. G. R. Askwith, September 5-7; General Tracy, September 7-15; Sir Richard Webster, September 15-19; and General Harrison,

[562] As Prof Child observed: "But supposing that M. de Martens was taken to England unnoticed by the press in order to participate in a 'deal' between Great Britain and Russia, is it likely that the leading British Counsel and the Law Officer of the British Crown most intimately concerned with the handling of the British case — Her Majesty's Attorney General — would have chosen this particular moment to go off in the opposite direction to Switzerland for a holiday? And would Lord Salisbury, who was following the proceedings with the utmost interest, also have chosen this particular time to retire to Walmer Castle in order to be with the Marchioness (then recovering from a serious illness), so that he was right out of the picture until the Queen summoned him to Osborne on August 24?" *Ibid.*, p. 688.

> September 19-27). He questioned the British Counsel, Sir Robert Reid and Mr. Askwith, as frequently as he questioned General Tracy, with whom he had long exchanges on September 12 over the latter's interpretation of the Treaty of Münster. Both he and Lord Russell continued to put searching questions to Sir Richard Webster during the latter's summing up. On the other hand, his interruptions during General Harrison's final speech were on the whole not unhelpful to the latter in rounding off the case for Venezuela.
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> 2. Lord Justice Collins' questions and interjections varied in number from 0 to 30 per session before the recess, except on July 31 and August 3, when they numbered 36 and 72 respectively (during Mr. Mallet-Prevost's own speech). They varied from 0 to 29 per session after the recess, the total reaching 29 during the first session after the recess, when the change in him would presumably have been most noticeable had he suddenly become taciturn and listless (as Judge Schoenrich puts it).
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> 3. After the recess, as indeed before, Lord Justice Collins tended to ask as many questions as Chief Justice Fuller and Justice Brewer".[563]

8.89 As explained at paragraphs 8.20 to 8.22, above, the Mallet-Prevost Memorandum was replete with demonstrable factual errors.

8.90 Sixth, the relationship between Great Britain and Russia at the time of the Arbitration was such that a "deal" of the type alleged by the Mallet-Prevost Memorandum would have been diplomatically and politically unlikely. In

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[563] Clifton J. Child, "The Venezuela-British Guiana Boundary Arbitration of 1899", *American Journal of International Law*, Vol. 44, No. 4 (1950), p. 685 (internal quotations omitted). MMG, Vol. III, Annex 3.

particular, in 1899 tensions were running high between Great Britain and Russia as a result of the Transvaal crisis. The state of that relationship was reflected in a report produced by the First Secretary at the German Embassy in St. Petersburg, who stated that there was no "scope within the framework of Russian policy — or, as far as I can imagine, within that of English policy — [for the two countries] to reach agreement and bind themselves in writing on general political questions of this nature".[564] As Child correctly observed in 1950, "Had Mr. Mallet-Prevost reflected for a moment upon the state of relations between Great Britain and Russia in the summer of 1899 he must inevitably have realized how difficult, if not impossible, from a political point of view, a 'deal' between the two countries would have been".[565]

8.91 Seventh, the allegation of a "political deal" is also inconsistent with the outcome of the Award. Had Great Britain intended to procure a particular outcome in the Arbitration through a clandestine deal with Russia, then that outcome would surely not be one which (in the words of the Mallet-Prevost Memorandum) "gave to Venezuela the most important strategic point at issue". During the hearing before the Tribunal, Venezuela's counsel emphasised that "[t]he importance of the Orinoco to Venezuela is so great and so universally acknowledged".[566] The

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[564] *Ibid.*, p. 688.

[565] *Ibid.*

[566] *Boundary between the Colony of British Guiana and the United States of Venezuela*, Forty-Third Day's Proceedings, Vol. IX (11 Sept. 1899), p. 2595 (Tracy). MMG, Vol. IV, Annex 110. *See also* Mr Mallet-Prevost's statement that: "so far as Venezuela is concerned, the taking possession by Great Britain of the mouth of the Orinoco involves her political and her commercial independence, and if this Tribunal were called upon to decide no other question, that point alone is pregnant with tremendous meaning to the future of Venezuela" (*Boundary between the Colony of British Guiana and the United States of Venezuela*, Fifteenth Day's Proceedings (21 July 1899), p. 867). MMG, Vol. IV, Annex 99.

strategic importance of control over the mouth of the Orinoco was also highlighted by members of the Tribunal.[567] In an interview on the day the Award was handed down, former President Harrison and Mr Mallet-Prevost similarly hailed the fact that "[n]o portion of the entire territory possessed more strategic value … both from a commercial and a military standpoint" as the mouth of the Orinoco River.[568] The fact that the Award left Venezuela with the mouth of the Orinoco River — a valuable and prized strategic asset — is incompatible with any suggestion that the Award was the result of a secret deal designed to further Great Britain's interests at the expense of Venezuela's.

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[567] *See* for example Lord Russell's observations that, "the importance to Venezuela of the command of the Orinoco is obvious. It does not seem to me to need argument" and that, "As more than one member of the court has intimated, it is impossible not to see the command of the river is important". *Boundary between the Colony of British Guiana and the United States of Venezuela*, Nineteenth Day's Proceedings (29 July 1899), p. 1119. MMG, Vol. IV, Annex 100. *Boundary between the Colony of British Guiana and the United States of Venezuela*, Nineteenth Day's Proceedings (29 July 1899), p. 1124. MMG, Vol. IV, Annex 101.

[568] Former President Harrison and Mr Mallet-Prevost were reported to have stated: "Within the Schomburgk line lay the Amakuru River and Point Barima, the latter forming the southern entrance to the great mouth of the Orinoco. No portion of the entire territory possessed more strategic value than this, both from a commercial and a military standpoint, and its possession by Great Britain was most jealously guarded. This point had been awarded to Venezuela, and along with it a strip of coast about 50 miles in length, giving to Venezuela the entire control of the Orinoco River. In the interior another long tract to the east of the Schomburgk line, some 3,000 square miles in extent had also been awarded to Venezuela, and this, by a decision in which the British arbitrators had themselves concurred, the position taken up by the British Government until 1895 had been shown to be without foundation. This in no way expressed the extent of Venezuela's victory. Great Britain had put forward a claim to more than 30,000 square miles of territory west of the Schomburgk line, and it was this territory which in 1890 she was disposed to submit to arbitration. Every foot of this territory had been awarded to Venezuela". "Declarations from Mallet-Prevost and General Harrison, Venezuelan's Agents before the 1899 Tribunal", *The Times* (4 Oct. 1899), p. 612.

8.92 For all these reasons, Venezuela's claim that the outcome of the 1899 Arbitration was the product of a secret "deal" between Great Britain and Russia is manifestly without foundation.

8.93 Finally, as shown throughout this Chapter, Venezuela's contention that the Award is a nullity is founded entirely on a series of allegations, which are incoherent, unsupported by any evidence and, in many respects, nothing more than outlandish conspiracy theories. Venezuela's criticisms are devoid of any merit and there is no doubt that the Award was, and is, a valid, binding and final determination of the location of the boundary between Venezuela and Guyana. Venezuela itself manifested this view for more than 60 years, the legal consequences of which are discussed in the following Chapter.

CHAPTER 9

THE LEGAL CONSEQUENCES OF VENEZUELA'S PROLONGED ACCEPTANCE OF THE AWARD AND THE BOUNDARY

9.1 The arguments made in the previous Chapters fully establish the validity of the 1899 Award, which constituted a perfectly valid juridical act at the time it was delivered and thereafter and, for that reason, continues to be binding on Venezuela (and Guyana). That alone justifies a finding by the Court that the Award is valid, final and binding on the parties and that the international boundary fixed by the Award is equally final and binding on them, as Guyana has requested. However, there is an additional reason why the boundary fixed by the Award is not subject to challenge: Venezuela's express and enduring acceptance of the Award and of the resulting boundary. Indeed, as Chapter 4 recalled in detail, for more than six decades, between 1899 and 1962, Venezuela unreservedly and repeatedly accepted the Arbitral Award and the boundary that was fixed by the Arbitral Tribunal. Further, Venezuela acted upon and implemented the Award and accepted the boundary that resulted from it, by taking part in a lengthy and consensual demarcation process and by ratifying the 1905 Boundary Agreement with Great Britain.

9.2 Venezuela's acceptance of the Award emanated from the highest and most directly concerned authorities in the State. As noted by the ILC in Guiding Principle n° 4 in its 2006 Report on Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations: "By virtue of their functions, heads of State, heads of Government and ministers for foreign affairs are

competent to formulate such declarations."[569] Moreover, Venezuela's declarations clearly manifested the State's intention to be bound — all the more so given that they were not necessary in view of the self-sufficient and binding character of the Award itself.[570] Finally, Venezuela's acceptance of the Award was made in full knowledge of its content and form.

9.3 Therefore, Venezuela's prolonged acceptance of the Award and of its outcome in regard to the boundary with British Guiana is itself a sufficient basis for confirming the validity of the Award and the finality of the resulting boundary. Because Venezuela's nullity contention was raised 63 years after the Award — and some thirteen years after the Mallet-Prevost Memorandum — it can have no legal

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[569] ILC, U.N. General Assembly, 58th Session, *Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations*, U.N. Doc. A/61/10 (2006), p. 372. *See also Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction of the Court and Admissibility of the Application, Judgment, I.C.J. Reports 2006, p. 27, para. 46 and the cited case-law. *See also Maritime Delimitation in the Indian Ocean*, p. 24, para. 48.

As the Court also recently recalled:

> "As the Court stated in the *Georgia v. Russian Federation* case, 'in general, in international law and practice, it is the Executive of the State that represents the State in its international relations and speaks for it at the international level (*Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 27, paras. 46-47). Accordingly, primary attention will be given to statements made or endorsed by the Executives of the two Parties.' (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 87, para. 37)."

(Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016, pp. 47-38 para. 96.)

[570] *See* Chapter 6 — The 1899 Award Was Intended to Be Final and Binding, and Is Entitled to a Presumption of Validity.

significance. Under the circumstances, Venezuela's prolonged acceptance of the Award and of its outcome are legally determinative for two reasons.

9.4 First, the prolonged acceptance of the Award *as such* had the effect of curing any legal defect that might once have afflicted it (Guyana insists, and has already demonstrated, that there was no such defect), so that, by 1962, Venezuela's nullity claim had lost any possible legal basis. To that extent, Venezuela had lost the substantive right to raise such claim (**A**). The Court is competent to decide on that issue because it "has jurisdiction to entertain Guyana's claims concerning the validity of the 1899 Award".[571]

9.5 Second, the prolonged acceptance of the outcome of the Award, in particular in the form of the 1905 Agreement, had the effect of grounding the territorial delimitation effectuated by the Award on a separate legal basis, which remains unaffected by any defect in the Award that had not been duly redeemed by 1962 (**B**). The Court is also competent to decide on that alternative issue because, as recalled in Chapter 1, its jurisdiction extends to "the related question of the definitive settlement of the dispute regarding the land boundary between the territories of the Parties".[572]

9.6 The Court has thus the power to address the legal significance and consequences of Venezuela's prolonged acceptance of the Award and of its outcome. However, before developing this contention, Guyana wishes to make it clear that those are subsidiary arguments, which would only need to be addressed

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[571] *Jurisdiction Judgment*, para. 137.

[572] *Ibid.*

if, by some improbable possibility, the Court were to consider that the Award is vitiated *ab initio* by a defect that could raise doubts as to its validity. Thus, the second prong of the Court's jurisdiction as determined by the Judgment of 18 December 2020 would not need to be exercised if Venezuela's nullity contention is rejected, as it should be.

I. The Legal Effect of the Prolonged Acceptance of the Award on the Award Itself and on the Right of Venezuela to Raise a Nullity Claim

9.7 As detailed in Chapter 4, Venezuela explicitly and unquestionably accepted the Award in 1899[573] and officially continued to do so until 1962.[574] Such unwavering and explicit acceptance acts to cure any alleged defect that should have been apparent to any outside observer already in 1899, in particular the alleged lack of stated reasons. Likewise, Venezuela's declarations in support of the Award after the publication of the Mallet-Prevost Memorandum,[575] together with the fact that Venezuela continued after 1949 to conduct itself as if the Award was perfectly valid, redeemed any alleged defect supposedly hidden thus far and revealed by Mr Mallet-Prevost, in addition to consolidating the cure of any alleged defect that was observable previously.

9.8 These Venezuelan declarations, set out in detail in Chapter 4, included those made by:

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[573] *See supra* Chapter 4, Sec. I.

[574] *See* Chapter 4.

[575] *See supra* Chapter 4, Sec. V.

- Venezuela's President in 1899: "The award was a source of satisfaction for the country, as international justice had returned a part of its territory that had been usurped and vindicated its right".[576]
- Its Agent before the Arbitral Tribunal: "Sentence of Tribunal: England gives up Point Barima and the coast until Point Playa from thence the line goes until Schomburgk's (line) which it follows until the junction of the Cuyuni and Wenamu. This gives us five thousand square miles east of the Schomburgk line. Arbiters and Counsel for Venezuela were brilliant."[577]
- Its Ambassador in London (and brother of the President): "Greatly indeed did justice shine forth when in the determination of the frontier we were given the exclusive dominion over the Orinoco which was the principal aim which we sought to achieve through arbitration".[578]
- Its counsel (former U.S. President Harrison and Mr Mallet-Prevost): "No portion of the entire territory possessed more strategic value than this, both from a commercial and a strategic standpoint and its possession by Great Britain was most jealously guarded. This point had been awarded to

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[576] *See* « Nouvelles de l'Étranger: Venezuela », *Le Temps*, 11 octobre 1899 quoting from Venezuelan President Ignacio Andrade : "The award was a source of satisfaction for the country, as international justice had returned a part of its territory that had been usurped, and vindicated its right." (« *l'arrêt était un motif de satisfaction pour le pays, car la justice internationale lui avait restitué une partie de son territoire usurpé et donnait raison à son bon droit* ») (Translation of Guyana). *See also* "Venezuela is Satisfied – President and the Press Pleased with the Boundary Awards – the Value of Barima Point – Its Possession Said to be of Great Advantage to the Republic by the Intelligent Classes", *The New York Times* (8 Oct. 1899) ("The award of the Anglo-Venezuelan Boundary Arbitration Tribunal has been received here with satisfaction. The intelligent classes consider that the possession of Barima Point will prove of great advantage to Venezuela. … The result is a cause of rejoicing for this country, because justice and the laws of the civilized world have restored a portion of usurped territory, and demonstrated the soundness of our claim.")

[577] *Letter* from the Venezuelan Ambassador to the United Kingdom to the Venezuelan Minister of Foreign Affairs (7 Oct. 1899). MG, Vol. II, Annex 3.

[578] *Ibid.*

Venezuela and along with it a strip of coast about 50 miles in length, both giving to Venezuela the entire control of the Orinoco River".[579]

- Its Foreign Ministry, which reported in 1900 that Venezuela "has up to date uttered no word in opposition" and that "it would not be expedient to reopen the case".[580]
- Its Foreign Minister, in 1941, who described the 1899 Award as "*chose jugée*".[581]
- Its Ambassador to the United States in 1944: "We have accepted the verdict of the arbitration for which we have so persistently asked".[582]
- Its Foreign Ministry's formal communication to the United States in 1962, that Venezuela "was not questioning the legality of the Arbitral Award".[583]

9.9 Beginning in 1944, Venezuela made public statements from time to time calling for *revision* of the 1899 Award, but there is no evidence that it ever contested its *legal validity*. Typical is the statement by the Ambassador to the United States in 1944, reaffirming Venezuela's acceptance of the Award, while indicating its "undying hope that one day the spirit of equity will prevail in the

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[579] "Declarations from Mallet-Prevost and General Harrison, Venezuelan's Agents before the 1899 Tribunal", *The Times* (4 Oct. 1899).

[580] *Report* of Counsellor Dr Rafael Seijas (4 May 1900), pp. 189, 192 (emphasis omitted). MMG, Vol. IV, Annex 66.

[581] *Letter* from the Venezuelan Foreign Minister, E. Gil Borges, to British Ambassador to Venezuela, D. Gainer (15 Apr. 1941). MMG, Vol. III, Annex 56.

[582] *Speech* by the Venezuelan Ambassador to the United States to the Pan-American Society of the United States (1944). MG, Vol. II, Annex 9.

[583] U.S. Department of State, *Memorandum of Conversation*, No. 741D.00/1-1562 (15 Jan. 1962), p. 2. MG, Vol. II, Annex 16.

world and that this will bring us the reparation which morally and justly is due to us".[584]

9.10 Similarly aspirational statements were made periodically, including in Venezuela's written communication to the United States in January 1962, which emphasised that "Venezuela considers the Award to have been inequitable and questionable from a moral point of view", while confirming, at the same time, that it "was not questioning the legality of the Arbitral Award".[585]

9.11 It is significant that all the statements between 1944 and 1962, when Venezuela began to question the equitableness of the 1899 Award, avoid formulation of any legal grounds for a Venezuelan claim; all the statements are revisionist in character; and all of them avoid formulation of a Venezuelan claim in positive terms. In sum, the statements merely give notice of an intention to call for an unspecified "equitable rectification" in the future, while in the meantime reaffirming Venezuela's acceptance of the legal validity of the Award.[586]

9.12 The principle according to which the prior declarations or conduct of a State have a substantive legal effect on later claims that contradict such declarations or conduct is well established in international law. It is notably reflected in Article

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[584] *Speech* by the Venezuelan Ambassador to the United States to the Pan-American Society of the United States (1944), p. 1. MG, Vol. II, Annex 9.

[585] U.S. Department of State, *Memorandum of Conversation*, No. 741D.00/1-1562 (15 Jan. 1962). MG, Vol. II, Annex 16.

[586] A "Policy Statement" prepared by the United States Department of State in 1951 characterised Venezuela's objective as seeking a "revision" of the boundary with British Guiana. *See Policy Statement* Prepared in the Department of State, 611.31/8-1051 (10 Aug. 1951), *available at* https://history.state.gov/historicaldocuments/frus1951v02/d888 (last accessed 22 Feb. 2022).

45 of the Vienna Convention on the Law of Treaties[587] and Article 45 of the ILC Articles on the International Responsibility of States for Internationally Wrongful Acts.[588]

9.13 As noted by Judge Alfaro in his celebrated Separate Opinion in the case concerning the *Temple of Preah Vihear*, the principle guiding the Court in that case was that "a State party to an international litigation is bound by its previous acts or attitude when they are in contradiction with its claims in the litigation".[589] Judge Alfaro stressed that "the soundness and justice of the rule is generally accepted"[590]

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[587] Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 332 (23 May 1969), Art. 45.

"Loss of a right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty.

> A State may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under articles 46 to 50 or articles 60 and 62 if, after becoming aware of the facts:
>
> (a) it shall have expressly agreed that the treaty is valid or remains in force or continues in operation, as the case may be; or
>
> (b) it must by reason of its conduct be considered as having acquiesced in the validity of the treaty or in its maintenance in force or in operation, as the case may be."

[588] ILC, *Articles on the International Responsibility of States for Internationally Wrongful Acts* (2001), Art. 45.

> "The responsibility of a State may not be invoked if:
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> (*a*) The injured State has validly waived the claim;
>
> (*b*) The injured State is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim."

[589] *Temple of Preah Vihear, Opinion of Alfaro*, p. 39. *See also, e.g. Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award, PCA Case No. 2011-03 (18 March 2015), pp. 547-548, para. 446.

[590] *Ibid*., p. 39.

and that "[t]he acts or attitude of a State previous to and in relation with rights in dispute with another State may take the form of an express written agreement, declaration, representation or recognition, or else that of a conduct which implies consent to or agreement with a determined factual or juridical situation".[591] Writing in 1962, the very same year when Venezuela raised for the first time its misconceived nullity contention, Judge Alfaro continued:

> "Whatever term or terms be employed to designate this principle such as it has been applied in the international sphere, its substance is always the same: inconsistency between claims or allegations put forward by a State, and its previous conduct in connection therewith, is not admissible (*allegans contraria non audiendus est*). Its purpose is always the same: a State must not be permitted to benefit by its own inconsistency to the prejudice of another State (*nemo potest mutare consilium suum in alterius injuriam*). *A fortiori*, the State must not be allowed to benefit by its inconsistency when it is through its own wrong or illegal act that the other party has been deprived of its right or prevented from exercising it. (*Nullus commodum capere de sua injuria propria*). Finally, the legal effect of the principle is always the same: the party which by its recognition, its representation, its declaration, its conduct or its silence has maintained an attitude manifestly contrary to the right it is claiming before an international tribunal is precluded from claiming that right (*venire contra factum proprium non valet*)."[592]

9.14 In the case of the *Arbitral Award by the King of Spain*, the Court essentially drew from such principles by stating its key conclusion as follows:

> "In the judgment of the Court, Nicaragua, by express declaration and by conduct, recognized the Award as valid and it is no longer

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[591] *Ibid.*, p. 40.

[592] *Ibid.* (emphasis in original).

> 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 terms of the Award had become known to it further confirms the conclusion at which the Court has arrived."[593]

9.15 In the *King of Spain* case, the period of acquiescence by Nicaragua extended just over five years — a mere one-twelfth of the period of Venezuela's acquiescence in the instant case. Moreover, the Court did not draw from Nicaragua's declarations and conduct a procedural preclusion, but a substantive one. Indeed, rather than considering Nicaragua's contention inadmissible, the Court found that "the Award made by the King of Spain on 23 December 1906 is valid and binding and that Nicaragua is under an obligation to give effect to it".[594]

9.16 In this case, there is no doubt that the 1966 Geneva Agreement recognised the existence of the controversy that arose from Venezuela's nullity contention and designed procedures to resolve it. Therefore, as in the *King of Spain* case, the preclusion of Venezuela's nullity claim is not procedural but substantive and it operates to cure any defect that might have otherwise constituted a ground for the invalidity of the Award.

9.17 As described in Chapter 4, Venezuela's knowing and prolonged acceptance of the Award was made manifest not only by its declarations, but by its conduct for more than 60 years, including:

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[593] *Award Made by the King of Spain Case*, p. 213.

[594] *Ibid.*, p. 217.

- Its demarcation of the boundary with British Guiana in strict conformity with the terms of the Arbitral Award, and its formal adoption of that boundary in a 1905 Agreement with Great Britain, subsequently ratified by Venezuela's Federal Executive. *See supra* Chapter 4, Section II.
- Its refusal to accept any modifications to the agreed boundary, rejecting even the most minor technical or practical adjustments, on grounds that the 1899 Award had to be faithfully followed, without any deviation. *See supra* Chapter 4, Section III.
- Its conclusion of a boundary agreement with Brazil, in 1928, which recognised the boundary between Venezuela and British Guiana as agreed in 1905. *See supra* Chapter 4, Section IV.
- Its negotiation and ultimate agreement with Brazil and British Guiana, between 1931 and 1932, on the tripoint at which the boundaries of all three States terminate, in conformity with the 1905 Agreement between Venezuela and British Guiana. *See supra* Chapter 4, Section IV.
- Its publication of official maps — in 1911, 1928, 1937, 1940, 1947, 1950, 1956, 1960 and 1962 — depicting its boundary with British Guiana as following the line delimited by the 1899 Award and demarcated in the 1905 Agreement.[595] *See supra* Chapter 4, Sections II-IV.

9.18 Whether one looks at the alleged defects of the Award which, if they existed, should have been apparent to any outside observer in 1899, or at the alleged defects supposedly revealed in 1949 by the Mallet-Prevost Memorandum, the

[595] Venezuela also issued no protests with respect to an official map published in 1939 by the British War Office nor to a global atlas presented during the 1945 United Nations Conference on the Organisation of States in San Francisco, both of which depicted the border between Venezuela and British Guiana in accordance with the boundary established by the 1899 Award and demarcated in the 1905 Agreement.

conclusion must be the same: any defect of the Award (*quod non*) was cured and superseded by Venezuela's prolonged acceptance of the Award. In other words, by 1962, Venezuela's nullity claim had lost any possible legal basis, and Venezuela had lost the substantive right to raise such a claim.

II. The Legal Effect of the Prolonged Acceptance of the Outcome of the Award on the Delimitation It Effectuated

9.19 It is a truism to state that the 1899 Award and the 1905 Demarcation Agreement are two legally separate acts: the Award is an arbitral decision — a distinct juridical act — and the Agreement is a negotiated treaty. To be sure, the latter would not have existed without the former, which its signatories intended to faithfully implement on the basis of the decision of the Arbitral Tribunal. However, the 1905 Agreement is not the result of an adjudicative procedure, but of a negotiation process, and its authors were duly authorised State representatives, not arbitrators. The fact that the parties agreed to faithfully incorporate, in the 1905 Agreement, the line decided by the Arbitrators does not imply that the Award and the Agreement would be one and the same juridical act. In fact, the parties to the 1905 Agreement could have agreed to depart from the delimitation effectuated by the Award, as was envisaged by the British representatives at one point;[596] such departure would have prevailed over the Award's line, constituting a perfectly valid legal title based on the neighbouring States' agreement concerning their respective territorial sovereignty. As stated by the international arbitral tribunal instituted between Argentina and Chile in the "*Laguna del Desierto*" case: "A decision on a

[596] *See supra* Chapter 4, Sec. III.

frontier dispute and its demarcation are two distinct acts, each of which has its own legal force".[597]

9.20 Because the 1899 Award and the 1905 Agreement are two legally distinct juridical acts, any defect affecting the validity of one of them has no bearing on the validity of the other. Moreover, because the Award is a judicial decision and the Agreement a treaty, their respective validity is governed by different conditions, so that the grounds on which nullity of each can be claimed are also different. Venezuela has not disputed — and could not dispute — the validity of the 1905 Agreement, which has stood as a valid treaty for more than 115 years. In any event, by 1962 and pursuant to the principle reflected in Article 45 of the Vienna Convention on the Law of Treaties,[598] Venezuela had lost the right to invoke any ground for invalidating the 1905 Agreement because of its prolonged acceptance not only of the Award but also of the Agreement itself.

9.21 Finally, even if, *quod non*, the 1905 Agreement were to be found invalid or terminated as a consequence of the invalidity of the Award, the border resulting from the Award and the Agreement would still delimit the respective territories of Guyana and Venezuela. It is indeed:

> "a principle of international law that a territorial régime established by treaty 'achieves a permanence which the treaty itself does not necessarily enjoy' and the continued existence of that régime is not

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[597] *Case concerning a boundary dispute between Argentina and Chile concerning the delimitation of the frontier line between boundary post 62 and Mount Fitzroy ("Laguna del Desierto"), Decision of 21 October 1994*, RIAA, Vol. XXII (21 Oct. 1994), para. 67, p. 24.

[598] *See supra* note 587.

> dependent upon the continuing life of the treaty under which the régime is agreed".[599]

9.22 This conclusion is even more compelling given that the territorial regime was accepted and respected for over six decades. For these reasons, Venezuela cannot lawfully challenge the validity of the boundary fixed by the Arbitral Tribunal in 1899, as agreed by Venezuela and Great Britain in their 1905 Boundary Agreement. In any event, as shown in the preceding Chapters, the 1899 Award and the 1905 Agreement are perfectly valid and, as such, are binding on the parties.

[599] *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment - Preliminary Objections, I.C.J. Reports 2007, p. 861, citing to *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, p. 37: "A boundary established by treaty thus achieves a permanence which the treaty itself does not necessarily enjoy … when a boundary has been the subject of agreement, the continued existence of that boundary is not dependent upon the continuing life of the treaty under which the boundary is agreed" and cited also in *Costa Rica v. Nicaragua*, I.C.J. Reports 2009, para. 68.

SUBMISSIONS

For the reasons given in this Memorial, and reserving the right to supplement, amplify or amend the present Submissions, the Co-operative Republic of Guyana respectfully requests the International Court of Justice:

To adjudge and declare that:

1. The 1899 Award is valid and binding upon Guyana and Venezuela, and the boundary established by that Award and the 1905 Agreement is the boundary between Guyana and Venezuela; and that

2. Guyana enjoys full sovereignty over the territory between the Essequibo River and the boundary established by the 1899 Award and the 1905 Agreement, and Venezuela is under an obligation to fully respect Guyana's sovereignty and territorial integrity in accordance with the boundary established by the 1899 Award and the 1905 Agreement.

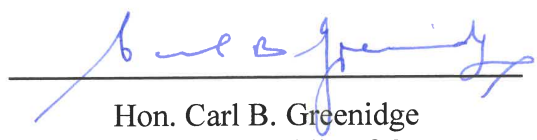
8 March 2022

Hon. Carl B. Greenidge
Co-operative Republic of Guyana
Agent

CERTIFICATION

I certify that the annexes are true copies of the documents reproduced therein and that the translations into English are accurate translations of the documents annexed.

8 March 2022



Hon. Carl B. Greenidge
Co-operative Republic of Guyana
Agent

VOLUME II

MAPS AND FIGURES

Figure 2.1	Map of Guyana
Figure 2.2	Guyana's Major Rivers
Figure 2.3	Guyana's Mountain Ranges
Figure 2.4	Map of Essequibo and Demerary (Demerara) Rivers (ca. 1770), Highlighting Ft. Kykoveral
Figure 2.5	Map of Guiana by William Blaeuw (1667), Highlighting the Extent of Dutch Authority and Control
Figure 3.1	Map Depicting the Expeditions of Robert Schomburgk (1835-1839)
Figure 3.2	Map Depicting the Expeditions of Robert and Richard Schomburgk (1841-1844)
Figure 3.3	Boundary Lines of British Guiana (1896)
Figure 3.4	Sketch Map of the 1899 Arbitral Award and British Claim
Figure 4.1	Sketch Map Indicating the Location of Punta Playa
Figure 4.2	Photograph of Boundary Marker in the Barima-Waini Region (2017)
Figure 4.3	Photograph with Close-Up of Boundary Marker (2017)

Figure 4.4 Cover Page of Map Produced by the Joint Boundary Commission in 1905

Figure 4.5 1905 Map Produced by the Joint Boundary Commission, Demarcating the Boundary Line between British Guiana and Venezuela

Figure 4.6 Physical and Political Map of Venezuela, Commissioned by President J. V. Gomez (1911)

Figure 4.7 Tri-Junction Point Marker between Venezuela, British Guiana and Brazil

Figure 4.8 Physical and Political Map of Venezuela, Commissioned by President J. V. Gomez (1928)

Figure 4.9 Physical and Political Map of Venezuela (1937)

Figure 4.10 Atlas of Venezuela (1940)

Figure 4.11 Map of the Boundary between British Guiana and Brazil (1939)

Figure 4.12 Map Presented at the 1945 United Nations Conference in San Francisco

Figure 4.13 Physical and Political Map of Venezuela (1947)

Figure 4.14 Physical and Political Map of Venezuela (1950)

Figure 4.15 Physical and Political Map of Venezuela (1955)

Figure 4.16 Official Map of Venezuela (1956)

Figure 4.17 Official Map of Venezuela (1960)

Figure 4.18 Official Map of Venezuela (1962)

Figure 5.1 Physical and Political Map of Venezuela (1965)

VOLUME III

ANNEXES

BOOKS AND ARTICLES

Annex 1	Otto Schoenrich, "The Venezuela-British Guiana Boundary Dispute", *The American Journal of International Law*, Vol. 43, No. 3 (July 1949)
Annex 2	Willard L. King, MELVILLE WESTON FULLER – CHIEF JUSTICE OF THE UNITED STATES 1888-1910 (Macmillan Company, 1950) (excerpt)
Annex 3	Clifton J. Child, "The Venezuela-British Guiana Boundary Arbitration of 1899", *American Journal of International Law*, Vol. 44, No. 4 (1950)
Annex 4	S. Garavini Di Turno, "[La traición de Chávez] Chávez's treason", *El Imparcial* (22 Jan. 2012)
Annex 5	Clare Cushman, "David J. Brewer 1890-1910" *in* SUPREME COURT JUSTICES: ILLUSTRATED BIOGRAPHIES (CQ Press, 2013) (excerpt)
Annex 6	Clare Cushman, "Melville W. Fuller 1888-1910" *in* SUPREME COURT JUSTICES: ILLUSTRATED BIOGRAPHIES (CQ Press, 2013) (excerpt)
Annex 7	Foreign Ministry of Guyana, THE NEW CONQUERORS: THE VENEZUELAN THREAT TO THE SOVEREIGNTY OF GUYANA (2016) (excerpt)

LETTERS AND DIPLOMATIC DESPATCHES

Annex 8 — *Account* of a Journey to Guiana and the Island of Trinidad, performed in the Years 1597 and 1598, submitted to the States-General by the "Commies-Generaal" by A. Cabeliau (3 Feb. 1599)

Annex 9 — *Extract from Despatches* in reference to Treaty of Truce finally made in 1609 from the Marquis de Spinola to the King of Spain (7 Jan. 1607)

Annex 10 — *Cedula* Issued by the King of Spain to the Governor of the City of Santo Thomé de la Guyana (9 Aug. 1621)

Annex 11 — *Letter* of the Request of the City of Santo Thomé and Island of Trinidad of the Presidency of Guayana for Help (undated, likely issued in 1621)

Annex 12 — *Extract of Letter* from the Corporation of the Island of Trinidad to the King of Spain (11 Apr. 1637)

Annex 13 — *Letter* from Don Diego Lopez de Escobar, Governor of Guayana and Trinidad, to the King of Spain (28 May 1637) (*Inclosure in Letter* from Jacques Ousiel, late Public Advocate and Secretary of the Tobago, to the West India Company (1637))

Annex 14 — *Letter* to the King of Spain from the Corporation of Trinidad Concerning the state of the town of Santo Thomé of Guiana, taken, plundered, and burnt by the Dutch, and the Indian Caribs, who also threatened the said island of Trinidad with a powerful fleet (27 Dec. 1637)

Annex 15 — *Letter* from Captain Edward Thompson, R.N. to Lord Sackville (22 Apr. 1781)

Annex 16 *Letter* from Mr. Schomburgk to Governor Light (1 July 1839) (*Inclosure in Letter* from the Colonial Office to the Foreign Office (6 Mar. 1840))

Annex 17 *Letter* from Lord J. Russell to Governor Light (23 Apr. 1840) (*Inclosure in Letter* from Colonial Office to Foreign Office (28 Apr. 1840))

Annex 18 *Letter* from Viscount Palmerston to Sir R. Ker Porter (28 Nov. 1840), *Letter* from Mr. O'Leary to Viscount Palmerston (24 Jan. 1841) and *Letter* from Mr. O'Leary to Viscount Palmerston (2 Feb. 1841)

Annex 19 *Letter* from Señor Aranda to Governor Light (31 Aug. 1841) and *Letter* from Governor Light to Señor Aranda (20 Oct. 1841) (*Inclosures in Letter* from Governor Light to Lord Stanley (21 Oct. 1841))

Annex 20 *Letter* from Mr Schomburgk to Governor Light (15 Sept. 1841)

Annex 21 *Letter* of Mr. Schomburgk to Governor Light (30 Nov. 1841) *enclosing Memorandum* by Mr. Schomburgk

Annex 22 *Letter* from Señor Calcaño to the Earl of Derby (14 Nov. 1876)

Annex 23 *Letter* from Señor de Rojas to the Earl of Derby (13 Feb. 1877)

Annex 24 *Letter* from The Marquess of Salisbury to Señor de Rojas (10 Jan. 1880)

Annex 25 *Letter* from Señor Seijas to Colonel Mansfield (15 Nov. 1883)

Annex 26 *Letter* from Señor Seijas to Colonel Mansfield (9 Apr. 1884) (*Inclosure* in *Letter* from Colonel Mansfield to Earl Granville (18 Apr. 1884))

Annex 27 *Letter* from Earl Granville to Colonel Mansfield (29 Feb. 1884)

Annex 28 *Letter* from Señor Urbaneja to Mr. F. R. St. John (20 Feb. 1887)

Annex 29 *Letter* from Mr. Andrade to Mr. Gresham (19 Dec. 1894)

Annex 30 *Letter* from Señor Andrade to Minister Ezequiel Rojas (9 Jan. 1897)

Annex 31 *Letter* from James J. Storrow to Dr. P. Ezequiel Rojas, Venezuelan Minister of Foreign Affairs (26 Jan. 1987)

Annex 32 *Letter* from S. Mallet-Prevost to Sir Richard Webster (22 Apr. 1899)

Annex 33 *Private Diary Entries* of Prof Fyodor Fyodorovich Martens (4 June 1899 - 3 Oct. 1899)

Annex 34 *Letter* from Mr Buchanan to Lord Salisbury, No. 52 (24 July 1899)

Annex 35 *Letter* from Benjamin Harrison to the Hon. Henry White (3 Oct. 1899)

Annex 36 *Letter* from Lord Russell to Lord Salisbury (7 Oct. 1899), *in* Papers of 3rd Marquess of Salisbury, Vol. A/94, Doc. No. 2

Annex 37 *Letter* from Sir Cavendish Boyle to Michael McTurk, Esquire, and Captain Arthur Wybrow Baker (24 Sept. 1900)

Annex 38 *Letter* from Sir M.E. Grant Duff to Lord Salisbury, No. 101 (26 Sept. 1900)

Annex 39 *Letter* from Michael McTurk (24 Nov. 1900)

Annex 40 *Letter* from Walter Sendall to J. Chamberlain (10 Apr. 1901)

Annex 41 *Letter* from Mr. Perkins to Government Secretary (9 Jan. 1905)

Annex 42 *Letter* from F.M. Hodgson to Alfred Lyttelton *enclosing* Abraham Tirado, Minister of Foreign Affairs, *Report of the Frontier towards British Guiana* (20 Mar. 1905)

Annex 43 *Letter* from Alejandro Ybarra to P.C. Wyndham (19 June 1905)

Annex 44 *Letter* from Mr. Bax-Ironside to General Ybarra (20 Feb. 1906) (*Inclosure in Letter* from Mr Bax-Ironside to Sir Edward Grey (10 Mar. 1906))

Annex 45 *Letter* from Dr. Paúl to Mr. Bax-Ironside (10 Oct. 1906)

Annex 46 *Extract from a Despatch* in reference to the founding of a Dutch West India Company from Don Juan de Mancicidor to Secretary Prada (7 Jan. 1607)

Annex 47 *Letter* from Mr. O'Reilly to Sir Edward Grey (July 1907) (*Inclosure in Letter* from Foreign Office to Colonial Office (11 July 1907))

Annex 48 *Letter* from Señor Paúl to Mr. O'Reilly (4 Sept. 1907) (*Inclosure in Letter* from Mr. O'Reilly to Sir Edward Grey (5 Sept. 1907))

Annex 49 *Letter* from Sir Edward Grey to Mr. O'Reilly (18 Oct. 1907)

Annex 50 *Letter* from Sir V. Corbett to Dr. José de Paúl (25 Feb. 1908) (*Inclosure in Letter* from Sir V. Corbett to Sir Edward Grey (25 Feb. 1908))

Annex 51 *Letter* from J. de J. Paúl to Sir Vincent Corbett (12 Mar. 1908) (*Inclosure in Letter* from Sir Vincent Corbett to Sir E. Grey (16 Mar. 1908))

Annex 52 *Letter* from General Juan Vicente Gomez, President of the U.S. of Venezuela (1 Feb. 1911)

Annex 53 *Letter* from the Venezuelan Minister for Foreign Affairs, P. Itriago Chacín, to W. O'Reilly (31 Oct. 1931)

Annex 54 *Telegram* from P. Itriago Chacín, to W. O'Reilly (23 Nov. 1931)

Annex 55 *Letter* from P. Itriago Chacín, No. 1157/2 (3 Nov. 1932)

Annex 56 *Letter* from the Venezuelan Foreign Minister, E. Gil Borges, to British Ambassador in Caracas, D. Gainer (15 Apr. 1941)

Annex 57 *Proceedings* of the West India Company (Zeeland Chamber) (1626-1628)

VOLUME IV

ANNEXES

MEMORANDA AND REPORTS

Annex 58 — *Extract from a Report* on Trinidad de la Guayana in reference to the Dutch Settlements on the Coast between the Amazon and the Orinoco, from Señor Don Antonio de Muxica, Deputy Governor of Santo Thomé de la Guayana, to His Majesty (25 June 1613)

Annex 59 — *Report* on Conditions for Colonies, adopted by the West India Company (the Nineteen) (22 Nov. 1628)

Annex 60 — *Report* from the Council of the Indies, to the King of Spain (8 July 1631)

Annex 61 — *Memorandum* by Don Juan Desologuren in Santa Fé, as to the Powers of the Dutch in the West Indies (19 Nov. 1637)

Annex 62 — *Report* of the Council of War to the King respecting the state of Guayana (10 May 1662)

Annex 63 — *Memorandum* on the Question of Boundaries between British Guiana and Venezuela (*Inclosure* in *Letter* from Earl Granville to Señor de Rojas (15 Sep. 1881))

Annex 64 — Venezuela Ministry of Foreign Affairs, *Memorandum by The Ministry of Foreign Affairs of Venezuela relative to the Note of Lord Salisbury to Mr Richard Olney, dated November 26, 1895, on the question of boundary between Venezuela and British Guayana* (1896)

Annex 65 United States 55th Congress, 1st Session, *Report from the Secretary of State regarding the Work of the Special Commission Appointed to Reexamine and Report upon the True Line between Venezuela and British Guiana*, Transmitted to the U.S. Senate Committee on Foreign Relations, Doc. No. 106 (25 May 1897)

Annex 66 *Report* of Counsellor Dr Rafael Seijas (4 May 1900)

Annex 67 British Guiana, *Report of the British Commissioners appointed to Demarcate the boundary between the colony of British Guiana and the United States of Venezuela* (8 Dec. 1900)

Annex 68 Ministry of Foreign Relations of Venezuela, *[Resolución de 8 de junio de 1903, por la cual se reconstituye la Comisión Venezolana de límites con la Guayana Británica] Resolution of 8 June 1903, creating the Venezuela Boundary Commission* (8 June 1903)

Annex 69 British Guiana, *Recommendations of the Boundary Commissioners for the Adoption of the Line of the Watershed between the Caroni, Cuyuni and Mazaruni River Systems as the Boundary between the Source of the Wenamu River and Mount Roraima in place of the Direct Line Mentioned in the Award of the Arbitral Tribunal of Paris, Dated 3rd October 1899*, British Guiana Combined Court, Annual Session (10 Jan. 1905)

Annex 70 Department of Foreign Affairs of Venezeula, *[El Libro Amarillo: Presentado al congreso Nacional en sus sesiones de 1911] The Yellow Book: Presented to the National Congress in its 1907 Sessions* (1911) (excerpt)

Annex 71 *Memorandum* from the Venezuelan Ministry of Foreign Affairs, No. 1638 (16 Dec. 1931) *in* Caracas *despatch* No. 51 (25 Dec. 1931)

Annex 72 *Memorandum* on British Guiana from Secretary of State Dean Rusk for President John F. Kennedy *enclosing* Action Program for British Guiana (12 July 1962) (excerpt)

Annex 73 *[Aide-Memoire presentado por el Dr. Marcos Falcón Briceño al Hon. R. A. Butler] Aide-Memoire presented by Marcos Falcón Briceño to the Hon. R.A. Butler* (5 Nov. 1963)

Annex 74 Hermann González Oropeza, S.J. & Pablo Ojer, *[Informe que los expertos venezolanos para la cuestión de límites con Guayana Británica presentan al Gobierno Nacional] Report submitted by the Venezuelan Experts to the National Government on the Issue of the Boundaries with British Guiana* (18 Mar. 1965)

Annex 75 Sir Geoffrey Meade, *Report on the Exposition presented by the Venezuelan Experts* (3 Aug. 1965)

Annex 76 Dr Ignacio Irabarren Borges, *[Declaración del Dr Ignacio Iribarren Borges, Ministro de Relaciones Exteriores de Venezuela, la Conferencia Ministerial de Londres] Statement Made by Dr Ignacio Iribarren Borges, Venezuelan Foreign Minister, to the Ministerial Conference Held in London* (9 Dec. 1965)

LAWS, AGREEMENTS AND RESOLUTIONS

Annex 77 *Charter* Granted by their High Mightiness the Lords the States-General to the West India Company (3 June 1621)

Annex 78 Articles of the Peace of Münster (30 Jan. 1648)

Annex 79 Articles of Capitulation of Demerara and Essequibo (18-19 Sept. 1803)

Annex 80 British Guiana, Letters Patent constituting the Colony of British Guiana and appointing Major-General Sir Benjamin D'Urban, K.C.B., Governor (4 Mar. 1831)

Annex 81 U.S. Congress, 53rd Session, *Joint Resolution*, H. Res. 252 (10 Jan. 1895)

Annex 82 United States 54th Congress, Act of the United States Congress, *Public Act No. 1* (21 Dec. 1895)

Annex 83 United Kingdom, Brazil, Treaty Series No. 14, *Treaty and Convention for the settlement of the Boundary between British Guiana and Brazil* (22 Apr. 1926) (excerpt)

Annex 84 Republic of Venezuela, Ministry of Foreign Affairs, *[Tratados públicos y acuerdos internacionales de Venezuela: 1920-1925] Public Treaties and International Agreements 1920-1925*, Vol. III (1927)

Annex 85 [Tratado General de Arbitraje Interamericano] General Treaty of Inter-American Arbitration, O.E.A. (5 Jan. 1929), entered into force on 28 Oct. 1929

Annex 86 League of Nations, "Brazil and Venezuela: Exchange of Notes for the Execution of the Provisions regarding the Frontier Delimitation between the two Countries, contained in the Protocol signed at Rio-de-Janeiro, July 24, 1928. Caracas, November 7, 1929", *Treaty series: Publications of treaties and international engagements registered with the Secretariat of the League of Nations* (1930)

Annex 87 Exchange of Notes between the United Kingdom and Brazil approving the General Report of the Special Commissioners Appointed to Demarcate the Boundary-Line between British Guiana and Brazil, 51 U.K.T.S. 1946 (15 Mar. 1940)

Annex 88 McQuillen & Brading, *Minutes regarding the Venezuelan - British Guiana Boundary Dispute* (10 Mar. 1944) (9 Sept. 1944)

Annex 89 U.S. of Venezuela, *[Ley orgánica de los Territorios Federales] Organic Federal Territories Law* (14 Sept. 1948)

Annex 90 *Minutes and Documents* from the Tenth Inter-American Conference (1-28 Mar. 1954) (excerpt)

Annex 91 Ministry of Foreign Relations, Mixed Venezuelan-Brazilian Commission on the Demarcation of Boundaries, *[Acta de la Cuadragesima Primera Conferencia] Minutes of the Forty-First Conference* (1973) (excerpt)

Annex 92 Federative Republic of Brazil, Ministry of Foreign Affairs, "9.4 – BV-0 Mount Roraima Marker"

Annex 93 Ministry of Foreign Affairs of Brazil, First Brazilian Commission to Establish Borders, "8.1 – Brazil – Guyana – Venezuela Tri-Border Area (Mount Roraima)"

Annex 94 *Petition* to the Noble and Mighty Lords the States-General of these United Provinces concerning the Population of the Coasts of Guiana situated in America (undated)

Annex 95 Bulletin of the Ministry of Foreign Affairs of Venezeula, *[Acta de Inaguración de dos hitos Venezolano-Brasileros en el Monte Moraima] Act of Inaguration of two Venezuelan-Brazilian Boundary Marks on Mount Roraima*

ORAL PROCEEDINGS OF THE 1899 ARBITRATION

Annex 96 *Boundary between the Colony of British Guiana and the United States of Venezuela*, First Day's Proceedings (25 Jan. 1899)

Annex 97 *Boundary between the Colony of British Guiana and the United States of Venezuela*, Second Day's Proceedings (15 June 1899), pp. 6-9

Annex 98 *Boundary between the Colony of British Guiana and the United States of Venezuela*, Second Day's Proceedings (15 June 1899), pp. 17-25

Annex 99 *Boundary between the Colony of British Guiana and the United States of Venezuela*, Fifteenth Day's Proceedings (21 July 1899), p. 867

Annex 100 *Boundary between the Colony of British Guiana and the United States of Venezuela*, Nineteenth Day's Proceedings (29 July 1899), p. 1119

Annex 101 *Boundary between the Colony of British Guiana and the United States of Venezuela*, Nineteenth Day's Proceedings (29 July 1899), p. 1124

Annex 102 *Boundary between the Colony of British Guiana and the United States of Venezuela*, Nineteenth Day's Proceedings (12 Aug. 1899), p. 1170

Annex 103 *Boundary between the Colony of British Guiana and the United States of Venezuela*, Twenty-Eighth Day's Proceedings (12 Aug. 1899), p. 1737

Annex 104 *Boundary between the Colony of British Guiana and the United States of Venezuela*, Twenty-Eighth Day's Proceedings (29 July 1899), pp. 1761-1762

Annex 105 *Boundary between the Colony of British Guiana and the United States of Venezuela*, Thirty-Second Day's Proceedings (25 Aug. 1899), p. 1999

Annex 106 *Boundary between the Colony of British Guiana and the United States of Venezuela*, Thirty-Second Day's Proceedings (25 Aug. 1899), pp. 2011-2012

Annex 107 *Boundary between the Colony of British Guiana and the United States of Venezuela*, Thirty-Third Day's Proceedings (26 Aug. 1899), p. 2063

Annex 108 *Boundary between the Colony of British Guiana and the United States of Venezuela*, Thirty-Fourth Day's Proceedings (28 Aug. 1899), pp. 2119-2120

Annex 109 *Boundary between the Colony of British Guiana and the United States of Venezuela*, Thirty-Fifth Day's Proceedings (29 Aug. 1899), p. 2149

Annex 110 *Boundary between the Colony of British Guiana and the United States of Venezuela*, Forty-Third Day's Proceedings (8 Sept. 1899), p. 2595

Annex 111 *Boundary between the Colony of British Guiana and the United States of Venezuela*, Fiftieth Day's Proceedings (19 Sept. 1899), pp. 2981-2985

Annex 112 *Boundary between the Colony of British Guiana and the United States of Venezuela*, Fifty-First Day's Proceedings (20 Sept. 1899), p. 3014

Annex 113 *Boundary between the Colony of British Guiana and the United States of Venezuela*, Fifty-First Day's Proceedings (20 Sept. 1899), pp. 3024-3025

Annex 114 *Boundary between the Colony of British Guiana and the United States of Venezuela*, Fifty-Second Day's Proceedings (22 Sept. 1899), pp. 3087-3097

Annex 115 *Boundary between the Colony of British Guiana and the United States of Venezuela*, Fifty-Fifth Day's Proceedings (27 Sept. 1899), p. 3233

Annex 116 *Boundary between the Colony of British Guiana and the United States of Venezuela*, Fifty-Sixth Day's Proceedings (3 Oct. 1899), p. 3238

WRITTEN PLEADINGS OF THE 1899 ARBITRATION

Annex 117 *Boundary between the Colony of British Guiana and the United States of Venezuela*, The Case of the Government of Her Britannic Majesty (1898), p. 18

Annex 118 *Boundary between the Colony of British Guiana and the United States of Venezuela*, The Case of the Government of Her Britannic Majesty (1898), pp. 54-55

Annex 119 *Boundary between the Colony of British Guiana and the United States of Venezuela*, The Case of the Government of Her Britannic Majesty (1898), p. 66

Annex 120 *Boundary between the Colony of British Guiana and the United States of Venezuela*, The Case of the Government of her Britannic Majesty (1898), p. 144

Annex 121 *Boundary between the Colony of British Guiana and the United States of Venezuela*, The Case of the United States of Venezuela (1898), Vol. I, p. 14

Annex 122 *Boundary between the Colony of British Guiana and the United States of Venezuela*, The Case of the United States of Venezuela (1898), Vol. I, pp. 35-36

Annex 123 *Boundary between the Colony of British Guiana and the United States of Venezuela*, The Case of the United States of Venezuela (1898), Vol. I, pp. 54-55

Annex 124 *Boundary between the Colony of British Guiana and the United States of Venezuela*, The Case of the United States of Venezuela (1898), Vol. I, pp. 71-75

Annex 125 *Boundary between the Colony of British Guiana and the United States of Venezuela*, The Case of the United States of Venezuela (1898), Vol. I, p. 163

Annex 126 *Boundary between the Colony of British Guiana and the United States of Venezuela*, The Case of the United States of Venezuela (1898), Vol. I, p. 179

Annex 127 *Boundary between the Colony of British Guiana and the United States of Venezuela*, The Case of the United States of Venezuela (1898), Vol. I, pp. 220-221

Annex 128 *Boundary between the Colony of British Guiana and the United States of Venezuela*, The Case of the United States of Venezuela (1898), Vol. I, p. 229

Annex 129 *Boundary between the Colony of British Guiana and the United States of Venezuela*, The Case of the United States of Venezuela (1898), Vol. I, p. 231

Annex 130 *Boundary between the Colony of British Guiana and the United States of Venezuela*, The Counter-Case on behalf of the Government of Her Britannic Majesty (1898), pp. 6-7

Annex 131 *Boundary between the Colony of British Guiana and the United States of Venezuela*, The Counter-Case on behalf of the Government of Her Britannic Majesty (1898), p. 130

Annex 132 *Boundary between the Colony of British Guiana and the United States of Venezuela*, The Argument on behalf of the Government of Her Britannic Majesty (1898), pp. 2-3

Annex 133 *Boundary between the Colony of British Guiana and the United States of Venezuela*, The Printed Argument on behalf of the United States of Venezuela (1898), Vol. I, pp. 21-22

Annex 134 *Boundary between the Colony of British Guiana and the United States of Venezuela*, The Printed Argument on behalf of the United States of Venezuela (1898), Vol. I, pp. 32-57

Annex 135 *Boundary between the Colony of British Guiana and the United States of Venezuela*, The Printed Argument on behalf of the United States of Venezuela (1898), Vol. II, p. 719

Annex 136 *Boundary between the Colony of British Guiana and the United States of Venezuela*, The Printed Argument on behalf of the United States of Venezuela (1898), Vol. II, pp. xvii-xix